IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
FAMILY COURT
DOMESTIC RELATIONS BRANCH

CAMERON KENNEDY,	)	
Plaintiff,	)	2006 DRB 2583
	)	Judge Alfred S. Irving, Jr.
v.	)	
PETER ORSZAG,	)	
Defendant.	)	

ORDER

This matter was before the Court on March 12, 13, and 14, 2014, and again on May 13, 14, and 15, 2014, for a Support (Modification) Hearing. On October 2, 2012, Plaintiff Cameron Kennedy filed a motion titled, "Petition to Establish a Child Support Order Modifying an Agreement Relating to Child Support." Defendant Peter Orszag filed a response on November 13, 2012.[1] The case concerns financial support for the parties' minor children, Leila and Joshua Orszag, who are 14 and 12 years old, respectively.

The Court's decision is based upon the testimony and exhibits presented at trial, the Court's consideration of the credibility of the witnesses and the entire record.

BACKGROUND AND FACTUAL FINDINGS

I. The 2006 Proceedings

On August 7, 2006, Ms. Kennedy filed her Complaint for a Judgment of Absolute Divorce, having been mutually and voluntarily separated from Mr. Orszag for six months. At

[1] This matter was certified to the undersigned on January 3, 2014, and the Court continued the original trial date, in part, to allow the Court an opportunity to assess and consider a motion by a media group to intervene in the case and also to resolve the Court's own concerns regarding Mr. Orszag's desire for a closed hearing.

that time, Ms. Kennedy indicated that, on April 3, 2006, the parties had executed a 35-page Voluntary Separation, Custody and Property Settlement Agreement (the "Agreement") that "resolved all issues incident to the parties' marriage," including how the parties would financially support their children going forward.

Mr. Orszag filed a consent answer to Ms. Kennedy's Complaint the same day, and the parties signed a Joint Waiver of Right to Appeal. On November 17, 2006, the Hon. Jerry S. Byrd issued Findings of Fact, Conclusions of Law, and Judgment of Absolute Divorce. Consistent with the parties' Agreement, Judge Byrd neither incorporated nor merged the Agreement into the Judgment. As such, the Agreement was not part of the public case record.

Paragraph 35 of the Agreement governs child support. The very first sentence of Paragraph 35 provides, as follows: "As of the date of this Agreement, the parties agree that there shall be no direct child support payments from either party to the other." Paragraph 35 also provides that, from April 1, 2006 until April 1, 2011, Mr. Orszag would pay two-thirds of "direct child care expenses," to include the salary, benefits, and taxes for a nanny to provide care for the minor children, up to $50,000.00 annually.[2] After April 1, 2011, the parties would equally divide direct child care expenses up to fifteen hours weekly and up to $50,000.00 annually; any direct child care expenses exceeding this amount would be paid by the party who incurred the expenses. "[N]on-direct child care expenses support" would be paid by the party who had the children at the time the expense was incurred. The parties were to meet quarterly to equalize and reimburse aggregate expenses for direct child care, medical, reasonable extracurricular activities

[2] At the time the Parties executed the Agreement, the children were ages 6 and 4, and child care likely was deemed by the parties to be quite necessary. The parties also seemed to anticipate that they would incur significant child care expenses in the first years after the marriage, but envisioned a reduction in costs in later years as the children got older.

and classes, and necessary clothing, not covered by the Trust.[3]

Paragraph 36 of the Agreement requires both parents, until each child reaches the age of 18, to contribute no less than $5,000 annually for each child to an account or trust for the benefit of each child. Funds so contributed were to be used for the children's undergraduate and graduate expenses, and "other agreed-upon expenses."

Finally, relevant to this case, Paragraph 51 of the Agreement required Mr. Orszag to deposit $200,000.00 into a trust for the minor children in 2009, and an additional $200,000.00 into the trust in 2010. The trust was initially set up to fund a host of expenses for the children, namely, costs of private school, college, camp, bar and bat mitzvahs, and other mutually agreed upon expenses that exceeded $2,500.00. As the Court learned at trial, the parties' apparent belief was that, once the Trust was depleted, the parties would share all expenses of child rearing 50:50, and perhaps through the equalization/reconciliation and reimbursement process—a process both parties indicated had become fraught with challenges over the years.

II. The Peter R. Orszag Irrevocable Trust #2

On September 21, 2006, Mr. Orszag executed an Irrevocable Trust Agreement, which created the Peter R. Orszag Irrevocable Trust #2 ("Trust"). Mr. Orszag was the Trustmaker, and his brother Jonathan Orszag was the sole Trustee. Both minor children were named as beneficiaries of the Trust. The property of the Trust would be held in a common trust, designated the "Education and Support Trust." The Trust authorized the Trustee to "distribute to any one or more of [the children] and the living descendants of any deceased children as much of the net income and principal of the Education and Support Trust as [the] Trustee may determine

[3] From the Court's perspective, the Agreement's support provisions seemed reasonable. It appears that the parties believed they could afford to support their children equally given their respective incomes at the time and the fact that the physical custodial arrangement was shared, 57 percent versus 43 percent.

advisable for any suitable purpose." The Trust documents do not appear to contain any provision specifically governing whether additional monies may be deposited into the Trust.

On September 19, 2008, Mr. Orszag, Ms. Kennedy, and Mr. Orszag's brother entered into the First Modification of the Trust. Subsection (c)(i) of the First Modification provides, as follows:

> Notwithstanding anything to the contrary contained in the Trust, the Trustee shall pay out of the income of the trust, and if income is insufficient out of the principal of the trust, up to the whole thereof, all expenses attributable to Leila's and Joshua's enrollment at private elementary, junior and senior high school, as long as such enrollment is jointly agreed upon by both Cameron Kennedy ("**Ms. Kennedy**") and Dr. Orzag (together "**the parents**"). The trust will be used exclusively for the payment of such private-school tuition expenses and shall not finance any other expenses unless jointly approved by both Ms. Kennedy and Dr. Orszag.

Subsection (c)(iii) of the First Modification provides that it is "impermissible" for Mr. Orszag, his brother, or "any other party to modify the trust without the written consent of Ms. Kennedy."

III. The 2008 Agreement

On September 26, 2008, the parties entered into the Second Amendment to the Agreement[4] ("Second Amendment"). The Second Amendment deleted Paragraph 35 of the Agreement and replaced it, in the following relevant respects. The parties again agreed that "there shall be no direct child support payments from either party to the other." The parties further agreed that each party would be responsible for any "costs associated with having a third party supervise or care for" the minor children outside of school hours during their custodial time with the children. The parties agreed that, each quarter, they would equalize aggregate expenses for the children's medical care, extracurricular activities, and classes upon which both parties had agreed. The parties agreed that each party would be responsible for expenses incurred

[4] On July 27, 2007, the parties entered into an agreement which modified provisions of the Agreement relating to visitation. As the child support provisions of the Agreement were not modified, the 2007 agreement is not relevant to these proceedings.

during their vacation time with the children; this included expenses for extracurricular activities and classes that occurred during each party's vacation time. The parties agreed that all outstanding reimbursements through the date of the Second Amendment would be considered moot. Finally, the parties acknowledged and confirmed that Mr. Orszag had satisfied his obligations to fund the Trust as required by Paragraph 51 of the Agreement.[5]

IV. The 2012 Proceedings

On October 2, 2012, Ms. Kennedy filed the subject Petition to Establish Child Support Order Modifying an Agreement Relating to Child Support ("Petition"). As support, she asserts that there have been multiple substantial and material changes in circumstances meriting a change in the current child support arrangement. Specifically, Ms. Kennedy contends that, in December 2010, Mr. Orszag was hired by Citigroup, receiving a compensation package that represented a significant increase in his compensation at the Brookings Institution, a non-profit think tank which employed Mr. Orszag in 2006.[6] As such, Ms. Kennedy contends that Mr. Orszag can afford to contribute more towards the children's expenses. She asserts that the children's overall expenses have increased substantially since the execution of the Agreement, which expenses include their tuition at Georgetown Day School, bar and bat mitzvah costs, camp

[5] As to the funding of the Trust, the Agreement provides that Mr. Orszag would fund the Trust for a total of $400,000.00. At trial, a question arose whether Mr. Orszag funded the Trust with marital funds. The Court takes no position on the issue because the parties do not dispute that Mr. Orszag deposited the appropriate sums into the Trust, as required by the Agreement, and the parties later agreed in writing that he had satisfied his responsibility under Paragraph 51 of the Agreement.

[6] While Ms. Kennedy's petition seemingly takes the position that the Court's inquiry should consider alleged changes in circumstances that have occurred since the execution of the Agreement in 2006, both parties agree that the Court's inquiry should focus upon evidence of alleged changed circumstances since the parties' execution of the Second Amendment in 2008. The Second Amendment supplanted the child support provisions contained in the Agreement, and thus represented the most recent baseline upon which to compare the circumstances of the parties and the minor children.

costs, and general living expenses. She claims that the Trust is nearing depletion and has insufficient funds to pay the children's tuition for the 2013-2014 school year or for subsequent years. She contends further that the significant disparity between her lifestyle and that of Mr. Orszag's warrants an increase in Mr. Orszag's child support obligation. Ms. Kennedy argues that the current child support arrangement, under which neither party makes direct child support payments to the other, is inadequate and untenable, and that their selected support paradigm has been subject to Mr. Orszag's arbitrary and contrary behavior.

In his November 13, 2012 opposition, Mr. Orszag asserts that certain of Ms. Kennedy's contentions are outdated, having been rendered moot by the execution of the Second Amendment, which addressed all then-outstanding issues and concerns regarding the parties' child support obligations. Mr. Orszag argues that, while his income has risen since 2008, the lifestyle and needs of the children have not changed since the execution of the Second Amendment. By way of example, he notes that the parties and the children continue to reside in the same homes and that the children continue to attend the same school, Georgetown Day School, as in 2008. He argues that, because Ms. Kennedy's requested monthly child support, which, by his calculation, was in excess of $20,000.00, far exceeds the needs of the children, her requested child support amount would have the improper effect of benefitting her lifestyle rather than addressing any perceived lifestyle disparities that the children experience in the parties' homes. As to the Trust, he contends that basic arithmetic informed the parties that the Trust as established would become depleted long before the children completed their secondary school education. He notes that the Trust, as initially established, was to cover a host of expenses, including the children's education. Mr. Orszag highlighted that, not only has he enjoyed an increase in income, but Ms. Kennedy, too, has enjoyed an increase in her income, which income

increase occurred after execution of the 2008 Agreement, and that her income potentially could be significantly higher than her current income. Mr. Orszag indicated a willingness to "expand his responsibility for tuition payments after the trust is depleted, with the objective of ensuring that the children can remain at Georgetown Day School." He contends, however, that there is no adequate justification for any change to the support arrangement aside from possibly requiring him to pay a larger percentage of the children's tuition costs.

On December 12, 2012, the parties appeared for a Status Hearing before the Hon. Danya A. Dayson. At the hearing, Ms. Kennedy represented that, when the Trust is fully depleted, the parties will have to split the children's education costs equally, which would, in her view, be unfair. Ms. Kennedy suggested that the Court should consider utilizing an extrapolation methodology to determine how much Mr. Orszag should be required to pay in child support. Mr. Orszag represented that his ability to pay the children's expenses was not an issue, though he did not know what expenses were at issue. He further represented that, although his income had increased, his lifestyle remained unchanged. The following day, Judge Dayson ordered the parties to mediation.

On February 19, 2013, the parties with their counsel appeared for a Status Hearing. Ms. Kennedy represented that the parties had met with mediator Margaret McKinney, Esq. for six hours and that, although the parties had failed to achieve a settlement, Ms. McKinney had indicated a willingness to continue mediation in the future if the parties so desired. Mr. Orszag requested a preliminary hearing to explore how the requested extrapolation methodology could be employed within the circumstances of this case. Ms. Kennedy opposed Mr. Orszag's request, contending that the methodology issue could efficiently be considered during the same hearing set to consider Ms. Kennedy's petition. Judge Dayson, over Ms. Kennedy's objection, scheduled

a hearing on the issue of extrapolation.

On April 26, 2013, after attending a further mediation session with Ms. McKinney, the parties reached an agreement on some of the outstanding issues (the "2013 Agreement"). Relevantly, the parties agreed that Ms. Kennedy would be responsible for the remaining cost of the trip to Israel for Leila's bat mitzvah, and that Mr. Orszag would be responsible for Leila's orthodontia. The parties also agreed to engage the services of a parent coordinator.

On May 1, 2013, Ms. Kennedy filed a brief regarding extrapolation and how it may be employed in this case. Ms. Kennedy envisioned the child support calculation methodology to involve the two-step process endorsed by the District of Columbia Court of Appeals in *Galbis v. Nadal*, 626 A.2d 26 (D.C. 1993), and as employed in *Holland v. Holland*, Case No. 2010 DRB 3062 (D.C. Super Ct., J. Kravitz, July 19, 2012). In both cases, the conclusion was that this Court may, in establishing child support, start with a baseline number extrapolated from the payor's income. To determine this baseline number, Ms. Kennedy argued that this Court should add the "basic child support obligation associated with the top rate on the [D.C. Child Support Guidelines] schedule" and add 13.29 percent of Mr. Orszag's income in excess of $240,000.00—dividing the total number by 12 to yield Mr. Orszag's monthly support obligation. According to her, the Court would then assess whether the extrapolated number reflects the children's reasonable needs and standard of living. If the number does not reflect the needs or standard of living of the children, the Court should then adjust the number to so reflect. At the time of the filing, Ms. Kennedy was not aware of Mr. Orszag's exact annual income, but she knew from newspaper accounts that it was significant and in the millions of dollars.

