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TAB 1

Family Law Refresher 2020

What You Need to Know About the Law of Custody and Access and Support

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FAMILY LAW REFRESHER 2020

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~ Fareen L. Jamal[1]

Custody and Access

Overarching Principle: Best Interests of the Child

The legislation mandates that the "best interests of the child" govern custody and access issues. Because each case must be decided on its own merits and has no precedential value, the law governing custody of children is hard to apply. The conditions, means, needs, and other circumstances of the child – including the history of the relationship – are all relevant to a determination on custody and access. Therefore, each case, when dealing with custody and access, must be reviewed on its own merits and the file's particular facts.

Legislative Authority

The Ontario *Children's Law Reform Act* and federal *Divorce Act* principally govern child custody and access matters. Both make the "best interests of the child" the sole test for determining custody and access. Generally speaking, the *Divorce Act* will govern custody matters respecting children of spouses who have applied for a divorce, and the *Children's Law Reform Act* will apply to all other situations.

On June 21, 2019, *An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act* ("Bill C-78") received Royal Assent. Bill C-78 will introduce substantial changes to federal family law legislation including the *Divorce Act*. Specifically,

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considerations relating to the “best interests of a child” have been expanded. These changes come into effect on July 1, 2020.

The *Child and Family Services Act* also deals with custody and access in connection with the adoption process, and in connection with the child protection process.

Apart from statute, superior courts have an innate *parens patriae* jurisdiction regarding children that descends from English Chancery courts’ *parens patriae* and wardship jurisdictions. This is mainly for “uncontemplated situations” that call for the protection of children. The legislation, however, is broad enough to achieve most aims; and where statutory jurisdiction exists, it ought to be used.

Definition of Custody

“Custody” is often misunderstood to be where a child lives. In fact, legal “custody” is synonymous with decision-making. The *Children’s Law Reform Act* defines custody only by reference to the “rights and responsibilities of a parent”, which amounts to the authority to make major decisions concerning the child. The term does not refer to where a child lives, although the child usually lives with the parent who has custody. However, in theory, a parent can have custody of a child who lives primarily with the other parent.

With the changes to the *Divorce Act,* pursuant to Bill C-78, that legislation removes the words “custody” and “access” from that Act, and new terminology is introduced as follows:

- “contact order” will provide for contact between a child of the marriage and “a person other than a spouse”.
- “Decision-making responsibility” will be the responsibility for making “significant decisions” about a child’s well-being, including health, education, culture, language, religion and spirituality, and significant extra-curricular activities.

- "Parenting time" is the time a child is in the care of a spouse, whether or not the child is physically with that person during that entire time.
- "Parenting order" is an order providing for the exercise of parenting time or decision-making responsibility by a spouse or person standing in the place of a parent in respect of a child of the marriage.

Major or significant decisions that must be made for a child are:

i) Educational decisions (such as which school the child will attend);

ii) Medical decisions of a non-emergency nature (such as whether or not certain vaccinations will be administered);

iii) Decisions regarding religious upbringing (such as whether or not a child will be baptized); and

iv) Decisions regarding extracurricular activities.

These rights and responsibilities must be exercised in the best interests of the child, and where they are not, the state may intervene to protect a child.

There may be restrictions on decision-making, such as the requirement to obtain the input of the other parent. Court orders and separation agreements can also assign some decision-making powers to one parent and other decision-making powers to another parent. Courts look for arrangements that minimize the conflict for the child while trying to maintain a meaningful relationship between the child and each parent.

<u>Who May Apply for Custody?</u>

Any person, not just a child's parents, may apply for custody of, or access to, a child. It is not necessary for a person who has performed the functions of a

parent to have a genetic relationship with the child before being able to apply for a custody order. The needs of the child may suggest that a step-parent, for instance, obtain custody: the needs of the child trump any view of the importance of genetic ties. Note, however, that under the *Divorce Act*, a person wishing custody who is not a spouse must obtain leave of the court to apply.

The *Children's Law Reform Act* does acknowledge the right accorded to parents to raise their own children, and section 20(1) provides that, "the father and the mother of a child are equally entitled to custody of the child". Therefore, parents have the initial right to custody.

De Facto Custody

The *Children's Law Reform Act* provides that parents who are living with the children have the authority to make all the decisions. If one parent leaves the matrimonial home (or family home if the parties are not married), leaving the children in the care of the other parent, the leaving parent forfeits all rights to custody until a separation agreement or court order provides otherwise. The staying parent has "de facto custody". The leaving parent has consented, implied consent, or at least acquiesced, to the other parent having custody.

The provision in the law giving the staying parent temporary custody is one reason why separated parents continue to live under the same roof: neither wants to give up custody of the children.

