**Syrtash Collection of Family Law Articles**
SFLRP/1999-014

# "Good News for Divorcing Women (or is this a mirage)?

*by John Syrtash*

April 16, 1999

¶ 1 We reflect on recent trends in the law that appear to give women greater economic security. In the very recent Supreme Court of Canada decision of Bracklow ([1999] S.C.J. No. 14) the court formally extended the ability of a spouse to claim spousal support, even where a woman's financial needs and plight did not arise from the marriage. The Bracklows lived together for about seven years and were married only for the last three. Mrs. Bracklow had her own career and this was not their first marriage. They had no children. Prior to the marriage, Mrs. Bracklow was sick with psychological and other medical problems that became progressively worse and finally work-disabling at the end of their relationship. The British Columbia Court of Appeal ruled that since the marriage did not cause Mrs. Bracklow's financial problems or have any connection to it, the husband was not obliged to "compensate" Mrs. Bracklow by paying spousal support. For instance, had she worked to raise children and clean toilets while he was improving his ability to earn money from year to year, it would have been unfair not to compensate her for being out of the workforce by reason of the marriage. The Appeal court therefore denied Mrs. Bracklow an entitlement to support.

¶ 2 However, Madame Justice McLaughlin of the Supreme Court of Canada overruled the British Columbia Court of Appeal. In a lengthy and philosophical decision she clarified the law by ruling that although the mere fact of marriage itself does not entitle a spouse to support, the relationship does if a spouse is in need and the payor is able to pay. The Court ruled that there are three ways in which a spouse can claim support: (a) by express or implied contracti.e. a pre-nuptial agreement or understanding that support would be paid in the event of a breakdown in the marriage; (b) compensatory support (where compensation is paid, in a sense for "services rendered" and lost opportunity in the workforce. McLaughlin J. called this the "clean break" model or theory of marriage, where each party is independent, not interdependent, but on marriage breakdown the spouse disadvantaged by the relationship needs to be compensated; and (c) non-compensatory support. The Court awarded support to Mrs. Bracklow under the umbrella of non-compensatory support since the couple had become interdependent during the course of their relationship, even though they kept separate bank accounts and had separate careers until the last part of the marriage when Mrs. Bracklow's medical condition deteriorated. Mrs. Bracklow now also had a need and could rely on the existence of the relationship in-itself and the history of interdependency when asking for spousal support. She did not have to prove that her disability or inability to work or financial need related to the marriage. In light of this decision, it is hard to imagine when a spouse in need will not be entitled to spousal support, irrespective of the length of their marriage or pre-marital state. Even in the face of a pre-nuptial contract where a spouse

has agreed never to seek such support several cases have now ruled that such contracts are but one factor the courts consider when ruling on the issue. If a spouse is in need, particularly on public assistance, it can still order support even in the face of such an agreement.

¶ 3 The Court refused to determine the quantity of support for the Bracklows and sent the case back to the trial judge to determine that issue. The Court did, however, suggest that in determining the issue of "quantum", a Judge must consider many factors such as need and ability to pay. Most surprisingly, the Court also ruled that the "conduct" of the one or both of the spouses could be a legitimate consideration in determining the amount to be awarded, even though section 15 of the Divorce Act says the opposite' ie. that a parties' conduct is irrelevant. Does this mean that an adulterous husband could be penalized by a greater amount of support awarded against him because he committed adultery? Does a spouse who supposedly failed to shop or clean the house adequately pay or receive more or less support? This is frankly a troubling statement, and I'm not sure if Her Honour intended to say it (I write this respectfully.) If this is now the new law of Canada then it could obviously inflame litigation between divorcing couples (e.g. "Why do you mean she wants $1000 monthly? She's been yelling at me for three years! You go tell that judge....etc...)

¶ 4 Now, how wise are these trends? Do they really ultimately help all Canadian separated women in need? Or in virtually all such cases is society shifting responsibility from the State (i.e. welfare, Canada Pension Plan) to the income-earning spouse (usually the male, since there are comparatively few male recipients)? And how practical and useful is it to disadvantaged women in need when such a shift is made? Clearly, Bracklow helps those women whose husbands obey court orders and agreements. However, practically speaking, in many cases women must rely on their provincial governments to collect the spousal support that has been ordered. Without the cooperation of their husbands, collection has become a chaotic nightmare for far too many, particularly where the spouses ordered to pay don't and are either self-employed (where they can bury their income "underground") or become deliberately underemployed. In Ontario, it is not uncommon for many women to confront an overworked and underfunded bureaucracy called the Family Responsibility Office that works best when its computers simply deduct the support owing from part of an employee's paycheques or suspends a pyaor's driver's license or passport? But the moment a payor evades payment, women are often stuck with useless court orders or agreements since there are often insufficient resources to enforce them or, at the very least, an inconsistent approach to applying those resources. In Ontario, by law, a recipient is not even permitted to collect the support owing to her by hiring her own lawyer and seeing a judge without getting here ex-partner's agreement to take enforcement out of the government's hands, or at least partly out its hands. And why would payor agree to do so if he has no intention to pay. He can be reasonably confident that the government will take its time or fail to find his hidden assets or undisclosed income? If the government does, on occasion, take drastic steps such as commence jail proceedings or even suspend driver's licenses, that does not automatically lead to payment.

¶ 5 In other words, whether through Welfare or more expensive enforcement procedures, the taxpayer may ultimately pay for divorced women of need in many cases. However, for many disadvantaged women, direct government assistance that is delivered on time through Welfare or other programs every two weeks is far more secure than hoping that some provincial enforcement agency will some day succeed in collecting on a court order or agreement. (We lawyers call these "paper Judgments".)

¶ 6 So, before women so gleefully embrace these trends in law that appear to be in their favour they may wish to think practically and say: "O.K., now show me the money!" It will take a combination of this new legal regime of support, more aggressive and efficient enforcement administration by governments, the ability to enforce an order or agreement privately or partly privately and continued public assistance before society can financially secure all disadvantaged women. Meanwhile, the decision in Bracklow alone will only help certain women with husbands who do not evade their legal responsibilities.

¶ 7 Next timefor Father's Day, how will Bracklow affect men?

**Syrtash Collection of Family Law Articles**
SFLRP/1999-013

# Evidence in Child Protection Matters*

*by Rosalyn Zisman*

November 6, 1998

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## INTRODUCTION

¶ 1 Child protection proceedings raise unique issues and problems for practitioners in the application of the law of evidence. Unlike the simple state vs. citizen in a criminal prosecution, a protection case demands constant concern for the dominant interest of the child but, unlikely a private custody dispute a protection case involves the state intervening in the family, with substantial powers and consequences for parents and children that are among the most serious sanctions in society. Accordingly, in the application of evidence law, protection proceedings are somewhere between the opposites of criminal stringency and family laxity. Although civil in nature, protection proceedings have a historical quasi criminal root in their statutory jurisdiction and summary procedures with limited pre-trial discovery compared to superior civil court proceedings. Proceedings tend to be private with strict statutory limits on trial publicity. Accordingly, judicial decision making is not exposed a great deal of public scrutiny. Also the low rate of appeals further insulates trial courts from Appellant review. Accordingly, many of the procedural and practical protection for litigants are absent. In a review of the decided cases, inconsistency in evidentiary rulings reflect the varying judicial conception of protection proceedings.

¶ 2 Trial judges approach to evidence in child protection proceedings is largely dependent on their conception of the nature of a protection hearing. Judges strictly applying the rules of evidence tend to emphasize the serious consequences of protection cases and are concerned about the reliability of evidence and fair procedures. This approach emphasizes the adversary nature of the proceedings and relies heavily on criminal precedent. Other judges emphasize the need for relaxing the rules of evidence because of the need to protect children. Judges following this approach tend to believe that rules of evidence are too technical, likely to exclude relevant evidence and too time-consuming and approach the matter on a broad concept of fundamental fairness. This approach allows most evidence to be admitted with the Judge left to determine the weight at the end of the trial.

¶ 3 The unique character of the protection proceeding itself further affects the application of evidentiary law in these cases. Although there are two distinct decisions to be made, the finding and the disposition, in many jurisdictions, the practice is for all of the evidence to be heard together both relating to finding and disposition. Despite the

definitions of "a child in a need for protection" at the finding stage and the use of the "best interests" test at the disposition stage there continues to be considerable judicial interpretation of these concepts, posing ongoing difficulties in defining the relevance of evidence in the hearing. Because of the absence of formal pleadings and extensive discovery, evidentiary rulings are crucial to maintain fairness in the trial. The issues of risk of surprise, unfair prejudice, confusion of issues and irrelevant evidences continue to pose problems for practitioners. Although in jurisdictions with case management, some of the evidentiary issues and issues of production can be dealt with prior to trial so as to eliminated many of these difficulties. The complex nature of protection proceedings because of the number of the parties involved, children in varying ages and circumstances, foster parents, native and other cultural issues etc. can further complicate the application of evidentiary law.

¶ 4 Most importantly protection proceedings involve the interplay of law and mental health expertise. The typical family in the child welfare process will have constant contact with a variety of experts, community agencies and officials, all of whom accumulate notes, records, opinions and assessments of family members. Considerable evidentiary issues are raised with respect to opinion and collateral evidentiary issues. To further complicate the matter, there is no end to the evidence gathering process in a protection case, as the party is preparing for trial ongoing events may change the focus of the hearing and in turn effect evidentiary rulings by the trial judge.

¶ 5 Before examining particular evidentiary issues, I will briefly outline the structure of proceedings pursuant to the Child and Family Services Act.

STRUCTURE OF THE CHILD AND FAMILY SERVICE ACT

¶ 6 The involvement of the state under the Child and Family Services Act, R.S.O., c.C11 (hereinafter referred to as the "C.F.S.A.") as a litigant distinguishes the Child Protection proceeding from other Family Law proceedings. Part 3 of the C.F.S.A. governs proceedings with respect of children who are alleged to be in need of protection. The declaration of principles and the provisions of the C.F.S.A. give credence to the approach that it is usually in children's best interests to be cared for and raised by their natural families, and only if this is not possible, should the state become involved. The entire Act is governed by the declarations of principles set out in Section 1, including the paramount objective to promote the best interests, protection and well being of children. In preparing for a proceeding pursuant to this legislation, it is important to understand the structure of the legislation, the burden of proof, upon whom it rests and how demanding and substantial it is at the various stages of the proceedings.

¶ 7 There are various stages to proceedings pursuant to the Child and Family Services Act:

(a) Temporary care and custody hearings:

Upon the apprehension of a child from his or her caregiver, pending

the hearing of the Protection Application, a judge, pursuant to Section 51(2), may order that the child be placed in the temporary care and custody of the last caregiver (either with or without supervision) or with another person with supervision of the Society. Before placing the child with a person other than the last caregiver or with the Society, the Court must be satisfied that there are reasonable and probable grounds to believe that there is substantial risk to the child's health or safety and that the child cannot be protected adequately by an order allowing him or her to remain with or return to the last caregiver (Section 51(3)).

There are two lines of cases interpreting what substantial risk to the child's health and safety means. In the leading case of Catholic Children's Aid Society of Metropolitan Toronto v. L.(T), [See Note 1 below.] His Honour Judge Felstiner held that the burden upon Children's Aid Society is "almost massive and that the risk must be substantial". He further stated that "the best interest provisions of the Act do not play any part of the interim hearing stage of the process". The decision was upheld on appeal to the District Court. This approach would appear to acknowledge parents prima facie right to have interim care and custody of their children.

The second approach disagreed with Judge Felstiner and held that substantial risk meant that there must be a risk to the health and safety of the child which is real and apparent on the evidence, not a risk that is without substance or which is fanciful or merely speculative. [See Note 2 below.] This approach espoused by Justice Wilson in C.C.A.S. of Metropolitan Toronto v. D. (A) [See Note 3 below.], concluded that the meaning of substantial risk is an actual, real, and not illusory risk and that the test must be considered in light of the statement of purposes of the Act, including the paramount of objective to promote the best interests, protection and well-being of children.

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Note 1: C.C.A.S. v. L. (P.), (Ont. Prov. Ct., Fam. Div., Felstiner J.), April 16, 1986, [1986] O.J. No. 1702, upheld on appeal, June 25, 1986 (Ont. Dist. Ct.), Hawkins D.C.J., [1986] O.J. No. 2498, summarized at [1986] W.D.F.L. 1746.

Note 2: Roman Catholic Children's Aid Society for the County of Essex and Lillian G. (No. 2) unreported (Ontario Provincial Court - Family Division) Abbey J. (October 23, 1996).

Note 3: Catholic Children's Aid Society of Metropolitan Toronto v. D. (A),(1994) 1 R.F.L. (4th) 268, (Ont. Gen. Div.)

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(b) Child Protection Hearing

A protection application arises when the Society believes that a child is "in need of protection" and there is no outstanding Court order in

place. The protection application involves two phases:

(1) The Finding and (2) The Disposition
(1) The Finding Stage - Threshold test:

The Society must demonstrate during the protection hearing, on a balance of probabilities that the child is in need of protection according to one or more of the grounds enumerated in Section 37(2). If the Society cannot do so, the child must be returned to the family.
The "finding" that a child is "in need of protection" is the threshold test the Society must meet before it can formally be involved in a child's life.
The relevant dates of the determination as to whether a child is in need of protection is the date of admission to care or the date of the commencement of the application and not the hearing date of the protection application. Therefore, after the court makes a finding that the child is in need of protection, it must determine whether an order is needed to protect the child in the future. If no order is needed to protect the child in the future, the Court is mandated to order the return of the child to its former custodial parent. This is because circumstances may change between the apprehension and the hearing date.
One line of case holds that the burden of proof is the ordinary civil standard but that a greater degree of justification is required to order a child's removal from his or her family than to order supervision. Therefore, although the burden of proof remains on a balance of probabilities, there is judicial precedent for the view that there may be varying standards of proof depending on the gravity of the consequences. His Honour Judge R.J. Abbey [See Note 4 below.] discusses the standard of proof which applies in child protection matters as follows:

> "I do not believe.....that there is a different standard of proof in a protection case than the normal civil standard of the balance of probabilities. In applying the civil standard and in reaching required findings of fact, however, the Court should, I believe take into account the severity of the allegations and the gravity of the consequences which would flow from the finding which is sought. Such matters are simply considerations which have a bearing upon the questions as to whether a particular matter has been proved to the reasonable satisfaction of the Court on the test of the balance of probabilities."

Another line of cases holds that the onus on the Society is the ordinary civil standard and there is no authority for the proposition

that there is a heavier burden when the Society is seeking a more intrusive finding. [See Note 5 below.]

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Note 4: Abbey, R.J. "Child and Family Services Act - Section 37(2): A child in Need of Protection", Representing Parents in Child Protection Cases, Law Society of Upper Canada Lectures, 1989, and Roman Catholic Children's Aid Society for the County of Essex and Lillian G. and Rick G. [1987] W.D.F.L. 340 (Abbey, J.).

Note 5: C.C.A.S. of Metropolitan Toronto v. P. (V), unreported, May 25, 1984, (Ont. Prov. Ct. Fam. Div.), Beaulieu, J., affirmed on appeal, unreported Nov. 6, 1984 (Ont. Ct.), Houston, J.

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(2) The Disposition:

If a child is found to be in need of protection and a court order is needed to protect the child in the future, the Court is directed to make "in the child's best interest", one of four possible disposition set out in Section 57(1) of the Act. The Act sets out dispositional guidelines in order to assist the Court in making a best interest determination. These guidelines, as set out in Section 57(2) to (6) of the C.F.S.A., reflect the philosophy of the legislation of adopting the least restrictive alternative where possible. However, at the dispositional stage, the least restrictive policy is always subject to the best interest of the child.
The disposition that a Court must make is defined in Section 57(3) as follows:

> "(3) The court shall not make an order removing the child from the care of the person who had charge of him or her immediately before intervention under this Part unless the court is satisfied that less restrictive alternatives, including non-residential services and assistance referred to in subsection (2),
>
> (a) have been attempted and have failed;
>
> (b) have been refused by the person having charge of the child; or
> (c) would be inadequate to protect the child."

(c) Status Review:

A status review hearing arises only if a protection order is in place. When the original disposition under the child protection application is about to expire the Society must apply to review the child's status or the Society may apply at any time if circumstances

such as the prior disposition should be reviewed or modified (S. 64). The Supreme Court of Canada decision in Catholic Children's Aid Society of Metropolitan Toronto v. M. (C), [See Note 6 below.] has defined the proper test on a status review application pursuant to Section 65. The court held that:

(1) The status review, unlike the original protection application, does not create a threshold test which the Society must satisfy before a Court can make a determination about the best interest of the child. At the status review hearing, the predominant factor at all times is the best interest of the child.
(2) The first question to be determined by Courts on the status review is whether there is a need for a continued order for protection and the second question is "a consideration of the best interests of the child, an important, and in the final analysis, a determining element of the decision as to the need of protection".
(3) It is not the function of the status review hearing to retry the original need for the protection order. That original finding is res judicata and does not have to be re-litigated.
(4) A court must be flexible in resolving issues about children. The court must understand the current circumstances of the child and the ever-changing circumstances of children must be taken into account. Therefore the Court held it was important to allow new evidence [in child protection appeals] to enable the court to have up to date knowledge of the situation and Courts must continually evaluate the need for state intervention in order to ensure that the objectives of the Act are being met.
(5) The paramountcy of the best interests of the child is clearly apparent in s. 65, as it is throughout the Act. The wide focus of the best interest test involves balancing the criteria in s. 37 (3) as well as the criteria in s. 65 (3).

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Note 6: C.C.A.S. of Metropolitan Toronto v. M. (C), (1994), 2 R.F.L. (4th) 313, [1994] 2 S.C.R. 165

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At the status review, as at the original protection application, there are dispositional guidelines in the C.F.S.A. to assist the Court in making a best interest determination. The guidelines a Court must consider are stated in Section 65(3) as follows:

"(3) Before making an order under subsection (1), the court shall consider,
(a) whether the grounds on which the original order was made still exist;

(b) whether the plan for the child's care that the court applied in its decision is being carried out;
(c) what services have been provided or offered under this Act to the person who had charge of the child immediately before intervention under this Part;
(d) whether the person is satisfied with those services;
(e) whether the society is satisfied that the person has co-operated with the society and with any person or agency providing services;
(f) whether the person or the child requires further services;
(g) whether, where immediate termination of an order has been applied for but is not appropriate, a future date for termination of the order can be estimated; and
(h) what is the least restrictive alternative that is in the child's best interests. 1984, c. 55, s. 61."

¶ 8 In status review applications, the burden of proof on the party seeking a change in the child's status is "that of any other civil matter: a simply preponderance of evidence, a balance of probabilities, in favour of the change of status will suffice". [See Note 7 below.]

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Note 7: Protestant C.A.S. of Essex County v. V. and V. (April 8, 1982) (Ont. Prov. Ct. [Fam. Div.], [1982] O.J. No. 740, appeal dismissed on consent [1984] W.D.F.L. 342 (Ont. Dist. Ct.)

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EVIDENTIARY ISSUES

¶ 9 I will now examine several evidentiary issues that are most prominent in child protection proceedings:

1. Use of Affidavits:

¶ 10 In most jurisdictions at the interim stage of the proceeding, evidence is restricted to affidavit materials. However, it is now becoming much more common place that at the child protection hearing itself, counsel for Children's Aid Societies are being encouraged to present their evidence in chief by means of affidavits. Many Society workers have been involved with families for several years and courts wish to eliminate days and days of viva voce evidence. There is nothing in the Rules of the Ontario Court (Provincial Division) (Family) that specifically allows or disallow the use of such affidavits. These issues are generally raised in trial management meetings although it would appear that pursuant to Rule 27 the use of affidavits can only be on consent of the parties. Depending on the party that counsel is representing, arguments both for and against the use of such affidavits can be made. However, if such affidavits are to be

utilized, it is important for counsel to scrutinize carefully the use of opinion and hearsay evidence prior to the admission of such affidavits.

2. Evidence of Expert Witnesses

¶ 11 The issue of evidence of expert witnesses is almost always raised in child welfare proceedings. The role of the expert has been described by Dickson, J. in R. v. Abbey [See Note 8 below.] as follows:

> "with respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary."

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Note 8: R. v. Abbey, [1982] 2 S.C.R. 24, 68 C.C.C. (2d) 394

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¶ 12 The four criteria for the admissibility of expert evidence are [See Note 9 below.]:

(1) Relevance;
(2) Necessity in assisting the trier of fact;
(3) The absence of any exclusionary rule; and
(4) A properly qualified expert.

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Note 9: R. v. Mohan, [1984] 2 S.C.R. 9, 18 O.R. (3d) 160, 89 C.C.C. (3d) 402.

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¶ 13 It has been said that the hallmark of admissibility simply should be whether the expert's testimony would be helpful to the tribunal. It is impossible to outline the full range of topics about which only experts may testify. The field of matters requiring expert assistance is in a state of continual flux. In each case it is a question of fact whether the subject matter under study necessitates comprehension beyond the level of a common person.

¶ 14 According to Wilson, J. in R. v. Lavallée [See Note 10 below.],

> "where expert evidence is tendered in such fields as engineering or pathology, a paucity of the person's knowledge is uncontentious. The long

> standing recognition that it is that psychiatric or psychological testimony also falls within the realm of expert evidence is predicated on a realization that in some circumstances the average person may not have sufficient knowledge of or experience within human behaviour to draw an appropriate inference from the facts before him or her."

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Note 10: R. v. Lavallée [1990]1 S.C.R. 852, 55 C.C.C. (3d) 97.

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¶ 15 Whether or not the expert evidence is valuable or not is a debatable issue in each case.

¶ 16 There are obvious areas where expert evidence is useful in child protection cases, for example, psychological evidence regarding a child's development, psychological evidence regarding the effect on a child of a lack of adequate parenting and/or neglect, medical evidence regarding the possibility of a child being physically, sexually or emotionally abused, etc. Frequently, a society may lead evidence from a psychologist and/or psychiatrist regarding a parent's capacity to parent, with respect to the issues bonding and attachment and the effect of disruption of bonding and supporting a society's plan for adoption.

¶ 17 In dealing with expert evidence, the qualifications of the expert to give evidence can be challenged on a voir dire. It is important that an expert's expertise be carefully scrutinized in order to ensure his or her opinion is within the realm of their expert qualifications whether academic and/or practical experience. The test of whether or not a witness is an expert in the field in which it is sought to have the witness' opinion is not dependent on academic qualifications alone but may be based on their experience. This is an especially important consideration if social workers, adoption workers and/or therapist are called to give opinion evidence where their academic qualifications may be deficient and/or their practical experience limited.

¶ 18 Depending on a Judge's perception of the nature of child protection proceedings, it can be argued that a relaxed approach to the admission of opinion evidence should be rejected given the substantial interest at stake in protection proceedings. On the other hand, it can also be argued all of the evidence should be admitted subject to the approriate weight to be attached. This line of reasoning is frequently used when it is sought to qualify a social worker as an expert witness even when he or she lacks the usual academic qualifications provided they have developed the necessary skills from practical experience. It is also possible to argue that social workers should be allowed to express an opinion on general social work matters where the facts and inferences drawn from those facts are closely associated and the opinion is no more than a extensive statement of facts.

3. Business Records

¶ 19 The introduction of business records is also frequently an issue in child protection proceedings. The wording of the Evidence Act is broad enough to encompass practically every type of writing utilized in connection with any operation. Two criteria must be met as preconditions to admissibility:

(1) the records must have been made in the usual and ordinary course of business; and
(2) it is in the usual and ordinary course of business to make such writings.

¶ 20 In order to satisfy the "business record" criteria in Section 35(2) of the Evidence Act, a motion is generally brought prior to trial to call someone from the Records Department who had a detailed knowledge of the ordinary business practices of the facility, with regard to the recording of business transactions and the retention of those records. It is not necessary for the actual maker of the records to be called to identify them. [See Note 11 below.]

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Note 11: Setak Computer Services Corp. v. Burroughs Business Machines Limited (1977), 15 O.R. (2d) 750, (High Court).

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¶ 21 At least seven days notice must be given under Section 35(3) of the Evidence Act in order for documents to be admitted as business records. The circumstances of the making of the record, including the lack of personal knowledge by the maker, may be shown to effect its weight but such circumstances do not effect its admissibility. See Section 35(4) of the Evidence Act.

¶ 22 Section 35 of the Evidence Act does not override the common rule as it relates to the admissibility of business records as it does not effect the admissibility of any evidence that would be admissible apart from this section and does not render admissible any privileged documents. The common law criteria for the admissibility of business records as set out in Ares v. Venner, [See Note 12 below.] would still be relevant. If the record sought to be relied upon meets the criteria established in the Ares v. Venner case, then such records may be received in evidence as prima facie proof of the facts stated therein. The criteria are as follows:

(1) the records must have been made contemporary and usually by someone having personal knowledge of the matters;
(2) the records must have been made in the regular course of business; and
(3) the author should have owed a duty to the third person to not have only done the very thing recorded by him, but also to have made a record or entry of it.

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Note 12: Ares v. Venner [1970], S.C.R. 608, 12 C.R.N.S. 349.

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¶ 23 Counsel must carefully scrutinize business records to determine whether or not they contain hearsay remarks of third parties, opinions, diagnosis or impressions of an expert nature that should not be admissible under the Business Record exception. Past occurrences, history or events which are routinely recorded in hospital records as part of the case history arguably should not properly form part of the business record. Counsel can require that contents of records that do not meet the Ares v. Venner criteria be ruled inadmissable, or that parts of records and/or files be excluded or that the part of the record containing opinion evidence be excluded unless the author is qualified as an expert by the court on a voir dire. On the other hand, the courts can be urged to approach a flexible and broad approach to the inclusion of documentary evidence while respecting the guidelines in Ares v. Venner as to trustworthiness and necessity. It can argued that the Ares v. Venner doctrine is not exclusionary and that each particular item of hearsay evidence in the records should be looked at as to whether or not there are circumstances that tend to guaranty its trustworthiness and make it reasonable to act on that evidence without the necessity of calling each individual who contributed towards the making of a particular record. It can also be argued that pursuant to Section 35(4) of the Evidence Act, the lack of personal knowledge of the maker of the record does not affect the admissibility, rather, it may go to the issue of weight.

4. Statements of Children

¶ 24 Probably the most frequent issue in child protection proceedings is the admissibility of statements of children. Traditionally, the rule against hearsay evidence rendered inadmissable an out of court statement made by a child complainant or any other person when its introduction was sought to establish the truth of the matters stated. The Supreme Court of Canada in the decision of R. v. Khan [See Note 13 below.], established a new frame work with respect to the admissibility of hearsay evidence if such evidence meets certain criteria with respect to necessity and reliability.

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Note 13: R. v. Khan [1990], 2 S.C.R. 531, 59 C.C.C., (3d) 92.

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¶ 25 McLachlin, J. in R. v. Khan, concluded that hearsay evidence of a child's statement is admissible where the requirements of a Ares v. Venner are met and stated (at p. 104 - 105 C.C.C.):

> "The first question should be whether reception of the hearsay statement is necessary. Necessity for these purposes must be interpreted as "reasonably necessary". The inadmissability of a child's evidence might be one basis for a finding of necessity but sound evidence based on psychological

> assessments and testimony in court might be traumatic for the child or harm the child might also serve. There may be other examples of circumstances which could establish the requirement of necessity.
> The next question should be whether the evidence is reliable. Many considerations such as timing, demeanour, the personality of the child, the intelligence and understanding of the child and the absence of any reason to expect fabrication in a statement may be relevant on the issue of credibility. I would not wish to draw up a strict list of considerations for reliability, nor to suggest certain categories of evidence (for example the evidence of young children on sexual encounters) should always be regarding as reliable. The matters relevant to reliability will vary with the child and with the circumstances and are best left to the trial judge.....
> I conclude that hearsay evidence of a child's statement on crimes committed against the child should be received, provided that the guaranties of necessity and reliability are met, subject to such safeguards as the judge may consider necessary and subject always to considerations affecting the weight that should be accorded to such evidence. This does not make out of court statements by children generally admissible; in particular, the requirement of necessity will probably mean that in most cases children will still be called to give viva voce evidence."

¶ 26 The conclusion has not just been limited to criminal proceedings or to civil proceedings generally but have been followed by many judges in child protection proceedings. College of Physicians and Surgeons of Ontario v. Khan [See Note 14 below.]. The preferred method of meeting the requirements of necessity and reliability is by way of a voir dire. Children's Aid Society of Metropolitan Toronto v. M. (R). [See Note 15 below.]

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Note 14: College of Physicians and Surgeons of Ontario v. Khan (1992) 9 O.R. (3d) 641.

Note 15: Children's Aid Society of Metropolitan Toronto v. M. (R.), April 9, 1992, (Ont. Prov. Div.), Jones, J., [1992] O.J. No. 1097.

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¶ 27 With respect to the issue of reliability, the Judge must be satisfied that the statements have been accurately and objectively reported and factors which would undermine the reliability of the child's statements are absent. As stated in R. v. Hawkins [See Note 16 below.], the Court held at page 157 as follows:

> "The requirement of reliability will be satisfied where the hearsay statement was made in circumstances which provide sufficient guaranties of trustworthiness. In particular, the circumstances must counter the traditional evidentiary dangers associated with hearsay.....
> The criteria of reliability is concerned with threshold reliability not

ultimate reliability. The function of the trial judge is limited to determining whether the particular hearsay statement exhibits indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement.
More specifically, the judge must identify the specific hearsay dangers raised by the statement and then determine whether the fact surrounding the utterance of the statement offers sufficient circumstantial guaranties of trustworthiness for those dangers. The ultimate reliability of the statement, and the weight to be attached to it, remain determinations for the trier of fact."

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Note 16: R. v. Hawkins (1995) 111 C.C.C. (3d) 129, 96 O.A.C. 1981 (C.C.C.)

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¶ 28 On the other hand, it can be argued that the Supreme Court of Canada decision in R. v. Khan has no application to protection proceedings in that child protection hearings are not criminal in nature but are a special form of civil proceedings with the specific focus of promoting the best interest, protection and well-being of children. The circumstances under which a child's hearsay statements may be received are not necessarily limited to those approved of by the Supreme Court to Canada in R. v. Khan and R. v. Smith [See Note 17 below.]. The best interest principle retains sufficient priority to justify the reception of a child's hearsay evidence, subject only to the exercise of caution and should not be subject to the test of reliability and necessity. Winnipeg Child and Family Services v. L. (L). [See Note 18 below.] Further, it can be argued that child's statements may be admitted not for the truth of the facts but to show the child's state of mind.

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Note 17: R. v. Smith, [1992] 2 S.C.R. 915, 75 C.C.C. (3d) 257.

Note 18: Winnipeg Child and Family Services v. L. (L) (1994), 4 R.F.L. (4th) 10 (C.A.).

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5. Statutory Provisions Relating to Admissibility of Evidence

¶ 29 The Child and Family Services Act contains several provisions liberalizing the admissibility of evidence.

(A) Section 51(3) provides that at the interim care and custody hearing, the courts may admit and act on evidence that it considers credible and trustworthy in the circumstances.
(B) At the main hearing, pursuant to Section 50, despite anything in the Evidence Act, before ordering that a child be placed in or return to the care and custody of a person other than a Society, the court may

consider that person's past conduct towards any child that is or has been in his or her care, and any oral or written statement or report that a court considers relevant, including a transcript, exhibit or finding in an earlier civil or criminal proceeding may be admitted into evidence and shall be proved as the court directs.

(C) A Society, pursuant to Section 74, may bring a motion for the production of records, including clinical records pursuant to Section 35 of the Mental Health Act. The court may order that the record be produced if the court is satisfied that the record contains information that may be relevant to a consideration of whether a child is suffering abuse or likely to suffer abuse and the person in possession or control of the record has refused to permit the society to inspect the record.

Counsel for parents can demand full disclosure in a timely fashion on the basis of the principles set out by the Supreme Court of Canada in R. v. Stinchcombe [See Note 19 below.] which has been held to apply in child protectoin proceedings. [See Note 20 below.] Relevant materials would includ case worker notes or service logs, health files, child and family files, night duty reports, andy historical family files stored on microfiche, case conference and risk assessment reports, any expert reports, raw data, and curriculum vitae of each expert. Request should also be made of any transcript, video tape or tape recording of any interviews conducted with the child and/or siblings.

(D) The court may also, pursuant to Section 49, on its own initiative summon a person to attend before it, testify and produce any document or thing and may enforce obedience to the summons as it were issued under the Family Law Act.

(E) As well, the report of an assessment ordered pursuant to Section 54 after a child has been found to be in need of protection, shall become evidence and part of the court proceeding. The court may draw any inference it considers reasonable from a person's refusal to undergo such an assessment.

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Note 19: R. v. Stinchcombe [1991] 3 S.C.R. 326, 66 C.C.C. (3d).

Note 20: Children's Aid Society of Sudbury and Manitoulin (Districts) v. M.(G), Jan 17, 1992, Ont. Prov. Div., Guay, J.; Children's Aid Society of Peel v. J.(V.), summarized at [1994] W.D.F.L. 42, Ont. Prov. Div., Wolder, J.

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CONCLUSION

¶ 30 The approach that counsel may espouse with respect to evidentiary issues in child protection proceedings is highly dependent on the particular interest and party that is being represented. The approach that the Court may follow with respect to evidentiary rulings may largely depend on the particular philosophical approach of the presiding Judge regarding the nature of child protection hearings. The nature of these proceedings may dramatically change in view of the current legislative changes that are being advocated which emphasize the inquiry nature as opposed to the adversarily nature of child protection proceedings. These changes in themselves may reopen the Charter challenges available to counsel which to date have been unsuccessful.

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APPENDIX

CASE LAW RE BURDEN OF PROOF

(A) TEMPORARY CARE AND CUSTODY BURDEN OF PROOF - "SUBSTANTIAL RISK"

- "almost massive burden of proof"

C.C.A.S. v. L. (P). June 25, 1986, (Ont. Dist Ct.), Hawkins D.C.J., [1986] O.J. No. 2498, summarized at [1986] W.D.F.L. 1746 affirming April 16, 1986, Ont. Prov. Fam. Ct., [1986] O.J. No. 1702.

Peel Regional Municipality v. V.(c.) (1987), 8 R.F.L. (3d) 15 (Ont. Fam. Ct.)

C.A.S. of Metropolitan Toronto v. F.(R), (1989), 66 O.R. (2d) 528 (Fam Ct.)

- "actual, real and not illusory risk.... real chance of danger to health or safety of child"

C.C.A.S. v. D(A.) (1994) 1 R.F.L. (4th) 268, (Ont. Gen. Div.)

C.C.A.S. of Metropolitan Toronto v. M.(R) (1987), 62 O.R. (2d) 535 (Ont. Dist. Ct.)

Family & Children's Services of London and Middlesex v. G.(D), (1989), 20 R.F.L. (3d) 429 (Ont. Fam. Ct.)

(B) PROTECTION HEARING

- high civil standard but something less than proof beyond a reasonable doubt

Director of Child Welfare v. Victor (1984), 47 Nfld. & P.E.I.R. 81, 139 A.P.R. 81 (P.E.I. C.A.)

Re F. (J.) (1983), 26 Alta. L.R. (2d) 329 (Prov. Ct.)

- civil burden but very demanding onus

Re Chrysler (1978), 5 R.F.L. (2d) 50 (Ont. Fam. Ct.)

C.A.S. of Sudbury - Manitoulin v. L.(M.) et al [1986] W.D.F.L. 1804 (Ont. Prov. Ct. [Fam Div.])

Re B (C.Y.) (May 26, 1982), [1982] W.D.F.L. 887 (Ont. Prov. Ct. [Fam Div.])

C.A.S. of Belleville v. H.C. (Oct 22, 1982), (Ont. Prov. Ct. [Fam Div.]), [1982] O.J. No. 2218.

Re C.A.S. of Hamilton - Wentworth and C. (D.) et al. (March 30, 1987), 54 A.C.W.S. (3d) 80 (Ont. U.F.C.)

C.C.AS. of Metropolitan Toronto v. Pamela M. (1982), 36 O.R. (2d) 450 (Ont. Fam. Ct.)

- ordinary civil onus, on balance of probabilities

C.C.A.S. of Metropolitan Toronto v. Veronica P., unreported, May 25, 1984, (Ont. Fam Ct), Beaulieu J. affirmed as appeal, unreported, Nov. 6, 1984, Ont. Co. Ct, Houston, J.

C.A.S. of Winnipeg v. Lawrence (1970), 3 R.F.L. 36 (Man. C.A.)

C.A.S. of Winnipeg v. Bouvette (1975), 24 R.F.L. 350, (Man. C.A.)

(C) STATUS REVIEW

- "simple preponderance of evidence, balance of probabilities, in favour of change of status"

Prot. C.A.S. of Essex County v. U. and U. (April 8, 1982), [1982] W.D.F.L. 821 (Ont. Prov. Ct. [Fam Div.]), appeal dismissed on consent [1984] W.D.F.L. 342 (Ont. Dist. Ct.).

Re M.(M.) (May 17, 1985), 8 F.L.R.R. 72 (Ont. Prov. Ct. [Fam Div]).

Re Y.(C.) (Sept 23, 1985), [1986] W.D.F.L. 381 (Ont. Prov. Ct. [Fam Div]).

C.A.S. of Ottawa - Carleton v. D.(S.) et al (Dec 20, 1985), [1986] W.D.F.L. 382, 35 A.C.W.S. (2d) 68 (Ont. Prov. Ct. [Fam Div.])

CASE LAW RE: EVIDENTIARY ISSUES

APPLICABILITY OF RULES OF EVIDENCE

Strict Application of Rules:

- Rules of evidence should be followed as allow fairest result ..... dispensing with rules could lead to inconsistent, arbitrary or unfair decisions

C.A.S. of Metropolitan Toronto v. R.K. (1983), [W.D.F.L.] 1320, (Ont. Fam. Ct.)

- Balance need to protect child and parents' right to fair hearing

Re C.(J.), (1984) 39 R.F.L. (2d) 244 (Ont. Fam. Ct.)

Relaxation of Rules of Evidence:

- Evidence should be admitted because of special character of child protection proceedings, rather than excluded for technical or borderline situations:

T.(T.) v. C.C.A.S. of Metropolitan Toronto (1984), 42 R.F.L. (2d) 47 (Ont. Fam. Ct.)

C.C.A.S. of Metropolitan Toronto v. R.(K.) Aug. 31, 1983, Doc. No. York C6309-82, Ont. Prov. Ct, Thompson J., summarized at [1983] W.D.F.L. 1320

C.C.A.S of Metropolitan Toronto v. M.M., March 23, 1981, Ont. Fam. Ct., Nasmith J., [1981] O.J. No. 2178.

(1) USE OF AFFIDAVIT

- Affidavit of social worker tendered as evidence in chief, ruled inadmissible as counsel for parent objecting, witness available to testify

T.T. v. C.C.A.S. of Metropolitan Toronto (1984) 42 R.F.L. (2d) 47 (Ont. Prov. Ct. [Fam. Div.])

(2) EXPERT WITNESSES

- Social worker's qualifications challenged to give opinion evidence based on lack of academic qualifications and limited experience.

C.C.A.S. Hamilton - Wentworth v. S.(J.C.) (1986), 9 C.P.C. (2d) 265 (U.F.C.)

- Social worker qualified as expert based on practical experience.

R. v. Bunniss (1964), 44 C.R. 262, 50 W.W.R. 422 (B.C. Co. Ct.)

C.A.S. of Metropolitan Toronto v. M.(S.), unreported, Feb 25, 1986, Ont. Fam. Ct. James J.

- General Medical Practitioner qualified as expert in child abuse based on experience.

C.A.S. of Hamilton - Wentworth v. D.(S.) (1991) 35 R.F.L. (3d) 136 (Ont. U.F.C.)

- Social worker allowed to express opinion on general social work matters, where facts and inferences amount to no more than Statement of Fact

C.C.A.S of Metropolitan Toronto v. S.P. (J.) (1987), 62 O.R. (2d) 702 (Ont. Fam. Ct.)

R. v. Graat (1982) 2 C.C.C. (3d) 365, [1982] 2 S.C.R. 819

D. (L.A.) v. M. (A.D.) (1983), 54 A.R. 255 (Prov. Ct.)

(3) BUSINESS RECORDS

- Social files and hospital records admissible as business records, hearsay statements and opinions expressed in records not admissible.

C.A.S. Halifax v. L.T.H. (1988) 16 R.F.L. (3d) 97 (N.S. Co. Ct.), affirmed (1989), 19 R.F.L. (3d) 171 (C.A.)

Adderley v. Bremner [1968] 1 O.R. 621 (H.C.)

Aynsley v. Toronto General Hospital [1968] 1 O.R. 425, 66 D.L.R. (2d) 575, varied on other grounds [1969] 2 O.R. 829, (C.A.), affirmed [1972] S.C.R. 435.

- Hospital Records, Discharge Summary and progress notes from hospital admitted as business records relevant to past parenting.

T.T. v. Catholic of Metropolitan Toronto (1984) 42 R.F.L. (2d) 47 (Ont. Prov. Ct. [Fam. Div.])

- Hospital chart containing doctors' and nurses' opinion as to past parenting not admissible as business records not admissible per s.50 (formerly s.28(4)) as identity of doctors and nurses unknown

Re J.C. (1984) 39 R.F.L. (2d) 244 (Ont. Prov. Ct., Fam Div.)

- All hearsay admissible subject to guarantee of trust worthiness and necessity as set out in Ares v. Venner, opinions and third party statements admissible subject to weight.

C.C.A.S. of Metropolitan Toronto v. M(M.) March 23, 1981, Doc. No. York C1852/80 Ont. Fam. Ct., Nasmith J. summarized at 8 A.C.W.S. (2d) 497

C.C.A.S. of Metropolitan Toronto v. S(D.), Dec. 18, 1984, Doc. No. Toronto C6881/81, Ont. Fam. Ct., Nasmith J.

Winnipeg South (Municipality) Child & Family Services Agency v. S.(R.) (1986), 40 Man. R. (2d) 64 (Q.B.)

(4) STATEMENTS OF CHILDREN

- Test for admissibility of child's hearsay statements is reliability and necessity to be determined on voir dire, not limited to criminal proceedings

R. v. Khan (1990) 59 C.C.C. (3d) 92, 2 S.C.R. 531

Khan v. College of Physicians and Surgeons (Ont.) (1992), 9 O.R. (3d) 641, 76 C.C.C. (3d) 10 (Ont. C.A.)

C.A.S. of Metropolitan Toronto v. M. (R.) April 9, 1992, Ont. (Prov. Div.)(Fam.) Jones J., [1992] O.J. No. 1097.

R. v. S.A. Jan. 12, 1998, Doc. No. North York Y97-137-00, Ont. (Prov. Div.), Weisman Prov. J., [1998] O.J. No. 300.

The Admissibility of Hearsay Evidence: Defining and Applying Necessity and Reliability since R. v. Khan, (1995) 13 C.F.L.Q. 67, Weisman, J.

- Children's statements admitted not for truth of the facts but to show the child's state of mind

Re Harris (1976), 28 R.F.L. 181 (Ont. Fam. Ct.)

Catholic Children's Aid Society of Metropolitan Toronto v. G., unreported, June 2, 1994, Ont. Prov. Div. (Fam. Ct.)

- Children's statements to expert admitted as forming basis for expert's opinion, not evidence of truth.

R. v. Abbey, [1982] 2 S.C.R. 24, 68 C.C.C. (2d) 394

C.C.A.S. of Essex (County) v. G.(L.), June 13, 1986, Doc. No. Windsor 326/85, Ont. Fam. Ct., Abbey, J., [1986] O.J. No. 1724.

Children Should Be Heard, but Not Seen: Children's Evidence in Protection Proceedings, (1991) 8 C.F.L.Q. 1, Rollie Thompson

- Children's hearsay statements admitted in child protection proceedings based on "best interest" principles, not subject to tests of reliability and necessity, caution exercised re use and reliance.

Winnipeg Child & Family Services v. L.(L.) (1994), 4 R.F.L. (4th) 10, [1994] 6 W.W.R. 457 (Man. C.A.)

H. (D.R.) v. Superintendent of Family and Child Service of British Columbia (1984), 41 R.F.L. (2d) 337, 14 D.L.R. (4th) 105 (C.A.)

Children's Aid Society of Renfrew (County and Pembroke (City) v. L.(P.), unreported, April 24, 1991, (Ont. Prov. Div.) Foran, J., [1991] O.J. No. 1113, summarized at [1991] W.D.F.L. 888.

Children's Aid Society of Ottawa - Carleton v. K.(L.), (Ont. Prov. Div.), Cousineau, J. summarized at [1994] W.D.F.L. 675.

- Videotape interview of child's statement re: alleged sexual abuse admitted subject to cross examination of social worker conducting interview.

C.A.S. of Brant v. R.(E.) September 27, 1993, Doc. No. Brantford C10/92, Ont. Prov. Div. Fam, Katarynych, J., [1993] O.J. No. 2382.

- Child allowed to testify outside courtroom or behind screen.

Awasis Agency of Northern Manitoba v. W.(W.), unreported, June 6, 1990, Fam. Ct., summarized at [1990] W.D.F.L. 838.

Winnipeg Child and Family Services v. P. (1994), 93 Man. R. (2d) 89 (Q.B.).

5. STATUTORY PROVISIONS RE. EVIDENCE

(A) Section 51(7) C.F.S.A.:

Credible and Trustworthy Evidence per s. 51(7) C.F.S.A.

- Phrase "credible and trustworthy "allows admission of reliable hearsay at interim stage

C.C.A.S. v. Colvin S. and Thora S. unreported, Nov. 26, 1985 (Ont. Fam. Ct.), Wilkins, J.

Roman Catholic Children's Aid Society (Essex) v. H.(L.), July 21, 1987, Doc. No. Windsor 438/87 (Ont. Fam. Ct.), Abbey, J.

Catholic Children's Aid Society of Metropolitan Toronto v. D.(A.) (1994), 1 R.F.L. (4th) 268, 111 D.L.R. (4th) 151 (Ont. Gen. Div.)

(B) Section 50 C.F.S.A.:

- Admission of Prior Statements, transcripts, exhibit or finding, etc.

- Paramount concern best interest, protection and well being of child, therefore should consider relevant material. Transcript of prior hearing admitted no necessity to call witnesses

E.C. et al. v. C.C.A.S. of Metropolitan Toronto (1982) 37 O.R. (2d) 82 (Co. Court).

C.A.S. of Metropolitan Toronto v. E. (N.H.), unreported, May 8, 1980, Ont. Fam. Ct., Walmsley, J., summarized at 5 A.C.W.S. (2d) 66.

C.A.S. of Kenora (District) v. P.(E.) (1984), 44 R.F.L. (2d) 70, 48 O.R. (2d) 591 (H.C.).

Lee v. C.A.S. [1982] W.D.F.L. 624 (Ont. Co. Ct.)

- Statute broadening rules of evidence should be strictly interpreted.

T.T. v. Catholic C.A.S. of Metropolitan Toronto (1984) 42 R.F.L. (2d) 47 (Ont. Prov. Ct. Fam Div.). Transcript of prior proceedings admitted not Reasons for Judgment.

Re B., unreported, July 14, 1982, Ont. Fam. Ct., summarized at [1982] W.D.F.L. 1406.

New Brunswick (Minister of Health & Community Services) v. R.(M.) (1988), 87 N.B.R. (2d) 112 (C.A.).

Children's Aid Society of Waterloo v. C.(R.), Nov. 14, 1994, Doc. Kitchener 596/91 Ont. Prov. Div., Katyrynch, J. summarized at [1995] W.D.F.L. 193.

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# Hearsay Evidence*

*by Nancy J. Iadeluca*

Received April 5, 1999

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## 1. INTRODUCTION

¶ 1 The rule against the admission of hearsay evidence has changed in recent years. It has moved from a more rigid categorical exception approach to a more flexible and perhaps more unpredictable principled approach based on the twin criteria of necessity and reliability. Understanding some of the policy and efficiency reasons behind this evolution should assist practitioners in fashioning appropriate arguments in support and against the admission of the hearsay evidence.

## 2. THE TRANSFORMATION OF THE RULE AGAINST HEARSAY EVIDENCE:

## FROM CATEGORICAL EXCEPTIONS TO THE PRINCIPLED APPROACH

### A. The definition

¶ 2 Hearsay is a statement made by an out of court declarant, adduced for the truth of its content. The general rule excludes hearsay evidence.

¶ 3 The statement can be oral, in writing or by communicative conduct. [See Note 1 below]

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Note 1: J. Sopinka, S.N. Lederman & A.W. Bryant, The Law of Evidence in Canada (Toronto: Butterworths, 1992) at 156.

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¶ 4 It follows that statements not adduced for the truth of its contents but for the fact that is was made or for some other purpose, is not hearsay and will not be excluded.

### B. The rationale behind the exclusionary rule

¶ 5 The exclusionary rule stems from a basic concern with the unreliability of evidence that is neither under oath or subject to cross-examination. Dickson J. in R. v. Abbey stated: "Testimony under oath, and cross-examination, have been considered to be the best assurances of the truth of the statements of facts presented". [See Note 2 below]

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Note 2: R v. Abbey, [1982] 2 S.C.R. 24 at 41.

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¶ 6 Other rationales articulated in the case law in support of the exclusionary rule are:

1 The admission of such evidence may lend itself to the perpetration of fraud;

2. Hearsay evidence results in a decision based upon secondary and therefore, weaker evidence than the best evidence available;
3. There is no opportunity to observe the demeanor of the declarant;
4. The introduction of such evidence will lengthen trials.

C. The categorical approach

¶ 7 The courts have generally recognized a number of exceptions to the hearsay rule in order to admit the evidence.

This fitting in of the evidence into a defined exception is referred to as the categorical approach.

¶ 8 Some of these exceptions include:

1. Dying declarations
2. Statements against pecuniary interest
3. Declarations about family history
4. Res gestae (Spontaneous statements)
5. Regular entries in the course of business
6. Sundry statements of deceased persons
7. Testimony in former proceedings;
8. Admissions of a party
9. Declarations of a mental condition

¶ 9 Each exception is governed by its own particular test. [See Note 3 below]

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Note 3: See Sopinka at 173 to 299.

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¶ 10 The principles underlying the rationale for the exclusionary rule are the same principles that underlie the exceptions:

> "Necessity has given rise to a number of exceptions to the rule against hearsay. The requirement that testimony be subjected to the test of cross-examination has been dispensed with in situations where the declarant of the words in question is unavailable and the oral or written statement was made under circumstances which, it can be presumed, would impress the remarks with a genuinely trustworthy quality. In many situations such declarations are the only cogent evidence available and to exclude them would result in considerable inconvenience." [See Note 4 below]

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Note 4: Sopinka at 173. See Sugden v. Lord St. Leonards (1876), 1 P.D. 154, [1875-80] All E.R. Rep. 21 (C.A.), at 240 (P.D.)

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¶ 11 However, the categorical approach has its critics. According to Wigmore:

> "The needless obstruction to investigation of truth caused by the hearsay rule is due mainly to the inflexibility of its exceptions, to the rigidly technical construction of those exceptions by the courts, and to the enforcement of the rule when its contravention would do no harm, but would assist in obtaining a complete understanding of the transaction." [See Note 5 below]
> and
> "The exceptions have been established casually in the light of practical experience, and with little or no effort (except in modern times) at generalization or comprehensive planning. The courts have had in mind merely to sanction certain situations as a sufficient guarantee of trustworthiness." [See Note 6 below]

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Note 5: J.H. Wigmore, Evidence in Trials at Common Law:

Chadbourn Revision (Boston: Little, Brown and Co., 1974), s. 1427.

Note 6: J.H. Wigmore, Evidence in Trials at Common Law:

Chadbourn Revision (Boston: Little, Brown and Co., 1974), s. 1422.

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¶ 12 The response to this criticism has been judicial reform.

D. The Principled Approach:

¶ 13 In Ares v. Venner, [1970] S.C.R. 608, the Supreme Court of Canada decided that the categories of exceptions to the hearsay rule were not exhaustive. In contrast to the British House of Lords which advocated legislative reform, the Supreme Court decided that judicial reform of the rule against hearsay was an appropriate manner to facilitate the judicial response to new social realities. Focussing on Wigmore's analysis of the principles which underlie hearsay exceptions, the Supreme Court reasoned that some evidence will be sufficiently necessary and reliable to be admissible even though it does not fall within one of the established exceptions.

¶ 14 Ares involved a malpractice suit in which nurses' notes were deemed admissible for evidentiary purposes without the requirement that the nurses be summoned to testify. In the result the Court expanded the common law business records exception. The Court accepted that the issue called for judicial reform, rejecting the British House of Lord's view that such matters should be left to the legislature. As the basis for its reasons, the Supreme Court credited the dissent of Lords Donovan and Pearce in Myers v. Director of Public Prosecutions, [1965] A.C. 1001 (H.L.).

¶ 15 In a trilogy of criminal cases decided in the early 1990s, the Supreme Court revisited the issue of hearsay evidence. In its decisions in R. v. Khan, [See Note 7 below] R. v. Smith, [See Note 8 below] R. v. B. (K.G.), [See Note 9 below] the Supreme Court formulated a principled approach to hearsay exceptions: necessity and reliability.

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Note 7: [1990] 2 S.C.R. 531.
Note 8: [1992] 2 S.C.R. 915.
Note 9: [1993] 1 S.C.R. 740.

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¶ 16 McLachlin J. in Khan stated:

> "The hearsay rule has traditionally been regarded as an absolute rule, subject to various categories of exceptions ... While this approach has provided a degree of certainty to the law on hearsay, it has frequently proved unduly inflexible in dealing with new situations and new needs in the law. This has resulted in courts in recent years on occasion adopting a more flexible approach, rooted in the principle and policy underlying the hearsay rule rather than the strictures of traditional exceptions". [See Note 10 below]

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Note 10: Khan at 531.

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¶ 17 As Chief Justice Lamer stated in R v. Smith, "the decision of this Court in Khan ... should be understood as the triumph of a principled analysis over a set of ossified judicially created categories." [See Note 11 below]

Note 11: Smith at 930.

¶ 18 In Khan, the Court adopted the reasoning in Ares as the basis for formulating a new exception to accommodate child abuse hearsay. The Court decided that a child's unsworn evidence and statements, made to an adult in an alleged child sexual assault case, could be received as evidence to assert the truth of their contents where the necessity and reliability requirements of Ares were met.

¶ 19 The principled approach as enshrined by the Supreme Court of Canada has been applied in civil as well as criminal cases. Let us now look at the criteria for admissibility.

i. Necessity

¶ 20 The first requirement is the necessity for the admission of the hearsay evidence. Necessity has been construed as "reasonably necessary" to prove a fact in issue. [See Note 12 below]

Note 12: Khan at 546.

¶ 21 Court have reasoned that hearsay evidence may be admissible on the basis of necessity if the evidence could not otherwise be adduced. For example, where the out of court declarant is dead, out of the jurisdiction, mentally incompetent or otherwise unavailable. Again, the concept of necessity is a flexible concept which can be satisfied in a variety of circumstances where it is not possible to get evidence of the same value from the same or other sources. [See Note 13 below]

Note 13: Smith at 934

¶ 22 In an application brought by the Minister of Citizenship & Immigration, the Minister sought to introduce witness statements implicating the Defendant's involvement in Nazi activities fifty years after the events in question. Three witnesses in the Ukraine were interviewed twice. Two of the witnesses were dead and one was mentally incompetent. There were also nine other witnesses who testified about the same events. McKeown J. found that these witness statements were not admissible. The criteria of necessity was not made out as it was possible to get evidence of the same value from other sources. There were nine other witnesses who testified about the same events. Canada (Minister of Citizenship & Immigration) v. Bogutin (1997) CanRepNat 1921.