On May 1, 2013, Mr. Orszag, as well, filed a brief regarding the methodology for calculating child support. Mr. Orszag argued that District of Columbia courts have given

deference to child support provisions set forth in parties' settlement agreements, presuming that parties have the best interest of their children in mind when making such agreements and that the amounts set forth in the agreements are adequate to meet the children's foreseeable needs. He further argued that the extrapolation method set forth in *Holland* is contrary to the principles underlying the Child Support Guidelines—that the percentage of family income dedicated to child support decreases as family income increases. Mr. Orszag argued that, were the Court to employ an extrapolation method, it should employ one that is in harmony with the Guidelines' pattern of attributing lower percentages of income to child support as family income increases.

On May 13, 2013, the parties appeared for a hearing devoted to the extrapolation method that the Court should consider employing. Ms. Kennedy reiterated her argument that the Court should begin by extrapolating based upon income, then adjust the extrapolated number to ensure that it reflects the needs of the children. Mr. Orszag represented that, after the enactment of D.C. Code § 16-916.01(t), the Court does not need to look to the Guidelines for any modification if the needs of the children are being met by the Agreement. If the Court is to modify the Agreement, he argued, the Court should then award the base child support amount for the highest income level allowed by the Guidelines, then look to the reasonable needs of the children based on actual family experience to determine whether an additional award is merited, as instructed by D.C. Code § 16-916.01(h). He reiterated that the "straight-line" extrapolation method used in *Holland* is not loyal to the principles embodied in the Guidelines, and that a "step-down" method would more closely achieve the principles.

During the hearing, the Court heard testimony from Dr. Carolyn Heinrich, who was qualified as an expert on child support policy and statistical methods. Dr. Heinrich testified that the Child Support Guidelines were formulated using data from a national consumer expenditure

survey. Her quarrel with the survey is the limited range of family incomes. Specifically, she noted that there was not much information contained in the survey regarding the expenditures of higher-income families. Because data regarding higher-income families were not sufficiently considered in the survey, she opined that extrapolating from the Guidelines to higher-income families could lead to results that do not reflect the actual needs of the children. She noted that the farther away from the Guidelines levels one extrapolates, the more "unusual" the results. She further opined that, as family income increases, the marginal share of that income spent on children declines. She testified that the Guidelines attribute a smaller percentage of family income to children as family income increases and that, after the highest level set forth in the Guidelines is reached, her expectation is that the trend of declining percentages would continue, rather than stabilizing at the percentage at the highest Guideline income figure, which is the percentage that the Superior Court used in calculating support in *Holland*. She suggested instead that child support in this case could be calculated by extending the Guidelines pattern—allocating smaller percentages of parties' combined income to child support as their combined income increased—out to the parties' combined income level through the use of a "trend line," a method she termed the "Ordinary Least Squares Regression" method.[7]

On May 15, 2013, at the conclusion of the testimony, Judge Dayson concluded that extrapolation is valid and instructive in guiding the Court's assessment of what constitutes reasonable expenditures for the children in the context of the actual family experience. She concluded that it was reasonable to use an extrapolated child support amount as one factor to be considered, and that the Court was not prohibited from using other extrapolation methods. She indicated that it was appropriate to use the Ordinary Least Squares Regression method to

[7] Laura Morgan, a family law consultant, also testified at the hearing. As she mostly testified to the state of the law in the District of Columbia, the Court did not find her testimony to be helpful.

extrapolate in this case because the incomes at issue are so much higher than the highest Guidelines amount.[8]

On July 22, 2013, the parties filed a Joint Pre-Trial Statement. The parties stipulated that, under the current custody arrangement, they share joint legal and joint physical custody of the children—Ms. Kennedy has the children 57 percent of overnights and Mr. Orszag has the children 43 percent of overnights. Ms. Kennedy represented that she was seeking an award of $25,000.00 in monthly child support, retroactive to two years prior to the date that she filed the Petition, plus attorney's fees. Mr. Orszag argued that no substantial and material change in circumstances had occurred since the Second Amendment, and thus a modification was unwarranted. In the alternative, Mr. Orszag requested the Court issue an Order requiring him to pay, directly, the costs of the children's private school education, college tuition and related costs, uninsured medical, camp, extracurricular, and bar/bat mitzvah expenses. Although one might argue that this would be a reasonable solution to any alleged inability on Ms. Kennedy's part to meet the alleged increased needs of the minor children, Ms. Kennedy rejected or opposed the request as not in the children's best interest.

V. The 2014 Hearing

At the hearing, the parties agreed that whether there has been a substantial and material change in circumstances would be determined by comparing the present circumstances of the parties and the minor children to the circumstances that existed in 2008, when the parties entered into the Second Amendment.

[8] At a July 24, 2013 Pre-Trial Hearing, the parties agreed that they would not put on testimony regarding extrapolation, and Judge Dayson granted both parties' motions to exclude the other's expert witness on the issue of extrapolation.

a. Ms. Kennedy's Evidence

i. Ms. Kennedy's Family

Ms. Kennedy testified that she lives in Washington, DC, with her husband, Rick Desimone and the two minor children. Mr. Desimone, a lobbyist and consultant, spends 50 percent of his time in the District of Columbia, and the remainder in Tacoma, Washington, where he conducts business and exercises joint custody of one of his children from a previous marriage. Mr. Desimone's other child lives in the Washington, DC area. Ms. Kennedy testified that she and Mr. Desimone generally keep their finances separate, though Mr. Desimone contributes financially to certain expenses and makes a monthly payment to Ms. Kennedy to defray a portion of the household costs.

ii. Ms. Kennedy's Income

Ms. Kennedy is the manager of the public sector management consulting practice at McKinsey & Company ("McKinsey"). Ms. Kennedy worked at McKinsey from 1994 until 1996, then rejoined the firm in 2001. She testified that, before 2010, she worked approximately 30-hour weeks but that, in 2010, she transitioned to a "full-time" schedule, under which she works between 40 and 50 hours each week. Ms. Kennedy reports to McKinsey's office on Mondays, Tuesdays, and Fridays; she works from home on Wednesdays and Thursdays.

In 2008, Ms. Kennedy received $145,781.00 in gross wages from McKinsey. She also received $4,656.00 in interest, $44,163.00 in dividends, a $2,613.00 tax refund, and $13,024.00 in capital gains, for a total adjusted gross income of $210,237.00. In 2008, she received monies from the Kennedy Trust, a trust set up by her parents which owns 33 percent of her home. The Kennedy Trust reimbursed Ms. Kennedy $9,396.19 ($782.02 monthly) for household expenses in 2008, and reimbursed her $11,293.65 ($941.14 monthly) towards her mortgage expenses. The

Kennedy Trust also paid $6,000.00 towards the children's college expenses, which offset the lion's share of the payments Ms. Kennedy is required to make under Paragraph 36 of the Agreement. Finally, Ms. Kennedy received from Mr. Desimone an annual amount of $8,550.00, which equates to a monthly amount of $712.50.

In 2012-2013, Ms. Kennedy received $294,132.00 in gross wages, $44,207.00 in dividends, and $16,167.00 in capital gains—a total adjusted gross income of $354,506.00. She also received $20,700.00 (equal to a monthly amount of $1,725.00) from Mr. Desimone. She only received $3,786.32 (equal to $351.53 each month) from the Kennedy Trust. There was no testimony presented that the Kennedy Trust's ownership interest in Ms. Kennedy's home has changed, or that the Kennedy Trust determined that it will no longer pay the same percentage of the household expenses as it did in 2008. The Court finds curious that, unlike the rest of Ms. Kennedy's financial statement, which was updated as of December 2013, the portion of her financial statement that reflects contributions from the Kennedy Trust and Mr. Desimone was only updated through August 2013. A reasonable inference is that Ms. Kennedy received additional monies both from Mr. Desimone and from the Kennedy Trust between August 2013 and December 2013, but simply failed to update the statement in that respect.

iii. The Children's Expenses

Ms. Kennedy claims that the children's expenses have increased significantly since 2008 in a number of areas.

1. Primary Residence Expenses

Ms. Kennedy's financial statements identify a number of increased residential expenses allocated to the children. Ms. Kennedy testified that one of the two air conditioning units that service her home had to be replaced during the summer of 2013, and that the other unit is leaking

Freon and needs to be replaced before the summer of 2014. She refers to these costs as "Replacement Furnishings/appliances" and "Incremental replacement furnishings/appliances," respectively. She represents that the children's monthly portion of these expenses total $560.89. She further testified that, after rainstorms, water pools in the front yard and infiltrates the basement of her home, and that rectifying this problem would cost $177.21 monthly. These issues and expenses did not exist in 2008. Overall, when taking into account the expenses listed, as well as yard care and painting expenses, Ms. Kennedy represents that the children's monthly primary residence expenses have increased $266.70.[9]

The Court notes that Ms. Kennedy's allocation of these expenses—54% of the expenses to the children and 46% to herself (a methodology she refers to as "Occupancy 1")—does not uniformly account for the fact that Mr. Desimone uses the home, and will likely benefit from such capital improvements long after the children have left the home. While Ms. Kennedy uses the Occupancy 1 methodology for "expenses that Rick doesn't contribute to or benefit from," Mr. Desimone is her husband, not a guest, and appears to spend nearly as much time living in the home as the minor children. He thus benefits from both the home itself and the amenities and fixtures contained therein. The Court further notes that Ms. Kennedy's financial statement does not reflect the portion of the expenses allocable to the Kennedy Trust, although she testified that the Kennedy Trust makes a contribution towards such expenses, thus offsetting expenses that would otherwise be allocable to the children and Ms. Kennedy.[10]

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[9] While the overall expenses have increased by over $1,000.00 monthly, such increases are partially offset by a decrease in Ms. Kennedy's mortgage obligation since 2008.

[10] Ms. Kennedy contends that neither Mr. Desimone nor the Kennedy Trust has any obligation to contribute to the needs of the minor children when they are in her care. Although true, Ms. Kennedy nevertheless receives funds from both Mr. Desimone and the Kennedy Trust for the purpose of offsetting her household expenses. As Ms. Kennedy has allocated a portion of the household expenses to the minor children, it stands to reason that some portion of the offset

2. Household Necessities

Ms. Kennedy claims that the children have incurred increased expenses relating to their food consumption. In 2008, the portion of the monthly grocery bill attributable to the children was $411.33. In 2013, Ms. Kennedy represents that the portion of the monthly grocery bill attributable to the children is $521.42, an increase of $110.09. Further, Ms. Kennedy testified that, as the children age and become more invested in their extracurricular sports activities, they have been eating more and requesting more healthful and higher quality foods, such as additional produce, free-range chickens, and hormone-free eggs. She testified that because of the children's changing tastes, she shops more at Whole Foods Market, though she also shops at Giant and Safeway. She testified that, to incorporate the additional cost stemming from the increased amount and quality of food, she anticipates a monthly increase in food cost of $433.33, all of which she attributes to the children. The Court surmises that Ms. Kennedy shops at Whole Foods Market because that is her personal preference. Indeed, the facts show that she shopped quite frequently at Whole Foods Market in 2008, some time before the children's alleged requests for greater quantities of more healthful food.

3. Medical and Dental Expenses

Ms. Kennedy claims that she anticipates orthodontia expenses for Joshua in the upcoming year. Joshua has had "wave one" orthodontia to correct an underbite, and Ms. Kennedy asserts that he will need "wave two" orthodontia, which she described as "regular braces." Ms. Kennedy estimates that Joshua's orthodontia will cost approximately the same amount as Leila's orthodontia, a monthly cost of $370.00.[11] Mr. Orszag has offered to pay the costs of

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would similarly be allocable to the children.

[11] It appears that Ms. Kennedy's line item for orthodontia represents 50 percent of the total cost, amortized over a period of one year.

Joshua's orthodontia and it appears that his insurance will cover this expense in its totality. No matter, it is a one-time, non-recurring expense.

4. School and Child Expenses

a. Tuition and School-Related Expenses

In 2008, the children were both attending Georgetown Day School, an independent school with an elementary and middle school campus located in the Georgetown neighborhood of Washington, DC, and a high school campus located in the Tenleytown neighborhood of Washington, DC. In 2008, the Trust was responsible for paying the children's tuition.[12] No testimony was given as to the cost of the children's tuition in 2008.

Ms. Kennedy testified that, as of the date of the hearing, the Trust has been depleted such that it cannot cover the entirety of the children's tuition. The Trust has approximately $15,000.00 in assets remaining, while the children's total tuition for the 2013-2014 academic year was $68,540.00—$34,270.00 for each child.[13] Ms. Kennedy believes that, when the Trust runs out of money, the tuition costs must be split equally between the parties. She believes that the Trust cannot be replenished because that has been the understanding of the parties to this point and because there is no provision in the trust agreement that allows the parties to replenish the Trust. What is more, she objects to the Trust's replenishment. Ms. Kennedy noted that Mr. Orszag paid the entire tuition bill for both children for the 2013-2014 academic year, though she indicated

[12] There appears to be some disagreement between the parties regarding whether the Trust was funded with marital money. In his testimony, Mr. Orszag took the position that, because money is fungible, it is impossible to tell whether the particular dollars that funded the Trust were marital. Ms. Kennedy appears to take the position that the monies that funded the Trust were marital funds. As the Court previously noted, this is of no moment, as the Parties agreed that Mr. Orszag would deposit the required funds into the Trust account, and it appears that he did so.

