CITATION: Rotondi v. Rotondi, 2014 ONSC 1520
COURT FILE NO.: FS-00-41772-03
DATE: 2014-03-07

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
IMELDA ROTONDI	)	*Ryan Aalto*, for the Applicant
	)	
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	)	
Applicant	)	
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	)	
- and -	)	
	)	
	)	
ALDO ROTONDI	)	*Geoffrey Wells*, for the
	)	Respondent
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	)	
Respondent	)	
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	)	
	)	**HEARD:** September 26, 2013,
	)	at Brampton, Ontario

Price J.

Reasons For Order

NATURE OF MOTION

[1] Aldo Rotondi says that he suffered a heart attack on April 19, 2012, which disabled him from continuing to earn the income upon which Van Melle J. based a consent order for child support six months earlier. On August 9, 2012, Mr.

Rotondi applied to vary Van Melle J.'s order, arguing that circumstances had materially changed due to his heart attack and the fact that his 21 year old son, Marco, had ceased to be in full-time attendance at school and had repudiated his relationship with his father.

ISSUES

[2] The court must decide whether the following are genuine issues for trial:

a) Whether Marco continues to be a child of the marriage within the meaning of the *Divorce Act*, entitled to continuing child support from Mr. Rotondi;

b) Whether there has been a material change in Mr. Rotondi's ability to pay child support and, if so, what amount of child support he should pay based on his present circumstances.

BACKGROUND FACTS

[3] Mr. and Ms. Rotondi separated in March 2000, following a 12 year marriage. They have one son, Marco, who is now 21 years old (born October 14, 1992).

[4] Ms. Rotondi applied to the court for child support for Marco. On October 11, 2011, Van Melle J., with Mr. Rotondi's consent, ordered Mr. Rotondi to pay $180 per month for the support of Marco, based on his reported income of $21,066 per year.

[5] Mr. Rotondi suffered a heart attack on April 19, 2012. Four months later, he applied to vary Van Melle J.'s order by terminating his obligation to pay child support. He argues that there have been material changes affecting both Ms.

Rotondi's entitlement to continued child support and his ability to pay. He submits that:

(a) He was disabled by his heart attack on April 19, 2012.

(b) Marco ceased to be in full-time attendance at an institution for post-secondary studies and therefore ceased to be a "child of the marriage" as defined by the *Divorce Act*/[1]

(c) Marco repudiated his relationship with his father.

[6] Mr. Rotondi now moves for summary judgment on his application. Ms. Rotondi opposes his motion. She seeks to continue Marco's child support until April 30, 2014, when she expects Marco to complete a diploma program in paralegal studies at Humber College. She states that Marco will be in full-time attendance in the program until then, and that Mr. Rotondi is capable of continuing to pay child support for him.

[7] Marco Rotondi was enrolled in a full-time paralegal program in the Fall/Winter 2011/2012 semester at Humber College. In the Fall/Winter 2012/2013 semester, he began a Bachelor of Arts program at York University, where he took several two-semester courses. He returned to Humber College in the summer semester of 2013 (from May to August), to "fast-track" toward his diploma in paralegal studies. He is currently in full-time attendance in that program, which he expects to complete in April 2014. His plan is that after receiving his diploma, he will use it to obtain summer employment while he earns his Bachelor of Arts degree at York University, after which he hopes to enter law school.

[1] *Divorce Act*, RSC 1985, c 3 (2nd Supp), s. 2(1)

PARTIES' POSITIONS

[8] Mr. Rotondi submits Marco should no longer be considered a "child of the marriage" based on the following factors, which the B.C. Supreme Court set out in *Farden v. Farden:*[2]

(a) He has not achieved sufficient academic success to support a conclusion that he is capable of achieving his educational goals; and

(b) He has unilaterally and without justification severed his relationship with Mr. Rotondi.

[9] Mr. Rotondi submits that, in any event, he is no longer able to pay child support at the amount that Van Melle J. ordered because his annual income has fallen from $21,066 which Van Melle J. imputed to him, to $16,490 per year. He further submits that Ms. Rotondi has failed to disclose Marco's own employment earnings and, therefore, whether he still needs Mr. Rotondi's contribution to the payment of his educational expenses pursuant to s. 7 of the *Child Support Guidelines*.

[10] Ms. Rotondi submits that Marco is in full-time attendance in the paralegal studies program at Humber College and, as such, dependent on his parents. She says that Mr. Rotondi should continue paying child support and contributing to the payment of Marco's school expenses until the end of April 2014, when Marco expects to earn his diploma. She further submits that Mr. Rotondi has concealed his true income and is actually earning more than the income imputed to him by Van Melle J. in October 2011.

[2] *Farden v. Farden* (1993), 48 R.F.L. (3d) 60 (B.C.S.C.)

ANALYSIS AND EVIDENCE

a) General Principles Applying to Motions for Summary Judgment

[11] In January 2014, the Supreme Court of Canada, in *Hryniak v. Mauldin,*[3] gave guidance as to how Rule 20 of the *Rules of Civil Procedure,* governing motions for summary judgment*,* should be applied to promote timely and affordable access to the civil justice system. Karakatsanis J., on behalf of the court, noted that such motions are an opportunity to simplify pre-trial procedures and move the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. She stated:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.[4]

[12] Karakatsanis J. held that the judge hearing a motion for summary judgment must compare the procedures available in such a motion, supplemented, if necessary, by the fact-finding tools provided in Rules 20.04(2.1) and (2.2), with those available at trial, to determine whether the court can make the necessary findings of fact and apply the principles of law to those facts in a proportionate, most expeditious, and least expensive manner to achieve a just result:[5]

> This inquiry into the interest of justice is, by its nature, comparative. Proportionality is assessed in relation to the full trial. It may require the motion judge to assess the relative efficiencies of proceeding by way of summary judgment, as opposed to trial. This would involve a comparison of, among other things, the cost and speed of both procedures. (Although summary judgment may be expensive and time consuming, as in