¶ 23 Unavailability should be understood as referring to the evidence as well as to the declarant. In an action for damages for personal injuries following a car accident, the Defendant sought to introduce into evidence certain OHIP records of a retired chiropractor living in British Columbia whose business records have been destroyed. The chiropractor advised counsel that if called as a witness he would not be able to add to the diagnostic code that he entered on the OHIP claims card. Kovacs J. held that the OHIP records were hearsay but nevertheless admissible under the test provided in Ares vs. Venner. Given the fact that the business records were destroyed, and the chiropractor was out of the province and considered a reluctant witness, the criteria of necessity was made out. Mastrangelo (Litigation Guardian of) v. Kitney (1992) 16 C.P.C. (3d) 262 Kovacs J. (Ont.Gen.Div)

¶ 24 In Smith, the court found that sometimes an expedience or convenience may predicate necessity. [See Note 14 below]

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Note 14: Smith at 934.

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¶ 25 In an action for damages for personal injuries following a car accident, the Plaintiff sought to introduce letters from a number of universities setting out the cost of tuition for re-training as a speech therapist. The Plaintiff claimed she could no longer continue her employment as a physical therapist. The letters were held admissible following the test in Smith. While the court found that individual witnesses from the various universities could have been called, expediency or convenience dictated the necessity issue. The cost to the Plaintiff far out weighed the Defendant's right to cross-examine. Reliability was found on the basis that the letters contained extracts of the various universities' brochures and were not obtained solely for the purposes of litigation and there was no issue as to the credibility of the authors: Rocchio v. Willets (1993) 17 C.P.C. (3d) 281 (Alberta Queen's Bench) Veit J.

ii. Reliability

¶ 26 The second requirement goes to the issue of the reliability of the evidence. The reliability of the evidence must be decided in reference to the particular circumstances of the case. However, reliability does not have to be established with "absolute certainty". [See Note 15 below] The main question is whether there are circumstantial guarantees of reliability.

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Note 15: Smith at 930.

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¶ 27 In Smith, the Supreme Court of Canada clarified the criterion of reliability. First, the circumstances in which the statement was made must "substantially negate the possibility that the declarant was untruthful or mistaken." [See Note 16

below] They need not establish that the statement is accurate with absolute certainty. Second, the inquiry must be into the admissibility of the statement, not into the use that will ultimately be made of it. As Lamer C.J.C. said in R. v. B. (K.G.) at 787: "what the reliability component of the principled approach to hearsay exceptions addresses is a threshold of reliability, rather than an ultimate or certain reliability".

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Note 16: Smith at 933

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¶ 28 Patrick Schmidt summarized the following non-exhaustive indicia of reliability:

1. The statement is made under oath or in a formal investigative setting;
2. The statement is made close to the time of the event related in the statement;
3. The statement is made by a person with peculiar means of knowledge of the matter;
4. The statement is made by a person with no incentive to lie and who is not likely to have misperceived the event related;
5. The statement is consistent with and corroborated by other evidence. [See Note 17 below]

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Note 17: Patrick Schmidt "Evidentiary Issues at Trial" presented at the Law Society conference "Family Feuds: Sometimes You Really Do Have To Go To Trial"

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¶ 29 For example, in Mastrangelo (Litigation Guardian of) v. Kitney, the court found the chiropractor was a disinterested person who made the entires on the OHIP claims form prior to the litigation and close in time to the event recorded.

¶ 30 In an appeal from a dismissal of a dependant's relief application under the BC Estate Administration Act, the Plaintiff's litigation guardian sought to introduce a statement made by the deceased in a prior support application made by the deceased's former wife that the Plaintiff and deceased lived in a common law relationship. The Plaintiff herself was unable for mental and physical reasons to give evidence either at trial or discovery. The court admitted the prior statement as a declaration against the deceased's interest. Also it was admissible under the Supreme Court of Canada trilogy of cases in that the evidence was necessary in that the deceased was unable to give evidence and reliable because it was an admission against interest made under oath in circumstances where the deceased was subject to cross-examination. Wepruk (Guardian ad litem of) v. McMillan Estate (1993) 77 B.C.L.R. (2d) 273 (B.C.C.A.)

¶ 31 Mistakes as to perception, false memory and motive to lie all undermine the finding of reliability. [See Note 18 below]

Note 18: R.B.(K.G), (1993) 19 C.R. (4th) 1 (S.C.C.)

¶ 32 In Bogutin, the witness statements in question were recounting events fifty years after the fact and could clearly not be viewed as spontaneous declarations by the witness immediately after the events. The court found these statements not to be reliable.

iii. The Issue of Weight

¶ 33 The third issue often addressed in the case law is fairness to the accused/litigant. In the absence of cross-examination, considerations of fairness are to be addressed by submission as to the weight to be accorded and whether such evidence was corroborated by other means. Furthermore, the evidence must always be balanced against its probative value. As Chief Justice Lamer states in Smith:

> In my opinion, hearsay evidence of statements made by persons who are not available to give evidence at trial ought generally to be admissible, where the circumstances under which the statements were made satisfy the criteria of necessity and reliability set out in Khan, and subject to the residual discretion of the trial judge to exclude the evidence when its probative value is slight and undue prejudice might result to the accused. Properly cautioned by the trial judge, juries are perfectly capable of determining what weight ought to be attached to such evidence, and of drawing reasonable inferences therefrom. [See Note 19 below]

Note 19: Smith at 937.

3. CHILDREN'S HEARSAY EVIDENCE

A. Reasons for a more relaxed approach

¶ 34 Although this paper is not intended to deal with the evidentiary issues in a child protection proceeding, it is impossible to discuss children's hearsay evidence in a civil context without referring to the case law in child protection as well as custody and access cases that have been responsible for a relaxation of the principled approach where children are concerned. The courts show a cautious approach to applying the law that has mostly been developed in criminal law to cases which are considered less adversarial in nature and concentrates on its parens patriae duty to children and paramountcy of the best interests of children standard.

¶ 35 Where the interest of a very young child is at stake, a deponent at trial would be permitted to repeat what the child had said. An inflexible rule against hearsay is quite

unsuited to the court's exercise of its parens patriae jurisdiction: Foote v. Foote [1986] 6 W.W.R. 474, 15 C.P.C. (2d) 42 (B.C.S.C.).

¶ 36 One of the reasons for a more relaxed approach to hearsay evidence where children are concern stems from the fact that children are often found to be incompetent to testify. If the trial judge rules that the child is incompetent to testify, it may be necessary to admit an out-of-court statement. This is the situation of what happened in Khan. In cases where allegations of abuse are made, the out-of-court statements of a child is usually the sole evidence of the subject of the legal proceedings. Several members of the judiciary have endorsed the view that in proceedings which concern the safety and well being of children, rules of evidence should not prevent a hearing of all available evidence. Any concerns about the reliability of the evidence should be a matter of weight. As Judge Main stated in Re S. (1979) 10 R.F.L (2d) 341:

> Since the immediate health and/or life of a child may hang in the balance, the ordinary rules of evidence as to admissibility should be modified to reflect the gravity of the situation consistent with as fair a hearing as possible.

¶ 37 Another reason for the relaxation of the hearsay rule stems from a desire to spare children the traumatic experience of testifying in court. In Khan, the Court decided that the necessity requirement was fulfilled by "sound evidence based on psychological assessments that testimony in court might be traumatic for or harm the child..." [See Note 20 below] See also Moreau v. Moreau (1997) CanRepBC 2624 (B.C.S.C.) per Bennett J.; R. (S.F.) v. R. (E.C.) (1997) CanRepBC 1841 (B.C.S.C.) per Dillon J.

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Note 20: Khan at 546.

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¶ 38 However, in R. v. R.(D.) (1995), 131 Sask. R. 81 (C.A.) a therapist provided evidence that testimony in court would have a traumatic effect on the child, although this was only one consideration affecting the determination that necessity had been established.

B. Uncertainty as to the appropriate test

¶ 39 As a result of these various concerns, a review of civil law decisions reveals that uncertainty still persists as to the appropriate test for the reception of out-of-court statements of children. Prior to Khan, some judges required that necessity and reliability as articulated in Ares v. Venner be established, some courts held that the statement need only be reliable for it to be admissible, and other members of the judiciary received the hearsay evidence without stipulating the grounds for the admissibility of such statements. [See Note 21 below]

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Note 21: Wilson, "Wilson on Children and the Law" (Toronto: Butterworths, 1994)

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¶ 40 A review of two cases illustrates the uncertainty.

¶ 41 In Winnipeg Child and Family Services v. L.L. (1994) 4 R.F.L (4th) 10, the Manitoba Court of Appeal refused to apply the principles in R. v. Khan to a child protection matter. This case involved an appeal from an order of permanent guardianship of five children. They were apprehended following allegations of serious physical and emotional abuse by their parents which involved beating the children with "household equipment" such as belts and spoons, flushing their heads in the toilet, and tying the children to pieces of furniture. The issue before the Court was the admissibility of hearsay statements made by the children to social workers, the police, a teacher, and their foster parents. Twaddle J.A., speaking for the Court, held that the criteria enunciated by the Supreme Court of Canada in R. v. Khan and R. v. Smith were not applicable in a child protection case:

> In determining the admissibility of the children's hearsay statements, Bowman J. applied the principles enunciated in R. v. Khan and R. v. Smith, both supra. If this were a criminal case, involving charges against the parents, I would have no doubt as to the validity of that approach. But this is a child protection case. The circumstances in which a child's hearsay statement may be received in a child protection case are not necessarily limited to those approved in Khan and Smith. In those cases, the Supreme Court of Canada extended existing rules: it did not limit rules applicable in special cases...I think the issue of whether there are special rules applicable in child protection cases is an important one.. [See Note 22 below]

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Note 22: Winnipeg Child and Family Services v. L.L. at 15

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¶ 42 The Manitoba Court of Appeal concluded that:

> The reception of this evidence is not, in my opinion, subject to the tests of reliability and necessity. That does not mean, of course, that the Court can place reliance on evidence that is suspect or that it can use such evidence when there is no need to do so. What it means is that the strict tests applicable in criminal cases are somewhat relaxed where the protection of a child is the issue rather than the guilt of a person. Once the evidence is received, great caution must be exercised in the use of it and in deciding the extent to which reliance may be placed upon it. [See Note 23 below]

However, not all cases have adopted this view. For example, Green J. in C.C. v. B.L. 1995 CanRepNfld 79, reviewed child protection and custody judgments in which civil courts did not adhere to the tests of reliability and necessity as preconditions to the admissibility of a child's hearsay statements and concluded that the twin tests of necessity and reliability in Khan were applicable. He offered the following rationale for endorsing the Khan decision:

> I have difficulty appreciating how a court should accord any weight to evidence that is not first determined to be reliable. One of the purposes of the rules of evidence is to ensure that all information presented to the court meets a minimum degree of reliability and accuracy that would be safe for a trier of fact to rely on it. So long as the evidentiary rules tend to accomplish that result, they have a proper role to play. [See Note 24 below]

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Note 23: at 28
Note 24: At paragraph 114

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C. Necessity and Reliability Defined

¶ 43 In the case of very young children, age alone may establish necessity. See R. v. P.(J.), [See Note 25 below] where an out-of-court statement by a two-and-a-half-year-old was admitted.

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Note 25: (1992), 74 C.C.C. (3d) 276 (Que. C.A.), aff'd [1993] 1 S.C.R. 469.

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¶ 44 Necessity may be justified on the basis that, although the child testifies, he or she is unable to give a comprehensive or coherent account of the event in court. Necessity cannot necessarily be equated with unavailability. Courts have become increasingly indulgent in accepting proof of the prior statements of testifying witnesses, particularly when the child was very young at the time of the alleged incident. In Khan v. College of Physicians, Doherty J.A. said that necessity will exist where the testimony of the child does not provide "an accurate and frank rendition of the child's version of the relevant events." [See Note 26 below] In considering this the following non-exhaustive list of factors was put forward: the age of the child; whether leading questions were needed at trial to obtain the testimony; whether that account was coherent and complete; any professed inability by the witness to recall; any expert evidence relating to the child's ability to comprehend, recall, or narrate; and, any evidence of matters which occurred between the event and the time of the child's testimony which may reflect on the child's ability to provide an independent and accurate account of the events in issue." [See Note 27 below] (For example, parental influence may affect the child's subsequent testimony--the consequences of seeing the parent in trouble may cause the child to recant [See Note

28 below], or an angry parent may inflame the child's testimony--or there may be concerns about many interim interviews which may incorporate suggestions... [See Note 29 below]

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Note 26: Khan v. College of Physicians at 657.

Note 27: Khan v. College of Physicians at 657-58.

Note 28: See for example R. V. F.(G.) (1991), 10 C.R. (4th) 93 (Ont. Gen. Div.).

Note 29: See Khan v. College of Physicians at 658.

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¶ 45 The indicia of reliability on the other hand, have been established in R. v. Kahn, and include: timing of the statement; demeanor of the child; personality of the child; intelligence and understanding of the child; absence of motive of child to fabricate; absence of motive or bias of the person who reports the child's statement, spontaneity; statement in response to non-leading questions; absence of suggestion, manipulation, coaching, undue influence or improper influence; corroboration by real evidence; consistency over time; and statement not equally consistent with another hypothesis or alternative explanation: See also R. (S.F.) v. R. (E.C.) (1997) CanRepBC 1841 (B.C.S.C.)

¶ 46 Another factor going to reliability: the credibility of the witness that gives evidence with respect to the child's statements. See: T.Y. v. C.L.M. (1990), 69 Man. R. (2d) 21.

4. CONCLUSION

¶ 47 In the wake of these cases, there are four possible avenues by which a proponent of hearsay evidence might seek to gain admissibility: (1) under a current categorical exception, perhaps redefined and enlarged to accommodate the submission [See Note 30 below]; (2) as per Khan, a novel categorical exception might be conceived; (3) or an item of hearsay might be scrutinized for necessity and reliability on a case by case basis; and (4) with respect to children's hearsay evidence only, all such evidence is admissible subject to the appropriate weight to be given to it by the trier of fact.

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Note 30: Note that the categorical exceptions are still valid. See R. v. B.(K.G.).

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¶ 48 As we expand the categories of exceptions, how do we preserve our guarantees of trustworthiness? Are we relaxing our standard of trustworthiness for policy reasons? Or are we discarding inflexible rules in order to facilitate the search for truth?

# HEARSAY CHART

| ARGUMENT IN SUPPORT OF THE ADMISSION OF THE HEARSAY EVIDENCE | ARGUMENT AGAINST THE ADMISSION OF THE HEARSAY EVIDENCE |
|---|---|
| THE EVIDENCE IS NOT HEARSAY | THE EVIDENCE IS HEARSAY |
| The evidence consisting of a statement of an out of court declarant is not adduced for the truth of its contents but for the fact it was made. For example, where the statement itself is relevant to a fact in issue. | The evidence consists of a statement made by an out of court declarant adduced either solely for the truth of its contents or also for the truth of its contents; |
| THE CATEGORICAL EXCEPTIONS | THE CATEGORICAL EXCEPTIONS |
| The evidence tendered falls within the categorical exceptions:* | The evidence tendered does not fall within the categorical exceptions. |

1. Dying declarations
2. Statement of facts against interest
3. Declarations about family history
4. Attestation of subscribing witness
5. Regular entries in the course of business
6. Sundry statements of deceased persons
7. Reputation
8. Official statements
9. Learned treatises
10. Sundry commercial documents
11. Affidavits
12. Statements by a voter
13. Declarations of a mental condition
14. Spontaneous declarations

* See J. Sopinka, S.N. Lederman & A.W. Bryant, The Law of Evidence in Canada (Toronto: Butterworths, 1992) at 173 to 299.

THE PRINCIPLED APPROACH

The proffered evidence meets both tests of necessity and reliability.

Ares v. Venner [1970] S.C.R. 608
R. v. Khan [1990] 2 S.C.R. 531
R. v. Smith [1992] 2 S.C.R. 915
R. v. B. (K.G.)[1993] 1 S.C.R. 740

NECESSITY AND RELIABILITY

Necessity can be found where out of court declarant is either dead, out of the jurisdiction, insane or otherwise unavailable; or where the court is cannot expect to get evidence of the same value from the same or other sources.
R. v. Smith [1992] 2 S.C.R. 915

The criteria of necessity can be satisfied on the basis convenience or expediency:

Where it would be too costly to call numerous witnesses to prove non-contentious issues, such as the cost of university to retrain, hearsay evidence in the form of letter from universities will be admitted.
Rocchio v. Willets (1993) 17 C.P.C. (3d) 281 (Alberta Queen's Bench) Veit J.

THE PRINCIPLED APPROACH

The proffered evidence does not meet both tests of necessity and reliability.

NECESSITY AND RELIABILITY

Where there are other the witnesses available to give evidence similar to the hearsay evidence, the hearsay evidence will not be deemed necessary.
Canada (Minister of Citizenship & Immigration) v. Bogutin (1997) CanRepNat 1921

The relevant factors in determining necessity where experts were not available to testify about reports were as follows:

1. Was the unavailability of the witness sudden and unexpected in relation to the trial date?;

2. Was the report prepared by the main treating specialist who made personal observations known only to him at the time?;

3. Was the report prepared at a crucial time in the action, that is could any of the facts have changed since the time of observation?

4. Has the plaintiff's condition changed since the report was prepared that could have affected the opinion in the report?

Etienne v. McKellar General Hospital (1994) 38 C.P.C. (3d) 347 (Gen Div)

The reliability of the evidence must be decided in reference to the particular circumstances of the case. The main question is whether there exists circumstantial guarantees of trustworthiness.
R. v. Khan [1990] 2 S.C.R. 531

Where witness statements were made recounting events fifty years after the fact and could clearly not be viewed as spontaneous declarations by the witness immediately after the events will be found to be unreliable.
Canada (Minister of Citizenship & Immigration) v. Bogutin (1997) CanRepNat 1921

CHILDREN'S HEARSAY EVIDENCE

Necessity may be established on the basis that it would be too traumatic for the child to testify.

The opinion supporting 'necessity' on the basis of trauma to the child has to be specific to the child and not a simple mouthing of the general view that court procedures are hostile to children. See R. v. W. (1990), 2 C.R. (4th) 204 (Ont. Prov. Div.)

In the case of very young children, age alone may establish necessity. See R. v. P.(J.) (1992) 74 C.C.C. (3d) 276 (Que CA), aff'd [1993] 1 S.C.R. 469, where an out-of-court statement by a two-and-a-half-year-old was admitted.

In R. v. Rockey (1995) 23 O.R. (3d) 641, it was held to be common sense that a five-year-old would not be a meaningful witness.

With respect to reliability, the following factors have been considered by the court:

1) Were the statements made by the child spontaneous?
2) Was the child coached?
3) Was there harmony between the evidence of one witness and another?
4) Did the questions asked of the child suggest an answer?
5) Did the evidence of the expert witnesses, as accepted by the learned trial judge, support the allegations of sexual abuse?
6) Was there consistency over time of the child's disclosures as to sexual abuse?
7) Was there any other evidence supporting the allegations of sexual abuse?

However, there are also factors which appear to undermine or qualify the reliability of a statement.

-- the existence of other possible explanations. In Smith, an alternative explanation existed with respect of one of the statements; and, therefore, Lamer C.J.C held it to be inadmissible.

These factors are applied in a number of cases. See, for example, C. (C.) v. B. (L.) (1995) 136 Nfld. & P.E.I.R. 296 (Nfld. U.F.C.); K. (J.D.) v. K (S.A.) (1989), 20 R.F.L. (3d) 372 (B.C.S.C.)

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**Syrtash Collection of Family Law Articles**
SFLRP/1999-011

# The Child Support Guidelines: Highlights & Insights*

*by Nicholas Bala*

February 3, 1998

* This is a slightly revised version of a paper presented at the 1999 Family Law Institute of the Canadian Bar Association - Ontario, Toronto, January 29, 1999. Posted by John Syrtash with permission of the author.

## Introduction

¶ 1 There was considerable controversy among politicians, the public and justice system professionals when child support guidelines were introduced in May of 1997, about both the principle of having guidelines and the specific proposals of the federal government. The experience with the Child Support Guidelines [See Note 1 below] has generally been positive, with lawyers and judges reporting that there is more consistency in the amounts of child support that judges are determining, and greater ease for parents to settle the amount of child support without relying on a judge. [See Note 2 below] It seems certain that Canada will not abandon guidelines and return to a system of determining child support on the basis of an individualized assessment of a child's needs and parental means, a system that inevitably gave judges a very substantial discretion and resulted in very significant variations between judges, and that made settlements of child support more difficult. However, it is also clear that some provisions of the Guidelines remain controversial and are producing significant amounts of litigation and jurisprudence.

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Note 1: The Divorce Act, s. 2(5) (S.C. 1997, C.1, s. 1) allows provinces and territories to adopt their own version of child support guidelines for divorces within their jurisdictions. Only Quebec has its own child support guidelines for divorces, with a very different model of guideline, one that utilizes the incomes of both parents in determining the amount of child support, as well as taking account of visitation when it accounts for 20% or more of the child's time. All other provinces (except Alberta) have enacted legislation so that the federal guidelines also govern child support when a divorce is not being granted, for example if the parents were not married or separate without seeking a divorce (and even in Alberta courts have indicated that they will apply in the Guidelines in non-divorce cases; see Walker v. Whiting, [1998] A.J. No. 1166 (Q.B.) per Burrows J.

Note 2: See e.g.. Paetsch, Bertrand and Hornick, Consultation on Experiences and Issues Related to the Implementation of the Child Support Guidelines (Canadian Research Institute for Law and the Family, for Department of Justice, September 1998).

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¶ 2 The Guidelines have provided more consistency, and in many cases their application is relatively straight forward. But some of the provisions lack clarity and have understandably been the subject of differing judicial interpretations; other provisions deal with factually complex situations where it is difficult to know exactly how to apply the Guidelines. There are clearly differing judicial approaches, with some judges emphasizing a relatively narrow interpretation that will promote certainty and consistency. Other judges seem more inclined to take a more flexible and discretionary approach, straining to find a fair resolution in individual cases. There may also be some tension between interpretative approaches that tend to favour to custodial parents (usually mothers), while other approaches may be more favourable to non-custodial parents (usually fathers).

¶ 3 This paper reviews some of the most contentious areas of litigation under the Child Support Guidelines, critically examining some of the recent caselaw. It should be recognized that a relatively brief paper such as this cannot begin to fully survey all the issues that have arisen, but will only discuss a relatively small number of cases out of a very large body of jurisprudence.

Reference Sources

¶ 4 Practitioners and judges with specific problems will want to consult some of the computer data bases or print sources to find the most recent cases dealing with their specific issues. There are between 30 and 60 new cases per month on the Guidelines added to the Quicklaw data bases, and sometimes more than 25 Guidelines cases in a volume of the Reports of Family Law. There is a very good (though at times not fully current) Quicklaw database on the Guidelines prepared by Professor Julien Payne. [See Note 3 below] Professor Jay McLeod regularly discusses recent trends in Guidelines cases on the eCarswell Family Law Updates.

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Note 3: PDCS, Payne's Digest of Child Support

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¶ 5 Carswell also has a looseleaf print service by James MacDonald and Ann Wilton, Child Support Guidelines Law and Practice that judges sometimes quote in interpreting the Guideline. Terry Hainsworth also has a useful looseleaf service published by Canada Law Book, Child Support Guidelines Service.

¶ 6 The Department of Justice has made a major effort to assist judges, lawyers and members of the public in understanding the Guidelines; it has a free Child Support Newsletter and a free Reference Manual for which it sends out periodic additions. Perhaps of the most immediate use to busy practitioners seeking relatively up-to-date information is the Department of Justice free website that is periodically updated which lists some of the leading cases interpreting different provisions of the Guidelines. [See Note 4 below]

Note 4: http://canada.justice.gc.ca/Orientations/Pensions/ Child/guide/intann_en.html

¶ 7 The December 1998 Law Society of Upper Canada-Canadian Bar Association program on Child Support Guidelines: New and Important Caselaw materials contain an excellent set of papers, including a reprint article by Justice Aston surveying recent caselaw. [See Note 5 below]

Note 5: Aston, "An Update of Case Law under the Child Support Guidelines" (1998), 16 Can. Fam L. Q. 261.

Definition and Determination of Income: s. 15-20

¶ 8 While the determination of spousal income has always been a significant issue in family law cases, the Guidelines make it an even more important issue, since once income is determined, the base Table amount follows automatically, and the resolution of other issues will often depend on this determination. In many cases the determination of income is the only matter at issue, or the most important point of disagreement. Given the nature of the Guidelines, questions of determination of income are probably the area of greatest continuing discretion for trial judges dealing with child support case. Appeal courts have indicated that they are only going to overturn a factually based income determination if it is "unreasonable" or the evidence was clearly "misconstrued" by the trial judge. [See Note 6 below]

Note 6: Benvie v. Mills (1997), 34 R.F.L. (4th) 313 (N.S.C.A.); and Lee v. Lee [1998] N.J. No. 247 (C.A.). In Meuser v. Meuser, [1998] B.C.J. No. 2808 (C.A.) the British Columbia Court of Appeal reversed an income determination by a trial judge, though noting its reluctance to interfer with this type of factual determination by a trial judge.

¶ 9 While s. 17 of the Guidelines starts the process of determining income with an examination of past income, using income tax returns, the central issue is what will be the income on which it is fair to base the child support determination. This was made clear in Lee v. Lee [See Note 7 below] where the Newfoundland Court of Appeal upheld a trial judge's decision that reduced child support payments based on the father's loss of employment shortly before, which was understandably not reflected in previous years tax returns. Green J.A. explained:

[para4] [The Guidelines]are predicated on the expectation that a certain level of gross income should, absent special circumstances, provide a level of ability to pay a specified minimum amount of support based on economic studies of average spending on children at different income levels. Support must be paid out of the future income of the payor-spouse. The underlying rationale is still ability to pay. In that sense, the process of setting child support is a prospective one. In engaging in that predictive exercise, however, historical data is obviously important and usually provides the best forecast of current ability to pay.

[para5] Where, however, the evidence is, on a balance of probabilities, that income is and for the foreseeable future will be, substantially different from historical income levels, and such is found as a fact, past financial information will often not be a good predictor of the payor-spouse's current ability to pay. In such a circumstance, it would be putting one's head in the sand to ignore the changes and to base the calculation of child support upon no-longer-representative past income levels. Indeed, s. 17(4) of the Divorce Act and s. 14(b) of the Guidelines base the jurisdiction of the court to make a variation order on the existence of a change in the "condition, means or other circumstances" of the spouse or a child who is entitled to support. It would be illogical, having determined that there was a change in the financial circumstances of a spouse which reflects on the expected levels of income out of which future child support is to be paid, not to take account of those changes and, instead, ostrich like, continue to base the calculation of support on outdated historical information.

[para6] Subsection 2(3) of the Guidelines supports the foregoing analysis inferentially since it requires the use of "the most current information" in the determination of any amounts for the purposes of the Guidelines.....

[para8] [The] argument [of counsel for the mother] that s. 16 of the Guidelines which provides that, subject to exceptional situations, "a spouse's annual income is determined using the sources of income set out under the heading "Total Income" in the T1 general form issued by Revenue Canada ...", means that the court must determine future support payments based upon the levels of income reported for past taxation years, cannot be sustained.

> Section 16 merely provides that the "sources" of income used for calculating income for the purposes of support shall be consistent with the sources used for calculating income subject to taxation. It is the categories of income, not their historical amounts, which must be determined by reference to income tax concepts.
> [para9] Neither does s. 17 of the Guidelines indicate, as suggested by appellant's counsel, that the court is required to base its income calculations on past income levels. Section 17 merely provides that the court may, where there is a trend of increasing or decreasing income levels over the previous 3 years, use the most recent year's income for the purposes of calculation or, where income has fluctuated over 3 years, use an average figure. These are convenient shorthand methodological rules to enable a fair prediction of current income to be determined. Where, however, circumstances indicate that current and future income does not, and will not, bear any fair relationship to the past information, the court is not driven to base its income calculations on that outdated data.

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Note 7: [1998] N.J. No. 247 (C.A.). Emphasis added.

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¶ 10 This prospective approach was adopted in Fibiger v. Figbiger [See Note 8 below] where the non-custodial father's income at the time of the hearing was about $197,000 but he had secured a new position that he would start within a few months at a salary of about $353,000. Skipp J. used the higher future figure, observing that it was "not speculative" since the father had accepted the new job even though he had not yet started work.

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Note 8: (1998), 38 R.F.L. (4th) 258 (B.C.S.C.)

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¶ 11 It is apparent that the spouse who is trying to persuade the court to depart from the pattern of income of previous years bears the onus of adducing evidence. Judges seem particularly reluctant to accept a payor's claim that there has been a drop in income from previous years without clear evidence, as illustrated in MacDonald v. Rasmussen. The payor, a doctor, claimed that his income in his first year after separation was going to be significantly less than in his last year living with his family, and provided a print out of billings for the first six months of the year. The judge noted that there was no explanation of whether patient load was down or the doctor was working fewer hours,

or any statement from an accountant. In refusing to accept this evidence and determining income based on previous years, McIntyre J. commented: [See Note 9 below]

> Where a party whose income is being used to determine his.. .support obligation makes an assertion that his...income in the current year is going to be substantially different from previous years there is ...an onus on that individual to provide some substantive verification or explanation of that change in ...income. The nature of the verification or explanation will depend on the circumstances of the case but in most instances the bald assertion "I anticipate making less this year" will not be sufficient.

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Note 9: (1997), 34 R.F.L. (4th) 451, at 456 (Sask Q,B.). Emphasis added. See also Westcott v. Westcott, [1997] O.J. No. 3060 (Gen. Div.)

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¶ 12 If a payer's income is derived from steady employment and such sources as dividends from public companies, the determination of annual income using pay slips and tax return data is generally less complex than if a person is self employed. However, even where a person is an employee there can be substantial fluctuations and unpredictability in income, and the task of determining income often requires more than looking at the most recent pay slip and annualizing the income. For example in a Saskatchewan case [See Note 10 below] a portion of the payor's income was significantly affected by a discretionary bonus given at the end of the year by the employer, as well as by overtime pay which fluctuated from year to year. The judge observed that ss. 16 and 17 of the Guidelines require a judge to make a "fair determination" of annual income in the current year based on the "most reliable indication" from the evidence presented. The judge determined that there was a "reasonable likelihood" that the performance bonus would continue at the level of the previous few years and included it in annual income, but excluded overtime pay, since it was established that there would be much less overtime in the current year.

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Note 10: Johnson v. Checkowy, [1997] S.J. No. 451 (Q.B.), per McIntyre J.; see also Tobin v. Crawley, [1998] N.J. No. 293 (U.F.C.), court considered reduction in hours in determining income; and Woods v. Woods, [1998] S.J. No. 687 (Q.B. Fam Div.), court used average of last three years tax returns where bonuses fluctuated.

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¶ 13 In some cases a claim is made that a spouse is "intentionally under-employed or unemployed" and there should be an imputing of income for Guidelines purposes under s. 19(1)(a). In Rains v. Rains [See Note 11 below] a payor father quit a hospital technician's job with significant seniority paying about $53,000 to take a job at another hospital paying only about $36,000, because a review of his first employer's operations

had recommended that his position should be eliminated and he felt that there was better job security in his new job. The mother argued that since his first employer had not yet made a decision to terminate him, he should be viewed as voluntarily under-employed and have the higher income of his original job imputed to him. Justice Pardu rejected this argument, ruling that s. 19(1)(a) of the Guidelines only applies when a person has "intentionally" made a decision to be underemployed. The judge concluded that it could not be said that the father's "decision to seek less remunerative employment rather than await termination of his employment was so imprudent as to justify imputing his former level of income."

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Note 11: [1997] O.J. No. 2516 (Gen. Div.).

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¶ 14 In Van Gool v. Van Gool the British Columbia Court of Appeal found that the payor mother had not made "reasonable" efforts to be fully employed, and imputed income to her based on near full time employment at the pay rate for her part time job. [See Note 12 below] The Court rejected arguments that she was entitled not want to work full time to be available to enjoy access, and that she should be home at the end of the school day to take care of her 13 year old son from a previous relationship.

> [para 30] [Quoting from Garcia v. Rodriguez (1997) 29 R.F.L. (4th) 329] "What is to be taken into account are the needs, means,capacities and economic circumstances of each person. In my view, capacity includes the capacity to work or to be trained to work. It is no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor. That, in effect is the argument of the appellant [mother] before us today.
> [para31] It is apparent...that the intention of the legislators both before and after the enactment of the Guidelines was to ensure that parties liable for child maintenance were not permitted to avoid their responsibilities simply by virtue of being unemployed or under-employed.
> [para32] In assessing Ms. Dryden's [the payer's] intentions... it is relevant to have regard to her actions and attitude with respect to obtaining employment in the past. ... The finding of Mr. Justice Macdonald that Ms. Dryden was a person prepared to deceive the court in order to further her own interests over those of Mr. Van Gool, even at the expense of the children, is also a relevant factor to consider.
> [para33] In this case, Ms. Dryden offered no persuasive reason for refusing to seek additional

employment. In essence, she said that she wanted to be "available" for Eric [her son from a previous relationship] at the beginning and the end of the day, and for Mataya and Ryley [the children who were the subjects of this support application] during periods of access. But Eric was 13 years old at the time of the hearing, and there is no suggestion that he had special needs for care, transportation or otherwise which would require her to be available to him so as to preclude her from obtaining full-time or increased part-time employment. Further, her desire to be home during access visits does not justify her almost complete failure to take steps to find increased employment during the week, or on weekends when she did not have access. ...

[para34] While it is true that Ms. Dryden has limited work experience and job skills, this does not explain her failure to pursue employment which does not require significant skills, or employment in which she could learn the necessary skills on the job. While these would doubtless be jobs at the low end of the wage scale, this Court has never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because they could not obtain interesting or highly-paid work. Rather, this Court has made it clear that person is expected to take reasonable steps to obtain employment commensurate with such factors as their age, state of health, education, skills and work history.

[para35] The chambers judge in this case did not specifically address the question of whether Ms. Dryden's state of under-employment was intentional. Rather, she focussed on the fact that Ms. Dryden had obtained part-time employment. She concluded that her efforts in that regard were sufficient to meet Mr. Van Gool's assertion that Ms. Dryden had demonstrated an intentional refusal to pursue employment beyond part-time employment, and that any efforts she had made were the bare minimum necessary to avoid judicial censure.

[para36] In my view, the evidence in this case, including the background to which I have referred, leads overwhelmingly to the conclusion that Ms. Dryden was intentionally under-employed at the time of the review application with a view to avoiding, or minimizing, her child support obligations.

Note 12: [1998] B.C.J. No. 2513 (C.A). Emphasis added. See also Carson v. Buziak 91998), 40 R.F.L.(4th) 50 (Sask Q.B.) where Krueger J. imputed $7,000 in summer earnings for a law student to give him a total income of $10,670.

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¶ 15 In Hunt v. Smolis-Hunt [See Note 13 below] the payer father had for several years engaged in an unsuccessful law practice. Prior to that time he had worked as a civil servant in a non-legal position making $55,000 a year. Justice Johnston imputed an annual income of $55,000, concluding that the father's "personal choice" to continue in the law practice "in the face of repeated unsuccessful years...with no reasonable prospect for future improvement ... is undervaluing his earning capacity." The judge concluded that s. 19(1)(a) should be invoked in situations where the payer "recklessly disregards the needs of his children in the furtherance of his own career aspirations."

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Note 13: (1998), 39 R.F.L. (4th) 143 (Alta Q.B.)

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¶ 16 While Van Gool makes clear that a payer parent must make reasonable efforts to obtain income in order to pay child support, in Furlong v. Furlong the Alberta Court of Appeal accepted that a father did not need to move from Calgary to Edmonton to get a higher paying job, as doing so would prevent him from enjoying full and regular access with his children. [See Note 14 below] However, in James v. James Brockenshire J. accepted the argument that the payor father should have income imputed to him as he declined to work the extra overtime that his employer offered and would no longer work more than 55 hours a week. [See Note 15 below] The judge was not doubtless influenced by the father's statement during testimony that when he realized that the amount that he would have to pay under the Guidelines was tied to his earnings, he decided that it was no longer worthwhile to work all of the hours he had been, and the judge gave little weight to the father's claim that working more than 55 hours per week was interfering with his seeing his children. While one can understand with the judge's reaction to the father's candid admission of his reason for working no more than 55 hours a week, the words of s. 19(1)(a) only allow imputation of income when a person is "underemployed" and unless the judge was satisfied that the father was actually likely to work the extra overtime, this approach to s. 19 is questionable; if the logic is followed one might expect payer parents who have jobs to be expected to look for second "moon lighting" jobs to increase their income above what it would otherwise be.

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Note 14: [1998] A.J. No. 1173 (C.A.)
Note 15: [1998] O.J. No. 1301 (Gen. Div).

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¶ 17 The challenge of determining income is often greatest with those who are self employed or operate their own businesses. There will often be legitimate differences of

opinion about how to determine expenses and income, as well as greater possibilities for manipulation or outright dishonesty. [See Note 16 below]

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Note 16: Justice Cheryl Robertson of the Ontario Unified Family Court acknowledges that determination of income is one of the "most highly litigated areas" under the Guidelines and reported on a case where Revenue Canada accepted a payer's income as $47,000 but for child support purposes the court attributed significant tax deductible business expenses to him as he personally benefited from that and he was treated as having an income of $150,000 a year. Quoted in "Bench and Bar give child support guidelines mixed reviews" Lawyers Weekly, January 23, 1998, p. 10

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¶ 18 Section 16 and Schedule III have some mandatory adjustments to taxable income to determine income for Guidelines purposes, while subss. 19(1) and (2) give courts a broad discretion to adjust taxable income and expenses on to amounts that are "reasonable." It is clear that expenses that may be legitimately deducted for tax may still be treated by a court as income for child support purposes if a court concludes that they constitute part of a person's "disposable income" or a "fair recognition of the actual income available that spouse from that source of income." [See Note 17 below] As an example of the court's exercise of discretion, in Cornelius v. Andres [See Note 18 below] expenses for meals and parking tickets that a payer father had deducted for tax purposes from his business as a courier were included for Guidelines purposes. One may even question whether all of these expenses were legitimately deductible for tax purposes, and it is apparent that litigated Guidelines cases may result in more scrutiny to income statements and expense claims than occurs when a tax return is assessed by Revenue Canada.

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Note 17: Wilson v. Wilson, [1998] S.J. No. 236 (Q.B.) per McIntyre J.

Note 18: (1998), 36 R.F.L. (4th) 436 (Man Q.B.)

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¶ 19 In Cooke v. Colony the court excluded travel, equipment and other expenses from a money losing part time business as a musician that a payor was deducting from his employment income for tax purposes. While the payer was earning income from this business, it was less than his expenses and Little J. concluded that the activities as a musician were in the nature of a "leisure choice, a hobby or entertainment" and that it would be "clearly inappropriate to subsidize" these activities with child support. [See Note 19 below] As these cases illustrate, counsel will always want to at least examine the financial statements that are the basis of income tax returns, and may have to obtain for detailed financial disclosure.

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Note 19: (1998), 38 R.F.L. (4th) 342 (Man.Q.B.). To a similar effect see Adams v. Loov (1998), 40 R.F.L. (4th) 222 (Alta QB), farm losses not deducted where farm income never likely to support payor.

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¶ 20 A troubling issue has been how to deal with capital cost expenses (depreciation) that are legitimately deducted from income for tax purposes. While these deductions do not represent an actual expense, if the payer plans to stay in business it is necessary to create a reserve from these claims to replace capital assets. The courts are not totally consistent in how they deal with capital cost allowances. [See Note 20 below] It would appear that the onus is on the party seeking to challenge the validity of a deduction for Guidelines purposes of a deduction that has been allowed for tax purposes, though tactically once the issue has been raised, the spouse who made the deduction will want to defend it. [See Note 21 below] The Saskatchewan decision in Simpson v. Palma provides a fair approach, asking whether the capital cost allowance is proportionate to the reasonable requirements to provide a reserve that will actually be used in the business to replace income producing assets, and if it is to allow this as a deduction for child support purposes. Conversely, if the payer is close to retirement and not likely to replace the equipment, this type of deduction should not be allowed. [See Note 22 below] Or if the asset will clearly last a long time without replacement, such as an apartment building, or is even increasing in value, the court should to disallow the deduction for child support purposes. [See Note 23 below]

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Note 20: Desrochers v. Desrochers, 1998 CarswellMan 449 (Man.Q.B) per Harrison M. reviews some of the caselaw, and observes: "One reached the conclusion that very few farmers actually know their own true incomes as calculated pursuant to generally accepted accounting principles.'

Note 21: Beeching v. Beeching(1998), 40 R.F.L.(4th) 15 (Sask. Q.B.) per Wilkinson J.

Note 22: Simpson v. Palma, [1998] S.J. No. 581 (Q.B.), per Zarzenczny J. This decision provides a useful review of some of the caselaw about deduction of capital cost allowances, especially in the context of farming cases.

Note 23: James v. James, [1998] O.J. No. 1301 (Gen. Div.)

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¶ 21 There are also possibilities for payers to attempt to "hide" a part of their real income in the business that require the lawyer for the applicant to carefully examine the payer's position, and often the position of related persons. This will require pre-hearing disclosure, and examination of bank records, receipts and credit card statements to discover whether they are consistent with disclosed income and cash flow statements. For example in the Prince Edward Island decision in Arsenault v. Mann, [See Note 24 below] the payor father claimed that he had no income, but a few years earlier he had sold his farm property and it was apparent that at least part of the proceeds of that sale had been given to his son to enable the son to buy a farm, on which the father resided with the son. While there was no proof that the father gave money to the son, the court

noted that the father said that his the son was supporting him and he was not on social assistance. The court considered the father's "lifestyle" in imputing income and ordering child support.

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Note 24: [1998] P.E.I.J. No. 85 (S.C.-T.D.) MacDonald C.J.T.D.; see also Disipio v. Disipio, [1998] O.J. No. 4921 (Gen Div.) per Panet J. where the father was found to be diverting income from his work as a musician to a numbered company controlled by his father-in-law and the court imputed income to the father.

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¶ 22 However, in Risen v. Risen Kitely J. held that if there is no issue of assets having been transferred away or intentional unemployment, it was not proper to invoke s. 19 to impute income based on the income of a new partner. [See Note 25 below] While the new partner may have an obligation to support the payor, and her income might be considered for such purposes as determining household income for an undue hardship application, she has no obligation to the children and there was no basis for using her income to establish the payor's income.

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Note 25: [1998] O.J. No. 3184 (Gen Div.) Kitley J.

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¶ 23 In Simpson v. Palma the payor father deducted $850.00 per month for tax purposes for salary paid to his second wife for work she did around the farm. [See Note 26 below] While the court recognized that she did valuable work, $250 of the deduction was added back into his income for Guideline purposes, presumably on the basis that the payments were greater than a "reasonable" amount, though the court provided no clear explanation.

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Note 26: [1998] S.J. No. 581 (Q.B.), per Zarzenczny J.

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¶ 24 In the British Columbia case of Schom-Moffatt v. Moffatt [See Note 27 below] the payor father claimed that his business was operating in a deficit position and that his income was a nominal $12,000 a year. Counsel for the mother found a recent magazine article that profiled the father and described his "rapidly growing business." It was established that the father's company had a rapid rise in expenses after the parents' separation, and that the income of a related company owned by his brother had a sudden unexplained increase in its revenue. The judge found the father's answers to questions "evasive" and imputed an annual income of $72,000 for child support purposes.

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Note 27: [1997] B.C.J. No. 2055 (S.C.), per Morrison J.

¶ 25 The Ontario case of Davidson v. Davidson is an example of a case where a recipient parent made extensive use of forensic accounting evidence to identify personal expenses paid by a father out of his business, cash being received from unknown sources and not included in income, and improper claiming of promotional expenses. [See Note 28 below] The court was able to make specific numerical findings and adjustments in determining the father's income, rather than the more general and speculative assessments that are typical of income determination cases. Davidson illustrates the value of having accounting assistance in preparing and presenting a complex child support case, but in many cases this will be too expensive to justify.

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Note 28: [1998] O.J. No. 2859 (Gen. Div.); see also Millar v. Millar, [1998] B.C.J. No. 2489 (S.C.) where the payor claimed he had no income after paying business expenses, but the court imputed an annual income of $90,000.

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¶ 26 The determination of income is crucial to the process of applying the Guidelines. While in some cases the determination of income is relatively straightforward, it is often a factually and conceptually complex exercise. The caselaw is helping to resolve some conceptual issues, but it remains an area of substantial discretion for trial judges, with appeal courts demonstrating reluctance to overturn lower court rulings. It is an area where a skilled practitioner, and in appropriate cases an experienced accountant, can make an enormous difference, but it must be recognized that this is "to date much more an art than a science." [See Note 29 below]

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Note 29: V.J. Mackinnon, "Determining Income Under The Child Support Guidelines," The Child Support Guidelines: New and Important Caselaw, (Toronto, Law Society of Upper Canada, December 1998).

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Adult Children: ss. 3(2) & 7(1)(e) of the Guidelines

¶ 27 The payment of "child support" to adult children who are "unable by reason of illness, disability or other cause" to withdraw from parental charge has been contentious as parents in intact families generally do not have this type of legal obligation, though courts have rejected Charter based challenges to this difference in treatment (see discussion below). Almost all of the recent reported cases involving adult children also raise the issue of parents sharing "expenses of post-secondary education" in "proportion to their respective incomes" under s. 7(1)(e).

¶ 28 The obligation to pay support to an adult child is created by the Divorce Act s. 2 which provides that the support obligation continues for a child "the age of majority or over... but unable, by reason of illness, disability or other cause, to withdraw from their [parents'] charge or obtain the necessities of life." Judges have interpreted "other cause" as including adult children pursuing post-secondary education, at least to the completion of the first degree or up to about the age of twenty-three, though some cases have imposed child support obligations for children as old as twenty-five or older. [See Note 30 below] Canada's Divorce Act reflects the sense that parents have a moral obligation to assist young adult children to pursue their education, and turns it into a legal obligation in order to ensure that children of divorced families receive the financial support that most children in intact families receive from their parents. The legal support obligation for adult children is not absolute, however, and courts have held that if without good reason an adult child "unilaterally terminates a relationship" with a paying parent, for example by refusing to communicate, this may be a reason to terminate the support obligation. [See Note 31 below] However, if the poor relationship is considered to be the fault of the parent, the obligation will continue. [See Note 32 below]

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Note 30: See e.g. Cole v. Cole (1995), 15 R.F.L. (4th) 399 (N.S. Fam. Ct.). In Welsh v. Welsh, [1998] O.J. No. 4550 (Gen. Div.) Quinn J. ordered that child support should continue to be paid for a severely physically disabled 31 year old daughter "at least" until she finished her Honours University degree; due to her disability she could only take two courses per year.

Note 31: Law v. Law (1986), 2 R.F.L. (3rd) 458 (Ont. H.C.); Apthorp v. Shearing, [1998] O.J. No. 4686 (Gen. Div.)

Note 32: Porter v. Porter, [1998] N.S.J. No. 426 (S.C.) Boudreau J.

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¶ 29 Section 3(2)(a) of the Guidelines requires a judge to determine support for an adult child by reference to the Table amount, plus dividing expenses for post-secondary education having regard to parents' incomes under s. 7(1)(e). If a judge considers use of this formula "inappropriate," s. 3(2)(b) gives a court a broad discretion to set support for an adult child at the amount "it considers appropriate having regard to the condition, means, needs and other circumstances of the child and the financial ability of each parent to contribute to the support of the child." If the court invokes s. 3(2)(b) the amount of support attributable to the adult child must be specified in the order; if there are other children of the marriage, this will facilitate determination of the continuing obligation when the adult ceases to be "a child of the marriage" and eligible for support.

¶ 30 A few of the cases involving adult children relate to students still in high school. In Mathieu v. Mathieu the 18 year old boy was a student at high school, though as is common with many children of divorced parents (as well as many children in intact families), he was not attending school regularly and was not doing well at school. He was also working part time. The father argued that the amount of child support should be reduced to reflect the boy's earnings and argued that the mother was not making

reasonable efforts to ensure that the boy attended school and that the level of support should to tied directly his attendance record in individual classes. Justice Clearwater felt that the mother was making reasonable efforts as a single parent to ensure the boy's attendance at school; child support was ordered pursuant to the Table amount [s. 3(2)(a)] conditional on the boy's remaining enrolled full time in high school and receiving passing grades in the minimum full time course load; the father was to receive a copy of the boy's report cards. In light of the mother's "modest" financial circumstances, there was no reduction in support to reflect the boy's earnings.

¶ 31 In cases in which the adult child is attending a post-secondary institution, judges invariably take account of the child's earnings from summer jobs and other employment, and in some cases in which the adult children do not seem to be actively pursuing employment opportunities, "impute" income to reduce the child's needs, presumably relying on the broad words of s. 3(2)(b). [See Note 33 below] There are also cases in which a court has ordered that as a condition of receiving support to allow a child to attend a post-secondary institution that the payer parent receive a copy of university transcripts, [See Note 34 below] though there are other decisions in which judges have refused to make this type of order. [See Note 35 below] None of the decisions discuss the issues involved in making this type of order. It is submitted that the payer had a legal right to disclosure of information about an adult's child's expenses and actual attendance at a post-secondary institution, but not to information about grades in specific courses; though adult children often choose to share this information, if a relationship between the adult child and the payer parent is already strained, a court order to provide grades is unlikely to be in the interests of the child. In one Manitoba case a judge adult children to provide sworn financial statements as part of a child support application. [See Note 36 below]

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Note 33: See e.g Simpson v. Palma, [1998] S.J. No. 581 (Q.B.). Zarzeczny J. writes (at para. 26) that one of the adult children "must accept the responsibility of making a more determined effort at obtaining meaningful summer employment which will enable her to make a financial contribution to her education expenses. Her efforts leading up to her employment (or non-employment) situation for the summer of 1998 are not satisfactory and should not be acceptable in future years."

Note 34: Woods v. Woods, [1998] S.J. No. 687 (Q.B.- F.L.D.) Wilkinson J.

Note 35: Risen v. Risen,[1998] O.J. No. 3184 (Ont. Gen. Div.) Kitely J.

Note 36: Adams v. Adams, (1997) 124 Man. R. (2d) 226 (Q.B.) Diamond J.

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¶ 32 A contentious issue when assessing post-secondary expenses is whether any student loans for which the adult child is eligible should be considered as part of the child's "condition, means ... and other circumstances." In some cases, often without too much discussion, it is expected that the child will make use of student loans, with child support being divided between the parents to meet needs not covered by loans or

earnings. [See Note 37 below] In other cases, however, judges have ruled that the adult child should not be expected to take out student loans. In Woods v. Woods Wilkinson J. observed that the parents acknowledged in their testimony that "it was not their expectation that their children would go into debt to obtain their education" and student loans were not taken into account in assessing the child's "needs." [See Note 38 below] In Risen v. Risen Kitley J. refused to take account of student loans, commenting: [See Note 39 below]

> While the expectation of employment is contained in s. 3(2), there is nothing in s. 3(2) which creates a positive duty to become indebted either through the bank or the student loan facility. I find that at least in households with the resources of [these parents, combined annual income of over $90,000, s. 3(2)]...does not require the child to go into debt as part of the child's contribution.

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Note 37: See e.g Michie v. Michie, [1998] 4 W.W.R. 758 (Sask Q.B.); Porter v. Porter, [1998] N.S.J. No. 426 (S.C.); and Adams v. Adams (1997), 124 Man. R.(2d) 226 (Q.B.).

Note 38: [1998] S.J. No. 687 (Q.B. - F.L.D.)

Note 39: [1998] O.J. No. 3184 (Gen. Div.)

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¶ 33 One might also consider s. 7(3) of the Guidelines which requires that when determining post secondary expenses, the court must take account of "any subsidies, benefits, or income tax deductions or credits relating to the expense." Government sponsored student assistance schemes often have components of both loan and grant, and certainly loan subsidies, and would seem to be within the fairly broad concept of "benefits." It is submitted that since adult children in intact families are generally expected by their parents to take full advantage for any student loans for which they are eligible, this should also be the starting assumption for situations where parents have separated. It is, however, quite appropriate to take account of expectations when the parents lived together, as well as incomes; in situations of higher parental income there may be less loan eligibility and a greater expectation of parental support.

¶ 34 Some cases have raised the question of whether a child's expenses for post secondary education should include accommodation or residence fees. In Woods v. Woods Wilkinson J. approached this question by asking whether there was a "reasonable" justification for the child moving away from the custodial parent's home, based on the student's desired course of studies, which requires consideration of the type of programs that are available within commuting distance of the parent's home. [See Note 40 below] In some cases one might also consider issues of program quality and student aptitude, as well as parental expectations and experience.

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Note 40: [1998] S.J. No. 687 (Q.B. - F.L.D.).

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¶ 35 Orders and agreements sometimes provide that support for adult children may be paid directly to an adult child. [See Note 41 below] It is important to recognize that many adult children attending post-secondary education continue to live with the recipient, or at least maintain a "home base" with that parent, which imposes significant costs on that parent, in particular during the four month long "summer vacation" that most university and college students have. Further, while there is often psychological value to both a payer parent and an adult child in having child support payments made to the child, in some cases the child may lack the maturity to deal appropriately with such a situation.

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Note 41: See e.g. Van Wynsberghe v. Van Wynsberghe, [1997] O.J. No. 2566 (Gen. Div.) Vogelsang J.

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¶ 36 When a court considers it reasonable for an adult child to live away from home, the courts generally rely on ss. 3(2)(b) and 7(1)(e) to order that the payor pay a proportionate share (based on income) of all tuition fees and related educational expenses such as books and sometimes computers, as well as accommodation or residence fees, laundry and trips home. There are, however, other living costs for adult children, such as clothing, and there are many adult children who continue to reside with their custodial parents (in particular those attending secondary school), during all or part of the year. Many decisions seem to ignore these costs, often because they are not claimed, and simply make a child support for a portion of the identifiable costs of pursuing post secondary education. [See Note 42 below] In some cases it may be appropriate for the support award to be split, so that a portion is paid under s. 3(2) to the recipient parent for maintaining a home for the adult child, and a portion paid to under s. 7(1)(e) to the adult child for post-secondary education costs. Even if the adult child is pursuing post secondary studies away from the home of the "custodial parent," there should be the possibility for some child support payments to that parent, for example for the four university vacation months to assist in accommodating the child during that period. [See Note 43 below]

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Note 42: Risen v. Risen, [1998] O.J. No. 3184 (Gen Div.). In Michie v. Michie, [1998] 4 W.W.R. 758 (Sask. Q.B.), McIntyre J. acknowledged that "there is undoubtdely a cost which the petitioned continues to bear in maintaining a home to which Kristine can return when not attending school" but noted that this was not the focus of the application.

Note 43: See e.g Simpson v. Palma, [1998] S.J. No. 581 (Q.B.)