Status Quo

Courts and child professionals believe that it is best to keep parenting arrangements as similar as possible as to what existed during the marriage. Considering the important factors in a child's best interests there is a particular emphasis on "stability", with the understanding that continuity of care is highly important to normal, healthy child development. Therefore, the status quo

typically governs what may occur regarding custody, at least on a temporary basis.

Access Schedule

The schedule by which children reside with their parents, is referred to as an "access schedule" although this may also be described as the residential schedule or parenting time. The access schedule is not subject to any specific formula, but determined in each child's best interest, and changes over time as the child's needs, interests and desires change, responding to the vicissitudes of life.

A "shared parenting" regime is one that describes arrangements wherein a child spends equal amounts of time with each parent, and each parent equally involved in the care and upbringing of the child.

Factors

For a judge, determining which outcome of the dispute would be in the best interests of a child, is an exercise of discretion after the consideration of relevant factors.

The best interests of the child test is not a determination of what in all the world would be best for this child (in which case the stranger-down-the-street, or the babysitter, may in fact be the individual who knows this child best, and therefore be granted custody for this child, or if the child has a certain aptitude, should be raised by great athletes or musicians or artists with the same aptitude), but instead, which of the real and limited alternatives proposed by these adults would be in the child's interests? Practical reality constrains the possibilities of the actual situation.

The *Divorce Act*, in section 16(3) enumerates the following 11 non-exhaustive factors to be considered:

(a) the child's needs, given the child's age and stage of development, such as the child's need for stability;

(b) the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;

(c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;

(d) the history of care of the child;

(e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;

(f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;

(g) any plans for the child's care;

(h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;

(i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;

(j) any family violence and its impact on, among other things,

a. the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
b. the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and

(k) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

The *Children's Law Reform Act*, in section 24(1) enumerates eight specific factors that must be considered when determining the best interests of a child. These include:

(a) the love, affection and emotional ties between the child and,

i. each person entitled to or claiming custody of or access to the child,

ii. other members of the child's family who reside with the child, and

iii. persons involved in the child's care and upbringing;

(b) the child's views and preferences, if they can reasonably be ascertained;

(c) the length of time the child has lived in a stable home environment;

(d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessaries of life and any special needs of the child;

(e) the plan proposed by each person applying for custody of or access to the child for the child's care and upbringing;

(f) the permanence and stability of the family unit with which it is proposed that the child will live;

(g) the ability of each person applying for custody of or access to the child to act as a parent; and

(h) the relationship by blood or through an adoption order between the child and each person who is a party to the application.

These are not exhaustive lists as the sections require consideration of all the needs and circumstances of the child, including those enumerated. However, because these express factors have been expressly identified, they are typically seized upon as being important ones to explore. There is no guidance as to whether some factors are to be weighted more heavily than others, for example the comparing of such values as stability and genetic relationship.

Other factors singled out in the legislation are: past conduct; violence or abuse; and maximum contact.

According to *Marshall v. Marshall*, the test applied by the Courts on an interim order is: what temporary living arrangements are the least disruptive, most supportive, and most protective of the child? Generally, the Court will favour that the status quo be maintained as closely as possible, which often means that an interim Order will favour the parent who has *de facto* custody following separation.

It is frequently my experience that, because (at least in part) the Judges fully appreciate the potential impact that an interim custody Order will have, they are reluctant to make an Order for custody on an interim basis. Instead, they will often make Orders specifically addressing residence, decision making, and parenting time, rather than custody specifically.

It is also my experience that, when the Court makes an Order that reflects the incidents of custody (such as primary residence and perhaps limited decision making) rather than custody, it can still have benefit for the client. First, it creates some certainty and stability and second, it still creates a status quo, although perhaps less of a formally recognized one. The Court's desire to provide continuity and stability on a successful interim Motion for custody still puts the

client in a better position for a future custody Order than one with no ordered status quo.

Past Conduct

A court is only to have reference to "the past conduct of a person" if the conduct of the person is relevant to the person's ability to act as a parent. This provision is similar in both the *Divorce Act* and the *Children's Law Reform Act*.

Earlier legislation and case-law, decided that "marital misconduct", "as a matter of justice", might bear directly on a woman's entitlement to custody.

Violence or Abuse

In assessing a person's ability to act as a parent, the court shall consider whether the person has at any time committed violence or abuse against,

(a) his or her spouse;

(b) a parent of the child to whom the application relates;

(c) a member of the person's household; or

(d) any child.

Bill C-78 introduces extensive changes to section 16(4) of the *Divorce Act* addressing family violence. In determining family violence, the Court is directed to consider:

- Nature, seriousness and frequency
- Whether pattern of coercive, controlling behaviour
- Whether directed to child
- Whether child directly or indirectly exposed
- Harm or risk of harm to child
- Compromise to safety of child or family member

- Whether causes child or family member to fear for safety
- Step taken by abuser to prevent further family violence and improve ability to care for child
- Any other relevant factor

Maximum Contact

A key consideration regarding whether a person can act as a parent is whether a person can not only encourage, but facilitate, the child's relationship with other people that are important in that child's life. In particular, the analysis is whether a parent supports the child having a relationship with the other parent.