[3] *Hryniak v. Mauldin*, 2014 SCC 7
[4] *Hryniak*, at para. 49
[5] *Hryniak*, at para. 57

> this case, a trial may be even more expensive and slower.) It may also involve a comparison of the evidence that will be available at trial and on the motion as well as the opportunity to fairly evaluate it. (Even if the evidence available on the motion is limited, there may be no reason to think better evidence would be available at trial.)[6]

[13] Based on guidelines set out in *Hryniak v. Mauldin,* I must first determine, based on the evidence before me, and without using the new fact-finding powers, whether there is a genuine issue requiring trial, to fairly and justly adjudicate the dispute, and whether the motion is a timely, affordable, and proportionate procedure under Rule 20.04(2)(a). If there is no genuine issue requiring trial, I must grant summary judgment. If there appears to be a genuine issue requiring a trial, I must exercise my discretion to determine whether the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2), provided that their use will not be contrary to the interests of justice and will lead to a fair and just result and serve the goals of timeliness, affordability, and proportionality in light of the litigation as a whole.[7]

b) Is there is a genuine issue for trial as to whether Marco continues to be a child of the marriage?

[14] The *Family Law Act* ("*FLA*"), s. 33(1), governs a parent's obligation to support a child.[8] The onus is on the parent claiming child support to prove entitlement. The court has discretion as to whether child support should continue to be paid to an adult child.[9]

[15] The *Divorce Act*, s. 15.1 provides, in part:

> 15.1 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to pay for the support of any or all children of the marriage.

[6] *Hryniak*, at para. 58
[7] *Hryniak*, at para. 66
[8] *Family Law Act*, R.S.O. 1990, c. F.3, s. 33(1)
[9] *Child Support Guidelines*, O.Reg. 391/97, s. 3(2)(b)

(2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim order requiring a spouse to pay for the support of any or all children of the marriage, pending the determination of the application under subsection (1).

(3) A court making an order under subsection (1) or an interim order under subsection (2) shall do so in accordance with the applicable guidelines.

(5) Notwithstanding subsection (3), ***a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines if the court is satisfied***

(*a*) that special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child; and

(b) ***that the application of the applicable guidelines would result in an amount of child support that is inequitable given those special provisions***.

(6) ***Where the court awards, pursuant to subsection (5), an amount that is different from the amount that would be determined in accordance with the applicable guidelines, the court shall record its reasons for having done so.*** [Emphasis added.]

[16] Section 2 of the *Act* defines "child of the marriage" as follows:

2. "***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;*** [Emphasis added.]

[17] The *Federal Child Support Guidelines (FCSG)*[10] permit a court to deviate from the presumptive rule that it should order payment of the amount prescribed by the *Guidelines* for an adult child under the following circumstances:

[10] *Federal Child Support Guidelines,* SOR/97-175

> 3(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:
>
> (*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.

[18] The Nova Scotia Family Court, in *Leviston,* noted that enrolment in a post-secondary education institution does not necessarily mean that a child is unable to withdraw from his parents' charge within the meaning of the *Divorce Act*.[11] Whether or not such attendance supports a finding that the child is still a "child of the marriage" requires examination of all of the circumstances. It is not a conclusion that follows automatically.[12]

Findings of Fact

[19] Mr. Rotondi asserts that he paid child support for the 2010-2011 school year while Marco was not enrolled in school, or was enrolled part-time. He states that Ms. Rotondi lied on October 11, 2011, by claiming that Marco was then enrolled in school full-time, and that he consented, on that basis, to Van Melle J.'s order. Marco, in fact, had graduated in June 2010 and did not begin his post-secondary studies that fall.

[20] My decision concerns only Marco's attendance after October 11, 2011, when Van Melle J.'s order was made, because Mr. Rotondi did not appeal from the order and has not requested a retroactive variation of it. His application, made on August 9, 2012, is to vary Van Melle J.'s order by terminating his obligation to pay child support immediately, that is, as of August 9, 2012.

[21] Mr. Rotondi asserts that in the summer of 2011, Marco enrolled in a single writing course in the paralegal studies program at Humber College. He then re-enrolled in the program in the fall of 2011 and earned all six available credits that term (from September to December 2011).

[22] In the winter term (January to April 2012), Marco was in full-time attendance in the paralegal studies program but earned only two of the available six credits that term. He was not enrolled during the summer of 2012.

[23] In September 2012, Marco enrolled in part-time studies at the Faculty of Liberal Arts and Professional Studies at York University. From September 2012 to April 2013, he achieved a B in ancient history, earning nine credits; D+ in astronomy, earning a further six credits; and failed a course in Introduction to Politics, for which he could have earned six more credits. He therefore earned a total of 15 of a total of 21 available credits that term. He was nevertheless permitted to proceed in the Bachelor of Arts program with an academic warning.

[24] Marco returned to the paralegal studies program at Humber College for the summer semester in 2013, and was in part-time attendance in that program from May to August 2013. Mr. Rotondi is unaware of Marco's academic performance that term but states that he was enrolled in only four of the six full-year courses that would be required for a full course load.

[25] Ms. Rotondi has established that Marco was in full-time attendance in the paralegal studies program from May to August 2013, and earned mid-term grades of 60 per cent, 86 per cent, and 83 per cent, respectively, in the courses he took.

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[11] *Leviston v. Leviston* (1984), 42 R.F.L. (2nd) 371 (N.S. Fam. Ct.)
[12] *McNulty v. McNulty* (1976), 25 R.F.L. 29 (B.C.S.C.), at para. 4

[26] Marco's Fees Invoice from Humber College discloses that in the fall of 2013 and the winter of 2014, his fees were $3,550.08, consisting of $2,590.58 for tuition and $959.50 for mandatory student government and non-tuition fees. His OSAP Assessment Summary for 2012-2013 discloses that for the period from May 6 to July 26, 2013, he obtained total funding of $3,849, consisting of $2,783 from OSAP for allowable educational costs and $1,066 for non-educational funding for the 12-week study period.