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Income Over $150,000: s. 4

¶ 37 It is not surprising that the first Guidelines case to reach the Supreme Court of Canada, Francis v. Baker, will involve the interpretation of s. 4, which deals with the obligations of payor parents whose incomes are over $150,000 per annum; leave to appeal the decision of the Ontario Court of Appeal was granted August 20, 1998 and the case should be argued in 1999. Although cases involving s. 4 are relatively rare, these are the parents who are most likely to have the resources to litigate, and the amounts involved make an appeal to the Supreme Court a viable proposition. When the income of the payer is over $150,000, s. 4(b) appears to give judges the discretion to deviate from the Table percentage if that amount is "inappropriate," and it will be important to see how the Supreme Court interprets this term, not only for cases under this provision, but also for other provisions of the Guidelines that use the same language, such as s. 3(2) (adult children). Further, the decision of the Ontario Court of Appeal in Francis provides an interesting, though controversial, discussion of the purpose of the Guidelines as a whole, and if the Supreme Court gives an indication of the general approach that judges should follow in interpreting the Guidelines, its decision may have significance beyond s. 4

¶ 38 In Francis v. Baker [See Note 44 below] the parties signed a separation agreement soon after their separation in 1985, with the mother getting custody of the two children and the father paying a total of $2,500 per month support. After the separation the father's economic position improved dramatically and by 1997 he had an annual income $945,000, while the mother's income was $63,000. Justice Benotto of the Ontario General Division refused to set aside the property provisions of the separation agreement, but took varied the support provisions. The mother received a $500,000 lump sum as spousal support, and $10,000 a month as child support for the two children of the marriage. The child support was set according to the percentage of the father's income at the maximum Table amount for two children. The mother had prepared a budget for the children's expenses, including private school, a part time nanny, summer camps, vacations and so on, which totalled about $9,000 a month. The judge decided to order the higher formula amount, so that the mother would have the ability to have "discretionary spending." The judge noted that the father "spares no expense for himself and probably when the children are with him. Mr. Baker's financial wealth is such that it is appropriate that the children have the benefit of that wealth" when they are with their mother.

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Note 44: (1998), 34 R.F.L. (4th) 317, (Ont.C.A.) affg. (1997), 28 R.F.L. (4th) 437 (Ont. Gen. Div). Emphasis added. See accompanying critical Annotations by McLeod.

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¶ 39 The Ontario Court of Appeal affirmed the trial decision, with Abella J.A. arguing that in situations where the payor's income is over $150,000 the Table formula is generally the minimum: the term "inappropriate in s. 4(b) means inadequate." In coming to her conclusion Abella J.A. rejected the argument that the court should scrutinize the proposed budget of the custodial parent.

> [29] In my view, although the word "inappropriate" appears, on the surface, to be wide in its discretionary reach, its particular meaning in s. 4(b) must be considered in the context of the Guidelines as a whole and the approach they mandate designating the Table amount as a starting point for the calculation of child support.
> [30] I acknowledge that s. 4(b) appears to authorize a court to diverge from the Table amounts. I am not persuaded, however, that s. 4(b) re-injects the budgetary method of child support calculations into the Guideline process where incomes exceed $150,000. This would mean that in every case of a paying parent earning over of $150,000, and for the sake of determining what portion of the excess should be available to the children, the old Paras formula would apply, with all its attendant budgetary requirements and substantive inconsistencies.....

¶ 40 Justice Abella based her analysis on an assessment of the purposes of the Guidelines

> [32] The Guidelines tie child support to the paying parent's income, even if that income is substantial. There is no indication in the legislation that this connection was intended to diminish with the increasing wealth of a parent. Such an approach would negate the entire benefit of the Guidelines. It is difficult to imagine that the intention of the legislature was to burden uniquely the children and custodial parents of wealthier spouses by subjecting them to an approach which retains the methodological complexity of the world dominated by Paras, and offers so little of the predictability of the new system.
> [33] One of the primary goals of the legislation is, in fact, to avoid this complexity and to help parents resolve child support issues as expeditiously as possible. The designated beneficiaries of this expedition are children, regardless of their parents' income.
> [34] The entire reform reflects an unchallengeable perception that child support was, too often, randomly assessed and gratuitously disputed. The solution proposed via these Guidelines was to replace the haphazard with the predictable, through the presumptive application of fixed amounts designed to reflect a more equitable distribution of the post-separation economic

realities of the parents.

[35] It is not surprising, given the intention to impose certainty, that the Guidelines offer few exceptions to their formulaic application....

[43] [There are] two economic aspirations of the Guidelines, neither of which enjoyed universal application before the introduction of this new statutory support scheme. The first is that the needs being addressed are those of the child's household, not only the economies of an individual child. This is a significant and, in my view, long overdue reform.

[44] By and large, the Guidelines render irrelevant the debate about the point at which a child support order is, by virtue of its largesse, thereby transformed into spousal support masquerading as child support. That debate represents an academic conversation from an era when the prevailing pretence was that one could separate the economic well-being of children from that of the parent with whom they lived.

[45] The artificial atomization of the needs of each individual family member for purposes of determining support entitlements rarely produced realistic assessments. When family members live together as part of a household, it is almost impossible to dissect which aspect of a particular expense is directly attributable to a particular individual's needs. Households tend to function as integrated economic and social units. This makes it more reasonable to determine what standard of living the household as a whole is entitled to enjoy. To parse a household into an individual member's percentage, instead of acknowledging that it is the allotted total that determines living standards, makes the process unrealistic.....

[47] The second economic goal ... is that children are entitled to live at the standard of living permitted by the available income, even if that means living better than their basic needs demand. There is a clear statutory attempt to equalize the standards of living between the payor's household and that of his or her children so that there is as little financial disadvantage to children from the parents' separation as necessary.

[48] In fact, the whole notion of what is a "reasonable" need of a child has been reformulated by the Guidelines. It is less the actual expense that matters; it is more the extent to which the payor's income permits the child to approximate the payor's own standard of living. The

> "reasonableness" of a need is now a function of what the payor can afford, not what would have been reasonable under the Paras formula. There is, on the whole, no more need for budgets containing estimated expenses. These estimates have been replaced by presumed expenses calculated to reflect "deemed" reasonableness, based on the payor's income. [49] The arbitrariness and underestimations due to budget estimates was criticized in the Alberta Court of Appeal decision in Levesque v. Levesque, [1994] 8 W.W.R. 589, 20 Alta. L.R. (3d) 429. It is, in fact, partially in response to Levesque, as well as to the "hidden costs" discussion by L'Heureux-Dubé J. in Willick, that these Guidelines were imposed. Budgets estimating the reasonableness of a child's needs have now been replaced by Table amounts under the Guidelines attributing reasonableness, and the definition of reasonable needs contemplated by the Paras analysis has been similarly supplanted.
>
> [50] The purpose of the Guidelines is to enhance the child's post-separation standard of living to approximate, as far as possible, what that standard would have been had the parents continued living together. Just because children may be enjoying in their own household a substantially higher standard of living than a strict budget evaluation of their needs would have warranted under the Paras formula, does not render the Table amount "inappropriate".
>
> [51] In summary, then, based on the preceding legislative context, in my opinion, the Table amounts can only be reduced in the following circumstances: where the child is the age of majority or older; where the paying spouse is not the child's parent; where there is split or shared custody; or in cases of undue hardship. Otherwise, presumptive Table amounts can only be added to. This means that "inappropriate" in s. 4(b) means "inadequate". Any other interpretation would render s. 4(a) irrelevant and the Guidelines meaningless.

¶ 41 While the actual decision in Francis v. Baker may be factually correct, the interpretative approach taken by Abella J.A. to the Guidelines in general, and s. 4 in particular, may be subject to challenge. Her emphasis on the "impossibility" of separating the interests of children from custodial parents is reminiscent of her approach in the parental mobility case of MacGyver v. Richards. [See Note 45 below] There she wrote of "presumptive deference" that should be shown to decision of a custodial parent to move the child, as well as of the value of clear rules that discourage litigation and support custodial parents. Her approach to parental mobility issues was apparently

rejected by the Supreme Court in Gordon v. Goertz [See Note 46 below] and it will be interesting to see whether the Supreme Court shares the view of Abella J.A. that "inappropriate" means inadeqaute.

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Note 45: (1995), 11 R.F.L. (4th) 432 (Ont.C.A.).
Note 46: (1996), 19 R.F.L. (4th) 177 (S.C.C.)

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¶ 42 The recent decision of Justice Anne Mackenzie of the British Columbia Supreme Court in Plester v. Plester rejected the approach of Francis, in a fact situation that illustrated the issues that can arise in very high income families. In Plester the parties separated after a 22 year traditional marriage, with one son, an 18 year old boy, continuing to reside with his mother. After the property division, the mother had an expensive home, 2 cars and about $1.7 million in financial assets. The father's annual income was about $1.1 million per year, which would have required about $7,000 per month in child support. The mother had submitted a budget that "generously' estimated the child's expenses as about $3,600 per month. The judge concluded that in this case it was appropriate to award $5,000 per month child support would "maintain the previous standard of living" and meet the "needs" of the child.

¶ 43 MacKenzie J reviewed a number of British Columbia decisions that took a different approach from Francis. She acknowledged that the Guidelines are intended to protect the standard of living of children after divorce, and to provide predictability and consistency. Accordingly, the courts should only depart from the Table percentage when there is a high income payer if there is "clear and compelling evidence to warrant doing so." She proposed a "two step" approach in high income payer cases, with a significant onus on the payer parent to justify consideration of factors other than the payer's income.

> [148]....a court must first make a finding that the Table amount would be "inappropriate" before it can go on to consider the alternate formula provided in s. 4(b). If Parliament had intended to give the courts total discretion to fix an "appropriate" amount, it would not have set the formulas it did for incomes over $150,000. These formulas are there for a reason, and to summarily dismiss the figures they produce is to ignore the legislative intent of these provisions.
> [149] While Parliament appears to have quite deliberately left courts with some discretion in s. 4 to impose an amount different from that provided in the Guidelines, that discretion must be exercised carefully so as not to undermine the effect and objectives of the Guidelines.
> [150] In my view, to say that "inappropriate" means "inadequate" in the context of the Guidelines, is to

> circumscribe that discretion too narrowly. Parliament could have used the word "inadequate" but did not. Instead, it used "inappropriate", a word which means, according to the New Shorter Oxford English Dictionary, "not suitable to the case; unfitting, improper".
> [151] The underlying concern of payers, whether expressed or left unsaid, seems to be that custodial parents, usually mothers, will receive a windfall through the payment of child support. This is often linked to a concern that the surplus, if any, will not be used in the child's best interests.
> [152] It should be remembered that the payment and receipt of child support in Canada is based on a presumption that the support will be used in the children's best interest. Similarly, there is no "tracking" system, whereby courts require an accounting of how the money is spent. The approach taken in Francis to the Guidelines would make these sorts of concerns irrelevant. I do acknowledge the reality that the needs and well-being of children are closely linked to the household in which they live and to the well-being of their custodial parent.
> [153] To trigger the alternate formula in s. 4(b), there should be some articulable reason for the court to conclude that the Table amount is improper or unreasonable in the unique circumstances of the case.
> [154] .....A plain reading of s. 4 sets out a two-step process. Logically, the section sets out first, the court must satisfy itself that the Table amount of child support income of over $150,000 is inappropriate. This is a threshold determination and a reason must be articulated why the strict Table amount is inappropriate. Then the court may use the factors in s. 4(b) to determine an appropriate amount.
> [155] I observe, however, that nothing in s. 4(a) precludes the court from considering the factors in s. 4(b) in determining whether the strict Table amount is inappropriate. Indeed, it is difficult not to consider at least some of those factors as that list is so comprehensive. There will be some overlap of consideration in ss. 4(a) and (b).

¶ 44 It is submitted that preferable the approach is that of Plester, a decision that recognizes the need to limit and structure discretion, but seems more faithful to the language of s. 4. It is an approach that seems fairer, but meets all the reasonable needs of the children, and might not even on the facts of Francis have produced a different

outcome. However, given the importance of family law cases to our society and the clear differences in judicial in approach to s. 4, one hopes that the Supreme Court of Canada will not only resolve the specific factual dispute in Francis, but offer more general guidance to the interpretation s. 4 and the Guideline more generally.

Spouse in the Place of A Parent: s. 5 of the Guidelines

¶ 45 Section 2(2) of the Divorce Act provides that obligation to pay support includes the duty to support any child for whom one "stands in the place of a parent." In its ruling on November 12, 1998 the Supreme Court of Canada reversed the Manitoba Court of Appeal judgment in Chartier v. Chartier, which had held that a step parent could unilaterally terminate the relationship of standing "in the place of a parent" after separation, and thereby terminate child support obligations. [See Note 47 below] The Supreme Court will only release reasons at a later date; these reasons they may be help define the nature and extent of the obligation of persons who stand in the place of a parent, but for the moment it is apparent that this is an obligation that cannot be terminated by the unilateral decision of a step parent. [See Note 48 below] While the ultimate determination of whether a person "stands in the place of a parent" may require a trial to determine whether the economic and psychological elements of this relationship exist, judges are prepared to make interim orders if a prima facie case is established on the basis of affidavit evidence. [See Note 49 below]

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Note 47: [1998] S.C.J. 79, revd. (1997), 35 R.F.L. (4th) 255 (Man.C.A.)

Note 48: Since it has rejected the approach of the Manitoba Court of Appeal, it seems inevitable that the Supreme Court will adopt the same general approach as the Ontario courts in cases like Primeau v. Primeau (1986), 2 R.F.L. (3d) 113; and Trenholm v. Trenholm(1996), 22 R.F.L. (4th) 164. These Ontario cases require that there is both financial support and a close psychological link, but once a "parent like" relationship is established, it cannot be terminated by the unilateral decision of the adult after separation.

Note 49: MacArthur v. Demers, 1998 CarswellOnt 3849 (Gen. Div.) Aston J; Cote v. Cote (1995), 12 R.F.L (4th) 194 (Ont. Gen. Div.)

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¶ 46 Section 5 of the Guidelines provides that where the payor spouse is a person "who stands in the place of a parent," the amount of child support shall be "such amount as the court considers appropriate, having regard to these Guidelines and any other parent's legal duty to support the child." With the adoption of the Guidelines in Ontario, the legislature repealed the former s. 33(7)(b) of the Family Law Act which had "recognized that the obligation of a natural... parent outweighs the obligation of a person who is not a natural ... parent." Section 5 of the Guidelines appears to give courts significant discretion to award the amount of support considered appropriate.

¶ 47 It seems to be generally accepted that if no child support obligation by the non-custodial natural parent has been established when the step parent is before the court, the

step parent will be required to pay the full Guideline amount. [See Note 50 below] To reduce the amount of child support without an obligation having been established for another person to pay support would be contrary to the interests of child. Further, in many cases where the natural parent (invariably the father) has not been pursued for support, the person standing in the place of a parent has encouraged or at least acquiesced to this course while residing with the child, so it would be unfair to reduce his obligation merely because another person might in theory have some obligation to the child. Some judgements suggest that there is an onus on the applicant claiming child support from a step parent to show that "reasonable steps have taken" to establish and enforce the obligation against the natural parent, [See Note 51 below] though it is not clear from these decisions what are the consequences are of a failure to satisfy the onus. [See Note 52 below]

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Note 50: Clarke v. Clarke, [1998] B.C.J. No. 2370 (S.C.)

Note 51: MacArthur v. Demers, 1998 CarswellOnt 3849 (Gen. Div.) Aston J also stated that there was an "onus" on the custodial parent to demonstrate why the respondent's obligation should not be reduced by the obligation of the biological parent. The judge then went through a budget exercise and concluded that even if the biological parent paid all support owing under his order, this sum added to the Table amounts for the step father and the custodial-biological mother would not meet the child's needs and he declined to reduce the child support obligation of the step father. In this case, however, there was no inquiry as to whether the biological father could pay more than he had been ordered to pay some 15 years earlier when the child was born.

Note 52: Powell v. Thomas(1998), 38 R.F.L. (4th) 127 (Ont. Gen. Div.); the statement regarding onus was made in an appellate judgement and the matter was remitted for hearing without any indication of the consequences for the applicant of failing to satisfy this onus.

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¶ 48 Some judges have held that when a claim for child support is being made against a person who stands in the place of a parent, that person cannot add a natural parent as third party or co-defendant. [See Note 53 below] However, from a practical and policy perspective, there is no reason for a judge not to allow the step parent to invoke Rule 29.01 or 69.09(2) of the Ontario Rules of Civil Procedure (or Rule 11 of the Provincial Court Rules) to add the natural parent as a party, and a number of decisions have implicitly or explicitly allowed the adding of a natural parent [See Note 54 below] In one Ontario case, a mother with joint custody who was seeking child support from the father was permitted to add father's new wife as a codefendant on the ground she also had a child support obligation. [See Note 55 below]

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Note 53: See e.g. MacArthur v. Demers, 1998 CarswellOnt 3849 (Gen. Div.) Aston J; Robinson v. Domin (1998), 39 R.F.L.(4th) 92 (B.C.S.C.) per Melnick J. criticized by Prof. McLeod in an Annotation.

Note 54: For decisions that explicitly allowed a natural parent to be added, see e.g. Clarke v. Clarke,[1998] B.C.J. No. 2370 (S.C.); and Hart v. Hart (1987), 6 R.F.L (3d) 445 (Ont.S.C.). M. (C.) v.

P.(R.) (1997), 26 R.F.L.(4th) 1 (Ont.C.A.) and Boyle v. Boyle, [1998] O.J. No. 3783 (Gen. Div.) which appeared to implicitly sanction the adding of the natural parent.

Note 55: Johnson v. Johnson (1998), 38 R.F.L.(4th) 279 (Ont. Gen Div.) per McGarry J.

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¶ 49 Some judgements suggest that some type of formula or onus should be used to help resolve cases in which it is necessary to divide support between a natural parent and step parent. For example in Bell v. Michie Cavarzan J. limited the duration of the child support obligation of a step father to 54 months, the length of time he resided with the children, payable at the Guideline Table amount. [See Note 56 below] In Boyle v. Boyle Herold J. determined a "fair and reasonable" approach was for the Table amount payable by the stepfather to be divided between him and the biological parent in proportion to their gross incomes. [See Note 57 below] In some cases the judge simply deducts support being paid by the natural parent from the total Table amount owing by the payor. [See Note 58 below] These approaches give the stepparent all of the "advantage" of having another person with whom to share the child support obligation.

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Note 56: (1998), 38 R.F.L. (4th) 199 (Ont. Gen Div.)

Note 57: Boyle v. Boyle, [1998] O.J. No. 3783 (Gen. Div.). This case actually involved three children. The decision involved the obligation towards only one of these children, and the judge took one third of the Table amount as the amount of support owing to her.

Note 58: Butzelaar v. Butzelaar, [1998] S.J. No. 741 (Sask Q.B.) McIntyre J.

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¶ 50 Oher cases that do not take a formula-based approach generally ensure that the child receives some economic advantage from having more individuals (with greater total incomes) obliged and able to pay support, while also reducing the stepparent's obligation below the Guidelines amount. Most judges acknowledge that this is a discretionary exercise which may be used to reduce the amount of support that would otherwise be payable under the Guidelines by the step parent, having regard to the amount of support that the natural parent is actually paying, the relative involvement of the two in the lives of the children, and the relative incomes of all those with a child support obligation. [See Note 59 below]

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Note 59: M. (C.) v. P.(R.) (1997), 26 R.F.L.(4th) 1 (Ont.C.A.); and Johb v. Johb (1998), 38 R.F.L. (4th) 11 (Sask. Q.B. -F.L.D.) per Carter J.

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¶ 51 The very recent Supreme Court of Canada decision in Chartier v. Chartier affirmed that once a person has assumed the obligation of "standing in the place of a parent," he cannot unilaterally terminate that obligation after separation by ceasing to have a relationship with the child. The major focus of the discussion of Bastarache J. is on the existence of the obligation of a stepparent, rather than on relative quantum, though he offers the following cryptic comments on relative liability: [See Note 60 below]

> The contribution to be paid by the biological parent should be assessed independently of the obligations of the step-parent. ... The obligations of parents are joint and several. The issue of contribution is one between all of the parents who have obligations towards the child, whether they are biological or step-parents; it should not affect the child. If a [step] parent seekd contibution from another parent, he ... must in the meantime, pay support for the child regardless of the obligations of the other parent.

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Note 60: [1998] S.C.J. No. 79, at para 42.

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¶ 52 It may be argued that this dicta supports determining child obligations for each non-custodial parent separately and allowing the custodial parent to claim a full amount from each based solely on consideration of each payer's income. However, it is clear that the Supreme Court was not considering quantum issues or the Guidelines, and a failure a consider that the interrelationship of the obligations of different payors would not be consistent with s. 5 of the Guidelines. This passage is, however, a strong support for joining all potential payors in a single action.

Special and Extraordinary Expenses: s. 7

¶ 53 A frequently litigated issue, especially where there is a middle or higher income payor, concerns the applicability of the "special and extraordinary" expense "add-ons" in s. 7. This is an area where there is significant scope for factual argument in specific cases, as well as widely differing judicial approaches. In significant measure, the problems that the courts face is a reflection of what the Senate Committee refers to as "ambiguity in some of the listed expenses" in s. 7. [See Note 61 below] Perhaps less obviously, some of the difficulties may reflect a lack of clarity about the purpose or design of the Guidelines, as well as the inadequacy of the amounts of child support found in the Tables, especially in the middle income ranges.

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Note 61: Senate of Canada Committee on the Child Support Guidelines, Interim Report,(June 1998) p.6

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¶ 54 Despite the contentious nature of s. 7, in the first year and a half that the Guidelines were in effect this section appears to have been used in roughly one third of

cases. [See Note 62 below] The widespread use of s. 7 was not surprising considering the broad nature of the listed expenses, though recent appeal decisions have taken a narrower view of this provision than some of the early case and may result in fewer claims being made in the future. [See Note 63 below] The caselaw in this area, especially under s. 7(1)(f), is rapidly evolving and the precedential value of decisions rendered more than a few months ago should be approached with caution.

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Note 62: Hornick, Bertrand & Bala, "Pilot Study on Child Support Orders Under the Divorce Act Project: Transition Report" (December 1998 Draft) reports on a study of over 8,000 contested and uncontested child support cases from all jurisdictions outside Quebec in 1997-98. In the cases in which the Guidelines were used, 40% revealed use of s. 7, including 8.5% with day care expenses, 9.7% with health insurance premiums, 8.4% with health related expenses, 6.9% with post secondary expenses, 4.7% with extraordinary educational expenses and 9.3% with extraordinary extracurricular expenses.

Note 63: See e.g. Andries vs. Andries, [1998] M.J. No. 196 (C.A.); and Raftus vs. Raftus, [1998] N.S.J. No. 119 (C.A.) which take the narrowest approach. McLaughlin v. McLaughlin, [1998] B.C.J. No. 2514 (C.A.), Saunders v. Saunders, [1998] A.J. No. 565 (C.A.), and Kofoed v. Fichter (1998), 161 D.L.R. (4th) 189 (Sask. C.A.) Were not as narrow, but clearly narrower than some of the earliest cases. All are discussed below.

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¶ 55 Section 7 provides:

> In a child support order, a court may ... provide for an amount to cover the following expenses, or any portion of those expenses, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense, having regard to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:
> a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
> b) ...medical and dental insurance premiums attributable to the child;
> c) health-related expenses that exceed insurance reimbursement by at least $100 annually per illness or event, including orthodontic treatment, professional counselling provided by a psychologist, social worker or psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
> d) extraordinary expenses for primary or secondary school education or for any educational programs that meet the child's particular needs;

e) expenses for post-secondary education; and
f) extraordinary expenses for extracurricular activities.

¶ 56 It is not surprising that disputes about s. 7 are common, since there is a degree of inconsistency within s. 7. The title of s. 7 ("Special or extraordinary expenses") and some of the wording, for example that in s. 7(1)(f) ("extraordinary extracurricular expenses") suggests that the circumstances in which there should be add-ons are intended to be quite limited. This narrow approach would appear to be consistent with the idea that the Tables in the Guidelines are already formulated "based on economic studies of average spending on children in families at different income levels in Canada." [See Note 64 below] - and therefore commonly incurred expenses like those relating to child care and extracurricular activities are already reflected in the Table amounts. Some of the wording of s. 7, however, in particular that related to child care and post-secondary expenses indicates that these commonly incurred expenses are divisible whenever they are incurred (provided the judge considers them "reasonable" and in the child's "best interests"), regardless of the fact that these expenses are already included in the "average spending" of Canadian families on children and thus reflected in the Table amounts.

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Note 64: Schedule 1, note 5

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¶ 57 Section 7 gives judges considerable discretion specifying that expenses are only to be added to the Table amount if considered by a judge to be necessary "in relation to the child's best interests and the reasonableness of the expense, having regard to the means of the spouses." The application of s. 7 creates an interpretative challenge for the courts. From a conceptual perspective, a major problem is there is no real information available what expenses are "ordinary" and reflected in the Guidelines, so determining what expenses are "special or extraordinary" is bound to be a somewhat speculative exercise. As Moreau J observed in Middleton v. MacPherson: "It would be an easier exercise for the courts to determine what is an extraordinary...expense if there was evidence of what expenses were taken into account when creating the tables amounts." [See Note 65 below]

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Note 65: This point is made in Middleton v. MacPherson, [1997] A.J. No. 614 (Q.B.) per Moreau J.[at para 27]

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¶ 58 Section 7 is intended to allow judges to tailor awards to meet the specific needs of individual children; some judges tend to take a fairly expansive approach to this provision, focussing on the "best interests" of the child before the court, while assessing the "reasonableness" of the expense in the context of parental means. Other judges take a narrower approach to s. 7, arguing that the cases in which this provision is used should be the exception not the rule; if s . 7 expenses are granted routinely they will regularly

trigger cross applications by payors for undue hardship, at least to eliminate or reduce the s. 7 claim, by payors and the process of determining child support will be more complex than before the Guidelines were introduced. [See Note 66 below]

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Note 66: See Messier v. Baines, [1997] S.J. No. 627 (Sask. Q.B.); and Hansvall v. Hansvall, [1997] S.J. No. 782 (Sask. Q.B.)

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¶ 59 Section 7 is an exhaustive list of amounts that can be added to the Table amount, though as discussed below if a child has special needs there may be situations in which a custodial parent might seek to invoke the s. 10 undue hardship provision to increase the amount of support payable. It should be noted that ss 7(1)(d) & (f) (educational and extracurricular expenses) require a finding that the expenses are "extraordinary," while no such finding is needed for the other "special" expenses. Under all of the headings in s. 7, judges retain a discretion expenses, or make no order.

Child Care Costs: s. 7(1)(a)

¶ 60 The typical Canadian family, especially with children under school age, has substantial child care expenses, [See Note 67 below] though for the purposes of s. 7 this is regarded as a "special expense." However, there is no need for an applicant to establish that these expenses are "special" or extraordinary in amount, only that they are "reasonable." The child care expenses must be incurred to allow the custodial parent to pursue educational, employment or treatment.

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Note 67: Canadian Council on Social Development, The Progress of Canada's Children '98 (Ottawa, 1998) estimates that child care represents the biggest single expense in raising a child, 33% of the $159,000 it costs to raise a child from birth to the age of 18 (reported Southam News, December 7, 1998)

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¶ 61 In McLaughlin v. McLaughlin the British Columbia Court of Appeal upheld a ruling including a division of expenses for after school care for an 8 year old child, rejecting an argument that teenage siblings could provide this care without charge; given the financial resources of the parents it was preferable in this case for the child to have "consistent, reliable" [i.e paid] child care, though the Court acknowledged that in a family of more limited means there might be no alternative but to utilize older siblings. [See Note 68 below] Child care expenses to allow a custodial parent to engage in social, cultural, religious or recreational activities are not within s. 7(1)(a), [See Note 69 below] though judges may be somewhat more flexible in including expenses in cases in which children have special needs or the non-custodial parent is not exercising access. [See Note 70 below]

Note 68: [1998] B.C.J. No. 2514 (C.A.), per Prowse J.A.

Note 69: Forrester v. Forrester, [1997] O.J. No. 3437 (F.C.) per Vogelsang J.

Note 70: Wright v. Wright, [1998] A.J. No. 1167 (Q.B.), per Nash J. where the children had special needs and the father did not visit. In awarding s. 7 expenses to allow the other to participate in training activities evenings and four weekends a year in the reserves commented: "At the very least, she is entitled to some time apart from these children."

¶ 62 The actual calculation of the net amount of s. 7(1)(a) expenses can be complex since s. 7(3) requires that the order take account of any income tax benefits associated with the expense. In McFadden v. McFadden, Vogelsang J. declined to make any order for child care costs because the mother failed to provide information about the tax effects and the court declined to guess at the tax consequences and the net cost of child care. [See Note 71 below] In Kelly v. Kelly Bielby J. held that the mother alone was entitled to all the credits and deductions that apply to reduce her own taxable income, and that the value of the child care tax deduction should then be determined; only those portions of the GST credit and Child Tax Credit which arise as a result of the actual child care expenses should be treated as a shareable subsidy reducing her costs; in coming to this conclusion, Bielby J. considered submissions and evidence from counsel for the Department of Justice and Childview Software, though ultimately declining to rely on the figure determined by the Childview computer program. [See Note 72 below] The federal government has published a pamphlet that helps to calculate the value child care tax deduction, and computer programs like DivorceMate and Childview are very helpful for this type of calculation.

Note 71: [1998] O.J. No. 3769 (Gen Div.)

Note 72: (1998), 38 R.F.L. (4th) 444, supplementary reasons (1998) 40 R.F.L. (4th) 68 (Alta Q.B.)

¶ 63 In some cases judges have considered the relative financial position of the parties and refused to make an order for child care expenses that the mother was actually incurring for employment purposes, relying on the discretionary nature of s. 7. It was felt that the father simply could not afford to pay more than the Table amount, [See Note 73 below] or in some cases invoking the s. 10 undue hardship provision. [See Note 74 below]

Note 73: Chaput v. Chaput, [1997] O.J. No. 4924 (Gen. Div.), Ferguson J., father earning $24,000 and custodial mother almost twice that, father having access costs, no sharing of mother's child care

Note 74: Hughes v. Bourdon, [1997] O.J. No. 4263 (Gen. Div.) Aiken J. Father's income is $38,664 and he has custody of two children from a prior relationship for whom he is not receiving support; court does not make s. 7 order for child care, and makes s. 10 order to reduce payment from Table amount of $335 to $300 per month, considering welfare of all the children involved.

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Medical and Insurance Costs: s. 7(1)(b) & (c)

¶ 64 If one parent can maintain health or dental insurance coverage for the child in an employer sponsored plan at little (or no) extra cost, courts may direct that parent to pay the full cost to maintain coverage, presumably based on the discretionary nature of s. 7(2), [See Note 75 below] though there are cases in which this extra expense can be divided with the non-custodial parent able to have a portion of this cost taken into account to reduce the amount of child support payable. [See Note 76 below] Section 7(1)(b) is also used if insurance coverage is directly obtained by the custodial parent from an insurer.

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Note 75: See e.g. Middleton v. Macpherson (1997), 29 R.F.L. (4th) 334 (Alta Q.B.); Meeniuk v. Meeniuk (1998), 39 R.F.L. (4th) 372 (Ont Gen. Div.) per Belleghem J.

Note 76: McManus v. Marchuk(1998), 40 R.F.L. (4th) 105 (Alta Q.B.)

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¶ 65 Section 7(1)(c) is commonly used for orthodontic treatment, eyeglass and large prescription drug expenses. Orthodontic treatment work is generally a discretionary procedure, and there are cases in which the expense would not be "reasonable" having regard to the parents' means. There are also cases in which claims for sharing of dental or orthodontic expenses have been rejected if there was no evidence (such as a letter from a dentist) explaining the necessity of this type of expense, but simply a letter quoting the price. [See Note 77 below] Expenses that a parent incurs for travelling to the hospital, parking and meals at the hospital are not considered to be within s. 7(1)(c). [See Note 78 below] Judges have rejected claims for the deductible ($100) on a drug plan. [See Note 79 below]

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Note 77: Thomson v. Howard, [1997] O.J. No. 4431 (Gen. Div.) G.A. Campbell J.

Note 78: Tallman v. Tomke (1997), 204 A.R. 119 (Q.B.).

Note 79: Thomson v. Howard, [1997] O.J. No. 4431 (Gen. Div.) G.A. Campbell J.

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Extraordinary education expenses: s. 7(1)(d)

¶ 66 Some decisions under s. 7(1)(d) have taken a very broad approach, including a range of "extraordinary" expenses that go "beyond the ordinary expenses" of public schooling, such as field trips, school sporting activities and lunch time supervision. [See Note 80 below] Most decisions, however, have taken a narrower approach to s. 7(1)(d) and also considered the effect of the "reasonableness" limitation in s. 7, and s. 7(1)(d) claims appear to be the least frequently awarded s. 7 expense, allowed in about one case in twenty. [See Note 81 below]

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Note 80: Middleton v. MacPherson (1997), 29 R.F.L.(4th) 614 (Alta Q.B.), per Moreau J.

Note 81: Hornick, Bertrand & Bala, "Pilot Study on Child Support Orders Under the Divorce Act Project: Transition Report" (December 1998 Draft).

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¶ 67 In Hoover v. Hoover a custodial mother's claim for reimbursement for expenses like school dances, school supplies and swimming were rejected as "ordinary," but the court did require the father to pay a proportionate share of the cost of purchasing a computer, though in lower income families this type of expense would not be regarded as reasonable [See Note 82 below]. Thomson v. Howard the custodial mother had an annual income of about $50,000 and the payor father an income of about $30,000. While G.A. Campbell J. recognized that the child might benefit from tutorial help, he ruled that the evidence was insufficient to establish that it was "necessary" and "reasonable." He commented: "[W]ho among us would not have improved our marks and standing in the classroom with additional personal and professional attention...? Every parent, on behalf of every child in Canada, could make a claim for extra support on [minimal] evidence not much dissimilar" to that presented here." [See Note 83 below]

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Note 82: [1997] N.W.T.J. No. 43 (S.C.), per Vertes J.

Note 83: [1997] O.J. No. 4431 (Gen. Div.). See also Blain-Hughes v. Blain (1998), 39 R.F.L. (4th) 327 (Ont. Gen. Div.) where Cusinato J. refused to order payments for a private Christian school to which the custodial mother had sent the child.

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¶ 68 Private school is only likely to be "reasonable" when there is a relatively high income level. If private schooling commenced before separation, this will clearly support its continuation. However, in Cochrane v. Zarins the British Columbia Court of Appeal held that the trial judge erred in considering this as the only factor; "other factors... would include the parent's educational history which included extensive private schooling, the children's private preschooling, the fact that the children's talent has

developed and become apparent over the ten year period since separation and, of course, the ability of the non-custodial parent to pay." [See Note 84 below]

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Note 84: (1998), 36 R.F.L. (4th) 434 (B.C.C.A.)

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¶ 69 In Pohlod v. Bielajew the non-custodial father had an annual income of about $140,000 while the mother had custody of two girls and an annual income of about $44,500. [See Note 85 below] The court ordered that in addition to the Table amount of child support, the father should pay 75% of the cost of one of the children attending a private school. Justice Aitken accepted the report of a psychologist that the girl had special educational needs and would benefit from the smaller class size and individualized instruction of a private school, and that it was in her "best interests" to attend; given the parents' incomes this was also a "reasonable expense" even though the girl did not attend a private school prior to the parents' separation.

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Note 85: (1998), 38 R.F.L. (4th) 35 (Ont. Gen. Div.), per Aitken J.

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¶ 70 In cases with some very high income payers where private school may be a reasonable expectation, private school fees may be considered "ordinary" expenses that are included within the Table amount of child support. [See Note 86 below] This would only be determined by considering a budget for the child, and it is clear that even with high income payers there can be add-on expenses ordered under s. 7. [See Note 87 below]

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Note 86: Francis v. Baker, [1998] O.J. No. 924 (C.A.)

Note 87: See e.g. Greenwood v. Greenwood (1997), 37 R.F.L. (4th) 422, Burnyeat J. where payor father's annual income was $995,000 resulting in $6,500 Table amount and mother also awarded extraordinary expenses for private school and extracurricular activities.

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Differing Approaches to s. 7(1)(f):

¶ 71 One of the issues that has produced great variation in judicial approaches has been the interpretation of s. 7(1)(f), which provides for apportionment of "extraordinary extracurricular expenses." The amount of litigation is not surprising since expenses for a range of extracurricular activities are significant for many middle and upper income Canadian children.

¶ 72 Some of the initial cases under the Guidelines took a very broad approach to the concept of "extraordinary expenses," including any expense for activities lying outside "ordinary" school activities, including lunch supervision, field trips and music lessons within s. 7(1)(d) and activities such as ballet lessons within s. 7(1)(f). [See Note 88 below] These early decisions may no longer have great precedential value.

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Note 88: See e.g Middleton v. MacPherson, [1997] A.J. No. 614, 29 R.F.L. (4th) 334 (Q.B.) per Moreau J and Kofoed v. Fichter, [1997] S.J. No. 558 (Q.B.) per Zarzeczny J., affd without endorsing the approach of the trial judge (1998), 161 D.L.R. (4th) 189 (Sask. C.A.); and Bially v. Bially (1997), 28 R.F.L.(4th) 418 (Sask Q.B.) per Gunn J.

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¶ 73 In 1998 the courts adopted three different approaches to s. 7(1)(f), though none were as broad as some of the early s. 7 cases. The narrowest approach, adopted by the Nova Scotia and Manitoba Courts of Appeal, requires that the expenses should be unusually large for the particular extracurricular activity under consideration, and that the child have special talents or needs to justify this type of expenditure. Courts of Appeal in British Columbia, Alberta and Saskatchewan have adopted an approach that asks whether the expenses are "extraordinary" having regard to the joint incomes of the parents; many Ontario judges have adopted this approach. A third approach, adopted by some trial judges in Ontario, asks whether the expenses are "extraordinary" having regard to the income of the custodial parent.

¶ 74 Given the relatively small amounts of money at stake in any s. 7 case, it seems highly unlikely that the Supreme Court of Canada will be given an opportunity to resolve the differing judicial approaches, though hopefully there will be an Ontario Court of Appeal decision on s. 7 before too long. Undoubtedly this is a provision that will be clarified when the government revises the Guidelines.

The Narrow View of s. 7(1)(f): Exceptional Expenses for the Activity

¶ 75 A narrow so-called "objective approach" to s. 7(1)(f) that focuses on the expenses for the particular extracurricular activity was adopted by the majority of the Nova Scotia Court of Appeal in Raftus v. Raftus [See Note 89 below] and by the Manitoba Court of Appeal in Andries v. Andries. [See Note 90 below] Justice Twaddle in Andries explained why he rejected the approach of the Ontario decision in Rains v. Rains [See Note 91 below] (and later by other cases) that considered the incomes of both parents in determining what types of expenses are "extraordinary:"

> Firstly, it requires a judge to consider the means of the non-custodial parent twice, once in deciding whether the expense is extraordinary and once in deciding whether the extraordinary expense is reasonable, an unnecessary duplication. Secondly, because the table amounts include

some allowance for extracurricular activities, the approach may result, albeit unintentionally, in a payor being required to pay twice for the same extracurricular expense. And thirdly, because an extracurricular expense is less likely to be disproportionately high in relation to a wealthier payor's income than to that of a poorer payor, the Rains approach favours the wealthier payor, making it less likely that such a payor will be required to pay anything more for any extracurricular expense. I do not think these results are what the Governor General in Council intended. The payor's means, in my view, are to be taken into account only in deciding whether an expense otherwise found to be extraordinary is reasonable....

A much more helpful approach ...is taken... in Moss v. Moss (1997), 159 Nfld. & P.E.I.R. 1 (Nfld. S.C.).

. . . the Court should look at the nature of the expenditure, in the context of the particular activity to determine whether or not, when assessed against expenditures that might reasonably be anticipated in connection with the activity, the expenditure in question is exceptional and represents a marked departure. This will focus the inquiry more on the nature of the expenditure in question, and not on its amount. Following the Moss approach, an expense for an extracurricular activity is extraordinary only where it is out of proportion to the usual costs associated with that particular activity. For example, if the average costs of downhill skis is $500, then $500 for downhill skis would not be an extraordinary expense, but $1000 would be. The judge would still be required to apply the tests of necessity and reasonableness before determining that the payor should contribute to the extraordinary portion of this expense, but the initial determination of the extraordinary character of the expense would not involve consideration of the payor's means.

This approach is consistent with the language and structure of s. 7(1) of the Guidelines. The word "extraordinary" in paragraphs (d) and (f) of s. 7(1) qualifies expense rather than activity. Just as the expenses in the other paragraphs of s. 7(1) are determined without reference to the means of the parties, so are those under paragraphs (d) and (f). All of the enumerated expenses are then subjected to the same tests of necessity and reasonableness.

Note 89: See also Raftus vs. Raftus, [1998] N.S.J. No. 119, 37 R.F.L. (4th) 59 (C.A.)

Note 90: Andries vs. Andries, [1998] M.J. No. 196, 36 R.F.L. (4th) 175 (C.A.) Emphasis added.

Note 91: [1997] O.J. No. 2516 (Gen. Div.), per Pardu J.

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¶ 76 This approach focusses on the particular expense rather than the activity or the burden of the expense on this family. It excludes consideration of whether the expenses are extraordinary for parents with the incomes of the parents individual involved. It excludes, for example, "ordinary" hockey or ballet expenses, regardless of how burdensome or "extraordinary" they may be to the family involved, and appears to restrict s. 7(1)(f) to situations where a child has "extraordinary" talents or special needs and concomitant expenses.

Considering the incomes of both parents

¶ 77 While the majority of the Nova Scotia Court of Appeal in Raftus adopted a narrow "objective" approach to s. 7(1)(f), in a concurring opinion Bateman J.A. took a broader "subjective" (or contextual) approach that considered the income of both parents in deciding whether an expense is "extraordinary." She wrote:

> The Table amounts are fixed by a formula that calculates the appropriate amount of support in light of economic data on average expenditures for children across different income levels. There is no suggestion in the explanatory material that preceded and accompanied the implementation of the Guidelines, nor in the Guidelines themselves, that the child support amounts were fixed in accordance with the average cost of only a child's food, shelter and clothing. The wording of s. 7 is consistent with an inference that the Table amount of support is intended to include the payor's reasonable contribution to expenses for extracurricular activities and school/education expenses that are not extraordinary. An "intact" family's ability to fund extracurricular activities logically correlates with income. At lower income levels there is less discretionary income to accommodate a child's extracurricular activities. The increase in the Table amounts as the payor's income rises, must be intended to address greater participation in extracurricular activities, in addition to increased clothing, food and shelter costs. If the Table amounts require adjustment to provide adequately in this regard, this is to be done by amendment to the Regulations and not by judicial intervention..... The relevance of financial means to the payment of add ons is expressly stated in the opening words of s. 7. Indeed s. 26.1(2) of the Divorce Act, which underlies the Guidelines, provides:
>
> 26.1(2) The guidelines shall be based on the principle that spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation. It is thus, in my view, appropriate and

> necessary when determining whether the expense fits within the "extraordinary" requirement of s. 7(1)(f) to assess it, subjectively, in accordance with the parents' incomes, using "income" as defined in the Guidelines. The definition of "extraordinary" invites a comparison to what is usual. A relatively modest expense for a child's extracurricular activity may be "extraordinary" for parents who are living at a very low income level, but trivial for those with generous incomes. In this regard, there is no "usual" that cuts across income levels. There must be some attempt by the court to measure "extraordinary" in accordance with a norm. An income based, presumptive, capacity to pay is the foundation of the Guidelines. The Table amounts are to this extent, subjective not objective. But all payors with equivalent nominal incomes do not necessarily have the same ability to pay support. The Guidelines through the Table amounts, establish an income based threshold level of child support, but by means of s. 7 expressly recognize that ability to pay is linked not just to income but to the broader concept of "financial means". It is most consistent with the structure of the Guidelines, in my view, to assess the "extraordinary" nature of the expense, subjectively. For this purpose I would use the parents' joint incomes. This is not to require that, at this stage, the judge go into a detailed investigation of the financial "means" of the parents. That analysis occurs when the Court, having determined that the expense is extraordinary, considers its reasonableness.

¶ 78 In McLaughlin v. McLaughlin the British Columbia Court of Appeal adopted the analysis of Bateman J.A., taking an approach that considered the joint parental incomes and the total amount of all of the proposed expenses for extracurricular activities. Prowse JA wrote: [See Note 92 below]

> [para47] In the result, Madam Justice Bateman was of the view that it was "fundamentally fair" to take an expansive approach to the meaning of "extraordinary expenses" by viewing the expense or expenses claimed in the context of the parties' joint incomes.
> [para48] After discussing whether an expense was extraordinary within the meaning of s. 7(1)(f), Madam Justice Bateman then went on to discuss the other considerations under s. 7, namely, whether the expenses were both reasonable and necessary. The question of reasonableness involved examining the "means" of the parties, taking into account the reality of their separate status and such other factors as their
> . . . capital, income distribution, debt load, third party resources which impact upon a parent's ability to pay, access costs, obligations to pay spousal or other child support orders, spousal support received and any other relevant factors. [p. 275] on the basis that with respect

to "add on" expenses, the Guidelines do not presume an ability to pay.

[para49] In concluding her analysis of s. 7(1)(f), Madam Justice Bateman agreed (at pp. 275-76) with the following comments from Child Support Guidelines in Divorce Proceedings: A Manual (1997), 2nd ed.; (James C. MacDonald, Q.C. and Ann C. Wilton, Carswell), at p. 49:

> The provision for special or extraordinary expenses, obviously, is a departure from the policy of uniform treatment for all families in divorce situations. This section recognizes that some kinds of expenses do not lend themselves to averages. It is an attempt to balance the goals of an efficient and effective system and, at the same time, respond to limited individual circumstances so that equity can be achieved. Whether a special or extra-ordinary expense will be allowed is primarily a matter for [the] discretion of the court. On the evidence before her, Madam Justice Bateman concluded the trial judge did not err in finding that the expenses claimed, taken individually or collectively, were not extraordinary. It was, therefore, unnecessary for the trial judge to go on to determine whether they were necessary or reasonable.

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Note 92: McLaughlin v. McLaughlin, [1998] B.C.J. No. 2514 (C.A.).

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¶ 79 Despite applying this "expansive approach" in McLaughlin the Bristish Columbia Court of Appeal overruled the trial judge and, considering the joint parental incomes of $120,000 the appeal court concluded that expenses of $70 per month for soccer and other sports were not extraordinary. In Kofoed v. Fichter the Saskatchewan Court of Appeal also adopted the approach of Bateman J.A., although accepting the trial judge's ruling hat where the total parental incomes were about $60,000, expenses of $170 per month for music, gymnastics, swimming, bowling, cubs and arts were "extraordinary" and should be divided between the parents. [See Note 93 below]

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Note 93: Kofoed v. Fichter (1998), 161 D.L.R. (4th) 189 (Sask. C.A.), affg. [1997] S.J. No. 558 (Q.B.)

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¶ 80 The Alberta Court of Appeal and a significant number of trial judges in Ontario also have adopted the approach that focusses on joint parental incomes, while making a case-by-case assessment. [See Note 94 below]

Note 94: Sanders v. Sanders, [1998] A.J. No. 565 (C.A.); Van Wynsberghe v. Van Wynsberghe, [1997] O.J. No. 2566 (Gen Div.), per Vogelsang. Philip Epstein argues that "the vast majority of trial judges in Ontario have adopted the approach of McLaughlin", quoted in "Extraordinary expenses clarified," Lawyers Weekly, January 15, 1999, p. 13.

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Custodial Parent's Income Approach to s. 7(1)(f)

¶ 81 A number of decisions in Ontario have focussed primarily on the income of the custodial parent to determine whether an expense is extraordinary. One was Camirand v. Beaulne, a decision of Aitken J., who wrote: [See Note 95 below]

> [para20] In arriving at the amounts stipulated in the Tables to the Guidelines, Parliament theoretically took into account all types of expenses that Canadian parents as a collectivity incur on behalf of their children. The Table amount represents an average amount which a parent at that income level will spend on his or her child or children. It does not necessarily equal what a particular parent who has that income actually spends on his or her child or children. The child support payment itself is considered a global sum available to cover a portion of whatever expenses the custodial parent incurs in order to meet the needs of a child or children. Those applying the Guidelines cannot make any assumptions regarding what portion of a Table amount represents expenses relating to extracurricular activities, aside from assuming that some portion does.
> [para21] The word "extraordinary" in section 7(1)(f) does not refer to the fact that the expense may be incurred infrequently by that parent or by parents in general. Nor does it refer to the unusualness of the expense in the jurisdiction where the matter is being considered. In other words, the fact that a small number of Canadian children may pursue a particular extracurricular pursuit has no bearing on the analysis of whether the expense incurred by a parent for a child in regard to such a pursuit should be considered "extraordinary".
> [para22] The real focus of the analysis must be the extent to which the expense or expenses for an extracurricular activity or activities would be inordinately burdensome for the custodial parent to pay, taking into account his or her income (as defined in the

Guidelines). It is in this sense that the word "extraordinary" is being used.
[para23] There are at least two ways in which the term "extraordinary" may be interpreted within the context of section 7(1)(f). The expenses for one particular extracurricular activity for one particular child may be considered extraordinary because of its amount in relation to the income from all sources of the parent who is paying the expense. As well, the totality of expenses for extracurricular activities for one child or for all of the children for whom a parent is paying such expenses may be considered extraordinary in relation to the income from all sources of that parent.

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Note 95: [1998] O.J. No. 2163 (Gen. Div.)

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¶ 82 In this case, the custodial mother had an annual income of about $60,000 and received about $13,740 a year in child support for three children, leading Aitken J. to conclude that $1,600 in expenses for extracurricular activities were a modest burden on the custodial parent and hence were not "extraordinary" and no s. 7 order was made.

¶ 83 The approach that focusses on the income of the custodial parent in determining what expenses are "extraordinary" has been followed by some judges in Ontario and other jurisdictions. [See Note 96 below]

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Note 96: Mossip J. in Giles v. Villeneuve, [1998] O.J. No. 4492 (Gen. Div.); Archambault J. in Walkeden v. Zemlak, [1997] S.J. No. 601 (Q.L.); Baynton J. in Hansvall v. Hansvall, [1997] S.J. No. No. 782 (Q.L.); Vertes J. in Hoover v. Hoover, [1997] N.W.T.J. No. 43 (Q.L.).

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Section 7(1)(f): A Concluding Comment

¶ 84 The "objective" approach of Andries and Raftus is quite narrow and would clearly result in almost all s. 7(1)(f) applications being dismissed; this approach seems to have no judicial support in Ontario.

¶ 85 It can be argued that the approach of Aitken J. in Camirand v. Beaulne, which focusses on the custodial parent's income in determining whether expenses are "extraordinary" is the most appropriate approach for meeting the needs of children. It focusses on whether these expenses are actually extraordinary for the child before the court, by considering whether it would be "extraordinary" for the custodial parent who will actually be paying to cover these expenses. It allows the judge to consider all spending on all extracurricular activities, not just the spending on one parrticular

activity. This interpretation also seems most consistent with the approach of the Ontario Court of Appeal in Francis v. Baker, with its emphasis on maintaining the standard of living of children after separation, [See Note 97 below] though as the actual outcome in Camirand illustrates, there will be many cases in which this test will not result in expenses being found to be extraordinary. This approach is premised on a recognition that extracurricular activities are often very important for the social, educational, and psychological development of children, especially children who have gone through the trauma of parental separation, and recognizes that custodial parents will often be unable to afford the expense of these activities based solely on their own incomes and the Table amount of child support.

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Note 97: [1998] O.J. No. 924 (C.A.); Melanie Kraft & Philip Epstein, "The Extraordinary Interpretations" in Law Society of Upper Canada, Child Support Guidelines: Recent and Important Caselaw (December 1998) argue that Camirand v. Bealune is "reflective of the approach generally being adopted by the Ontario courts and, respectfully, is the correct approach." (p. 3-22)

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¶ 86 Many Ontario judges appear to favour the approach adopted by Bateman J.A. in Raftus, determining whether expenses are extraordinary by reference to joint parental incomes. In practice there may be little difference between the approach of Aitken J in Camirand and the approach of Bateman J.A. in Raftus. In practice both of these approach consider the income of both parents, but primarily focus on the income and expenses of the custodial parent; this is most explicit in the approach of Bateman J.A. But with the approach of Aitken J., which focuses on the income of the custodial parent, there is also indirect consideration of the income of the payor parent since this determines the amount of child support and hence indirectly affects the income of the custodial parent. The approach of Bateman J.A. has the great symbolic advantage of considering the income of both parents, and therefore seems most consistent with the principle that child support is a joint obligation of both parents. It therfore seems likely that this is the approach that considers the income of both parents will draw considerable judicial support, though in applying this approach judges are likely to focus primarily on the income and budget of the custodial parent in actually deciding what expenses are "extraordinary."

¶ 87 If courts adopt an approach that considers whether expenses are "extraordinary" by reference to the income of the custodial parent (the Aitken J approach), or an approach considering the income of both parents (the approach of Bateman J.A.), counsel will generally want to introduce evidence about what expenses are being incurred for the children in addition to those for extrcurricular activities. For the custodial parent, in particular, this will mean that budget based information will be relevant.

¶ 88 It should be recognized that the approach that focuses on the income of the custodial parent or the income of both parents gives judges significant discretion. It is a matter of judgement whether expenses are "extraordinary" having regard to parental income, and whether they are "reasonable" for parental means and "necessary" for a

child's best interests. There is no "objective" evidence that is readily available to determine what is "extraordinary," though budget based information will allow a judge to make determinations about this issue.

¶ 89 Under any of the approaches to s. 7(1)(f), a judge must be satisfied that the expenses are necessary for the child's best interests and reasonable having regard to the parents' means, and a judge may conclude that an expense that was incurred while the parties' were cohabiting can no longer be justified. This happended, for example, in Nadeau v. Mitchell where the court concluded that horseback riding was a "luxury" that the child could no longer afford. [See Note 98 below] An examination of the caselaw reveals that judges who in theory adopt the same interpretation of s. 7(1)(f) may disagree about how to apply it to a particular fact situation.

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Note 98: [1997] O.J. No. 2837 (Gen. Div.) Per Jarvis J.

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¶ 90 Whatever approach is taken to the interpretation of ss. 7(1)(d) and (f), these provisions are most likely to be applicable only in middle income situations. As the income of the payor and child support payments rise, an increasing amount of money from the basic Table amount will be available for extracurricular and educational expenses, and courts will be somewhat less likely to invoke s. 7(1) (d) and (f). [See Note 99 below] For lower income payors, courts are also less likely to invoke s. 7, as such expenses will not be viewed as "reasonable" having regard to the parents' means and the "family's spending pattern prior to separation." But in the middle income ranges, s. 7 may be very important to ensuring that a child does not suffer undue curtailment of activities and education due to parental separation.

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Note 99: But see Greenwood v. Greenwood (1997), 37 R.F.L. (4th) 422, Burnyeat J. where payor father's annual income was $995,000 resulting in $6,500 Table amount and mother also awarded extraordinary expenses for private school and extracurricular activities such baby sitting, country club fees, bike equipment, drum kit and kayak lessons.

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Dividing Expenses: s. 7(2)

¶ 91 Section 7(2) states that the "guiding principle" is that an expense in s. 7 is to be divided by the parents in proportion to their incomes. If a court identifies an expense as being within s. 7, it usually divides the cost in proportion to the parents' gross incomes. However, s. 7(1) is discretionary, stating that a court "may"make an order to divide all "or any portion" of their identified expenses. There are cases in which judges have considered the parties overall standard of living in dividing expenses or making a s. 7 order, for example considering the receipt of financial contributions from the family of the custodial parent, or the income of the new partner of the custodial parent. [See Note 100 below]

Note 100: Ewart v. Miller, [1997] S.J. No. 661 (Q.B.F.L.D.); Ebrahim v. Ebrahim, [1997] B.C.J. No. 2039 (S.C.).

¶ 92 In Burggraff v. Burgraff McDermid J. ordered that the non-custodial payor mother should not have to contribute to any of the s. 7 expenses because the judge felt that it was important for her to be able to maintain a residence "of such a nature as to encourage them to visit with her and receive the benefit of her care and guidance." [See Note 101 below] Query whether this concern should have been dealt with in the context of a s. 10 application with some consideration of the respective standards of living of the two households.

Note 101: (1998), 40 R.F.L. (4th) 26 (Ont. Gen Div.)