Following the changes to the *Divorce Act* following Bill C-78, the "maximum contact" heading has been removed, and this is only one factor to be considered as the legislation introduced additional valued that affect parenting. Until then, Courts believed Parliament had indicated that maximum contact with both parents was generally in the best interests of the child. The test focused on maximizing contact with both parents and minimizing disruption to the child. There is no provincial counterpart to this "friendly parent" rule.

In evidence before the Court, one wants to demonstrate that his/her client will facilitate a relationship and meaningful contact between the children and other parent.

Sole Custody

In this situation, the parent who has custody has the legal right to make all the major decisions about how to raise the child. That parent will have ultimate parental responsibility for the care, upbringing and education of the child, generally to the exclusion of the other parent to interfere in these decisions. Typically, the child lives with this parent. The child may spend time with the parent who has access, and may even regularly stay at his or her home. But the

main responsibility for raising the child and the right to make important decisions regarding the child belongs to the parent with sole custody.

Joint Custody, Shared Parenting, Co-parenting, Parallel Parenting

All of these terms divide the responsibilities between the parents in such a way that they are shared.

Parents who have joint custody share the rights and responsibilities of custody even though they live apart. Both parents have the right to make decisions about their child.

Joint custody is not about the time the child spends with each parent. The child might live half the time with each parent or most of the time with one parent. Either way, both parents have the right to make decisions about important matters concerning their child.

For arrangements where responsibility is shared, it is necessary for the parents to cooperate. Courts have been clear that if parents cannot cooperate, then joint custody or shared parenting will not be an option for them. Where parents have such a high level of conflict that they cannot work together to parent a child, the Court will not order joint custody. [*Kaplanis v. Kaplanis* (2005), 10 R.F.L. (6th) (C.A.)]

Joint custody in high conflict circumstances exposes the children to too much unhealthy conflict. If there is even a slight hope that the parents will be able to get along in the future, courts are willing to order joint custody. Courts are particularly likely to order joint custody where either of the parents would use sole custody to marginalize the other parent in the children's lives. [*Young v. Young* 2010 ONCA 602.]

Despite a great deal of lobbying by fathers' rights groups for a joint custody presumption, currently, no presumption in favour of joint custody exists, and

there are serious objections to its implementation. Where the arrangement is not one of genuine shared work, a presumption of joint custody may interfere with the authority of the spouse doing the job of child rearing. Moreover, it has the capacity to allow a controlling spouse to perpetuate the influence after separation. Furthermore, a joint custody order might allow a payor spouse (usually the father) to pay less child support than would otherwise be the case, and yet might not result in lower costs to the recipient spouse (usually the mother).

There may be a temptation to use joint custody as a way of agreeing without actually resolving difficulties – postponing issues and simply prolonging the regime that may have operated before separation. The consequences of a joint custody choice, with its requisite level of cooperation and aligned vision, have to be addressed by the parties, otherwise problems arise later which are difficult, and often expensive, to resolve.

Consider how disputes will be resolved and decisions made if there is disagreement.

I believe that there is a lot of truth in Justice Brownstone's observations (in his book Tug of War) when he comments that:

> *[…] all too often, parents are so filled with hatred and vindictiveness that they keep the litigation going as a means of torturing each other without the slightest concern for the effect of their immature behavior on their children […] They turn every long weekend, vacation period, and special occasions into "all or nothing" battles rather than focusing where we should which would be on what is in the child's best interest.*

Especially in weighing when to bring an interim motion, and what factors dictate the need to commence an interim motion, we need to remain vigilant that our prime focus remains on the children and their best interests. At the end of the day, we do our clients little service if what we have created is an ongoing battle

where the children become a ping pong ball swatted back and forth between the parents.

Parallel Parenting

A parallel parenting order is technically an award of joint custody, although there is no expectation of cooperation between the parents. Both parents are highly involved in the children's lives, but the level of conflict makes it difficult to be parenting partners. The decisions can be divided between the parents such that each is responsible for various decision-making aspects. Alternatively, it could be divided by time between the parents and a parent's responsibilities while the child is with each party.