[27] Ms. Rotondi explains that Marco returned to Humber College in May 2013 to "fast-track" to completion of his diploma program in paralegal studies. She states that Marco wants to earn his diploma in paralegal studies so that he can use it to obtain summer employment while he earns a B.A. degree from York University. He expects to complete his paralegal studies program in the spring of 2014 and then return to York University to resume his studies toward a B.A. degree, after which he hopes to attend law school. Ms. Rotondi seeks ongoing child support for him until April 30, 2014.

Enrollment in Post-secondary Studies

Jurisprudence

[28] In *Farden,*[13] the B.C. Supreme Court set out the factors that the court should consider when determining whether an adult child in a post-secondary institution is "a child of the marriage". These are:

(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;

[13] *Farden*, at para. 15

(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; and

(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.

[29] Marital separation can cause stress and uncertainty in a child's life that can impede his/her ability to make a smooth transition from secondary to post-secondary studies. The child may not have access to both parents for guidance as readily as children in families that are intact, and may be more dependent on trial and error to find a satisfactory career path. The court has given children latitude, in these circumstances, by maintaining their parents' payment of child support and contribution to s. 7 expenses in spite of set-backs, delays, and interruptions in the child's academic career, provided there is a reasonable

prospect that continued support will eventually lead to the child's ability to earn a livelihood.

[30] In *Pollen v. Pollen*,[14] Polowin J. found that the parties' 23 year old son, Adrian, was a child of the marriage while enrolled in post-secondary studies, notwithstanding that there were gaps in his attendance. She ordered child support, but not for a long period when Adrian was suspended. Adrian's performance at school from 1999, when the parties separated, until 2003, had been very poor. He did not complete grade 13, and after enrolling at Algonquin College, he had switched programs three times and not completed any of them. He had not attended in the winter semester of 2000 and had continually failed or withdrawn from courses. On academic probation in the fall of 2002, he had withdrawn from two courses and was automatically suspended until the fall term of 2003, when he re-entered. He took only three courses in the fall 2003 program.

[31] Adrian had worked part-time at McDonald's restaurant during the school year and full-time in the summers of 2001 and 2002. He had used his earnings to pay some of his expenses, including gas for his car, but there was no evidence that he had used any of the money for his tuition or school expenses, or that he had paid his mother room and board. Polowin J. allowed partial retroactive child support but did not order support for Adrian's long period of suspension. She concluded:

> The evidence certainly gives this Court cause to question whether Adrian has had a reasonable and appropriate career plan, and whether he will complete any program at Algonquin. He has shown himself to be incapable of succeeding at school or unwilling to apply himself diligently to his studies. While he deposed that he has suffered from clinical depression since his parents separated, there is absolutely no evidence before me, which would support such contention. To borrow from Justice de Sousa, in *Pepin*

[14] *Pollen v. Pollen* (2004), 2 R.F.L. (6th) 382 (Ont. S.C.)

> *and Jung, supra*, the serious question of whether he is simply going to college because there's nothing better to do, must be asked.[15]

[32] In *Nikita v. Nikita*,[16] the payor father was required to pay child support for his adult son from when he began, after a gap, to attend community college, including transitional periods between semesters. He was retroactively absolved of his obligation during the long periods of his son's non-attendance. However, Wolder J. found that the father was liable to support his son later, when he attended community college, including any transitional periods between semesters.

[33] In some cases, the court will order a parent to resume paying child support after lengthy interruptions in the child's studies. *Fisher v. Rogers* was such a case. MacPherson J. found that the parties' adult son, Bradley, continued to be a child of the marriage and was entitled to support during periods when he was attending post-secondary school, notwithstanding interruptions. Bradley completed high school in June 2005. He enrolled in a culinary program at Conestoga College in Kitchener which he began attending in September 2005. He quit the program after a couple of months, but later obtained early acceptance into a two-year woodworking course to start in September 2006, from which he was to graduate in August 2008.

[34] Bradley initially enrolled in the woodworking technology co-op program in September 2006, and continued in the program into the winter 2006 term. He was achieving all of his credits in that program in the fall 2007 term. However, during the winter 2007 term, he was off for two months for medical reasons and was unable to complete his co-op placement. While he obtained a subsequent co-op placement, he was injured on the job and was fired. He then changed to

[15] *Pollen,* at paras. 40, 43
[16] *Nikita v. Nikita*, 2002 CanLII 46584 (Ont. C.J.)

the two year non-co-op woodworking technician program, beginning with the spring 2008 term. This continued until August 2008 but because he had failed one course, he had to repeat it by attending part-time in the spring 2010 term, which delayed his graduation until August 2010.

[35] MacPherson J. stated:

> ***I have no difficulty in finding that the obligation to pay child support was revived when the child returned to full-time studies*** and that the father was obligated to pay child support for Bradley from September 2006 to and including August 2008. ***He was enrolled and attending a college co-op program, albeit with some explained absences***. Although the mother's evidence was that he completed the program in August 2008, in fact he did not graduate until receiving one final credit in August 2010 – none of which was shared by the mother with the father. However, as he was married in September 2008, I would not extend the father's support obligation beyond August 2008.[17] [Emphasis added]

[36] In *Fiorino*, Del Frate J. declined, based on an insufficiency of evidence, to find that the parties' adult daughter was a child of the marriage based on her attendance at post-secondary studies, or to impose an obligation on her father to pay child support. He left it open to the mother, however, to re-apply based on further evidence and, in doing so, set out the evidence that would be required. He stated:

> ***The applicant should, among other things, be able to demonstrate that Victoria is serious about her studies, and that if registered and paying full-time tuition, she is actually attending on a full-time basis. She should have a plan as to what she is studying and why, and there should be a reasonable prospect that the course of studies will facilitate a transition to financial independence. The applicant should be able to demonstrate that Victoria is contributing to the costs of her education, by means such as student loans, bursaries, and/or part-time work (and if not, explain why)***. On the basis of the evidence presented to me, I cannot conclude that Victoria is a dependent child; however, in the event that the applicant is able to demonstrate that she is in fact dependent, the respondent will be obliged to contribute accordingly to the reasonable costs of her education.[18] [Emphasis added.]