Dividing Expenses: Percentage of Expense Orders

¶ 93 It appears to be a common practice for parents to agree on the percentage division for the sharing of the special expenses, for example for day care or extracurricular activities, without specifying a dollar amount. The proportion for each parent will usually reflect their relative incomes. Use of a percentage division may reflect uncertainty about the exact dollar amount of the expenses or a recognition that the expenses are variable and will change over time. While this type of order may not be consistent with the exact words of the Guidelines, which appear to contemplate a specific dollar amount, this type of arrangement is often the most sensible way to deal with expenses that are likely to vary over time. There are reported cases in which judges have made this type of proportionate or percentage of expenses order, [See Note 102 below] and if the parents can implement it in a cooperative fashion, it may be very appropriate. However, if the parents are in a high conflict situation and appear to have difficulty cooperating, this type of order should not be made as it invites further argument and may be impossible to enforce without returning to court for further judicial specification of a dollar amount.

Note 102: See e.g. Scotcher v. Hampson, [1998] O.J. No. 3700 (Gen. Div.) per Métivier J: Simpson v. Palma, [1998] S.J. No. 581 (Q.B.) per Zarzency J.

Direct Payments & Custodial Parents on Social Assistance

¶ 94 Pursuant to the Divorce Act s. 15.1(4) a judge can make an order that the s. 7 portion of a child support order should be made directly to the agency or institution providing services to the child, such as a day care facility. At least in Ontario, if the custodial parent is in receipt of social assistance, having direct payments made will have the advantage that the money will actually be used for the benefit of the child; if a sum of money is included in a child support order, the welfare authorities take the position that it should be deducted from welfare, leaving no net benefit to the child. [See Note 103 below] Requiring direct payment, however, can create enforcement problems, and should be avoided if there is a concern that the payor will not honour the order.

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Note 103: This point is made by Justice Aston, "An Update of Case Law under the Child Support Guidelines" (1998), 16 Can. Fam. L. Q. 261, at 285

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Evidence on s. 7 Applications

¶ 95 In contested cases counsel must be prepared to meet the threshold test, leading evidence about the necessity of the expense for the child's best interests, and if possible of its reasonableness in relation to the family's pattern of spending prior to separation. Courts have commented on the importance of particularizing evidence of costs and due dates for payments, as well as of having information available about subsidies and tax benefits. [See Note 104 below]

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Note 104: See e.g Pinto v. Turchio, [1998] O.J. No. 3898 (Prov. Ct.), King Prov. J.; Blain-Hughes v. Blain, [1998] O.J. No. 3011 (Gen Div.) Per Cusinato J.; and McFadden v. McFadden, [1998] O.J. No. 3769 (Gen. Div.), per Vogelsang J.

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Section 7: Concluding Comment

¶ 96 Section 7 gives judges significant discretion to make individualized decisions, which is reflected in the conflict in the caselaw interpreting the section. The more individualized approach of s. 7 does limit the value of the Guidelines for promoting consistency and reducing litigation costs. One can question the appropriateness of having judges make very detailed and personal decisions for separated families, for example about what day care a child will attend, or which type of extracurricular activities a child will be participating in. However, it is apparent that judges are prepared to make this type of determination, and are not sympathetic to parents who unilaterally decide to incur expenses and then expect the courts to ratify their decisions and share the expense. [See Note 105 below] The preferred approach is clearly for parents to consult about these expenses before they are incurred and reach an agreement about how they will be paid.

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Note 105: See e.g comments of Cusinato J. in Blain-Hughes v. Blain (1998), 39 R.F.L. (4th) 327 (Gen Div.); also comments in accompanying Annotation by J. McLeod.

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¶ 97 If the parents caanot agree, it is clear that s. 7 adds some flexibility to the Guidelines. It also has psychological value for at least some payors since they "know" what the money is being spent on and that both parents are making contributions in accordance with their means. The fact that s. 7 is used in a very significant number of cases suggests that the Table amounts may not be adequate, in particular when children are a preschool age and there are significant child care expenses, and for adolescents with expenses for extracurricular activities (as well as costs for food, clothing, etc.).

Split Custody s. 8

¶ 98 Split custody cases occur when one parent has custody of one or more children of the marriage, and the other parent also has custody of one of more of the other children. Research indicates that split custody occurs in about one case in thirty. [See Note 106 below] Section 8 requires the Guideline amount owing for each parent to be calculated, and requires the difference to be paid as a "set off" type order.

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Note 106: Hornick, Bertrand & Bala, "Pilot Study on Child Support Orders Under the Divorce Act Project: Transition Report" (December 1998 Draft) report that 3.7% of the Guideline cases involved split custody.

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¶ 99 Unlike s. 9, which governs shared custody, s. 8 does not directly give courts any discretion. However, the child support amount for one parent may include a s. 7 amount. [See Note 107 below]

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Note 107: Schroeder v. Schroeder (1998), 38 R.F.L. (4th) 395 (Alta Q.B.)

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¶ 100 There may also be split custody situations where it is appropriate to apply s. 10, as occurred in Scharf v. Scharf. [See Note 108 below] The father had an annual income of $30,000 and had remarried a woman earning $26,000. The mother's annual income was $24,000. Each parent had custody of one child. The difference in the Table amounts required the father to pay only $60 per month. The mother and child lived at a much lower standard of living and Métivier J. accepted the mother's undue hardship claim,

concluding that a straight application of s. 8 "does not provide a fair standard of support, which is one of the enumerated objectives of the Guidelines." She ordered that the father should pay $200 a month to the mother, to fall to $150 per month when the mother's income rose to $30,000 a year.

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Note 108: [1998] O.J. No. 199 (Gen. Div.)

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¶ 101 The decision in Scharf recognizes the unfairness to different siblings in situations of split custody that can arise if they live in households where there are significant economic disparities. Section 10 applications seem especially appropriate in cases of split custody when there is a significant income disparity between the two households. [See Note 109 below]

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Note 109: But see Plant v. Plant, [1998] A.J. No. 1206 where the court refused to invoke s. 10 to raise the Table amount in a situation of split custody where father's annual income was $54,000 and mother's was $8,500. The court concluded that in light of matrimonial debts that father assumed, there was little difference in actual standards of living after child support paid at Table amount.

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Shared Custody: s. 9

¶ 102 Given the growing interest by separated parents in various forms of shared parenting and the fact that there is no provision in the federal Guidelines for taking account of access costs (except for cases of undue hardship), it is not surprising that there has been a significant use of the "shared custody" provision of the Guidelines, s. 9, with research suggesting that shared custody is used in about 7% of cases. [See Note 110 below] While most shared custody cases are resolved by the agreement of the parties, there is a considerable body of jurisprudence dealing with s. 9, though there are quite different approaches to the two fundamental questions that arise under s. 9: when does s. 9 apply and what are the consequences of s. 9 applying?

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Note 110: Hornick, Bertrand & Bala, "Pilot Study on Child Support Orders Under the Divorce Act Project: Transition Report" (December 1998 Draft) report that 6.6% of the Guideline cases involved shared custody.

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When Does s. 9 Apply? The 40% Threshold

¶ 103 It is clear that the mere fact that an order or agreement refers to a "joint" or "shared custody" or "joint guardianship" does not entitle the court to invoke s. 9. These

concepts may create an arrangement in which there is joint decision-making, but the issue under s. 9 relates to physical control. To invoke s. 9 it must be established that the payor "exercises a right of access to, or physical custody of, a child for not less than 40% of the time over the course of a year." [See Note 111 below]

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Note 111: Mol v. Mol, [1997] O.J. No. 4060 (Gen Div.) Per Kuzick J.

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¶ 104 Few of the reported cases dealing with the threshold test for the applicability of s. 9 deal with truly shared physical custody. Rather the contentious cases are really situations of extended access (quite possibly with joint legal custody). There is significant scope for argument about whether the 40% figure has been reached. Access arrangements may be complex and flexible, making the calculation difficult, with the potential for variation from one year to the next. Children may spend time in boarding schools and summer camps, also giving rise to potential argument. Mid-week overnight visitation arrangements give rise to arguments about who gets to count the preceding or following day at school.

¶ 105 Judges have generally accepted that the starting spot of the analysis is that the custodial parent has custody 100% of the time, and placed an onus on the other parent to establish he (or she) has custody or access for 40% of the time during a year. Courts have generally looked at the actual pattern of exercising exercise, rather than merely at the terms of the agreement or order that established the arrangement. [See Note 112 below] While some of the Senators who were considering the Guidelines before they came into effect argued that judges would have to exclude the time that a child was asleep or at school and count only the number of hours that a child was awake with each parent, the court have wisely rejected this approach and recognized that a parent encurs costs for a child who is asleep or at school. [See Note 113 below] The courts have usually accepted that the time a child spends at school "counts" for the primary residence parent, as that parent is usually paying most or all of the costs for school lunches, clothing, transportation, and is responsible for dealing with a child's absence from school due to illness or professional development days. [See Note 114 below]

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Note 112: See e.g Metzner v. Metzner, [1998] B.C.J. No. 2903 (S.C.).

Note 113: See Cross v. Cross (1998), 40 R.F.L. (4th) 242 (B.C.S.C.), McKinnon J. rejecting the views reportedly expressed by Senator Jessiman: "when they are asleep you don't consider that parenting time. I also believe when the child is asleep it should not be considered parenting time either." The judge concluded that this approach would produce "chaos" as well as ignoring costs of care while the child is asleep or at school.

Note 114: See Crofton v. Sturko, [1998] B.C.J. No. 38 (S.C.), per Patterson M.; and Meloche v. Kales (1997), 35 R.F.L. (4th) 297 (Ont. Gen Div.) per Cusinato J. The child in this case spent significant portions

of the year in a publicly funded school for the hearing impaired, and the father argued that his access visits accounted for almost half of the boy's time out of school, even though the child's primary residence was with the mother. The court refused to invoke s. 9.

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¶ 106 Many of the cases seem to try to avoid complex calculations and do a rough count based on day/nights, requiring the payor parent to have the child 146 day/nights a year to be able to invoke s. 9. [See Note 115 below] Courts have uniformly rejected arguments that they should only consider a child's hours awake for calculating the 40% of time, since there are costs associated with the time when a child is asleep. In some cases judges have been willing to engage in more detailed analysis and counted the number of hours (or fractions of days) over some period of time, looking for the 40% threshold. In these cases judges have often taken a "purposive" interpretation to s. 9, looking to patterns of spending as well as time. In one Alberta case the judge tried to get a sense of "the spirit and reality" of the arrangement, and was prepared to count hours at school following a mid-week night of care by the payor mother, especially as it is shown that she was preparing meals and paying some school related expenses. [See Note 116 below] On the other hand, there are cases where judges seem to "raise the threshold" in their calculations where it is clear that the primary residence parent is incurring the bulk of the expenses for the child and providing most of the care and support. [See Note 117 below] This suggests that in cases where there is a "threshold question" it is important for counsel to introduce evidence of patterns of expenditures.

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Note 115: See Ellis v. Ellis (1997), 490 A.P.R. 16 (P.E.I.S.C.) and Middleton v. MacPherson (1997), 29 R.F.L. (4th) 334 (Alta Q.B.) obiter comments.

Note 116: See e.g Dennett v. Dennett, [1998] A.J. No. 440 (Q.B.), per Romaine J.and McKerracher v. McKerracher, [1997] B.C.J. No. 2257 (S.C.)

Note 117: See e.g Penner v. Penner, [1998] M.J. No. 353 (Q.B. Fam. Div.); and Ball v. Ball, [1998] S.J. No. 572 (Q.B.F.L.D.).

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¶ 107 It is probably understandable that in counting time in cases close to the 40% threshold, judges may be influenced by whether they think that some adjustment to the Guideline amount of child support is appropriate, though s. 9 gives judges significant discretion and there are cases in which judges have found that a payor has crossed the threshold but due to his relatively high income and the needs of the primary residence parent reduce the amount of child support payable in an ordinary situation little or nothing. [See Note 118 below]

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Note 118: Rosati v. Dellapenta, [1997] O.J. No. 5047 (Gen Div.) Eberhard J. made only a relatively small adjustment ot the Table amount; Metzner v. Metzner, [1998] B.C.J. No. 2903 (S.C.) and Dunham v. Dunham, [1998] O.J. No. 4758 (Gen. Div.) per Aitken J., no reduction for shared custody due to disparity of incomes.

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Consequences of s. 9 Applying

¶ 108 While much of the commentary about s. 9 has focused on how to determine whether the 40% threshold has been crossed, the most difficult issues and greater divergence in judicial approach has been about the appropriate way to assess child support in a "shared custody." Some of the difficulties arise because the provision covers a broad range of situations, both in terms of patterns of time and in terms of costs of shared custody and spending patterns. In some shared custody situations, roughly equal sharing of time may result in a fairly even sharing of expenses. In other cases, even an equal sharing of time may not result in equal sharing of expenses, and one parent may be the "primary spender," [See Note 119 below] responsible for major expenditures such as school and extracurricular activities and clothing, while the other parent assumes responsibility only for food and entertainment while the children are with him, plus the cost of maintaining a second residence.

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Note 119: The term was coined in Coleman v. Meyer, [1997] B.C.J. No. 2622 (S.C.) by Master Horn.

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¶ 109 If the parents are in a shared custody situation where s. 9 applies, the courts are given a broad discretion to determine child support "by taking into account": (a) the Table amounts of support; (b) "the increased costs of shared custody arrangements"; and (c) the "conditions, means, needs and other circumstances of each spouse and any child." Not surprisingly, given the discretion conferred on judges by s. 9 and the variation in shared parenting situations, the reported cases have taken broad a range of differing approaches.

¶ 110 Some cases have focused on s. 9(1)(a), and simply awarded the difference between the Table amounts each month, treating s. 9 as similar to s. 8. As explained in one Saskatchewan case, where the parents had virtually the same annual income and their daughter spent equal time with each parent, in rejecting any claims based on an increase in costs due to shared parenting, McIntyre J. emphasized the desirability of awarding the difference in the Guideline amounts to "cut down on the time cost and confrontation of child support determinations and maintain consistency of results among judges." [See Note 120 below]

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Note 120: Mertler v. Kardynal, [1997] S.J. No. 720 (Q.B.) per McIntyre J.; see also Hubic v. Hubic,[1997] S.J. No. 491 (Q.B. F.L.D.).

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¶ 111 In some cases judges have been persuaded to adjust the difference in the Table amounts by also requiring one parent to pay a share (proportionate to relative parental incomes) of major expenses such as clothing and (ordinary) extracurricular activities to the parent who actually incurred the expenses. [See Note 121 below]

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Note 121: Middleton v. MacPherson (1997), 29 R.F.L. (4th) 334 (Alta Q.B.); Mertler v. Kardynal, [1997] S.J. No. 720 (Q.B.) per McIntyre J.

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¶ 112 Some cases have adopted an approach that takes account of the time spent with each parent to weight the setoff. An order is made for the difference between: the Table amount that would be payable by the mother multiplied by the percentage of time with the father, and the Table amount that would be payable by the father multiplied by the percentage of time with the mother. Other cases have simply ordered the primary residence parent to receive 60% of the ordinary Guideline amount. Either of these approaches may be combined with an order for a portion of s. 7 expenses. [See Note 122 below]

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Note 122: Spanier v. Spanier (1998), 40 R.F.L.(4th) 329 (B.C.S.C.) Humphries J. compares these two approaches and decides that in light of the parties incomes and the child's needs, and the fact that the child spends just about 40% of the time with the father, to adopt the less complicated approach of 60% of the Table amount plus an order for "extraordinary" extracurricular activities.

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¶ 113 In Hunter v. Hunter, a 1998 Ontario decision, Brockenshire J. recognized the value of a formulaic approach in terms of facilitating resolution of disputes, but decided that merely having a difference in the Table amounts was inappropriate so decided to adopt a model used in Colorado and some other American states. This model tries to take account of the extra costs of a shared custody arrangement, which requires each party to incur significant costs for providing accommodation, furnishings and transportation, by increasing the notional amount that each parent should pay the other according to the Tables by 50% and having a "set off" payment that reflects the time that each parent has care of the child. In this case the father had an annual income of $60,000 with a monthly payment of $507, increased by 50% and paid for 6 months a year is $4563; the mother had an annual income of $29,000 for a payment of $258, increased by 50% and payable for 6 months would be $2322. On a monthly basis, this required the father to pay the mother $186.75, being 1/12 the difference of $2241. Notice that in cases of equal time

sharing, this method produces an amount that is substantially less than the more common formulaic approach of taking the difference in Table amounts and making it payable each month. In cases of significant income disparity and equal time sharing, it results in more substantial differences in standard of living than a simple application of s. 9(a) and therefore appears inconsistent with the dicta of Abella J.A. of the Ontario Court of Appeal in Francis v. Baker [See Note 123 below] about the desirability of moving in the direction of equalizing household standards of living, an objective that would seem even more important in cases of shared custody. The search for a formula to resolve shared custody situations is understandable, especially in cases where the parties have not adduced evidence of expenditures, but it seems inappropriate to allow a single figure to be used to adjust for all cases shared custody, since there is a great variation in how parents actually split expenses in shared parenting situations. Some of the variation is due to the fact that some of them are 60:40 time splits and one parent maintains the child's "primary residence" while other cases involve substantial equality of time and it may not be possible to identify a primary residence. Further there are many cases of shared custody, even if there is rough equality of time, in which one parent remains the "primary spender," for such expenditures as clothing, school supplies and perhaps equipment for extra curricluar activities and medical expenses.

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Note 123: [1998] O.J. No. 924 (C.A.)

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¶ 114 There is now a significant body of commentary [See Note 124 below] and caselaw [See Note 125 below] that recognizes the need for judges to take a more flexible or discretionary approach to shared custody situations, one that takes account of whether the child has a "primary residence" or "primary spender parent," and of actual spending patterns and the relative financial positions. In taking this approach, a judge may, for example, decide that if there is a significant income disparity and the primary resident parent has the lower income, there should be little or no deviation from the ordinary application of the Guidelines. [See Note 126 below] Or if there is a substantial income disparity, it may even be appropriate to have no child support [See Note 127 below] or even for a high income primary resident parent to make a payment to a parent with little income to establish a residence suitable for extended visitation. [See Note 128 below]

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Note 124: The analysis developed here relies heavily on an excellent paper by Prof. Carol Rogerson, "Child Support Under the Guidelines in Cases of Split and Shared Custody," in Law Society of Upper Canada, Child Support Guidelines: Recent and Important Caselaw (December 1998). For a fuller discussion of the issues and cases in this area, readers should refer to that paper. See also MacDonald & Wilton, Child Support Guidelines in Divorce Proceedings: A Manual, 2nd ed (Toronto, Carswell, 1997), at 58: and Epstein, "Child Support Guidelines Legislation: An Overview, Federal Child Support Guidelines Reference Manual (Ottawa, Department of Justice,1997) at 15.

Note 125: Rosati v. Dellapenta, [1997] O.J. No. 5047 (Gen. Div.), per Eberhard J.; Ham v. Ham, [1998] N.S.J. No. 139 (S.C.), obiter dicta, per Goodfellow J.

Note 126: McKerracher v. McKerracher, [1997] B.C.J. No. 2257 (S.C.)

Note 127: Creighton v. Creighton, [1997] B.C.J. No. 1938 (S.C.)

Note 128: Dennett v. Dennett, [1998] A.J. No. 440 (Q.B.).

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¶ 115 It is submitted that a simple application of s. 9(1)(a) difference in Table amounts approach is an appropriate starting spot if no evidence is led by the parties to justify a deviation from this. However, if the parties adduce evidence of spending patterns and budgets, a more discretionary approach is one that more fairly meets the child's needs and reflects the diversity of child care arrangements, spending patterns and relative economic positions.

Undue Hardship: s. 10

¶ 116 The undue hardship provision permits a court to award a greater or lesser amount than the Guidelines would otherwise require. It was intentionally drafted to be a narrow exception to the Guidelines, so as not to invite undue litigation, but it is also flexible. Section 10 is narrow because it only applies if there is "undue hardship" - a quite stringent test - and if the person seeking to invoke the provision resides in a household with a lower standard of living. The reported caselaw interpreting the undue hardship provision suggests that the Department of Justice was correct (or influential) when it stated as the Guidelines were being introduced that it is only in "rare cases" that s. 10 will be applicable. [See Note 129 below] Judges are generally reluctant to deviate from the Guidelines. Most parents experience economic hardship following separation, but only rarely will judges find that it is undue hardship.

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Note 129: Federal Child Support Guidelines: A Guide to the New Approach (Department of Justice Canada, May 1997) p. 6, quoted in Middleton v. MacPherson, [1997] A.J. No. 614 (Q.B.), para 43.

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¶ 117 While the s. 10 standard is high, the provision is flexible in that the circumstances of undue hardship specified in s. 10(3) are deliberately left open; a judge may add grounds. Further, the household standard of living comparison of Schedule II is only advisory, and a judge may choose to apply a different test. Given its discretionary nature and the fact that to-date there has only been one appellate decision on s. 10, it is understandable that there has been some variation in judicial approaches.

¶ 118 There is an onus on the person seeking to invoke s. 10 to satisfy the court both that there is undue hardship and that his or her household has a lower standard of living. Section 10 has not been invoked frequently, and relatively few payors can meet the lower household standard of living test. Payors are most likely to succeed in reducing child support if they have entered into a new relationship with child support obligations, or can

otherwise link their application to the interests of children. [See Note 130 below] Section 10 is also occasionally used by recipient parents to increase the amount of child support above the Guideline amount.

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Note 130: See e.g. Reiter v. Reiter (1997), 36 R.F.L. (4th) 102 (B.C.S.C.)

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¶ 119 The restrictive judicial attitude to s. 10 is reflected in the recent British Columbia Court of Appeal decision in Van Gool v. Van Gool, where the Court refused to invoke s. 10 to reduce the Table amount owing by a payor-mother with an imputed annual income of $19,000 and custody of a child from another relationship.

> [para44] Section 3 of the Guidelines sets forth the presumptive rule that the amount of child support provided for in the tables, together with any "add ons" under s. 7 for special or extraordinary expenses, is the amount which the payor is required to pay for children under the age of majority. This presumptive rule can be deviated from in certain defined situations. One of those situations is where a spouse (including a former spouse) can establish that the amount he or she is required to pay under the table would cause "undue hardship" to either the spouse or to a child in respect of whom the request for relief is made....
> [para45] The undue hardship test under s. 10 is two-fold. The spouse applying for relief under this section must prove that payment of the table amounts would cause undue hardship under s. 10(1) having regard to the criteria in s. 10(2). If this test is met, the applicant must go on to establish that, if required to pay the amount of maintenance otherwise payable under the guideline table, the standard of living of his or her household would be lower than that of the household of the other spouse. If this dual test is met, the court has a discretion to award a different amount of maintenance than that otherwise required under the Guidelines.
> [para46] Section 10(2) sets out a non-exhaustive list of circumstances which may give rise to a finding of undue hardship....
> [para47] It appears from the cases decided to date that the most common situation in which an application under s. 10(2)(d) will arise is where a payor spouse has acquired a second family. In this case, however, Ms.

Dryden's claim relates to her legal obligation to provide support for Eric, her child from a prior relationship. This obligation exists whether Eric is in her custody, as he was at the time of the application, or in the custody of his father, as he is at present.

[para48] In Swift v. Swift, [1998] O.J. No. 501 (Ont.Gen. Div.), the husband-payor applied for a reduction in the amount of maintenance otherwise payable by him pursuant to the Guidelines as a result of responsibilities arising from his second family, which included two children. In dismissing the application, Robertson J. stated as follows, at paras. 4-6:

> The husband has the onus to satisfy the court that this is a case for undue hardship before the standard of living test is applied. The use of the word "may" in Para. 10(1) of the guidelines clearly shows that any digression from the guidelines even after a finding of undue hardship and a reduced standard of living is discretionary.
>
> Undue hardship is a tough threshold to meet. Payment of child support is often seen as a financial hardship by the payor and the new family. It generally consumes a large portion of much needed cash or discretionary income. The payment of the guideline amount will rarely be a hardship that is undue in the legal sense.
>
> Synonyms for undue include: excessive, extreme, improper, unreasonable, unjustified. It is more than awkward or inconvenient. The application of the guidelines may result in interference with existing financial planning strategy in many payor families..... .... [para50] Similarly, in an article dated March 1998, "Child Support under the Federal Child Support guidelines", Professor Julian Payne, Q.C. said of s. 10: The requirement that the hardship be "undue" signifies that a stringent criterion will be applied. Some degree of economic hardship may be the inevitable consequence of separation and divorce. In order to meet the requirements of section 10(1), the hardship must be exceptional or excessive, rather than the inevitable consequence of dividing limited resources between two households. The use of the term "undue" implies something more than the hardship that ensues from a lower standard of living after divorce.
>
> . . . . [para51] Although s. 10 can be used by either the payor or the payee spouse to seek a level of maintenance other than that provided under the basic guideline table, thus far the applications have been almost entirely by payors for a reduction in the table amount. Since the basic tables were designed to be a "floor" for the amount of maintenance payable, rather than a ceiling, it is not surprising that the authorities have held that the threshold for a finding of undue hardship is high. Hardship is not sufficient; the hardship must be "undue", that is, "exceptional", "excessive" or "disproportionate" in all of the circumstances. The onus is on the party applying under s. 10 to establish

> undue hardship; it will not be presumed simply because the applicant has the legal responsibility for another child or children and/or because the standard of living of the applicant's household is lower than that of the other spouse. The applicant must lead cogent evidence to establish why the table amount would cause undue hardship.

¶ 120 All of the cases where s. 10 has been successfully invoked have involved parents of limited income; a higher income parent may be suffering hardship, but it will be very difficult to satisfy a judge that it is "undue." As suggested by Abella J.A. in Francis v. Baker, relief under s. 10 is "only available where severe financial consequences flow" from an order for support. [See Note 131 below] Even when a payor parent has a low income, there must be evidence to justify a reduction in child support. In Van Gool the payor mother had custody of a 13 year old child from another relationship and an income of $14,000 with the court imputing another $5,000 per year and the Court accepted that she had satisfied the lower household standard of living test, but still rejected her application based on a lack of evidence of undue hardship.

> [para52] In this case, there is a dearth of evidence which would permit the court to find that the payment of the basic table amount of $282 would cause Ms. Dryden undue hardship. There is no evidence as to the costs Ms. Dryden incurs relating to Eric; nor is there any suggestion that he has care requirements beyond those associated with most children his age....
> [para53] While the court can take judicial notice that 13-year-old boys are not inexpensive to house and maintain, this is not sufficient, in itself, to lead to a finding of undue hardship for someone with an imputed income of $19,000 per year. Whether an applicant has legal obligations to children from prior or subsequent relationships, some evidence is needed to establish that this has resulted in "undue" hardship to the applicant, not simply hardship. Undue hardship will not be presumed, except in those situations in which the payor is at the lowest income level for the payment of any child support, which is approximately $7,000 per year. Ms. Dryden's income is significantly above that level. In my view, she has not met the burden upon her to prove that her legal responsibilities to Eric have resulted in undue hardship to her.

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Note 131: In obiter dicta in Francis v. Baker (1998), 34 R.F.L. (4th) 317, at para 41 (Ont.C.A.) Abella J.A. see also comments in Salvadori v. Kedebe, [1998] B.C.J. No. 1819 (S.C.)

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¶ 121 Some cases involving lower income parents have not required specific evidence of undue hardship but inferred it from the circumstances, and it may be that the approach in Van Gool was affected by the Court's hostility towards a payor mother who was not actively seeking full time employment and who appeared to be trying to shirk her child support responsibilities. However, the decision illustrates the importance of adducing

evidence of an applicant's economic circumstances, and the effect that this is having on that person and any children in that person's care.

Obligation To Support Other Children: s. 10(2)(d)

¶ 122 The courts are clearly most sympathetic to invoking s. 10 when it is shown that the "undue hardship" relates to children, and most of the successful applications arisen out of cases where a payor spouse has support obligations to children arising out of another (often new) relationship. [See Note 132 below]

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Note 132: It is not sufficient to reside with children in a new relationship; it must be shown that the payor is the natural parent or has assumed a legal obligation tof support by standing in the place of a parent; Nishnik v. Smith (1998), 39 R.F.L. (4th) 105 (Sask.Q.B.)

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¶ 123 In Hughes v. Bourdon [See Note 133 below] Aitken J. observed that in exercising discretion under ss. 7 and 10 of the Guidelines it is necessary for a judge "to take into account the best interests of all the children involved." She invoked s. 10 to reduce the payer's payments for one child to allow him to be able to satisfy child support obligations to two children from a previous relationship.

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Note 133: [1997] O.J. No. 4263 (Gen Div.)

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¶ 124 There are a number of cases in which courts have invoked s. 10(2)(d) without much discussion once a lower income payor has met the household income threshold and established new child support obligations; [See Note 134 below] although not explicitly mentioned by judges, they may be more sympathetic if the recipient is on social assistance and hence (at least in Ontario) the children will have no benefit from a higher support order (and will suffer no loss if the support order is reduced.) [See Note 135 below]

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Note 134: Hookey v. Smith, [1998] N.J. No. 238 (S.C.); and Kolodziekski v. Kolodziekski, [1998] S.J. No. 464 (Q.B.)

Note 135: Walker v. Whiting, [1998] A.J. No. 1166 (Alta Q.B.).

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¶ 125 Justice Moreau in Middleton suggested in obiter dicta that an important factor that a payer spouse might want to raise in attempting to establish "undue hardship" would

be his support of the children of a new partner. However, even in this situation the courts should "exercise circumspection in determining those circumstances" in which a payer could derogate from his "primary obligation" to his children, and would of course have to establish that his household had a lower standard of living before the court could even consider the issue of undue hardship. [See Note 136 below] An often quoted passage from Justice Wright in the Saskatchewan case of Messier v. Baines reflects a common judicial attitude: [See Note 137 below]

> These objectives [s. 1 of the Guidelines] will be defeated if courts too readily deviate from the presumptive rule set out in section 3 of the Guidelines absent compelling reasons for doing so. Second families, and the associated legal duty to support a child of that family, are not uncommon. The assumption of such new obligations may by necessity create a certain degree of economic hardship. That hardship is not however necessarily "undue". Similarly, the mere fact that an applicant's household standard of living is lower than that of the other spouse, due in part to the applicant's legal duty to another child, does not automatically create circumstances of undue hardship.

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Note 136: Middleton v. MacPherson, [1997] A.J. No. 614 (Q.B.), para 50.

Note 137: [1997] S.J. No. 627 (Q.B.); see also Camirand v. Beaulne, [1998] O.J. No. 2163 (Gen. Div.) Aitken J.

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¶ 126 If the court accepts a s. 10(2)(d) argument, there are varying approaches to determining how much to reduce the amount of support including: deducting from the payor's income the Table amount for the other children, and using that as the reduced income figure to establish the Table amount payable; [See Note 138 below] determining the Table amount of support for the total number of children in both households, and ordering child support based on that amount proportionate to the number of children in the recipient household; [See Note 139 below] awarding an amount of child support that would equalize household standards of living; [See Note 140 below] or awarding the Table amount without add-ons. [See Note 141 below] Some decisions take a more discretionary approach and reduce the payment s without offering a detailed explanation. [See Note 142 below]

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Note 138: Butler v. Ryan, [1998] N.J. No. 63 (U.F.C.)

Note 139: Hemming v. LeBlanc, [1998] N.S.J. No. 336 (Fam. Ct.)

Note 140: Reiter v. Reiter, [1998] S.J. No. 34

Note 141: Kolodziekski v. Kolodziekski, [1998] S.J. No. 464 (Q.B.)

Note 142: Sampson v. Sampson, [1998] A.J. No. 1213 ((Q.B.) Veit J. declined to vary pre-Guideline tax dedcutible order that was less than proportionate amount (1/4) of Table amount for total all children father was supporting.

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Obligations Under A Support Order or Agreement s. 10(2)(c)

¶ 127 There have been a few reported cases in which a payor was able to obtain a reductiojn in support due to a situation of "undue hardship" arising out of support obligations to other persons that are reflected in a court order or agreement. As with s. 10(2)(d) cases, the courts seem more sympathetic when the support payments are to other children, but they are reluctant to allow a reduction unless it is established that there is hardship that is "extreme" or "undue." Since the payor is not living with the "other" children who are the beneficiaries, it may be more difficult to satisfy the court of "undue" hardship. [See Note 143 below]

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Note 143: See Crawley v. Tobin, [1998] N.J. No. 293 (U.F.C.) no s. 10(2)(c) order; compare White v. Rushton (19980, 37 R.F.L. (4th) 373 (B.C. Master), s. 10(2)(c) resulted in no order for child support on an interim application against a stepfather who already had significant obligations under a previous order for child support to other children.

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Unusually High Access Expenses: s. 10(2)(b)

¶ 128 The Federal Child Support Guidelines only allow access costs to be taken into account if the payor parent can satisfy the s. 10 hurdles of establishing a lower household standard of living, and that undue hardship arises out of "unusually high expenses in relation to exercising access to a child." Unusually high access costs can reflect either the distances involved or the amount of time. Of course if the amount of access is 40% of the year or more, the s. 9 shared parenting provisions apply. In general, judges have been reluctant to invoke s. 10 if at the time of the support application the parents are already living at a significant distance from one another within the same province or territory, even when a payer can establish a lower household standard of living. As judges have noted, significant "travel distances between communities are a reasonably common fact of life" in Canada. [See Note 144 below] Judges are especially unsympathetic if the travel costs reflect the decision of the payor parent to move, [See Note 145 below] and more sympathetic to s. 10(2)(b) applications if it is the custodial parent whose move has increased the access costs. [See Note 146 below]

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Note 144: Beeler v. Beeler (1997), 32 R.F.L. (4th) 397 and 399 (Sask. Q.B.). Courts should only consider "reasonable" access costs when assessing an application under s. 10(2)(b); see Matthews v. Hancock, 1998 CarswellSask 575 (F.L.D.) Gerein J.

Note 145: Williams v. Williams (1998), 32 R.F.L. (4th) 23 (N.W.T.S.C.)

Note 146: Marlow v. Berger, [1998] O.J. No. 3903 (Prov. Div.) per Johnston J.

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¶ 129 It is also apparent that courts are more sympathetic to s. 10(2)(b) applications are made by parents of limited means. In Friesen v. Friesen a judge allowed a payor mother with an income of only $12,000 a year to reduce her child support payments in light of "unusually high access" costs since she had to travel from Saskatoon to Calgary to visit the children who were in the care of the father. [See Note 147 below] The court clearly wished to facilitate access visits between the mother and her children, recognizing that this would be in their best interests.

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Note 147: [1997] S.J. No. 264 (Q.B.) per Rothery J. Contrast Salvadori v. Kedebe, [1998] B.C.J. No. 1819 (S.C.) where Hood J. dismissed a s. 10(2)(b) application by a father whose annual income was about $172,000, and the costs of travel for 6 visits per year by his daughter were about $6,000 per year.

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¶ 130 Courts have been sympathetic to hardship cases where the payor parent has a much lower income than the recipient and wants to maintain accommodations to permit significant access and involvement in the lives of their children. For example in Petrocco v. Von Michalofski the payor mother had an annual income, inclusive of spousal support, of about $40,000 while the custodial father had an annual income in the range of $300,000. Justice Métivier felt that it was important to encourage the mother's involvement in the lives of the three children and reduced support from the Table amount of $516 per month to $150. [See Note 148 below]

> [para20] Here the particular circumstances include the mother in a situation where she has been essentially financially denuded as a result of the separation and the breakdown of her health. Further, having regard to the mother's historical role as primary care giver and the need of the children to have her reinstated as an important parental figure, and to the fact that the children in this family have a life style of luxury in the custodial parent's home, the expenses required for a realistic exercise of access will be unusually high. It is clear that the mother's access should be expanded considerably so the children will spend more time with her. In this case, the access parent's role and importance may be detrimentally affected by an inability to offer the children a reasonable level of activity and comforts relative to that enjoyed in their primary residence. The payment of support at the Guideline level will interfere with the ability of the mother to provide such extended access.

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Note 148: (1998), 36 R.F.L. (4th) 298 (Ont Gen. Div).; see also Baranyi v. Longe, [1998] O.J. No. 606 (Gen Div.) Wright J. reduced support payable by father from $236 to $50 per month to enable father to maintain "decent accommodation" for children's visits; apparently no comparison of household standards of living was made in this case.

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Access Costs & Parental Mobility Cases - Outside the Guidelines?

¶ 131 The issue of the increased cost of travel to facilitate access has arisen in parental mobility applications, such as when a custodial parent is applying to move with a child in order to pursue employment opportunities or because of a new marital relationship. These parental mobility applications are often contentious, since the custodial parent may have very good reasons for wanting to move, but the move will limit the possibility for a non-custodial parent to have a relationship with the child. The courts resolve the mobility issue on the basis of the "best interests" of the child. [See Note 149 below] Before the Guidelines came into force, judges sometimes allowed the custodial parent to move on condition that the custodial parent pay part of all of the increased access costs, reasoning that these costs are being incurred to meet the needs of the custodial parent. [See Note 150 below]

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Note 149: Gordon v. Goertz, [1996] 2 S.C.R. 27, 19 R.F.L. (4th) 177

Note 150: See e.g. Marinovic v. Marinovic (1989), 20 R.F.L. (3rd) 404 (Ont. H.C.)

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¶ 132 Since Guidelines came into effect, some judges have held that unless the non-custodial parent can come within s. 10 and establish a lower household standard of living and undue hardship, they have no jurisdiction to require a custodial parent to pay all or part of the increased access costs resulting from the move. [See Note 151 below] The better view is articulated by the recent mobility cases, such as the decision of Wood J. in Allen v. Allen, [See Note 152 below] where it was accepted that the court can, in appropriate cases, exercise a discretion to require the custodial parent to pay part of all of the increased access costs arising from a move, without invoking s. 10. Technically, the judge is not reducing the amount of the Guidelines child support order, which continues to be fully enforceable as child support, but rather is invoking s. 16(6) of the Divorce Act to impose a "condition" on custody that permits the custodial parent to move, but requires that parent to pay all or part of the increased access costs, when and if access is exercised, and sets off this amount from the child support order. This interpretation gives a judge the flexibility to deal with the potentially highly contentious problems posed by an application of a custodial parent to move the child's residence in a fair fashion that encourages a continuing relationship with the non-custodial parent.

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Note 151: See e.g. South v. South, [1998] B.C.J. No. 962 (S.C.)

Note 152: (1998), 38 R.F.L. (4th) 96 (Ont. Gen Div.); Wood J. did not directly address the question of his jurisdiction to "discount" the Guideline amount of child support. See also Meeniuk v. Meeniuk (1998), 39 R.F.L. (4th) 372 (Ont Gen. Div.) per Belleghem J. where achieved the same objective; for the purpose of determining income for Guideline purposes the judge refused to include income that the non-custodial father earned from part-time employment that supplemented his full time job, as the father incurred extra expenses to visit the child after the mother moved to a new city 150 km from the city where the parents had both resided, imposing extra access costs on the father. See also Meuser v. Meuser (1998), 40 R.F.L. (4th) 295 (B.C.S.C.)

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Family Debts s. 10(1)(a)

¶ 133 While a considerable number of undue hardship applications have been made based on "unusually high levels of debts" of the payor, few of them have been successful. [See Note 153 below] Courts scrutinize these applications to ensure that the debts under consideration meet the Guidelines criteria, i.e. were "reasonablely incurred to support" the family prior to separation, or were incurred before or after separation to "earn a living." Further the debt load must be "unusually high" [See Note 154 below] and that it cannot be restructured in such a way as to be repaid without an undue burden. [See Note 155 below] Debts alleged to be owing to family members are viewed as suspect, without clear evidence of the purpose of the loan and requirements and expectation for repayment. [See Note 156 below]

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Note 153: For decisions allowing reductions in support based on s. 10(2)(a), see Ness v. Ness, [1998] M.J. No. 71 (Q.B.); Loosdrecht v. Loosdrecht, [1998] B.C.J. No. 1629 (S.C.).

Note 154: See Lamb v. Lamb, [1998] S.J. No. 283 debts not "unusually high."

Note 155: Crawley v. Tobin, [1998] N.J. No. 293 (U.F.C.)

Note 156: Ellis v. Ellis, [1998] N.S.J. No. 84

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¶ 134 Typically if there is a reduction in child support due to debts, the court stipulates pursuant to s. 10(5) of the Guidelines that it is to be a limited in time until the debts are repaid, and will thereafter revert to the Guideline amount.

Other Undue Hardship Circumstances

¶ 135 Section 10(2)(e) includes as a possible hardship circumstance the obligation to support a person who is disabled by illness or disability; the few reported cases under this provision suggests that it must be a long term or permanent disability, [See Note 157 below] and one would also think that courts should be expecting evidence of extra expenses or burdens arising from this condition, beyond a mere inability to earn an

income, as lower payor income due to a disability is already reflected in the Guidelines. The general provision of s. 10(2) makes clear that the categories of "undue hardship" specified are not exhaustive. Cases that have accepted situations of undue hardship that are not specified have included ones where the payor has special medical needs, and presumably expenses. [See Note 158 below]

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Note 157: Cuddie v. Cuddie, [1998] B.C.J. No. 159

Note 158: Farragan v. Ferragan, [1998] O.J. No. 895 (Gen. Div.). This decision may be difficult to justify if there is merely medical disability (reflected in reduced income) but not also added expenses due to the disability.

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Recipient Seeking An Increase in Child Support

¶ 136 At least in principle, it has been accepted by the courts that a recipient spouse can seek to invoke s. 10 to increase the amount of child support otherwise payable, but such applications are rarely made, and few of those applications succeed. Judges seem to generally feel that the Guidelines, including s. 7 add-ons, are intended to establish the amount of child support that a child should receive, and allowing s. 10 applications to increase child support would be starting down a "slippery slope" back to a budget-based case-by-case approach, which the Guidelines are intended to avoid.

¶ 137 In Middleton v. MacPherson Moreau J., in obiter dicta, explained the need for a narrow interpretation of s. 10, especially if the custodial parent is seeking to invoke the provision: [See Note 159 below]

> ....either the payor or the payee spouse can resort to s. 10 of the Guidelines. However, courts should be circumspect given its potential for misuse. In particular, on the application of a payee spouse, s. 10 should not become an indirect vehicle for the payment of spousal support. That entitlement only arises having due regard to the circumstances ... in s. 15.1(5) and (7) of the Divorce Act....Moreover, using s. 10 as a vehicle to redistribute resources from one household to another raises the prospect of members of the payor spouse's household subsidizing the cost of the payee spouse's household..

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Note 159: (1997), 29 R.F.L.(4th) 334 (Alta. Q.B.). Emphasis added.

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Most of the applications to invoke s. 10 to increase child support above the Guidlines amount have involved payee spouses of limited means, often rasing the issue in response to variation applications brought by payee spouses to reduce a pre-Guidelines support

order. While in a number of cases judges have held that they have a discretion to refuse the variation applications (discussed below), once judges decide that the Guidelines apply, they have been reluctant to allow s. 10 to be used to increase child support, even when this results in a significant reduction in income to a custodial parent of limited means. [See Note 160 below]

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Note 160: See e.g. Racette v. Gamauf (1997), 35 R.F.L. (4th) 357 (P.E.I.S.C.); Hoover v. Hoover, [1997] N.W.T.J. No. 43; Holtby v. Holtby (1997), 30 R.F.L. (4th) 70 (Gen. Div.)

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¶ 138 Scharf v. Scharf [See Note 161 below] is one of the few cases which accepted a s. 10 argument to raise the amount of child support. It was a split custody situation, with the mother having custody of one child and an annual income of $24,000 while the father had an annual income of $30,000 and custody of the other child ,as well as a new partner with an annual income of $26,000 and custody of two children. The girl in the mother's custody was very demanding and special problems. The father applied to reduce a pre-Guideline child support order of $200 per month to $60 per month, as provided for in s. 8. Justice Métivier accepted the mother's s. 10 claim and maintained the payments at $200 per month (tax deductible to the payor), noting the child's special needs, the father's relatively high standard of living due to his new partner's income and the father's failure to have the child visit him, leaving the mother with full responsibility for her care; the order included provision for a reduction in child support if the mother's income increased significantly. The court was also influenced by a desire to ensure a degree of equality in the treatment of the tow siblings. The judge rejected an argument by counsel for the father that s. 10 circumstances had to be of the "same flavour" as those enumerated, or "causally connected" to the separation. Justice Métivier found this " this view of s. 10(2) to be entirely too restrictive. The language clearly permits a consideration of other circumstances, no doubt because the difficulties which people may encounter, as payor, recipient or as the child for whom support is paid, are impossible to enumerate. While certainty was sought by the introduction of the Guidelines, they were not drafted so as to provide "certainty in a straight-jacket."

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Note 161: [1998] O.J. No. 199 (Gen. Div.). See Plant v. Plant, [1998] A.J. No. 1213 (Alta Q.B.) taking a narrower approach to a split custody situation where the lower income parent sought to invoke s. 10 to raise child support above the difference between the table amounts as provided for in s. 8.

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¶ 139 However, in case Justice Métivier decided a few months later, Scottcher v. Hampson, [See Note 162 below] she made clear that there is a significant onus on a recipient parent seeking to raise the Guideline amount of child support. The mother had custody of the three children. The father had an annual income of $110,000 per year,

producing a Table amount of support of $1,590 per month. The mother based her main s. 10 argument on the fact that the father rarely had the care of the children, largely because he was busy with his career and the teenaged children often had plans that conflicted with his when he wanted to have them visit at this home, and as a result the mother had expenses that would not be incurred if the father exercised the access to which he was entitled. [See Note 163 below] The judge accepted that in principle the failure to exercise access and the extra costs that this imposes on a custodial parent might be taken into account on a s. 10 application to raise the amount of child support, but rejected the application in this case due to a lack of evidence.

> The evidence is clear that this father is not present in his children's lives in any significant way. The mother has, alone for a number of years, borne the direct and indirect costs of this lack of access. She has been obliged to pay more for food, for recreational activities, for driving costs, for household wear and tear and obliged to forego the freedom from the absence of responsibility while the children are with their other parent; to forego free time, and the ability to plan easily for adult leisure time.
>
> When a s. 10 claim is made, the court must first determine whether or not "hardship" exists. The word is not legislatively defined but dictionary definitions include "sever suffering", while "undue" means "unreasonable" or "unjustified"....
>
> To define the situation in the mother's home as "hardship" requires cogent and clear evidence. It would be mere speculation for this court to conclude that the relatively modest income of the mother's household, now to be adjusted by the Guidelines, has meant "hardship" for her or these children. There is no doubt that three children, particularly of these ages, could quickly absorb any amount of money which may become available. But adequate evidence must be led as to these specific children and what they have specifically lacked. Little of such evidence was before this Court. The children skied, had each enjoyed a trip to England, and had driving lessons.

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Note 162: [1998] O.J. No. 3700 (Gen. Div.)

Note 163: The mother also tried to argue that s. 10 should be invoked since the father resided in Quebec, and that the federal Table amounts for that province are lower than for Ontario, where she resided (due to higher tax rates in Quebec). The judge dismissed this arguement as one that "flies in the face of the fundamental structure and goals of these Guidelines."

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¶ 140 This decision demonstrates the importance of adducing specific evidence of "undue hardship". The mother's income in Scotcher was not indicated in the reported decision, and it may be that it was impossible to demonstrate undue hardship in this particular case. [See Note 164 below] While there is an understandable judicial reluctance to easily invoke s. 10 to increase amounts of child support above the

Guidelines amounts, it is submitted that, as in cases where payors seek to invoke s. 10, courts should focus on the interests of the children involved. Cases where there is a substantial difference in household standards of living and the household where the child has his or her residence has a low standard of living, should be recognized as creating "undue hardship" for the child. Judges, however, have been slow to accept this s. 10 based argument, though in some cases they may be achieving the same result by a relatively generous interpretation of s. 7 when the household where the child resides has a low income.

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Note 164: As discussed below, the judge aalso awarded costs against the mother in Scotcher for failing to accept a settlement offer that was more than she received at trial.

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Standard of Living Test

¶ 141 Section 10(4) of the Guidelines makes clear that "household standard of living" comparison of Schedule II is only advisory. This test is intended to compare household standards of living by comparing obtaining a ratio for each household of how that particular household (standardized for number of adults and children) lives compared to a household living at the poverty line. The formula is complex to apply, though with one of the child support computer programs, such as DivorceMate or Childview, it is not difficult to make the comparison.

¶ 142 Most lawyers and judges seem to be applying the Schedule II test in s. 10 cases. In some cases judges have suggested that it may be inappropriate to consider the full amount of a new partner's income in comparing household standards of living since this person may have no obligation to support the children (or parent) in question, though the cases do not seem to have deveolped an alternate "formula" to Schedule II. [See Note 165 below] There are sometimes difficulties in obtaining income information from a new partner, since the Guideline provisions for disclosure of parental incomes do not apply to these non-parties. In some cases the courts have imputed income, but generally the preferable route is to obtain a court order for disclosure from a non-party under the Rules of Civil Procedure.

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Note 165: See e.g Nagy v. Tittemore, [1997] S.j. 810 (Q.B.F.L.D.)

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Evidence in Undue Hardship Applications

¶ 143 Some reported cases give little explanation of why they have allowed an undue hardship application and seem to have a relatively low threshold. However, most of the

reported cases that discuss the issue emphasize that it is a "tough threshold" to meet. Those seeking to invoke s. 10 generally face a significant evidentiary burden to adduce specific financial and other evidence to demonstrate that they are facing "undue hardship." Ironically (and distressingly) this places a litigation burden on those who are often least able to afford the costs of assembling and presenting this type of information to the court.

Lump Sum Awards: s. 11

¶ 144 Section 11 of the Guidelines allow a court to order a "lump sum" support award. Recent appeal decisions make clear that this is to be done in "exceptional" circumstances. The fact that a payor has limited income but significant assets may be a justification for imputing income, but it is generally not a justification for ordering a lump sum. This point was recently made by the Manitoba Court of Appeal in Letourneau v. Letourneau, [See Note 166 below] an interim support case, where Twaddle J.A. stated: " Unless there has been a failure to recognize an obvious obligation or an attempt to avoid it, a parent should not ordinarily be ordered to pay a lump sum amount for child support [especially] on an interim basis." The courts are concerned that a property award should not be made under the disguise of a child support award, but there are a few recent cases that illustrate when "exceptional circumstances" arise a lump sum may be ordered. They are situations where there is a substantial reason to be expect that the payor will not honour a periodic order or there are other special circumstances that justify a lump sum.

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Note 166: [1998] M.J. No. 461. To a similar effect see Porcari vPorcari 91997), 34 R.F.L. (4th) 157 (Ont. C.A.) where the father's annual income was minimal - under $5,000 per year- while the custodial mother had court ordered exclusive posession of the matrimonial home. The trial judge had made a lump sum child support order, transferring the father's net equity in the home to the mother to satisfy child support obligations. The Court of Appeal held that the mother should continue in exclusive possession, but the father should be entitled to his share of the net proceeds, expected to be about $35,000. Upon receipt of that sum the father would be obliged to pay $233 per month child support, being the monthly amount that 8% per annum of $35,000 would produce.

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¶ 145 Where a payor has been consistently in default on child support payments and has significant assets, a court may be persuaded to make a lump sum award. This occurred in the recent Alberta decision in Hunt v. Hunt-Smolis where the payor father persisted in pursuing an unprofitable career as a lawyer when he had other employment prospects and "demonstrated a lack of appreciation of his obligations to his children." [See Note 167 below] Justice Johnstone concluded that the "only means" to meet the needs of the children was to order a lump sum award for child support from the date of separation until the children reach majority. Evidence from an actuary established a lump sum amount that included the Table amount of support based on imputed income and a share of s. 7 expenses.

Note 167: (1998), 39 R.F.L. (4th) 143 (Q.B.)

¶ 146 In the British Columbia case of E.R.S v. H.C.S. the non-custodial mother suffered from Huntingdon's disease, a degenerative neuropsychological condition that meant that she would be unable to earn any income for the rest of her life. [See Note 168 below] The judge established an income figure for the mother of $40,600 based on her disability payments and an imputed 6% return of her portion of the matrimonial property. The Table amount of support for the child would be $348 per month, or a total of $33,408 if child support is paid until she reaches the age of 21. The judge "rounded down" this amount to $30,000 to reflect that it was to be paid at once, and ordered this amount as a lump sum, to be deducted from matrimonial property claim that the father owed her. While there is little discussion of why a lump sum was justified, it would appear that the mother's assets were being managed by the Public Trustee and the most effective way to ensure that the mother met all her child care obligations was by ordering a lump sum.

Note 168: [1998] B.C.J. No. 2411 (S.C.) Levine J.

¶ 147 In the Alberta case of Greenwood v. Greenwood [See Note 169 below] the father had an annual income of $996,000 and the custodial mother had an annual income of $64,000 and resided in "inadequate housing" (in light of the parental means.) The father was ordered to pay the Table amount of almost $6,500 per month plus 94% of s. 7 expenses for private school, kayak rental, piano lessons, country club fees and babysitting expenses. The judge also concluded that "the combined reading of ss. 7 and 11 ... allows the conclusion to be drawn that lump sum payments were contemplated under s. 7" for example for orthodontic treatment. The judge accordingly also ordered the father to pay as a lump sum 94% of the cost of furnishing the boy's room ($3,000), or purchasing country club membership ($20,000) and of purchasing sports equipment. The awarding of a lump sum seems to be a valid interpretation of ss 7 and 11, though one can question whether the cost of furnishing the boy's room fits within s. 7.

Note 169: (1998), 37 R.F.L. (4th) 442 (B.C.S.C.)

Variation & Prior Agreements: Guidelines s. 14 & D.A. s. 17.1(6.2)

¶ 148 The Guidelines s. 14 specifies that for the purposes of variation of a child support order under s. 17(4) of the Divorce Act, a "change in circusmtances" occurs if there is any change in the "condition, means, needs or other circumstances" of either spouse or of a child. For a child support order made before May 1, 1997 the coming into force of the Guidelines itself is deemed under s. 14(c) to be "a change in

circumstances." Section 14 appears to give a payor or recipient a broad scope for seeking variation, but the courts have emphasized that the use of the word "may" in s. 17(1) of the Divorce Act gives courts a discretion to vary an order if there has been a change in circumstances. In the reported decisions, [See Note 170 below] courts have demonstrated considerable reluctance to vary pre-May 1, 1997 orders, in particular when there is an application to reduce the amount of support. It is clear that notwithstanding s. 14(c), the courts may decide to keep a pre-Guidelines order in effect, and given the net tax loss that often occurs from a variation there is considerable reluctance to vary these older orders, especially when this would leave a custodial parent with less money to care for a child.

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Note 170: The reported caselaw may not accurately reflect all of the activity in this area. Hornick, Bertrand & Bala, "Pilot Survey on Child Support Orders under the Divorce Act Project: Transition Report" (December 1998 Draft, for Department of Justice) report 40% of variation applications were brought by the payor parent, 52% were brought by the recipient parent, and 8% were cross applications.

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¶ 149 Most of the reported variation caselaw deals with situations where the previous order was based on a separation agreement. The fact that the parties made an agreement and have relied upon to plan their financial affairs is a significant factor in deciding not to vary a previous order, but the courts are clearly not bound by these agreements.

¶ 150 An analysis of orders made prior to May 1, 1997 indicated that over half of the recipients of those orders would have an increase in net income under the new regime, and even taking account of the expected costs of litigation that it would be advantageous for as many as one quarter of them to apply to the courts for variation. [See Note 171 below] Government officials were understandably concerned about the effect of a potential flood of applicants for child support variation on an already overcrowded Family Court system. While there have been a significant number of variation applications and renegotiations of prior agreements, it is clear that most of those the recipients of old orders are not seeking variation, even though many would be financially better off if they did so. In some cases the reluctance to seek variation may be due to lack of knowledge, but there are also very significant emotional costs to reopening a divorce arrangement, and recipients have concerns about the effect that seeking variation might have on the relationship with their former partners, and ultimately on their children. The reluctance to reopen child support may be especially great in the common situation where there was a prior separation agreement or consent order, as recipients may feel "committed" to the arrangement, even if not legally bound.