Jurisdiction

There are four ways for an Ontario court to assume jurisdiction to make an order for custody of, or access to, a child:

a. where the child is habitually resident in Ontario at the commencement of the application for the order;

b. although the child is not habitually resident in Ontario, the court is satisfied,

i) that the child is physically present in Ontario at the commencement of the application for the order

ii) that substantial evidence concerning the best interests of the child is available in Ontario,

iii) that no application for custody of or access to the child is pending before an extra-provincial tribunal in another place where the child is habitually resident,

iv) that no extra-provincial order in respect of custody of or access to the child has been recognized by a court in Ontario,

v) that the child has a real and substantial connection with Ontario, and

vi) that, on the balance of convenience, it is appropriate for jurisdiction to be exercised in Ontario;

c. where the child is physically present in Ontario and the court is satisfied, on balance of probabilities, that the child would suffer "serious harm" if an order is not made; or

d. by exercise of the court's *parens patriae* jurisdiction.

Pursuant to the *Children's Law Reform Act*, a child is habitually resident in the place where he or she resided,

a. with both parents;

b. where the parents are living separate and apart, with one parent under a separation agreement or with the consent, implied consent or acquiescence of the other or under a court order; or

c. with a person other than a parent on a permanent basis for a significant period of time,

whichever last occurred. The removal or withholding of a child without the consent of the person having custody of the child does not alter the habitual residence of the child unless there has been acquiescence or undue delay in commencing due process by the person from whom the child is removed or withheld.

Parens Patriae Jurisdiction

The *parens patriae* jurisdiction is specifically preserved by s. 69 of the *Children's Law Reform Act*.

The *parens patriae* jurisdiction originates from the Court of Chancery's wardship over, initially, mentally incompetent individuals and later also children. Generally, the power is reserved for cases in which there is legislative gap and is not exercised to modify existing statutory schemes. However, the Supreme Court of Canada has stated, "It continues to this day, and even where there is legislation in the area, the courts will continue to use the *parens patriae* jurisdiction to deal with uncontemplated situations where it appears necessary to do so for the protection of those who fall within its ambit."

The *parens patriae* jurisdiction is invoked to deal with an uncontemplated situation where it is necessary to do so for the protection of a child. The court's *parens patriae* jurisdiction is founded on necessity, namely the need to act for the protection of those who cannot care for themselves.

The *parens patriae* jurisdiction may be invoked if the other jurisdiction is a not a Hague signatory. Access to the courts in the foreign jurisdiction, and whether the foreign laws and procedures are similar to those of Ontario in that there are jurisdictional requirements, parents have equal rights, and the best interests of the child is the principle on which judgments are made, are considerations in assessing whether a court will assume *parens patriae* jurisdiction.

Judges of the Ontario Court of Justice do not have *parens patriae* jurisdiction.

Child's Views and Preferences

A child's views and preferences may be considered in certain circumstances. In practice, little weight is placed on views of young children, and significant weight on views and preferences of teenagers. The more mature the child, the greater

weight is given to a child's opinion. Where the child's opinion is the product of manipulation, coercion or brainwashing, no weight is given to the views and preferences of the child.

Courts are required to consider, where possible, the "views and preferences of the child" to the extent the child is able to express them, when considering an application with respect to custody and access.

In 2014 the United Nations Convention on the Rights of the Child celebrated its 25th anniversary. Article 12 guarantees children and youth the right to be heard in legal proceedings affecting them. It is one thing to have a "right" in theory, but quite another to be able to exercise that right.

Children are not parties to custody or access actions that concern them, and do not have standing before the court to testify or present evidence of their views and preferences. Courts have the power to appoint a litigation guardian for the child, or a legal representative for a minor who is not a party to a proceeding.

OCL

The Court may request the Office of the Children's Lawyer ("OCL") to appoint a lawyer to represent the children, or a social worker to investigate the custody and access arrangements, and provide recommendations to the Court. It is the OCL's decision whether or not to provide a legal representative for the child, or an assessment. The OCL has limited resources, and does not take all cases.

The OCL appointment is pursuant to s. 112 of the *Courts of Justice Act* which provides that the OCL may conduct an investigation and make a report and recommendations to the court concerning custody of or access to a child, child support, and education.

The OCL provides independent information about the child's needs and wishes. OCL lawyers may participate in trial, call evidence and cross-examine witnesses.

It is possible for a judge to interview the child in chambers: however, most judges have no special training in interviewing children and are therefore are reluctant to do so. This is wise when one considers the trauma experienced by a child in these circumstances.

Children ought not to testify unless they are mature. The OCL interviews the children and then testifies as to their views and preferences. It is believed that the trauma that a child would experience from participating in their parents' dispute is diminished by operating through representatives who are parenting professionals experienced in working with children, trained in child interviewing, and appreciate the sensitivities of the role.

There may, however, also be trauma as a result of the invasive and intrusive investigation, interviews and circumstances that may unduly harm or traumatize a child.

Private Custody and Access Assessments

The *Children's Law Reform Act*, provides at s. 30(1), that the court "may appoint a person who has technical or professional skill to assess and report to the court on the needs of the child and the ability and willingness of the parties or any of them to satisfy the needs of the child."