[17] *Fisher v. Rogers*, 2012 ONSC 669, at paras. 130-131
[18] *Fiorino v. Fiorino*, 2013 ONSC 2445, at para. 25

[37] In *Wharton v. Oreskovich*,[19] Gauthier J. found that one of the parties' children, Tanner, was entitled to child support, notwithstanding gaps in his studies, while his brother, Jordan, was not. Jordan had entered college but failed four out of his five courses in the fall term and withdrew from the program. His mother conceded that he was no longer entitled to support.

[38] Tanner was 19 years old. Like his brother, he was academically successful in high school, graduating at the age of 17. He then moved to New Caledonia with his mother and remained there from November 2010 to July 2011, when he returned to Ontario. Although he was not enrolled in full-time studies in New Caledonia, he nevertheless spent his time there in ways that Gauthier J. found educationally useful in the broad sense and beneficial to his eventual employment. Gauthier J. stated:

> ***A child who is not in school full-time because of special circumstances may still be entitled to support***. Here, after having been in the Lycee full-time until the end of the term, Tanner ***participated in several other successive educational opportunities, all of which were not only reasonable, but valuable to him***.
>
> For Tanner not to have sought employment for the seven week period between his return to Canada and the start of his term at the University of Ottawa, is also not unreasonable. ***Tanner did not idle away those seven weeks; rather, he volunteered his time. This was a reasonable and valuable use of the short time available to him***.[20] [Emphasis added.]

[39] By September 2011, Tanner was enrolled in the Mechanical Engineering program at the University of Ottawa. Gauthier J. found that he was entitled to support for the entire period from December 2010, until September 2011.

[19] *Wharton v. Oreskovich*, 2011 ONSC 6300
[20] *Wharton v. Oreskovich*, at paras. 51-53

[40] In *Caterina v. Zaccaria*,[21] Pazaratz J. applied the same principle, namely, that a child continues to be dependant by reason of full-time studies, notwithstanding reasonable interruptions of the studies.[22]

[41] The court will not require a parent to continue paying child support for an adult child of the marriage beyond a point where there is no reasonable prospect that such support will lead to the child's being able to earn a livelihood. In *Pepin v. Jung*,[23] Linhares de Sousa J. declined to order a mother to pay child support for her 19 year old son, Dieter, whose performance at school was unsatisfactory, who showed no likelihood of completing his academic program, and who had repudiated his relationship with his mother.

[42] In the two years preceding the hearing, Dieter showed himself to be unwilling or unable to apply himself diligently to his college studies. He enrolled in three different programs, did not complete any of them, and had no prospects of completing any of them. He continually failed courses, dropped courses, withdrew from courses, or failed to write his examinations. This academic history when he was in his mother's care continued when he was in his father's care.

[43] De Sousa J. found that, despite both his parents' many efforts to help him pursue higher education, Dieter had not shown himself to have a reasonable and appropriate education and career plan. After an unexplained break in his education, it was unclear why he continued to be registered at a community college until a year later, when there was no reasonable prospect of his completing his program successfully. De Sousa J. concluded that she had to ask the serious question of whether Dieter was simply going to college because there was nothing better to do.

[21] *Caterini v. Zaccaria*, 2010 ONSC 6473, 97 R.F.L. (6th) 249

[44] Based on the jurisprudence set out above, I find that Marco Rotondi is still a child of the marriage. He attended post-secondary school more or less continuously from the date of Van Melle J.'s order to the present, apart from the summer of 2012. While his performance has been uneven, some allowance must be made for the fact that his family was in transition following his parents' separation. He is entitled to some time to adapt to these changes and, in the absence of hands-on guidance from both parents, to gauge his abilities through experience in the paralegal studies program at Humber College and the B.A. program at York University, and to chart a course toward a career that offers him a reasonable prospect of earning a living.

[45] Marco's grades in the May to September 2013 semester show improvement. His parents should support him in his efforts and build on his accomplishments rather than seizing on his temporary lapses to divest themselves of their financial responsibility toward him. Marco's OSAP records show that he has made an investment in his own education and his parents should also contribute to it. There is a reasonable prospect that continued support will eventually lead to Marco's being able to earn a livelihood.

[46] I am satisfied that there is no genuine issue for trial as to whether, by reason of his academic performance, Marco has ceased to be a child of the marriage. The existing evidence allows me to make a fair determination of this issue and I find that Marco has not ceased to be a child of the marriage on this ground.

[22] *Caterini v. Zaccaria*, at paras. 104-106

Unilateral Termination of Relationship with Father

[47] I must now determine whether Marco has ceased to be a child of the marriage by reason of a unilateral repudiation by him of his relationship with his father. Mr. Rotondi states in his factum, "Marco has no relationship with the Respondent. Moreover, given the history of the Applicant's failure to advise the Respondent of any academic performance it is more than reasonable to conclude that the Respondent will have to bring another Motion to Change child support."

Jurisprudence

[48] Courts have generally not terminated a parent's obligation to pay child support for a dependent adult child based solely on the absence of a relationship between them. The payor parent must adduce substantial evidence indicating that the child is responsible for the breakdown of the relationship.[24] The courts' reluctance to put the full blame on the child is evident in *Re Haskel and Letourneau*. There, the court stated:

> ...the concept of the "withdrawal from parental control" at age 16 means a "voluntary" withdrawal; the free choice, indeed, of the child to cut the family bonds and strike out on a life of his own. On taking on this personal freedom the child assumes the responsibility of maintaining or supporting himself. It is his choice, freely made, to cut himself away from the family unit. ***Once this choice is freely made and the responsibility accepted by the child, the family unit has, in effect, been severed and the responsibility of the parents to support the child thus ceases***.[25] [Emphasis added.]

