

## Is child support payable while children are away at university?



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## Memorandum of Law

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### Classification:

[Family law—Support—Child support under federal and provincial guidelines—Application of guidelines—Shared or split custody](#)

[Family law—Support—Child support—Duty to contribute—Child at school](#)

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**Jurisdiction:** Ontario

**Date of Research:** 2011

**Updated Date:** May 2, 2013

### Legal Issue:

Is child support payable while children are away at university?

### Fact Scenario:

You represent the father. The parties have 4 children. The two oldest are finished university and living on their own, although the father still helps them out financially. The third child is still in university. The youngest child is attending high school and resides primarily with the father.

The father has paid child support to the mother and has paid for all expenses relating to the children, without any contribution from the mother. Their expenses include, but are not limited to, university and private school tuition, all extra curricular activities, cars and car insurance. The mother has never contributed to the children's s. 7 expenses, nor has she paid support to the father.

The mother claims child support (ongoing and retroactive), as she maintained space for the children when they visited from university, and still does so for the 2 youngest children.

### Cases Cited:

**H** [Al v. Lawson](#) (2010), 2010 ONSC 4030, 2010 CarswellOnt 5232 (Ont. S.C.J.)

**C** [Blonski v. Blonski](#) (2010), 2010 ONSC 2552, 2010 CarswellOnt 2768, [2010] O.J. No. 1781 (Ont. S.C.J.)

**C** [Coghill v. Coghill](#) (2006), 2006 CarswellOnt 3890, 27 R.F.L. (6th) 434, 30 R.F.L. (6th) 398, [2006] O.J. No. 2602, [2006] O.J. No. 1489 (Ont. S.C.J.)

**■** [Contino v. Leonelli-Contino](#) (2005), 204 O.A.C. 311, 341 N.R. 1, 80 O.R. (3d) 480 (note), [2005] S.C.J. No. 65, 2005 SCC 63, 2005 CarswellOnt 6281, 2005 CarswellOnt 6282, 19 R.F.L. (6th) 272, 259 D.L.R. (4th) 388, [2005] 3 S.C.R. 217 (S.C.C.)

**C** [De Hoog v. Cojbasic](#) (2011), 2011 ONSC 1961, 2011 CarswellOnt 2190 (Ont. S.C.J.)

 *Lewi v. Lewi* (2005), 2005 CarswellOnt 693 (Ont. S.C.J.)

 *Liscio v. Avram* (2009), 75 R.F.L. (6th) 176, [2009] O.J. No. 3406, 2009 CarswellOnt 4882 (Ont. S.C.J.)

 *Merritt v. Merritt* (1999), 98 O.T.C. 321, 1999 CarswellOnt 1471, [1999] O.J. No. 1732 (Ont. S.C.J.)

 *Park v. Thompson* (2005), 2005 CarswellOnt 1632, [2005] O.J. No. 1695, 252 D.L.R. (4th) 730, 13 R.F.L. (6th) 415, 77 O.R. (3d) 601, 197 O.A.C. 158 (Ont. C.A.)

*Schwabe v. Schwabe* (2010), 2010 CarswellOnt 2953, 2010 ONSC 2547 (Ont. S.C.J.)

*Thomson v. Richardson* (2011), 2011 CarswellOnt 2064, 4 R.F.L. (7th) 357, 2011 ONSC 1889 (Ont. S.C.J.)

### Regulations considered:

*Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.)

*Federal Child Support Guidelines*, SOR/97-175

generally

s. 3(2)(b)

s. 7

Sched. I, s. 4(a)

### CONCLUSION:

The cases reviewed, with the exception of  *De Hoog v. Cojbasic* and *Thomson v. Richardson* which proceeded on consent, suggest a reduced table amount is appropriate. However, there is no steadfast rule as to how that reduced amount is calculated.

If the children did in fact live part time with each parent during their summer holidays from university, i.e. 50% with each parent, then presumably the amount of child support payable to the mother both during the summer and while the children are living away from home attending university, should be calculated based on a shared custody arrangement. In determining the amount of child support payable, the court will take into consideration the substantial discrepancy in the parties' incomes and the fact that your client paid for all of the children's expenses since separation.