[13] Assuming that the tuition cost schedule remains the same between the 2013-2014 academic year and the 2014-2015 academic year, the children's total tuition cost for the 2014-2015 academic year will rise to $69,555.00 because Leila will be transitioning to high school, and will have a higher tuition cost.

that she did not approve of this arrangement and objects to his paying the children's tuition for the 2014-2015 academic year.

Ms. Kennedy also testified that Georgetown Day School expects that, in addition to making tuition payments, parents will contribute money to the school. Ms. Kennedy currently contributes $29.17 monthly ($350.00 annually) to Georgetown Day. She testified that the children are aware of the respective amounts that each parent contributes to the school, which is impressive. She therefore includes in her 2013 expenses, a monthly amount of $166.67 ($2,000.00 annually) that she described as a "projected annual school fund" contribution. As such, it seems her position is that Mr. Orszag should provide monies for her discretionary contribution. Ms. Kennedy's contribution does not inure in any articulable way to the benefit of the children. Such a payment would seem only to enhance her stature in the Georgetown Day School community. It has nothing to do with child support and Mr. Orszag is not responsible for enhancing her standing as a parent. His duty is solely to the children.

b. Child Care

In 2008, Ms. Kennedy obtained child care from Giannina Sanguinetti. Ms. Sanguinetti provided child care for six hours on Mondays and Tuesdays, and for four-and-a-half hours on Wednesdays, a total of 22.5 hours each week. During this time, she would watch the children, chauffeur the children from school and to activities, and perform chores, such as laundry and picking up the family's dry cleaning. The annual cost for Ms. Sanguinetti's services, which were primarily allocated to child care, was $29,839.32.

In 2013, Ms. Sanguinetti (who has since changed her last name to Marin-Malaver) continues to provide child care for Ms. Kennedy. She provides significantly less child care than she did in 2008, however. The Court did not receive any testimony regarding when or why the

reduction in child care hours occurred. Ms. Marin-Malaver provides child care from 9:00 a.m. until 6:00 p.m. on Mondays, and from 12:00 p.m. until 6:00 p.m. on Tuesdays, a total of 15 hours each week. Ms. Kennedy represents that she provides her own child care on Wednesdays and Thursdays when she works from home. Finally, Ms. Kennedy testified that Saundra Lopez, who provides housekeeping services to Ms. Kennedy one day every week, provides one hour of child care every week, though it is unclear to the Court what form that care takes. Ms. Kennedy represented that her annual child care expenses are $28,643.64.

Ms. Kennedy testified that her current child care is insufficient to meet the minor children's needs, and contends that the children require more child care now than they required in 2008. As an example, she noted the difficulties in transporting the children to and from their extracurricular activities. Joshua has soccer practice Monday, Wednesday, and Thursday evenings,[14] and has at least one match every weekend, which matches, Ms. Kennedy testified, are generally played between 60 and 90 minutes from her home. Joshua also has Hebrew tutoring on Wednesdays between the end of school and the beginning of soccer practice. Leila's primary activity, gymnastics, has practices on Tuesday evenings and Saturday afternoons. Leila also tutors a fellow student near the family's home. Both children are in physical therapy to help them recuperate from sports-related injuries, though it is unclear how often these sessions occur. Ms. Kennedy testified that the children's activities frequently overlap, and that she finds it difficult to coordinate transportation to ensure that each child can attend their respective activities. The chore of coordination causes Ms. Kennedy great stress. She testified that, when a scheduling/transportation conflict arises, she usually calls the parents of one of the other participants or one of the coaches, and can generally get someone to transport the child. She

[14] Because Joshua's soccer league is run by the Bethesda Soccer Club, the Court assumes that his practices are held either in Bethesda, Maryland or nearby.

testified that there have been occasions when she was unable to coordinate a ride for one of the children, and that the child was unable to attend an activity, as a result. She did not testify as to how often this has occurred. Ms. Kennedy contrasted her situation with that of Mr. Orszag, who has a person in his District of Columbia home who often provides child care services, including transporting the children to their activities.

Ms. Kennedy further contends that there may be issues transporting the children to school next year because Leila will be attending school on the Tenleytown campus, while Joshua will remain on the Georgetown campus. She testified that there is a bus which travels from the Tenleytown campus to the Georgetown campus, and that Leila has already taken advantage of that bus service in the past. Finally, she testified that increased child care is necessary because the children need someone in the home after school to ensure that they do homework, and to care for them when they are sick. She neither indicated whether the children at their ages have demonstrated a need for that type of supervision for studies, nor has she indicated the frequency in which the children are sick and require a sitter.

For additional childcare or transportation costs for the children, Ms. Kennedy testified that she required an additional monthly amount of $766.63 ($9,199.56 annually). Ms. Kennedy testified that she arrived at the number by increasing the amount of child care she currently receives by 33 percent. She testified that, even if she received the incremental child care she requests, it would be insufficient to meet the children's needs. Ms. Kennedy admitted that she has contacted Mr. Orszag's child care provider, Kaleigh Bradley, regarding the children's needs at times when the children have been in her care. She also testified that she cannot rely on Mr. Desimone to provide child care because of his work obligations and that, although Mr. Desimone's daughter does help her occasionally, she cannot count on her to do so regularly.

The Court is not at all persuaded that the children at their ages require the level of child care that Ms. Kennedy would have this Court believe that they require. Ms. Kennedy's main concern appears to be occasional transportation needs that arise when the children's schedules have overlapped. Ms. Kennedy provided no documented evidence regarding the number of times such has occurred. She also provided no evidence regarding whether the children desire such an arrangement, or whether they might prefer the alternative of riding with their friends to activities. Moreover, the Court notes that Ms. Marin-Malaver provided 7.5 more hours of child care in 2008, a time when Ms. Kennedy's income was significantly less than it is presently, though Mr. Orszag was likely contributing towards such care at that time. Finally, Ms. Kennedy has not given the Court a reason why the children need someone to watch over them to ensure that they perform their homework. They are ages 14 and 12. Neither party has indicated issues with the children's study habits. To the contrary, the children appear to be performing well in school, even with the current reduced level of care. Further, Leila perhaps understands the value of studying, as she tutors another student near her home.

c. Bar and Bat Mitzvah Expenses

Ms. Kennedy represents that the monthly cost of Leila's bat mitzvah, which took place in 2013 as part of a trip to Israel, was $1,347.41 (a total cost of $16,169.92). The parties, themselves, resolved this cost as part of the 2013 Agreement—they agreed that Mr. Orszag would pay for Leila's orthodontia, and Ms. Kennedy would pay the remaining cost of the Israel trip. Ms. Kennedy, though she does not include the cost in her expenses, testified that Leila enjoyed a second bat mitzvah celebration at the Gaylord National Hotel, and that Mr. Orszag planned and paid for the event.

Ms. Kennedy's financial statement also contains a line-item representing the estimated

cost of Joshua's bar mitzvah, which will occur in 2015, when he turns 13. Without the benefit of any discussions with Mr. Orszag, Ms. Kennedy estimates that the monthly cost of the bar mitzvah will be $1,464.72, for a total of $17,576.64 over the course of 12 months. Ms. Kennedy testified that the annual amount represents half of the costs she expects to be incurred in 2014 for the bar mitzvah; she believes that two-thirds of the total cost of the bar mitzvah will be incurred in 2014, with the remainder ostensibly to be incurred in 2015. Ms. Kennedy testified that she had not gotten estimates of how much the bar mitzvah will actually cost, though she and the minor child were planning to tour a venue, and that she had based her estimate on discussions she has had with other parents who had given b'nai mitzvah parties in the Washington, DC area. She testified that the amount she expected to expend for the bar mitzvah was "reasonable" but was not necessarily an amount that she would be able to afford. She also testified that she assumes that Joshua's bar mitzvah will be larger than Leila's Washington, DC bat mitzvah party because more of Ms. Kennedy's family and friends will be invited to Joshua's party than were invited to Leila's. Finally, she testified that Joshua is currently incurring expenses for tutoring related to his bar mitzvah, as Leila did in preparation for her bat mitzvah. Again, as the parties recognize, this will be a one-time, non-recurring expenditure and the Court imagines that such celebration will be planned by both parents. At this juncture, and as explained further below, the Court finds this expenditure to be too speculative for the Court to give the numbers provided by Ms. Kennedy much weight.

5. Recreation and Entertainment Expenses

a. Vacation Expenses

Ms. Kennedy represented that, in 2008, she spent $283.17 monthly on vacations, $188.71 of which she allocated to the children. Ms. Kennedy did not testify, and it is not clear from her

financial statement, to which destinations she and the children travelled in 2008.

Ms. Kennedy represented that, in 2013, her monthly spending on vacations had increased to $788.31, $525.54 of which was attributable to the children. She testified that, in 2012-2013, she and the children traveled to Maine, to Washington State, and to Hawaii. Ms. Kennedy testified that her vacations are not as lavish as the vacations the children take with Mr. Orszag, and thus he should provide her with additional monies so that her vacations may, in essence, match his. Ms. Kennedy noted that, in December 2012, she took the children to Hawaii, where the children stayed in a one-bedroom condominium with their step-siblings; she and her husband stayed in a separate condominium. In contrast, she noted that, the previous year, the children had travelled to Hawaii with Mr. Orszag and had stayed at the Four Seasons hotel. Ms. Kennedy testified that the children were visibly upset by the disparity in accommodations, and that the children refused to participate in vacation activities for the first few days of the vacation. If true, this may be concerning for reasons other than lack of money. No matter, Ms. Kennedy's financial statement includes a line-item for "incremental vacation costs to be comparable" which, she represented, would allow her and the children to travel business-class and to stay in more luxurious hotels, thus making her vacations with the children more comparable to Mr. Orszag's; she represented that the additional monthly cost would be $1,216.67.

Again, the Court could not credit Ms. Kennedy's testimony. The Court infers from this testimony that Ms. Kennedy seeks for herself and her husband travel comparable to Mr. Orszag's. Ms. Kennedy's husband ostensibly accompanies Ms. Kennedy and the children on vacations. Ms. Kennedy's husband has children from a prior marriage, both of whom participated in the Hawaiian vacation, yet the Court heard no testimony regarding the role her

husband plays in selecting vacation destinations and accommodations. Further, while the children allegedly took exception to the accommodations in Hawaii, they apparently were satisfied with the travel arrangements, as Ms. Kennedy did not testify to the children's disposition regarding coach travel.

b. Camps

Ms. Kennedy represented that, in 2008, she spent $121.78 monthly on summer camps for the children. At the time, she testified, Leila went to Adventure Theater Camp, a day camp in the District of Columbia, and Joshua went to Discovery Creek, a day camp.[15] She testified that the children began going to sleepaway camp in 2010.

Ms. Kennedy represented that, in summer 2013, the children both attended sleepaway camp. Leila attended Camp Matoaka, which is located in Maine, the same summer camp that Leila has attended since 2010. Before 2013, Leila had attended one session of camp each summer; a session of camp is approximately three and a half weeks. In 2013, Leila attended one and a half sessions of camp, with the second session having been truncated to accommodate her bat mitzvah trip to Israel. From 2010-2013, Joshua attended Camp Caribou, which is located in Maine, for one session each summer. Camp Caribou's sessions are also three and a half weeks. Ms. Kennedy testified that, in summer 2014, Leila will continue to go to Camp Matoaka and Joshua will go to Camp Cedar, both of which are located in Maine. Ms. Kennedy represented that the children's monthly camp expenses would be $856.49, contemplating that Leila would go to camp for two full sessions, and that Joshua would go for one session and spend the rest of the summer at day camps, presumably in the Washington, DC area. The figure listed by Ms. Kennedy would cover 50 percent of the children's camp expenses, with Mr. Orszag being

[15] Although Ms. Kennedy did not testify as to the name of the day camp Joshua attended in 2008, it is contained in Plaintiff's Exhibit 41.

responsible for the other 50 percent.

c. Extracurricular Activities

Although there was little testimony regarding the children's extracurricular activities, the Court notes that the children's extracurricular activities are described in Plaintiff's Exhibit 41, documents describing the amounts paid by the parties to one another as part of their quarterly reconciliation process.

In 2008, Leila was involved in Adventure Theater, Girls on the Run, soccer, and the Georgetown Day School chess club, while Joshua took swimming lessons and "Hip Hop" lessons. Both children attended martial arts classes and played basketball.

In 2009, Leila took part in the Math Olympiad, took flute and piano lessons, played softball, soccer, and basketball. She also attended Adventure Theater camp and Georgetown Day School's summer camp. Joshua continued his swimming lessons, engaged in a "light saber fighting" class at Adventure Theater, and practiced martial arts. He attended summer camp at Georgetown Day School and Sidwell Friends School.

In 2010, Leila took part in the Math Olympiad, took flute lessons, participated in Adventure Theater, and went to music camp. Joshua took drum lessons, played soccer, and attended math camp and robotics camp. Both children attended Georgetown Day School and Silver Stars Gymnastics camp.

