CITATION: Hess v. Hamilton, 2018 ONSC 661
COURT FILE NO.: 03-FS-282880-0001
DATE: 20180126

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HEIDI HESS	)	*Leroy A. Bleta,* for the Applicant
	)	
Applicant	)	
	)	
– and –	)	
	)	
LORNE HAMILTON	)	*Andrea L. DiBattista & Lisa Katz,* for the Respondent
Respondent	)	
	)	
	)	
	)	
	)	
	)	**HEARD:** April 12-16, 19-20, 24, 2017

M. D. FAIETA J.

REASONS FOR DECISION

INTRODUCTION

[1] The parties were married in August, 1988. They have two daughters, Victoria (25 years old) and Monika (23 years old). The parties separated in June, 2002. At the time of separation, the Applicant, Heidi Hess ("Heidi") was 32 years old, the Respondent, Lorne Hamilton ("Lorne") was 40 years old, Victoria was 10 years old and Monika was almost 8 years old.

[2] Both parties seek to vary the spousal support and child support provisions of the Order of Justice Backhouse dated December 14, 2007 ("the 2007 Order").

BACKGROUND

[3] Heidi emigrated to Canada from the United States in February 1988. She completed her Grade 10 education in Canada. In August, 1988, at the age of 18, Heidi married Lorne who was 26 years old. Lorne had graduated from the University of Toronto in 1985 with a business

degree. He was employed in the foreign currency trading business from the late 1980s until about 2002.

[4] Their first daughter, Siera, was born in August, 1989. Siera died in April, 1990. Subsequently, Victoria was born in January, 1992 and Monika was born in July, 1994.

[5] Lorne worked for four companies as a foreign currency trader quoting prices. Heidi states that she was a "stay at home mom" during the 14 years that the parties lived together, which included a period of about one year when Lorne resided in Montreal. She states that Lorne had little time for the family as he developed his skills and credentials and "worked his way up the corporate ladder". On occasion, Heidi states that she worked with Lorne at trade shows.

[6] Lorne was unemployed at the date of separation. Heidi states that in June 2002 she left the matrimonial home as her living conditions were intolerable.

[7] From July 2002 until December 2005, he worked as a Director of Client Development for a software company. In September 2006, his employment was terminated without cause after his employer was acquired and the Toronto office was closed. He suffered a heart attack in December, 2006 and remained unemployed until March 2007 when, for the first time in his career, he became a salesperson. His annual salary since 2013 has been $155,000 plus commission. Lorne states that the success in his career since 2007 has largely been the result of mentorship that he received and various training courses that he has participated in since 2007.

[8] Heidi was employed by Metagenics as a nutritional supplements salesperson from May 2, 2007 until September 18, 2015.

Case Conference - 2003

[9] At a case conference in February, 2003, Lorne agreed to commence paying spousal support to Heidi in the amount of $1,800.00 per month.

Final Order for Joint Custody and Divorce - 2004

[10] In April, 2004 the parties executed Minutes of Settlement. Pursuant to the Minutes of Settlement, Lorne paid Heidi the sum of $1,800.00 per month in spousal support and $1,160.00 in child support commencing April 1, 2003. He also paid Heidi the sum of $15,300.00 by way of lump sum spousal support and $12,000 by way of lump sum child support.

[11] On September 21, 2004, a divorce was granted. The children resided with each parent on alternate weeks from the time of their separation until March, 2006.

Child and Spousal Support - 2005

[12] On December 22, 2005 Justice Hoilett ordered that Lorne pay spousal support in the amount of $2,500 per month commencing December 21, 2005. The Court also ordered that

Lorne pay child support in the total amount of $1,064.00 retroactive to November 1, 2014 based on his annual income of $135,000.00.

Custody, Access, Child and Spousal Support - 2007

[13] From March 2006 until June 2006 the children remained in the primary care of Lorne and did not have any access to Heidi. In June 2006, the children began to see Heidi on alternate weekends. On November 29, 2006, the Office of the Children's Lawyer ("OCL") found that Lorne had unjustifiably alienated the children from their mother. The children told the OCL that they were tired of alternating between their parents' homes and wanted to live in the matrimonial home with their father. The OCL recommended that Lorne have primary care of the children.

[14] In December, 2007, the parties brought motions to vary Justice Hoilett's Order. The 2007 Order did not vary the requirement for joint custody. However, Justice Backhouse found that "… the children have been overly involved in the adult dispute by their father, but not by their mother who attempted to protect them from it …". She also ordered that the children were free to determine their own schedule. Amongst other things, she also ordered that: (1) Lorne pay spousal support to the mother ($3,500.00 per month from January 1, 2006 to December 31, 2006, $2,500.00 per month from January 1, 2007 to May 31, 2007, and $2,000 per month from June 1, 2007) given that his 2006 income was $190,429 (inclusive of $76,249 in severance) and his income in 2007 was $128,000.00 per year; (2) Lorne's obligation to pay child support was terminated; (3) Heidi pay child support to Lorne in the amount of $972.00 per month commencing June 1, 2007 based on her stated income of $65,000.00 per year.

[15] Justice Backhouse's Reasons for Decision, dated December 14, 2007, note that Heidi obtained probationary employment as a sales representative with Metagenics Canada Inc earning $50,000 per year plus benefits of a $400/month car allowance, $200/ month gas allowance and $175/month cell phone allowance and that, nine to fifteen months thereafter, she would be eligible for an increase of up to $10,000. In awarding spousal support of $2,000 per month commencing June 1, 2007, Justice Backhouse found that Heidi's current income was $65,000/year and that Lorne' income was $128,000/year.

The Parties' Own Arrangements

[16] Heidi went on a medical leave in May, 2009 for about six months.