Parties themselves may submit expert evidence as to the needs of the child, pursuant to s. 30(15) of the *Children's Law Reform Act*.

Section 30 assessments, as they are colloquially referred to, are not to be ordered routinely. Assessments should be limited to cases in which there are clinical issues to be determined, in order that such assessments can provide expert evidence on the appropriate manner to address the emotional and psychological stresses within the family unit in the final determination of custody. If, on all the evidence, the court is in a position to reasonably decide the issues, without expert input, then the assessment should not be ordered.

Clinical issues have been loosely defined as being “those behavioural or psychological issues about which the average reasonable person would need assistance in understanding... not limited to psychiatric illness or serious psychological impairment.”

Allegations of parental alienation or an inexplicable rift between parent and child may warrant a s. 30 assessment. General allegations of parental misbehavior, without credible evidence to substantiate those concerns, will not warrant an assessment, in the absence of distinct clinical issues.

Speculation that clinical issues might exist or might arise (for example, in the context of a mobility dispute) are not sufficient to justify an assessment. The mere fact that the parties are engaged in a high-conflict custody dispute does not, in itself, justify ordering an assessment. A dispute about joint custody versus sole custody is a question of fact. An assessment, although perhaps helpful, is not required in order to make this determination.

Age may be important. Where the case involves a young child (whose views and preferences may be given limited weight) and where the young child is not experiencing behavioural difficulties, an assessment may not be appropriate in the absence of significant clinical issues.

Assessments may be conducted by a psychiatrist, social worker or psychologist and testing may be expected to be part of the process. This is one of the fundamental differences between a section 30 assessment and an OCL investigation.

A court should not delegate its duty to determine what parenting arrangement is in a child’s best interests to an assessor. An assessor’s expertise will be necessary only if clinical issues exist outside the normal give-and-take of custody and access disputes decided on a daily basis by the Court.

Balancing the Costs and Benefits

The potential benefit of expert assistance in a particular dispute must be weighed against the fact that assessments are expensive, intrusive, and time-consuming. There must be evidence sufficient to satisfy the court that the reasons for requiring the assessment more than offset any harm that might be incurred by ordering the assessment.

By the time custody disputes come to Court, many children have already been exposed to a great deal of stress, disruption, and exposure to professionals. An assessment is intrusive not only for parents but also for children. In deciding whether to order an assessment, Courts must carefully consider whether an additional layer of investigation can be justified, bearing in mind the potential negative impact of having children further drawn into the court process. The assessment process is not benign. Where the advantages don't outweigh the disadvantages, or where there really are no advantages, an unwarranted assessment can actually make children's lives and family dynamics worse.

List of Criteria

The following non-exhaustive list of criteria has been identified to assist a judge in deciding whether to order an assessment [*Glick v. Cale*]:

1. What was the parenting relationship like before separation? Did the parents function at least adequately before the separation and the dysfunction arose after the separation?

2. Are the parents unable to make any decision about the child's needs (including education, religion, health, and activities) without intervention by a court?

3. Without defining high conflict, is the relationship between the parents so unhealthy that one or both parents is/are unable to identify the best interests of the child and act on it?

4. Do the parents have a mutual disregard for the other parent's ability to parent?

5. Do the parents blame each other for the dysfunction each describes?

6. Is there a clinical diagnosis that might impact on the parenting capacity of one or both parents?

7. Is there a clinical diagnosis with respect to any of the children in the family unit that means the child is fragile and vulnerable to ongoing conflict and has special needs?

8. What is the age of the child at separation and at the time of the request for the assessment?

9. Is the child manifesting behaviour that might be associated with stress caused by the conflict between the parents?

10. Is there an alternative? For example, is the child of an age and maturity that his or her views should be known and if so, would it be more appropriate to ask the Office of the Children's Lawyer (the "OCL") to become involved and appoint a lawyer to act for the child?

11. Are there other challenges in the family such as whether the family home must be sold? If those challenges are resolved, will the family dynamic be improved and avoid the necessity of an assessment?

12. What is the basis upon which the moving party relies? Is it essentially a mobility case on which the court must hear evidence? Is the issue custody or access?

13. What is the estimated cost? Do the parents have the financial resources to pay that cost?

14. Will the assessment cause delay that is not in the best interests of the child? In considering the impact of delay, is it more likely than not that the delay necessarily involved in an assessment will enable the parents to have a better understanding of the family dynamic and arrive at a resolution without a trial?

15. Is an assessment in the best interests of the child?

An OCL report is more in the nature of a fact-finding mission, while a s. 30 assessment is a more clinical exercise.

Child Support

All parents have a basic obligation to financially support their children. The Federal and Provincial *Child Support Guidelines* are regulations that prescribe the quantum of child support payable based on the number of children and the payor's income.