In 2011, Leila took piano and flute lessons, and played soccer, gymnastics, and swimming. She also went to Camp Matoaka, as well as gymnastics and theater camp. Joshua took drum lessons, and played soccer and basketball. He went to Camp Caribou and Sidwell Friends day camp.

In 2012, Leila attended theater camp and gymnastics camp, and was part of a gymnastics

team. Joshua took yoga classes and was involved in soccer.

6. Other Notable Expenses

The Court notes that, in her financial statement, two-thirds of Ms. Kennedy's state taxes are allocated to the children. The Court finds it curious that such an amount would be included among the children's expenses.

The Court further notes that Ms. Kennedy's financial statement reflects that Ms. Kennedy, in addition to maximizing her pre-tax contributions to her 401k plan, saves an additional $1,000.00 monthly—$500.00 towards retirement and an additional $500.00 in an "emergency fund." The Court finds this additional savings noteworthy in light of Ms. Kennedy's stated inability to meet the children's child care needs, to replace necessary appliances, and to re-grade her front yard.[16]

iv. The Parties' Relationship

Ms. Kennedy represented that the relationship between the parties has been fraught with conflict, making both the current arrangement and Mr. Orszag's proposed arrangement untenable.

1. The Quarterly Reconciliation Process

Ms. Kennedy testified that the quarterly reconciliation process established by the Agreement, and continued after execution of the Second Amendment, is no longer a viable option. Generally, the parties would send each other spreadsheets, detailing the qualifying expenses incurred by each party. The party who paid a given cost for the children would be

[16] *Cf. Nevarez v. Nevarez*, 626 A.2d 867, 872 (D.C. 1993) (noting that payor spouse, who had claimed an inability to pay child support despite contributing $470.25 each month to his retirement account, must "focus on his children's present needs rather than on his own retirement.") In this jurisdiction, both parents are responsible for supporting their children. D.C. Code § 16-916.01(f)(1)(c); *see also Wagley v. Evans*, 971 A.2d 205, 208 (D.C. 2009) ("In the District of Columbia parents have an unqualified obligation to contribute to the support of their children.")

owed one-half of the expenditure from the nonpaying party and, once the expenses were totaled, the party who paid less would send a check to the party who paid more to make up the difference. Ms. Kennedy testified that Mr. Orszag abused the process in multiple ways. First, she alleged that Mr. Orszag would make large purchases, with which she did not agree, then submit them as part of the quarterly reconciliation process. As an example, she noted that Mr. Orszag purchased $1,200.00 worth of camp clothes for Leila and required Ms. Kennedy to pay one-half of the expenditure. In another example, Mr. Orszag purchased for Joshua eyeglasses that cost $400.00, and sought half of the cost from Ms. Kennedy. Ms. Kennedy testified that she objected to the amounts expended, but was required to pay 50 percent of the expenditures as part of the reconciliation process. She also noted that, when Mr. Orszag took Leila to get braces, she not only disagreed with his decision to purchase clear braces without discussing the cost with her, but she also disagreed with his decision to make the payment upfront, rather than as part of a monthly payment plan, as it required her to make her half of the payment in a lump sum.

Ms. Kennedy was further offended when she learned that Mr. Orszag did not directly pay his 50 percent share of the costs of the glasses and the braces, but instead submitted the entire costs as a claim to the health insurance plan he has through Tanglelane, Mr. Orszag's closely-held "C corporation." The health plan fully covered the costs. Ms. Kennedy testified that this upset her, when she learned this during this litigation. Finally, she represented that he would refuse to make the reconciliation payments until he extracted certain concessions from her. Because of Mr. Orszag's alleged bad acts, Ms. Kennedy represented that the last quarterly reconciliation between the parties occurred after the second quarter of 2012, and prior to her filing this lawsuit.

With respect to the examples of Mr. Orszag's submission to his insurance company of expenses incurred for the glasses and the braces, the Court appreciates Ms. Kennedy's frustration. While she may have felt that she had been fleeced by her ex-husband, the fact remains that both parties acted pursuant to their agreement—Mr. Orszag paid his 50 percent share of the expenses, indirectly through his insurance with Tanglelane, and Ms. Kennedy paid her 50 percent share. Mr. Orszag's approach perhaps speaks volumes about the Parties' unfortunate relationship. As to the costs of the camp clothing for Leila and Joshua's glasses, the Court has no frame of reference to judge whether the charges were unreasonably exorbitant. Both parties are high earners and, judging from their financial documents and how much money they spend on themselves and their children, both parties appear financially capable of purchasing the types of glasses, braces, and clothing that accommodate the children's preferences. In short, the Court's sensibilities are not offended by the expenditures, although Mr. Orszag's approach to the expenditures and the reconciliation process could have been more conciliatory.

2. The Trust

Ms. Kennedy contended that the Trust should not be replenished after its depletion. First, she represents that Mr. Orszag's brother is the sole trustee, when the Agreement envisioned a joint trustee arrangement, whereby both Ms. Kennedy's father and Mr. Orszag's brother would serve jointly as trustees. Ms. Kennedy alleged that, despite being required to send her biannual financial updates, Mr. Orszag's brother only updates her on the Trust once yearly. She also testified that there is general animosity between her and Mr. Orszag's brother. She further testified that she does not want Mr. Orszag to replenish the Trust because she believes that such an arrangement would give Mr. Orszag leverage over her, in that he will attempt to make

unilateral decisions regarding the children's education. By way of example, Ms. Kennedy testified that Mr. Orszag took steps to enroll Leila at Phillips-Exeter Academy without consulting Ms. Kennedy, and that she had to write a letter to Phillips-Exeter informing them of the joint custody arrangement and that she did not consent to Leila's being enrolled there. This example, however, speaks to a possible legal custody issue to which Ms. Kennedy's relief, if contrary to the parties' joint custodial arrangement, would not be addressed through child support. Further, Ms. Kennedy succeeded in stymieing Mr. Orszag's efforts. A direct child support payment will not deter this behavior.

3. The Discrepancy in Wealth

Ms. Kennedy alleges that Mr. Orszag flaunts his wealth to the detriment of the children. As an example, she testified that Mr. Orszag has the financial wherewithal to enroll the children in certain activities, such as enrolling Joshua in private soccer lessons and Leila in equestrian lessons. This ostensibly places her at a competitive disadvantage in the children's eyes because she cannot afford such luxuries. The Court knows not what it is to make of this as Ms. Kennedy never suggested activities she wishes to enroll the children but is unable to do so because of the costs. She indicated that Leila needed money to take a trip with Georgetown Day School to Quebec and that she experienced difficulties paying for the trip, while Mr. Orszag in contrast experienced no difficulty sending Leila to attend b'nai mitzvah or b'not mitzvah celebrations in Florida.

Ms. Kennedy claims that the children have felt the effects of the differences in wealth to their detriment. In addition to the incident in Hawaii, she testified that, before the parties decided that Mr. Orszag would not accompany the children to Israel, he told the children that they would be staying in a separate hotel from Ms. Kennedy and Mr. Desimone's family because

Mr. Orszag found the accommodations at that hotel were not sufficiently luxurious. She testified that the idea of not staying with Ms. Kennedy and her family caused the children distress. She testified further that, when her home lost power after a severe thunderstorm, she and the children had to sleep in the basement and shower at neighbors' homes, in contrast to Mr. Orszag, who stayed at the Pierre Hotel when he had to evacuate his New York home after Hurricane Sandy.

The Court was struck by this testimony in that it seemed to highlight the misgivings Ms. Kennedy, herself, has with Mr. Orszag's wealth and how she is unable to participate to her advantage in his wealth. She gave no persuasive testimony about how the children have suffered as a result of the differences in income. Child support is not meant to ensure that one party gets to enjoy the same financial benefits as the other but, instead, is meant to ensure that the children are well provided for in both parties' homes. As the parties may recall, the Court asked the parties at a January 22, 2014 hearing whether the Court should order mental health evaluations of the children to assess any detriment stemming from the wealth disparity and what effect, if any, this litigation may be having upon the children, but the parties declined. From the testimony as presented, the Court cannot conclude that the children are experiencing any psychological or emotional detriment as a result of Mr. Orszag's wealth.

4. Communications Between the Parties

Ms. Kennedy testified that, when she first discussed her Petition with Mr. Orszag, he told her that she would "regret" filing the Petition, and that it would impact their ability to co-parent. He then allegedly spoke to Joshua and told him that there would be "changes." He further allegedly threatened to "run up" Ms. Kennedy's legal fees in these proceedings. Finally, he allegedly negated pre-arranged changes to the custodial arrangement, preventing the children from going to b'nai mitzvah celebration for friends of the family.

v. Ms. Kennedy's Request

Given the increase in Mr. Orszag's income and the change in the children's monthly expenses since 2008, which Ms. Kennedy represents is $10,162.61,[17] Ms. Kennedy requests that the Court order Mr. Orszag to make monthly direct child support payments to her in the amount of $22,000.00, which is approximately 93 percent (Mr. Orszag's income-proportionate share) of the total expenses she incurs on behalf of the children while they are in her care. Ms. Kennedy noted that, under this arrangement, she would be responsible for seven percent of the expenses that Mr. Orszag incurs during his custodial time with the children. Any additional expenses would be addressed through a reconciliation process similar to the one in place under the Second Amendment.

b. Mr. Orszag's Evidence

i. Mr. Orszag's Family

In 2008, Mr. Orszag lived in the District of Columbia, in the former marital home, full time, and the children resided with him during his custodial time. Mr. Orszag received the marital home under the Agreement.

In 2010, Mr. Orszag married Bianna Golodryga, a television journalist, with whom he shares an apartment in New York City. They have a son, Jake, who is approximately two years old. Before Jake was born, they lived in a two-bedroom apartment. After Jake's birth, the family moved to a four-bedroom apartment in New York City which is closer to Mr. Orszag's current place of employment; Mr. Orszag lives in the New York apartment during his

[17] It is unclear to the Court if Ms. Kennedy's 2008 expenses are adjusted for inflation. If they are not, according to the Bureau of Labor Statistics' Consumer Price Index Inflation Calculator, *http://www.bls.gov/data/inflation_calculator.htm*, the children's 2008 expenses (in 2014 dollars) were $10,395.57 and, accordingly, the increase in the children's monthly expenses would be $9,175.18.

non-custodial time. During his custodial time with Joshua and Leila, he and the children live in the former marital home in the District of Columbia. Although he does take occasional business trips during his custodial time, he lives approximately 43 percent of the time in the District of Columbia. In 2012, the minor children spent approximately seven days in the New York apartment, though Mr. Orszag testified that they are always welcome to visit him in New York.

The Court heard no testimony regarding the relative sizes of Ms. Kennedy's home, Mr. Orszag's Washington, DC home and Mr. Orszag's New York apartment. Much was made of the amount of rent that Mr. Orszag pays for the New York apartment, which amount was, in part, used to demonstrate the discrepancy or difference in lifestyle between the parties.

ii. Mr. Orszag's Income

In 2008, Mr. Orszag was employed as the director of the Congressional Budget Office ("CBO"), a position to which he was appointed in January 2007. At the time, his salary was $145,691.00. He also received annual dividend income of $12,386.00, giving him a total adjusted gross income of $166,157.00. He remained with the CBO through 2008, and was appointed to be the director of the Office of Management and Budget in January 2009, a position that he held until 2010.

In December 2010, Mr. Orszag was hired as a Vice Chairman at Citigroup. In this position, he was to work primarily in New York City, though he would work in the District of Columbia on Fridays. His base annual salary at Citigroup is $400,000.00. He also receives various forms of deferred compensation, both in cash and stock, and also received a "signing bonus." His deferred compensation is, as follows: When Citigroup initially awards deferred compensation to Mr. Orszag, Citigroup informs Mr. Orszag that he has been awarded a certain amount. Mr. Orszag then receives installments of the total amount, or "tranches," over the next

few years. Mr. Orszag's eligibility to receive the full stated amount of the award is contingent upon his remaining with Citigroup and on his continuing to meet Citigroup's performance standards. In 2012, Mr. Orszag received $3,689,960.00 in income. As of March 13, 2014, the first day of the hearing, Mr. Orszag testified that he had received $3,622,736.00 thus far in 2014, and he estimated that he would receive approximately $4,000,000.00 from Citigroup in 2014.[18]

iii. Mr. Orszag's Expenses

1. Residential Expenses

Mr. Orszag represented that, in 2008, when he was living full time in the District of Columbia, his monthly expenditures for his residence totaled $11,386.00. In 2012-2013, although Mr. Orszag only resided in the District of Columbia during his non-custodial time, his monthly expenditures for his residence totaled $13,341.00. The majority of the increase in cost is attributable to a $1,299.00 increase in Mr. Orszag's monthly mortgage payment.

In addition to the District of Columbia home, Mr. Orszag and his wife maintain a primary residence in New York City. On average, Mr. and Ms. Orszag expend $47,508.58 each month on the New York residence, of which Mr. Orszag allocates approximately 33 percent to himself.[19] The Court notes that the majority of the New York residence cost is the monthly rent,

[18] The Court did not receive significant testimony regarding Tanglelane or any income that Mr. Orszag may have received in his capacity as director. Any income that Mr. Orszag earns from Tanglelane, when he already earns over 16 times the highest presumptive amount to which the Guidelines applies, would not affect the Court's analysis. Nor does the Court believe that any information regarding Tanglelane's activities and expenses are relevant to this child support proceeding. Where and how Mr. Orszag travels for his speechmaking through Tanglelane seems to be a business activity, and not relevant to his personal expenses or his lifestyle.