### ANALYSIS:

#### Payment of Child Support for a Child Living Away From Home Attending University

In situations where a child lives away from home to attend university, but returns to live primarily with one parent during school breaks, including the four month summer vacation, the courts have held the payor parent is required to pay the table amount of child support for the child during the period in which that child is at home from school. The courts have further held that an amount of child support may be payable to the primary parent during the periods of time in which the child is living away from home attending university.

In  *Park v. Thompson*, 2005 CarswellOnt 1632 (Ont. C.A.) the parties' daughter Vanessa was over 18 years of age and attending McGill University in Montreal, Quebec. Justice Paisley ordered the father to pay the full table amounts in accordance with the *Guidelines* generally, and his pro-rated share of the tuition fees. The father appealed this Order.

At the hearing of the appeal, the father presented the Ontario Court of Appeal with a detailed chart showing that generally courts reduce the amount of child support during the academic year where the child is not living at home, in accordance with s. 3(2)(b) of the *Child Support Guidelines*. In  *Merritt v. Merritt*, 1999 CarswellOnt 1471 (Ont. S.C.J.) at para. 73 Justice Heene explained the rationale for this approach as follows:

Where, however, a child is residing in another residence for the bulk of the year, it seems inappropriate to apply tables that are not designed with that living arrangement in mind. Furthermore, *the table approach assumes that the recipient parent discharges her obligation by being physically in the same household and providing the family home and other amenities for the child. Where a child is at college, this assumption does not hold true. It therefore seems more appropriate to calculate the actual costs of providing for the needs of the child in his other residence, factoring in a*

contribution toward the cost of maintaining the family home to return to on weekends and school breaks where appropriate, and apportion that between the spouses on a *Paras* approach after considering the child's own ability to contribute. [Emphasis added.]

Justice Rosenberg concluded Justice Paisley had erred in failing to consider whether the table amount was inappropriate within the meaning of s. 3(2)(b) of the *Child Support Guidelines*. The learned Court of Appeal Justice set aside Justice Paisley's Order in regard to ongoing child support.

The motion judge in [Lewi v. Lewi, 2005 CarswellOnt 693 \(Ont. S.C.J.\)](#), a case involving two children, ordered that if a child lived away from home while attending university, table support was payable only during that period in which the child lived with Ms. Lewi, that is, during the four month "summer" vacation. The motion judge indicated that child support, in such an event, was to be paid on a monthly basis; however, the amount was calculated as the table amount for one child, plus one third of the difference between table support for one child and two children. This is because the child would only be living at home 1/3 of the year.

Ms. Lewi cross-appealed submitting that unreduced table child support should be paid throughout the year because, even though a child may be living away from home attending university, the living expenses covered by table support would still be incurred. Ms. Lewi argued the proper approach is to order unreduced table support, apply that table support to as much of the living expenses of the child at university as possible, and resort to s. 7 for the additional costs of post-secondary education.

Justice Juriansz, speaking for the majority at paras. 164-165, concluded the motion judge did not err by concluding it would be inappropriate to apply the *Guidelines* generally, to Brandon as if he were a minor because he would be living and attending a university out of town. Justice Juriansz made the following comments about the analysis and approach used by the motion judge:

It may also be observed that having taken this view, she could have used a different analysis to arrive at the reduced table support for Brandon. For example, she could have regarded the portion of table support for Brandon as one half of the table support for two children, rather than the increment in table support for one child to two children. It may also be said that one-third table support for Brandon, while reflecting that he would be living at home only one-third of the year, fails to recognize the ongoing costs of maintaining a home for him to return to during the summers and other holidays.

Nevertheless, the reduced table amount must be considered in the context of the entire child support order. The motion judge was entitled to exercise her discretion to reduce table support for Brandon in ordering, in total, an amount she considered appropriate having regard to the criteria in s. 3(2)(b).

In [Coghill v. Coghill, 2006 CarswellOnt 3890 \(Ont. S.C.J.\)](#), one of the most frequently cited cases on the issue of child support for a child living away from home attending a post-secondary institution, one of the parties' daughters was living away from home attending university. When she was not at university she resided primarily with her mother.