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[23] *Pepin v. Jung* (2003), 39 R.F.L. (5th) 383 (Ont. S.C.)
[24] *Surrette v. Johnson*, 2002 CanLII 2766 (Ont. S.C.); *Grierson v. Brunton* (2004), 8 R.F.L. (6th) 146 (Ont. S.C.)
[25] *Re Haskel and Letourneau* (1979), 25 O.R. (2d) 139 (Co. Ct.), at p.151

[49] The payor parent bears the onus of proving the child's repudiation of their relationship.[26] In *Fitzpatrick v. Karlein*, Nasmith J. stated:

> ...***once withdrawal from parental control is established***, as it is in this case, ***the onus***, I think, ***shifts back to the child, as applicant, who has, ostensibly, withdrawn from parental control, to show on the balance of probabilities that she did so without any other choice in the matter***.[27] [Emphasis added.]

[50] Nasmith J. noted that courts have interpreted this exception narrowly, but he proposed that it might be time to reassess this approach:

> I am persuaded that it is time to ask whether there is a valid basis for the "narrow" approach to the legislation now that the wording of section 31 of the *Family Law Act*, leaves open-ended the parental obligation to support a child after age sixteen so long as the child remains a full-time student.
>
> ***The correct approach to the new legislation, in my opinion, once the defence under subsection 31(2) has been raised and it has been established that the child is past sixteen years and outside the control of the former custodial parent, is to assign to the child, as the applicant, the onus of demonstrating that the withdrawal was involuntary whether by reason of eviction or a living situation with the parent that is viewed as unbearable or impossible***. If the child wants to do that and can do that, the parental support obligation can be legally sustained. It is not just a matter of showing that the choice to become independent was reasonable or understandable. Under section 31 of the *Family Law Act*, for a youth past the age of sixteen, who has, ostensibly, withdrawn from parental control to succeed in obtaining court-ordered support, it must be demonstrated by her that the withdrawal was involuntary.[28] [Emphasis added.]

[51] A child's repudiation of the relationship with a parent is only one factor the court considers in determining whether the child is still "a child of the marriage," entitled to continued child support. In *Pepin v. Jung*, above, De Sousa J. concluded that Dieter's unilateral termination of his relationship with his mother, combined with his academic failure and failure to make any substantial

[26] *Fitzpatrick v. Karlein* (1994), 5 R.F.L. (4th) 290 (Ont. C.J.), at para. 13
[27] *Fitzpatrick,* at para. 14
[28] *Fitzpatrick*, at paras. 18-19

contribution to his own support and education, supported a finding that he was no longer a child of the marriage. She stated:

> The above-mentioned jurisprudence indicates that ***parental rejection is just one factor, albeit an important factor, among many factors such as academic ability, educational plans both before and after the separation and financial need, to be considered in the determination of whether a child is a "child of the marriage"***. I am not convinced on the case law that parental rejection alone is determinative of the matter unless the circumstances are "extremely grave" such as those found in *Dalep v. Dalep, supra*, involving parental abuse, as referred to by Justice Johnstone in Wahl v. Wahl, supra. Even in *Dalep v. Dalep, supra*, as Justice Johnstone pointed out, the court considered other economic factors.[29] [Emphasis added]

[52] De Sousa J. stated that, even if she had found that Dieter was still "a child of the marriage," she would have exercised her discretion not to order his mother to pay child support as it would be inappropriate in all the circumstances to do so pursuant to s. 3(2) of the *Child Support Guidelines* ("Guidelines"), "having regard to the condition, means, needs and other circumstances of the child and the financial ability of each parent or spouse to contribute to the support of the child".

[53] In order to justify termination of child support, an adult child's decision to withdraw from parental control must be free as well as voluntary. As noted above, it will not be regarded as free where the child has been driven to the decision by emotional or physical abuse.[30]

[54] Before terminating child support based on a child's repudiation of his or her relationship with the parent, the court generally requires evidence, additionally, that the parent has persevered in his efforts to preserve or rehabilitate his relationship with the child, and that the child has unequivocally rejected those efforts. In *Green v. Green*,[31] a father sought to terminate support for his adult

[29] *Pepin v. Jung*, at para. 32
[30] *Madden v. Simm*, 2012 ONCJ 331
[31] *Green v. Green* (2008), 38 R.F.L. (6th) 378 (Ont. S.C.)

son, a university student, on the basis that the son had repudiated their relationship. The court refused to terminate support, noting that the breakdown of a marriage usually has a serious emotional impact on the children. However, the court ordered that ongoing child support be terminated after a certain passage of time, based on the son's rejection of the father's later attempts at reconciliation.

[55] Where the court finds that a child has unreasonably repudiated a relationship with a parent, it must determine whether it should exercise its discretion to continue requiring the parent to pay child support. In the exercise of its discretion, the court may require the child to communicate with the parent, and to share information about his/her academic progress, as a condition of receiving continuing child support and contribution to education expenses.

[56] In *Wahl,* Johnstone J. found that despite the strained relationship between the daughter and her father, the daughter was still a "child of the marriage" and ordered child support under very onerous conditions of continued academic success: exchange of academic and financial information; ongoing reasonable efforts; obligation to contribute towards her own support through summer and part-time employment; and applications for student loans, bursaries and other funding for which she may be eligible. Johnstone J. concluded that, "the breakdown of the relationship with her father remains of utmost importance in the establishment of the conditions on which his ongoing support obligation is ordered."[32]

[57] In *Colford*,[33] Goodman J. cited *Law*, approved by the Court of Appeal in *Whitton v. Whitton*,[34] for the principle that, under the *Divorce Act*, the onus rests on the applicant for child support for a child "sixteen years of age and over and

[32] *Wahl*, at para. 69
[33] *Colford v. Colford*, 2005 CanLII 13032 (Ont. S.C.)