[19] According to Accountant Jill Bombino's testimony, the expenditures for the New York residence were allocated, as follows: Leila and Joshua were initially allocated 0.8 percent of the total New York residence expenditures, as they spent seven of the 365 days in the New York residence and 40 percent of the expenses were allocated to them as two of the five individuals who shared the home (Mr. Orszag, Ms. Orszag, and Jake and the nanny (the two of whom were treated as one individual), Leila, and Joshua). The remaining 99.2 percent of the expenses were

which totals an impressive $30,000.00.

2. Child Care Expenses

In 2008, Mr. Orszag's child care was provided by Rodanda Rakistra who, he testified, was in the home during his custodial time with the children, and during some of his non-custodial time as well. Her total salary attributed to child care, exclusive of payroll taxes, was $27,087.00 (which equates to $2,257.25 monthly).

In 2013, Kaleigh Bradley provided child care services for the children when they were in Mr. Orszag's home, including on Saturdays and Sundays. Her duties for the children include: dropping the children off at, and picking them up from, school and extracurricular activities; arranging carpools for the children; cooking; laundry; grocery shopping; and other "errands." Without consulting Mr. Orszag, Ms. Kennedy engaged Ms. Bradley in performing certain duties to assist the children while they were in Ms. Kennedy's care. Mr. Orszag testified that he has since informed Ms. Kennedy that, if she wishes to avail herself of Ms. Bradley's services in the future, she must contact him first. Ms. Bradley's annual salary, exclusive of taxes, is $55,800.00, approximately 50 percent of which is allocable to child care.

Mr. Orszag does incur costs for live-in, round-the-clock nanny care for Jake in the New York residence. The Court does not consider this expenditure to be relevant to its lifestyle analysis because Leila and Joshua are no longer toddlers, and do not require the same level of care that a two-year-old with two working parents may require.

3. Vacations

Little evidence was provided as to how frequently Mr. Orszag vacationed with the minor children in 2008. Mr. Orszag testified that he took the children to a ranch, and that they visited

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allocated equally between Mr. Orzag, Ms. Orszag, and Jake and the nanny.

his mother in Maine; during these vacations, he and the children flew first-class. He represented that his monthly expenditures for the children's vacations totaled $1,873.00.

In 2012, Mr. Orszag joined the Portico Club (which has since changed its name to Inspirato), a resort club through which members have access to vacation properties in numerous national and international destinations. In 2012, Mr. Orszag took the minor children to Brush Creek Ranch in Wyoming, Turks and Caicos, and to Maine. Ms. Orszag, Jake, and the nanny accompanied Mr. Orszag and the children on these trips, and all present flew first-class. On the Wyoming trip, due to the difficulty of travelling to the ranch from any major airport, the family travelled on a private jet, the cost of which was reimbursed by Mr. Orszag's brother. Leila and Joshua also traveled to New York for seven days during this time period. Mr. Orszag represented that his monthly expenditures for Leila and Joshua's share of vacations was $1,273.00.

Mr. Orszag testified that he and Ms. Orszag have taken some vacations without any of the children accompanying them. Specifically, he mentioned that they travelled to Stowe Mountain in Vermont, and to Canyon Ranch in Massachusetts, although certain costs for the latter trip were covered by Tanglelane.

4. Medical Expenses

Mr. Orszag represented that, as a director of Tanglelane, he has a medical plan that covers 100 percent of the children's medical expenses. He represented that Leila's orthodontia and Joshua's glasses were both covered by his medical plan, though during the reconciliation process with Ms. Kennedy, he required Ms. Kennedy to pay him her 50 percent share of the costs of the orthodontia and the eyeglasses.

5. Education Expenses

In 2008, the Trust paid the children's tuition at Georgetown Day School. Mr. Orszag testified that the trust documents clarified that private school tuition was the priority for the trust assets. Because the Trust lacked sufficient funds to pay the children's tuition for the 2013-2014 academic year, Mr. Orszag paid the entirety of the tuition bill. The Court notes that, at this time, the parties were in throes of this litigation, and thus, it very well may have been a litigation strategy for Mr. Orszag to pay the tuition.

Mr. Orszag testified that he believes that the Trust can be replenished. He testified that it was foreseeable that the trust would exhaust its funds before the children graduated from private school—he testified that, given the trust corpus and the cost of tuition, the Trust would be expected to have been fully depleted in approximately six years. He testified that he believes that he can replenish the Trust, and that he intended to do so, but was advised that he was not allowed to do so. The Court did not credit this testimony.

6. Overall Expenses

Mr. Orzag represents that, in 2008, he spent $13,380.00 on the children's monthly expenses, compared to $14,970.00 monthly in 2012-2013. The Court finds it difficult to rely heavily upon Mr. Orszag's representations. Mr. Orszag's allocation methodology has changed multiple times throughout this litigation, beginning with a 50-50 allocation between himself and the children, respectively, which he modified to 66-33, then modified again to the current 71-29 allocation. His financial statement does not reflect the expense of the children's tuition, a cost which he actually incurred in the relevant time period. Further, given the commingling of his funds with those of Ms. Orszag, the Court is uncertain what expenses Mr. Orszag has actually incurred for himself. The Court discerned from the testimony that he has borne the lion's share

of his family's (New York) expenses. Finally, during his testimony, Mr. Orszag appeared to the Court to be obfuscating whenever a question was posed regarding his income or his expenses. The Court's takeaway is that Mr. Orszag and his wife live very well and in the fashion that his income affords.

iv. The Relationship Between the Parties

Mr. Orszag agrees that the parties' relationship, and particularly since and during this litigation, has been poor.

v. Mr. Orszag's Request

Mr. Orszag requests to be able to pay directly 100 percent of the children's private school tuition, college tuition, camp expenses, unreimbursed medical expenses, and extracurricular activity expenses. Were the Court to grant this request, Ms. Kennedy would certainly have the financial freedom to do with her income as she wishes.

c. Jill Bombino's Testimony

Ms. Bombino, who is a Certified Public Accountant, was qualified as an expert witness in accounting and forensic accounting. Although Ms. Bombino was useful as a foundational witness for Mr. Orszag's financial statements, which she helped to create, the Court did not find her testimony very helpful. Indeed, from her testimony, the Court was impressed that she likely was very heavily influenced by Mr. Orszag and his counsel to reach a result which would comport with their theory of the case, raising further doubts in the Court's mind as to how much reliance it could place on the financial statements.

ANALYSIS AND CONCLUSIONS OF LAW

I. D.C. Code § 16-916.01(t) and the Court's Authority

As an initial matter, and before the Court can proceed to the merits of Ms. Kennedy's

claim, it must first determine the scope of its authority and the applicable standard of review.

Ms. Kennedy argues that, through the enactment of D.C. Code § 16-916.01(t), the Council of the District of Columbia removed any distinctions previously drawn by the Court between the standard for modifying incorporated or merged agreements, and the standard for modifying unincorporated and unmerged agreements.

Mr. Orszag argues that deference should be given, however, to the terms of the parties' contract, which the parties negotiated at arm's-length, with benefit of counsel. Rather than applying the standard used for modification of court orders, he urges the Court to ascertain whether there has been a substantial and material change in the children's needs based on actual family experience, as required by D.C. Code § 16-916.01(h).

In *Lanahan v. Nevius*, 317 A.2d 521 (D.C. 1974), the Court of Appeals found that the trial court lacked the authority to modify the terms of a settlement agreement providing for child support when that agreement had not been incorporated into a divorce decree. The court ruled that such agreements "will be enforced [in] the absence of fraud, duress, concealment, or overreaching." *Id.* at 524 (quoting *Davis v. Davis*, 268 A.2d 515, 571 (D.C. 1970)) (internal quotation marks omitted). While the Court of Appeals recognized that a trial judge may order greater child support than is provided for in the parties' agreement, it also recognized that, in such circumstances, the trial court "does not modify the agreement of the parties, but rather issues an order for larger child support." *Id*. at 880. That case did not concern a contract, where, as here, Ms. Kennedy and Mr. Orszag twice agreed that neither party would pay direct child support to the other. The Agreement, however, does provide for child support, insofar as both parties are required to pay a 50:50 share of certain of the children's expenses.

In another decision, *Cooper v. Cooper*, 472 A.2d 878 (D.C. 1984), the Court of Appeals

agreed with the trial court that it "retained jurisdiction to increase child support payments above those limits specified in a separation agreement." *Id.* at 880. The Court of Appeals concluded, however, that the trial court had applied the incorrect standard when it opined that modification of a support order "is justified only when the proponent of the change bears the burden of proof that there has been a material change in the needs of the child or the ability of the parents to pay." *Id.* Because the child support provisions were set forth in a settlement agreement, the Court of Appeals held that a court may modify the amount of support "if the party seeking modification shows (1) a change in circumstances which was unforeseen at the time the agreement was entered into, and (2) that the change is both substantial and material to the welfare and best interests of the child." *Id.* This test became known as the "*Cooper* standard," and it differs from the general modification standard only insofar as the change in circumstances must be unforeseeable. *See Albus v. Albus*, 503 A.2d 1229, 1231 (D.C. 1986) (differentiating the *Cooper* standard from the "*Hamilton* standard," which only requires a substantial and material change in the circumstances of the parties).

In 2002, the District of Columbia Council passed the "Domestic Relations Laws Clarification Act of 2002." D.C. Law 14-207. In part, the Act added a new subsection (s) to the Child Support Guidelines, which provided, as follows:

> Upon the occurrence of a substantial or material change in circumstances sufficient to warrant the modification of a support obligation pursuant to the child support guideline, the Court may modify any provision of an agreement or settlement relating to child support, without regard to whether the agreement or settlement is entered as a consent order or is incorporated or merged in a court order.

D.C. Law 14-207, *now codified at* D.C. Code § 16-916.01(t). The Committee Report from the Committee on the Judiciary makes clear that the purpose of the provision was to "overturn[] the decision of the D.C. Court of Appeals in *Cooper v. Cooper*, which limited the authority of the

court to make changes to an agreement based on changed circumstances." KATHY PATTERSON, CHAIRPERSON, COMMITTEE ON THE JUDICIARY, REPORT ON BILL 14-635, THE "DOMESTIC RELATIONS LAWS CLARIFICATION ACT OF 2002," at 4 (May 29, 2002). While the Court of Appeals has not explicitly recognized that *Cooper* has been overturned, it did note that "[t]he legislative history confirms that § 16-916.01(t) was intended to overturn the decision of the D.C. Court of Appeals in *Cooper*." *Mazza v. Hollis*, 947 A.2d 1177, 1180 n.5 (D.C. 2008).

Mr. Orszag contends that, because the incomes of the parties exceed the highest amount to which the Guidelines presumptively apply, subsection (t) is inapplicable to this case. If that is so, the Court would be limited to modifying support only if the change in circumstances was unforeseeable at the time that the parties entered into the Second Amendment in 2008. Possible support for Mr. Orszag's position can be found in the legislative history. Specifically, the Committee Report accompanying the 2006 amendments to the Guidelines indicates that subsection (t) "requires that any modification must be done pursuant to the guideline." PHIL MENDELSON, CHAIRMAN, COMMITTEE ON THE JUDICIARY, REPORT ON BILL 16-205, the "Child Support Revision Amendment Act of 2006," at 14 (February 28, 2006). The Court, however, is not persuaded that this was the Council's intent. The legislative history of subsection (t) provides that the intent was to overturn *Cooper*. There is no suggestion that the Court's authority to increase support amounts is limited to the subset of cases in which the parties agreed to a child support arrangement as part of a settlement agreement and to which the Guidelines would otherwise apply. Further, a reading of this provision that would require the Court to perform any modification made under subsection (t) pursuant to the Guidelines would run afoul of the Court of Appeals' ruling in *Galbis v. Nadal*, 626 A.2d 26 (D.C. 1993). In

Galbis, the Court of Appeals held that, when the payor's gross income exceeds the highest amount to which the Guidelines at the time presumptively applied, the trial court has "greater discretion in determining an appropriate award amount." *Id.* at 31-32. The Court believes that its reading of subsection (t) is in harmony with its authority to modify the child support provision of an agreement *sua sponte* upon the occurrence of a substantial and material change in circumstances, if such action is necessary to protect the minor child's welfare. *See Wilson v. Craig*, 987 A.2d 1160, 1165 (D.C. 2010).

The Court does not believe, however, that its authority to modify the parties' child support arrangement under subsection (t) is unlimited. Although subsection (t) appears to be intended to overrule *Cooper*, there is no indication that it was meant to have any effect upon the Court of Appeals' longstanding rulings regarding settlement agreements, which predate *Cooper*. As the Court of Appeals concluded in *Lanahan*, "[a] separation agreement providing for child support is a contract, governed by the principles of contract law, notwithstanding the fact that the subject matter of such a contract (child support) is an independent legal obligation which may be enforced by a noncontractual support action." *Lanahan,* 317 A.2d 521, at 525.

Against this legal backdrop, the Court concludes that subsection (t) is properly construed as a carve-out to the general rule that contracts are valid "[i]n the absence of fraud, duress, concealment, or overreaching," even if the party seeking modification could have secured a more advantageous agreement. *Davis,* 286 A.2d at 517. This carve-out authorizes the Court to modify the child support provision of a settlement agreement upon a finding of a substantial and material change in circumstances.