[17] Victoria (then age 17) resumed living with Heidi in May 2009 and Monika (then age 14) resumed living with Heidi in June 2009. In May 2009, at Heidi's request, Lorne signed a Notice of Termination of Support to confirm that Heidi was no longer obliged to pay child support to Lorne. At Heidi's request, Lorne commenced paying child support in the amount of $1,818.00 effective September 1, 2009. He also continued to pay spousal support of $2,000.00 per month to Heidi.

[18] In September, 2010, Victoria started attending Wilfrid Laurier University ("Laurier") in Waterloo, Ontario. Victoria graduated, with a Bachelor of Science (Honours) in Kinesiology, in April 2014. Lorne paid for Victoria's full tuition and fees over that four year period ($22,850.00) from a Registered Education Savings Plan that he had established for her. Heidi paid for Victoria's books, rent, utilities, food, clothing, cell phone, travel and moving expenses while she was at Laurier.

[19] While attending university, Victoria only resided with Heidi during the summer of 2011. During the other summers Victoria worked out of town (whether in Waterloo or at the Youthdale Camp).

[20] Heidi went on a second medical leave in May, 2013. In 2013, her annual salary was $78,663.00. Heidi received short term disability benefits from her employer until January 2014 when she commenced receiving long term disability benefits from Manulife Financial. During that period, in October 2013, Heidi purchased a townhome in Mississauga.

[21] Lorne stopped paying child support for Monika after she returned to live with Lorne in October, 2013. She attended The Student School located in Toronto during the Fall of 2013. He continued to pay Heidi the sum of $909 per month in child support for Victoria. Monika returned to live with Heidi in February 2014 until October, 2014. Starting in February 2014, Lorne increased his payment of child support to $1,818.00. Monika graduated from high school in June, 2014 however she returned to The Student School to upgrade her marks in September 2014. Monika lived on her own from about October, 2014 until December, 2014. Lorne gave Monika $900 per month for living expenses. Monika returned to live with Lorne in December 2014. Except for a period in January, 2015, Monika lived with Lorne from December 2014 until she entered Carleton University in Ottawa in September 2015.

[22] On September 18, 2015 Metagenics terminated their contract of employment with Heidi effective November 6, 2015 on the grounds of frustration of contract as they found that there was no reasonable prospect of her returning to work given that she had been absent for more than two years.

[23] The children are now adults. Victoria is 25 years old. She attends medical school outside of Canada. Monika is 23 years old and continues to attend Carleton University.

[24] The annual income of the parties as shown on their income tax returns is as follows:

	Heidi	Lorne
2007	$41,991.93	$130,139.00
2008	$99,848.12	$222,403.00
2009	$63,248.00	$264,282.00

2010	$92,625.06	$309,386.00
2011	$114,328.29	$221,946.00
2012	$109,299.74	$250,294.00
2013	$82,246.82	$217,157.00
2014	$68,518.58	$229,599.00
2015	$80,259.00	$267,537.51
2016	$67,777.32	$325,607.36

Motion to Change – 2015

[25] On September 29, 2015, Heidi brought a motion to change the 2007 Order as follows:

(a) Increase the amount of child support paid by Lorne on an ongoing basis from January 1, 2009

(b) Special or extraordinary expenses under section 7 of the Child Support Guidelines be paid by Lorne in respect of Victoria commencing January 1, 2015 for:

- Medical school tuition: $2,148.83 per month (which represents ½ the monthly cost);
- Books, medical equipment and computers: $83.33 per month (being ½ the monthly cost);
- Shelter rent: $500.00 (being ½ the monthly cost);
- Food: $250.00 (being ½ the monthly cost);
- Clothing: $25.00 (being ½ the monthly cost).

(c) Conversion of the above amounts into American dollars as of January 1, 2015 and each January 1 thereafter;

(d) Spousal support be paid by Lorne:

- Commencing January 1, 2009 in the amount of $3,828.00 per month;
- Commencing January 1, 2010 in the amount of $4,221.00 per month;

- Commencing January 1, 2011 in the amount of $1,225.00 per month;
- Commencing January 1, 2012 in the amount of $2,394.00 per month;
- Commencing January 1, 2013 in the amount of $2,397.00 per month;
- Commencing January 1, 2014 in the amount of $1,907.00 per month;
- Commencing January 1, 2015 in a monthly amount to be determined;

(e) The father provide proof on an annual basis that Lorne's life insurance designates Heidi as trustee of the policy and that the children are named as irrevocable beneficiaries.

[26] In his Response to the Motion to Change dated October 29, 2015, Lorne asks that Heidi's motion to change be dismissed and that the following changes to the 2007 Order:

(a) Child support for Victoria be terminated effective May 1, 2014;

(b) Child support for Monika shall only be payable by a parent to the other parent from May through August if Monika resides with the other parent over the summer months that the school is not in session;

(c) Each parent shall contribute his/her proportionate share of Monika's post-secondary expenses after deducting a reasonable contribution to these expected from Monika;

(d) Spousal support be terminated effective June 1, 2016 or reduced to an amount to be determined following receipt of disclosure of Heidi's income;

ISSUES

[27] The motions brought by the parties raise the following issues:

- Should the table child support provisions in the 2007 Order be retroactively varied?
- Should the table child support provisions in the 2007 Order be prospectively varied?
- Should Lorne be required to pay one-half of Victoria's costs of attending medical school?
- Should table child support be payable for Monika only if she resides with the recipient parent during the summer months while university is not in session?
- Should spousal support be terminated effective June 1, 2016?

ISSUE #1: SHOULD THE TABLE CHILD SUPPORT PROVISIONS IN THE 2007 ORDER BE RETROACTIVELY VARIED EFFECTIVE JANUARY 1, 2009?

[28] As noted earlier, the last child support order issued in this proceeding, being the December 2007 Order, required Heidi rather than Lorne to pay child support. However, in 2009, Lorne agreed to pay child support, in an amount requested by Heidi, after Victoria and Monika returned to living with Heidi in or about June, 2009. The 2007 Order was not amended to reflect their agreement. Heidi now asks that this Court order that Lorne pay a greater amount in table child support effective June 1, 2009.