Under the *Divorce Act*, only a parent who is a married, or formerly-married, spouse may make a child support claim (Section 15.1(1) and 17). Under the *Family Law Act*, a parent or a dependent child that may apply for benefits for the child may also apply for a child support Order (Section 33(3)). The *Child Support Guidelines* provide the Court with the discretion to order a quantum of child support other than as set out in the *Guidelines* when the child in question spends more than 40% of his or her time with the access parent.

It is my experience that, when trying to set the quantum of child support that the payor needs to pay, the largest areas of conflict are determining the payor's income, obtaining full financial disclosure, and determining how to deal with the child's special and extraordinary expenses (Section 7).

With the introduction of the *Child Support Guidelines*, the need to bring interim motions for child support has diminished. Frequently, judges at the first Case Conference ask for agreements on child support. Often, the more contentious issues are with regards to section 7 special and extraordinary expenses.

Section 7 expenses must be necessary in relation to the child's best interests and reasonable in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation.

The other issue with child support that frequent trips up the parties is child support for children over the age of 18.

Child Support in Shared Parenting Arrangements

Where a parent has a child for not less than **40 percent** of the time over a year, the amount of child support must be determined pursuant to s. 9 of the *Guidelines*, 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.

There have been two predominant approaches for calculating “40 percent”: (1) days and (2) hours. If days, the access parent must have the child in his or her care for 145 days per year. If hours, the access parent must have the child in his or her care for 3,504 hours per year. [*Skaljac v. Skaljac*, 2018 ONSC 3519.]

In the case of *L.(L.) v. C.(M.)*, 2013 ONSC 1801, Justice Czutrin concluded that, given the importance of the issue, the more precise approach of counting hours should be used. When presented with a shared parenting arrangement, you should calculate time by hours rather than days to see if the access parent has the child for not less than 40 percent of the time.

Nevertheless, some cases have allowed for the counting of days. [*Skaljac v. Skaljac*, 2018 ONSC 3519, *Froom v. Froom*, [2005] O.J. No. 507 (ON CA)., *Gauthier v. Hart*, 2011 ONSC 815, 100 R.F.L. (6th) 178.]

The interpretation of section 9 of the *Guidelines* has been largely dominated by the analysis of Justice Herman in *Contino v. Leonelli-Contino*, 2005 SCC 63. The Contino analysis requires four steps:

i) Determining the simple set-off amount. The starting point under s.9(a) is the difference between the table amounts for both parents

as though each parent were seeking child support from the other. This amount may be adjusted upwards or downwards in the remaining steps.

ii) Reviewing the child care expenses budgets. Section 9(b) recognizes that the total cost of raising children in shared custody arrangements may be greater than in sole custody situations. At this stage, the Court must examine the budgets and actual child care expenses of each parent. There may be duplicated costs or a disproportionate assumption of spending by one parent. The expenses will have to be apportioned between the parents in accordance with their respective incomes.

iii) Considering (a) the ability of each parent to bear the increased costs of shared custody and (b) the standard of living for the children in each household. In assessing each parent's ability to bear the increased costs of shared custody, under s. 9(c) the Court will consider their assets and liabilities, income levels and any disparity in incomes. The Court will also examine the standard of living of each household. Children should not experience a significant variation in the standard of living as they move from one household to another.

iv) Distinguishing between initial orders or agreements and variations. A variation application will usually raise different concerns than an application where no prior order or agreement exists. The recipient parent may have incurred expenses based on legitimate expectations of how much child support would be provided.

Child Support for Adult Children

This would be the subject of a complete paper on it's own. Very briefly, there is little argument that children remain children of the marriage through their first degree or diploma. There has also been a trend to permit children to remain a child of the marriage beyond their first degree or diploma. The courts have said

that one post-secondary degree does not necessarily lead to self-sufficiency. Frequently, further education is required to prepare a child for life ahead or to equip a child for a career.

Ontario courts have often used the factors cited in *Farden v. Farden* (1993), 48 R.F.L. (3d) 60, to determine a child's dependency when pursuing education:

> a. whether the child is in fact enrolled in a course of studies and whether it is a full-time or part-time course of studies;
>
> b. whether or not the child has applied for or is eligible for student loans or other financial assistance;
>
> c. the career plans of the child, i.e. whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do;
>
> d. the ability of the child to contribute to his own support through part-time employment;
>
> e. the age of the child;
>
> f. the child's past academic performance, whether the child is demonstrating success in the chosen course of studies;
>
> g. what plans the parents made for the education of their children, particularly where those plans were made during cohabitation;
>
> h. at least in the case of a mature child who has reached the age of majority, whether or not the child has
>
> i. unilaterally terminated a relationship from the parent from whom support is sought.