Relying heavily on the principals set out in [Lewi v. Lewi, supra](#) by the Ontario Court of Appeal, Justice Wright concluded at paras. 51-53:

For the 8 months the daughter is away at school the father should pay to the daughter \$5,720 or \$715 per month. ( $\$7,600 \times 150,000$  divided by 200,000). I say pay to the daughter because she is now an adult and there is no justification for directing such sums to be paid to the mother for transmission to the daughter. The Divorce Act says only that a parent must pay support, it does not specify to whom it is to be paid. In other circumstances we are quick to point out that the right of support is that of the child's not the parent.

For the same period the mother shall pay to the daughter the sum of \$1,900 or \$238 per month. ( $\$7,600 \times 150,000$  divided by 200,000).

In addition to the sum directed to be paid by the father to the daughter during the 8 month school year, he shall also pay to the mother the sum of \$300 per month during that eight months towards her expenses of keeping a home for the child to come back to on weekends and holidays.

Justice Wright continued at paras. 54 - 55:

If the child returns to live with the mother during the summer then for those months the father shall pay to the mother under s.3(2)(a) the “standard Guideline Amount” for \$150,000 being \$1,254 ...

If, as she wants, the daughter remains in London for the summer, then her living expenses of \$1,170 will be apportioned between the parents with the father paying \$878 per month and the mother paying \$292 per month. The father will continue to pay the mother the sum of \$300.

In **C** [De Hoog v. Cojbasic, 2011 CarswellOnt 2190 \(Ont. S.C.J.\)](#) the father sought an order suspending child support for his daughter Vanessa, for the months that she resided outside of her mother’s home, while attending Queen’s University. He proposed support would recommence during the summer months when Vanessa returned to reside with her mother.

Relying upon **R** [Lewi v. Lewi, supra](#), and **P** [Park v. Thompson, supra](#) the father argued that full support in accordance with the Guidelines is inappropriate in situations where a child is attending school away from home. The father argued since Vanessa resided in Kingston, Ontario, for eight months a year, he should not have to pay full *Guideline generally*, child support to the Applicant during these eight months, and pay his proportionate contribution to her post secondary education.

In response, the mother took the position that she is still responsible for maintaining a home for the children, Sean and Vanessa, year round. The mother advised that Vanessa came home regularly (every few weeks) and came home during school breaks and her summer vacation. Justice Johnston determined Vanessa’s attendance at university away from home was not a material change of circumstances justifying a variation of the final order. However, Justice Johnston made the following relevant comments with respect to the payment of child support while Vanessa was at university at para. 63:

For all of these reasons, *I find no material change in circumstance and there should be no change in the Table amount of support payable for Vanessa, even while she is attending Queen’s University.* The court obviously would have come to a different conclusion if Vanessa does not otherwise maintain a residence with the Applicant while not attending university. However, the evidence in this motion is that Vanessa resides with her mother while not living in Kingston for purposes of attending Queen’s University.

In other words, if Vanessa did not reside with her mother primarily when she was at home from university, Justice Johnston would likely have found a change in circumstances and ordered a different amount (potentially no) child support.

In **T** [Thomson v. Richardson, 2011 CarswellOnt 2064 \(Ont. S.C.J.\)](#) the parties had two children. The father commenced an application to vary the terms of the Divorce Judgment that was granted in 2003 on the basis that one of the two children was attending university away from home. On this application he sought an order providing support would only be payable for this child during the summer months that she actually resided with her mother.

The parties ultimately agreed that the father should pay the mother support for two children during the months that the eldest child was not away at school and support for one child during the months that she was away at school. After determining the amount of support due for the years 2009 and 2010, going forward, Justice Sachs ordered: “the father is to pay the mother child support based on when the children are residing with her, as opposed to attending school. The parties have agreed on these principles” (para. 16).

In **H** [Al v. Lawson, 2010 CarswellOnt 5232 \(Ont. S.C.J.\)](#) the parties’ three daughters lived primarily with the mother. Except for the eldest daughter, Alexandra, the daughters saw their father for access visits from time to time. At the time of the trial, Alexandra was scheduled to commence university at Wilfred Laurier in Waterloo, Ontario in September and would also be turning 18 years old. Alexandra was expected to be living away from home for approximately 8 months each year while she attended university.