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Note 171: See Feltham & MacNaughton, "Predicting the Popularity of Child Support Strategies" (1998), 30 R.F.L. (4th) 428.

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Applications to Reduce Child Support

¶ 151 Applications by payors to reduce the amounts of child support have sometimes been a result of a change in their circumstances, such as a reduction in their income or the making of a support order for another child. In case where there has been a significant reduction in disposable income since the original order was made, the courts are generally quite sympathetic to the payor, even if the prior order was a product of a negotiated settlement. [See Note 172 below]

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Note 172: Furlong v. Furlong, [1998] A.J. No. 1173 (C.A.); Meuser v. Meuser, [1998] B.C.J. No. 2808 (C.A.).

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¶ 152 In some cases, applicants for reduction of pre-Guidelines orders have relied on the fact that the Guidelines are in force and would provide for a lower amount of support than the earlier agreement. Most judges appear reluctant to allow this type of application, unless there is a sense that the original arrangement is unfair in light of present circumstances.

¶ 153 In Wang v. Wang the father had agreed in a consent order to pay $3,000 per month (tax deductible) as child support for three children; he sought variation relying on the implementation of the Guidelines as well as an alleged reduction in his income. The trial judge dismissed the application, commenting that it was not the intent of Parliament in introducing the Guidelines "to cause a reduction of [previously] court ordered or agreed child support to the amount required by the Guidelines." [See Note 173 below] In upholding the trial judge's decision not to allow a reduction in the amount of child support, the British Columbia Court of Appeal observed that the court should respect "reasonable arrangements ... parties made before the change in policy." [See Note 174 below]

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Note 173: [1997] B.C.J. No. 1678 (S.C.) Saunders J.

Note 174: (1998), 39 R.F.L. (4th) 426 (B.C.C.A.)

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¶ 154 This standard for deciding whether to allow any variation, in particular of a pre-May 1, 1997 child support arrangement, asking whether it was not "reasonable," is less demanding than the standard for deviation from the Guidelines once the court has decided to deal with child support or variation. Under ss. 15.1 (5) and 17(6.2) of the Divorce Act, a previous order or agreement can only justify a child support award that is different from the Guidelines amount if there are "special provisions" that directly or indirectly benefit the child, and it would be "inequitable" to vary the previous agreement or order; there is a clear onus on an individual who opposes the application of the Guidelines to show that a previous agreement or order has a "special provision" and to

satisfy the court that it would be "inequitable" to apply the Guidelines. [See Note 175 below] However, the British Columbia Court of Appeal has emphasized that these provisions of the Divorce Act are only to be considered after a decision has been made that a previous order should be varied; they are not to be applied in deciding whether or not a variation order should be made in the first place. [See Note 176 below] In one decision the British Columbia Court of Appeal made comments about the onus on a payor seeking to reduce the amount of child support due to the implementation of the Guidelines, asking whether there was a "compelling reason to cross the threshold" to and vary a previous order by reducing the amount of child support ordered before the Guidelines came into force. The British Columbia of Appeal is, however, willing to allow a reduction in the amount of child support previously agreed to if it considers that there has been a "dramatic" change in the payor's means so that it is no longer fair to the uphold the agreement. In Meuser v. Meuser the Court allowed a payor father to reduce the amount of child suppport payable under a separation agreement for two children from a second marriage after he faced a very substantial increase in child support owing to a child of the first marriage due to the implementation of the Guidelines. [See Note 177 below]

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Note 175: See e.g Cane v. Newman, [1998] O.J. No. 1776 (Gen. Div.)

Note 176: Meuser v. Meuser, [1998] B.C.J. No. 2808 (C.A.)
Note 177: Meuser v. Meuser, [1998] B.C.J. No. 2808 (C.A.)

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¶ 155 A number of other decisions have also displayed a reluctance to reduce amounts of child support on variation applications premised on the Guidelines implementation, though taking an intpretative approach which holds that s. 17(6.2) of the Divorce Act is applicable when considering whether to vary a previous order. These judges often find that the provision to pay a high amount of child support is a "special provision" that benefits the child, and it would be "inequitable" to deprive the child and custodial parent of the additional amounts of child support. This analysis can often be justified by inferring or accepting slight evidence that the agreement about child support involved the recipient parent making some kind of concessions, for example about spousal support, to obtain a relatively high amount of child support. [See Note 178 below] Courts adopting this approach place an onus on the parent seeking to uphold the agreement to pay support at an amount other than that in the Guidelines and to show that it would be "inequitable" to apply the Guideline. While some judges appear to place a relatively light onus on a recipient parent opposing a reduction in child support, other judges are looking for clear evidence to satisfy this onus.

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Note 178: See e.g Epp v. Robertson, [1998] S.J. No. 684 (Q.B.) Wilkinson J.

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¶ 156 In the Ontario decision of Cane v. Newman Wein J. allowed the payor father to reduce the amount he had agreed to pay before the Guidelines were in force, since the mother had not adduced clear evidence about any specific concessions that she made to get the higher amount of child support. [See Note 179 below] It may well be that Wein J. was influenced by the fact that there was a very large difference between the agreed to amount of $1,100 per month and the Guidelines amount of $377 per month, and she considered the original agreement burdensome on the payor. She contrasted other Ontario decision where judges declined to allow downward variation of pre May 1, 1997 arrangements as cases where the payor's after tax position would be improved only marginally while the recipient would suffer substantially from the reduction. [See Note 180 below]

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Note 179: [1998] O.J. No. 1776 (Gen. Div.)

Note 180: See e.g Mingo v. Mingo, [1997] O.J. No. 4835 (Gen Div.)

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¶ 157 While the words of ss. 15.1(5) and 17(6.2) appear to place a significant onus on a person seeking to uphold an agreement to pay support of an amount different from the Guideline amount, there is much to said for the British Columbia Court of Appeal approach that places a burden on an applicant to justify variation of a previously agreed to order.

Applications to Increase Child Support

¶ 158 Courts have generally been more sympathetic to applications based on Guidelines implementation to increase the amount of child support above the amount agreed to pre-May 1, 1997. This is consistent with the Guidelines objective of providing a fair standard of support for children, and the recognition that under the pre-implementation legal regimes the amounts of child support may not always have been adequate.

¶ 159 The mere fact that the prior agreement provided for the custodial parent to receive a greater than equal share of property or title to matrimonial home does not establish that this is a "special provision" for the benefit of the children, and that it "inequitable" to order the Guideline amount of support. [See Note 181 below] While this type of property transfer may be a "special provison" that indirectly benefits the child, there is an onus on the party seeking to rely on the agreement to satisfy the court of that the child was intended to benefit the child or to justify a lower amount of child support, and was not agreed to in order to satisfy some other type of claim. If possible the parties should adduce evidence about the value of this benefit to allow a quantification of the amount that child support should be reduced. [See Note 182 below] The courts have indicated that they will accept evidence about the conduct of negotiations that might be inadmissible in other contexts to determine whether a particular provision was intended

to benefit the child and would justify a lower amount of child support, [See Note 183 below] though clearly it is preferable for agreements to specify this.

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Note 181: Wallace v. Wallace (1998), 36 R.F.L. (4th) 428 (B.CS.C.); Campbell v. Martijn (1998), 40 R.F.L. 41 (P.E.I.S.C.)

Note 182: Aggith v. Trader, [1997] O.J. No. 2351 (Gen Div). Marsham J., transfer by payor husband of his equity in matrimonial home to wife jsutified reduction in child support by $200 per month. Court determined that $25,000 out of $40,000 value of equity attributable to child support, while baklance due to release of spousal support claim.

Note 183: Wallace v. Wallace (1998), 36 R.F.L. (4th) 428 (B.CS.C). Holmes J. admitted "without prejudice" letter to try to detemine parties' intent.

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Drafting Separation Agreements to Limit Future Variation: "Special Provisions"

¶ 160 If the parties to a separation agreement wish to limit the scope for future variation of child support, they may do so by making a "special provision" that directly or indirectly benefits a child. Thus, for example, a payor may agree to transfer ownership of the matrimonial home to the custodial spouse in exchange for an agreement to accept a lower amount of child support than the Guidelines require, with the understanding that the children would benefit from occupation of a house owned by the custodial parent. If there is a "special provision," under ss. 15.1(5) & 17(6.2) of the Divorce Act, a court will consider whether the application of the Guidelines to override the agreement would result in an amount of child support that would be "inequitable."

¶ 161 While it is not essential to label provisions as "special" for courts to consider them as such, [See Note 184 below] counsel who are negotiating and drafting an agreement that has an amount of child support different from that which would be determined under the Guidelines are well advised to clearly identify what "special provisions" are being made for the children, and how they will benefit from them; if possible it may be appropriate to identify the monetary value of the "special provision." The agreement should state that the parties are both aware that the amount agreed to is different form the amount that the Guidelines require. It may also be appropriate to insert a clause that the parties agree that later variation would be "inequitable" in certain predictable types of changes in circumstances (such as increase in the payor's income).

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Note 184: Finney v. Finney (1998), 40 R.F.L. 249 (B.C.S.C.)

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Constitutionality of the Guidelines

¶ 162 The Canadian courts have recently been very receptive to Charter based claims to extend family law benefits (and obligations) to those in same sex and common law couples, [See Note 185 below] and at least interested in arguments as to whether parents in child protection cases can claim protections against undue interference in the family. [See Note 186 below] The courts have, however, been consistently rejected arguments to use the Charter to strike down that provisions in the Guidelines or other parts of family law legislation that create support obligations, even though these laws differentiate, for example between divorcing persons and those in intact families. [See Note 187 below] This seems consistent with the general lack of receptivity of Canadian courts to Charter challenges to escape obligations which the law imposes, most obviously the unsuccessful challenges to the income tax laws. [See Note 188 below]

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Note 185: See e.g Taylor v. Rossu (1998), 39 R.F.L. (4th) 242 (Alta.C.A.); M. v. H. (1996) 25 R.F.L. (4th) 116 (Ont.C.A.)

Note 186: B. (R.) v. C.A.S. of Metro Toronto (1994), 9 R.F.L. (4th) 157 (S.C.C.)

Note 187: In Souliere v. Leclair (1998), 38 R.F.L. (4th) 68 (Ont. Gen Div.) Boland J. rejected arguments by a payor father that: (1) s. 10 of the Guidelines violated s. 7 of the Charter by requiring a disclosure of a partner's income; and (2) s. 7(1)(e) discriminated against divorced parents by obliging them to pay post-secondary education expenses; the judge, however, did not award costs against the unsuccessful father based on the argument that the assertion of constitutional rights should not be discouraged. In Michie v. Michie, [1998] 4 W.W.R. 758 (Sask Q.B.) McIntyre J. also dismissed a challenge to s. 7(1)(e) under s. 15 of the Charter; while in this case the court found discrimination and invoked s. 1 of the Charter but awarded costs against the unsuccessful father.

Note 188: See e.g Thibideau v. R. (1995), 12 R.F.L. (4th) 1 (S.C.C.)

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## Costs

¶ 163 There is a general reluctance to award costs in family law cases, and in particular in child support cases, especially if the effect of a costs award might be to reduce the resources available for a child. One reason that costs are often not awarded in family law cases is that it is difficult to determine which party has been "successful," since there are often several interrelated issues with success being divided. [See Note 189 below] There are, however, cases where the judge will award costs based on determining which party was "most successful"in the sense of getting a better outcome at trial on most issues than the settlement offer, even if there is one issue on which the party received less at trial than the settlement offer. [See Note 190 below]

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Note 189: See e.g. Plester v. Plester, [1998] B.C.J. No. 2438 (S.C.); and Nadeau v. Mitchell, [1997] O.J. No. 3440 (Gen. Div.), Jarvis J.

Note 190: Boumas v. Boumas, 1998 CarswellAlta 881 (Q.B.) Veit J.

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¶ 164 Despite the general reluctance to make a costs award that might have a negative effect on the lifestyle of children, there are a few recent in which judges have awarded costs against custodial parents who are unsuccessful in litigating a "novel point of law". In Cane v. Newman Wein J. ordered the custodial mother to pay costs incurred by the father in seeking to reduce the amounts of child support; [See Note 191 below] the court was influenced by the fact that the father was successful and had made an offer to settle that was slightly better for the mother than the result at trial. In Scotcher v. Hampson the mother was unsuccessful in making an undue hardship application to raise the amount of support above the Table amount and the had rejected offers to settle that were better than what she received at trial. [See Note 192 below] Justice Métivier recognized that it might seem "harsh" to order a parent with lesser means to pay the costs of the parent with greater means, but noted that "no client should proceed to litigation and disregard reasonable offers." However, to ensure that the children not suffer, the payment of the costs (fixed at $4000) and any interest was deferred until the last child was no longer a "child of the marriage."

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Note 191: 1998 CarswellOnt 2174; see also Boumas v. Boumas, 1998 CarswellAlta 881 (Q.B.) Veit J. In Broz v. Broz (1998), 39 R.F.L.(4th) 211 (Ont. Gen Div.) per Campbell J., the mother had legal aid support for family litigation while the father was paying all of his legal bills. The judge ordered the mother to pay $8,750 in costs based on her lack of success and "obstructionist behaviour" in interfering with the father's relationship to his child, commenting on the need to ensure that a party litigating "with the state's money" bears some financial consequences." The costs were to be deducted from spousal support and the equalization; there was no discussion of the effect that this cost order might have on the child.

Note 192: [1998] O.J. No. 4002 (Gen. Div.).

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¶ 165 While these case illustrate that some judges will award costs against custodial parents who get less at trial than settlement offers, there is an reluctance to do so as this may prejudice the welfare of children. However, payor parents who are unsuccessful in their litigation, especially if they have significant assets, are more likely to be penalized with an award of costs against them. [See Note 193 below] Although it is likely that the courts will have to play a significant role in clarifying some of the ambiguous provisions of the Guidelines, it is apparent that judges are not encouraging arguments on "novel points of law" just to have these issues resolved. [See Note 194 below]

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Note 193: See e.g Francis v. Baker, [1998] O.J. No. 924 (C.A.).; and Simpson v. Palma, [1998] S.J. No. 581 (Q.B.)

Note 194: Boumas v. Boumas, 1998 CarswellAlta 881 (Q.B.) Veit J. explains that all points being argued are likely to be"novel" in some sense, otherwise there would be little point in arguing them.

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Reforming the Guidelines: The Process and Players

¶ 166 The Federal Guidelines were enacted in regulations rather than in a statute, so that at least in theory they could be easily amended by the Governor General-in-Council without the need for Parliamentary Committee hearings or approval. Thus, in theory, the Minister of Justice, acting on the advice of Department of Justice staff and with the approval of her Cabinet colleagues, has a broad discretion to amend the Guidelines. [See Note 195 below] However, in practice the process of making significant changes to the Guidelines is likely to be complex and contentious, and I suspect that it is unlikely that there will be any significant changes in the near future.

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Note 195: The Divorce Act s. 26.1 places some very general constraints on the scope of the regulations that enact the Guidelines. Section 26.1(2) broadly provides that the "guidelines shall be based on the principle that spouses have a joint obligation to maintain the children... in accordance with their relative abilities to contribute to the performance of the obligation."

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¶ 167 Almost as soon as the Guidelines came into force the Department of Justice began a process of monitoring and consultation with a view to reforming the Guidelines, and some minor changes were made in December 1997. [See Note 196 below] In June of 1998 a Senate Committee issued a report calling for more extensive changes, for example to ss. 7 and 9. [See Note 197 below] The Federal - Provincial - Territorial Committee on the Child Support Guidelines and the National Advisory Committee on the Child Support Guidelines also have ideas about changes. The Department of Justice has also surveyed lawyers and judges to learn of their experiences [See Note 198 below], and in the Fall of 1998 there was talk about the possible release of a Consultation Paper as a preclude to reform of some of the more contentious or awkward provisions.

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Note 196: SOR/97-563

Note 197: Senate Committee on Social Affairs, Science and Technology, Interim Report on the Child Support Guidelines (June 1998)

Note 198: See e.g. Paetsch, Bertrand and Hornick, Concultation on Expereinecs and issues Related to the Implementation of the Child Support Guidelines (Canadian Research Institute for Law and the Family, for Department of Justice, September 1998)

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¶ 168 However, with the release of For the Sake of Children, the Report of the Special Parliamentary Joint Committee on Custody and Access in December 1998, it seems that any efforts to significantly reform the Guidelines are likely to be postponed. While that Report deals primarily with issues of (what is now called) custody and access, it makes the point that these issues are related to child support questions, and makes proposals for the reform of the Guidelines.

¶ 169 In 1997 when the Guidelines were being introduced, much of the opposition came from Fathers' Rights groups who argued that all child related issues were connected, and that if child support (a "mothers' issue") was being addressed, so should such issues as access and joint custody ("fathers' issues"). With the high visibility of the issues that the Joint Parliamentary Committee Report addresses, it seems unlikely that the Minister of Justice will make significant changes to the Guidelines until she has a clear sense of what she wants to do about the other child related issues. Given the contentious nature of these issues, and the desirability of support from the provinces for any possible changes, it seems likely that months and perhaps years will pass before we see changes to the Guidelines. In particular, it is most unlikely that there will be any changes to the shared custody provisions without resolution of the broader issues related to children. It is possible that a Consultation Paper may be released in the next few months to clarify some of the provisions that seem less directly related to custody and acsess issues, like s. 7, though even provisions like s. 7 may be viewed as contentious and action may be delayed since the Special Joint Committee made recommendations about this provision as well.

¶ 170 It therefore seems likely that for the near term future judges, lawyers and litigants will have to keep struggling to with the Guidelines in their present form. There are some issues around which there is a slowly emerging judicial consensus, though it is clear that for many key issues there is still a lack of consistency in judicial approach.

¶ 171 In the longer term it is inevitable (and highly desirable) that Parliament return to the Guidelines and reform some of the more contentious and unsatisfactory provisions. There is a clear commitment to having a Parliamentary review of the child support and the Guidelines by 2002. However, given the apparent degree of success of the Guidelines in facilitating settlements and increasing consistency in the determination of child support, it seems most unlikely that Canada will return to a regime of individualized determination of child support based on an assessment of "needs and means." While other countries with child support guidelines have sometimes substantially modified their models and amended their laws after initial implementation, no jurisdiction that has adopted child support guidelines has abandoned them and returned to a model of individualized assessment, and it seems most unlikely that Canada will do so.

**Syrtash Collection of Family Law Articles**
SFLRP/1999-010

# An Update of Case-Law Under the Child Support Guidelines*

*by Justice David R. Aston*

August 1998

* Posted by John Syrtash, with permission of the author.

INTRODUCTION:

¶ 1 This paper, an update of an earlier version in February 1998, consists of three parts:

(a) this commentary;
(b) an attached outline which attempts to group cases according to various issues under The Child Support Guidelines (beginning at page 78); and
(c) a digest of 109 cases decided in the first year after the federal Child Support Guidelines came into effect May 1, 1997 (beginning at page 35).

¶ 2 In the outline, the cases are not listed in any particular order of importance. The commentary which follows is an attempt to bring those cases into sharper focus and to offer some comment (restrained as it must be) on whatever consensus can be discerned from the cases. This is a useful exercise from the perspective of promoting the certainty and consistency that is one of the fundamental aims of Child Support Guideline legislation.

¶ 3 There are already a tremendous number of child support decisions. I do not profess to have read them all. The awkward organization of this paper is designed to accommodate the frequent updating required by the heavy volume of judicial decisions, the implementation of provincial legislation across the country and the emergence of decisions at the Court of Appeal level.

IN WHAT CIRCUMSTANCES SHOULD THE COURT DECLINE TO MAKE ANY ORDER FOR CHILD SUPPORT?

¶ 4 The amendments to the Divorce Act provide that in making an order for child support, including interim support, the court "shall do so in accordance with the guidelines". There are three exceptions. A different amount may be ordered

(a) if "special provisions" in an order or written agreement directly or

indirectly benefit a child and the guideline amount "would be inequitable given those special provisions",

Div. Act, ss. 15.1(5), 17(6.2)

(b) on consent of both parties if the court is satisfied that "reasonable arrangements" have been made for the support of the children (in determining which the court "shall have regard to the guidelines" but shall not consider the arrangements to be unreasonable solely because the amount differs from the guideline amount), or

Div. Act, ss. 15.1(7), 17(6.4)

(c) if the support payor is not the biological parent of the child (in which case the amount is the amount the court "considers appropriate" having regard to the guideline amount and any other parent's obligation to support the child).

CSG, s. 5

¶ 5 In Wang v. Wang (39), the court noted that if a support order is to be made, it must be in accordance with the Guidelines. However, this still leaves the question: is a court compelled to vary a child support order made before May 1st, 1997 simply because the Guidelines are now in effect? The court held that the language of sections 15 and 17 of the Divorce Act is discretionary because it begins with the words "a court ... may make an order ...". Even though the coming into force of the Guidelines is deemed to be the required change in circumstances to allow reconsideration of the support previously ordered, the application by the father was dismissed. A similar conclusion was reached in Meloche v. Kales (27) and in Smith v. Smith (80). The British Columbia Court of Appeal had an opportunity to approve or disapprove of the result in Wang in Baker v. Baker (104), but declined to do so.

¶ 6 One primary reason that a court would decline to make an order under the Guidelines is the different tax treatment that applies to orders or agreements made after May 1st, 1997. Because support orders after that date are tax neutral, the guideline amount may result in no significant savings to the paying parent on an after-tax basis, yet result in an erosion of the after-tax amount received by the recipient. See Hall v. Hall (37), Colford v. Colford (77) and Gordon-Tennant v. Gordon-Tennant (22). See also Mingo v. Mingo (99).

¶ 7 In Parsan v. Parsan (26), the father had been paying $500 monthly, tax deductible, and applied to have his support determined under the Guidelines, based on a $10,000 reduction in his income. The guideline amount of $300 was not substantially different from the after-tax cost of the existing order and the court declined to make the variation.

¶ 8 In considering whether a variation should be made, the court should begin by considering the non-taxable/non-deductible payments under the Guidelines and compare that to the after-tax cost and benefit of the existing amount. The erosion of the support paid to the custodial parent seems to be considered more significant than the change to the paying parent's situation. Thus, even if the paying parent would be slightly better off under the Guidelines, the court may still decline to exercise its jurisdiction if there is a significant loss to the recipient. See Claridge-Skof v. Skof (18). This approach may be theoretically asymmetrical, but the Guidelines aim to ensure the child's needs as the central focus. See, for example, Mingo v. Mingo (99) which emphasizes the goal in the Guidelines of maximizing the ability of the spouses together to support the child.

¶ 9 However, in Smith v. Smith (44), the after-tax cost to the father under the Guidelines was an additional $300 per month and only increased the amount for the mother by $119 per month. The table amount from the Guidelines was ordered to be paid. Revenue Canada was the real winner.

¶ 10 The "special provisions" exception of section 15.1(5) or 17(6.2) of the Divorce Act are the second common reason for refusing to make an order under the Guidelines, and the considerations are extensively reviewed in Cane v. Newman (81). The father successfully applied to reduce child support by substituting a Guideline amount of $377 monthly for a pre-guideline separation agreement amount of $1,129 monthly ($682 net of tax) even though the mother relied upon the separation agreement in deciding to leave the work force to remain at home with a child of her remarriage. This case offers a detailed analysis of the cases (which at first blush appear to be in conflict) and the relevance of the "special provisions" exception in section 15.1(5) of the Divorce Act. Justice Wein followed the Court of Appeal decision in Francis v. Baker (3) in concluding that the only discretion for departure from the table amounts is for children over the age of majority, shared or split custody situations and cases of undue hardship. If none of those exceptions apply, the table amount should be ordered whether it amounts to an increase or a decrease.

¶ 11 Occasionally, a Canadian court will be asked to vary a non-Canadian divorce decree under reciprocal support legislation. Where support is ordered pursuant to a non-Canadian divorce decree, the Federal Child Support Guidelines do not apply and the introduction of the Guidelines does not constitute a material change in circumstances. See Gordon-Tennant v. Gordon-Tennant (22).

¶ 12 Lewkoski v. Lewkoski (83) considers the discretion to refuse an order for interim child support under section 15 of the Divorce Act in the face of an existing final order under the provincial legislation. Justice Kurisko made such an order but only after first reminding himself the applicant mother is not entitled to such interim support as of right (because of the use of the word "may" in section 15) and the Divorce Act is not to be used as a mechanism to retry support issues already decided on the merits under provincial legislation. See also Smith v. Smith (80).

THE APPLICATION OF THE FEDERAL CHILD SUPPORT GUIDELINES TO CLAIMS FOR CHILD SUPPORT UNDER PROVINCIAL LEGISLATION:

¶ 13 Until a province passes companion legislation, the Guidelines only apply to parents who are, or were, formally married to one another and only if child support or the variation thereof is being determined under the Divorce Act. Notwithstanding this, courts have routinely used the federal Guidelines as at least a "litmus test" for child support under provincial legislation.

¶ 14 In Tallman v. Tomke (31), the unmarried parents asked the court to use the Federal Guidelines to determine support. The court acceded to their request, with reservations. Similarly, in Ninham v. Ninham (12), the court stayed the granting of the divorce under section 11(1)(b) of the Divorce Act and, therefore, had to determine the child support under provincial law. Because both parties asked the court to use the Guidelines, the court saw no reason not to do so.

¶ 15 In Asadoorian v. Asadoorian (19), the court was urged to use the Paras formula rather than the Guidelines because the provincial Guidelines were not yet law. The court, nevertheless, used the Federal Guidelines in anticipation that the province of Ontario would shortly pass identical legislation. In Bevand v. Bevand (11) Justice Perkins reaches a similar conclusion but points out that in order to avoid error reversible on appeal, the court should also try to examine the payor's obligations without the application of the Guidelines. If there is not enough evidence for the court to apply the Paras approach, the Guidelines could be used as a "default".

¶ 16 If federal and provincial support Guidelines produced a different amount for support in a given case, which would apply? Justice Pardu in Ontario adopts the Clayton decision from the Divisional Court in holding that a support order under the Divorce Act overrides a support order under provincial legislation if either party seeks to have the support determined under the Divorce Act. Hopefully, this issue will not arise because the provinces will either pass Guidelines that produce an identical support award or, alternatively, the Federal Government will adopt the Provincial Guidelines by the designation provisions in section 2(5) of the Divorce Act. That provision allows the Federal Government, by Order in Council, to designate any province's own Guidelines as the "applicable Guidelines" for the purpose of support under the Divorce Act.

THE RELATIONSHIP BETWEEN THE CHILD SUPPORT GUIDELINES AND THE COURT'S OBLIGATION UNDER SECTION 11 OF THE DIVORCE ACT:

¶ 17 Section 11(1)(b) of the Divorce Act has long provided that the court has an obligation to satisfy itself that reasonable arrangements have been made for the support of any children of the marriage before granting the divorce and to stay the granting of the divorce until such arrangements are made. The amendments to the Divorce Act last May take this obligation one step further by providing that in considering whether reasonable arrangements have been made for the children, the court must have regard to the Child

Support Guidelines. At an absolute minimum, this would almost always seem to necessitate evidence of the income of the non-custodial parent.

¶ 18 In Hansen v. Hansen (36), the table amount based on the father's income was $564 per month. He was paying $470 per month pursuant to a separation agreement. The father's application for a divorce was refused, pending evidence of "satisfactory arrangements" for the support of the children or more convincing evidence that such arrangements (i.e. a departure from the table amount) would constitute "undue hardship". Zarebski v. Zarebski (2) adopts a much more flexible approach. The mother applied for a divorce but could not establish the father's whereabouts, much less his income, and had no evidence to offer about his present or future ability to pay child support. The mother simply wanted a divorce and did not want to be put to the time and expense of chasing a man who had abandoned his family two and-a-half years ago for parts unknown. The court held that the mother's financial circumstances were not ideal, but "reasonable arrangements" do not have to be ideal. It was reasonable in the circumstances, and probably in the best interests of the child, for the mother to be able to get on with her life. Similarly, in Wedge v. McKenna(64), a separation agreement was silent on the question of child support but detailed circumstances which could trigger child support payments in the future. The court approved this as a "reasonable arrangement" and did not apply the Guidelines to impose any child support obligation.

¶ 19 Most courts, however, are adopting a much less flexible view and uncontested applications for divorce are being refused in record numbers, with courts insisting that the necessary information be provided to ascertain what the guideline amount should be, and to explain any discrepancy between the proposed support for the children and the apparent guideline amount.

¶ 20 In Hare v. Kendall (53), the mother earned $24,000 per year and sought an uncontested divorce. The father, who resided in Bermuda, refused to provide any information about his income, but the mother's evidence was that she believed he earned the equivalent of $83,000 (Cdn.). He was paying $400 per month, net of tax, and the mother was content with that sum being included in the divorce judgment. The court was not satisfied that there was any evidence of a reason to depart from the mandatory application of the Guidelines and the basic table amount of $656 monthly was ordered to be paid as part of the judgment for divorce. A similar analysis, but slightly different conclusion, was reached in Arbeau v. Arbeau (60). The mother was receiving social assistance and, in minutes of settlement, agreed to renounce any child support as a trade-off to assure that an abusive father had no access to the child. The trial judge granted the divorce and incorporated the provisions of the minutes of settlement into the judgment, except for the child support provision and prohibition on visitation rights. Instead, the father was ordered to pay support of $250 monthly. The father's appeal was allowed and the child support order set aside. Both parties had not been given an opportunity to attempt to make arrangements for the child support, and the appropriate disposition, having regard to the wording of section 11(1)(b) of the Divorce Act, was to stay the divorce in order to allow the parties that opportunity and then to present their proposal to the court for approval or modification.

¶ 21 Beyond being satisfied about the amount of support, the court may also require assurance that the support ordered will, in fact, be paid. In Ninham v. Ninham (12), the court could readily determine the amount of child support under the Guidelines but was not satisfied that the father would honour such an order, nor that the mother would take any steps to enforce it. The divorce was, therefore, stayed until the court could be persuaded that the child support payments ordered were, in fact, being made.

RETROACTIVE APPLICATION OF THE GUIDELINES FOR PERIODS BEFORE MAY 1ST AND INVITATIONS FOR FUTURE ADJUSTMENTS:

¶ 22 In Andries v. Andries (32), a lump sum of $4,754 was made for retroactive child support, based in part upon application of the guideline amount for the period February 1st, 1995 to May, 1997. That approach was reversed on appeal.

¶ 23 Courts have consistently held that the Guidelines should not automatically be applied for periods before May 1st, 1997. For example, in Holtby v. Holtby (5), it was determined that the issue of variation of child support for any period of time before May 1st, 1997 must be based upon the traditional test of a "material change in circumstances" without regard to the guideline amount for that period. To retroactively apply the Guidelines, absent that material change in circumstances, would encourage a re-examination of virtually every child support order and a host of practical problems stemming from the sudden creation of arrears or overpayments. In both Prince v. Prince (50) and Hughes v. Hughes (52), the Nova Scotia Court of Appeal held that if the Guidelines were not in effect when the award was made, it would be inappropriate for the appeal court to assess child support in comparison to the Guidelines, and the Guidelines have no impact on the disposition of the appeal. A similar conclusion was reached by the Ontario Court of Appeal in Dennis v. Wilson (51) and by the Newfoundland Court of Appeal in Hunt v. Hunt (107).

¶ 24 As an aside, it is worth noting that both the Nova Scotia Court of Appeal, in Hughes v. Hughes (52) and the Ontario Court of Appeal, in Dennis v. Wilson (51), assumed the ability to substitute a new amount for the pre-May 1st, 1997 order but to preserve the former tax treatment so that the new substituted amount remained tax deductible for the payor and taxable as income for the recipient. There are some very tricky provisions in the Income Tax Act that allow for that possibility, but only in limited and narrow circumstances which are beyond the scope of this paper.

¶ 25 Although the court must adopt the traditional material change in circumstances test to determine if any variation should be made for a period before May 1st, 1997, there is nothing to prevent the court from using the Guidelines (at least as a "guideline") to recalculate the support once that threshold test has been met. For example, in Dennis v. Wilson (51), the Ontario Court of Appeal reviewed the child support, using the traditional Paras-based approach to reach a conclusion that the amount ordered was in error. Having made that threshold determination, the issue was then one of assessing the proper quantum. The court looked at the table amount based on the father's income of $1,200 per month and grossed that figure up for tax purposes to $2,400 per month, to arrive at

the appropriate figure ($2,400) to substitute for the $3,900 figure that had been ordered in 1995. Again, the assumption was that the amount would be tax deductible for the father.

¶ 26 Though I have been unable to find any reported case on point, I suggest that the Guidelines are routinely applied retroactively on the question of variation of arrears of child support. If the payor gets past the threshold of establishing that a past inability to pay constitutes a material change in circumstances, there is no reason not to then adjust the amount of the arrears by applying the Guidelines to the historical information of the payor's income throughout the years when the arrears accumulated. Not only is it expeditious to do so as a matter of available evidence and pure math, but it is also generally fair from the perspective that the guideline amounts are regarded as more generous than the previous methodology for determining child support (at least before Willick v. Willick) and, therefore, are not likely to give the payor who was, after all, in default of the court order, any financial windfall.

¶ 27 The same might apply for variation of arrears under separation agreements. For example, in Levesque v. Levesque (61), the parents agreed in November, 1995, when the husband was unemployed, that he would not be required to pay child support until he began to receive income in addition to his disability payments. He became employed the next month after the agreement but did not inform the mother. It was only when the court was called upon in 1997 to determine the child support obligation that the issue of determining his retroactive obligation arose. The court had no difficulty in determining that the proper amount was the amount calculated under the Guidelines, retroactive to January, 1996.

¶ 28 The courts seem to be reluctant to "rewrite history" in most cases, however, by making retroactive orders in the first instance. See, for example, Hughes v. Bourdon (43).

¶ 29 What about future adjustments for amounts ordered and payable after May 1st, 1997? In Quintal v. Quintal (24), the court held that the father had an ability to earn not less than $25,000 annually, starting within the next six months, and the support obligation was based upon that imputed income. The court went on to say that if the father found employment more remunerative than that which was assumed in assessing the child support obligation, a retroactive adjustment could be made. A similar result is Brown v. Lacombe (54), in which the court ordered the parties to produce copies of their income tax returns annually, no later than May 15th each year, and "if the actual income earned varies from that utilized for the previous year's calculation for child support, then there will be a retroactive change effective January 1st of the previous year and the deficiency or excess, as the case may be, shall be repaid in an lump sum to the appropriate party". I have seen several separation agreements with language similar to this. This case also confirms that the "Levesque formula" continues to be applicable up to and including May 1st, 1997 and that the Guidelines do not have retroactive effect.

¶ 30 Future variation may also be linked to section 7 contributions, the so-called "add-ons". The court has the ability to order a particular money amount or, alternatively, to

order a proportion or percentage of section 7 expenses. A third option, confirmed in cases like Kowalski v. Kowalski (28) and Estrela v. Estrela (16), is to order a parent to pay a proportionate share of future expenses not now being incurred when, and if, those expenses are, in fact, incurred. For example, in Kowalski v. Kowalski (28), the court determined that the equipment for the son as a hockey goalie was significantly more expensive than other hockey equipment and it was an "extraordinary" expense. However, it was uncertain the expense would be incurred, and the order, therefore, simply provided that if those expenses were incurred, the father would share proportionately in that future expense.

DETERMINATION OF INCOME AND ATTRIBUTION OF INCOME:

¶ 31 Determination of income starts with section 16 of the Guidelines which states that income is determined in the same manner as "total income" on an income tax return. The figure is subject to certain adjustments under Schedule III, may be varied based upon a change in pattern of income as set out in section 17 and may be adjusted for shareholders, directors or officers of corporations under section 18 if the actual amount paid to the person does not fairly reflect all the money available to the spouse for the payment of child support. Finally, there is a non-exhaustive list of circumstances in section 19 in which income may be imputed to a parent in cases of intentional unemployment or underemployment (unless required by the needs of the child or because of reasonable, educational or health needs), exemptions from income tax or lower rates of tax, diversion of income, failure to "reasonably" use property to generate income, deduction of "unreasonable expenses" (whether or not such expenses are deductible for tax purposes) and actual or potential benefits available from a trust.

¶ 32 Corporate income will not necessarily be attributed to the shareholder, even if a sole shareholder. See, for example, Kelly v. Kelly (82).

¶ 33 Because the codification of the determination of income still leaves room for so many adjustments (both actual and notional), it is not surprising that quite a large body of case law is developing.

¶ 34 It is worthwhile to keep in mind that the purpose of these exercises is still to determine the projected future income of the paying spouse and not simply a determination of historical income. Support will be paid from what the payor will earn, not from what the payor has earned. See Holtby v. Holtby (5).

¶ 35 Concerning section 17 and fluctuations of income, it is widely misunderstood that fluctuations of past income necessitate averaging of past income. In fact, section 17 addresses fluctuations in a source of income, not fluctuations in total income. For example, in Ewart v. Miller (72), employment income was based on the current year but professional income from a consulting business which fluctuated was averaged over the last three years.

¶ 36 In Wedge v. McKenna (64), the disposition of an R.R.S.P. in a prior year was considered immaterial to the determination of income for the purpose of the Guidelines because it was a one time event.

¶ 37 In Thomas v. Thomas (58), the court took into account the fact that, in the previous year, the father was on strike for five weeks, a non-recurring event, and adjusted his future income upwards accordingly.

¶ 38 In James v. James (106), the father took advantage of every overtime opportunity available to him in the three years before he was served with an application for increased child support. When he realized his child support would reflect his income, he decided to limit his overtime to 15 hours per week - a 55 hour work week - and submitted his income for Guideline purposes was his then actual income of $70,470 per annum. Justice Brockenshire concluded that the father was more likely than not to resume his pattern of overtime and attributed to him an income of $98,500 as the "rolling average" of his 1995, 1996 and 1997 income.

¶ 39 The Guidelines do provide a useful checklist and have provided specific reference in the past for adjustments such as adding back into income items such as capital cost allowance (in the absence of evidence that the asset is really depreciating in value), wages paid to a second spouse, investment and rental property losses, car allowances and the value of personal use of a vehicle expensed for business purposes, and other personal expenses paid by a corporation, such as travel, meals and the like. See, for example, Finn v. Levine (4), Van Wynsberghe v. Van Wynsberghe (9), Ewart v. Miller (72) and Irwin v. Irwin (25).

¶ 40 Determination of the real income of self-employed persons is not a new problem since the introduction of the Guidelines, but the Guidelines necessitate some actual finding of income (section 13) which may necessitate a closer analysis and actual reasons than in the past, and even for interim orders.

¶ 41 In Shelleby v. Shelleby (10), the husband declared an income of $47,000 but was operating a business owned by his parents. The court found that he was able to freely resort to his parents' corporations for his personal expenses in ways that were not apparent in the financial records of the company. The court analyzed the life-styles and spending patterns of the parties prior to separation in order to assist in determining income. Reference was made to section 18 of the Child Support Guidelines and the husband's ability to draw money from the corporation which, itself, was earning an annual profit of $133,000. The conclusion was that the husband's declared salary of $47,000 represented less than one-third of his true income, which was fixed at $150,000 for the purposes of the support Guidelines, a figure which was supported by evidence of the voluntary support and expenses that he had paid in the two years following separation.

¶ 42 Sometimes the court has little to work with, particularly at an interim stage. In McFadden v. McFadden (71), the court found it appropriate to "work backwards" to

determine the father's income on an interim basis. He was asserting that his income was $12,000 or less per annum, whereas the mother asserted that his income was at least as much as her own income of $40,000 per annum and that he had significant cash receipts not reported for tax purposes or in his business records. The parties had previously agreed that he would pay $300 per month for one child, and the court used this agreed upon figure to reference the tables and translate it to an income of $34,000 per annum, a figure found to be reasonable having regard to the conflicting evidence. Westcott v. Westcott (17) also discusses the difficulty of assessing self-employment income at an interim stage. In that case, the court rejected the father's assertion that his real estate commission income in 1997 would be less than 1996, on the basis that it was common knowledge that the economy and real estate market were generally performing at least as well in 1997 as 1996. In the absence of any cogent, corroborative evidence of why the father's income should drop, the court used his 1996 income as the base for assessing his means.

¶ 43 Similarly, in Nadeau v. Mitchell (14), the father had a base salary of $106,000 and, in the past year, had received a discretionary bonus of $14,000. There was no evidence about whether he would or would not receive a similar bonus in 1997, and the court, therefore, fixed his income for support purposes at $120,000.

¶ 44 Parties who do not produce evidence run the risk of an adverse inference. For example, in Estrela v. Estrela (16), the husband claimed to have an income of barely $20,000 annually but did not produce tax returns or adequate supporting documentation, and the court made a finding that his true income was not less than $45,000 annually. The Ontario Court of Appeal decision in Melzack v. Germain (105) suggests that the onus on an applicant seeking to vary a previous order may more readily lead to an adverse inference and imputed income.

¶ 45 In Rudachyk v. Rudachyk (38), the father transferred land and buildings to a company on a tax deferred basis, using the roll over provisions of section 85 of the Income Tax Act. In exchange, he received certain shares and a promissory note for $184,000. The husband was receiving, in addition to his salary, $64,000 a year as a partial repayment of the promissory note. The court ruled that the return of capital was not income as defined in the Income Tax Act or in any provision in the Child Support Guidelines and it was, therefore, ignored for the purposes of determining the quantum of child support.

¶ 46 The Jackson v. Jackson (48) case illustrates a specific example of a capital payment being brought into income. The father was the beneficiary of a substantial trust fund, paying him $25,000 annually as income, plus an additional $105,000 annually, as an encroachment on the capital of the trust. The husband, a former police officer, was working as a part-time school bus driver, earning $351 a month. Relying on the specific provision of section 19 of the Child Support Guidelines, with reference to actual or potential benefits available from a trust, the court held that the repayment of capital could be included in income for the purposes of child support, even though not income in the traditional sense. The court included the $105,000 annual capital repayment in assessing

the husband's income for support purposes, at $188,000 and in ordering him to pay the table amount of $2,158 per month for one child. This case may also be on the cutting edge of a shift in our thinking about support, in which we will tend to pay less attention to the distinction between income and capital. Madam Justice Pardu points out that the Guidelines envisage many costs for which parents are routinely obliged to resort to capital, such as university or orthodontal expenses. Rather than trying to make a finding that the particular father was "under-employed" or that he had significant assets which could be liquidated to generate income, the court simply alluded to his capital base as part of his "means", a concept which is receiving some attention these days when it comes to consideration of add-on expenses under section 7, to be discussed below. On the other hand, student loan income was held not to be income for the purposes of calculating child support in Vierling v. Boudreau (78) even though student loans traditionally cover the living expenses of the student and not just tuition fees and books.

¶ 47 This is, perhaps, a good spot to mention certain misconceptions that have occurred in the determination of income under Schedule III of the Guidelines; the first is under clause 1 of Schedule III which refers to deducting from a person's income Canada Pension Plan contributions and Employment Insurance Act premiums. In some courts, these were routinely being deducted from the income of employees to determine their income for support purposes, but a careful reference to the Income Tax Act section that is referred to in Schedule III would have clarified that it is only those premiums paid for some other third party who works for the spouse that are deductible. This has been clarified by the December 9, 1997 amendments to the Guidelines, and it will be a rare case, indeed, when this kind of deduction comes into play.

¶ 48 Next, keep in mind that clause 2 of Schedule III excludes from income any taxable child support that a person receives. Non-taxable child support is not "income" as defined in section 16. Therefore, whether a person is claiming support or is obliged to pay support, whether the child support is taxable or not, any child support being received by that person is never included in the person's income for child support purposes.

¶ 49 Clause 3 of Schedule III is the next provision that seems to find a common misapplication. Clause 3(1) provides that to calculate a person's income for the purpose of an applicable table, you deduct spousal support received from the other spouse. So, for example, if the mother claiming child support is also receiving spousal support, there is no adjustment for the determination of the table amount. The spousal support is not included in her income (because her income is irrelevant to the table amount), nor is it subtracted from the income of the father (because he is not receiving spousal support). This clause will only come into play if the person paying child support is also receiving spousal support from the other spouse.

¶ 50 Clause 3(2) provides differently in the case of add-ons. It states that to calculate a person's income for the purpose of section 7, deduct spousal support paid to the other spouse. Therefore, to determine the proportionate incomes of the mother and the father for add-ons, the spousal support is deducted from the income of the person paying it (because of the wording of clause 3(2)), and it is also included in the income of the

recipient (because of the definition of income in section 16 of the Guidelines as a source of income under the heading "total income" in a tax return).

¶ 51 It may seem odd that spousal support paid by a husband to a wife is not deducted from his income in determining the basic table amount he is to pay for the support of the children in the wife's custody. What must be kept in mind is that the step by step scheme of things under the Divorce Act is to determine child support first before determining spousal support. The child support may exhaust, or at least erode, the ability to pay spousal support and may reduce the spousal support payable. Alternatively, if the spousal support is a pre-established right of the wife, the introduction of the Guidelines and a higher amount for child support may provide grounds for variation downwards of the spousal support. Keep in mind as well that the court is required to record reasons if the amount of spousal support is less than it otherwise would have been because of the child support, so that any future reduction or termination of child support will constitute a change in circumstances for the purpose of variation of spousal support. See section 15.3 of the Divorce Act.

¶ 52 An example of the application of clauses 3(1) and (2) to a determination of both spousal and child support is found in Blair v. Blair (49). The step by step approach went as follows:

(a) determine the table amount payable;
(b) determine the section 7 add-on amount, using the incomes of the parents for the prorating;
(c) determine the spousal support, taking into account the results of (a) and (b); and
(d) recalculate the amount in (b) by subtracting the spousal support from father's income and adding it to mother's income.

¶ 53 The recalculation is a necessary step, but only varied the end result by a few dollars a month.

¶ 54 Income that is exempt from tax needs to be grossed up for tax purposes in order to apply the Guidelines. In both Osetti v. Moughtin (66) and Ninham v. Ninham (12), the income of a Native band member exempt from income tax on employment earnings was notionally grossed up. A similar situation would arise with respect to non-taxable disability payments or workers' compensation benefits and the like. See Hoover v. Hoover (34). Although these sources of income would not be found on the person's tax return and included under section 16 of the Guidelines, they are imputed as income under section 19.

¶ 55 Section 19 provides that the court may impute such amount of income to a spouse "as it considers appropriate in the circumstances", which circumstances include nine defined situations. The defined situations are not an exhaustive list, and the court will be imputing income in the same fashion that it did before the introduction of any Child

Support Guidelines or, alternatively, refusing to impute income even if one of the listed circumstances seems to apply.

¶ 56 For example, in McLean v. McLean (63), the court concluded that in 1997, the father was not working overtime that was available to him, in an effort to minimize his income until the proceedings were complete. The court also concluded that less overtime was available to him than had been the case in past years because of corporate restructuring. For the purposes of the Child Support Guidelines, the father's income was projected to be the average of his income for the last three years, a figure some $6,000 annually more than his income for the previous 12 months. See also James v. James (106) for a similar result. In Smart v. Smart (29), the husband declared an income of $400 monthly, but the court found that he was not making a genuine effort to work. The court took into account his "specialized skills in painting and decorating work" and his possession of the equipment and machinery for that trade, in attributing to him an annual income of $22,000 "at least as large as the income of the wife". The court also made the finding that the husband had a past practice of concealing income from the tax authorities.

¶ 57 In Quintal v. Quintal (24), the father had been dismissed from his employment as an R.C.M.P. constable following a disciplinary proceeding. The mother, claiming child support, argued that the father was "intentionally unemployed" within the meaning of section 19 because his unemployment arose from his misconduct. The court pointed out that the listed circumstances in section 19 do not purport to be comprehensive and that it was not necessary to make a finding that he was "intentionally unemployed" in order to impute income to him. Because he wants to work, expects to find employment and has certain skills, the court was able to conclude, based on his job history, apparent good health, earnest effort to find employment, etc., that he was capable of earning not less than $25,000 annually within six months. (A note of caution: in Wong v. Wong (1990), 27 R.F.L. (3rd) 215, the Ontario Court of Appeal held that to impute income without any evidentiary basis is a reversible error).

¶ 58 The court will not always impute income even if the parent has an apparent capacity. For example, in Soever v. Soever (55), Associate Chief Justice Smith held that no income would be imputed to the father above his base salary of $58,000 per year as a geologist. He would be able to almost double his income if he were willing to work at on-site locations in the Canadian North and in Africa for months and months at a time each year, as he had done prior to the separation. Although the mother was willing to provide flexible and substantial "make-up" access upon the husband's return from work-related travel, the court accepted the husband's evidence that he wanted to be in close proximity to the children to maximize his involvement in their care and upbringing and that his attitude in that regard was neither unreasonable nor inappropriate. In Rains v. Rains (7), father sought a variation, based on the fact that he had moved from his employment in Canada, where he earned $53,600, to the United States, where he now earned only $36,000. The court accepted his reasons for the move and based support upon his new earnings, declining to make a finding that he was "intentionally under-employed" as provided in section 19. In Schick v. Schick (33), mother's income in the

previous year was $14,500. Her current hours were cut back for reasons beyond her control and, based on current pay stub information, her income was annualized at $11,829. Current earnings information is to be preferred to historical information where there is a demonstrated change in the employment pattern. It is interesting that, in this case, both sides made the submission that the spousal support payable to the mother by the father should be added to her income for the purposes of determining child support, but because of the specific provision of clause 3(1) of Schedule III, the court found that it had no jurisdiction to accede to that common position and the child support obligation was limited to her employment income of $11,829.

INCOMES OVER $150,000

¶ 59 The tables provide a basic amount up to an income of $150,000 annually for the payor and provide that a percentage of income be applied to any surplus income over $150,000, the basic amount and the percentage changing with the number of children. In other words, there is a "table amount" for incomes over $150,000. Section 4 of the Guidelines provides that when the income of the spouse against whom a child support order is sought is over $150,000, the amount of the child support order is either (a) the table amount plus any add-ons under section 7 or (b) if that amount is "inappropriate", the basic table amount on the first $150,000 of income, plus any amount determined under section 7 as an add-on, plus any additional amount the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children, the "balance of the spouse's income" (i.e. the amount of income over $150,000) and the financial ability of each spouse to contribute to the support of the children.

¶ 60 In Francis v. Baker (3), the issue was whether the husband should pay the straight table amount of $10,000 per month for the support of two children on an income of almost $1 million annually. The father's position (though he gave no evidence at trial) was that the sheer size of the payment, based on the table, made the amount inappropriate. The court held that the concept of "needs" for a child is not static and that for children of wealthy families, the true test is "the reasonableness of discretionary expenses". The court ordered the table amount, rejecting the father's position that it exceeded what was reasonably necessary to raise the children.

¶ 61 The Ontario Court of Appeal not only upheld the decision but went on to state that the table amount (including the percentage application to income over $150,000) establishes a minimum amount for child support unless the child is not a minor, a situation of shared or split custody exists or relief can be afforded based on 'undue hardship'.

¶ 62 This controversial decision also held that "inappropriate" is synonymous with "inadequate" and that budgets of expenses or financial needs for children are largely irrelevant, i.e. such budgets could increase a child support award but would not reduce it below the mathematical table amount.

¶ 63 Philip Epstein, a member of the advisory team appointed by the Department of Justice, in a paper delivered to the 1998 National Family Law Program of the Federation of Law Societies of Canada and Canadian Bar Association at Whistler, B.C., June 1998 writes:

> ... "We believe that it is extremely likely that there will be appellate cases from other provinces that do not follow Francis v. Baker. Accordingly, even if the Supreme Court of Canada refuses leave, on the current Francis application, it will only be a matter of time before the Supreme Court of Canada is faced with conflicting judgments from provincial appellate courts and in those circumstances the Supreme Court of Canada will have to grant leave and resolve the conflict.
>
> However, all of this may be academic. The child support advisory team appointed by the Department of Justice has recommended significant amendments to section 4(b). Discussions are currently underway to consider how best to deal with this particular issue. It does not appear to us that Francis v. Baker actually reflects the intent of the legislation and, accordingly, consideration will have to be given to redrafting the legislation in a way that makes it clear that the Courts should have some limited discretion to go above or below the Table amounts in circumstances where the Table amounts do not produce a just result."

¶ 64 In Plester v. Plester (57), the father appealed an interim order requiring him to pay a straight table amount of $7,000 monthly on an income of $690,000 annually. The evidence presented by the mother estimated the children's expenses at $4,000 a month. Mr. Justice Humphreys approved "reasonableness of discretionary expenses" as the appropriate test of "need" and confirmed that the Guidelines have de-emphasized the child care budget and an inquiry into the cost of raising children. The court held, however, that the budget cannot be ignored, even if it is not relied upon exclusively. Given the mother's ability to also contribute to the children's needs, the amount was limited to the estimated expenses of $4,000 monthly rather than the table amount of $7,000. This result seems contrary to the Ontario Court of Appeal decision in Francis v. Baker (3). It may be important to distinguish that in Plester v. Plester (57), the father's income had remained more or less constant and there was a measurable standard of living for the children pre-separation, whereas in Francis v. Baker (3), the father's income had gone up very substantially post-separation. Part of the Court of Appeal decision in Francis v. Baker (3) was that the children should continue to benefit from the financial means of both parents, even after separation, and the benefits of the father's new-found wealth ought to be enjoyed when the children are with the mother and not just when they are with the father. There was no evidence to limit the assessment of the "reasonable needs" of the Baker children.

¶ 65 Timing was also regarded as important in Simon v. Simon (47). The parents had entered into a separation agreement requiring payments of $2,200 monthly for the support of one child when the father had an income of $180,000 (U.S.) as a professional hockey player. When the husband signed a new contract for more than $1 million per

season for two years, the mother applied for an increase and sought the table amount of $9,127 per month. The court pointed out that the substantial income of the father would be a relatively short thing and that when his playing career was over, he would be left to rely on whatever he had been able to invest. The mother's budget of $6,000 monthly as expenses for the child was held to be unreasonable. Furthermore, the court found that it would not be in the best interests of the child to experience luxuries and a life-style that would be of relatively short duration and then suddenly reduced. Support was fixed at the rate of $5,000 per month, of which $1,000 was to be paid into an interest bearing trust account for future needs, i.e. enforced savings for the years after the husband's career comes to an end or is winding down. This case is scheduled to be heard in the Ontario Court of Appeal in October 1998.

¶ 66 On very large incomes such as these, it will often make a consideration of section 7 add-ons irrelevant because they will be included in the basic table amount or because of the custodial parent's own financial resources and ability to share in the costs. For example, in Sagl v. Sagl (15), the table amount was ordered, based on father's income of $275,000 annually but no additional amount was ordered for private school fees because of the relatively high amount for child support and substantial spousal support of a $4 million lump sum to be paid in quarterly instalments of $400,000.

¶ 67 As incomes are closer to the $150,000 level, it may be more appropriate to consider section 7 expenses. The wording in the Guidelines is also wide enough to include other more generalized notions of what a fair amount of child support amounts to; for example, the time the children spend with the non-custodial parent and the expenses that are absorbed directly during that time. In Marck v. Parrotta-Marck (30), the table amount for the father, based on his income of $195,000 annually, amounted to $2,390 per month. The disposition of the custody issues resulted in the parents having the children approximately half of the time each, thereby also bringing into play section 9. The court accepted the father's position that, in those circumstances, an amount less than table amount was appropriate. Child support was fixed at $2,000 monthly, with specific provision that the mother be responsible out of that sum for payment of all of the costs for children's clothing, incidental school expenses, recreational and activity costs, with the father responsible only for orthodontal expenses.