Spousal Support

The *Divorce Act* provides that a court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

Various provinces have similarly worded statutory provisions that apply to married and common law spouses. The *Ontario Family Law Act* provides:

> Section 33(1):
>
> A court may, on application, order a person to provide support for his or her dependents and determine the amount of support.
>
> Section 34(1)(a) and (b):
>
> 34(1) In an application under section 33, the court may make an interim or final order,
>
> > (a) Requiring that an amount be paid periodically, whether annually or otherwise and whether for an indefinite or limited period, or until the happening of a specified event;
> >
> > (b) requiring that a lump sum be paid or held in trust.

Both Acts include sections addressing the purposes of an order for spousal support and the factors to be taken into consideration in making such an award. Specifically, section 33(8) of the *Family Law Act* provides that the purposes of spousal support are to:

> (a) recognize the spouse's contribution to the relationship and the economic consequences of the relationship for the spouse;

(b) share the economic burden of child support equitably;

(c) make fair provision to assist the spouse to become able to contribute to his or her own support; and

(d) relieve financial hardship, if this has not been done by orders under Parts I (Family Property) and II (Matrimonial Home).

Entitlement to spousal support is based on three major components:

1. Contractual: Courts will consider any implied or expressed agreements between the parties.

2. Compensatory: Court will compensate a spouse who has suffered economic disadvantage as a result of the marriage.

3. Needs-Based: Court will consider the needs, means and other circumstances of the spouse to determine if spouse can support him/herself without the help of the other party.

Tax Considerations for Spousal Support

As a general principle, sections 56 and 60 of the *Income Tax Act* deem that payments of periodic spousal support made pursuant to a court order or written agreement are tax deductible by the payor and are included in the taxable income of the recipient. However, the income tax implications for lump sum support payments are treated differently in that these payments are generally treated as being non-deductible to the payor and are received on a tax-free basis by the recipient.

In determining whether support payments are periodic or lump-sum, the Court will consider the nature of the payments, relying on the criteria set out by the

Federal Court of Appeal in *McKimmon v. Minister of National Revenue*, 17(1990) 1 C.T.C. 109 (Fed. C.A) namely:

> 1. The length of the periods at which the payments are made. [...] Amounts which are paid weekly or monthly are fairly easily characterized as allowances for maintenance. Where the payments are at longer intervals, the matter becomes less clear.
>
> 2. The amount of the payments in relation to the income and living standards of both payer and recipient. [...] Where the payment is no greater than might be expected to be required to maintain the recipient's standard of living, it is more likely to qualify as such an allowance.
>
> 3. Whether the payments are to bear interest prior to their due date. [...] It is more common to associate an obligation to pay interest with a lump sum payable by instalments than it is with a true allowance for maintenance.
>
> 4. Whether the amounts envisaged can be paid by anticipation at the option of the payer or can be accelerated as a penalty at the option of the recipient in the event of default. [...].
>
> 5. Whether the payments allow a significant degree of capital accumulation by the recipient. [...] An allowance for maintenance should not allow the accumulation, over a short period, of a significant pool of capital.
>
> 6. Whether the payments are stipulated to continue for an indefinite period or whether they are for a fixed term. [...].
>
> 7. Whether the agreed payments can be assigned and whether the obligation to pay survives the lifetime of either the payer or the recipient. [...].

8. Whether the payments purport to release the payer from any future obligations to pay maintenance. Where there is such a release, it is easier to view the payments as being the commutation or purchase of the capital price of an allowance for maintenance.

The Spousal Support Advisory Guidelines: Revised User's Guide (colloquially referred to as the RUG), which can be found at https://www.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/ug_a1-gu_a1/pdf/ug_a1-gu_a1.pdf, is mandatory reading for all family law lawyers.

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Family Law Refresher 2020

Law Society of Upper Canada

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Jamal Family Law

What You Need To Know About The Law

Agenda

1. Introduction to Family Law
2. Custody/ Access
3. Child Support
4. Spousal Support
5. Income for Support Calculations
6. Tax Considerations for Support
7. Life Insurance

Jamal Family Law

Custody and Access

- Best Interests of the Child
- Terminology
- Major Decisions
- De Facto Custody
- Status Quo
- Factors
- Access Schedule

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Custody and Access cont'd

- Child's Views and Preferences
- OCL
- Private custody/access assessment
  - Criteria
  - Cost
- Jurisdiction

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Child Support

- Based on *Federal Child Support Guideline*
  - Income to be discussed in further detail today
- Child Support
  - Table
  - Section 7
  - Duration
- Shared Parenting
  - 40%
  - Contino
- Adult Children
  - Farden Factors

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Spousal Support

- Compensatory
- Non-compensatory
- Contractual
- Spousal Support Advisory Guidelines (SSAGs)
  - Revised User's Guide (RUG)
- Range
- Duration
- Lump Sum