[29] Section 17 of the Divorce Act states:

> (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> (a) a support order or any provision thereof on application by either or both former spouses; ….
>
> (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order. …
>
> (6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.

[30] Section 14 of the Child Support Guidelines states:

> For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:
>
> (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof;
>
> (b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support; …

[31] The determination of whether the child support provisions of the 2007 Order should be varied raises the following issues:

- Has there been a "change in circumstances" since the issuance of the 2007 Order?
- Is it appropriate to make a retroactive award?

Has there been a "change in circumstances" in relation to the child support provisions of the 2007 Order?

[32] The fact that Heidi became the custodial parent of the children in 2009, as well as Lorne's increase in income, constitute a "change in circumstances".

Is it appropriate to make a retroactive award of child support?

[33] A motion for the variation of a support payment for a period prior to the filing of the motion is a retroactive claim: see *MacKinnon v. MacKinnon* (2005), 75 O.R. (3d) 175 (Ont. C.A.) at para. 19. Accordingly, Heidi's claim for variation of child and spousal support prior to September 29, 2015 (being the date of this Application) is considered to be a retroactive claim as is Lorne's claim for the variation of child support prior to October 29, 2015 (being the date of his Response to the Motion to Change).

[34] In *S. (D.B.) v. G. (S.R.)*, [2006] 2 S.C.R. 231, at paras. 94-116, the Supreme Court of Canada stated that the following factors should be considered, although none of the factors are determinative, in deciding whether to retroactively vary a child support order:

i) is there a reasonable excuse for why support was not sought earlier;

ii) the conduct of the payor parent;

iii) the circumstances of the child; and

iv) any hardship occasioned by a retroactive award.

[35] Once a court determines that a retroactive child support award should be ordered it must decide: (1) the date to which the award should be retroactive; and (2) the amount of support to be paid.

[36] The general rule is that the award of child support should be retroactive to the date when effective notice was given to the payor parent. Effective notice means any indication by the recipient parent that child support should be paid, or if it is already is, that the current amount of child support needs to be re-negotiated. Even if effective notice is given, it will usually be inappropriate to make a support award retroactive to a date more than three years before formal notice was given to the payor parent. However, if the payor parent engages in blameworthy conduct, such as withholding information about a material change in circumstances, then the presumptive date of retroactivity is moved back to the time when circumstances changed materially: *D.B.S.*, paras. 117-125.

[37] The Guidelines must be followed in determining the amount of retroactive child support owed. The amounts set out in the applicable tables may be reduced if such award would cause undue hardship. As well, the amount may be reduced if there has been unreasonable delay after effective notice was given: *D.B.S.*, paras. 127-130.

[38] Heidi now seeks to vary the child support payments as follows:

- Commencing June 1, 2009 in the amount of $3,155.00 per month based on Lorne's annual income of $264,282.00 based on two children residing with Heidi;

- Commencing on January 1, 2010 in the amount of $3,829.00 per month based on Lorne's annual income of $309,386.00 based on two children residing with Heidi;

- Commencing on January 1, 2011 in the amount $2,832.00 per month based on Lorne' annual income of $221,496.00 based on two children residing with Heidi;

- Commencing on January 1, 2012 in the amount of $3,155.00 per month based on Lorne's annual income of $250,294.00;

- Commencing on January 1, 2013 in the amount of $2,788.00 per month based on Lorne's annual income of $217,157.00 based on two children residing with Heidi;

- Commencing on January 1, 2014, in accordance with the Table amount found in the Child Support Guidelines based on Lorne's income in 2014 based on one child residing with Heidi;

- Commencing on January 1, 2015, in accordance with the Table amount found in the Child Support Guidelines based on Lorne's income in 2015 based on one child residing with Heidi;

Is there a Reasonable Excuse for Why an Increase in Support Not Sought Earlier?

[39] Counsel for Heidi sent the following letter dated May 21, 2009 to counsel for Lorne:

> As I am sure you are aware Victoria has been living with my client this month. Please confirm that your client will agree to an Order terminating child support to avoid a costly Motion at his expense.
>
> I am sure that you will be readily able to persuade him, given that he makes significantly more money than my client and as such he would be required to pay her child support.
>
> I hope we can have acknowledgment of his Consent by tomorrow afternoon, and I will then send you the Notice of Withdrawal form which as you know must be signed by both parties so that matter can be completed by the end of this month. [Emphasis added.]

[40] By letter dated September 23, 2009 counsel for Heidi requested child support in the amount of $1,818.00 per month. His letter states:

> I understand that the youngest child, Monika, has resided with my client since August 2009. My client is entitled to child support. Your client suggested that he is only required to pay spousal or child support, but not both.
>
> Would you speak to your client and inform me whether or not he will agree to pay child support in accordance with the Tables? The rate for $135,000.00 of income is $1,818.00 monthly. This would be effective September 1, 2009.

> If agreeable, please confirm and I will draft the necessary Form 15 materials. This is the rate for $135,000.00 of income. If he agrees then there will be no costs sought. However, I must hear from you by October 2, 2009. So you are not lead astray, as your client knows, my client has been on a medical leave of absence. [Emphasis added]

[41] Counsel for Lorne replied by letter dated October 1, 2009 as follows:

> … To the best of Mr. Hamilton's knowledge, Monika has not decided to reside full-time with your client. … According to Monica's counsellor, Monika last expressed a desire to reside with both parents and to be able to move freely between households. Monika has a scheduled appointment with her counsellor and her wishes will be explored and confirmed in this environment. Mr. Hamilton will be responsive to Monika's wishes and is prepared to address the issue of support once Monika's wishes have been confirmed.

[42] Lorne subsequently accepted Heidi's proposal to pay $1,818 in child support. There is no evidence that an Order was granted to reflect this new arrangement.

