TAB 12

Section 9 Issues Arising from *Contino*

Jaret N. Moldaver
Teplitsky Colson LLP

The Six-Minute Family Law Lawyer

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SECTION 9 ISSUES ARISING FROM *CONTIN0*

By: Jaret Neil Moldaver

In *Contino* v. *Leonelli-Contino* ("*Contino*"), the Court of Appeal for Ontario interpreted the shared custody provisions in section 9 of the *Federal Child Support Guidelines.*

Section 9 reads as follows:

Where a spouse exercises a right of access to or has physical custody of a child for not less than 40 per cent of the time over the course of a year, the amount of the child support must be determined by taking into account

(a) the amounts set out in the applicable tables for each of the spouses;

(b) the increased costs of shared custody arrangements; and

(c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

The Facts of *Contino*:

- The parties were married on October 30, 1982.
- They have one child, Christopher, born March 26, 1986.
- They separated in January of 1989.
- They entered into a separation agreement in May of 1992.
- They divorced on January 7, 1993.

- The separation agreement provided that the parties would have joint custody of Christopher, with Christopher to reside with the mother, with liberal access to his father. The agreement further provided that these provisions could be reviewed and varied at any time by either party without necessarily establishing a material change of circumstances.

- The separation agreement provided that the father would pay child support in the monthly amount of $500.00, to continue until certain events, none of which became relevant on appeal.

- The support as agreed upon was subject to an annual adjustment for cost of living, but no adjustment was ever made.

- In 1998, the mother brought an application to vary the amount of child support. That same year, the parties entered into minutes of settlement wherein the father agreed to pay the monthly sum of $563.00, representing the base rate on his then income of $68,712.00. The parties also agreed to share equally Christopher's orthodontic expenses, notwithstanding the fact that the mother earned less than the father. Child support could be reviewed each year in accordance with the *Federal Child Support Guidelines*.

- In March 2001, the father brought an application to vary the amount of child support, grounded by his assertion that Christopher was living with him for 50% of the time.

- Mother, who was self represented, advised the court that father agreed to care for Christopher for one additional evening per week so that she could attend a course. Mother said that father did not advise her at the time that he would be seeking a reduction of child support.

- Both parties filed financial statements, wherein they each attributed 50% of their respective fixed and variable costs to Christopher. The mother stated that she spent an additional $275.00 per month on items for Christopher and invested $153.84 in his RESP each month. Father represented additional sums of $120.00 per month.

Motion Before Rogers J.

- Rogers J. found that the father's income was $87,315 and that the mother's income was $68,000. The table amounts were $688.00 per month and $560.00 per month respectively.

- Rogers J. essentially accepted the father's position to set off the two numbers [$128.00], pro rate the amount by 50% [$64.00] and add a 50% multiplier [$32.00] to account for additional costs of Christopher living in two homes = $96.00 per month, rounded to $100.00 per month, retroactive to September 2000.

Mother's Appeal to the Divisional Court

- Without the benefit of the motion transcript, the Divisional Court found that there was neither evidence, nor analysis, regarding the factors set out in sections 9(b) and (c) of the *Guidelines*.

- The Divisional Court adopted the approach used in *Francis* v. *Baker*, a case determined under section 4 of the *Guidelines*, and applied the following procedure: (1) make a **presumption in favour of the *Guideline* amount**; (2) impose an onus on the party seeking the deviation to establish on clear and compelling evidence that the deviation is in the child's best interest; (3) consider

all the statutory factors noted in the section establishing a permitted deviation without providing pre-eminence to any factor; (4) deny any application for deviation based merely upon invocation of the discretionary provision; and, (5) focus on the child's actual circumstances and not perceived parental fairness considerations, such as balancing of parental means.

- The Court then set out the following three step analysis: (1) Does the applicant exercise physical custody of the child for not less than 40% of the time (onus on the applicant to prove)?; (2) if the 40% test is met, has the applicant rebutted the presumption in favour of the table amount, with clear and compelling evidence that the deviation would be in the best interest of the child?; and, (3) only if the first two steps are met should the Court consider sections 9(a), (b) and (c) in its discretion.

- The Court held that the motion judge erred in not applying the second step of the above noted analysis; that the judge was wrong to depart from the table amount where there was no clear and compelling evidence that the deviation would be in the child's best interest. The Court allowed the appeal, restored the 1998 order and ordered the father to pay the base rate of $688.00 per month, retroactive to September, 2000.