under their charge" to establish the child's "inability to provide" for him or herself. Goodman J. reviewed the factors that Fleury J. had said that a court might consider, including:

> …the age of the child, his or her ability, his or her past performance in previous courses, his or her determination to assist with study costs through summer employment, the means of the paying spouse, and any obligation to provide for the education of other children, the plans of the parents generally with respect of [sic] further education of their children, especially where these plans were formulated jointly by the spouses during cohabitation, the appropriateness of the course selected to generate future employment, and the conduct of the parties and the condition, means, and circumstances of either of them.[35]

[58] Goodman J. noted that while a minor child has the right to be supported by both parents to the extent that the parents are able, and the *Guidelines* set the parameters for such support, subsection 3(2) of the *Guidelines* provides that when a "child of the marriage" is over 18, a court may find payment according to the *Guidelines* to be inappropriate. Where it does, it determines the appropriate amount, having regard to the condition, means, needs, and other circumstances of the child, and the financial ability of each spouse to contribute to the child's support. He further noted that there is nothing in the *Divorce Act* that prevents the court from considering the conduct of the parties when determining whether or not it would be inappropriate to order child support for an adult "child of the marriage" pursuant to subsection 3(2) of the *Guidelines*.

[59] Goodman J. noted that in *Whitton*, a father had sought a declaration that his 22 year old daughter was no longer a "child of the marriage" under the *Divorce Act*. The Court of Appeal approved the principles set out in *Law,* and expressed concern over the poor relationship between the father and his dependent child. The court stated that, although the child was a "child of the marriage", the most troublesome issue was the child's attitude toward her father.

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[34] *Whitton v. Whitton* (1989), 21 R.F.L. (3d) 261 (Ont. C.A.)
[35] *Colford,* at para. 88

The court held at para. 95 that at "age 22 she should have the maturity to deal with her father directly, to help him in discharging his legal and parental duties to assist in her education".

[60] The court noted, in *Whitton*, that while the parents' separation agreement expressly provided for joint decision-making of the parents in the education of their children, neither the mother nor the daughter had consulted the father concerning the child's education, which was at the heart of the wife's claim that the child was unable to withdraw herself from their charge. The court found the explanation given for the daughter's refusal to communicate with her father to be vague and although it held that the child was a child of the marriage under the *Divorce Act*, it stated that if the child continued to refuse to engage in any sensible discussion with her father on the matter of her future education, the father could seek to have the quantum of her support that he was paying reviewed by the court.

[61] In *Colford*,[36] Goodman J. noted that in each of the decisions relied on before him, where one parent had contributed to the other's lack of a relationship with the child, the court either (1) ordered no child support at all, or (2) required the payor-parent to contribute toward the child's post-secondary education in some respect, but did not order that ongoing monthly support be paid toward the interfering parent's household. Goodman J. noted that in *Rosenberg v. Rosenberg*,[37] the court was tempted to find that the father's 20 year old daughter was not a "child of the marriage", but considered that the father had moved away when the daughter was 11 years old, and that his attempts to contact her were sporadic, albeit consistent. The court found the daughter to be a "child of the marriage", at least until she earned her first undergraduate degree. The

[36] *Colford v. Colford*, 2005 CanLII 13032 (Ont. S.C.)
[37] *Rosenberg v. Rosenberg* (2003), 42 R.F.L. (5th) 440 (Ont. S.C.)

relationship between the father and daughter was almost non-existent, and the court established the conditions under which ongoing child support would be required. Goodman J. noted:

> For the future, the amounts were to be paid directly to the child or her educational institution, and ***on the condition that she provide the father with pertinent information about her courses of study, her marks, any applications for bursaries or student loans and her plans for the future, at regular intervals. The payments were to cease if she did not provide the required information or withdrew from full-time attendance at an educational institution***.[38][Emphasis added.]

[62] I have reviewed Mr. Rotondi's two affidavits filed in support of his motion for summary judgment. They contain no evidence that supports his assertion that Marco has no relationship with him. If Marco has become estranged from him, Mr. Rotondi's own evidence suggests that this may be attributable to Ms. Rotondi, or to the conflict between herself and Mr. Rotondi, rather than to a wilful and unjustified decision by Marco himself.

[63] Mr. Rotondi tendered an affidavit of Marco's elder brother, Joseph Rotondi, who states, "While it is not necessary (sic) relevant to the issues in dispute, my parents' divorce was particularly difficult and my mother refused to permit my brother, Marco, and I to have any relationship with our father, the Respondent, despite his numerous attempts to seek judicial intervention to resume access."

[64] Evidence of Marco's estrangement from Mr. Rotondi, to be relevant to Mr. Rotondi's obligation to pay child support, would need to disclose why Marco became estranged from Mr. Rotondi, the efforts Mr. Rotondi has made to restore the relationship, and Marco's unjustified rejection of his efforts. Mr. Rotondi has not tendered any such evidence.

[38] *Colford,* at para. 96

[65] I am entitled to assume that Mr. Rotondi has put his best foot forward and tendered all of the evidence he will rely upon in relation this issue. Karakatsanis J., as she then was, articulated the onus on the parties and the shifting burden of proof in summary judgment motions in *New Solutions Extrusion Corp. v. Gauthier*. She stated:

> The new Rule does not change the burden in a summary judgment motion. Rule 20.01(3) provides that a defendant who seeks summary dismissal must "move with supporting affidavit material or other evidence." ***The defendant bears the evidentiary burden of showing that there is no genuine issue requiring a trial. The defendant must prove this and cannot rely on mere allegations or the pleadings***. It is only after the moving party has discharged its evidentiary burden of proving that there is no genuine issue which requires a trial for its resolution, that the burden shifts to the responding party to prove that its claim or defence has a real chance of success. Pursuant to Rule 20.02(2), a responding party "may not rest solely on the allegations or denial in the party's pleadings but must set out in affidavit material or other evidence, specific facts showing there is a genuine issue requiring a trial." ***In other words, consistent with existing jurisprudence, each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried. The court is entitled to assume that the record contains all the evidence which the parties will present if there is a trial***.[39] [Emphasis added]

[66] The evidence enables me with confidence to make a fair determination of this fact and to apply the principles of law to it. I find, based on the evidence and jurisprudence reviewed above, that there is no genuine issue for trial as to whether Marco has ceased to be a child of the marriage based on a unilateral and unjustified repudiation by him of his relationship with his father.