[43] Heidi states that she did not feel that she had the strength to return to court to seek additional child and spousal support even though she was advised by her lawyer to do so. Heidi states that she was in "survival mode" and not thinking clearly following the December 2007 decision. Her affidavit, sworn September 22, 2015, states:

> I asked [Lorne] for child support beginning in September, 2009 but he told me he could delay it indefinitely and my biggest fear was to put the children through the hell that we all had endured just so recently. Nonetheless through my lawyer I requested that [Lorne] pay guideline support for the children based on $135,000 annual income. …
>
> For my own mental and physical health, I have resisted from bringing the within motion. It takes a huge toll on me physically and mentally. I have been reduced to borrowing from Victoria, a total of $14,000.00. [Emphasis added]

[44] Lorne submits that the letter dated May 21, 2009 from Heidi's lawyer makes it clear that she was aware that "higher support payments may have been warranted" but decided not to pursue that matter.

[45] I have difficulty accepting Heidi's explanation as her actions do not match her words. Although she alleges that she was not thinking clearly at that time and fearful of returning to court, shortly after both children returned to live with her, Heidi (through her lawyer) demanded that Lorne agree, within about one week, to pay child support of $1,818 per month failing which she would ask the court to award her child support and costs.

Has the Payor Engaged in Blameworthy Conduct?

[46] Heidi submits that Lorne refused to disclose his income. Her evidence is that Lorne's "standard response" was to tell her to "F--- Off" when Heidi asked Lorne for information about about his income. However, Lorne states that he was never asked by Heidi or his lawyer for such information. No request for such information was made in December 2009 when Heidi

requested that Lorne pay $1,818 in child support. Instead, the earliest written request for Lorne's income information (2007-2013 tax returns and Notices of Assessment) for purposes of determining child support was made by Heidi's lawyer by email dated November 14, 2014. Lorne's lawyer provided that information by letter dated November 26, 2014.

[47] Although section 25(1) of the Child Support Guidelines, which requires a "spouse against whom a child support order has been made must, on the written request of the other spouse or the order assignee, not more than once a year after the making of the order and as long as the child is a child within the meaning of these Guidelines …", is not applicable because the 2007 Order did not require Lorne to pay child support, I find that he complied with the spirit of this provision given his prompt reply to the written request for income information.

[48] Lorne properly notes that Heidi did not disclose her income to him during 2007 and 2008 when she was the payor parent. However, there is no evidence that such information was requested by Lorne and, accordingly, no basis to suggest that she breached s. 25(1) of the Child Support Guidelines.

[49] I am not satisfied that Lorne has engaged in blameworthy conduct. He neither hid his income nor intimidated Heidi. Lorne's belief that he was meeting his support obligations by paying the amount requested by Heidi was reasonable and thus supports the conclusion that he did not engage in blameworthy conduct.

Will the Payor Suffer Undue Hardship if a Retroactive Award is Granted?

[50] Lorne is 55 years old. He has no pension. His two main assets are his home ($270,000) and his RRSP ($452,000). He suffered a heart attack about 11 years ago. In these circumstances, I find that Lorne will suffer undue hardship if a retroactive award of child support is granted.

Conclusions

[51] Considering the totality of the circumstances described above, I find that it is not appropriate to grant Heidi's claim to vary child support retroactively.

[52] In addition, I find that the parties' agreement, viewed holistically, does not support the retroactive award of child support. Their 2009 arrangement regarding the amount of child support to be paid by Lorne also resulted in Lorne relenting from his position that he was not obliged to continue to pay spousal support. This conclusion is consistent with the direction provided in *S.D.B.*, at para. 78:

> In most circumstances, however, agreements reached by the parents should be given considerable weight. In so doing, courts should recognize that these agreements were likely considered holistically by the parents, such that a smaller amount of child support may be explained by a larger amount of spousal support for the custodial parent. Therefore, it is often unwise for courts to disrupt the equilibrium achieved by parents. …

[53] In the event that an increase in child support should have been paid retroactively, I am of the view that it would have been inappropriate to award full table child support while the children lived away from home attending university given that the table approach assumes that the child and the recipient parent live in the same home: see s. 3(2) of the CSG; *Park v. Thompson*, (2005), 77 O.R. (3d) 601, paras. 27-29 (C.A.). Having regard to the circumstances of Victoria and her parents, I would have reduced the table amount by one-half while she attended Wilfrid Laurier University.

ISSUE #2: SHOULD THE CHILD SUPPORT PROVISIONS FOR VICTORIA IN THE 2007 ORDER BE PROSPECTIVELY VARIED?

[54] Heidi, in her application, dated September 29, 2015, seeks child support on a prospective basis for both Victoria and Monika.

[55] It is clear that Lorne's income has greatly increased since the 2007 Order and the time that he negotiated the 2009 agreement for the payment of child support.

[56] Victoria graduated from Wilfrid Laurier University in mid-April 2014. She received an offer of admission to the School of Medicine at the American University of the Caribbean ("AUC") on September 26, 2014. Victoria has estimated that the cost of this program is $348,788 USD inclusive of tuition and fees of $206,288 USD and $132,000 USD in accommodation and other living expenses.

[57] In October, 2014, Victoria approached Lorne to ask that he guarantee a loan from the Bank of Montreal that she sought in order to pay for the cost of AUC's medical school program. Lorne was shocked that she had applied to AUC rather than to a Canadian medical school. He was also shocked by the cost of the program. Lorne refused to guarantee Victoria's loan. However, Victoria was determined to attend medical school. Being an American citizen, Victoria obtained a loan through a program offered to American students to cover the full cost of the program. She moved to the Caribbean and started medical school in January 2015. Victoria returned to live with Heidi for one month in December 2016 before leaving to commence her clinical studies in Manchester, England in January 2017.

[58] In assessing whether child support, including both table child support and the cost of attending medical school, should be paid the following issues must be addressed:

- Does Victoria remain a "child of the marriage"?

- If so, is it "appropriate" for child support to be determined by applying the Guidelines as if she were under the age of majority?