Father's appeal to the Court of Appeal for Ontario

- The Court disagreed with the findings of the Divisional Court that the same approach should be used in all discretionary sections of the *Guidelines*. That would dismiss the differences in the wording of each section.

- No presumption can be found within the wording of section 9.

- Where the 40% test has been met, child support **must** be determined in accordance with section 9. Therefore, there is right of deviation merely upon invocation of the provision.

- Motion judge erred in essentially applying a section 8 set off approach. There is no discretion in section 8. If the court were to adopt the section 8 approach, it would ignore the fact that shared custody may result in overall costs of caring for a child that are greater than the *Guideline* amount that an individual parent would otherwise be obligated to pay and the actual spending patterns of the parents.

- Use of a multiplier may be appropriate.

The Court's Section 9 Analysis

- Section 9 requires a two part determination: (1) establishing that the 40% test has been met; and (2) where it has been met, determining the appropriate amount of support to be paid.

Subsection 9(a): The Table Amount

- Under 9(a), the Court **must** take into account the table amounts.

- A section 8 set off formula can be a good starting point, but a formula should not be used if it would lead to a result that is inconsistent with the objectives of the *Guidelines* or contrary to a child's best interest.

- The formula must then be modified to reflect consideration for the factors set out in sections 9(b) and (c).

- The Court would also be open to a *Paras* type formula where the child's expenses are greater than the table amount for either parent, i.e. to calculate support by determining a sum that represents the total needs of the child and then dividing it in proportion to the respective incomes and resources of the parents. The Court would then decide whether further adjustments are necessary, having regard to the costs already assumed by a parent and the increased costs of exercising access.

Subsection 9(b): Increased Cost of Shared Custody

- Under 9(b), the Court **must** take into account the increased costs of the shared custody arrangement. As was noted by the British Columbia Court of Appeal in *Green* v. *Green* (2001) 6 R.F.L. (5th) 197, and by the Newfoundland Court of Appeal in *Slade* v. *Slade* (2001) R.F.L. (5th) 187, subsection 9(b) recognizes that the total cost of raising children in shared custody situations is greater than where there is sole custody.

- The custodial parent's costs are not reduced on a dollar for dollar basis, i.e. fixed expenses.

- A **multiplier** may be effective to recognize the impact on the custodial parent. The multiplier may further the *Guideline* objectives of predictability and consistency. The multiplier may be used to recognize the inflexibility of some of the custodial parent's fixed costs. In the absence of evidence concerning the fixed costs of the responding parent, the most common multiplier is 50%, which is applied to the set off amount.

- Should be a fact specific analysis.

Subsection 9 (c): Condition, Means, Needs and Other Circumstances

- Under 9(c), the Court **must** consider the condition, means, needs and other circumstances of each spouse and of any child for whom support is sought.

- The goal, in so far as possible, is a comparable standard of living in both of the child's homes.

- In the absence of evidence to the contrary, there should be a presumption that the fixed costs of the responding parent have gone unchanged and that the variable costs of the responding parent have been reduced only modestly by virtue of the increased access.

- The Court may take into account the actual spending patterns of the parents.

- The Court may take into account incomes over $150,000, other income earners in the household and other persons who are contributing to the support of the child.

- In some cases there will be less money to the payee parent which may trigger a section 10 undue hardship claim and analysis. The factors listed in section 10 are not exhaustive.

Application of the Section 9 Factors

- No reason not to start with the set off formula ($688.00 - $560.00 = $128.00).

- The mother's costs for accommodations ($845.00) were found to be higher than 50% of her variable costs for Christopher, i.e. 67.6% of her total expenditures of $1,260.00, exclusive of RESP contributions. Therefore, a multiplier of 67.6% was deemed appropriate ($128.00 x 67% = $86.62.

- So the Court begins with a set off amount of $128.00 and adds to that the sum of $86.62. Rounded the Court produces a figure of **$215.00**.

- With little evidence filed by the father in support of his increased costs, the Court assumed that he had incurred additional variable costs, i.e. food and entertainment.