Income for Support Calculations

- Taxable vs. actual (dividends, capital gains, etc.)
- Employer portion of CPP contributions (self-employed)
- Interest and carrying costs
- Taxation of different sources of income
- Employment expenses

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Income for Support Calculations Cont'd

- Personal or discretionary expenses paid by a business
- Compensation paid to family members for income splitting
- Tax gross-up on personal and discretionary expenses or income splitting
- Attribution of corporate income

Income for Support Calculations Example

Total Income (Line 150)		$1,000
Less: taxable dividends	-117	
Add: actual dividends	100	-17
Less: taxable capital gains	-45	
Add: actual capital gains	90	45
Less: investment carrying costs		-15
Add: pre-tax corporate income		250
Income per the *Guidelines*		**$1,263**

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Gross-ups Affecting Income

- Gross-up for personal or discretionary expenses
- Gross-up on low-rate income (and income-splitting)

Gross-ups Affecting Income Example

		2018 ($)	2017 ($)
Total discretionary expenses	A	20,000	18,000
Gross up thereon:			
Assume a marginal tax rate of	B	50%	40%
Income (before tax) required to pay discretionary expenses	C = A/(1 - B)	40,000	30,000
Less: discretionary expenses	A	20,000	18,000
Gross-up on expenses	C - A	20,000	12,000

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Tax Considerations for Support

- Spousal support is taxable and deductible
  - If pursuant to a written agreement/court order, periodic, as well as other conditions
  - Lump sum payments excluded (exception for payments in arrears)

- Child support is non-taxable

Tax Considerations for Support

- Foreign payor considerations

- Can go back to the preceding year if payments were being paid prior to the finalization of the separation agreement

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Family Trusts Factors for Income

Factors to consider when determining whether an amount received by a beneficiary of a trust should be included in income for the purposes of calculating support:

- Is the amount included in income for purposes of income tax?
- Is the amount from capital that generates the income?

Family Trusts Factors for Income Cont'd

- Is capital compensation for loss of income?
- Has the amount, if capital, been equalized or is it exempt?
- Is the payment of the amount gratuitous?
- Is the payment of the amount recurrent?
- Were the funds typically used to finance a significant proportion of the recipient's living expenses?

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Life Insurance

- Funding Support After Death
- Common Mistakes
  - Revocable? Expiration – term insurance? Borrow against?
  - Bare trusts
    - Gift over so do not “Bust the Trust”
  - Tax considerations

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Life Insurance Cont'd

- Common Mistakes
  - Henson Trust
  - Declining Insurance (reallocation of beneficiary)
  - Amend/Revoke When Support Obligation Terminates
  - Compensation/ Replacement Trustees/ Reside in Ontario

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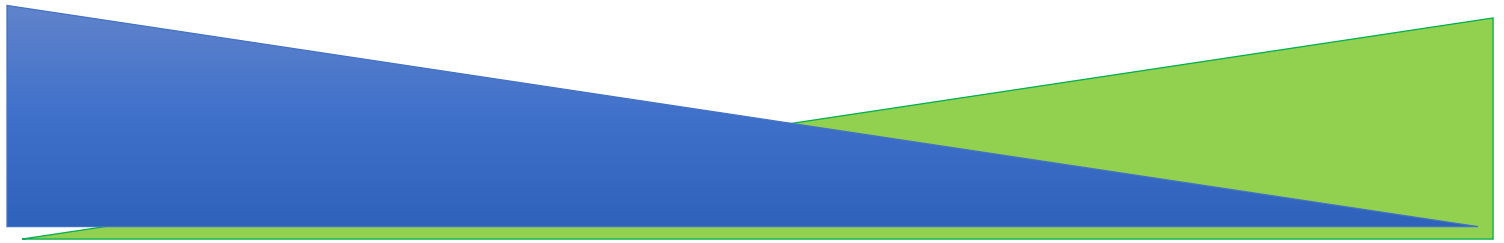
Life Insurance Cont'd

Declining Term Policy

- Security for Support Obligations
- Needs for insurance decrease as children age and liabilities no longer exist
- Mortgage life insurance is a decreasing term policy – pegs the benefit to the remaining mortgage on the insured's home

Life Insurance Cont'd

Rebalancing Beneficiaries



- In the event of death, the Support Beneficiary will receive a lump sum insurance payment for support he or she is still owed, while the policy owner can leave the remaining rebalanced proceeds to his or her children, a new spouse or partner or to secure a financial loan, etc. Each year on the anniversary date of the policy the beneficiary amounts rebalance.

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Life Insurance Example

Rebalancing Beneficiaries

- There are provisions for trustees regarding under-age children.
- The agreed to Beneficiary Designation Schedule is attached to the legal agreement or court order and the insurance policy.

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