- Should Lorne be required to pay for one-half of Victoria's cost of attending medical school "… taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation."

[59] Heidi submits that child support, including one-half of the cost of attending medical school, should be paid by Lorne on an ongoing basis for Victoria until she completes medical school. Lorne submits that child support for Victoria should have ended effective May 1, 2014 after she graduated from Wilfrid Laurier University. Lorne submits that he should only be obliged to pay child support for Monika for the months from May through August, if Monika resides with Heidi over the summer months while the university is not in session.

Does Victoria remain a "child of the marriage"?

[60] The definition of "child of the marriage", under s. 2(1)(b) of the Act, includes a child who "… is the age of majority or over and under their [her parents'] charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life."

[61] Victoria was 23 ½ years old at the time that this Application was commenced. Accordingly, the onus is on Heidi to establish that Victoria was under parents' charge and unable to withdraw from their charge or to obtain the necessaries of life: *Ethier v. Skrudland*, 2011 SKCA 17, paras. 17-18.

Is Victoria under her parent's charge?

[62] Residency is usually associated with a child being under a parent's charge. In *Tapson v. Tapson*, [1970] 1 O.R. 521 (C.A.) Laskin, J.A., as he then was, stated that an adult child is under her parents' charge if a parent has assumed the care and maintenance of the child in the parent's premises. He stated, at paras. 5 and 6, that:

> … I am prepared to read the phrase, 'under their charge' broadly as meaning simply that the parent has assumed the care and maintenance of the child in the parent's premises.
>
> … An order for maintenance or interim maintenance based on a child 16 years of age or over being in the charge of a parent assumes, of course, that the child is living with the parent in the parent's care and to that extent, within the parent's responsibility for maintenance. If it should prove to be the case that a child, having reached the age of 16, withdraws from a parental home and goes out to live by himself or by herself, other considerations will have intruded to make this provision probably no longer applicable." [Emphasis added]

[63] Economic dependence is the essential feature of whether a child is under a parent's charge: See Hon. Justice David L. Corbett, Claudia Schmeing, 2011 30 CFLQ 165, Child Support for Estranged Adult Children — "Parent as Wallet" or "Can't Buy Me Love". Thus, a child that has left home because of conflict within the home nevertheless remains under his parents' charge: *Pound v. Pound* [1987] B.C.J. No. 109 (C.A.).

[64] Although Victoria had been briefly engaged at the time that she graduated from Laurier, she lived with Heidi after her graduation from Waterloo until she left for medical school in the Caribbean in January 2015. Despite the fact that her tuition and living expenses had been paid for by her parents, Victoria received OSAP loans in each of her four years at Laurier. Victoria lent the proceeds of her OSAP loans to Heidi. Victoria lent $13,000 to Heidi by the time that this Motion to Change was commenced and had lent $47,400.15 to Heidi by the time of this trial. These loans undermine any argument that Victoria was dependent on Heidi. In this context, given that she lived largely on her own during from 2010 to 2014, there is not a strong case for finding that Victoria was dependent on Heidi during that period but for returning home during the school year on weekends from time to time.

[65] Victoria's medical studies require her to live year-round out of the country for four years (whether to attend medical school in St. Maarten for almost two years before undertaking clinical studies in the United Kingdom for approximately another 18 months). Without her parents' assistance, Victoria has arranged for a loan to fund the cost of medical school. Her studies will be followed by residency in a country yet to be determined by Victoria. Given all of the above circumstances, I find that Victoria had withdrawn from her parents' charge, and thus was no longer a child of the marriage, as of January 1, 2015.

[66] In the event that I am wrong in this conclusion, I will address whether Victoria is unable to withdraw from her parents' charge.

Is Victoria unable to withdraw from her parents charge or obtain the necessaries of life by reason of illness, disability or "other cause"?

[67] In deciding whether the pursuit of a postsecondary degree amounts to "other cause" for a child to be unable to withdraw from his or her parents' charge, consideration should be given to "… 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 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 also the "conduct of the parties and the condition, means and circumstances of each of them": *Whitton v. Whitton,* [1989] O.J. No. 1002 (C.A.), para. 6.

[68] Victoria was 22 years old at the time that she was accepted into AUC's full-time medical school program. It is a four-year program.

[69] Victoria recalls telling her parents at the age of 16 that she wanted to become a doctor. As a result, she selected her undergraduate program and volunteer activities in order bring her closer to this goal. However, Victoria felt that her grades (3.06 GPA) and MCAT (23/40) were not high enough for there to be a "real possibility" that she would be accepted into a Canadian university given that admission to these programs is highly competitive.

[70] Victoria's parents made no plans for Victoria to attend medical school or to otherwise pursue a postgraduate degree before they separated in 2002. However, Heidi states that Lorne said that he would fund the children's education without condition and never suggested that it would be limited to an undergraduate degree. On the other hand, Lorne states that he told Victoria that she would be responsible for her education expenses beyond an undergraduate degree. This is consistent with the fact that Victoria did not ask Lorne to contribute to the cost of medical school but rather asked him to guarantee her loan. Further, while Lorne established an Registered Education Savings Plan ("RESP") that paid for his children's undergraduate degree, there is no evidence that the RESP or other forms of saving were established by either Lorne or Heidi to provide for a postgraduate degree. I also note that neither Heidi or Lorne obtained a postgraduate university degree. Heidi did not attend university or college. Lorne obtained an undergraduate degree. Thus, based on their own path of education, it is not reasonable to conclude that her parents expected that Victoria would be expected to pursue a postgraduate university degree. In that respect, this case is distinguishable from *N. (W.P.) v. N. (B.J.),* 2005 BCCA 7, para. 26, where a doctor had planned for his daughter to go to medical school and "follow her father into the family career".