SECTION 7 ADD-ONS:

¶ 68 Section 3 of the Guidelines provides a presumptive rule that child support is to be the table amount plus the amount, if any, determined under section 7. Section 7 lists six types of special or extraordinary expenses that may be considered. The section also provides a guiding principle: that in determining the amount of an expense under section 7, it should be shared by the parents in proportion to their respective incomes (N.B. "incomes", not "means"), after deducting from the expense the contribution, if any, from the child and, further, taking into account any subsidies, tax deductions or credits that that may apply to the expense. So, for example, it is necessary in the case of child care expenses to start by looking at the after-tax cost and any subsidy that is available (even if

it is not actually being received) before considering what portion, if any, ought to be paid by the non-custodial parent.

¶ 69 It is not surprising that section 7 has triggered as much contested litigation as any other provision in the Child Support Guidelines. When the Guidelines were introduced, there was a fair amount of advance speculation about whether the courts would consider a narrow and restricted expansion of the basic table amounts or whether, instead, courts would routinely add to the tables if there were expenses of the kind contemplated in section 7. A review of the cases leads to the conclusion that the courts are quite cautious about ordering add-on amounts, and most judges are mindful of the fact that there is a benefit to encouraging certainty and discouraging litigation, consistent with the principles and purposes of Child Support Guidelines.

¶ 70 One of the first things to notice about section 7 is that the categories itemized in sub-paragraphs (a) through (f) are exhaustive. Therefore, even if the custodial parent has some extraordinary expense in relation to a child, if it does not fit into one of these categories, it cannot be considered as an add-on to the table amount.

¶ 71 Many people expected that the judicial interpretation of what constituted an extraordinary expense when it came to educational, recreational or extracurricular expenses would be a reflection of the kind of expense itself. For example, in the early decided case of Hoover v. Hoover (34), school activities, school supplies, school dances and the like, as well as recreational activities such as swimming, bicycling and going to the movies, were all deemed to be ordinary expenses covered by the table amount, but one exception was made with respect to computer equipment. The court pointed out that although computers are quite common in schools and there is nothing unique or exceptional about using a computer, not every child has ready access to a computer. The mother's claim amounting to $178 per month was deemed to be reasonable and a proportion of the expense was ordered to be paid by the father.

¶ 72 However, as the case law developed, it became apparent that it is not the nature of the expense that determines the result as much as other factors, such as the affordability of the expense and whether it matches up with the kind of expense that was being incurred before the parents separated.

¶ 73 In Rains v. Rains (7), the mother claimed additional support to cover recreational activities that included day camp, soccer, Brownies, swimming, ski equipment, pizza days at school, birthday parties and summer camp, all totalling $3,568 a year for two children. The legislation requires that extracurricular expenses be "extraordinary" before any amount can be ordered as additional support, and this case confirms in clear language that some extracurricular activities are meant to be subsumed in the table amount. "Extraordinary" was held to mean

> "activities for which the cost is disproportionately high in relation to the payor's income which would not be included in the usual allowance for recreation which is part of the table amount".

On that analysis, the skiing expenses, for example, were held to be "extraordinary" but were disallowed because they did not meet the next test of being "reasonably necessary", having regard to the incomes of the parents. The court also focused on the importance of the element of cost with these words:

> "It is not open to a parent to select any recreational activity regardless of cost and then demand the other parent to contribute regardless of cost, arguing that the children will be deprived if they do not have the opportunity. Households in which both parents reside together must moderate their children's recreational activities in light of the cost and the means of the parents. Unless there is a special need for the activity, the cost of which is disproportionate to the parents' incomes, no contribution should be required from the non-custodial parent."

¶ 74 That same conclusion was reached independently in Forrester v. Forrester (23). The mother advanced a large claim for add-ons for activities she had enrolled her daughter in after the separation. The court found that she had "erroneously arrogated to herself" the right to decide what expenses would be incurred and for which the father would have to contribute, but "the Guidelines were not intended to grant the custodial parent a licence to enroll a child in additional activities and then demand automatic contribution". Each expense is, first, to be considered for its necessity in relation to the child's best interests, then its reasonableness in relation to cost. It must also meet the third test of representing an unusual cost, not subsumed in the ordinary payments expected for a family of the same means. See also Boudreau v. Vickery (98).

¶ 75 In Van Wynsberghe v. Van Wynsberghe (9), the court did not focus on the type of expense, but on the combined incomes of both parents, and particularly the support amount from the table, to come to an opinion on whether the amounts claimed are truly "add-ons". The court held that

> "as the table amount increases with the income of the payor, it reflects additional expenses presumed to incur as financial circumstances escalate. With the exception of the vocal lessons, the expenses appear to be ordinary and, therefore, not recoverable".

¶ 76 In Pepin v. Jung (45), two boys, ages 10 and 13, were enrolled in competitive soccer, costing $9,500 annually, including out of country trips. The mother's income was $65,000, the father's $60,000 per annum. Taking into account the basic table amount and whether the magnitude of the expense was reasonable, given the means of the parties, and the father's lack of input into whether the expense should be incurred, the court only ordered him to contribute $1,920 per annum - an amount significantly less than the mathematical result of prorating incomes. In other words, the "guiding principle" of section 7(2) is subject to an overriding discretion.

¶ 77 In Thomson v. Howard (59), the mother made a claim for reimbursement for a number of activities, ranging from rock climbing to three weeks at summer camp. All

were disallowed, the court determining that extracurricular activities unilaterally started post-separation by the custodial parent are not intended to be included unless they are consistent with the family's spending pattern prior to separation. Even a claim for additional tutoring, supported by a letter of opinion from a private profit-based tutoring company, and part of the cost of a computer were disallowed. The court found that such expenses might help or benefit the child but that the evidence fell short of establishing that they were "necessary".

> "Every parent on behalf of every child in Canada could make a claim for extra support on evidence not much dissimilar to the mother's."

¶ 78 The interpretation of the word "extraordinary" in relation to extracurricular expenses was at the heart of two Court of Appeal decisions in Manitoba and Nova Scotia. The Manitoba Court of Appeal in Andries v. Andries (32) specifically rejected the approach adopted in Rains (7) and in Middleton v. McPherson (35). The court held that to determine whether an expense is "extraordinary", the court looks only to the expense itself, and not to the means of the parents or the pattern of spending prior to separation. Those considerations come into play only after the expense itself is found to be extraordinary.

¶ 79 A similar conclusion was reached by the Nova Scotia Court of Appeal in Raftus v. Raftus (79) although the dissenting opinion of Bateman J.A. seems to accord with the Rains and Van Wynsberghe decisions.

¶ 80 The Alberta Court of Appeal obliquely approved of Middleton v. MacPherson (35) in Sanders v. Sanders (108).

¶ 81 The majority decision in Raftus may reflect proper principles of statutory interpretation, but the dissenting opinion of Bateman J.A. and the Saskatchewan Court of Appeal decision in Kofoed v. Fichter (97) better reflect the intention of those who drafted section 7. In Kofoed v. Fichter (97), the Saskatchewan Court of Appeal specifically noted its preference for the consideration of the joint incomes of the parents as a factor in determining whether an expense is "extraordinary", and not just whether it is "reasonable.

¶ 82 The Forrester case also confirms that baby-sitting expenses of the mother while she is attending theatre, cinema or mediation sessions are not recoverable and only baby-sitting expenses incurred as a result of her employment, illness, disability or education are recoverable under the Guidelines.

¶ 83 A similar result was reached in Kapell v. Richter (75). Madam Justice Dawson held that child care costs do not have to be "extraordinary" but they must be related to employment or one of the other enumerated factors. In that case, it was not clear what proportion of child care costs were related to employment and what were related to social occasions for the mother. Absent such evidence, the court declined to fix a specific amount for the expense but did order that the mother could produce a quarterly statement, setting out her child care costs relating to her employment and the father was to pay his

proportionate share within 15 days. After completing her tax return each year, the mother was to reimburse the father for his portion of the child care expenses that she could deduct from her income tax. In the Kapell case, the mother also claimed additional support to reimburse her for costs that she incurred when the father refused to take the children for his scheduled weekend access; for example, extra food costs, baby-sitting and the like. The court determined that such extra costs are not eligible as an extraordinary expense for extracurricular activities, nor are they within any other category of the section 7 expenses. No reimbursement could be ordered.

¶ 84 In Tallman v. Tomke (31), the mother's claim for her own expenses in attending at the hospital while the child was going for treatment, including her travel costs, parking and meals, etc., were disallowed as not fitting within any category under section 7.

¶ 85 So, the custodial parent cannot make a claim for additional expenses not enumerated in section 7.

¶ 86 Surprisingly, I have not been able to find any case in which the non-custodial parent makes section 7 expenses an issue. Is section 7 only for "add-ons" or can it be used for "take-aways"? The non-custodial parent could not claim a credit against the table amount, but it is conceivable that the non-custodial parent might have what amounts to a counter-claim for a share of section 7 type expenses that the non-custodial parent is paying out of proportion to the respective incomes of the parents.

¶ 87 Baby-sitting and day-care expenses for times the custodial parent is at work are routinely added to the support payable because there is such a direct connection between the expense and the custodial parent's ability to also contribute to the child's financial needs. However, it is not always the case. In McFadden v. McFadden (71), the court dismissed the claim for a contribution to child care expenses because the custodial parent had provided no information on the after-tax cost of the child care. The court held that a judge should not have to guess at the tax consequences and, absent that essential evidence, the claim was dismissed. The federal government has now published a pamphlet outlining the tax calculations, but it remains to be seen if courts will treat that as evidence. In Chaput v. Chaput (46), the father earned $24,000 and the mother almost twice as much as that. The mother claimed a contribution towards her day-care costs of approximately $2,400 annually. Justice Ferguson considered the disproportionate incomes of the parents and the father's access costs, and declined to make any order for a contribution towards day-care, limiting the support to the basic table amount of $217 monthly. In Hughes v. Bourdon (43), a similar result occurred. The mother satisfied the court that her day-care expenses were reasonable and necessary, but the court declined to make any order for contribution by the father, even though his income was twice as much as the mother's, because he had custody of two children from a prior relationship, received no support for them and simply could not afford to make any payment in addition to the basic table amount. The court went further and also exercised a discretion under the undue hardship provision to reduce even the table amount of support from $335 monthly to $300 monthly.

¶ 88 Rather than ordering a specific monthly sum, the court can order payment of a percentage of day-care expenses as was done in Estrela v. Estrela (16), Kapell v. Richter (75) and others. In Ontario at least, this may have the added advantage of ensuring that the amount paid directly benefits the child in circumstances where the mother is in receipt of public assistance. Those who administer social assistance in Ontario take the position that if any amount is ordered for add-ons, it is subtracted from the social assistance benefits. Therefore, it does not accrue to the benefit of the child. It might be more difficult for those who administer social assistance to deduct anything from the custodial parent if the expense was simply being paid directly (in whole or in part) by the non-custodial parent.

¶ 89 Some cases illustrate the distinction between what was affordable when the family was together, what might be affordable temporarily and what might have to be eliminated eventually. For example, in Bially v. Bially (70), a father was ordered to pay, on an interim basis, his proportionate share of extracurricular activities the children had been involved in before the separation, but the court went on to say that the parties might have to reassess the list of those extracurricular activities in the long term, given the affordability factor. Similarly, in Nadeau v. Mitchell (14), the issue focused on riding expenses costing approximately $900 monthly. There was evidence to suggest that riding had been a positive thing for the child in the past, but the court held that it had become a luxury she could no longer afford.

¶ 90 It makes sense to look at cost on the basis of what the parents chose for their children before separation. In Dodd v. Dodd (1), the court found that the limited incomes of the parents did not permit expensive frills, but the family history indicated a willingness of the parents to make sacrifices for the children, and additional support was added for figure skating and riding expenses.

¶ 91 Affordability includes the means of both parents but not necessarily their new partners. In Ewart v. Miller (72), the court determined that it ought to take into account the significant table amount being paid, the mother's own income and the substantial income of the man she was now married to in assessing her obligation to absorb the cost of extracurricular activities. However, the court stopped short of saying that her second husband had any obligation to contribute to the child support and, indeed, in Smith v. Smith (44), the court held that the income of new partners of the spouses is "irrelevant" to section 7 considerations because the new partners have no obligation to pay child support. It is certainly true that section 7(2) talks about the "incomes" of the spouses but subsection (1) talks about the "means" of the spouses, which opens the door to at least an indirect consideration of a parent's ability to contribute, having regard to the financial assistance being received from a subsequent spouse. This case also highlights the importance of the "original family unit" as a yardstick for what is "extraordinary" and whether the kind of expense for which additional support is sought fits into the family's spending pattern prior to separation. In Ebrahim v. Ebrahim (67), the court even considered as part of the "means" of the custodial parent, the availability of financial contributions from his family, which had historically occurred. The court ordered an equal sharing of the "section 7 expenses", notwithstanding the fact that the non-custodial

parent's income was $108,000 and the custodial parent's $40,000 annually. Additional factors considered included the custodial parent's decision to work at home, a decision which reduced his potential income, the inadequacy of his income information and the significant amount of the basic table amount support.

¶ 92 In summary, there are many examples of judges adding to the table amounts, but it has been a cautious exercise of judicial discretion. As Justice Baynton noted in Hansvall v. Hansvall (62), section 7 orders should be the exception, not the rule. Expenses only become special or extraordinary when they exceed what would have been the norm for a family at that particular income level or, alternatively, when they involve unusual expenses such as those required for a child with a disability. If section 7 applications are granted routinely, they will, in turn, routinely trigger section 10 applications (based on undue hardship) and child support will become a more convoluted and complex process than was the case prior to the adoption of the Guidelines. That is inconsistent with the purpose of the Guidelines. However, inconsistency in the caselaw on the subject of section 7 add-ons may be promoted if appeal courts adopt the view of the Saskatchewan Court of Appeal in Kofoed v. Fichter (97). That court held that determining whether an expense is "extraordinary" involves a discretion on the part of the trier of fact to which appeal courts ought to afford considerable deference.

DEPARTURE FROM THE GUIDELINE AMOUNT BECAUSE OF "SPECIAL PROVISIONS" IN AN ORDER OR AGREEMENT:

¶ 93 Haggith v. Trader (6) is an example of a common bargain made in separation agreements whereby a husband pays a lump sum or gives up his share of the matrimonial home in order to satisfy an equalization payment, a potential claim for spousal support and, at least in part, in consideration of a release or reduction in child support obligation. In this case, the husband transferred his equity in the matrimonial home to the wife and the agreement specifically acknowledged that, in consideration for that, the child support was "low" without indicating by how much. The trial judge determined how much of the $40,000 equity could be equated to what would have been owing as an equalization payment, how much ought to be attributed to the release of spousal support and concluded that $25,000 ought to be attributable to the reduction in child support. The court then calculated that, according to the Guidelines, the support ought to be $500 to $550 per month and reduced that amount by $325 monthly for the next eight years to reflect the $25,000.

¶ 94 In Holtby v. Holtby (5), the mother was obligated to pay child support to the father but the father had been successful at trial in persuading the court to postpone a substantial portion of the equalization payment that he owed to the mother. The postponement was to allow the father, a farmer, to maintain a viable farming operation, not only as a home for some of the children, but as an asset being preserved for their ultimate benefit. The court reduced the support otherwise payable and notwithstanding that interest was payable to the mother on the postponed equalization payment. With the exception of the Osetti v. Moughton (66) case, significant access costs have been held not to trigger the "special provisions" section. In Osetti, the father accepted new employment

1,300 kilometres away and the mother agreed to accept less than she might otherwise be entitled to, but all other cases to date reject claims for a reduction in the guideline amount based on access costs. See, for example, Anderson v. Anderson (21) in which the father requested a reduction from the guideline amount, based on additional costs he incurs for access, necessitated by the mother's move, arguing that he ought not to be penalized by her decision to move. Osetti is distinguishable because of the custodial parent's consent to the lower amount. Unless it is on consent or a case of adjustment under section 9 (shared parenting) or a case is made for an undue hardship variation, there is nothing in the Federal Child Support Guidelines that allows for any reduction to the table amount, based upon access costs.

¶ 95 Life insurance premiums paid by the non-custodial parent were not considered a "special provision" within the meaning of section 15.1. "Special provision" was held to be one which replaces a present need for ongoing support rather than merely protecting against a contingency or providing security for the funding of present needs. Similarly, medical and dental insurance provided by the non-custodial parent was also disregarded as a special provision. Since those expenses could be addressed directly under section 7(1)(b) and apportioned equitably under that section, they are outside of section 15.1 of the Act which requires that the provision result in inequity before there is any departure from the Guidelines. See Hall v. Hall (37).

CLAIMS FOR VARIATION BASED UPON "UNDUE HARDSHIP":

¶ 96 One of the first cases to consider a claim for relief from the guideline amount based upon undue hardship was Tallman v. Tomke (31). The court there set the stage for cases to follow in stating:

> "The regime of the Guidelines is that they must be applied. The court is given no discretion to fudge them if there is no finding of hardship".

In order to seek relief from the guideline amount (or, for that matter, to ask for increased support) based on undue hardship, section 10 requirements must be met. Section 10 contemplates a two-step analysis: first, the court must be satisfied that circumstances exist that would cause undue hardship. Subsection 10(2) sets out a non-exhaustive list of the circumstances which might support that conclusion. The second stage is to compare household standards of living, and the onus is on the applicant to satisfy that secondary test as well. In Messier v. Bains (69), the court held that in determining whether or not circumstances of undue hardship exist, the objectives of the Guidelines should be kept in the forefront. The presumptive rules set out in section 3 of the Guidelines should not be deviated from, absent compelling reasons to do so. Second families and associated legal duties to support a child of that family are not uncommon. The assumption of those obligations may, by necessity, create a certain degree of economic hardship. That hardship is not, however, necessarily "undue". Similarly, the mere fact that an applicant's household standard of living is lower than that of the other spouse does not automatically create circumstances of undue hardship.

¶ 97 In both Messier v. Bains (69) and Hughes v. Bourdon (43), the court had to consider an undue hardship claim, primarily based upon the obligations for a second family. In both cases, the court reached the conclusion that exercising discretion under section 10 of the Guidelines must consider the best interests of all children and not just the child who is the subject of the litigation. The court, in both cases, suggested that the children of both families must be treated equitably.

¶ 98 In Hansvall v. Hansvall (62), a variation application, both parties had remarried and the household incomes of the two families was approximately the same, but the father's new wife was about to leave the workforce and they were the parents of two children that he had become obliged to support since the order relative to his first family. The court concluded that he could show a lower standard of living in his household, but that he failed to satisfy the first step under section 10. That first step involves a significant hurdle. The hardship must be exceptional or excessive rather than the inevitable consequence of dividing limited resources between two households.

¶ 99 In Swift v. Swift (84), the father was paying $350 per month, tax deductible, and an increase to $548, non-deductible, under the Guidelines would substantially impact on the two children of his second marriage, but no relief was granted. For someone earning $65,000, "the payment of the guideline amount will rarely be a hardship that is undue in the legal sense".

¶ 100 In Hoover v. Hoover (34), the father applied to reduce his child support when the Guidelines were introduced, and the recipient asked the court to make a finding that any reduction in support to the guideline amount would constitute undue hardship for the child. The court confirmed that the listed circumstances in subsection 10(2) are not an exhaustive list of what constitutes undue hardship but they are indicative of the type of circumstances contemplated and lead to the conclusion that the discretion in section 10 is somewhat circumscribed and should be cautiously exercised. The court concluded that the possibility of support orders being rolled back as a result of the application of the Guidelines must have been foreseen by Parliament. The policy-makers must have considered that there would be some "hardship" in all parental separation situations but only "undue hardship" would qualify for special dispensation. The father's application was successful in reducing the child support to the guideline amount, the court accepting the argument that the Guidelines cannot create undue hardship simply from their application alone.

¶ 101 Apart from claims involving second families, attempts have been made on several occasions by non-custodial parents to reduce child support, based upon the cost of exercising access. In Williams v. Williams (40), the mother claimed a reduction in support based upon the high cost of travelling between Nova Scotia and the Northwest Territories to exercise access. The court rejected her claim, saying that her expenses, while high, were not unusual. In Kaderly v. Kaderly (41), the father was able to establish that his access costs were approximately $10,000 annually but no reduction was granted because his household standard of living was still higher than the mother's. A similar claim was unsuccessfully advanced in Anderson v. Anderson (21).

¶ 102 However, in Baranyi v. Baranyi (85), the father's obligation was reduced from the table amount of $236 monthly to $50 monthly because he had to spend $780 per month in rent to have suitable premises to exercise access out of a net income of $1,330 per month.

¶ 103 The undue hardship section was successfully used as a shield to a child support claim in Martin v. Girard (8). The mother's obligation under the table amounted to $379 monthly, on her $26,000 annual income, but the court relieved her of any obligation to pay support under section 10 because of a relatively high level of debt, an obligation to support a second spouse, monies that she had to spend to earn her employment income and significant access costs because of the distance between her home in Kingston and the father's home in Thunder Bay.

¶ 104 In Petrocco v. Von Michalofski (86), the non-custodial parent had an income of $27,650 per annum and would be required to pay a table amount of $516 monthly for three children. The custodial parent had an income of $300,000 and the non-custodial parent was able to persuade the court to reduce the support to $150 per month so that she could afford to provide generously for the children while exercising access, i.e. a lifestyle similar to that which they enjoyed day to day with their father. The significance of this case is that a payor need not necessarily show inability to pay to get past the undue hardship threshold.

¶ 105 In cases of undue hardship, the second hurdle, based on a comparison of standards of living of the two households, is critical and mandatory. If insufficient evidence is presented, the claim must be dismissed. See Holtby v. Holtby (5) and Thomson v. Howard (59).

¶ 106 Because relief under section 10 is discretionary, even after a parent satisfies the two step tests noted, the third step is the quantification of the modification of the guideline amount. There is nothing in section 10 that speaks to how to quantify the variation, but keep subsections (5) and (6) in mind; it may be a time limited departure from the guideline amount, and recorded reasons are required.

¶ 107 In Reiter v. Reiter (87), the father satisfied both aspects of the two-part test for undue hardship. How then to quantify the adjustment? The court calculated the monthly figure that would roughly equal the "household income ratios" under the standard of living formula in Schedule II of the Guidelines.

¶ 108 "Undue hardship" may occasionally lead to an increase in support, but probably only rarely because the table amount and section 7 add-ons will first be determined. The most likely scenario for increased child support, based on undue hardship, is the split custody or shared custody situation in which the court may consider maintaining a similar standard of living for siblings. See, for example, Holtby (5) and Scharf (88).

HOW TO DEAL WITH "SHARED CUSTODY" UNDER SECTION 9:

¶ 109 Section 9 of the Guidelines provides that when a spouse exercises a right of access, or has physical custody to a child, not less than 40% of the time, the amount of child support must be determined by taking into account the amounts set out in the applicable tables, the increased costs of the shared custody arrangement, and the conditions, means, needs and other circumstances of each spouse and any child. The first point to observe is that the section is badly worded because it applies to every situation. In every case, one of the spouses exercises access or has physical custody more than 40% of the time. However, courts have ignored that and assumed that the section is aimed at a situation where there is a true shared custody situation and a true sharing of the day-to-day costs of raising the child.

¶ 110 There is no doubt that more and more non-custodial parents are seeking "joint custody" or making issues out of access that will take them past the magic 40% number, depending on how that 40% is calculated. As pointed out in Crick v. Crick (56), section 9 invites litigation over access and "embroils the parents in a minute consideration of the child's time with each parent", quite apart from the difficult and intricate exercise of considering what "increased costs" arise from a shared custody arrangement.

¶ 111 The first point, though, is that if the counting of time results in anything even fractionally less than 40%, there is no discretion under section 9, and the only grounds upon which the court may depart from the guideline amount would be under section 10 after a finding of undue hardship.

¶ 112 The difficulty of counting the 40% is illustrated in cases like Hall v. Hall (37) and Meloche v. Kales (27). Judges are resisting the necessity of "inquiring into the sleeping patterns of children" or counting the time that the child is in school, away on holidays, with friends or grandparents, etc. It is not the relative time each of the parents spends with the child. Rather, the person making the claim must establish that he or she has the child more than 40% of the total time in the year. The Meloche v. Kales (27) case states that the starting assumption is that the custodial parent has 100% of the time, but it begs the question as to how the non-custodial parent's time gets counted.

¶ 113 In Middleton v. MacPherson (35), it was suggested (though not adopted) that one option would be to consider the arrival at the parent's home as a day with that parent (and not the other), but that apportionment of a day might be necessary for non-overnight, mid-week access. I suppose that would include non-overnight, week-end access as well.

¶ 114 My own personal view is that it would be simpler to count the number of meals with each parent than to try to calculate the exact number of hours with each parent. Meals involve a direct expense for the parent providing the meal and probably more fairly apportion the actual responsibilities for the child because a parent would have to have both dinner and the following breakfast to receive any credit for the hours when the child is asleep.

¶ 115 In Hubic v. Hubic (74), Madam Justice Dawson made a finding that there was a shared custody arrangement and, having crossed that threshold, stated that the

quantification of child support in such circumstance involves a broad discretion. Absent specific evidence of the increased cost of shared custody, she ordered an amount for support equal to the difference between each party's table amount under the Guidelines. A similar approach was adopted by the Ontario Court of Appeal in Dennis v. Wilson (51) at least as a measuring stick. In that case, there was a shared custody arrangement in a separation agreement and provision for child support of about $1,000 per month. The court took the table amount for each parent and determined that the difference between the two was $708 per month, after tax. The court then notionally grossed that up for tax purposes to $1,350 to support the conclusion that the amount being paid under the agreement was too low and ought to be varied.

¶ 116 The method of simply determining the amount from the tables in the same fashion as is done under section 8 for split custody is attractive from the perspective of certainty and ease of calculation. However, it does not necessarily take into account the fact that there are additional costs in a true shared custody situation. I have had some success at settlement conferences by suggesting to parties that the calculation be based upon the difference in the table amounts after first grossing up each table amount by 50%. The resultant figure is a compromise but it will sometimes avoid litigation over the issue of whether the 40% threshold has been met. Another alternative is to ignore the table amounts but focus on a "fair sharing" of section 7 type expenses.

¶ 117 In Hunter v. Hunter (89), Justice Brockenshire considered alternative ways of using the tables in the absence of evidence from the parties on their respective costs for the children in the shared parenting situation. He borrowed from experience south of the border to take the difference between the table amounts and then gross up the resulting figure by 50% to estimate the additional costs of the shared parenting arrangement. However, he also divided the figure in half to reflect the principle that the child is with each parent 6 months of the year and no support ought to be paid for the 6 months the child was with the father.

¶ 118 This is similar to the approach of Gruchy J. in O'Quinn v. O'Quinn (December 17, 1997) Halifax Doc. No. 1201-50409 (N.S.S.C.) in which the father, a sailor, was ordered to pay the table amount but only for the months the children were in the wife's care while he was at sea.

¶ 119 Justice Vogelsang considered these precedents and applied them in Burns v. Burns (90), approving the concept of the fractional child. One of three children resided equally with the parents, while two other children resided with their mother on a full-time basis. The father was found to have accommodation, clothing, furniture and other indirect costs for the time the child resided with him, making half the table amount for one child the appropriate sum to be paid by the mother to the father. However, the mother's household enjoyed the economies of scale for more than a single child. The father's obligation was fixed at half the difference between the table amount for 3 children and for 2 children (not half the table amount for one child) with the result that support was determined by using the tables and notionally making the father responsible for 21/2 children and the mother for 1/2 a child. The judge did not overlook the factor of

possible additional costs resulting from the shared parenting arrangements but declined to make any adjustment, absent evidence of same.

SPLIT CUSTODY UNDER SECTION 8:

¶ 120 Split custody is defined as a situation where one or more children live with each parent, and is to be distinguished from shared parenting in which a child spends at least 40% of the time with each of the parents. The method for determining child support is quite simple: you determine the child support that each would pay to the other and order payment of the difference between the two amounts. It is worth noting in passing, however, that under section 13, the court is probably required to make a finding of the income and proper guideline amount for each parent as part of the order for payment.

¶ 121 In Richardson v. Richardson (13), two minor children resided with the mother and a 19 year-old with the father. Because the 19 year-old was not fully dependant on the father, section 8 was not applied, and the father was ordered to pay the full table amount for the two younger children, notwithstanding equal parental incomes.

¶ 122 The situation of split custody was complicated in the Simms v. Simms (68) case by the fact that the three children were not the natural children of the father. On separation, two of the children, i.e. his step-children, lived with him and one child lived with the mother. The table amount he was to pay to the mother for the one child with her was reduced by the amount the biological father was supposed to pay for that child (see section 5 of the Guidelines). The amount that the mother was to pay to the step-father for the two children with him was simply the table amount, but she was also ordered to assign to the step-father the child support order against her first husband.

¶ 123 Having made the determination of the guideline amounts in a split custody situation, the only other potential issue would be whether to modify the amount, based upon section 10. Holtby v. Holtby (5) suggests that in cases of split custody, the court ought to consider whether the children residing with one parent enjoy a significantly different standard of living than the children who reside with the other parent. If there is a significant difference, section 10 may provide some basis for relief. See Scharf v. Scharf (88).

CASES INVOLVING "ADULT CHILDREN":

¶ 124 Section 3(2) provides that for children who have attained the age of majority, the amount of support is to be either (a) the amount determined by applying the Guidelines as if the child were under the age of majority or (b) the traditional Paras-based determination that inquires into the costs for the child and a prorating of those costs according to the relative means of the parents, taking into account the ability of the child to contribute to his or her own support. The wording states that the latter approach is to be used only if the guideline determination is found to be "inappropriate", suggesting that the guideline amount ought to be ordered unless there is good reason to depart from it.

¶ 125 In Nadeau v. Mitchell (14), the court had no difficulty concluding that the child's own income of $7,000 per year made the guideline approach inappropriate. Notwithstanding that there were special expenses for university involved, the amount of support was fixed at approximately $170 a month less than the basic table amount. Similarly, in Finn v. Levine (4), the court used the traditional cost sharing method of determining child support for a 21 year-old university student without regard to the table amount in the Guidelines.

¶ 126 One of the difficulties in using the Guidelines for university or college students who reside away from home eight months of the year is whether or not a guideline amount can even be calculated. In Van Wynsberghe v. Van Wynsberghe (9), the court made provision for support directly to the child for the time the child was out of province as a student but declined to make any order for any table amount on the basis that any expenses were only notional and any payment support to the mother illogical and inappropriate.

¶ 127 In Blair v. Blair (49), the trial judge (who happened to be me) struggled with whether there is a table amount that can be determined if one child resides away from home eight months of the year and another child resides with the mother 12 months of the year. What is the table amount for the second (in this case) adult child? Is it one-half of the table amount for two? No. Is it the difference between the table amount for two and the table amount for one? Perhaps, but that seems to undermine the assumption behind the table amounts concerning "economies of scale" for children residing under the same roof. My conclusion was that on the facts of that case, the table amount, if there was one, must be the table amount for one child, i.e. the table amount for each child was the table amount for one child.

¶ 128 On the other hand, Evans v. Evans (95) Smith J., in a similar case, held that there is no table amount or even "guideline amount" when the child is away at university.

STEP-PARENT OBLIGATIONS:

¶ 129 The first four cases noted in the outline deal with different circumstances and the exercise of individual judicial discretion in each case. In the fifth case, MacArthur v. Demers (109), I offer my own view on how courts ought to exercise such discretion in a structured way.

MISCELLANEOUS CASES:

¶ 130 I will just touch briefly on some of the miscellaneous cases noted in the outline; two that are not noted in the outline are Wang v. Wang (39) and Blair v. Blair (49) which both state that if the parties consent to an order for an amount greater than the amount in the Guidelines, the amount should be ordered on consent.

¶ 131 The Child Support Guidelines survived constitutional challenges in Souliere v. Leclair (93) and Michie v. Michie (94).

¶ 132 The Gray v. Gray (65) and Cuddie v. Cuddie (76) cases deal with financial disclosure. In Adams v. Adams (96), children over the age of majority attending post-secondary school were ordered to file sworn financial statements.

¶ 133 As a result of the father's disability, the child was receiving C.P.P. disability benefits of $166 per month in Van Harten v. Van Harten (92). No credit was given to the father in assessing his child support obligation.

¶ 134 Smart v. Smart (29) and Richardson v. Richardson (13) are cases in which the court takes advantage of its ability to secure child support. It is worthwhile to note that all of the focus on the Guidelines should not distract us from the provisions in sections 11 and 12 of the Guidelines for lump sums for support or security for the payment of support. A lump sum was confirmed on appeal in MacDonald v. MacDonald (1998), 33 R.F.L. (4th) 75 (Ont.C.A.).

¶ 135 Finally, Nadeau v. Mitchell (14) is an example of the court taking full advantage of its ability to order terms and conditions as part of a child support order, including conditions for the child to live up to, such as continuing to seek part-time employment, maintaining passing grades, keeping the parents informed with respect to educational plans, etc., etc. Payments were ordered to be made directly to the child or the educational institution rather than to the mother.

CONCLUSION:

¶ 136 It is difficult to keep pace with the volume of child support cases. As cases reach appeal levels, precedent may be set that will allow for a more consistent interpretation of the Child Support Guidelines.

¶ 137 The Federal Government is creating a data base of cases for the purpose of reviewing the legislation and fine-tuning it. I will conclude by expressing the hope that such a data base is readily available to judges and lawyers so that we can work towards the consistency that is fundamental to the principles underlying a guideline approach to child support.

## APPENDIX

CHILD SUPPORT GUIDELINES: CASE-LAW NOTES

(1) Dodd v. Dodd, [1997] O.J. No. 2076, Dunn J.

The oldest child shows great promise in figure skating but it is expensive for tuition fees, extensive travel and other associated costs. Younger child is a riding enthusiast, also a relatively expensive activity for the parties, whose incomes are $39,000 and $12,000 annually. The combined income of the parties does not permit many expensive frills but it is apparent from the family history that each of the parents is willing to make extra

special sacrifices for the children. Child support ordered in the amount of $680 per month, an amount $123 in excess of the table amount.

(2) Zarebski v. Zarebski (1997), 29 R.F.L. (4th) 93 (Ont.Gen.Div.), G.A. Campbell J.

Mother applies for a divorce but cannot establish husband's whereabouts and, therefore, cannot offer any information about his present income or future ability to pay child support. Mother wishes to provide for son herself rather than prolong the divorce process, trying to locate and get support from a man who abandoned his family two and-a-half years ago. The Divorce Act requires the court to stay the application for divorce if it is not satisfied that reasonable arrangements for child support have been made "having regard" to the Child Support Guidelines.

HELD: Mother's solution was not ideal but "reasonable arrangements" do not have to be "ideal" as long as they are reasonable in the circumstances. The requirement for the court to have regard to the Child Support Guidelines is not absolute and does not compel the court to apply them rigorously. Divorce granted.

(3) Francis v. Baker (1997), 28 R.F.L. (4th) 437 (Ont.Gen.Div.), Benotto J.

(a) Trial Decision

The issue is whether the husband, whose income is almost $1 million annually, should pay child support of approximately $10,000 per month (the straight table amount of support for two children) or whether some lower amount should be ordered. The father (who gave no evidence at trial) submits that the sheer size of the payment based on the table amount makes it inappropriate.

HELD: The concept of the "needs" of the child is not static. Look at the "reasonableness of discretionary expenses" for children of wealthy families. The objective of the Guidelines is to ensure the children continue to benefit from the financial means of both spouses after separation and that they enjoy the benefits of the father's wealth when they are with the mother and not just when they are with the father. Based on projected expenses of $100,000 annually for the children, the court is unable to conclude that the table amount of $10,034 per month for child support for the two children is "inappropriate" and that amount was ordered to be paid.

(b) Court of Appeal

Mr. Baker argued that $10,034 per month amounted to an order for spousal support disguised as child support. The Court of Appeal held that "The Guidelines render irrelevant the debate about the point at which a child support order is, by virtue of its largesse, thereby transformed into spousal support masquerading as child support", at least so far as the basic table amount is concerned. The court held that "The table amounts can only be reduced in the following circumstances: where the child is of the

age of majority or older; where the paying spouse is not the child's (biological) parent; where there is split or shared custody; or in cases of undue hardship. Otherwise the table amounts can only be added to." Therefore, "inappropriate" in section 4(b) is synonymous with "inadequate".

Leave to appeal this controversial decision is pending before the Supreme Court of Canada.

(4) Finn v. Levine, [1997] O.J. No. 2201, Desmarais J.

Application to vary a 16 year-old support order. Twenty-one year old child now a full-time university student. Analysis of expenses directly attributable to his attendance at university assessed at $9,500 and additional needs assessed at $5,500, for a total of $15,000. Expenses apportioned according to the incomes of the parents without regard to the table amount in the Child Support Guidelines but using the Levesque litmus test as a guide (contrast to Blair v. Blair (49) below). Child also expected to contribute $2,000 annually from his own resources in arriving at the costs to be shared by the parents. This contribution by the child represents 50% of his income for the year and child not required to apply all his income to his own "needs" before determining the shares of the parents.

On determination of income, father's income adjusted to reflect an additional attribution of 20% for the personal use of his vehicle, notwithstanding that he is able to expense the entire cost to his real estate business. Father's income also increased by amount that he pays his second spouse as wages because there is no evidence of any service rendered to earn such wages. Finally, though father entitled to deduct capital cost allowance for income tax purposes, that sum is added back into his income for the purposes of the ability to pay child support.

(5) Holtby v. Holtby (1997), 30 R.F.L. (4th) 70 (Ont.Gen.Div.), Aston J.

In determining the issue of variation of child support for any period of time before May 1st, 1997, the traditional test of "material change in circumstances" applies, without regard to the Guideline amount for that period. To retroactively apply the Guidelines, absent a material change in circumstances, would encourage a re-examination of virtually every child support order and a host of practical problems stemming from the sudden creation of arrears or overpayments.

Projected annual income, not historical income, is the income figure to be used for the table amount. Past income is the basis upon which to assess future income, but support will be payable from what the payor will earn, not what the payor has earned.

> "It is worth noting that section 17 addresses fluctuations in a source of income, not fluctuations in total income."

The Guidelines do not necessarily apply but may be used for children 18 years of age or older. The wording of CSG, s.3(2) suggests that the Guideline amount should be used unless the court considers it "inappropriate".

In cases of undue hardship claims under CSG, s.10, the court must have sufficient evidence to enable a comparison between standards of living of the two "households" and not merely evidence of the income of the two parents themselves. In addition, in a case of split custody, the court ought to consider whether the children residing with one parent enjoy a significantly different standard of living than children who reside with the other parent.

Postponement of a substantial portion of an equalization payment by a farmer to his former spouse in order to allow him to maintain a viable farming operation is a "special provision" within the meaning of section 17(6.2) if one or more of the children reside with the father and it is an asset that is being preserved for their ultimate benefit. Even if interest is payable on the postponed equalization payment, the interest should not be applied dollar for dollar to the child support otherwise payable.

(6) Haggith v. Trader, [1997] O.J. No. 2351 (Ont.Gen.Div.), Marshman J.

Husband transferred his equity in the matrimonial home to wife as part of a separation agreement. Value of equity approximately $40,000. In exchange, separation agreement provided for "low" child support but nothing in agreement to indicate what portion of the $40,000 ought to be treated as an ongoing contribution to support of children. Necessary to determine benefit to the children arising from the transfer in order to consider departure from the Guideline amount as a "special provision". The $40,000 was, in part, to satisfy equalization payment husband might have owed and to obtain a release from any claim for spousal support by wife. Court attributes $25,000 to child support. Agreement also specifies that transfer of matrimonial home to be a factor taken into account for the next eight years when considering the issue of child support. Court determines that the reasonable amount of support for the children, absent the transfer of the matrimonial home, would be between $500 and $550 per month, based upon husband's income and application of Child Support Guidelines. Taking into account the equivalence of a $25,000 lump sum for child support in separation agreement, support reduced by $325 monthly to an ongoing figure of $175 to $225 per month.

(7) Rains v. Rains, [1997] O.J. No. 2516, Pardu J.

Father seeks an interim variation of support payable under a divorce judgment from some 16 months earlier, requiring him to pay $1,000 per month for the support of two children based on an annual income of $53,600. Father moved to the United States, where he now earns $3,000 per month. No income imputed to father over and above his actual income at the interim stage because no evidence that he was "intentionally under-employed".

With respect to add-ons, father ordered to contribute 60% of the cost of insurance coverage for the children which had previously been covered through his employment in Canada and 60% of mother's day care costs.

Mother claims an additional contribution for "add-ons" for recreational expenses for the children, such as day camp, soccer, Brownies, swimming, ski equipment, pizza days at school, birthday parties and summer camp, all totalling $3,568 annually for the two children. The court holds that, with respect to extracurricular activities, expenses must be "extraordinary" before additional support payable because ordinary extracurricular activities are subsumed in the table amount. Extraordinary held to mean "activities for which the cost is disproportionately high in relation to the payor's income, which would not be included in the usual allowance for recreation, which is part of the table amount". Skiing expenses held to be "extraordinary" on that basis, but disallowed because not "reasonably necessary" having regard to the income of the parents. Other expenses disallowed as not being "extraordinary" but rather subsumed in table amount.

> "It is not open to a parent to select any recreational activity regardless of cost and then demand the other parent to contribute regardless of cost, arguing that the children will be deprived if they do not have the opportunity. Households in which both parents reside together must moderate their children's recreational activities in light of the cost of those activities and the means of the parents. Unless there is a special need for the activity, the cost of which is disproportionate to the parents' incomes, no contribution should be required from the non-custodial parent."

(8) Martin v. Girard, [1997] O.J. No. 2517, Kozak J.

Table amount for child support would require non-custodial mother to pay father $379 monthly, based on her $26,000 annual income. Mother pleads undue hardship, relying on high level of debt as a result of returning to school, obligation to support a second spouse, monies required to purchase clothing and a vehicle to better facilitate her employment, and significant access costs because of the distance between her home in Kingston and father's home in Thunder Bay. Taking into account these factors and the evidence in support of same, "as well as what is in the best interests of the children", mother relieved of any obligation to pay child support.

(9) Van Wynsberghe v. Van Wynsberghe, [1997] O.J. No. 2566, (Ont.Gen.Div.), Vogelsang J.

Motion for interim support. Husband's car allowance valued at $500 monthly and added to his income for the purposes of Guideline determination. Each parent earning $67,000 per annum. Wife claims additional "add-ons" for school fees, music, drama, vocal lessons and other activities.

> "The table amounts increase with the income of the payor and reflect additional expenses presumed to incur as financial circumstances

> escalate. With the exception of the vocal lessons, the expenses appear ordinary and, therefore, not recoverable."

Adult son committed to a compressed post-secondary school education in a ten month period at the Vancouver Film School to prepare himself for a life in the film industry, a very intensive and specialized course of study. Also very expensive. Parents to subsidize son's decision and cannot dictate that he undertake a more traditional and lengthy course of instruction at a community college or university. Mother also seeks table amount from Guidelines for son's support while son is in Vancouver.

HELD: No justification for such order as nothing in material to support the existence of any expense incurred by the mother while he resides in Vancouver and "receipt of the table amount for his notional care ... completely illogical and inappropriate".

(10) Shelleby v. Shelleby, [1997] O.J. No. 2608, Pardu J.

Issue is determination of husband's income for purposes of interim child support - declared income $47,000, but husband operates a business owned by his parents and

> "it is clear that he has been able to freely resort to these corporations for his personal expenses in ways that are not apparent in the financial records of the company."

Reference made to life styles of the parties prior to separation, including standard of living enjoyed by children, to assist in determination of his income.

Reference to CSG, s.18 as to husband's ability to draw money from the corporation, which was earning an annual profit of $133,000. Conclusion that husband has the equivalent of $150,000 annual income, supported by "cogent evidence" of the voluntary support and expenses he paid in two years following separation.

Husband pays for children's recreational expenses and extracurricular activities when they are with him. Others paid by the wife not "extraordinary" and, therefore, subsumed in the table amount for child support.

(11) Bevand v. Bevand, [1997] O.J. No. 2661, Perkins J.

Application for child support under the Family Law Act. Should the court assess the quantum using the Federal Child Support Guidelines?

HELD: Court's examination of the provincial Bill not yet law could be regarded as premature and a speculative exercise but, on the other hand, there is little use in making a quantum determination without regard to impending provincial guidelines if the result if only to provoke a further variation proceeding in the near future. Court resolves that the sensible way is to examine the payor's obligations, both with and without regard to the

proposed Guidelines, however, because not enough evidence before the court to apply the "Paras" approach support determined using the table amount in the Federal Guidelines.

(12) Ninham v. Ninham (1997), 29 R.F.L. (4th) 41 (Ont.Gen.Div.), Aston J.

Divorce Act requires the court to satisfy itself that reasonable arrangements have been made for the support of children and to otherwise stay the granting of the divorce. Court able to readily determine the amount of child support under the Guidelines but not satisfied that the father would honour such order, nor that the mother would take any steps to enforce it. Divorce, therefore, stayed until court could be persuaded that the child support payments ordered were, in fact, being made.

Because divorce action stayed, child support determined under provincial law. Both parties asked the court to decide child support under the new Federal Guidelines and no reason not to do so.

Income figures for each spouse have to be adjusted upwards because their native status exempts them from federal income tax. Father deliberately inaccurate in his financial information, but the court has no basis upon which to attribute income to him over and above the amounts set out in the pay stubs filed as evidence of his income. Father ordered to pay solicitor and client costs.

(13) Richardson v. Richardson, [1997] O.J. No. 2795, Kealey J.

Parties each earn $45,000 annually. Two minor children reside with mother and 19 year-old child resides with father. Father to pay mother table amount of child support for two youngest children. Older child not fully dependent on father so as to merit father's suggestion that he only pay for one child, pursuant to section 8 of the Child Support Guidelines.

Mother permitted to withhold from the equalization payment that she owes the sum of $12,000, to be set aside in an interest-bearing account from which she may take unpaid support obligations. Balance in the account, if anything, to be paid to father when the children are no longer dependents.

(14) Nadeau v. Mitchell, [1997] O.J. No. 2833, supplemental reasons [1997] O.J. No. 3440, Jarvis J.

Father's base salary $106,000. In past year, he received a discretionary bonus of $14,000 and no evidence that he would receive similar bonus in 1997 but no evidence that he would not. Father's income assessed at $120,000 for child support purposes.

Child over the age of 18 and table amount considered "inappropriate" having regard to child's own income of $7,000 annually. Table amount of $918 per month reduced to $750 per month.

Child incurring riding expenses of approximately $900 monthly. Evidence to support the conclusion that riding has been both a positive and a negative element for the child - a benefit to her emotional health when she was having some difficulties in the past, but a negative in that it effectively slowed down her educational progress. Court holds that riding is a luxury she can no longer afford and that continuation is not in her best interests or a wise expenditure of her earnings. Therefore, riding expense not included in claim for "add-on".

Court takes advantage of its ability to order terms and conditions as part of the child support order, namely, (1) child to execute an authorization to her school so that father can get information directly concerning her academic results, tests, assignments and grades, as well as attendance; (2) child to continue to seek part-time employment; (3) parental responsibility for higher education limited to one under-graduate degree at an educational institution within the vicinity of Metro Toronto or such other location as the parents agree; (4) child to live with mother while taking under-graduate degree unless the father agrees otherwise; (5) child's choice of under-graduate courses to be arrived at in consultation with parents, who are not unreasonably withhold their consent; (6) child's school and living expenses to be arrived at annually in advance by consultation between child and parents and to include tuition and related educational costs, including books, meals away from home and reasonable recreational activities and vacation costs; total agreed upon to be shared by child, father and mother in proportion to their incomes; (7) should child fail sufficient courses that admission and/or participation in school is denied for the following academic year, parents' obligation to contribute further to her school shall forever cease unless they choose to do so voluntarily; (8) should child ignore reasonable request from father to consult regarding educational plans or refuse to respond to reasonable written requests for educational information, father's obligation to pay support to cease; and (9) all payments by the father to be made directly to the child or to the educational institution (rather than to the mother).

(15) Sagl v. Sagl, [1997] O.J. No. 2837, E.M. Macdonald J.

Father deliberately withheld his tax return so as to render it more difficult for the court to calculate his income and apply the Guidelines.

HELD: Father's income $275,000 annually and table amount ordered. No additional amount ordered for private school fees because of relatively high amount for child support and substantial spousal support of $4 million lump sum to be paid in quarterly instalments of $400,000.

(16) Estrela v. Estrela, [1997] O.J. No. 2916, Jarvis J.

Husband claimed to have an income of barely $20,000 annually but did not produce tax returns or adequate supporting documentation. Financial statement for his business indicated that many personal expenses were paid for him by the business and, though difficult to quantify, supported a finding that his true income was no less than $45,000 annually.

Father ordered to pay 69% of day care expenses of mother, representing pro-rating of their respective incomes. Father also ordered to pay a similar percentage of any future educational expenses or reasonable additional day care or baby-sitting fees that mother incurs after the date of the order.

(17) Westcott v. Westcott, [1997] O.J. No. 3060, Perkins J.

Difficulties of determining income of self-employed father discussed on motion for interim child support. Court rejects father's assertion that his real estate commission income in 1997 will be less than he earned in 1996.

> "Everyone knows that the economy and the real estate market were generally performing at least as well in 1997 as 1996. In the absence of any evidence of why the father's income should have dropped in 1997, the court will use his 1996 income as the base for assessing his means."

Evidence with respect to brokerage income less clear and, though father earned $100,000 from this source of income in 1996, a course of caution adopted at the interim stage and income assumed at $75,000 from this source.

Spousal support payable by father to mother not deducted from his income in determining the basic table amount for support. N.B.: Section 3 of Schedule III of the Guidelines.

(18) Claridge-Skof v. Skof, [1997] O.J. No. 3112, MacDougall J.

Tax deductible child support of $1,300 monthly ordered on consent July 1st, 1996. Net cost to payor approximately $800 monthly and net benefit to recipient $1,040 monthly. If the court is to make a variation based on May 1st, 1997 Guidelines, it must do so according to the Guidelines. In considering whether a variation should be made, the court begins by considering the non-taxable/deductible payments under the Guidelines, in this case $705 per month from the table amount, and an additional $90 for "add-ons", a total of $795 per month.

HELD: The children would suffer a significant loss if the payment was required to be made pursuant to the new Guidelines because there would be no benefit to the father, and the mother would receive substantially less after-tax support. Application to vary child support by father dismissed.

(19) Asadoorian v. Asadoorian, [1997] O.J. No. 3115, Fleury J.

Court urged to use Paras formula rather than Federal Guidelines because Provincial Guidelines not yet law. Court, nevertheless, uses Federal Guidelines in anticipation that the province of Ontario will apply the same Guidelines in pending legislation.

(20) L.H.H. v. D.J.M., [1997] O.J. No. 3218, Kozak J.

Issue is how to factor in father's obligation to pay child support for another child of a different relationship. Mother of three children applies for child support, and table amount based on father's income would be $779 per month. Father also paying $300 per month support for a fourth child, residing with a different mother.

HELD: Father should pay to the mother of the three children an amount of $630 per month, calculated as the Guideline amount for four children ($930 per month) less the $300 he is paying for the fourth child. The $630 per month is apportioned $600 for the two biological children of the father and $30 for the step-child included in the claim by the mother of the three children (i.e. father ends up paying $300 per month for each of three biological children and $30 per month for step-child).

(21) Anderson v. Anderson, [1997] O.J. No. 3219, Jenkins J.

Father requests a reduction from the Guideline amount, based on additional costs he incurs for access necessitated by mother's move to Newmarket, arguing he ought not to be penalized by her decision.

HELD: Except in cases of shared parenting under section 9 or as part of an undue hardship variation, there is nothing in the Federal Child Support Guidelines that allows for any reduction based upon the father's access costs. No reduction ordered.

(22) Gordon-Tennant v. Gordon-Tennant, [1997] O.J. No. 3436 (Ont.Gen.Div.), Aston J.

Where support is ordered pursuant to a non-Canadian divorce decree, the Federal Child Support Guidelines do not apply and the recent introduction of Guidelines does not constitute a material change in circumstances.

Amendments to the income tax that came into force May 1st to dovetail with the amendments to the Divorce Act, and the new Child Support Guidelines provide that if the court makes any order for support after May 1st, 1997, support is no longer deductible or taxable. After-tax cost to father of existing order of $1,250 per month approximately $650 monthly. New Guideline amount, based on his income, together with section 7 add-ons, would probably result in a support order of $600 to $650. Therefore, no after-tax difference for father, but after-tax benefit to mother (who resides in New York) would be reduced by almost half and, therefore, not in the child's best interests to make any order but rather to leave previous order in place.

(23) Forrester v. Forrester, [1997] O.J. No. 3437 (Ont.Gen.Div.), Vogelsang J.

Mother advances large claim for add-ons, having enrolled daughter in a great number of activities, such as a variety of day camps (which she called a form of child care) and also claims reimbursement for baby-sitting expenses when mother goes out to the theatre, cinema, mediation sessions or out to dinner herself.

HELD: Mother had erroneously abrogated to herself the right to decide what expenses would be incurred and for which the father would have to contribute, but the Guidelines are not intended to grant the custodial parents a licence to enrol the child in lavish, additional activities and then to demand automatic contribution. Each expense first has to be considered for its necessity in relation to the child's best interests and its reasonableness in relation to cost. In addition, extracurricular activity expenses not only have to meet the threshold tests of necessity and reasonableness, but also must represent an unusual cost not subsumed in the ordinary payments expected by a family manifesting the same means. As for baby-sitting expenses, costs that are not "incurred as a result of the custodial parent's employment, illness, disability or education or training for employment" are not recoverable under the Guidelines.

(24) Quintal v. Quintal, [1997] O.J. No. 3444 (Ont.Gen.Div.), Aston J.

The issue is what income is to be used in assessing father's child support obligation. Subsection 19(1) of the Guidelines provides the court "may impute such amount of income to a spouse as it considers appropriate in the circumstances" and the subsection then goes on to list a number of specific circumstances. The listed circumstances do not purport to be comprehensive and do not interfere with the power of the court to impute income in other circumstances. It is not necessary to make a finding that the father is "intentionally unemployed" in order to impute income to him. Father wants to work, expects to find employment, which alone justifies imputing income to him in the reasonably foreseeable future but the difficulty is to assess how much income he may earn and when that income might start. Court quotes Wong v. Wong (1990), 27 R.F.L. (3d) 215 (Ont.C.A.) which held that to impute income without any evidentiary basis is a reversible error.

HELD: Evidence of job history skills, apparent good health, earnest effort to find employment all allow a finding that father capable of earning not less than $25,000 annually within six months.

HELD: If father finds employment more remunerative than that which is assumed in assessing his child support obligations, a retroactive adjustment can always be made.

(25) Irwin v. Irwin, [1997] O.J. No. 3892, Roy J.

Father's 1996 income tax return discloses income of $212,000 annually. That figure is adjusted by the court to add in the personal benefit for car expenses, rent, travel and public relations expenses that are deductible for tax purposes but for which he derives a personal benefit. Court also then reduces income to reflect part of the cost of a loan for constructing home office. Father ordered to pay Guideline amount for three natural children.

Issue with respect to step-son. No evidence as to why natural father of that child is not paying support. Step-parent respondent ordered to pay child support for step-son for a

period of one year at one-half of the Guideline amount so that parties will have one year to adjust and step-son to become the responsibility of mother and natural father.

(26) Parsan v. Parsan, [1997] O.J. No. 3918, McCartney J.

Father paying $500 monthly, tax deductible, applies to have support determined under Guidelines, based on $10,000 reduction in his income. However, Guideline amount of $300 not substantially different from after-tax cost of existing order and court declines to make any order in dismissing application to vary.