Further, and contrary to Ms. Kennedy's contention, subsection (t) does not grant the Court the power to change the underlying structure of the parties' child support arrangement.

While courts have modified provisions of settlement agreements to ensure the amount of child support is sufficient to meet children's needs, *see Wilson*, 987 A.2d at 1165, Ms. Kennedy has not cited, and the Court has not found, any cases in which the Court has modified provisions of settlement agreements governing how child support is to be paid. In this case, the parties, both in 2006 and in 2008 through arm's length negotiated settlements (with the assistance of counsel), agreed that no direct child support was to be paid by either party to the other, and the Court does not believe that subsection (t) grants it the authority to modify that arrangement. Further, it does not appear that the Court needs to make such modifications, when the Court can achieve the correct result by requiring Mr. Orszag to pay a greater share of the children's expenses.

Moreover, even if subsection (t) grants such authority to order Mr. Orszag to make direct payments to Ms. Kennedy, the Court, in its discretion, concludes that Ms. Kennedy has not provided a compelling reason why the Court should go behind the parties' arm's-length agreement in that fashion. First, although Ms. Kennedy asserts that the quarterly reconciliation process has not worked smoothly, the fact that Ms. Kennedy continues to request that a similar equalization measure remain in place going forward (even if she is granted a direct child support award) suggests that the reconciliation process is viable. Indeed, with the engagement of the Parent Coordinator, it is likely the parties can head off disagreements prior to making purchasing decisions that would otherwise lead to conflicts.

Second, the Court notes that there is no practical difference for the children between Mr. Orszag paying their expenses directly and Mr. Orszag paying Ms. Kennedy first, who would then remit certain payments. As long as the children have not suffered any harm through Mr. Orszag's refusal to pay an expense, and there has been no evidence provided by Ms. Kennedy that this has been the case, the Court sees no reason to have Ms. Kennedy serve as

a conduit for payment of such expenses.[20] Ms. Kennedy raises the specter of Mr. Orszag making unilateral decisions regarding legal custody matters if he is given the sole responsibility for paying expenses relating to those matters. The argument is not persuasive and has no merit. When Mr. Orszag has seemingly attempted to work his intent upon the parties and the children, as exemplified by his attempt to enroll Leila at Phillips-Exeter, Ms. Kennedy was able to stymie his efforts effectively. Ms. Kennedy is quite capable of making known her position and is able to meet Mr. Orszag's contrary efforts in kind. Further, the engagement of the Parenting Coordinator will help to facilitate productive discussions in the event that a difficult legal custody decision must be made.

Third, and finally, the nature of Ms. Kennedy's request makes this particular matter unsuitable for a direct payment arrangement. Many of the expenses cited by Ms. Kennedy as having increased or arisen since the parties entered into the Second Amendment are of a non-recurring variety, such as costs for replacing the air-conditioning systems in her home or costs for Joshua's upcoming bar mitzvah, which she breaks out into monthly payments, strictly to show that she requires a monthly child support payment, when the parties very easily can make lump sum payments to satisfy the obligations. While a child support order that captures such expenses might meet the children's needs at the time that the expenses are incurred, the Order would remain in place long after the expenses are satisfied. In that circumstance, the additional

[20] In her closing argument, Ms. Kennedy argued that it would be "humiliating" to have Mr. Orszag be responsible for paying the children's expenses because she would have to send the children to him to request payment of the expenses. The Court received the statement as argument, not as evidence. In a child support matter, the Court's utmost concern is that children are supported in the ways that our laws contemplate. It is concerning, however, that Ms. Kennedy would seek direct payments in a monthly amount ($22,000.00) that exceeds the children's alleged expenses by nearly $3,000, and particularly when the monthly amount includes numerous anticipated and non-recurring expenses, some of which, such as the bar mitzvah costs for Joshua, are mere estimates.

monies would inure to Ms. Kennedy's benefit, effectively serving as alimony rather than child support.[21] The Court thus sees no reason to order a direct child support payment from Mr. Orszag to Ms. Kennedy, notwithstanding his new level of income.[22] Instead, if the Court concludes that a substantial and material change in circumstances has occurred, the Court may reallocate the payment obligations, ordering one party to pay more than the current 50 percent of a given expense, while reducing the obligation of the other party. In this way, and notwithstanding Ms. Kennedy's desire for a monthly payment, the children will continue to be supported at the appropriate level.

II. Substantial and Material Changes in Circumstances

Ms. Kennedy argues that a modification of the child support obligation is merited because there have been multiple substantial and material changes in circumstances, namely, a change in the amount Mr. Orszag would be required to pay under the Guidelines; a change in Mr. Orszag's ability to pay child support; and a change in the reasonable needs of the children based on actual family experience.

a. Mr. Orszag's Obligation Under the Guidelines

Ms. Kennedy argues that, under D.C. Code § 16-916.01(r)(4)(A), there has presumptively been a substantial and material change in circumstances sufficient to merit a modification of the current support arrangement. D.C. Code § 16-916.01(r)(4)(A) provides, as follows:

[21] Ms. Kennedy's steadfast refusal to allow Mr. Orszag either to pay the children's expenses directly or through the Trust, despite both options resulting in a net alleviation of the financial burden on her, leads the Court to believe that she may well be seeking to have Mr. Orszag's child support payments serve as alimony.

[22] For similar reasons, though it has the discretion to do so, the Court will decline to extrapolate a child support figure from Mr. Orszag's income. The Court credits the testimony of Dr. Heinrich at the May 13, 2013 hearing that the data underlying the Guidelines did not account for especially-high-income parties such as Ms. Kennedy and Mr. Orszag, and thus extrapolating based on that formula would not provide the Court with a figure that reflects the needs of the children based on actual family experience.

> There shall be a presumption that there has been a substantial and material change of circumstances that warrants a modification of a support order if application of the guideline to the current circumstances of the parents results in an amount of child support that varies from the amount of the existing support order by 15% or more.

Ms. Kennedy contends that, because Mr. Orszag paid her no direct child support, application of the Guidelines would necessarily result in a child support figure that exceeds the current child support by the requisite 15 percent.

This position is without merit. As the parties know, Mr. Orszag has not been paying child support directly to Ms. Kennedy. Rather, pursuant to the parties' own negotiated agreements, it is undisputed that Mr. Orszag has been supporting the children, just as Ms. Kennedy has been supporting the children.[23] Further, this is a case to which the Guidelines do not apply. Mr. Orszag earns more than 16 times the highest amount to which the Guidelines presumptively apply and, even if Mr. Orszag's income were zero, the Guidelines would not presumptively apply because Ms. Kennedy also earns more than $240,000.00 annually, the maximum amount for purposes of the Guidelines. Although the Court could apply the Guideline percentages to this case, *see Galbis*, 626 A.2d at 31-32, the Court again credits Dr. Heinrich's testimony that, because of the range of incomes considered in the data set that underlies the Guideline formula, the Guideline formula is not a useful tool to determine the proper child support obligation when the parties' annual combined income so greatly exceeds $240,000.00.

b. Mr. Orszag's Ability to Pay

Ms. Kennedy argues that, because Mr. Orszag's income has risen 2600 percent since 2008, totaling 93 percent of the parties' combined incomes, there has necessarily been a

[23] The Court finds Ms. Kennedy's request for two years of retroactive child support curious for similar reasons. Under D.C. Code § 16-916.01(v)(1), the Court may award retroactive child support for up to two years from the filing of a petition or request for child support "[w]hen a case is brought to establish child support." This provision appears to apply to cases where there has been no child support arrangement, not to cases where the children have been supported according to the provisions of a negotiated, arm's-length agreement.

substantial and material change in circumstances. The Court notes that the Court of Appeals has never held that, in a vacuum, an increase in a parent's income is sufficient to trigger a modification of child support.

For example, in *Graham v. Graham*, 597 A.2d 355 (D.C. 1991), after the entry of the divorce decree (which included provisions for alimony and child support), Appellee (father) signed a new contract with his employer which increased his salary from $100,000.00 to $255,000.00 over a five-year period. *Id.* at 356. Appellant (mother) moved to modify the support provisions of the divorce decree based on the increase in Appellee's income. *Id.* The trial court denied her motion, finding "that an increase in the non-custodial parent's income, no matter how great, was, by itself, an insufficient basis upon which to modify a support order." *Id.* The Court of Appeals reversed, holding that, "[b]y insisting that there could be no increase in support without a commensurate increase in the needs of [. . .] the children, the trial court effectively nullified the first prong of [the *Hamilton*] standard," and remanded for further proceedings. *Id.* at 357. The court instructed that it was "appropriate that a trial court may act to ensure that where there is a material increase in non-custodial parents' financial resources, that these parents do not increase their own standard of living without also ensuring that their children live as well as they." *Id.* at 358.

By way of further example, in *Prisco v. Stroup*, 947 A.2d 455 (D.C. 2008), the parties' child support arrangement was set forth in a December 28, 2000 divorce decree issued by the Circuit Court of Fairfax County, Virginia. The order was subsequently modified by the Virginia court in 2004, *id.* at 457, and was later registered in the District of Columbia. *Id.* In February 2005, Appellant (mother) filed a motion to modify support, citing a 14 percent increase in Appellee's (father) income, a decrease in her own income, and a substantial change in the

children's needs. *Id.* The trial court denied her motion, finding that the increase in Appellee's income was not sufficiently substantial to warrant modification in light of the significant child-related expenses that he incurred in addition to child support. *Id.* at 457-58. On appeal, the Court of Appeals clarified its holding in *Graham*, explaining, as follows:

> [W]e did not hold in *Graham* that the father's salary increase constituted a material change in his ability to pay child support that required an automatic adjustment of child support. Rather, the case was remanded for the trial court to make a factual determination whether such increases were a substantial and material change in Mr. Graham's ability . . . to pay.

Id. at 459. The Court of Appeals went on to clarify that its "primary concern in *Graham* was to compare the standard of living of the children with that of the noncustodial parent." *Id.* In *Prisco*, the Court of Appeals found that the record supported the trial court's finding that the children maintained the lifestyle that they lived before their parents' divorce, due in large part to payments made by Appellee in addition to his child support, and thus affirmed the trial court's decision. *Id.* The Court further distinguished the case before it from *Nevarez*, providing that "appellant fully provided for his children's needs—and more." *Id.* at 460.

Given the guidance from the Court of Appeals, the proper inquiry seems to be whether the children's lifestyle reflects the increase in Mr. Orszag's income. Mr. Orszag urges the Court to find that his lifestyle is not a relevant consideration. He argues that, because the Guidelines were modified in 2006 from a standard that "calculated child support based on a percentage of income of the noncustodial parents with certain offsets applied" to an income-shares model which takes the financial circumstances of both parties into account and prioritizes the needs of the minor children, it would be improper for the Court to base its determination on an evaluation of whether the children's lifestyle mirrors that of Mr. Orszag. This Court disagrees. The Court has the discretion to deviate from the Guidelines because the parties' combined income exceeds

the highest amount to which the Guidelines presumptively apply. In any event, consideration of the lifestyle of the higher-earning parent is consistent with the principles of the income-shares model. Under the income shares model, as the parties' combined income increases, the amount of support for the minor children increases, with the higher-earning parent paying a greater share of the expenses. It is undisputed that Mr. Orszag earns a higher percentage of the parties' combined income than does Ms. Kennedy.

The Court of Appeals has never set forth what factors trial courts should consider in comparing the lifestyle of the children to that of the parents. In *Prisco*, in determining that the increase in Appellee's income did not warrant an increase in child support, the Court of Appeals noted that "[t]he children enjoy the luxuries of the parents' million-dollar homes; meals out at restaurants; luxurious vacations; clothing; athletic activities; and sporting equipment." *Prisco*, 947 A.2d at 459. The court found that Appellee's provision of these luxuries, in addition to making his ordered support payments, were proof that the children did not live at a standard below Appellee's own.

Further guidance on assessing a party's lifestyle can be found in a case from the Court of Special Appeals of Maryland, *Smith v. Freeman*, 149 Md. App. 1 (Md. Ct. Spec. App. 2001). In *Smith*, the parties reached a custody and visitation agreement that required Appellee (father), a professional athlete, to pay $3,500.00 monthly in child support, in addition to paying private school tuition, health care, and insurance costs, and creating a college fund for the minor child. Three years later, Appellant (mother) sought an increase in child support, citing a newly-threefold increase in Appellee's salary, from $1,200,000.00 to $3,200,000.00. The trial court denied her motion, finding that she was not entitled to an increase in child support, despite Appellant's increase in income, because she had not proven that there was a change in the child's

needs. The Court of Special Appeals reversed and remanded, finding that a substantial increase in Appellant's income could have provided the basis for a modification of child support even in the absence of a change in the child's needs. The court then went on to discuss which parent's lifestyle determines what amount of support is reasonable for the children and, in doing so, noted that a "child of a multi-millionaire generally expects a lifestyle of unusual privilege and advantage" including "child care that is not work related, private school, summer camp, lessons, luxury vacations, designer clothes and shoes, toys, travel, cultural and recreational activities, and other material privileges."