[71] As noted, Victoria obtained a loan to cover the cost of medical school without the need for a guarantor. Given that the program appears to run all year long, there does not appear to be an opportunity for Victoria to contribute to her own support by working part-time. She worked about 20 hours per week during Grades 10 through 12. I have little doubt that Victoria would work if circumstances permitted. Heidi submits that once Victoria is a resident physician she will earn a salary of about $45,000 per year.

[72] Lorne's average income for the period from 2008 to 2016 has been about $256,000. His average income for the period from 2014 to 2016 has been about $273,000. As noted earlier, Lorne's two main assets are his interest in his home ($270,000) and his RRSP ($452,000). Until trial, he has continued to pay spousal support of $2,000 and child support of $1,818 per month for both children. He also pays Monika's tuition.

[73] Lastly, Victoria does not have a close relationship with Lorne. From what they said, as well as the emotion they displayed at trial, it is apparent that both Victoria and Lorne wish that they had a closer relationship. Sadly, the relationship between Lorne and Heidi after their separation was, and is, "high conflict" and their children have been unnecessary and unwilling participants in the push and pull of the "Team Hess" v. "Team Hamilton" drama (as labelled by Monika). In my view, responsibility for the state of their relationship cannot be laid at Victoria's feet. Nevertheless, the concern expressed by Lorne regarding the loan guarantee was reasonable given his age, his financial circumstances and the size of the loan guarantee although perhaps those concerns could have been communicated with greater sensitivity.

[74] In light of all the circumstances, particularly from the perspective of economic dependency, I find that Victoria was not a "child of the marriage" as of January 1, 2015.

Is it "appropriate" for child support to be determined by applying the Guidelines as if Victoria were under the age of majority?

[75] As I have found that Victoria was no longer a child of the marriage effective January 1, 2015, I order that child support be terminated for Victoria as of that date.

[76] Had I not found that Victoria was a no longer a "child of the marriage', then I would have found that table child support should no longer be paid as of January 1, 2015.

[77] Subsection 3(2) of the CSG states:

> 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.

[78] Given that the table approach assumes that the child and the recipient parent live in the same home, I find that it would have not been appropriate for any amount of child support to have been paid in respect of Victoria given that Victoria has spent very little time residing with the Applicant while she has lived and attended medical school on a year-round basis in the Caribbean and England since January 1, 2015.

Is it appropriate for Lorne to pay for one-half of Victoria's cost of attending medical school?

[79] In the event that I had found that Victoria was a "child of the marriage", I would not consider it appropriate for Lorne to pay for one-half of Victoria's cost of attending medical school.

[80] Under s. 15.1(1) of the *Divorce Act*, a court may make an order "requiring a spouse to pay for the support of any or all children of the marriage". Further, s. 7(1) of the Child Support Guidelines under the *Divorce Act* provides that:

> … a court may … provide for an amount to cover all or any portion of the following expenses, which may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to separation: … (e) expenses for post-secondary education… .

[81] Section 7 of the CSG states:

> 7 (1) In a child support order the acourt may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness

> of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation: …
>
> (e) expenses for post-secondary education; …
>
> (2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

[82] The above approach is modified for a child that is beyond the age of majority. Subsection 3(2) of the CSG states:

> 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. [Emphasis added]

[83] Much of the analysis relevant to the determination of this issue has been described above under the "child of the marriage" analysis.

[84] I find that it is inappropriate for Lorne to pay for one-half of Victoria's cost of attending medical school given the enormous cost of medical school, Lorne's limited means and the fact that Victoria was able to obtain the funds to pay for the cost of medical school.

ISSUE #3: SHOULD THE CHILD SUPPORT PROVISIONS FOR MONIKA IN THE 2007 ORDER BE PROSPECTIVELY VARIED?

[85] There is no dispute that child support is payable for Monika as she remains a "child of the marriage" while she pursues an undergraduate degree.

[86] Monika has been a student at Carleton University since September, 2015. It is clear from Monika's affidavit, sworn February 24, 2017, that she feels unwelcome in Lorne's home despite having lived with him for several months prior to entering university. She states that she "lives with her mother" and occasionally visits her father at his home.

[87] Lorne has given Monika the sum of $900 per month commencing September 2015 until November 2015 in addition to paying for her books, moving expenses and furniture. Lorne increased this amount to $1,000 per month from November 2015 until June, 2016 and again in July, 2016 to $1,100 per month until the present. Lorne states that he has also paid all of Monika's tuition fees at Carleton University.

[88] I order that Lorne pay table child support in respect of Monika from November 1, 2015 in accordance with his income during the relevant periods subject to the requirement that the table amount of child support be reduced by 50% given that Monika resides in Ottawa.

[89] I also order that each Lorne and Heidi pay their proportionate share of Monika's section 7 expenses. Lorne's share would have been 83% in 2015 and 85% in 2016.

ISSUE #4: SHOULD SPOUSAL SUPPORT BE RETROACTIVELY VARIED?

[90] The legal analysis for determining whether child support should be retroactively varied also applies to the question of whether spousal support should be retroactively varied with the condition that concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support

[91] The factors described in *S.D.B*. for determining whether child support should be retroactively ordered, namely, the reason for the delay, the conduct of the payor, the needs of the recipient, any resulting hardship, also apply in determining whether retroactive spousal support should be ordered. However, concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support than claims for child support as there is no presumptive entitlement to spousal support nor is a spouse under any legal obligation to look out for the other spouse's legal interests: *Kerr v. Baranow*, [2011] 1 S.C.R. 269, paras. 207, 208.

[92] My analysis related to whether the retroactive variation of child support should be permitted also applies in respect of whether spousal support should be retroactive varied. I come to the same conclusion and dismiss Heidi's claim for spousal support prior to the date of this Application (September 29, 2015).

ISSUE #5: SHOULD SPOUSAL SUPPORT BE VARIED?

[93] Lorne has paid spousal support to Heidi since February, 2003. He currently pays $2,000 per month in spousal support to Heidi pursuant to the 2007 Order.