The question to be determined was whether the father should pay table support for all three children, or for only two of the children while Alexandra was at university, and for three children only when she was living with her mother. In answering this question, Justice Mesbur stated at para. 53:

The *Guidelines* permit the court to order something different than table support for a child over the age of majority, if table support would not be appropriate in the circumstances. Since Alexandra will be away from home for eight months, table support is not appropriate here for all three children for twelve months of the year.

However, Justice Mesbur noted the mother would still have some costs for Alexandra, even when Alexandra was living away

from home. Justice Mesbur provided an example: “Alexandra will no doubt come home for some weekends and school breaks, when mother will feed her. Mother will no doubt still contribute to the cost of her incidentals” (para. 54). Justice Mesbur concluded at para. 54:

There must be provision for these costs as well, though not by full table support. In order to reflect these diminished costs, it is appropriate for father to pay one third of the difference between table support for three children and table support for two children in the months when Alexandra is at university. At his current income level, that difference is about \$100 per month.

Accordingly, Justice Mesbur ordered at para. 55:

father will pay table support of \$1,417 per month for three children for the months of July and August in 2010, and will pay table support for two children, plus the sum of \$100 for the months of September, 2010 through and including May of 2011. This means that for the months September 2010 through and including May of 2011, father will pay \$1,086 plus \$100 for a total of \$1,186 for those months. In June, July and August, 2011 he will pay full table support of \$1,417, subject to whatever adjustment is made to table support in July, 2011 after father has made complete financial disclosure.

In *Schwabe v. Schwabe*, 2010 CarswellOnt 2953 (Ont. S.C.J.) Justice Daley made the following child support order at paragraphs 81 and 82:

While I am of the view that the respondent has an obligation to pay child support, in order to provide that such payments are fair and do not result in double counting when considered with the payment of his proportionate share of the childrens’ university expenses, I order that the respondent pay child support in favor of Ronit to the end of May, 2010 when she completes university; and, that he pay child support in favor of Miriam as well, subject to a change commencing September, 2010 in that thereafter he will pay child support at 50% of the Guideline amount (provided for in the *Child-Support Guidelines*) while she is attending and residing at university, and at the rate of 100% of the Guideline amount, while she is residing with the applicant at her home during the summer months, while she is enrolled in university.

The respondent’s income for the year 2009 was in the sum of \$114,812.00. In accordance with the *Child Support Guidelines*, the monthly child support table for two children would be \$1,584.00. Thus the respondent shall pay child support to the end of May, 2010 at that rate and thereafter shall pay child support in favor of Miriam alone on the basis set out above: the monthly rate of \$992.00 while residing with the respondent in the summer, and at 50% of that amount, namely in the sum of \$496.00 per month while she is attending and residing at university. This child-support shall continue in favor of Miriam through to the completion of her undergraduate degree.

In *Blonski v. Blonski*, 2010 CarswellOnt 2768 (Ont. S.C.J.) the mother asked that in addition to year-round base guideline support for the parties’ son Mark, the father should also pay the full table amount for their older son Daniel during the summer months when Daniel was at home from university generating income through summer employment.

Daniel was living away from home attending Lakehead University in Thunder Bay, Ontario and was in his second year of an undergraduate degree. He returned home to reside primarily with his mother during Christmas and spring school breaks, and also for the whole of the summer. During the summer of 2009 he worked in construction earning \$14,000.00 which he applied toward his school expenses for the academic year 2009/2010.

The mother didn’t charge Daniel room and board, to assist him in saving for his school year expenses. At the time of trial, the Respondent had not paid the mother anything for Daniel since the date of separation, but had paid some amounts directly to Daniel (approximately \$350.00 per month for several months). The mother contended that she still needed financial assistance with Daniel’s expenses during the four months of the year when she had to provide food, shelter and other necessities for Daniel.