As such, this Court begins its analysis with the appreciation that this case differs from both *Graham* and *Smith* insofar as Ms. Kennedy is also a high-earning party, capable of providing a more than comfortable lifestyle and many advantages for her children even in the absence of any assistance from Mr. Orszag. It appears to the Court that, insofar as there has been any change in Mr. Orszag's lifestyle since 2008, the children are enjoying the benefits of that lifestyle change. From the testimony provided at the hearing, regardless of whether the children are in Ms. Kennedy's home or Mr. Orszag's home, they are living a lifestyle befitting the children of wealthy parents. The children transition easily between two comfortable homes in the District of Columbia. Here, Mr. Orszag's District of Columbia home is not his primary residence, and it appears to the Court that the primary purpose of Mr. Orszag's continued retention and maintenance of the District of Columbia home is to ensure that the children's schedules are not disrupted by the change in custody. This is the type of "additional" expense that the Court of Appeals found in *Prisco* to be evidence that the children lived the same lifestyle as the custodial parent. The children attend a very expensive private school, attended said school in 2008, and will continue to attend in the future. The children have attended summer camps in

Maine for several summers, and there is no evidence that they will cease doing so. The children have, since 2008, been able to engage in whatever extracurricular activities that strike their fancy, and appear to have experienced a broad range of activities before deciding on a few activities of particular interest to them. The children have also had the benefit of participating in both families' vacations—Ms. Kennedy affords the children nice vacations, as does Mr. Orszag. In 2012, the children appear to have travelled to Maine, Washington, and Hawaii with Ms. Kennedy, and to Wyoming, Turks and Caicos, Maine, and New York City with Mr. Orszag. As such, the children receive the benefit of the vacations that both parents provide. Finally, the children receive child care in both homes, which assists them in attending their extracurricular activities. Thus, it does not appear that the children live at a standard below that which would be expected of parents with their respective incomes. As the benefits of Mr. Orszag's increased income are reflected in the children's lives, there has not been a substantial and material change in his ability to pay sufficient to modify the current child support arrangement.[24]

While Ms. Kennedy asserts that she is unable to provide the same level of child care that Mr. Orszag provides in his home, the Court does not find the distinction and difference sufficient to warrant Mr. Orszag providing additional child care for Ms. Kennedy. Ms. Kennedy has obtained the level of care that makes her life easier. Further, Ms. Marin-Malaver, hired to provide such care, often provides services that seemingly do not involve direct care for the

[24] The Court's analysis of this factor is predicated upon the assumption that subsection (t) applies to this case. If subsection (t) does not apply, and the *Cooper* standard is applicable, the Court's analysis remains the same. As the Court believes that any change in Mr. Orszag's lifestyle since 2008 is reflected in the advantages and opportunities provided to the children in 2012-2013, and thus that there has not been a substantial and material change in circumstances, the question of whether any changes that have occurred were unforeseeable is irrelevant. The Court further notes that it was likely not unforeseeable to the parties, given the positions to which Mr. Orszag had been appointed at the time the parties entered into the Second Amendment, that he could be enticed away from government service to receive significantly more lucrative employment in the private sector.

children. The Court did not credit Ms. Kennedy's testimony or reasons for more care because it seemed that she simply wishes to enjoy the same luxuries that her husband now enjoys. Further, the Court finds that the parties satisfactorily and sufficiently addressed their child care expenses in their 2008 Agreement.

With respect to vacation, Ms. Kennedy testified that the children's vacations with her should, in effect, mirror the vacations that they enjoy with Mr. Orszag in terms of luxuries, first class travel (she would opt for business class travel), and five star hotels. Again, the caselaw does not require that the children's vacations mirror dollar-for-dollar the vacations the children enjoy with the noncustodial parent. In fact, the children appear to travel very well with both parents. When Ms. Kennedy speaks of the disappointment on the children's faces when they arrive to their accommodations with her, the Court was left more with the impression that Ms. Kennedy was projecting her desires onto her children.

c. The Reasonable Needs of the Children

Ms. Kennedy's final contention is that there has been a substantial and material change in the needs of the children from 2008 until the present, because the children's expenses have risen considerably. The Court of Appeals has rejected the argument that "any award [of child support] must be based upon the child's documented expenses" when the parties' income exceeds the highest amount to which the Guidelines presumptively apply. *Galbis*, 626 A.2d at 31. Instead, when the Guidelines do not presumptively apply, the Court looks to whether there has been a change in the "reasonable needs of the children based on actual family experience." D.C. Code § 16-916.01(h). The Court does not, however, believe that these expenses can be considered in a vacuum. There is already a child support arrangement in place, and changes in the children's needs must be considered within the context of that arrangement.

i. Primary Residence Expenses

Ms. Kennedy represents that there have been two significant changes in her household expenses. First, both of the air conditioning units which service her home have malfunctioned over the last two years. Ms. Kennedy had one of the units replaced in the summer of 2013, and represents that the other will need to be replaced before the summer of 2014. These expenses are non-recurring, and may have already been paid in full. There is no indication that Ms. Kennedy will have any further immediate need for replacement appliances. The Court notes that, in *Prisco*, as evidence that the children's needs had substantially and materially changed, Appellant included a list of renovations performed on her home, including new appliances. The trial judge held that these costs did not reflect a substantial and material change in circumstances, in part, because he "was not convinced that the improvements were primarily for the benefit of the children." *Prisco*, 947 A.2d at 461. The Court of Appeals found "no reason to deviate" from that judgment, and noted that "the improvements to the home, even if they incidentally benefitted the children, are a capital investment that will increase the value of appellant's and appellant's husband's interest in their real estate." *Id.* Similarly, although replacement air-conditioning units do not necessarily rise to the level of a new pool, one of the listed expenses in *Prisco*, the fact remains that all members of the household, including Mr. Desimone, will benefit from the new air-conditioning units, and that an updated air-conditioning unit will likely have a positive effect upon the value of the home.

Ms. Kennedy also cites the need to repair the home's drainage because water pools in her front yard during rainstorms and infiltrates the basement of her home. This also seems to be a capital improvement, one which benefits all members of the household, and one which will continue to benefit Ms. Kennedy and Mr. Desimone long after the children have left the home.

The Court finds it very curious that Ms. Kennedy, despite how important she says the drainage problem is—she claims that it could "undermine the foundation of the home" and she represented that the landscaping company she retained to examine the issue recommended that she undertake the work immediately—has not yet contracted to complete the necessary repairs. She has the financial wherewithal to make the changes. In addition to her salary, she receives money from the Kennedy Trust and money from her husband to offset household expenses. Even if neither the Kennedy Trust nor Mr. Desimone has an obligation to support the children, the Kennedy Trust owns one-third of the home and Mr. Desimone resides in the home 50 percent of the time, and the money that she received from them ($24,486.32 in the time period reflected on her financial statement) would have covered a significant portion, if not all, of the household expenses. Further, Ms. Kennedy's financial statement reflects that she has been contributing $500.00 post-tax dollars each month to an "emergency fund," the assets of which could also be used to cover emergent household repairs. This is not Mr. Orszag's financial burden to bear.

ii. Household Necessities

Ms. Kennedy cites the children's increased food bill and further anticipated increases as a substantial and material change in circumstances. She notes that, between 2008 and 2012-2013, the portion of the monthly grocery bill attributable to the children has risen $110.09. Ms. Kennedy contends that the children's appetites have increased as they have aged, and that they have become more health-conscious as a result of their participation in sports. As such, Ms. Kennedy represents that she buys more groceries, and of a higher quality, which has led to higher bills at Whole Foods Market.

While the Court appreciates that children's appetites increase as they age, Ms. Kennedy has not shown how much, beyond the $110.09 increase each month, of the anticipated $433.33

increase has been actually reflected in her grocery bills. The Court further notes that Ms. Kennedy's 2008 credit card statements reflect approximately 100 charges at Whole Foods Market during that year, and thus rejects any argument that the children's focus on the quality of their food has resulted in any change in where she purchases such food.

iii. Medical Expenses

Ms. Kennedy claims that she anticipates "second wave" orthodontia expenses for Joshua in the upcoming year. Ms. Kennedy estimates that the cost of Joshua's orthodontia will cost approximately the same amount as Leila's orthodontia, a monthly cost of $370.00. Again, the parties have not incurred the expenses, and the Court is not in a position to determine whether Joshua's orthodontic needs will be the same, greater, or less than Leila's expenses. In any event, Ms. Kennedy did not state that she had been unable to pay the costs of Leila's orthodontia and the Court sees no reason that she could not make such payments for Joshua. The simplest course of action, however, would be to have Mr. Orszag use Tanglelane's medical plan to pay the entirety of the expenses, as he has requested to do.

iv. Child Care

Ms. Kennedy represents that the children's need for additional child care represents a substantial and material change in circumstances between 2008 and the present. She represents that the children need to be driven to their various extracurricular activities, which often overlap, and that it is stressful to coordinate transportation for the children on those days. Despite alluding generally to a couple of occasions during which the children were unable to attend activities due to logistical difficulties, Ms. Kennedy failed to provide the Court with concrete examples of times when the children were unable to attend activities or an accounting of how often these conflicts arose, and thus the Court cannot accurately assess what the children's child

care needs may be. Despite Ms. Kennedy's claim that the children require more care than in 2008, she seems to have reduced the number of hours that she employs a child care provider since 2008, rather than increase those hours.

Ms. Kennedy's testimony indicates that any issues stemming from the children's child care needs may be a result of misallocation rather than need. Ms. Kennedy represented that Ms. Marin-Malaver provides child care for the children on Mondays, from 9:00 a.m. until 6:00 p.m., and on Tuesdays, from 12:00 p.m. until 6:00 p.m. The children are in school from approximately 8:00 a.m. until approximately 3:00 p.m.; the children are thus out of school for only six hours of the time that Ms. Marin-Malaver is assigned to care for them. If the children's transportation is Ms. Kennedy's primary concern, Ms. Kennedy could reallocate her 16 weekly child care hours to coincide with the times the children are not in school and require transportation. In addition, Ms. Kennedy testified that she is able to provide her own child care on Wednesdays and Thursdays, thus obviating much of the need for child care on those days. The Court notes as well that Ms. Kennedy appears to have had success arranging carpools with other parents that allow the children to attend their activities. The Court also notes that the children carpool when in Mr. Orszag's custody—Mr. Orszag testified, during Ms. Kennedy's case-in-chief, that one of Kaleigh Bradley's duties when the children are in his care is to coordinate carpools—so the children would have very much the same experience regardless of in whose care they are.

v. Bar and Bat Mitzvah Expenses

Ms. Kennedy's financial statement reflects both charges for Leila's bat mitzvah trip to Israel and for Joshua's impending bar mitzvah. Leila's bat mitzvah occurred in 2013, and was a non-recurring expense. The Court further notes that, as a part of the Parties' 2013 Agreement,

Ms. Kennedy specifically agreed to pay the remaining cost of the Israel trip in exchange for being relieved of the burden of paying the balance of Leila's orthodontia.[25] A paid, non-recurring expense thus does not serve as support for Ms. Kennedy's claim.

Nor does the Court believe that Joshua's upcoming bar mitzvah expenses represent a substantial and material change in circumstances.[26] The Court recognizes that Joshua will have a bar mitzvah some time in 2015, and the parties will incur expenses in both 2014 and 2015 in preparation for the bar mitzvah. Not only are the costs non-recurring, they are also too speculative to constitute a substantial and material change in circumstances. Ms. Kennedy testified that she has obtained no firm estimates of costs for the bar mitzvah, and the Court heard no testimony that the parties have had any discussions regarding plans for the bar mitzvah. Instead, Ms. Kennedy's estimate on her financial statement is based upon discussions with other parents who have had b'nai mitzvah in the District of Columbia. The Court surmises that a bar mitzvah is a highly personal event, and decisions made by one family may not be appropriate for another. It also bears noting that Ms. Kennedy endorsed a figure without determining whether it would be an amount she would be able to pay. Further, unlike Leila's bat mitzvah, which was divided into an Israel trip with Ms. Kennedy and a party at the Gaylord National Hotel hosted by Mr. Orszag, in contrast, the parties appear to agree that Joshua will only have one party, which will be hosted by both parents. Thus, both parents will have to agree on the level of expenses to be incurred for the bar mitzvah. Because the Court cannot predict, with any degree of certainty,

[25] At the hearing, Ms. Kennedy made much of the fact that, despite Mr. Orszag's having agreed to pay the balance of Leila's orthodontia, he used Tanglelane's medical plan to pay the expenses rather than incurring them from his own pocket. As it relates to child support, this is a distinction without a difference. Ms. Kennedy agreed to take on a financial obligation for the children, in exchange for being relieved of an equivalent financial obligation, and the Court does not find it relevant that Mr. Orszag did not personally pay the orthodontia expense.

[26] The Court notes that the parties contemplated incurring such expenses, though the costs were unknown at the time, in 2006 when they executed the Agreement.

the expenses on which the parties will agree, the Court does not consider the costs for the bar mitzvah to be a substantial and material change sufficient to support a modification of the child support arrangement.

vi. Vacation Expenses

Ms. Kennedy represented that there has been a significant change in the children's vacation expenses between 2008 and 2012-2013. In 2008, Ms. Kennedy's monthly spending on the children's vacations was $188.71. However, Ms. Kennedy provided no testimony as to how frequently she vacationed with the children or as to where she and the children vacationed in 2008.