(27) Meloche v. Kales (1997), 35 O.R. (3d) 688, Cusinato J.

How does the court determine shared custody under section 9 of the Guidelines and calculate whether a parent has the child not less than 40% of the time over the course of a year? Mother was granted custody seven years earlier and the child had his ordinary residence with her but, in 1996, the child was placed in a special school for the hearing impaired in London while mother continued to reside in Windsor. From September to June each year, the child resided in London during the school week, from Monday morning until Friday evening. Father had access alternate weekends and other specified times, including two weeks each summer and other holiday access. Father argues that by excluding the time that the child is residing in London, he and the mother each essentially have equal amounts of time with the child and that they each have more or less equal expenses for the child; therefore, that no support ought to be payable by him to the mother. The court notes that unless the applicant meets the criteria of section 9 and establishes "shared parenting", then no account is to be taken for access costs or any other expenses incurred by the support payor in caring for the child. The court rejects the father's position and starts with the assumption that the custodial parent has 100% of the time subject to evidence of the actual physical custody or physical access of the non-custodial parent.

> "The fact that the custodial mother may now be receiving additional benefit because the child is at school for a good portion of the week is not alone justification for a reduction of the child support."

The court accepts the mother's evidence that the child's attendance at school will cause little or no reduction in her expenses; that although her weekly grocery expense will be reduced, there are other expenses she has for the child such as providing an allowance, weekly supplies and a travel expense for her to go to and from London. The judgment quotes Hall v. Hall (1997), 30 R.F.L. (4th) 333:

> "The legislation may require this court to count the hours for which each parent has responsibility but I do not think that the court has to interpret the legislation in a way which requires it to inquire into the sleeping patterns of the children."

By extrapolation, the court should not be required to count the hours when the child is not in the actual presence of the custodial parent because the legislature surely did not intend that when the child is in school, away on holidays, with friends or with grandparents, that this mandate a consideration by the courts as to whether the non-custodial parent was with the child 40% of the relative time each of the parents spends with the child. Father's position rejected.

Although this case seems unusual on the facts, it might be a useful reference for children who are away at college or university eight months of the year.

(28) Kowalski v. Kowalski, [1997] O.J. No. 4050 (Ont.Gen.Div.), Marshman J.

Son's equipment for hockey goalie found to be an extraordinary expense but no evidence that such expense will definitely be incurred in the future. In the event that they are, Mr. Kowalski to share proportionately in the expense. Expenses for driver's education, upgrading of the computer and participation in football not extraordinary and no adjustment made.

(29) Smart v. Smart, [1997] O.J. No. (Ont.Gen.Div.), Vogelsang J.

Husband's declared income $400 monthly; he is not really looking for work. Court takes into account his "specialized skills in painting and decorating work" and his possession of equipment and machinery for that trade in attributing to him an annual income of $22,000 "at least as large as the income of the wife". In coming to that figure, court determines that husband has a past practice of concealing income from tax authorities.

Court goes on to conclude from the evidence and demeanour of the husband during the trial that he will refuse to pay the child support of $192 monthly, based on that attributed income, and that any enforcement steps would be futile, After referring to those cases which caution against a redistribution of family property assets in the guise of support, the court orders that the monthly payments should not be converted to a lump sum but that the equalization payment of $18,500 owing by the wife to the husband should stand as security for the support payments so that the wife holds that sum in trust for her son and may reduce the amount payable every month by any amount of child support that is not paid by the father. Balance of equalization payment, if any, delayed until the son turns 20 years of age in the year 2005 or ceases to be a dependent within the meaning of the Act, whichever first occurs.

(30) Marck v. Parrotta-Marck, [1997] O.J. No. 5578, Hurley J.

Father's income $195,000 annually. Income tax amendments extinguish "tax holiday" on deferred income and require him to pay $10,000 annually as additional income tax. Table amount for support using percentage applicable on income over $150,000 would amount to $2,390 per month. Father content to pay the set amount on the first $150,000 of his income but argues that percentage on excess income should be reduced by half because of situation concerning deferred income tax and because of expenses

which he pays while two children are with him. Disposition of custody claims resulted in parents having the children half the time each, thereby bringing section 9 into play. Court accepts father's position and fixes child support at $2,000 monthly with specific provision that mother be responsible for paying all of the costs for the children for clothing, incidental school expenses, recreational and activity costs from the support, and father to pay the orthodontal expense.

(31) Tallman v. Tomke, [1997] A.J. No. 682, Wilson J.

Parents not married. Nevertheless, take the position that the federal support guidelines should apply. Court accedes to that request with reservations.

Re: "special expenses" - mother's claim for her own expenses in attending at the hospital for child's treatment, including her travel costs, parking and meals, disallowed as not within the definition in CSG, s.7(1)(c).

Claims for special tutoring and schooling, swimming lessons and horseback riding lessons allowed in part as "reasonable" but amount reduced significantly because of custody parent's failure to provide receipts or specific evidence on the cost.

Father's claim for relief based on undue hardship -

> "The regime of the guidelines is that they must be applied. The court is given no discretion to fudge them if there is no finding of hardship."

(32) Andries v. Andries, June 2, 1997 (Man.Q.B.) Menzies J.

(a) (1997), 119 Man.R.(2d) 224, Menzies J.

Custody parent qualified for "Pharmacare assistance" if she would apply. Fails to explain her failure to take advantage of the program. Available Pharmacare benefits taken into account to reduce her claim for prescription and eye glass expenses for the children.

Claims relating to swimming pass and registration ($215 annually) and baseball ($100 annually) disallowed as not being "extraordinary" but within the basic table amount.

Because children reside in a small town, there are additional expenses for out of town travel relating to sporting activities. Mother allowed travel costs of $500 as extraordinary expense for transportation based on 2,576 kilometres annually, at 20[cents] per kilometre.

Retroactive child support ordered in a lump sum of $4,754 based in part upon application of the Guideline amount for the period February 1, 1995 to May 1997.

(b) (Man.C.A.) [1998] M.J. No. 196, per: Twaddle J.A.

The Court of Appeal determined that the mathematical application of the Guidelines to the period before May 1, 1997 as the measuring stick for retroactive child support was "clearly wrong". The Court also held that section 15.1 of the Divorce Act does not give the court jurisdiction to order child support before the inception of the divorce proceeding. A retroactive award of $3,000 was sustained on other principles.

The Court of Appeal dealt extensively with the meaning of "extraordinary" expenses in the context of extracurricular activities. The Court started with the assumption that the special expenses for child care, medical and dental insurance premiums, health care and post-secondary school education are "special" in the sense that no part of them was taken into account in fixing the amount payable under the tables.

> "Thus, by way of example, every penny spent on post-secondary education expenses is in addition to the expenses for which allowance has been made in the tables and a non-custodial spouse may be required to contribute to them in proportion to his or her income if two conditions precedent are met. These conditions are:
>
> (i) that the expense is necessary in relation to the child's best interests, and
> (ii) that the expense is reasonable having regard to the means of the parents and those of the child and to the family's spending pattern prior to the separation.
>
> A judge has a modicum of discretion in deciding whether the expense is necessary and reasonable, but must otherwise require a non-custodial parent to contribute to special expenses."

That beginning assumption by the Court of Appeal is questionable. The economic studies of average spending on children that are the basis of the table amount do, in fact, take into account all expenses for children, including day-care, health care and post-secondary school spending.

The Court of Appeal specifically rejects the approach adopted in Rains which linked "extraordinary", at least in part, to the income of the non-custodial parent. The Court of Appeal also specifically rejected the Middleton v. McPherson approach which did not take into account the payor's means but equated "extraordinary" with "voluntary".

The approach adopted by the Court of Appeal is to determine whether an expense is "extraordinary" by looking at the expense itself rather than the activity. So, for example, if the average cost of downhill skis is $500, then $500 for downhill skis is not an extraordinary expense but $1,000 would be. The judge would be required to apply the tests of necessity and reasonableness before determining whether the payor should contribute to the expense, but the initial determination of "extraordinary" does not involve consideration of the payor's means or whether the expense is reasonably necessary or part of a pattern of spending by the family before parental separation.

In the end, the father's appeal on the travel costs relating to out of town sporting activities was allowed. The expense was found to be extraordinary but not necessary because the mother did not need to accompany her 13-year-old to all of his games and gave no evidence as to why she could not share travel expenses with other parents.

The decision should be compared to the Nova Scotia Court of Appeal decision in Raftus v. Raftus noted below.

(33) Schick v. Schick, [1997] S.J. No. 447, McIntyre J.

Mother's income in prior year $14,500. Currently, her hours cut back for reasons beyond her control and her present income annualized at $11,829. Current earnings information used as the amount for the Guidelines rather than historical information. (See CSG, s.2(3)).

Both sides submit that spousal support payable to mother by father to be added to her income for the purpose of determining child support obligation but specific provision of section 3(1) of Schedule III excludes that amount and court has no jurisdiction to accede to the argument advanced by both counsel. Father ordered to pay $1,000 monthly as spousal support but mother's obligation to pay child support limited to her employment income of $11,000 annually.

(34) Hoover v. Hoover, [1997] N.W.T.J. No.49, Vertes J.

Re: "special expenses". The categories itemized in sub-paragraphs (a) through (f) of CSG, s.7 are exhaustive. Therefore, even if the custodial parent does have some extraordinary expense in relation to the children, if it does not fit into one of these categories, it will not be considered.

School activities, school supplies, school dances and the like, as well as recreational activities such as swimming, bicycling, going to the movies deemed to be "ordinary" and no allowance made for them.

One exception made with respect to computer equipment. Though computers are quite common in schools and there is nothing unique or exceptional about using a computer in one's studies, not every child has ready access to a computer. Mother claims $178 per month as the cost of computer equipment and supplies to aid in the children's education. Expense allowed as "extraordinary" within the meaning of subsection 7(d). Also found to be a necessity in relation to the children's best interests as an aid to their education and reasonable as to the amount of the expense. (See Thomson v. Howard (59) for an opposite conclusion).

With respect to "undue hardship", the circumstances listed in subsection 10(2) are not an exhaustive list of what constitutes undue hardship but are indicative of the type of circumstances that are contemplated.

> "The discretion to invoke this ground is, therefore, somewhat circumscribed."
> "The fact that the stipulated amount of support determined by the Guidelines may be low and may result in hardship to the custodial parent does not, in and of itself, appear to be the type of circumstance contemplated by subs.(2). Perhaps the policy-makers, in crafting the Guidelines regime, considered that there would be some 'hardship' in all parental separation situations but only 'undue hardship' would qualify for special dispensation."

The father was successful in reducing the amount of support he was obliged to pay before the introduction of the Guidelines, the court accepting the argument that the Guidelines cannot impute "undue hardship" to a reduction in support resulting from the very application of the Guidelines.

> "The fact that some support orders would be rolled back as a result of the application of the Guidelines must have been foreseen by Parliament. Unfortunately, from the mother's perspective, this is one of those cases."

(See Wang v. Wang (39) below for an opposite conclusion).

Disability payments, not taxable, must be grossed up for notional taxes in order to apply the Guidelines.

(35) Middleton v. MacPherson (1997), 29 R.F.L. (4th) 334, Moreau J.

Joint custody; child spends equal time with each parent; father earns $31,000, mother $14,500 annually.

Father covers second spouse as well as child on his health and dental plan; since "family premium" not increased because of child not proper to consider his cost as an "add-on".

The "undue hardship" test involves an inclusion of the incomes of all household members, but if the new partner pays support, that should be taken into account, i.e. reduce the income of that household.

Calculation of time under section 9: one option is to consider the arrival at the parent's home as a day with that parent (and not the other parent), but apportionment of a day may be necessary for non-overnight mid-week access. (What about non-overnight weekend access?). Once the 40% threshold is met, the broad discretion under section 9 does not preclude a section 8 type of calculation.

(36) Hansen v. Hansen, May 6, 1997 (S.C.B.C.) McEwan J.

How close is "close enough" under section 11(1)(b) Divorce Act?

Based on father's income of $40,000 per year, the table amount from the Guidelines for two children is $564 per month. Husband paying $470 per month "one way or the other" for the support of the children, being $350 as defined child support in the separation agreement plus additional sums for recreational activities, school supplies, clothing, etc. Father's application for a divorce refused, pending evidence of or satisfactory arrangements for the support of the children or more convincing evidence that such arrangements would constitute undue hardship.

(37) Hall v. Hall (1997), 30 R.F.L. (4th) 333, Master Joyce

Life insurance premiums paid by the non-custodial parent to provide security for support payments are not considered a "special provision" within the meaning of section 15.1 of the Act so as to enable the court to depart from the Guideline amount. "Special provision" must be one which replaces the need for ongoing support for the children. The life insurance policies, while they may be a wise expenditure of money and good insurance against the financial consequences of the loss of a parent, do not replace a need for ongoing support during the life of the parent. They merely protect against a contingency which one assumes will not occur.

Medical and dental insurance provided by the non-custodial parent are also disregarded under the special provisions exception. Even if they could be considered special provisions, the application of the Guidelines including, specifically, section 7(1)(b) which provides for payment of medical and dental insurance premiums, apportioned between the parents would not result in an amount that is "inequitable".

Having determined the amount payable under the Guidelines, the court has two options: (1) make an order under the Guidelines, or (2) dismiss the application and let the separation agreement continue to govern. Since an order under the Guidelines would be more costly to the non-custodial parent after tax than the current agreement, and the custodial parent is content with the terms of the agreement, the application was dismissed.

(38) Rudachyk v. Rudachyk, May 29, 1997 (Sask.Q.B.) Gunn J.

Father transferred land and buildings to a company on a tax deferred basis, using section 85(1) of the Income Tax Act, receiving in exchange certain shares and a promissory note for $184,300. Husband receiving $64,000 in addition to his salary from the company, as a partial repayment of the promissory note. That amount considered a return of capital and not income as defined in the Income Tax Act or the Child Support Guidelines and, therefore, ignored for the purposes of determining quantum of child support.

(39) Wang v. Wang, [1997] B.C.J. No. 1678, Saunders J.

In June 1996, father was ordered to pay $3,000 per month in child support. On the coming into force of the Guidelines May 1st, 1997, he applied to reduce the support payable. The court noted that if the court now makes a support order, it must do so in

accordance with the Guidelines. However, this still leaves the question: is a court compelled to vary a child support order made before May 1st, 1997 simply because the Guidelines are now in effect? The court holds that the language of sections 15 and 17 of the Divorce Act is discretionary in that it begins with the words "a court ... may make an order ...". Even though the coming into force of the Guidelines is deemed to be the required change in circumstance to allow reconsideration of support previously ordered, the application by the father was dismissed. The court also notes that Parliament's intention must reflect the fact that a consent order may be made outside of the Guideline amount provided the court is satisfied that it is reasonable. One would, therefore, expect that all orders higher than the Guideline amount would meet that test and, therefore, a pre-existing order for a higher after-tax amount should not be varied. (See also Blair v. Blair (49) below).

(40) Williams v. Williams, [1997] N.W.T.J. No. 49, Vertes J.

Claim by father with custody for increased child support based upon a reduction of his income from $80,000 to $64,000. Court holds that reduction in father's income is "to put it bluntly, irrelevant under the new regime created by the Guidelines".

Mother claims reduction in support based upon high expenses of exercising access between Nova Scotia and the Northwest Territories. Court rejects this, saying that there is nothing "unusual" about the high costs of travelling between Nova Scotia and the Northwest Territories. Mother cannot say on one hand that she made a bona fide choice in moving to Nova Scotia and then ask to be relieved from the costs that would clearly have been foreseeable. Her expenses, while high, are not unusual.

(41) Kaderly v. Kaderly, [1997] P.E.I.J. No. 74, Jenkins J.

Father's costs for exercising access (travel) and long distance telephone approximately $10,000 annually. No reduction in child support because his household standard of living is higher than mother's.

(42) C.H.R. v. E.B.C., [1997] A.J. No. 56, Veit J.

The introduction of the Guidelines generally makes an inquiry into the expenses for the children unnecessary. The "Levesque litmus test" no longer applies and has been replaced by the Guidelines.

(43) Hughes v. Bourdon, [1997] O.J. No. 4263, August 5, 1997, Aitken J.

Respondent father's income $38,664 per annum. Table amount for child support $335 monthly. Court declines to apply the Federal Support Guidelines retroactively to January 1st, 1997 but does make the child support retroactive to May 1st, 1997, when the Guidelines came into force.

Respondent father has custody of two children from a prior relationship and receives no support for them. Applicant mother satisfies the court that day-care expenses are necessary and reasonable, but court declines to make any order for payment of same, even though father's income twice as much as mother's, because father simply cannot afford to make the payment. Court also exercises its discretion under section 10 (undue hardship) to reduce table amount of support from $335 to $300 monthly. In exercising discretion under both section 7 and section 10 of the Guidelines, the best interests of all children are to be considered, not just the child who is the subject of the litigation.

(44) Smith v. Smith, [1997] O.J. No. 4833, November 19, 1997, Ferguson J.

Mother earns about $15,000 annually and father $55,000. Both have remarried. Father ordered to pay table amount of $991 monthly; new amount increases by $119 monthly the after-tax amount to the mother, but the after-tax cost to the father is an extra $300 per month. Court declines to make any order for extracurricular activities under section 7 and, in doing so, holds that the income of the new partners of the spouses is irrelevant to section 7 considerations because the new partners have no obligation to pay child support for the children. Court also finds that none of the expenses could be considered "necessary" in relation to best interests of the children, nor are they consistent with family spending pattern before separation.

(45) Pepin v. Jung, [1997] O.J. No. 4604, July 22, 1997, Aitken J.

Mother's income $65,000 and father's income $60,000 annually. Two boys, ages 13 and 10, enrolled in a competitive soccer program involving significant expenses, including out of country trips. Estimated cost $9,500 annually.

Father ordered to pay basic table amount of $823 monthly and an additional amount under section 7 for extracurricular activities. Court holds that the children are highly talented soccer players who may have opportunities in the future to play at a provincial, national or international level, either as amateurs or professionals, and that their talent may bring them offers of scholarships at colleges or universities. However, taking into account the means of the parties and the reasonableness of forcing them to contribute to an expense of this magnitude, the court considers that the father should only contribute $1,920 annually towards the expense, an amount significantly less than he would have to contribute by simply prorating the incomes of the mother and father, notwithstanding section 7(2). Court also considers that the father was not consulted and had no say in the decision to involve the children in soccer at this level and that it would be unreasonable to force him to make the personal sacrifices necessary to subsidize that decision.

(46) Chaput v. Chaput, [1997] O.J. No. 4924, Ferguson J.

Mother earns $45,000 annually; father $24,000. Father to pay basic table amount of $217 monthly. Mother claims a contribution to the day-care costs of approximately $2,400 annually. Considering the disproportionate incomes of the parents and the father's access

costs of $40 per weekend plus transportation relating to access, the court declines to order him to make any contribution to the day-care.

(47) Simon v. Simon, [1997] O.J. No. 4145, October 17, 1997, Kealey J.

Parents entered into a separation agreement whereby father required to pay $2,200 monthly child support. His income as a professional hockey player at that time $180,000 (U.S.) per annum. Mother applies for an increase in child support when father signs a new two-year contract for an income of more than $1,000,000 per annum. Table amount would be $9,127 per month. Court satisfied that the substantial income of the father is a relatively short-term thing and that when his playing career is over, he will be left to rely on whatever he has been able to invest. Mother's budget of $6,085 per month as expenses for the child held to be unreasonable. Furthermore, "it would be unfair and clearly not in the best interests of any child to experience luxuries and a life-style that will be of relatively short duration and then suddenly reduced". Support ordered at the rate of $5,000 per month, of which $1,000 is to be paid into an interest bearing trust account for the child's future needs. This case is in contrast to the decision in Francis v. Baker but the two cases are not necessarily inconsistent because of the distinguishing facts in Simon (i.e. the temporary nature of father's exceptional income and the finding that the mother's child care budget of expenses in Simon is unreasonable).

(48) Jackson v. Jackson, [1997] O.J. No. 4790, November 24, 1997, Pardu J.

Father is the beneficiary of a substantial trust fund which pays him $25,000 annual non-taxable income plus an additional annual sum of $105,000 representing encroachment on the capital of the trust. Husband a former police officer, now works as a part-time school bus driver, earning $351 per month.

HELD: Income for the purposes of the Guidelines is not limited to "income" in the traditional sense. For example, the Guidelines envisage many costs for which parents may be obliged to resort to capital, such as university or orthodontal expenses. Husband definitely under-employed and has significant assets which could generate an income if liquidated but the court does not, on an interim basis, attribute income to him. Rather, the court does include $105,000 available to him annually as a "benefit from the trust" even though it represents a capital payment. Together with other investment income, husband's annual income $188,000. He is ordered to pay the table amount (including percentage calculation) in the amount of $2,158 monthly.

(49) Blair v. Blair (1998), 34 R.F.L. (4th) 370 (Ont.Gen.Div.), Aston J.

Two children; younger at home all year, the other is away at university eight months a year. Based upon father's annual income of $75,000, the table amount for one child is $607 per month and, for two children, $980 per month. Father ordered to pay $672 monthly for the youngest child, being the table amount of $607 plus $65 per month as his share of certain extracurricular activities, such as music and drama expenses, driver's education and the like. Court finds that the expenses claimed do not meet the test under

section 7 and would be subsumed in the table amount but for the agreement of the parties. "It is hard to imagine why a court would refuse to make a consent order for an amount greater than the Guideline amount".

The second child had attained the age of majority and was away eight months of the year as a university student. Support is, therefore, to be the Guideline amount "as if the child were under the age of majority" or the amount that would be "appropriate" if the Guideline amount is "inappropriate". What is the table amount for the second (adult) child? Is it one-half of the table amount for two children? (no). Is it the difference between the $980 for two children and the $607 for one child under the table? (no, because the assumption behind the table amount concerning "economies of scale" for children residing under the same roof does not hold true). The table amount for the older child, if there is a table amount, must be $607 per month. Court then analyses the evidence in relation to the expenses for the adult child and pro-rates those expenses as between the parents and without considering any spousal support to be paid by the father to the mother. Conclusion is child support of $619 per month. Child support ordered at $607 per month because the small difference between the two figures does not make the Guideline amount "inappropriate".

Court then determines spousal support, having fixed the obligation for child support for the two children, and orders the husband to pay $300 monthly.

Section 3(2) of Schedule III of the Guidelines then requires a reassessment of the section 7 add-on expenses after determining spousal support. The spousal support of $300 monthly reduces husband's share of total income from 63% to 60% and reduces the section 7 add-on for the youngest child from $65 monthly to $62 monthly. Because the parties agreed on $65, the amount is not varied in the circumstances of this particular case.

(50) Prince v. Prince, [1997] N.S.J. No. 433 (N.S.C.A.), October 30, 1997

Child support was determined by the trial judge before the Child Support Guidelines came into force. The appellant submitted that the award of $2,100 monthly was inappropriately high when compared to that which would be ordered under the Guidelines.

HELD: The Guidelines had not come into effect when the award was made and it would be inappropriate for the appeal court to assess child support in comparison to the Guidelines since those Guidelines were not considered by the trial judge.

(51) Dennis v. Wilson, [1997] O.J. No. 4663 (Ont.C.A.), heard May 12, 1997; decision released November 17, 1997

Pursuant to a separation agreement incorporated into a divorce judgment, father was paying $1,042 per month child support. On a variation application in June of 1995, the child support was increased to $3,900 monthly, tax deductible for the father, who

appealed the decision. The Court of Appeal used the traditional approach to determine child support, reaching a conclusion that the trial judge had erred in the assessment of the cost of maintaining the child. Having made that threshold determination, allowed the appeal. The issue then became one of assessing the proper quantum. The table amount, based on father's income, is $1,208 per month. The court grossed that figure up for tax purposes to $2,400 per month and substituted $2,400 per month for the $3,900 per month that had been ordered in 1995, the assumption being that even though the decision was made after May 1st, 1997, the father could still deduct the child support for tax purposes, and the express assumption that the mother would have to pay income tax on that sum.

The court expressly did not take into account all of the factors required under section 9 for shared custody but did look to the table amounts, based on the incomes of the mother and father, as at least an indicator of whether the amount under the original order was reasonable ($1,042 monthly). The table amount for the father of $1,208 was reduced by the table amount that the mother would pay if the child resided with the father, $500, to produce a net amount payable by father to mother of $708 after tax. This was notionally grossed up for tax purposes to $1,350 to support the conclusion that the amount being paid under the original agreement was on the low side.

(52) Hughes v. Hughes, [1997] N.S.J. No. 445 (N.S.C.A.), November 12, 1997

At trial, the father was ordered to pay $850 per month child support. The trial was one week before the introduction of the Child Support Guidelines, but the trial judge took the Guidelines into account as a consideration, though the original decision was based upon the traditional approach to calculating child support. The Nova Scotia Court of Appeal confirmed that the Guidelines have no impact upon the appeal because the order under appeal was made before the Guidelines became effective May 1st, 1997. The court allowed the appeal and reduced the child support to $600 per month on the evidence and specifically ordered that the amount be paid to the respondent on the basis of the payor being able to deduct the child support and the recipient having to include it in income. The amount under the Guidelines would have been $250 monthly, net of tax.

(53) Hare v. Kendall, [1997] N.S.J. No. 310 (N.S.S.C.), July 2, 1997, Scanlan J.

Mother's income $24,000 per annum. Father resides in Bermuda and refuses to provide any information about his income, but mother's evidence is that she believes he earns the equivalent of $83,000 (Cdn.) per annum. Mother had been receiving $400 per month, net of tax, and was content with this amount being included in the divorce judgment.

HELD: The court was not satisfied by any of the evidence that there was any reason to depart from the mandatory application of the Guidelines, and the basic table amount of $656 monthly was ordered to be paid as part of the judgment for divorce. (See Arbeau v. Arbeau (60) below).

(54) Brown v. Lacombe, [1997] A.J. No. 1017, October 20, 1997, Johnstone J.

Dealing with an application for retroactive child support, court held that the Levesque formula is applicable up to and including May 1st, 1997 and that the Guidelines do not have retroactive effect. However, the court went on to hold that the Guidelines could be used retroactively in the future by ordering that each party produce copies of their income tax returns annually, no later than May 15th of each year, and that "if the actual income earned varies from that utilized for the previous year's calculation for child support, then there will be a retroactive change, effective January 1 of the previous year, and the deficiency or excess as the case may be shall be repaid in a lump sum to the appropriate party".

(55) Soever v. Soever, [1997] O.J. No. 3994, October 3, 1997, Smith A.C.J.

The father, a geologist, had a base income of $58,000 annually which he could almost double if he were willing to work at on-site locations in the Canadian North and in Africa for months and months at a time each year, as he had done prior to the separation. The mother was willing to provide flexible and substantial "make-up" access upon the husband's return from work-related travel. The court did not notionally impute income to the husband over an above his base income and found that his wish to be a full-time caring and available parent was neither unreasonable or inappropriate.

(56) Crick v. Crick, [1997] B.C.J. No. 2222 (B.C.S.C.), October 7, 1997, Warren J.

After a contested custody and access trial, the result was that the child would spend substantial time with the father; by his calculation 39.93% of the year, plus occasional extra time on the long weekends, which would take it over 40%. Even assuming that he would have the child more than 40% of the time in the following 12 months, the court refused to make any adjustment to the table amount under section 9 of the Guidelines because the father's income is substantially greater than the mother's and because he is living with his parents and there is no evidence of any "increased costs of shared custody".

> "It is proving to be a vain hope that the introduction of the Guidelines would make the task of setting child support easier and, hence, lead to settlements. If anything, fresh areas for dispute have arisen and certain aspects are at least as difficult and contentious as before."

Section 9 is specifically referred to as a provision which invites litigation over access and embroils the parties in a minute consideration of the child's time with each parent, quite apart from the difficult and intricate exercise of considering "the increased costs of shared custody" and the condition, means, needs and other circumstances of each spouse and child.

(57) Plester v. Plester, [1997] B.C.J. No. 2267 (B.C.S.C.), October 14, 1997, Humphreys J.

This is an appeal by the father from an interim order requiring him to pay $7,095.38 per month child support, being the straight table amount on his income of $693,271 annually. Evidence was presented by the mother, estimating the children's expenses at $4,000 per month. The court quotes with approval the reasons in Francis v. Baker in stating that "reasonableness of discretionary expenses replaces the concept of need". The Guidelines have de-emphasized the child care budget. The court held nonetheless that the budget cannot be ignored, even if it is not relied upon exclusively. The court distinguished the instant case on the basis that the father's income had not changed post-separation and the standard of living for the children should continue the pre-separation standard. Given the mother's ability to also contribute to the children's needs, the amount was limited to the estimated expenses of $4,000 monthly.

(58) Thomas v. Thomas, [1997] O.J. No. 4543, Pardu J.

If the Federal and Provincial Child Support Guidelines produced a different amount for support in a given case, which would apply? Pardu J. adopts the Clayton decision in the Divisional Court in holding that a support order under the Divorce Act overrides a support order under provincial legislation if either party seeks to have the support determined under the Divorce Act.

In determining the respondent's income, the court took into account the fact that in the previous year, he was on strike for five weeks, a non-recurring event, and adjusted income accordingly.

A separation agreement entered into at a time when the child was spending more or less equal time with both parents was disregarded because the child now had its primary residence with the applicant.

Horseback riding ($700 annually) and summer camp ($330 annually) were held to be subsumed in the table amount and no additional amount was ordered as an add-on.

(59) Thomson v. Howard, [1997] O.J. No. 4431, Campbell J.

Father's claim for a reduction in child support based on undue hardship fails because he does not present enough information upon which the court could measure comparative standards of living.

Mother claims add-ons:

(a) evidence in the form of a letter from Sylvan Learning Centre, a profit-based company, recommending additional tutoring, disregarded as self-serving opinion and claim for a share of the cost of a new computer and dictating equipment for the child disallowed. Though such expenses might help or benefit the child, the evidence falls short of establishing that they are "necessary". "Every parent, on behalf of every child in Canada, could make a claim for extra support on evidence not much dissimilar to Ms. Howard's".

(b) claim for reimbursement for seven groups of activities and equipment from rock-climbing, mountain biking, rollerblading and skiing to three weeks at summer camp, all disallowed. "New extracurricular activities unilaterally commenced post-separation by a custodial parent are not intended to be included unless they are reasonable, in the child's best interest and flow from the first family's spending pattern." There was no evidence that the child enjoyed these activities or similar activities before the separation.

(60) Arbeau v. Arbeau (1997), 30 R.F.L. (4th) 192 (N.B.C.A.)

Mother who is receiving social assistance agreed in minutes of settlement to renounce child support as a trade-off to ensure that the abusive father had no access to the child. Trial judge granted the divorce and incorporated the provisions of minutes of settlement into the judgment but rejected the provision for no child support and no visitation rights and, instead, substituted provision that the father pay $250 monthly support. Father's appeal was allowed and the child support order set aside. The parties had not been given an opportunity to attempt to make arrangements for child support. The appropriate disposition having regard to the wording of section 11(1)(b) of the Divorce Act is to stay the divorce in order to allow the parties to make those arrangements and then to present them to the court for approval or modification.

(61) Levesque v. Levesque (1997), 31 R.F.L. (4th) 59, Dawson J.

Parents agreed in November 1995, when the husband was unemployed, that he would not be required to pay child support until he began to receive income over and above his disability payments. He became employed the following month but did not inform the mother. At the time of the hearing, July 1997, he had been on employment insurance since March.

Husband's income had fluctuated from year to year because of the nature of his employment and disability payments. Court averages his last three years' income (1994, 1995, 1996) to determine income of $37,000 annually for the purposes of the Guidelines. Father ordered to pay retroactive child support of $4,000 calculated as the mathematical difference between the amount that he "should have paid on a non-tax basis" from January 1996 to April 1997 less the voluntary child support payments that he actually paid during that period. Father also to pay ongoing support starting April 1st, at the table amount of $305 monthly based on $37,000 annual income. The $4,000 retroactive support to be paid by an additional $125 monthly commencing August 1st.

(62) Hansvall v. Hansvall, [1997] S.J. No. 01960 (Q.B.), Baynton J.

Mother applies to vary child support ordered on consent in 1992. Both parents had remarried. Mother ($28,000) and her husband ($58,000) have combined income of $86,000. Father ($60,000) and his wife ($24,000) have income of $84,000 but father and new wife have two children that he is obliged to support and his wife has plans to leave the workforce.

Father seeks relief from table amount of child support on grounds of undue hardship. Court concludes that he can clearly show a lower standard of living in his household but that does not meet the test required. Section 10 contemplates a two-step analysis. The first step is that the court be satisfied that circumstances exist that would cause the applicant or a child to suffer undue hardship. Only if this test is met does the court then consider the secondary test of comparing the household standards of living. The onus of establishing circumstances of undue hardship and of a lower standard of living is on the person seeking to invoke section 10.

Quoting from the then unreported decision, Messier v. Bains, U.F.C. No. 134/89 Saskatoon (Wright J.) (digested below as #69), the court holds that the objectives of the Child Support Guidelines are too easily defeated if the court routinely deviates from the presumptive rule of the table amount. The assumption of legal duties to support a second family are not uncommon and may, by necessity, create a certain degree of economic hardship but that does not necessarily make it "undue hardship". The first step in determining whether there is "undue hardship" involves a degree of subjective judicial discretion which lacks the precision and predictability of a mathematical calculation but findings of undue hardship should be the exception to the norm. Quoting, with approval, Professor Payne, "The hardship must be exceptional or excessive rather than the inevitable consequence of dividing limited resources between two households".

Because it is desirable that child support matters be predictable and certain, section 7 orders should also be the exception, not the rule. Expenses only become special or extraordinary when they exceed what would have been the norm for a family at that particular income level or, alternatively, when they involve unusual expenses such as those required for a child with a disability. If section 7 applications are granted routinely, they will in turn routinely trigger section 10 applications and child support will become a more convoluted and complex process than was the case prior to the adoption of the Guidelines. That is inconsistent with the purpose of the Guidelines.

Section 6, which is sometimes overlooked, gives the court the discretion to order either parent to acquire or maintain medical and dental insurance coverage for the children where it is available at reasonable cost through employment or otherwise. Section 6 should be utilized wherever possible before resorting to section 7.

(63) McLean v. McLean, [1997] O.J. No. 5315, December 29, 1997, Eberhard J.

In determining the father's income, the court concluded that in 1997 he was not working overtime that was available to him in order to minimize his income until the proceedings were complete. The court also concluded, however, that less overtime was available to him than had been the case in past years because of corporate restructuring. For the purposes of the Child Support Guidelines, father's income projected at $32,200 for 1997 was increased to $38,700 annually, the average of his income for the last three years.

(64) Wedge v. McKenna, [1997] P.E.I.J. No. 75, August 5, 1997, Jenkins J.

The separation agreement was silent on the question of child support but detailed circumstances which would trigger child support payments by either party. The court approved this as a reasonable arrangement, adequate to support the children, and did not apply the Guidelines to impose a child support obligation in granting the divorce. The disposition of R.R.S.P.'s was immaterial to determination of income.

(65) Gray v. Gray, [1998] O.J. No. 4652 (Ont.Gen.Div.), November 10, 1997, Aston J.

Applicant mother seeks the table amount and nothing more. She is not required to file the financial information or documentation set out in CSG, s.21 (e.g. personal tax returns last three years, with notices of assessment, pay stubs, etc.). Court also relieves her of the obligation to file a financial statement in accordance with the Rules. When and if an issue is raised by the respondent that makes the applicant's income relevant to the determination of child support under the Guidelines, she will be required to deliver not only a financial statement, but also the other section 21 information and documentation, but her income may remain irrelevant to the determination of the child support.

(66) Osetti v. Moughtin, [1998] O.J. No. 5393 (Ont.Gen.Div.), November 27, 1997, Wood J.

Father's new employment 1,300 kilometres away will necessitate significant expenses to exercise access. However, father's salary gives his household a higher standard of living than that of the mother and the Guidelines, therefore, preclude any relief based upon undue hardship.

Father was a status member of a Native band working on a reserve for a Native organization and, therefore, exempt from income tax. His salary of $30,000 annually was the equivalent of a person earning $42,000 annually and paying tax. Table amount on that income $782 monthly but mother agreed to accept table amount of $587 monthly, based on his lower non-taxable income. Mother having agreed to the lower amount, the court did not interfere with the bargain made by the parties, and lower table amount approved.

(67) Ebrahim v. Ebrahim, [1997] B.C.J. No. 2039, September 15, 1997, Macaulay J.

Ten year-old intellectually precocious child currently completing secondary school curriculum years ahead of her peer group; also a talented violinist. Father, the custodial parent, conducting home schooling for the child and claiming an additional $1,470 per month for extraordinary expenses relating to home schooling, tutoring, computers, violin lessons and camps, etc. Father, a self-employed computer consultant, earns $40,000 per year, but court finds that the time spent assisting the child means that his earnings do not reflect his earning potential. Respondent mother, a physician, earns $108,000.

Court goes through an analysis of (a) means of the spouses; (b) expenses claimed to be necessary in relation to child's best interests; and (c) whether expenses which are found to be necessary are reasonable, having regard to the means of the spouses.

Court holds that means of the spouses may be greater than income and finds that father's "means" exceed his income by about $24,000 per annum. Expenses, therefore, determined as reasonable or unreasonable in the context of parental income of $172,000 annually.

Mother contends that home schooling is not in the child's best interests because it is too restrictive, with inadequate opportunity for social contact with her peer group. Court unwilling to substitute its decision for the opinion of the custodial parent and finds home schooling to be reasonable but limits the cost to the equivalent of a good private school rather than the actual cost father incurs.

After analyzing other claims, court concludes that the extraordinary expenses amounting to $1,350 monthly are necessary in relation to the child's best interests and reasonable having regard to the means of the parents. Section 7(2) provides guiding principle that such expenses be shared by the parties proportionately to their respective incomes but court holds that it is not bound to exercise a discretion on that basis without also taking into account other factors such as the inadequacy of the petitioner's income information, the nature of his employment and the availability of financial contributions from his family which have, historically, occurred. Court orders the expenses shared equally, notwithstanding apparent discrepancy between incomes of mother and father.

(68) Simms v. Simms, [1997] B.C.J. No. 1553, June 16, 1997, Davies J.

Mother had three children from a previous marriage, two girls and a boy. Biological father of those children was under an obligation to pay support but, historically, had not paid on a consistent basis. On separation, the boy resided with the mother, and the two girls with the step-father. The table amount that the step-father should pay the mother for the son was reduced by the amount of support that the boy's natural father was supposed to pay for him. The table amount that the mother was to pay the step-father was unaffected by the earlier child support order, but the mother was also ordered to assign the child support order from her first husband to the step-father. The net amount payable as between mother and step-father was the difference between the two table amounts as adjusted.

(69) Messier v. Bains, [1997] S.J. No. 627 (Q.B.), September 26, 1997, Wright J.

Respondent father earns $26,000 and the table amount for two children requires a payment of $397 monthly. He has remarried and supports an unemployed wife and a seven year-old daughter. He claims relief from the table amount based on undue hardship.

HELD: The court's discretion in situations like this is to ensure, to the extent possible, that the children of both families are treated equitably.

Section 10 contemplates a two-step analysis. First, the court must be satisfied that circumstances exist that would cause "undue hardship". Subsection 10(2) sets out a non-exhaustive list of circumstances which might cause undue hardship. The second stage is to compare household standards of living and the onus is on the applicant to satisfy that secondary test as well.

In determining whether or not circumstances of undue hardship exist, the objectives should be kept in the forefront. The objectives will be defeated if courts too readily deviate from the presumptive rule set out in CSG, s.3, absent compelling reasons to do so. Second families and the associated legal duty to support a child of that family are not uncommon. The assumption of those obligations may, by necessity, create a certain degree of economic hardship. That hardship is not, however, necessarily "undue". Similarly, the mere fact that an applicant's household standard of living is lower than that of the other spouse does not automatically create circumstances of undue hardship.

(70) Bially v. Bially, [1997] S.J. No. 352, May 28, 1997, Gunn J.

On an interim basis, father was ordered to pay his proportionate share of extracurricular activities that the children had been involved in prior to the separation, but the court went on to say that the parties might have to reassess the list of extracurricular activities in the long term, given the affordability of those activities. Mother held not to be entitled to seek any contribution from father for any new activities the children become enrolled in unless father gives his express permission in advance.

(71) McFadden v. McFadden, [1998] O.J. No. 3769 (Ont.Gen.Div.), February 3, 1998, Vogelsang J.

The court found it appropriate to "work backwards" to determine the income of the father on an interim basis. Parties separated in May 1996 and agreed upon child support of $300 monthly. On the contested motion for interim child support, the wife asserted that father's income was more than her own income of $40,000 per annum and that a significant part of his income was in the form of cash not reported for tax purposes or in the business records. Father's position was that his income was approximately $12,000 per annum. Court fixes the interim support at $300 monthly and uses the table to ascertain that this would make the respondent's income $34,000 per annum, a figure that is reasonable, having regard to the conflicting evidence.

Mother claims add-ons for child care expenses but provides the court with no information on the net cost of the child care. Court holds that the judge should not have to guess at the tax consequences and, absent the essential evidence from the applicant mother, the claim was dismissed.

(72) Ewart v. Miller, [1997] S.J. No. 661 (Q.B.), October 27, 1997, Archambault J.

Father's income calculated as follows: basic income from employment for the current year, plus professional income from his consulting firm averaged over the last three years, plus amount deducted on his tax return for the business use of his house and the wages paid to his wife. These deductions may be legitimate for tax purposes but are added back in for the purposes of determining child support under the Guidelines. Similarly, losses from his investments in a horse boarding operation and motor home rental business not deductible in determining income for support purposes.

Determination of proportionate shares of extracurricular activity expenses takes into account significant table amount payable to the mother for child support, her own decent income and the substantial income of the man she is now married to. She is, accordingly, expected to absorb at least some of the extracurricular activity costs in the table amount.

(73) Walkeden v. Zemlak, [1997] S.J. No. 601 (Q.B.), October 3, 1997, Archambault J.

No amount payable at the moment on account of the mother's claim for dental expenses, but the court ordered that any expenses in excess of $100 annually in any future year are to be shared by the parties according to their proportionate income.

(74) Hubic v. Hubic, [1997] S.J. No. 491 (Q.B.), July 24, 1997, Dawson J.

The parents had joint custody of the two children of the marriage, with shared residency such that the children stayed with their father 11 days out of 28 and half of all vacations. The father paid child support and assumed all of their expenses when the children were with him. Each parent paid for the extracurricular activities in which they enrolled the children; the activities paid for by the father were more expensive. The mother applied, inter alia, for an increase in child support. The issue was whether the shared custody provisions in section 9 of the Guidelines applied, and if so, how much support was payable.

HELD: The parties had shared custody within the meaning of section 9. The legislation requires that in setting the amount of child support, the court should consider (a) the amounts set out in the applicable tables; (b) increased costs of shared custody; and (c) any extraordinary expenses incurred by either party. The last consideration confers a broad discretion in determining the proper award, which should be interpreted having regard to the joint responsibility of parents to support their children. Neither party provided evidence of increased costs of shared custody, but the fact that the father paid more for extracurricular activities was taken into consideration. The amount of child support was calculated by taking the difference in each party's table amount under the Guidelines.

(75) Kapell v. Richter, [1997] S.J. No. 796 (Q.B.), December 9, 1997, Dawson

J.

Mother claimed, as an add-on, expenses for baby-sitting and day-care. Under section 7, child care costs do not have to be extraordinary but they must be related to employment or one of the other enumerated factors. In this case, it was not clear what proportion of child care costs were related to employment and what were related to social occasions for mother. Court declines to fix a specific amount for this expense but orders that mother produce a quarterly statement, setting out her child care costs relating to her employment and that father pay his proportionate share within 15 days. After completing her tax return each year, mother to reimburse father for his portion of the child care expenses that she can deduct from her taxes.

Mother also claims additional support to reimburse her for costs she incurs when father refused to take children for his scheduled weekend access, e.g. food, baby-sitting, etc. Court determines that such extra costs are not eligible as extraordinary expenses for extracurricular activities or within any other category of section 7. Therefore, disallowed.

(76) Cuddie v. Cuddie, [1998] B.C.J. No. 159 (S.C.), January 13, 1998, McKinnon J.

Mother seeks table amount for child support, and father responds by claiming undue hardship. Father seeks disclosure of mother's financial circumstances, including all information, etc. required under section 21. Mother concedes that her standard of living is higher and argues that disclosure is neither useful nor required.

HELD: Financial disclosure is required by the mother, notwithstanding her admission as the court needs to know full particulars of both parents' financial circumstances to determine the extent of any reduction in child support that might be ordered. Even though the custodial parent's financial circumstances are not relevant to the initial determination of whether undue hardship exists, it is relevant to the second stage of the analysis and then to the calculation if relief is to be granted.

(77) Colford v. Colford, [1997] N.J. No. 295 (U.F.C.), November 18, 1997, Wells J.

Before coming into force of the Guidelines, parents agree to $1,000 per month child support, deductible by the father and taxable in the hands of the mother.

HELD: Both parties better off if amount not converted to the Guideline amount and a new tax neutral sum paid.

(78) Vierling v. Boudreau, [1997] S.J. No. 503 (Q.B.), August 14, 1997, MacPherson C.J.Q.B.

Student loan income is not income for the purposes of calculating child support.

(79) Raftus v. Raftus, [1998] N.S.J. No. 119 (N.S.C.A.), heard January 6, 1998. Judgment released March 25, 1998

The three justices on the appeal agreed with the trial judge's determination that the extracurricular activities were not extraordinary and that only the table amount for child support should be ordered to be paid. Flinn J.A. held that parental income has no relevance to the determination of what constitutes extraordinary expenses for extracurricular activities. His view is that "extraordinary" is determined by the nature of the activity and the nature of the expense. If neither the activity nor the expense are out of the ordinary, no amount is to be ordered as an add-on. Jones J.A. concurs. Bateman J.A. concurs with the result but delivers separate reasons in which she says that the determination of whether an expense is "extraordinary" is a subjective test involving a judicial discretion that takes into account the income level of the parents. It is not the activity that must be extraordinary but the associated expense having regard to the fact that, at lower income levels, there is less discretionary income to accommodate a child's extracurricular activities. The increase in the table amounts as the payor's income rises must be intended to address greater participation in extracurricular activities as well as increased clothing, food and shelter costs. Moreover, it is not just the income of the non-custodial parent, but both parents, which should be taken into account. The judge should consider factors such as capital, income distribution, debt load, third party resources, access costs, obligations to pay spousal or other child support orders, spousal support received and any other relevant factors relating to the financial means of both parents as part of the threshold determination of whether the expense is extraordinary or not and not merely as part of the exercise of determining whether the expense is reasonable or necessary.

(80) Smith v. Smith, [1998] O.J. No. 617 (Ont.Gen.Div.), February 12, 1998, Eberhard J.

The mother sought child support under the Divorce Act. There was already an order dated November 25, 1994, under the provincial legislation, for child support $250 per month. Though the support application "can only have life as an original" application under the Divorce Act, the court applied criteria consistent with the variation provisions of the Family Law Act, i.e. a material change in circumstances, in order to ensure that the Divorce Act was not used to avoid the substantive requirements that would have been necessary, had a variation proceeding been commenced under the provincial legislation. The child was over the age of majority, giving the court the option, under section 3(2) of the Child Support Guidelines, to apply either the table amount or the amount it "considers appropriate". The original amount of $250 monthly was confirmed, having regard also to the fact that the child was attending college out of province and that the mother was using the child support to subsidize his expenses. There is no indication in the judgment of the father's income or what the table amount for support would have been.

(81) Cane v. Newman, [1998] O.J. No. 1776, (Ont.Gen.Div.), April 14, 1998, Wein J.

Separation agreement requires father to pay $1,100 child support, tax deductible to him, and half the cost of daycare. After-tax cost to the father of the child support $682 monthly. After agreement made, mother leaves the work force, remarries and has a second child, then deciding to remain at home to look after the children. Father applies to reduce child support to the Guideline amount of $377 net of tax. Court holds that its jurisdiction to award child support in an amount other than as provided in the Guidelines is very limited, following Francis v. Baker (Ont.C.A.) in approving a "formulaic application" of the Guidelines to reflect the legislative intent of imposing certainty. The same principles apply even if the Guideline amount is lower than the amount in a separation agreement. Child support was reduced to $377 per month.

(82) Kelly v. Kelly (1998), 33 R.F.L. (4th) 16 (Sask.Q.B.), Hunter J.

In a corporate entity, all net income is not necessarily paid out as dividends. So long as there is no undue accumulation of income within the company, the income actually paid out to the father ought to be used in assessing his income.

(83) Lewkoski v. Lewkoski, [1998] O.J. No. 1736, (Ont.Gen.Div.), April 20, 1998, Kurisko J.

Mother applies for interim child support under the Divorce Act, having already obtained a final order for child support under the provincial legislation. The court increased the child support after cautioning itself that support under the Divorce Act is "not something the mother is entitled to as of right" and that the Divorce Act is not to be used as a mechanism to retry support issues which have already been dealt with on the merits under provincial legislation. Cross ref. Smith (80) supra.

(84) Swift v. Swift, [1998] O.J. No. 501, (Ont.Gen.Div.), February 5, 1998, Robertson J.

Husband earning $66,000 per year, remarried to a woman earning $30,000 per year, seeks to reduce child support from a Guideline amount of $548 monthly, based upon undue hardship, relying upon the fact that he has two children of second marriage. "Undue hardship is a tough threshold to meet ... the payment of the Guideline amount will rarely be a hardship that is undue in the legal sense". Considering the household standard of living test in Schedule II of the Guidelines, it is not proper to notionally include costs of the children of the second marriage if the payor is residing with those children. An allocation of expenses for all household members is already included in the calculation.

(85) Baranyi v. Longe, [1998] O.J. No. 606 (Ont.Gen.Div.), February 10, 1998, Wright J.

Father on Workers' Compensation benefits, has a net income of $1,330 monthly; table amount $236 monthly, but father pays $780 per month for accommodation in order to

have suitable premises upon which to exercise his access to the children. Mother earning $40,000 per annum. Based on undue hardship, father only ordered to pay $50 monthly.

(86) Petrocco v. Von Michalofski, [1998] O.J. No. 200 (Ont.Gen.Div.), January 16, 1998, Metivier J.

Father, having custody and a household income of $300,000, applies for child support. Mother's income $27,650 annually, and table amount for three children $516 monthly. Mother claims undue hardship relief. Court holds that because of lifestyle of luxury with father, the expenses required for a realistic exercise of access will be unusually high and that mother's role and importance may be detrimentally affected by an inability to offer the children a reasonable level of activity and comforts akin to that enjoyed in their primary residence. The payment of support at the Guideline level would interfere with mother's ability to provide those activities and, therefore, constitutes "undue hardship". Court rejects mother's submission that, because there is no "need" for child support by the father, nothing ought to be ordered, but does reduce the child support from the table amount of $516 to $150 per month, anticipating that the $366 monthly difference will be used by the wife to assist her with the direct and indirect expenses she will have for the children while exercising access.

(87) Reiter v. Reiter (1998), 36 R.F.L. (4th) 102 (B.C.Master)

Undue hardship had been proved where the father had remarried and supported a wife who did not work outside of the home and their four children. The standard of living test was met, leaving the court with the difficulty of then quantifying how to give relief based on undue hardship. The court calculated a monthly amount that would roughly equalize the household standards of living according to the formula in Schedule II of the Guidelines.

(88) Scharf v. Scharf, [1998] O.J. No. 199 (Ont.Gen.Div.), January 16, 1998, Metivier J.

Two children of the marriage, one residing with each parent, bringing into play section 8 of the Guidelines. Strict application of section 8 would result in a net amount payable from father to mother of $60 per month. Mother claims that this would cause undue hardship and that a higher amount should be ordered. Court holds that the child is the one who should be the focus of the inquiry into hardship and that no financial penalty ought to attach to that child for any alleged financial "fault" of the mother. Court also considers standard of living of the siblings and the lack of any meaningful access by father to the child living with mother. Conclusion: Mother's obligation for child who ordinarily resides with father is met by the expenses she has when exercising access, and no child support need to be paid by her. Father to pay table amount for the child who resides with the mother. Court also specifically provides that the application of this undue hardship adjustment will be open for review on the second anniversary date of the order.

(89) Hunter v. Hunter, [1998] O.J. No. 1527 (Ont.Gen.Div.), March 27, 1998, Brockenshire J.

Each parent having child 50% of the time. Mother earning $29,000 per year and father $60,000 per year. Father's submission is to take the table amount for each parent and divide the difference between the two figures in half to reflect the fact that the child is with father half the time. Court accepts this approach but then increases the resulting figure by an additional 50% to reflect the additional costs of shared custody arrangement. There was no detailed child care budget, but the court borrowed from experience south of the border (the "Colorado method") on the assumption that empirical evidence there and in other jurisdictions in the United States supports an increase of 50% to adjust the payment so as to reflect the increased costs of shared custody.

(90) Burns v. Burns, [1998] O.J. No. 2602 (Ont.Gen.Div.), June 19, 1998, Vogelsang J.

Two children in the ordinary day-to-day care and custody of the wife and one child residing equally with mother and father. Court adopts the approach of father's counsel, using the tables to notionally assess 2 1/2 children being in the care of the mother and 1/2 a child in the care and custody of the father. Though the language of Parliament does not "import the concept of a fractional child ... the argument advanced by the husband has the advantage of consistency with the logic of the Guidelines and reality". In recognizing the principle of "economies of scale", i.e. that support for three children is less than three times the support for one, the father's obligation was fixed at half the difference between the table amount for three children and for two children. The mother's obligation was assessed at one-half the table amount for one child, based on her income, divided in half in each case.

(91) Bell v. Michie, [1998] O.J. No. 675 (Ont.Gen.Div.), February 10, 1998, Caverzan J.

Application for child support against husband who is not the biological parent of the children. Court orders father to pay child support, time limited to 54 months from the date of separation, basing time limit primarily on the length of time that the step-father resided with the child.

(92) Van Harten v. Van Harten, [1998] O.J. No. 1299 (Ont.Gen.Div.), February 11, 1998, Walters J.

Child for whom support is claimed receives a direct payment of $166 per month, representing Canada Pension Plan disability benefits because of father's disability. No credit given to father in determining his child support obligation.

(93) Souliere v. Leclair, [1998] O.J. No. 1393 (Ont.Gen.Div.), March 24, 1998, Bolan J.

Respondent sought a declaration that the add-on and undue hardship provisions of the Guidelines and their corresponding provisions in the provincial legislation were unconstitutional on the grounds that (a) the requirement of a household income test under the undue hardship application violates privacy rights and (b) the requirement of paying post-secondary school costs above and beyond supporting the child provides an advantage to children of divorced or separated parents which are not granted to children of an intact family.

The court upheld the validity of the legislation.

(94) Michie v. Michie (1998), 36 R.F.L. (4th) 90 (Sask.Q.B.)

The definition of "child of the marriage" which extends support obligations for adult children violates the Charter or Rights and Freedoms by imposing obligations on divorced parents not imposed on married parents. However, such violation is justified under section 1 of the Charter, reasonable and the effect of such discrimination is proportionate to the benefit achieved.

(95) Evans v. Evans, [1998] S.J. No. 91, February 4, 1998, Smith J.

In considering the child away from home at post-secondary school, it is inappropriate to base the support on a table amount or even a Guideline amount because (a) the child is not residing at home and (b) the child has an obligation to contribute to his own needs.

(96) Adams v. Adams, [1998] M.J. No. 621

Children over the age of majority, attending post-secondary school, were ordered to file sworn financial statements in the proceeding.