In considering the mother’s request, Justice Pazaratz commented at para. 23:

Although she only seeks the table amount for the summer months when Daniel is home from university, those summer months cannot be considered in isolation. Daniel’s year-round finances need to be considered, to identify the extent to which he could afford to contribute to his living expenses in the Applicant’s home, during the summer months. With the Applicant establishing only Daniel’s income—but not his expenses—it is impossible to assess how much support Daniel needs; how much he could afford to contribute to his own expenses; and whether the Respondent’s voluntary

contributions thus far have been adequate.

Justice Pazaratz concluded at para. 24:

While it is commonly the case that the full table amount of child support is paid during summer months when adult children are home from university, in *Lewi v. Lewi* [2006 CarswellOnt 2892 (Ont. C.A.)] the Court of Appeal confirmed there is no standard formula. All of the circumstances of the parents and the child must be considered. And in this case the Applicant has failed to adduce sufficient evidence to establish that the Respondent should contribute more than he has been voluntarily contributing.

In *Liscio v. Avram*, 2009 CarswellOnt 4882 (Ont. S.C.J.), Justice Price relied on the approach used by the court in *Coghill v. Coghill*, *supra* in making the following child support order for the parties' daughter Tina who was attending school away from home, but residing primarily with her mother when not at home

the father's obligation for child support for Tina for the year commencing September 1, 2008 consists of the table amount corresponding to his imputed income of \$ 70,000 (\$ 647 per month) for the four summer months (May to August, 2009) = \$ 2,588, plus one third of that amount for each of the eight months of the academic session (September, 2008 to April, 2009)  $215.67 \times 8 = \$ 1,725.36$  [para. 43]

As had Justice Wright in *Coghill v. Coghill*, *supra*, Justice Price required the father to pay one third of the table amount to the mother for the eight months when Tina was at university to help defray the mother's costs of maintaining a home for Tina to return to on holidays and during the summer.

It is clear based on the case law discussed above, with the exception of *Blonski v. Blonski*, *supra* where the child was earning a substantial sum of money during his summer holidays from school, that the father should be and should have paid the full amount of child support for the children for the months in which they primarily resided with their mother during their summer holidays from school. With the exception of the motion judge in *Lewi v. Lewi*, *supra*, who averaged the total amount payable during the summer over the course of the full calendar year, in all of the above discussed cases the full amount of child support was ordered during this summer holiday period.

As to whether child support should be or should have been paid to the mother while the children were attending university and living away from home, the cases I reviewed, with the exception of *De Hoog v. Cojbasic*, *supra* and *Thomson v. Richardson*, *supra* which proceeded on consent, suggest a reduced table amount is appropriate. However, there is no steadfast rule as to how that reduced amount is calculated.

Justice Wright in *Coghill v. Coghill*, *supra* ordered the father to pay the mother \$300.00 per month while the daughter was living away from home attending university.

Justice Mesbur in the case *Al v. Lawson*, *supra* ordered the father to pay the mother one third of the difference between table support for three children and table support for two children in the months when Alexandra was at university. Justice Price used the same approach in *Liscio v. Avram*, *supra*.

Justice Daley in *Schwabe v. Schwabe*, *supra* ordered the father to pay child support for the parties' daughter Miriam at 50% of the *Guideline generally*, amount (provided for in the *Child-Support Guidelines generally*) while she was attending and residing at university.

As there is no steadfast rule, it is up to you what approach you want to argue should be used to calculate the reduced amount of child support payable to the mother during the periods of time that any of the children were living away from home attending university.

#### **FURTHER SUGGESTED RESEARCH:**

You may wish to have further research conducted on the following issues:

With the exception of *Coghill v. Coghill*, *supra* I have only reviewed Superior Court of Justice cases decided in Ontario between 2009 and 2011. You may wish to have later cases reviewed as well as cases in different provinces.

You may wish to review further how the Ontario courts have determined the amount of child support payable following

the Supreme Court of Canada's decision in [Contino v. Leonelli-Contino, 2005 CarswellOnt 6281 \(S.C.C.\)](#) with a particular emphasis on how the amount of child support is payable where one child lives primarily with one parent, but there is a shared custody arrangement with respect to the other children.



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