In 2012-2013, Ms. Kennedy's monthly spending on the children's vacations was $525.54, for trips to Maine, Washington state, and Hawaii. Ms. Kennedy further represents that she will need to incur additional expenses to ensure that her vacations with the children are "comparable" to Mr. Orszag's. Specifically, the extra money will allow her family to stay in more luxurious accommodations and to travel business class to their vacation destinations. Ms. Kennedy cites the children's reaction upon seeing their accommodations in Hawaii as proof that their needs include accommodations on their travels with Ms. Kennedy that are equivalent (or nearly so) to their accommodations when travelling with Mr. Orszag. She failed to disclose where it is she would travel were the Court to order direct support for such purpose. Her concern is seemingly how she flies and what her accommodations are, rather than where she travels.

Courts have recognized that children's needs with respect to vacations are difficult to determine. As the Court of Special Appeals noted in *Smith*, "[e]ven among middle-class populations, there is a range of tastes with varying costs. While some Marylanders are amply satisfied with a vacation in Ocean City, others prefer to vacation in places like Martha's

Vineyard, despite the fact that both beaches front on the Atlantic Ocean." *Smith*, 814 A.2d at 83. Simply put, Ms. Kennedy has not cited any case in which a court has determined that children of divorced parents are entitled to additional child support to allow both parents to take them on the same caliber of vacation.[27] The Court further notes that Ms. Kennedy and the children were accompanied on the Hawaii vacation by Mr. Desimone and his children. It is not unreasonable to assume that the decision about how to fly and where to stay stem from the preferences of all involved. Given that the children enjoy vacations with both Ms. Kennedy and Mr. Orszag, the Court does not find that additional vacation expenses are a reasonable need of the minor children.

vii. Camp Expenses

Ms. Kennedy represents that the children's camp expenses have increased significantly since 2008, reflecting the children's attendance at sleepaway camp. While the Court recognizes that sleepaway camp expenses have increased, it does not appear to the Court that such expenses are substantial and material. Ms. Kennedy's financial statements reflect that the cost of sleepaway camp has not only increased since 2008, but that such expenses will increase again between summer 2013 and summer 2014—Ms. Kennedy's line-item for camp expenses reflects that Leila will be attending two sessions of camp, rather than the one-and-a-half sessions she attended in 2013. Ms. Kennedy has not indicated that this anticipated amount is one that she is unable to afford. Indeed, the Court notes, the children's presence at sleepaway camp may have some partially-offsetting financial implications—during their time at camp, the children will not be in the home to consume food or utilities and will not require child care.

The Court further notes that, while camp expenses are recurring, they do not recur

[27] The Court notes that Mr. Orszag testified that the children engaged in similar behavior while on a trip to Florida to visit his brother. He further testified that he informed them that such behavior was not acceptable, and that the children ceased the behavior.

indefinitely. Leila is 14 years old and, although the Court heard no testimony regarding how old the oldest campers at Camp Matoaka are, the Court cannot imagine that she has many summers of camp remaining. As part of Ms. Kennedy's examination of Mr. Orszag during her case-in-chief, she asked Mr. Orszag if he had considered the costs of summer programs, summer internships, or other enrichment opportunities that may present themselves for Leila in the upcoming years. This signals to the Court that there may be a significant range of activities that Leila and, eventually, Joshua may undertake during the upcoming summers, each of which will impact the family's overall cost of summer activities in a different way. The Court thus cannot say that any change in the children's camp expenses is sufficiently substantial and material as to require a modification of the current support arrangement.

viii. The Children's Tuition

Finally, Ms. Kennedy claims that the depletion of the Trust's assets, which were used to fund the children's private school education, constitutes a substantial and material change in circumstances. Mr. Orszag notes that, assuming that subsection (t) applies in this case—and thus that the *Cooper* standard does not apply—"the near-depletion of the trust could arguably be deemed a substantial and material change in circumstances affecting the needs of the children, and therefore a change sufficient to warrant modification." Mr. Orszag contends that, in the event that the Court concludes that the depletion of the Trust constitutes a substantial and material change in circumstances, the Court should either order him to replenish the Trust or to pay the children's tuition directly.

The Court concludes that the depletion of the Trust does constitute a substantial and material change in circumstances.[28] The cost of the children's tuition is significant and, though it

[28] Again, the Court's analysis proceeds on the assumption that subsection (t) applies to this case. If the Court were to find that the *Cooper* standard applies, here, and it does not so find, the Court

will not recur indefinitely, it will involve a significant cost to the parties until Joshua graduates from high school. Further, the costs will only rise in the near future as the children transition from middle school to high school. Finally, the Court notes that 50 percent of the children's tuition constitutes a cost that Ms. Kennedy has never personally borne, and represents approximately 10 percent of her adjusted gross income. The Court therefore will order Mr. Orszag to pay the entirety of the children's tuition.

Further the Court will order him to pay the costs of the children's camp expenses, unreimbursed medical expenses, and costs of all extracurricular activities, because he requested such and because it in essence obviates the need for the parties to resume the laborious and contentious reconciliation process.

III. Conclusion

Ultimately, although there has been a substantial and material change in circumstances meriting a modification of child support, Ms. Kennedy has failed to articulate a basis for the Court to proceed on her motion in the way that she seeks, and thus the Court is constrained to deny her Petition. For all of the reasons listed in Section I of the Court's Analysis and Conclusions of Law, there is no reason for the Court to order Mr. Orszag to pay child support directly to Ms. Kennedy. Indeed, given the contentious nature seemingly of all interactions between the parties, it is likely in the best interest of the children for the Court to avoid putting in place any arrangement that would lead to increased contact between the parties. The Court will

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would be constrained to leave the current child support arrangement in place. The only substantial and material change in circumstances that the Court has found to have occurred between 2008 and the present is the depletion of the Trust. Given the amount of money with which Mr. Orszag funded the Trust, and the cost of the children's tuition, the Court agrees that it was foreseeable that the Trust would be depleted before the children finished high school. As this change was not unforeseeable, the Court could not modify the child support arrangement under *Cooper*.

also decline to order Mr. Orszag to replenish the Trust. Ms. Kennedy testified that there is "animosity" between herself and Mr. Orszag's brother, who serves as trustee. While this argument strikes the Court as more self-serving, employed mostly to justify direct child support payments to her, the Court will simply not consider replenishing the Trust. Further, it is unclear if the trust documents allow the Trust to receive a new infusion of money and, if not, whether subsection (t) grants the Court the authority to order such. Even so, were the Court to determine that it had authority to modify the terms to permit replenishment of the trust, there is no need to do so, when tuition payments can be made directly to the institution.

The Court does have the authority, *sua sponte*, to modify a provision of a settlement agreement in order to ensure that the agreement meets the needs of the minor children. *See Wilson*, 987 A.2d at 1165. As such, as noted above, the Court will order Mr. Orszag to pay the children's tuition directly for the pendency of their middle and high school education, as well the costs of all camp expenses, unreimbursed medical expenses, and all costs associated with the children's extracurricular activities. The Court finds that such relief is most appropriate for multiple reasons. This arrangement keeps in place the parties "no direct child support" structure, to which they previously agreed, on two occasions, as part of their arm's-length negotiations.

Finally, the Court notes that, of all the increases in the children's expenses listed on Ms. Kennedy's financial statement, the new line item for the children's private school tuition is the largest, representing approximately 28 percent of the total increase. When considering the additional expenses that the Court is ordering Mr. Orszag to pay, Ms. Kennedy enjoys a 40 percent savings of the claimed increase in the children's monthly expenses incurred since 2008. Given that Ms. Kennedy will not be responsible for such expenses, she can divert monies she otherwise anticipated expending for those items to procuring additional child care or

spending more money on vacations, if she in fact desires such.[29]

The Court will also deny Ms. Kennedy's request for retroactive child support. Under Ms. Kennedy's interpretation of D.C. Code § 16-916.01(v)(1), Ms. Kennedy's Petition was the commencement of a "case to establish child support" because no support order has ever been entered in this case. The Court does not find this to be the correct interpretation of the statute. It is undisputed that Mr. Orszag has been providing support for the children since 2008, and, indeed, since their birth. Since the Agreement, he has been supporting the children in the way the parties envisioned contractually. Even were the Court to agree with Ms. Kennedy's interpretation of the statute, the Court, in its discretion, will decline to award her retroactive support. The purpose of retroactive child support is to reimburse a parent for monies expended to meet the child's needs that would have otherwise been paid for by the other parent. However, in this case, Ms. Kennedy did not incur any direct expenses relating to the children's tuition—the Trust paid the tuition until the 2013-2014 academic year, for which term Mr. Orszag paid the tuition.

IV. Attorney's Fees

Finally, the Court turns to Ms. Kennedy's request for attorney's fees. "This jurisdiction follows the American Rule under which . . . every party to a case shoulders its own attorney's fees, and recovers from other litigants only in the presence of statutory authority, a contractual arrangement, or certain narrowly-defined common law exceptions." *Pajic v. Foote Props., LLC*, 72 A.3d 140, 145 n.6 (D.C. 2013) (quoting *Nest & Totah Venture, LLC, v. Deutsch*, 31 A.3d 1211, 1229 (D.C. 2011)) (internal quotation marks omitted). Here, the Agreement does not

[29] The Court notes that Mr. Orszag also expressed a willingness to pay the cost of the children's college tuition, which would remove another significant financial burden from Ms. Kennedy. This is not an immediate expense. As such, at this time the Court will leave it to the parties to explore how they will finance the children's college education when the time comes.

provide an exception to the American Rule here, as it appears only to provide for "reasonable expenses related to the enforcement" of the Agreement, rather than expenses incurred in attempting to modify the Agreement.

Ms. Kennedy relies on D.C. Code § 16-916, which provides, as follows:

> Whenever a spouse or domestic partner shall fail or refuse to maintain his or her needy spouse, domestic partner, minor children, or both, although able to do so, or whenever any parent shall fail or refuse to maintain his or her children by a marriage since dissolved, although able to do so, the court, upon proper application and upon a showing of genuine need of a spouse or domestic partner, may decree, pendente lite and permanently, that such spouse or domestic partner shall pay reasonable sums periodically for the support of such needy spouse or domestic partner and of the children, or such children, as the case may be, and the court may decree that he or she pay suit money, including counsel fees, pendente lite and permanently, to enable plaintiff to conduct the case.

D.C. Code § 16-916(a) (emphasis added). Although this provision creates an exception to the American Rule, this case does not seem to fall within the ambit of § 16-916. Mr. Orszag did not fail to maintain the minor children; indeed, when the Trust became sufficiently depleted as not to have the funds to pay the children's tuition, Mr. Orszag paid the entirety of the children's tuition.

In any event, when considering the factors set forth by the Court of Appeals, Ms. Kennedy is not entitled to attorney's fees. The Court of Appeals has instructed that, in deciding whether to award attorney's fees, it is proper for the Court to consider, among other factors, "whether the litigation has been oppressive or burdensome to the party seeking the award" and "the motivation and behavior of the litigating parties." *See Cave v. Scheulov*, 64 A.3d 190, 195 (D.C. 2013); *Steadman v. Steadman*, 514 A.2d 1196, 1200 (D.C. 1986).

In this case, there can be no doubt that the litigation has been lengthy, but the Court cannot conclude that it has been particularly burdensome and oppressive to either side, as both parties have incurred significant attorney's fees and costs, though neither has claimed that they have been, or will be, unable to pay their legal bills.

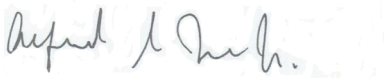
This Court has found Ms. Kennedy's insistence on receiving $22,000.00 in direct monthly child support to be curious. Mr. Orszag has, regardless of whether as a litigation strategy (as Ms. Kennedy alleges) or as a genuine desire to provide for his children, offered to pay significant costs of the minor children, as early as his response to the Petition, which he filed in November 2012. Ms. Kennedy opposed the offer. Instead, Ms. Kennedy chose to seek a direct child support payment that would result in her, despite earning over $350,000.00 annually and having portions of her household expenses offset by the Kennedy Trust and her husband, making a total monthly contribution to her children's needs of $3,153.22. Contained within her request for a direct child support payment are a number of anticipated expenses, non-recurring expenses, capital improvements which will benefit Ms. Kennedy and her husband for longer than they will benefit the children, and expenses which are unrelated to the children. Further, along with a child support order, Ms. Kennedy sought a retroactive child support award of $459,460.00, which would constitute a significant windfall.[30] The Court is left with the impression that Ms. Kennedy's motivation in bringing this lawsuit was, upon seeing Mr. Orszag's increase in income, to use a motion to modify support as a method of relitigating the equities of the alimony provision of the Agreement, which is improper. *Cf. Graham*, 597 A.2d at 357 n.5 ("A motion for modification of support, therefore, is not to be used as a pretense to relitigate the equities of the prior decree."). Thus, given the motivations and behavior of the parties, the Court finds that Ms. Kennedy is not entitled to an award of attorney's fees. Both parties shall bear their own costs.

[30] Ms. Kennedy sought a $22,000.00 monthly payment, retroactive for 24 months, offset by the children's 2013-2014 tuition, which Mr. Orszag paid.

ACCORDINGLY, it is this 10th day of July, 2014, hereby,

ORDERED that Plaintiff's Petition to Establish Child Support is **DENIED**; and it is

FURTHER ORDERED that Defendant shall pay 100 percent of the children's private school tuition for the duration of the children's middle and high school careers, camp expenses, unreimbursed medical expenses, and all costs associated with the children's extracurricular activities.



Alfred S. Irving, Jr.
Associate Judge
(*Signed in Chambers*)

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