[94] Heidi submits that spousal support should be continued because she is not financially self-sufficient due to her poor health for which she partly blames Lorne. She also takes the position that Lorne's increase in salary after their separation is the result of the sacrifice that she made to stay home to raise the children thereby and therefore she is entitled to participate in his income, including any increase.

[95] Lorne submits that spousal support should be terminated effective June 1, 2016. He states that he has paid spousal support for slightly more than 14 years which is beyond the range for the duration of spousal support suggested by the SSAG.

[96] It was open to Justice Backhouse to order spousal support for a fixed period or fix a *de novo* review. She did neither. Accordingly, the motion to vary spousal support is limited and governed by section 17 of the Act.

[97] Under s. 17(4.1) of the Act a spousal support order may be varied when there has been a change of circumstances. It states:

> Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

[98] Subsection 17(7) of the Act provides that an order varying a spousal support should:

> (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
>
> (b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> (c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
>
> (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

[99] Thus, on a motion to vary a spousal support order a court must first determine whether there has been a change of circumstances since the making of the prior order. If so, then the court must determine what variation of the existing order ought to be made in light of the change in circumstances: *L.M.P. v. L.S.*, 2011 SCC 64, para.31.

[100] In my view there are no material changes in circumstances that favour the termination of spousal support. Generally, the mere passage of time itself does not constitute a material change in circumstance in respect of a spousal support obligation: *Rondeau v. Rondeau*, 2011 NSCA 5, para. 15. Lorne's financial circumstances have improved since the 2007 Order while Heidi is now disabled and her financial circumstances have worsened.

Compensatory Basis

[101] The compensatory basis for spousal support was explained in *Moge v. Moge*, [1992] 3 S.C.R. 813 at para. 70, as follows:

> Today, though more and more women are working outside the home, such employment continues to play a secondary role and sacrifices continue to be made for the sake of domestic considerations. These sacrifices often impair the ability of the partner who makes them (usually the wife) to maximize her earning potential because she may tend to forego educational and career advancement opportunities. These same sacrifices may also enhance the earning potential of the other spouse (usually the husband) who, because his wife is tending to such matters, is free to pursue economic goals.

[102] As events unfolded, it appears that Heidi delayed her entry into the workforce in order to raise Victoria and Monika. In doing so, Lorne was able to pursue his career. The evidence shows that Lorne worked in the foreign currency exchange business from 1988 until about May 2002. The available evidence shows that his total income during the latter part of this period and afterwards was:

	Total Income
1999	$118,234.61 ($97,080.76 employment income plus severance)
2000	$77,890.97
2001	$101,999.96
2002	$124,913.63
2003	$125,000.00
2004	$124,999.92
2005	$147,748.92
2006	$190,429.48 ($127,929.48 employment income plus severance)
2007	$130,139.00 ($105,139.00 employment income plus RRSP withdrawal)

[103] A few years after their separation, Lorne changed career paths in 2007 and became a salesperson. His salary jumped by almost $100,000 per year in 2008 to $222,403.00. Since 2013 he has been paid $155,000 plus commission.

[104] Heidi submits that it is through her sacrifice that Lorne is able to earn an income which has averaged about $250,000 per year since he became a salesperson in 2007.

[105] I see no such causal relationship. The career path that Heidi supported as a stay-at-home mother led Lorne to earn the income shown above which was about $125,000 per year at the time of separation and the two years that followed the date of separation. Lorne's significant increase in salary was the result of becoming a salesperson several years after the parties had separated and learning the skills of his new career through mentoring and courses.

[106] Further, the SSAG formula, applied at the time of the 2007 Order, with child support of $1,818 per month being paid, provides that Heidi is entitled to spousal support in a range of $712 to $1,566 per month with a minimum duration of 7 years and a maximum duration of 14 years from the date of separation. Given that Lorne has paid spousal support for more than 14 years, I

find that Heidi's compensatory basis for support has been satisfied by the payment of spousal support over the last 14 years.

Needs Basis

[107] The needs analysis must consider the recipient's ability to support herself, in light of her income and reasonable expenses, in maintaining the standard of living to which she was accustomed at the time that cohabitation ceased. In *Gray v. Gray*, 2014 ONCA 659, Lauwers, J.A. stated, at paras. 27-28:

> One of the objectives of the *Divorce Act* is to relieve economic hardship. Need is not measured solely to ensure a subsistence existence, but rather should be assessed through the lens of viewing marriage as an economic partnership. As stated by this court in *Marinangeli v. Marinangeli* (2003), 66 O.R. (3d) 40 (Ont. C.A.) at para. 74, in determining need, courts ought to be guided in part by the principle that the spouse receiving support is entitled to maintain the standard of living to which she was accustomed at the time cohabitation ceased. The analysis must consider the recipient's ability to support herself, in light of her income and reasonable expenses.
>
> In the case before us, Ms. Gray's health prevents her from working. This is relevant to the assessment of her needs. As stated by the Supreme Court in *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 (S.C.C.), "in some circumstances the law may require that a healthy party continue to support a disabled party, absent contractual or compensatory entitlement. Justice and consideration of fairness may demand no less." (at para. 48).

[108] In 2005, Heidi pursued education in the field of nutrition and worked part-time in a naturopathic clinic. Heidi worked as a full-time sales representative with Metagenics from May, 2007 until November, 2015, although she had taken a medical leave of absence in 2009 and a second medical leave in 2013 from which she did not return.

[109] Heidi has been under the care of a psychiatrist, Dr. Margaret Dudek, since September 2013. In January, 2014, Heidi was approved by Manulife Financial to receive long term disability benefits of $3,613 per month (being 66% of her gross pre-disability earnings) effective September 9, 2013. Manulife's letter dated January 9, 2014 states that this benefit is taxable as all of the long term disability benefit premium was paid by Heidi's employer. In October, 2014, Heidi was also approved by the Canada Pension Plan ("CPP") for a disability benefit of $897.06 per month. As a result, Manulife reduces its disability benefit by the amount of the CPP benefit.