- The Court then looked at the actual spending patterns of the parents regarding variable expenses such as food, clothing, school fees, school lunches, school activities, entertainment, summer camp, haircuts, birthday gifts, gifts for family occasions and dental bills. The mother's total of such variable expenses was $403.41 on a monthly basis. The father's total was $270.00 on a monthly basis, for a grand total of $673.41. The Court found that these expenses should be shared by the parties in proportion to their respective incomes, and, therefore, on a 55:45 split. Accordingly, the father should be responsible for $370.00 rounded and the mother should be responsible for $303.00. Since the father was actually spending $270.00, he should pay the mother **$100.00**.

- The Court further held that the father should contribute his 55% share of the RESP expense. 55% of $153.84 = **$84.61**.

Calculation:

set off amount	$128.00
multiplier	$ 86.62
rounded	**$215.00**
father's share of total variable costs	$100.00
father's share of RESP expense	$ 84.61
TOTAL	**$399.61**

Other Appellate Decisions

Decisions of other appellate courts show inconsistency of interpretation where section 9 of the *Guidelines* is concerned. In *Green* v. *Green*, supra, the British Columbia Court of Appeal rejected a simple set off approach, and, instead, applied a very discretionary, case by case, need and means analysis. In *Slade* v. *Slade*, supra, the Newfoundland Court of Appeal applied a straight set off approach to address the issue of support in a shared parenting situation. In *Slade*, the Court found that, as a general statement, the *Guidelines* can be said to make the calculation of child support easier and more objective, which should reduce litigation and costs to the parties, and, in light of the fact that the costs of raising children is often under-estimated by parents, meet the goal of ensuring adequate support for children. As was noted by Paul McInnis, a family law lawyer in Toronto, it is difficult to see how *Contino* has followed that general statement.[1]

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[1] A summary of *Green* and *Slade* and comments made by Paul McInnis in his paper titled *"Life After Contino - A Good Reason For Not Recommending Shared Custody"* prepared for the Open Bar Series October 4, 2004.

Adequacy of the Evidence

After reviewing *Contino* and other decisions of appellate courts, it appears as though this apparently complicated exercise is only compounded by the inadequacy of available evidence. This problem was specifically and further addressed by the Manitoba Court of Appeal in *Cabot* v. *Mikkelson* [2004] M.J. No. 240, where the Court remitted the issue back to the motions judge finding that the presentation of the case suffered from the very lack of evidence described in *Contino*.

Subjectivity and uncertainty are inherent in the wording of section 9. To add some level of predictability and certainty to the result, and while it may not always be practical or feasible from a cost benefit standpoint, lawyers presented with a shared custody situation should consider marshaling extensive budgetary and other relevant evidence to, firstly, provide the Court with the information it needs to properly conduct a *Contino* type analysis, and, secondly, to avoid assumptions made by Court which may be erroneous in fact. A review of the noted inadequacies lends argument to adducing the following:

1. For both the applicant and the respondent, a comprehensive budget, with a clear breakdown of both fixed, i.e. housing, and variable, i.e. food, clothing and entertainment, costs. This will assist the Court in its examination of actual spending patterns and in its determination of the appropriate multiplier.

2. For the applicant, a specific, item by item, analysis showing increased fixed and variable costs (actual or proposed) as a result of the shared custody arrangements. Given the wording of section 9(b) which refers to "increased" costs of shared custody, the applicant must show what his or her costs are for time spent with the child in excess of 40%. Thus, if the applicant already provided the child with his or her own bedroom before the shared custody regime, this would not be an increased cost. Conversely, if the applicant had to

rent or purchase more expensive accommodations so that the child could now have his or her own bedroom, this may be an accepted added cost. In the absence of evidence, courts will only assume that variable costs have increased minimally. Rebutting the presumption, with proof, rests with the applicant.

3. Given the assumption that the respondent's variable expenses will be reduced only modestly by the increase in access, the applicant will need to lead evidence that clearly demonstrates to the contrary, i.e. the decrease in the respondent's expenditure for after school programs/care or evening babysitters.

4. For the respondent, whether he or she intends to raise an undue hardship argument or not, a specific, item by item, analysis demonstrating little to no change in his or her fixed and/or variable costs notwithstanding a shared custody arrangement.

It is incumbent on the parties to lead evidence relating, in particular, to subsections 9(b) and (c). In the absence of such evidence, courts may either make assumptions or dismiss the application for lack of evidence.