[67] Having regard to the absence of evidence as to such a repudiation, and the evidence referred to above as to Marco's educational plan and financial need, Marco continues to be a child of the marriage within the meaning of the *Divorce Act*, and Ms. Rotondi is entitled to continued child support for him until the end of April 2014, provided he has completed his paralegal program by then. If he has not completed it for reasons beyond his control, Ms. Rotondi has leave

[39] *New Solutions Extrusion Corp. v. Gauthier*, 2010 ONSC 1037, at para 12

to apply to vary the order of Van Melle J. dated October 11, 2011, as varied by the present order, in this regard.

c) Is there is a genuine issue for trial as to whether there has been a material change in Mr. Rotondi's ability to pay child support and, if so, what amount of child support should he pay based on his present circumstances?

[68] I find that there is a genuine issue for trial as to whether there has been a material change in Mr. Rotondi's ability to pay child support at the level set by Van Melle J. in October 2011, based on the following:

1. Mr. Rotondi's has historically earned well in excess of the income that Van Melle J. attributed to him in 2011 as an owner/manager of hair salons.

2. Mr. Rotondi asserts that he has been unable to earn income at the level attributed to him in 2011 by reason of his heart attack and the insolvency of his then employer and has had to depend on Employment Insurance, loans from friends, and contributions by his current spouse to the payment of their household expenses.

3. Mr. Rotondi appears to continue maintaining a lifestyle and spending patterns inconsistent with the level of income he says he has earned since April 2012 and the contributions he says he has received from his current spouse.

(i) History of Mr. Rotondi's Earnings

[69] Mr. Rotondi earned income in the past as an owner-operator of high-end hair salons. In 1992, he purchased his own "Joseph Coiffeurs" salon, located in the Hillcrest Mall in Richmond Hill. In 1994, he incorporated 1045945 Ontario

Inc., to operate Joseph Coiffeurs, and was the company's officer and director. Mr. Rotondi paid approximately $300,000 for that business. Six months later, he bought his business partner's interest in the business for $60,000. The company was discontinued in October 2010.

[70] In 1994, Mr. Rotondi bought a "Gable and Garbo" hair salon at Upper Canada Mall in Newmarket for approximately $250,000. On July 26, 1995, he incorporated "Garbo of Newmarket Limited" to operate the salon and was the company's sole officer and director. That company was dissolved in December 2006.

[71] Mr. Rotondi has tendered a letter from Domenic Bumbaca, President of Maverick Studio for Men, dated September 3, 2013, which asserts that Mr. Rotondi was employed as a "full-time manager and top hairstylist" for Mav Pickering Hair Ltd. at the Pickering Town Centre from October 2010 until April 2012, when Mr. Rotondi suffered his heart attack. The letter states that at the date of the letter, Mr. Rotondi had no financial stake or shares in Mav Pickering Hair Ltd. Mr. Rotondi's Record of Employment from Mav Pickering Hair Limited dated April 24, 2012, states that he was laid off due to medical issues and that he had total insurable earnings of $47,363.14. This level of income is consistent with the level reported by Mr. Bumbaca, as President of Gable & Garbo, in a letter dated September 21, 1992, where he stated that Mr. Rotondi was then earning an annual salary of $40,000 plus bonuses.

[72] In her order dated October 11, 2011, Van Melle J. ordered Mr. Rotondi to pay child support based on his previous year's income of $21,066. Mr. Rotondi's declared income for 2011 was $33,000. Mr. Rotondi has therefore been underpaying child support since January 2012.

(ii) Mr. Rotondi's Lifestyle and Level of Spending

[73] Mr. Rotondi acknowledges that from January to April 2012, he received bi-weekly cheques in the net amount of $1,032.08 from Mav Pickering Inc. which he asserts that he never cashed due to a lack of funds in the company's account. In the absence of evidence from Mr. Bumbaca to account for the lack of funds in the company's account, and evidence from Mr. Rotondi as to why he continued working for the company for three months without receiving any income, I do not accept Mr. Rotondi's evidence that he did not receive income from the company during this period of his employment.

[74] Mr. Rotondi received Employment Insurance in the amount of $485 per week from April 12, 2012, until April 21, 2013. When combined with his income from Mav Pickering Inc. from January to April 2013, this amounts to income for 2012 in the amount of $22,682.48, and income for the first three months of 2013 in the amount of $25,220 on an annualized basis. Both of these amounts are in excess of the income of $21,066 upon which Van Melle J. based her order for child support on October 11, 2011.

[75] Mr. Rotondi's joint RBC bank account statements from February to August 2012 show monthly spending from this account alone in the range of $3,400 to $4,000 per month, or between $40,000 and $48,000 on an annualized basis. These amounts exceed what would be explained by the Employment Insurance Mr. Rotondi received from January to April 2013 and the $1,000 per month that he says he received from his spouse, Ms. Marina Gibson, as her contribution to household expenses. It is also inconsistent with his evidence that he received no income from April 2013 onward and was supported entirely by Ms. Gibson, who now earns $2,800, and, he says, contributes the entire amount toward their household expenses.

[76] Ms. Rotondi has given evidence that she observed Mr. Rotondi and Ms. Gibson driving an Audi Q5 automobile of a kind that was not available in Canada or the U.S. until 2009 and that costs $659.51 per month to lease. Ms. Rotondi states that it has been Mr. Rotondi's practice in the past to lease high-end vehicles through his business/companies.