[110] A medical update form written by Dr. Dudek, dated September 8, 2015, states that Heidi has a major depressive disorder that reflected, amongst other things, by a depressed mood and social withdrawal. Her view was that Heidi was "unable to return to work now or in the near future - motivated to return to the workplace." Her prognosis was "guarded – very depressed - poor short-term prognosis".

[111] A letter dated December 14, 2016 from Dr. Dudek states:

> The patient suffers from Major Depressive Disorder and also has symptoms of Post-traumatic Stress Disorder. She has been treated pharmacologically and also treated in therapy.

> She continues to be very symptomatic with depressed mood, anxiety, problems with sleep, difficulties with concentration and memory, social withdrawal, difficulties with leaving home.
>
> During years of follow up she was encouraged to go out more, socialize more and go away on holidays if possible, challenge herself, become more physically active, and improve her self-care as part of behavioral activation and therapy. Despite of her efforts she has difficulties with daily functioning. She continues to be depressed and during appointments clearly demonstrates circumstantial thinking, problems with concentration, distractability, and depressed mood, sad and anxious affect. She is usually tearful and even in supportive environment of therapeutic relationship easily overwhelmed and prone to self-blame.
>
> She had numerous stressors in her life including death of her first child, head trauma in 2001 with loss of consciousness and subsequent cognitive difficulties and despite these traumatic events she was determined and able to return to work despite her grief, ongoing cognitive problems and depression (even after the divorce from her husband) till May 2013.
>
> She is unable to return to work now and has not been able to work in the last 3 years. This patient was assessed by an independent examiner in December 2014 that was requested, selected and compensated by her insurance company in order to evaluate her ability to work and it was determined that she was unable to return to the workforce.
>
> In my professional opinion forcing Ms. Hamilton Hess to undergo a disability medical assessment consisting of a clinical psychological assessment with psychological testing would put an additional strain on this already very vulnerable, very depressed and anxious patient who has been extremely overwhelmed by current legal proceedings and who although not currently suicidal had suicidal ideations in the past.

[112] Lorne's pre-trial motion for an independent disability examination was dismissed by Justice Paisley on December 20, 2016. His Endorsement states:

> …The Respondent's motion to compel an independent disability exam is dismissed for several reasons: I am not persuaded that such an examination is required in light of the fact that an independent examination has already been conducted on behalf of the Applicant's employer, the existing medical records are sufficient to establish that the Applicant I unable to return to employment and to require the Applicant to be assessed by a psychologist who is not a professional involved in the Applicant's treatment would be unduly intrusive in this case, and in light of the litigation history referred to above would likely be used by the Respondent as an abuse or a nuisance.

[113] Lorne submits that the above expert evidence, which was attached to Heidi's affidavit, is not admissible. However, neither party addressed whether the requirements of section 52 of the *Evidence Act*, R.S.O. 1990, c. E.23, s. 52 for the admission of Dr. Dudek's letters had been satisfied. Accordingly, I will accept this evidence.

[114] The parties' April, 2017 financial statements show:

	Heidi	Lorne

Monthly Gross Income	$3,648.11 (comprised of Long Term Disability benefits from Manulife and a disability pension of $897.06 from the Canada Pension Plan but not including $2,000 spousal support)	$15,917.00
Monthly Gross Expenses	$9,886.43	$18,005.29
Assets	$657,012.99 (including a house $525,000.00, RRSP $101,853,38 and a car $15,000)	$836,908.00 (including a ½ interest in a house $300,000, a car $2,000, TFSA $12,311.44, RRSP $478,098.54)
Debts	$584,269.95 (including a mortgage $400,760.49, loans from Victoria $47,400.15 and a loan from her brother $60,013.15)	$190,541.70 (Contingent tax liability $123,500.81 on registered investments @ 25%, Line of Credit $64,634.22)
Net Worth	$72,742.33	$646,456.30

[115] It is clear from the evidence that Heidi's reasonable expenses (such as mortgage payments, property tax and utilities, groceries, income tax) far exceed her income. There is the real prospect that Heidi may become financially destitute if spousal support was to be terminated. The fact that Lorne has paid spousal support for more than 14 years is no answer to Heidi needs based claim for support.

[116] I find that Lorne has failed to demonstrate a change in circumstances to justify the variation of the spousal support order made in 2007.

[117] Lorne may make a further application to vary if there is a material change in circumstances in the future.

[118] Further, a spouse is not entitled to share in another spouse's post-separation increase in income unless support is awarded on a compensatory basis: *Fisher v. Fisher*, 2008 ONCA 11. Accordingly, the amount of spousal support paid to Heidi shall remain at $2,000 per month.

CONCLUSIONS

[119] For the reasons given, I make the following orders:

a. Child support for Victoria is terminated effective January 1, 2015;

b. Child support for Monika, in the amount of one-half of the table amount, shall be paid by Lorne to Heidi, effective November 1, 2015, along with payment of section 7 expenses by the parties on a proportionate basis;

c. Spousal support, in the amount of $2,000 per month, shall continue to be paid by Lorne to Heidi; and

d. Claims for retroactive variation to spousal and child support are dismissed.

[120] Success is divided. If the parties are unable to agree on costs, then I will receive written submissions. The Respondent shall deliver his costs submissions, up to three pages in length, along with an outline of costs and any offers to settle, within two weeks. The Applicant shall deliver her responding costs submissions, on the same terms, within four weeks.

Mr. Justice M. D. Faieta

Released: January 26, 2018

CITATION: Hess v. Hamilton, 2018 ONSC 661
COURT FILE NO.: 03-FS-282880-0001
DATE: 20180126

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HEIDI HESS

Applicant

– and –

LORNE HAMILTON

Respondent

REASONS FOR DECISION

Mr. Justice M. D. Faieta

Released: January 26, 2018