[77] Mr. Rotondi's RBC account statements additionally disclose purchases in the amount of almost $700 at Rogers Video in June and July 2012, and $248.55 in a single purchase from a shoe store in June 2012. These expenditures are inconsistent with Mr. Rotondi's assertion that he was maintaining himself entirely from Employment Insurance benefits and the modest earnings of Ms. Gibson.

[78] Mr. Rotondi bridges the gap between his reported income and his reported expenditures by asserting that he borrowed $27,900 in personal loans, including $10,000 from his "former employer", presumably Mr. Bumbaca. I find this explanation implausible, having regard to Mr. Rotondi's assertion that Mr. Bumbaca's company had insufficient funds in its account to pay Mr. Rotondi's salary from January to April 2012, and that Mr. Rotondi was unemployed from May 2012 onward. I would have expected, at the very least, his evidence regarding these loans to be supported by evidence from the lenders.

[79] Based on the foregoing, I am unable, with any confidence, to make a finding as to Mr. Rotondi's current income.

[80] In *Hryniak*, Karakatsanis J. stated:

> When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or

> cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute.[40]

[81] There is a genuine issue for trial as to Mr. Rotondi's income and, therefore, whether there has been a material change in his ability to sustain the level of child support ordered by Van Melle J. on October 11, 2011, and, if so, what his current child support obligation should be pursuant to the *Federal Child Support Guidelines*. As there appears to be a genuine issue requiring a trial, I must exercise my discretion to determine whether the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2), provided that their use will not be contrary to the interests of justice and will likely to lead to a fair and just result and serve the goals of timeliness, affordability, and proportionality in light of the litigation as a whole.[41]

[82] Ms. Rotondi is entitled to the further disclosure she is requesting from Mr. Rotondi and the opportunity to examine him and, if necessary, relevant third parties, in order to complete the evidentiary record needed for the determination of Mr. Rotondi's income. Until this disclosure is completed, a use of the fact-finding powers provided under Rules 20.04(2.1) and (2.2) would not lead to a fair and just result or serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[83] In *Hryniak v. Mauldin*, The Supreme Court provided helpful direction as to how, having dismissed a motion for summary judgment, the motion judge can expedite proceedings toward a final resolution of the issues. Karakatsanis J. stated, in this regard:

> ***Where a motion judge dismisses a motion for summary judgment, in the absence of compelling reasons to the contrary, she should also seize herself of the matter***

[40] *Hryniak*, at para. 50
[41] *Hryniak*, at para. 66

as the trial judge. I agree with the Osborne Report that the involvement of a single judicial officer throughout

> saves judicial time since parties will not have to get a different judge up to speed each time an issue arises in the case. It may also have a calming effect on the conduct of litigious parties and counsel, as they will come to predict how the judicial official assigned to the case might rule on a given issue.

While such an approach may complicate scheduling, to the extent that current scheduling practices prevent summary judgment motions being used in an efficient and cost effective manner, the courts should be prepared to change their practices in order to facilitate access to justice.

CONCLUSION AND ORDER

[84] Based on the foregoing, it is ordered that:

1. Mr. Rotondi's motion for summary judgment on his application to vary the order of Van Melle J. dated October 11, 2011, is dismissed.

2. Mr. Rotondi shall disclose to Ms. Rotondi the following by April 10, 2014:

   a. All monthly statements for the period from January 1, 2012, to the present for all bank accounts and credit cards that the party operated, alone or with others (with the exception of accounts jointly operated with the other party to this proceeding), personally or through any business, in Canada or elsewhere, at any time during that period,

   b. All applications for credit, including mortgage, lines of credit, credit cards, or personal loans, made at any time during the period referred to in para. 2. a. above,

   c. All title documents and reporting letters for any real property acquired by him, alone or with any other person or business, at any time during the period referred to in para. 2. a., above,

d. Proof of all entries under the sub-headings “Housing”, “Utilities” and “Transportation” in Part 2: Expenses of his Financial Statement dated September 3, 2013,

e. All records of the lease agreement for any Audi motor vehicles that he has operated at any time during the period referred to in para. 2. a., above,

f. Records of his earnings, including salary, bonuses, while employed by MAV Pickering Hair Ltd. from 2011 to the present, and an estimate of tips and gratuities earned by him in cash or otherwise in his capacity as manager or stylist or both during those years,

g. Mr. Rotondi’s Income Tax Returns, including all schedules and attachments, and Notices of Assessment and Re-Assessment for each year from 2010 to the present.

3. If Mr. Rotondi fails to produce a document required by the date set out in paragraph 2, above, he shall, by that date, produce a sworn affidavit setting out the steps taken to obtain the document and the reasons it was not produced, together with a signed Direction to any non-party who may be in possession of the document, directing the third party to produce the document, at Mr. Rotondi’s expense, directly to Ms. Rotondi’s solicitor.

4. The parties have leave to conduct questioning after March 24, 2014, and before April 30, 2014.

5. The order of Van Melle J. dated October 11, 2011, is varied to terminate Mr. Rotondi's obligation to pay child support for Marco Rotondi at the end of April 2014. Ms. Rotondi has leave to apply for an extension of such support if, for reasons beyond Marco's control, he does not complete his paralegal program at that time.

6. I shall be seized of Mr. Rotondi's motion to change the order of Van Melle J. dated October 11, 2011, in which he seeks to reduce the amount of child support payable based on a material change in his ability to earn income at the level imputed to him by Justice Van Melle. For this purpose, the parties shall attend a trial management conference on June 18, 2014, at 10 a.m.

[85] If the parties are unable to agree on the costs of these motions, they may make written submissions, not to exceed four pages, with a Costs Outline, by March 24, 2014.

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Price J.

Released: March 7, 2014

CITATION: Rotondi v. Rotondi, 2014 ONSC 1520
COURT FILE NO.: FS-00-41772-03
DATE: 2014-03-07

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

IMELDA ROTONDI

Applicant

- and –

ALDO ROTONDI

Respondent

REASONS FOR ORDER

Price J.

Released: March 7, 2014