(97) Kofoed v. Fichter, [1998] S.J. No. 338 (Sask.C.A.), May 8, 1998

The Court of Appeal specifically approves and adopts the approach of Bateman J.A. in Raftus in holding that the joint income of the parents is a relevant consideration in determining whether an expense is "extraordinary".

The determination of whether an expense is "extraordinary" involves discretion and an appeal court ought to afford considerable deference to the findings of fact and the exercise of discretion by the trial judge. The trial judge's determination was "not necessarily one that we would have arrived at, but it is within the purview of his discretion and we find no reviewable error of law".

(98) Boudreau v. Vickery, [1998] N.S.J. No. 77 (S.C.), February 20, 1998, Haliburton J.

Concerning section 7 add-ons, if it is established that the parties agree the expenditures are appropriate, they will ordinarily be considered as an add-on expense, but before

making such an order, the circumstances of both the custodial and non-custodial home must be taken into account and the cost of the activity weighed against the necessity and reasonableness of the expense. The father does not need to succeed in proving "undue hardship" to succeed in resisting a claim for section 7 add-ons based on inability to pay.

(99) Mingo v. Mingo, [1997] O.J. No. 4835, November 21, 1997, MacDougall J.

Father paying $675 per month, deductible ($377 per month after-tax), applies to reduce child support under the Guidelines to the table amount of $308 monthly. Recipient mother paying no income tax on her other income would lose over $300 per month if application allowed. Court exercises a discretion not to vary the amount, notwithstanding the coming into force of the Guidelines and, in doing so, refers to one of the objectives in the Guidelines, being to ensure that children benefit from the financial means of both spouses after separation.

(100) Odway v. Odway, [1998] M.J. No. 176 (Man.C.A.), April 23, 1998

The table amount under the Federal Guidelines was $224 per month, but the trial judge ordered only $185 per month under the provincial legislation, taking into account the father's access costs and the mother's higher income. The Court of Appeal confirmed that the provincial legislation could be so applied, notwithstanding the fact that the parties were married to one another.

(101) Cochrane v. Zarins, [1998] B.C.J. No. 756 (B.C.C.A.), March 20, 1998

Mother sought additional support to cover private school costs and equestrian training. At trial, the application was dismissed on the basis that private schooling had not been adopted for the child in the past and equestrian training could be obtained at less cost elsewhere. The Court of Appeal directed a new hearing on the basis that a broader range of factors should be considered including, for example, the parents' own educational history of private school, the child's pre-school enrolment when the parents were together, and the special talents of the child, as well as the ability of the non-custodial parent to pay.

(102) Burggraaf v. Burggraaf, [1998] O.J. No. 2696, May 19, 1998, McDermid J.

Mother ordered to pay table amount of $940 per month, but section 7 claims against her, which would ordinarily have been added to the table amount, were not ordered because of her need to purchase a home to provide a second home for the children when exercising access. The court concluded that it was in the best interests of the children that their mother's residence be of such a nature as to encourage them to visit with her and to receive the benefit of her care and guidance in priority to her obligation to contribute to private Christian school expenses, tutoring, piano lessons and orthodontal expenses.

(103) Leger v. Szpilewski, [1998] O.J. No. 2592 (Ont.Gen.Div.), May 15, 1998, Kovacs J.

One child resided at home year round, while another was away at university for eight months of the year. Separation agreement provided that the university student was deemed to reside with the wife while at university. This fact, coupled with evidence that the mother did maintain a home for the child to return to, resulted in the court using the table amount for two children as the basic table amount to be paid and then looking at the additional section 7 expense for the child at university.

(104) Baker v. Baker, [1998] B.C.J. No. 1822 (B.C.C.A.), July 31, 1998

Consent order from 1992 required father to pay $2,400 per month, tax deductible, child support. Chambers judge reduces figure to $1,160 per month under the Guidelines. Court of Appeal considers the decision in Wang in which court exercised a discretion not to reduce the pre-existing support to the Guideline amount but leaves the resolution of the apparently conflicting decisions to the trial judge in the Baker case.

(105) Melzack v. Germain, [1998] O.J. No. 2341 (Ont.C.A.), June 11, 1998

Father sought to vary support payable under a separation agreement. Trial judge drew an inference that his decision to move to Hawaii demonstrated an intention to be under-employed or unemployed and that he is capable of earning substantial income as he had in the past, notwithstanding his present circumstances. Court of Appeal upheld judge's discretion in imputing income to the appellant, pointing out that the appellant's application to reduce a previous commitment meant that he had "an onus of justification".

(106) James v. James, [1998] O.J. No. 1301, February 4, 1998, Brockenshire J.

Father had taken advantage of virtually every overtime opportunity available to him from 1994 to 1997 but, as soon as he was served with an application for interim child support, he realized that under the Guidelines, the amount he would have to pay was tied to the amount he earned, and he decided that it was not worthwhile to continue working as much overtime. He decided to limit his overtime to 15 hours per week (a 55-hour work week) and submitted that his income for child support purposes ought to be that actual income of $70,470 annually that he was now actually earning. The court was not prepared to ignore his history of work over the past four years and imputed an income to him of $98,500, being the "rolling average" of his 1995, 1996 and 1997 income. His 1994 income was ignored because it included a special, discretionary, perhaps once in a lifetime bonus of $40,000.

(107) Hunt v. Hunt, [1997] N.J. No. 232 (N.C.A.), September 19, 1997

The Federal Child Support Guidelines should not be applied retroactively.

(108) Sanders v. Sanders, [1998] A.J. No. 565 (Alta.C.A.), May 20, 1998

Father's tax return shows an income of $38,000 for the previous year. As the sole shareholder of a corporation providing veterinary services, he had approximately $93,000 available to him from the corporation that year, in addition to other benefits, such as a corporate vehicle. He represented his income at $100,000 annually on an application for an account with Midland Walwyn. Court of Appeal upholds trial judge's finding, imputing income to the father of $96,500 for the purposes of the Guidelines.

Mother claims add-ons under section 7 for basketball, school registration, school supplies, camp expenses. In upholding the disallowance of these claims by the trial judge, the Court of Appeal specifically approves the approach followed in Middleton v. MacPherson to find that these items cannot be categorized as extraordinary expenses.

(109) MacArthur v. Demers, (Ont.Gen.Div.), August 24, 1998, Aston J.

Biological father never had any relationship with child, but separation agreement required him to pay child support. Step-parent to pay table amount, without reduction by amount biological father obligated to pay. Custodial parent established that even if biological father's support applied to reasonable costs of raising child, prorata share of the balance for step-parent greater than table amount. Discussion of how to exercise judicial discretion in a structured step by step approach under section 5.

(110) Jackson v. Holloway (1997), 35 R.F.L. (4th) 272 (Sask.Q.B.)

Father's bonus represents a significant portion of his annual income and an undue burden would be placed on him if monthly child support was computed on the basis of an annual income that included the projected bonus. Father ordered to pay table amount based on his $52,000 salary. Also ordered to pay further child support by lump sum in relation to any annual bonus received. Within 30 days of receipt of bonus, father to pay to the mother, as a lump sum, the difference between the annualized amount of the child support required by the table for his annual income, including the bonus, and the annualized amount required by the table without the bonus.

(111) Elliott v. Elliott (1997), 30 R.F.L. (4th) 339 (Alta.Q.B.)

This case predates the introduction of the Guidelines but contains a useful analysis of the treatment of home-based business expenses deducted for tax purposes but having personal aspects and personal benefit to the tax payor. See pp. 344-346 inclusive.

(112) Ireland v. McMillan (1998), 36 R.F.L. (4th) 48 (Man.Q.B.)

A variation of the pre-Guideline support order would result in the mother receiving less support on an after-tax basis. Court relies on the "special provisions" section of the Divorce Act to reject the variation application and holds that the existing order constitutes a "special provision". The term is not defined in the Act and could cover a whole range of benefits not easily, comprehensively enumerated, including division or

transfer of property, trust arrangements, etc. which could all fit within the definition, providing there is some demonstrated benefit to the child.

(113) Anderson v. Anderson (1997), 32 R.F.L. (4th) 177 (B.C.S.C.)

Father's medical practice operated through a corporation of which he is the sole shareholder. Court holds that $36,000 paid to the husband's new wife for her services to the corporation was reasonable and the husband's income should not be adjusted upward in accordance with clause 9, Schedule III of the Guidelines.

(114) Blackburn v. Elmitt (1997), 34 R.F.L. (4th) 183 (B.C.S.C.)

Eldest child had special needs and would possibly never be independent. As part of a comprehensive agreement, wife gave up her spousal support and husband paid increased child support as a trade-off. After the Child Support Guidelines came into force, he applied to reduce the child support. Application dismissed on the basis that mother made a bargain that clearly benefits the child and constitutes a "special provision" justifying departure from the Guidelines. The case includes an interesting annotation by Professor McLeod.

(115) Powell v. Thomas, [1998] O.J. No. 1308, LaForme J.

There is a positive onus on the parent seeking child support from a step-parent to demonstrate that reasonable steps have been taken to obtain child support from the other biological parent. Although this case was decided on the basis of the wording in Ontario's legislation before the introduction of the Guidelines, it likely remains valid in its concept because section 5 of the Guidelines only provides relief for a parent who is not the biological parent.

(116) Dennett v. Dennett, [1998] A.J. No. 440 (A.C.Q.B.) Romaine J.

The court examines the approaches to calculating 40% access under section 9 in several prior cases noted and concludes that section 9 requires more of a court than a simple mathematical comparison of the number of hours in a year compared to the number of hours of physical access exercised by the parent making an application for relief. The analysis may not require an inquiry into the sleeping patterns of children as feared by the court in Hall but, if the facts establish an unusually extensive pattern of access by a support payor consistent with the concept of shared parenting or shared custody, the reality of the situation between the parties should be carefully reviewed. The court attempted to quanitfy the actual access and found that it was an unfortunate but necessary exercise. Although it would be possible, using one method to calculate the time at less than 40% and using another method at more than 40%, the ultimate decision would rest on finding whether "in spirit and in reality" it is a case of shared custody envisaged by the Guidelines. The focus should not be on the method of calculation but on whether the method of calculation is reasonable, taking into account the intention of section 9.

The court ordered the father, who had the children 60% of the time, to pay child support of $550 monthly to the mother, who had the children 40% of the time.

(117) Camirand v. Beaulne, [1998] O.J. No. 2163, May 15, 1998, Aitken J.

Parents, both teachers, earn $61,000 and $65,000 annually. Applicant mother seeks to increase the table amount of support ($1,145 per month for three children) by $800 annually, representing half the cost of hockey and swimming for the children. Respondent has remarried a woman working part-time ($10,000 per year), and they have a child of their own. Father asks for relief based on "undue hardship".

Court holds that the table amount includes some extracurricular activities, and the test for what is extraordinary starts with a focus on whether the expense of such activities would be inordinately burdensome for the custodial parent to pay, taking into account his or her income. Having found that a payment of $45 monthly per child out of an income of $61,000 from employment and almost $14,000 for the table amount for child support is a very modest burden for the custodial parent, no amount was ordered and it was not necessary to consider whether the expense was reasonable or necessary because it was subsumed in the table amount.

Regarding section 10, the court reviews extensively the case-law to date and agrees that consistency and predictability are goals of the Guidelines which cannot be achieved if courts frequently deviate from the tables. The words "undue hardship" set a high threshold. In this case, the respondent's take-home pay, because of mandatory pension and other deductions from his gross income of $65,000 per annum, is only $3,160 per month. The table amount for child support at $1,145 leaves him with barely $2,000 for all his other expenses. Taking into account that he has a legal duty to support his new daughter and a spouse who is only employed on a part-time basis, there is no question that payment of the table amount will produce hardship. The ultimate question is whether it is "undue" hardship. Court focuses on husband's decisions: (a) to have a fourth child when he knew he had an obligation to support three already; (b) to move into a home instead of choosing less expensive accommodation; (c) his wife's choice in working part-time so as to be available for their child, and finds that notwithstanding that it is "perfectly understandable" why these choices were made, they are choices which carry costs, and the applicant mother is not required to forego the child support parliament determined she is entitled to in order to help the father support his youngest child and enable his second spouse to work only part-time. Father's claim for relief dismissed.

(118) Giles v. Villeneuve, [1998] O.J. No. 2902, Karswick Prov. J.

Child with extensive medical problems required a long list of special expenses totalling over $1,000 per month, not covered by mother's social assistance benefits. Mother paid those expenses by contributing $230 of her own meagre income and finding help on an ongoing basis from private charities and her own parents. Court holds that these voluntary contributions from charities and grandparents are not to be regarded as

subsidies and benefits to be taken into account in quantifying special, extraordinary expenses as she has no legal right to this assistance. Father's income only $27,000 per annum and his ability to pay more than the table amount of $246 per month questionable but, given the staggering sacrifices for the child that needed to be made, the court notionally eliminated from his budget expenses for alcohol, tobacco, entertainment and student loan repayment, and determined that he had an ability to contribute an additional $260 per month towards the child's special expenses.

(119) Mertler v. Kardynal (1998), 35 R.F.L. (4th) 72 (Sask.Q.B.) McIntyre J.

Parents share custody equally. Court looks to table amount for each parent and orders father to pay mother the difference between the two table amounts, based on their incomes, of $11 per month. No evidence was led to identify increased costs of the shared custody arrangement. Evidence did, however, establish that one parent was paying all of the extracurricular costs and the other parent all the clothing costs. These costs were adjusted on a pro rata basis according to incomes, resulting in an additional payment from the father to the mother of $53.15 per month.

(120) Muir-Halliday v. Halliday, [1998] O.J. No. 861 (Ont.Prov.Div.) Foran Prov. J.

On separation, father gave mother the exclusive use of the family vehicle, found to be a benefit to the children. Father's table amount reduced by $40 per month because of this "special provision". Father claimed further adjustment for his assumption of personal debts accumulated during cohabitation. Court disallows this claim on the basis that the assumption of debt only benefits the wife and not the children.

(121) Needham v. Needham (1998), 36 R.F.L. (4th) 395 (B.C.S.C.) Ralph J.

Father appealed decision of Master as to determination of his income. Farm losses of $28,000, deductible for tax purposes, had been disallowed in determining his income for support purposes. Court held (p.398, para.4) "Without in any way questioning the legitimacy of deducting the farm losses for tax purposes, it is my opinion that the guidelines seek to determine a means of balancing the incurring of reasonable expenses against the alternative of using those funds for child support". See section 19(2). Court also upheld finding that payment of $25,000 salary to new wife was not proven to be reasonable, and amount added back to father's income.

OUTLINE

1) In what circumstances should the court decline to make any order for child support?

   Claridge-Skof v. Skof (18)
   Gordon-Tennant v. Gordon-Tennant (22)
   Parsan v. Parsan (26)

Hall v. Hall (37)
Wang v. Wang (39)
Tallman v. Tomke (31)
Hoover v. Hoover (34)
Colford v. Colford (77)
Smith v. Smith (44) and (80)
Meloche v. Kales (27)
Cane v. Newman (81)
Lewkoski v. Lewkoski (83)
Mingo v. Mingo (99)
Baker v. Baker (104)

2) Application of the Federal Child Support Guidelines to claims for child support under provincial legislation

Bevand v. Bevand (11)
Nadeau v. Mitchell (14)
Asadoorian v. Asadoorian (19)
Ninham v. Ninham (12)
Tallman v. Tomke (31)
Thomas v. Thomas (58)
Smith v. Smith (80)
Odway v. Odway (100)

3) The relationship between the Child Support Guidelines and the court's obligation under section 11 of the Divorce Act

Ninham v. Ninham (12)
Zarebski v. Zarebski (2)
Hansen v. Hansen (36)
Arbeau v. Arbeau (60)
Hare v. Kendall (53)
Wedge v. McKenna (64)

4) Retroactive application of the Guidelines for periods before May 1st and invitations for future adjustments

Holtby v. Holtby (5)
Kowalski v. Kowalski (28)
Estrela v. Estrela (16)
Quintal v. Quintal (24)
Parsan v. Parsan (26)
Dennis v. Wilson (51)
Levesque v. Levesque (61)
Andries v. Andries (32)
Hughes v. Bourdon (43)

Prince v. Prince (50)
Hughes v. Hughes (52)
Brown v. Lacombe (54)
Walkeden v. Zemlak (73)
Hunt v. Hunt (107)

5) Determination of income and attribution of income

Finn v. Levine (4)
Holtby v. Holtby (5)
Nadeau v. Mitchell (14)
Ninham v. Ninham (12)
Quintal v. Quintal (24)
Shelleby v. Shelleby (10)
Westcott v. Westcott (17)
Rains v. Rains (7)
Estrela v. Estrela (16)
Irwin v. Irwin (25)
Smart v. Smart (29)
Van Wynsberghe v. Van Wynsberghe (9)
Rudachyk v. Rudachyk (38)
Schick v. Schick (33)
Levesque v. Levesque (61)
Thomas v. Thomas (58)
Jackson v. Jackson (48)
Soever v. Soever (55)
Vierling v. Boudreau (78)
Ewart v. Miller (72)
McFadden v. McFadden (71)
Osetti v. Moughtin (66)
McLean v. McLean (63)
Kelly v. Kelly (82)
Van Harten v. Van Harten (92)
Melzack v. Germain (105)
James v. James (106)
Sanders v. Sanders (108)

6) Incomes over $150,000

Sagl v. Sagl (15)
Francis v. Baker (3)
Marck v. Parrotta-Marck (30)
Simon v. Simon (47)
Plester v. Plester (57)

7) Section 7 "add-ons"

Rains v. Rains (7)
Forrester v. Forrester (23)
Van Wynsberghe v. Van Wynsberghe (9)
Nadeau v. Mitchell (14)
Estrela v. Estrela (16)
Dodd v. Dodd (1)
Kowalski v. Kowalski (28)
Tallman v. Tomke (31)
Andries v. Andries (32)
Hoover v. Hoover (34)
Hall v. Hall (37)
Middleton v. MacPherson (35)
Chaput v. Chaput (46)
Hansvall v. Hansvall (62)
Thomas v. Thomas (58)
Thomson v. Howard (59)
Hughes v. Bourdon (43)
Smith v. Smith (44)
Pepin v. Jung (45)
Blair v. Blair (49)
Kapell v. Richter (75)
Walkeden v. Zemlak (73)
Ewart v. Miller (72)
McFadden v. McFadden (71)
Bially v. Bially (70)
Ebrahim v. Ebrahim (67)
Raftus v. Raftus (79)
Boudreau v. Vickery (98)
Kofoed v. Fichter (97)
Cochrane v. Zarins (101)
Burggraaf v. Burggraaf (102)
Sanders v. Sanders (108)

8) Departure from the Guideline amount because of "special provisions" in an order or agreement

Holtby v. Holtby (5)
Haggith v. Trader (6)
Anderson v. Anderson (21)
Hall v. Hall (37)
Blair v. Blair (49)
Osetti v. Moughtin (66)

9) Claims for variation based upon "undue hardship"

Holtby v. Holtby (5)
Anderson v. Anderson (21)
Martin v. Girard (8)
Tallman v. Tomke (31)
Hoover v. Hoover (34)
Middleton v. MacPherson (35)
Williams v. Williams (40)
Kaderly v. Kaderly (41)
Hansvall v. Hansvall (62)
Hughes v. Bourdon (43)
Thomson v. Howard (59)
Osetti v. Moughtin (66)
Messier v. Bains (69)
Baranyi v. Baranyi (85)
Petrocco v. Von Michalofski (86)
Reiter v. Reiter (87)
Scharf v. Scharf (88)

10) How to deal with "shared custody" under section 9

Meloche v. Kales (27)
Marck v. Parotta-Marck (30)
Dennis v. Wilson (51)
Crick v. Crick (56)
Hubic v. Hubic (74)
Hunter v. Hunter (89)
Burns v. Burns (90)

11) "Split custody under section 8

Holtby v. Holtby (5)
Simms v. Simms (68)
Scharf v. Scharf (88)
Burns v. Burns (90)

12) Cases involving "adult children"

Finn v. Levine (4)
Van Wynsberghe v. Van Wynsberghe (9)
Holtby v. Holtby (5)
Richardson v. Richardson (13)
Nadeau v. Mitchell (14)
Blair v. Blair (49)
Evans v. Evans (95)
Leger v. Szpilewski (103)

13) Step-parent obligations

Irwin v. Irwin (25)
L.H.H. v. D.J.M. (20)
Simms v. Simms (68)
Bell v. Michie (91)
MacArthur v. Demers (109)

14) Miscellaneous cases

Richardson v. Richardson (13)
Nadeau v. Mitchell (14)
Smart v. Smart (29)
C.H.R. v. E.B.C. (42)
Simon v. Simon (47)
Gray v. Gray (65)
Cuddie v. Cuddie (76)
Van Harten v. Van Harten (92)
Souliere v. Leclair (93)
Michie v. Michie (94)
Adams v. Adams (96)

INSERTS:

1. In Jackson v. Holloway (110), there was uncertainty on the evidence about the projected bonus the father would receive. He was ordered to pay the table amount based on his salary and then, within 30 days of receipt of the bonus, the amount was to be recalculated to the higher table amount with payment of the difference.
2. However, in Denesi v. Neves (1997), 36 R.F.L. (4th) 154 (Ont.Prov.Div.), the court retroactively varied a 1998 separation agreement to 1989, a date long before the application was filed. After full discussion of the authorities on point, the court found the retroactive award to be justified by the father's non-disclosure of increased income, manipulation and lies. The retroactive award was based upon the traditional Paras formulation for the period up to the introduction of the Provincial Guidelines December 1st, 1997 and thereafter based upon the Guidelines.
3. For a good, general analysis of the issue of business expenses and their relevance in determining real income, see Rawlins J. in Elliott v. Elliott (111) and Needham v. Needham (112). In the latter case, Ralph J. underscores the point that the Guidelines seek to determine a means of balancing the incurring of reasonable expenses against the alternative of using those funds for child support.
4. The mere fact that a management corporation salary is paid to the new spouse of a professional payor does not make the payment "unreasonable". Anderson v. Anderson (113).

4b. On August 20th, 1998, the Supreme Court of Canada did grant leave to appeal, but only on the limited issue of the interpretation of section 4(b), i.e. whether "inappropriate" only means "inadequate" and whether the court may award less than the table amount without the payor having to satisfy the undue hardship test.

5. Other special expenses that do not have to be "extraordinary" such as daycare, medical and post-secondary school expenses must fall within the categories enumerated and are also subject to the "reasonably necessary and affordable" test.
6. It also makes sense to consider whether the expense is a voluntary or discretionary expenditure. In Giles v. Villeneuve (118), a child having significant medical problems required expenditures of more than $1,000 per month which the mother, on social assistance, could not meet except by going to private charities and her own parents for financial assistance. The father, earning only $27,650 per year, was ordered to contribute $246 for the table amount and an additional $260 monthly for these special expenses. The court had to notionally ignore all his discretionary spending and his student loan repayment to determine his ability to pay that much.
7. In Camirand v. Beaulne (117), Aitken J. focused on the ability of the recipient (not the payor) to afford the expense claimed, having regard to her own resources, including the significant table amount. Having then concluded that the expense was not "extraordinary", it was held to be unnecessary to go on to analyse whether the expense is "reasonably necessary".
8. Access costs are generally no basis to reduce the table amount of support but may be a "shield" to a section 7 claim. See, for example, Anderson v. Anderson, [1997] O.J. No. 3219 and Burggraaf v. Burggraaf (102).
9. In Boudreau v. Vickery (98), Haliburton J. sums it up by stating that if it is established that the parties agree the expenditures are appropriate, they will ordinarily be considered as an add-on expense but, before making such an order, the circumstances of both the custodial and non-custodial home must be taken into account and the cost of the activity weighed against the necessity and reasonableness of the expense. The father does not need to succeed in proving undue hardship to succeed in resisting a claim for section 7 add-ons based upon his inability to pay.
10. In Muir-Halliday v. Halliday (120), the court reduced the table amount payable by $40 per month because the father gave the mother the family vehicle which was held to be a benefit for the children. However, he was afforded no reduction for his assumption of debts and obligations incurred before separation because this only benefitted the mother, not the children.
11. In Blackburn v. Elmitt (114), the parties' eldest child had special needs and would possibly never be independent. The parties entered into a comprehensive agreement and the wife gave up her spousal support in exchange for increased child support. After the Guidelines came into

force, he applied to reduce this support. Macaulay J. dismissed the application on the basis that the mother made a bargain to benefit the children, which should not be changed.

12. Romaine J. extensively reviewed the case-law in Dennett v. Dennett (116) and concluded that section 9 requires more of a court than a simple mathematical comparison of the number of hours in a year, compared to the number of hours of physical access exercised by a parent seeking to invoke section 9. Beyond an analysis of the pattern of access and an attempt to quantify it, the court focused on the cost consequences to the parents of that pattern (e.g. number of meals provided, etc.) and the "spirit and reality" of the arrangement to conclude that section 9 applied. This case also highlights the fact that custody or "primary residence" is not a requirement to an entitlement to child support. A parent who has the child 40% of the time may be entitled to child support from the parent who has the child 60% of the time.
13. In Mertler v. Kardynal (119), McIntyre J. found that, with the exception of clothing and extracurricular activities, there was nothing to distinguish the costs being assumed by each of the joint custodial parents. The father was ordered to pay $11 per month as the difference between the table amounts based on the respective parental incomes, plus $53.15 per month to pro-rate the clothing and extracurricular activities.
14. In Leger v. Szpilewski (103), the table amount and section 7 add-on contribution was ordered for an out of town university student on the basis of a separation agreement which provided that, while residing out of town for university, the child would be "deemed to reside" with the mother.
15. The definition of a dependent child which extends support obligations to adult children violates the Charter of Rights and Freedoms by imposing obligations on divorced parents not imposed on married parents. However, such a violation is justified under section 1 of the Charter, is reasonable, and the effect of this discrimination proportionate to the benefit achieved. The court upheld the validity of the Federal legislation in Michie v. Michie (94) and in Souliere v. Leclair (93).

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**Syrtash Collection of Family Law Articles**
SFLRP/1999-009

# We're All in This Boat Together: More Advice for Avoiding Negligence Claims or, How I Stopped Worrying and Learned to Love LPIC*

*by Stephen Grant*
*Gowlings, Toronto*

January 1999

* Posted by John Syrtash, with permission of the author.

## I. Introduction [See Note 1 below]

¶ 1 Everybody makes mistakes. That's the fundamental truth of the matter. I make this point to assuage any concern anyone has that anyone else is any different.

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Note 1: Generally, see P.M. Epstein, "Family Law and Solicitors' Negligence", Law Society of Upper Canada Special Lectures (1993), updated from time to time, the most comprehensive work in this area.

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¶ 2 This being said, how can we practice in such a way as to avoid negligence? There are general and specific areas that I intend to review to elucidate the point.

## II. General

¶ 3 Practice, in some ways, is a matter of style just as it is a matter of substance. Some lawyers practice aggressively, some defensively, some with particular attention to detail, some with a broad brush but all of these different styles must measure up to the appropriate standard of care: that is, reasonable competence and diligence.

¶ 4 There is also a specialist standard of care, namely, if a lawyer holds himself or herself out as a specialist in a particular field, he or she will be called to account for errors or omissions which may afford the generalist an escape from liability. [See Note 2 below] This is particularly so, I suspect, for those practitioners who have been certified by the Law Society of Upper Canada or elsewhere as specialists. Interestingly, there is a recent decision in the medical field that found a doctor liable for failing to recognize his own lack of expertise and refer the patient to a specialist. [See Note 3 below]

Note 2: See, Grant and Rothstein, Lawyers' Professional Liability (2nd. ed.) (Toronto: Butterworths, 1998) at 36-39. The standard might be termed that of "reasonably competent experts".

Note 3: De la Giroday v. Brough, [1997] 6 W.W.R. (B.C.C.A.), leave to appeal to S.C.C. refused. Whether we will see liability attach to lawyers in these circumstances remains to be seen but, why not?

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¶ 5 Ideally, practice makes perfect although, in reality, in our line of work there is no such thing. Bearing in mind that the underlying causes of error are poor communication, poor file management, ignorance of the applicable law, failure to manage legal issues and lack of attention to detail, [See Note 4 below] this is the way I would like to practice [See Note 5 below]:

(1) Initial Interview: Be patient. Let the client tell the story in full. Try to avoid assessing the legal issues too quickly. Be patient. Try to elicit all relevant facts. Be patient. Offer an overview of the problem and its possible solutions. Detail any assignment for client if there is something for client to do such as complete the financial statement. Do confirmatory file note for details and follow-up.

(2) Retainer: Not only for fees, but for substantive concerns, I think a retainer letter is of critical importance. It should set out the particulars of the services to be provided as well as fee arrangements. Among other things, it should discuss the applicable limitation periods, especially if the client decides to think things over for a while. I think it is essential that the client sign an acknowledgment of the scope and particulars of the contract. I generally tell clients that until I have the acknowledgement signed, I will not start working on the matter. If it is clear, on the other hand, that the client has just come in for a consultation, a confirmatory letter to this effect is useful to prevent unwarranted reliance. (One should be careful as to where this letter is addressed!)

(3) File Management: Organization in a paper-intensive practice such as ours is key. Use sub-files. Use indexes. Use colour-coding. Use any devices that keep the paper in some orderly fashion. Keep notes of telephone calls, especially ones containing advice or instructions. As well, a reminder system for follow-up is crucial, as well as a requirement under the Rules of Professional Conduct, especially to avoid missing limitation periods, keeping track of outstanding offers to settle and so on.

(4) Communication: While there is no general consensus on this point, I think it is imperative that clients be copied on all correspondence. It is also a helpful practice to comment as need be on incoming mail when being sent to the client for review. It helps keep the dialogue alive, even in writing. The client at least knows what the lawyer is

thinking. [See Note 6 below] I also send articles of interest to clients, whether I've written them or not. These include articles about spousal or child support, the latter especially recently, the deductibility of legal fees, pension matters and so on. The odd time I send a copy of a pertinent case to a client. To paraphrase an old TV advertisement, "Our most important client is an educated client." Confirmatory instruction letters are obviously essential if the client has not otherwise provided written instructions for one action or another.

(5) Notes and Internal Memoranda: Take notes. If your handwriting is bad, dictate a memorandum to the file or put the note right on the computer. Occasionally, if there are questionable instructions given at a meeting, make a note and have the client acknowledge his or her instructions right there. If delegating a task to other professionals or paralegals, confirm it in writing.

(6) Opinions: Some cases warrant crafting a legal opinion for the client. This should be well-researched (see point (10) below) and offer the client a synopsis of the facts and relevant legal principles as well as an overview and your recommendations. Opinions are handy tools when clients choose to ignore cogent advice or recommendations (especially on later assessments of one's accounts).

(7) Reporting: This is ancillary to communication but worth a separate note. Sending a reporting letter from time to time or at the end of the matter is particularly useful as a means of cementing the client's understanding about the case. It also provides an opportunity to determine which of the lawyer and client is to follow-up on a particular aspect of the matter, an insurance designation for instance. [See Note 7 below]

(8) Drafting: As Mr. Justice Krever pointed out in a panel discussion years ago, family lawyers are hybrid craftspeople. We are both solicitors in terms of drafting agreements and barristers in terms of advocating positions, including the validity or invalidity of a particular agreement. Drafting, however, takes care and patience. Use plain language. Proofread the document or if you have done many drafts of a document, ask a colleague to proofread it for you. Use checklists to ensure that you have included all possible provisions. Review your precedents periodically especially if there have been recent changes in law or practice. [See Note 8 below] Avoid precedents which have lost their precision of language or meaning.

(9) Timeliness: A friend of mine raved to me once about her lawyer, a civil litigator who was pursuing a collection matter for her. When I inquired, she told me that her lawyer telephoned her when he said he would with a status report or update. His timeliness of service impressed her. The moral of the story is, "Don't make promises you can't keep." [See Note 9 below] While this is also part and parcel of

communicating, clients like known time-lines. Often in litigious matters, it helps to do an Action or Trial Preparation Plan so that the client not only has a sense about the enormity of the undertaking but also of the time constraints involved. Therefore, the plan should be realistic and not raise the client's expectations artificially. It is surely easier to be timely of service if one does not have a crushing caseload or has at least enough assistance to handle the caseload.

(10) Knowledge of the Law and Research Skills: With the explosion in information sources, from the Internet on, it is difficult for even careful practitioners to keep current with the evolving jurisprudence and statutory changes in our area of practice and considering that family law is a field of almost continual flux and of great complexity--encompassing, as it does, aspects of commercial, corporate, estates, income tax, insurance, pensions, trusts and even tort law--it is surprising that there are not more claims. Bear in mind that if there ever existed a "locality rule" as a defence to a claim for solicitor's negligence as there has been in the medical field, it no longer exists given the vast improvements in technological accessibility to current developments in the law. [See Note 10 below] In any case, keeping current is a matter of dedication and discipline and, as always, the standard of care does not require perfection; it requires diligence of research.

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Note 4: Y. Bernstein, "Protecting Your Deductible: Loss Prevention and the Practice of Family Law", presented to the Middlesex Family Law Association Spring Conference, May, 1998 at 3 and well worth the time to read.

Note 5: This paper might also be subtitled: "Do As I Say, Not As I Do".

Note 6: I confess that I am not always good about doing this.

Note 7: Ditto.

Note 8: Ironically enough, as I was writing this section, I had a call from a client who suggested that there was an ambiguity in one of our standard clauses. I looked and didn't agree but it certainly gave me a few moments of anxiety.

Note 9: Viz. the late Tim Hardin.

Note 10: Grant and Rothstein, supra, note 2 at 34-35.

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¶ 6 In passing, I want to mention the family law practitioner's potential liability as an advocate. To be found liable in the course of conduct of an action, a lawyer must have committed "egregious errors". While this is certainly capable of proof, generally speaking, barristers are given a great deal of latitude in the prosecution or defence of a case which accounts for this high threshold of liability. [See Note 11 below]

Note 11: Ibid at 11-15.

III. Specific

¶ 7 I want to turn now to specific areas of concern in practice.

A. Marriage Contracts

¶ 8 These are to be devoutly avoided, if possible. They are fraught with peril. This is especially true if the lawyer is the one acting for the disadvantaged party, of which there is usually one in every situation. Generally, one party wants to gain something at the expense of the other party through a marriage contract. While I have not seen any reported decisions against lawyers for negligent drafting or advice given on a marriage contract, I have seen a number of situations where LPIC has been called on to pay or contribute to a settlement of the matrimonial dispute where the marriage contract has become an issue in the proceeding.

¶ 9 In dealing with contracts, I offer this advice:

1. If you are going to do them, take their negotiation seriously; never simply give a cursory one or two hour session called Independent Legal Advice ("ILA");
2. Recognize that there is no chance that a brief consultation will ever be sufficient to ensure that a client has the requisite appreciation of the nature and consequences of the contract, thus guaranteeing that there will be an issue about its validity later;
3. Appreciate that s.56(4) of the Family Law Act mandates financial disclosure;
4. Explain to clients that a court may set aside a support waiver if circumstances turn out to be unconscionable (which may really mean "unfair" at least to some judges); and, in turn,
5. Consider binding together the property and support terms, if warranted;
6. If acting for the party of lesser bargaining power, try to negotiate; if the response is, 'it's this or nothing' ensure that the client is prepared to forego the marriage itself or, although this is simply shifting the problem elsewhere, as a last resort, advise the client to obtain other representation as advising on this contract will only bring trouble later [See Note 12 below]; and, finally,
7. Do a reporting letter.

Note 12: This advice often has a salutary effect; it makes the client understand the seriousness of the problem.

B. Separation Agreements [See Note 13 below]

¶ 10 As the parties and their counsel are not trying to predict an uncertain future as they are with marriage contracts, separation agreements are obviously more manageable and can be drafted with more certainty, at least in my view. Nevertheless, there are still many issues to consider and as we do more of these agreements than any others, it is important not to rely blindly on precedent. Let me review one or two issues:

(1) General: Does the contract have the appropriate language to make it binding on the parties and otherwise enforceable? Does it provide for incorporation in whole or part in a subsequent divorce judgment or court order? Are the support and property provisions of the agreement separately enforceable or are they to be read together? Should it contain a certificate of independent legal advice?

(2) Custody/Access: Although these provisions are generally susceptible to being overridden by court order in appropriate circumstances, has the right language been used to protect the parties? For example, is the non-mobility clause strong enough? Is there a prohibition on name change? Are the access provisions sufficiently specific to allow enforcement if necessary? Is decision-making clearly-enough defined?

(3) Spousal support: Given what seems to be at least some examples of judicial refusal to sanction consensual arrangements for time-limited spousal support and spousal support releases, have these clauses been drafted tightly enough? Do they warrant being tied in some way to the property provisions of the agreement? Does support terminate on remarriage, cohabitation or death? If the last, how does this circumstance relate to the insurance provisions of the agreement? Under what circumstances is support variable, if at all? Are the support payments, if not insured, to be binding on the payor's estate? If so, have you drafted a reduction to account for the loss of income tax deductibility by the estate? Finally, if there is to be a review, who bears the onus of proof as to further entitlement or need?

(4) Child Support: Given the still-recent Guidelines, it is possible to canvass only superficially the issues but this is one area that counsel will be called on to draft more editorial comment than ever before. Counsel will now be called on to describe the constructs for the payment and receipt of support. For example, one should describe the parties' income, including any irregular payment such as a bonus or dividend, the particular circumstances of the child or children including the residential arrangements, the nature and extent of special or extraordinary activities for which payment is being made and which parent is responsible for payment and the time at which

the payments will be reviewed, varied or terminated altogether. [See Note 14 below]

(5) Insurance: Follow-up is often overlooked here, particularly to obtain the designation. Issues to consider are: default of payment of premium, obtaining replacement coverage if lost, the length of the obligation, whether the insurance is to be paid in full satisfaction of the support obligation or only to provide a pool from which support is payable and if there is a deficiency or no insurance altogether, whether there is a binding and enforceable obligation on the payor's estate.

(6) Equalization and other payments: It is imperative that one consider the income tax implications here. Are transfers of property still tax-exempt if the parties have already divorced? If there are tax consequences, which party is to bear them? This problem is amply illustrated by the case of Denelzen v. Canada [See Note 15 below] where Mr. Justice Mogan determined that the basic problem was the failure of the parties to distinguish the character of the money the wife was to receive from a certain share redemption. He said:

"...neither one [of the parties' solicitors] fully understood the significant income tax consequences of having a share...redeemed by a corporation as opposed to having that share transferred from one spouse to the other (a rollover). If the [husband's solicitor] did understand those income tax consequences...he did not have the ability to express them clearly in writing...." [See Note 16 below]

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Note 13: For a more detailed review, see Epstein's paper, supra, note 1.

Note 14: The new LSUC Separation Agreement precedent, currently in preparation, should greatly assist practitioners in this area.

Note 15: [1996] T.C.J. No. 98 (T.C.C.); affirmed, [1998] F.C.J. No. 1450 (Fed. C.A.).

Note 16: Ibid at para. 30.

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¶ 11 Apart from income tax considerations, there are security and bankruptcy issues to consider: namely, how can payment be enforced if in default and, specifically, if the payor becomes bankrupt. [See Note 17 below]

(1) Pensions: The problems here are too numerous to mention but the key is this: unless the lawyer wants to risk his or her deductible on the client's behalf with negligible, if any, corresponding reward, he or she should not negotiate an "if and when" pension division. This is the sorry truth of it until such time as pension and family

legislation conform to one another. If a practitioner does want to take this chance, at the very least ensure that there is adequate life insurance to cover the eventuality, the near-certainty, that the "if and when" will turn into the "never" payment on the death of the pension-holder spouse.

(2) Debts and Indemnity Agreements: Ensure that responsibility for payment of outstanding debts and liability is specifically provided in the agreement, preferably before the equalization or other payment is distributed. If doing a collateral indemnity agreement, make sure that it is not only drafted carefully but also is incorporated by reference or tied in some other way to the separation agreement itself.

(3) Reporting Letter: Do one!

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Note 17: In respect of the latter, I recommend an excellent paper by R.A. Klotz, "What's Happening in Bankruptcy/Family Law?" presented to the Canadian Insolvency Practitioner's Association, October 16, 1998.

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C. Proceedings

¶ 12 Upon reflection, it seems to me that many problems arise at or near the beginning of the proceeding. This seems to be the time (if advance planning hasn't already been done by one of the spouses) where money slips out of the envelope and potential liability arises. Early notice to the other side about preserving assets is helpful but occasionally proves to be 'too little, too late' as the saying goes.

¶ 13 The critical feature of preventative work is to obtain a restraining order of some description--whether preservation, non-depletion or non-dissipation-- at the earliest opportunity. Note that there is still uncertainty about these types of orders. Recently, payment of money to certain "creditors" (including payment of legal fees) was found not to be in breach "non-dissipation"- type order as they were not "wasteful or frivolous expenditures". Inferentially, the payments would have been caught had the order been capable of being read as a "non-depletion" order which precludes any money leaving the asset package. [See Note 18 below] In short, there seems to be a terminological debate that may have adverse consequences for the client. Prudence dictates that the most comprehensive order (including all possible relief) be obtained to restrain the asset-owning spouse from alienating his or her property in any way as soon as litigation has commenced if the circumstances warrant this pre-emptive measure.

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Note 18: See Herman v. Rathbone, as yet unreported, Steinberg, J, June 3, 1998 (Ont. Ct., Gen. Div., Fam. Div.).

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¶ 14 The second potential problem that arises at the outset of the retainer is the determination as to when to commence proceedings. Where there exist concerns about the appropriate date of separation, even though the client has waited an inordinate length of time to seek counsel, it is up to the lawyer to advise the client clearly that if the action isn't started immediately or soon, his or her rights might be significantly impaired, namely, the claim might be statute-barred. The careful practitioner will send confirmatory correspondence to the client if he or she decides to wait longer to proceed when there is a potential limitation period about to expire.

¶ 15 Thirdly, offers to settle must be handled carefully and tracked appropriately. Even more particularly, clients should authorize the terms of all offers to settle, whether under Rule 49 or regular settlement proposals. Clients should also provide written instructions as to accepting or rejecting offers or counter-offers. In short, solicitors should never conclude settlements on their clients' behalf without written instructions. Because they are usually structured to extend until the commencement of trial, Rule 49 offers are particularly vulnerable to acceptance late in the day when the situation might warrant a different result (especially after significant costs have been incurred). Therefore, counsel must take care to monitor their currency on an ongoing basis.

¶ 16 Otherwise, as I mentioned earlier, liability arising from our role as barristers attaches only if the court finds that an "egregious" error has been made by counsel. Usually, errors of this kind are errors of judgment which are not actionable.

## IV. Conclusion

¶ 17 No one likes to make mistakes. I have found, however, that most (although not all) mistakes family law practitioners make are rectifiable. The difficulty, of course, is that even in these cases, one has to trouble LPIC which, in turn, has possible consequences for the practitioner, financial ones if not otherwise. To minimize the risk of committing an error or omission, I offer these rules:

1. When in doubt, check;
2. Exercise an abundance of caution; or, if there is risk to be taken, after let it be the client's risk, not yours;
3. When a possible error has been made, seek assistance to rectify the problem; and
4. Don't worry; we're all in this boat together.

**Syrtash Collection of Family Law Articles**
SFLRP/1999-008

# Federal Child Support Guidelines: A List of Case Law*

## As established May 1, 1997 (SOR/97-175)
## As amended, effective December 9, 1997 (SOR/97-563)

*Department of Justice Canada*

Updated December 1998

* The following is an updated version of a paper available on the federal Department of Justice website at http://canada.justice.gc.ca/Orientations/Pensions/child/guide/intann_en.html. Hypertext links to the cases mentioned below have been added by Quicklaw. Posted by John Syrtash, with permission.

TABLE OF PROVISIONS
FEDERAL CHILD SUPPORT GUIDELINES
(This table is not part of the Guidelines.)

# FEDERAL CHILD SUPPORT GUIDELINES

## OBJECTIVES

### Objectives

1. The objectives of these Guidelines are

(a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
(b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
(c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and

(d) to ensure consistent treatment of spouses and children who are in similar circumstances.

Plester v. Plester [1998] B.C.J. No. 2438 (S.C.) (October 21, 1998).
Raftus v. Raftus (1998), 159 D.L.R. (4th) 264, 37 R.F.L. (4th) 59, 166 N.S.R. (2d) 179, [1998] N.S.J. No. 119 (C.A.) (March 25, 1998).
Francis v. Baker (1997), 150 D.L.R. (4th) 547, 28 R.F.L. (4th) 437, [1997] O.J. No. 2196 (Gen. Div.) (May 22, 1997) aff'd (1998), 157 D.L.R. (4th) 1, 34 R.F.L. (4th) 317, [1998] O.J. No. 924 (C.A.) (March 10, 1998).
Le Bourdais v. Le Bourdais (1998), 36 R.F.L. (4th) 387, [1998] B.C.J. No. 217 (S.C.) (January 20, 1998).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

INTERPRETATION

Definitions

2. (1) The definitions in this subsection apply in these Guidelines.

"Act"
" Loi "
"Act" means the Divorce Act.
"child"
" enfant "
"child" means a child of the marriage.
"income"
" revenu "
"income" means the annual income determined under sections 15 to 20.
"order assignee"
" cessionnaire de la créance alimentaire "
"order assignee" means a minister, member or agency referred to in subsection 20.1(1) of the Act to whom a child support order is assigned in accordance with that subsection.
"spouse"
" époux "
"spouse" has the meaning assigned by subsection 2(1) of the Act, and includes a former spouse.
"table"

" table "
"table" means a federal child support table set out in Schedule I.

Income Tax Act

(2) Words and expressions that are used in sections 15 to 21 and that are not defined in this section have the meanings assigned to them under the Income Tax Act.

Most current information

(3) Where, for the purposes of these Guidelines, any amount is determined on the basis of specified information, the most current information must be used.

Lee v. Lee, [1998] N.J. No. 247, (C.A.) (September 18, 1998).
Lewkowski v. Lewkoski (1998) 40 R.F.L. (4th) 86, CarswellOnt 1775 (Gen. Div.) (April 20, 1998).
Ireland v. McMillan (1997), 36 R.F.L. (4th) 48, [1997] M.J. No. 638 (Q.B.) (December 18, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

Application of Guidelines

(4) In addition to child support orders, these Guidelines apply, with such modifications as the circumstances require, to
(a) interim orders under subsections 15.1(2) and 19(9) of the Act;
(b) orders varying a child support order;
(c) orders referred to in subsection 19(7) of the Act; and
(d) recalculations under paragraph 25.1(1)(b) of the Act.

Recalculations

(5) For greater certainty, the provisions of these Guidelines that confer a discretionary power on a court do not apply to recalculations under paragraph 25.1(1)(b) of the Act by a provincial child support service.

AMOUNT OF CHILD SUPPORT

Presumptive rule

3. (1) Unless otherwise provided under these Guidelines, the amount of a

child support order for children under the age of majority is

(a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
(b) the amount, if any, determined under section 7.

Meuser v. Meuser (1998), CarswellBC 2813, (C.A.) (December 4, 1998), var'd (1998), 40 R.F.L. (4th) 295 (B.C.S.C.) (May 6, 1998).
Francis v. Baker (1997), 150 D.L.R. (4th) 547, 28 R.F.L. (4th) 437, [1997] O.J. No. 2196 (Gen.Div.) (May 22, 1997) aff'd (1998), 157 D.L.R. (4th) 1, 34 R.F.L. (4th) 317, [1998] O.J. No. 924 (C.A.) (March 10, 1998).
Blair v. Blair (1997), 34 R.F.L. (4th) 370, [1997] O.J. No. 4949 (Gen. Div.) (November 28, 1997).
Jaworsky v. Jaworsky (1997), 32 R.F.L. (4th) 59, [1997] B.C.J. No. 2219 (S.C.) (October 7, 1997).
Holtby v. Holtby (1997), 30 R.F.L. (4th) 70, (Ont.Ct. (Gen.Div.) (May 30, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

Child the age of majority or over

(2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is

(a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
(b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

Carnall v. Carnall, [1998] S.J. No. 493 (Q.B.) (June 30, 1998), var'g (1998), 37 R.F.L. (4th) 392, [1998] S.J. No. 211 (Q.B.) (March 26, 1998).
Garrison v. Garrison (1998), 38 R.F.L. (4th) 435, [1998] O.J. No. 2029 (Gen.Div.) (May 14, 1998).
Budyk v. Sol, [1998] M.J. No. 252, (C.A.) (May 14, 1998).
Mathieu v. Mathieu (1998), 38 R.F.L. (4th) 117, [1998] M.J. No. 211 (Q.B.) (April 27, 1998).
Soulière v. Leclair (1998), 38 R.F.L. (4th) 68 (Ont. Ct. (Gen.Div.)) (March 24, 1998).

Bort v. Derworiz (1998), 37 R.F.L. (4th) 220, [1998] S.J. No. 177 (Q.B.) (March 10, 1998).
Smith v. Smith (1998), 36 R.F.L. (4th) 419, [1998] O.J. No. 617 (Gen. Div.) (February 12, 1998).
Evans v. Evans (1998), 35 R.F.L. (4th) 158, [1998] S.J. No. 91 (Q.B.) (February 4, 1998).
Vanderstoep v. Vanderstoep (1998), 35 R.F.L. (4th) 385, [1998] B.C.J. No. 229 (S.C.) (January 27, 1998).
MacDonald v. Rasmussen (1998), 38 R.F.L. (4th) 294, [1998] S.J. No. 9 (Q.B.) (January 12, 1998).
Corkum v. Corkum (1998), 36 R.F.L. (4th) 367, [1998] N.S.J. No. 34 (S.C.) (January 8, 1998).
Miller v. McClement (1997), 35 R.F.L. (4th) 83, [1997] S.J. No. 761 (Q.B.) (December 10, 1997).
Glen v. Glen (1997), 34 R.F.L. (4th) 13, [1997] B.C.J. No. 2806 (S.C.) (December 3, 1997).
Blair v. Blair (1997), 34 R.F.L. (4th) 370, [1997] O.J. No. 4949 (Gen.Div.) (November 28, 1997).
Depeel v. Abramyk (1997), 35 R.F.L. (4th) 152, [1997] S.J. No. 749 (Q.B.) (November 27, 1997).
Holizki v. Reeves (1997), 34 R.F.L. (4th) 414, [1997] S.J. No. 746 (Q.B.) (November 24, 1997).
Michie v. Michie (1997), 36 R.F.L. (4th) 90, [1997] S.J. No. 668 (Q.B.) (November 6, 1997).
Andersen v. Andersen (1997), 32 R.F.L. (4th) 177, [1997] B.C.J. No. 2496 (S.C.) (October 31, 1997). Hughes v. Hughes (1997), 30 R.F.L. (4th) 179, [1997] N.B.J. No. 261 (Q.B.) (June 6, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

Applicable table

(3) The applicable table is

(a) if the spouse against whom an order is sought resides in Canada,

(i) the table for the province in which that spouse ordinarily resides at the time the application for the child support order, or for a variation order in respect of a child support order, is made or the amount is to be recalculated under section 25.1 of the Act,

(ii) where the court is satisfied that the province in which that spouse ordinarily resides has changed since the time described in subparagraph (i), the table for the province in which the

spouse ordinarily resides at the time of determining the amount of support, or

(iii) where the court is satisfied that, in the near future after determination of the amount of support, that spouse will ordinarily reside in a given province other than the province in which the spouse ordinarily resides at the time of that determination, the table for the given province; and

(b) if the spouse against whom an order is sought resides outside of Canada, or if the residence of that spouse is unknown, the table for the province where the other spouse ordinarily resides at the time the application for the child support order or for a variation order in respect of a child support order is made or the amount is to be recalculated under section 25.1 of the Act.

SOR/97-563, s.1

Cederland v. Cederland (1997), 32 R.F.L. (4th) 35, [1997] N.W.T.J. No. 59 (S.C.) (September 9, 1997).

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Incomes over $150,000

4. Where the income of the spouse against whom a child support order is sought is over $150,000, the amount of a child support order is

(a) the amount determined under section 3; or

(b) if the court considers that amount to be inappropriate,

(i) in respect of the first $150,000 of the spouse's income, the amount set out in the applicable table for the number of children under the age of majority to whom the order relates;

(ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and

(iii) the amount, if any, determined under section 7.

Plester v. Plester [1998] B.C.J. No. 2438 (S.C.) (October 21, 1998).
Nataros v. Nataros (1998), 40 R.F.L. (4th) 308 (B.C.S.C.)

(April 23, 1998).
Greenwood v. Greenwood (1998), 37 R.F.L. (4th) 422, [1998] B.C.J. No. 729 (S.C.) (March 31, 1998).
Francis v. Baker (1997), 150 D.L.R. (4th) 547, 28 R.F.L. (4th) 437, [1997] O.J. No. 2196 (Gen.Div.) (May 22, 1997) aff'd (1998), 157 D.L.R. (4th) 1, 34 R.F.L. (4th) 317, [1998] O.J. No. 924 (C.A.) (March 10, 1998).
Fibiger v. Fibiger (1998), 38 R.F.L. (4th) 258, [1998] B.C.J. No. 187 (S.C.) (January 30, 1998).
Depeel v. Abramyk (1997), 35 R.F.L. (4th) 152, [1997] S.J. No. 749 (Q.B.) (November 27, 1997).
Simon v. Simon (1997), 33 R.F.L. (4th) 310, [1997] O.J. No. 4145 (Gen.Div.) (October 17, 1997).
Sagl v. Sagl (1997), 31 R.F.L. (4th) 405, [1997] O.J. No. 2837 (Gen. Div.) (July 11, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

Spouse in place of a parent

5. Where the spouse against whom a child support order is sought stands in the place of a parent for a child, the amount of a child support order is, in respect of that spouse, such amount as the court considers appropriate, having regard to these Guidelines and any other parent's legal duty to support the child.

Johb v. Johb (1998), 157 D.L.R. (4th) 754, 38 R.F.L. (4th) 11, [1998] S.J. No. 178 (Q.B.) (March 12, 1998), rev'd [1998] S.J. No. 603 (C.A.) (August 28, 1998).
White v. Rushton (1998), 37 R.F.L. (4th) 373, [1998] B.C.J. No. 422 (S.C.), (1998), 38 R.F.L. (4th) 454 (S.C.) (May 12, 1998).
Robinson v. Domin (1998), 39 R.F.L. (4th) 92, CarswellBC 1103 (S.C.) (May 11, 1998).
Campbell v. Campbell (1998), 37 R.F.L. (4th) 228, [1998] S.J. No. 180 (Q.B.) (March 17, 1998).
Gordon v. Paquette (1998), 36 R.F.L. (4th) 382, [1998] B.C.J. No. 225 (S.C.) (January 9, 1998).
Motuzas v. Yarnell (1997), 37 R.F.L. (4th) 422, [1997] M.J. No. 520 (Q.B.) (October 28, 1997).
Singh v. Singh (1997), 30 R.F.L. (4th) 307, [1997] B.C.J. No. 1550 (S.C.) (June 11, 1997).

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Medical and dental insurance

6. In making a child support order, where medical or dental insurance coverage for the child is available to either spouse through his or her employer or otherwise at a reasonable rate, the court may order that coverage be acquired or continued.

Andries v. Andries (1998), 159 D.L.R. (4th) 665, 36 R.F.L. (4th) 175, [1998] M.J. No. 196 (C.A.) (April 9, 1998).
Krislock v. Krislock (1997), 34 R.F.L. (4th) 420, [1997] S.J. No. 698 (Q.B.) (November 20, 1997).
Jackson v. Holloway (1997), 35 R.F.L. (4th) 272, [1997] S.J. No. 691 (Q.B.) (November 10, 1997).
Walkeden v. Zemlak (1997), 33 R.F.L. (4th) 52, [1997] S.J. No. 601 (Q.B.) (October 3, 1997).
Hall v. Hall (1997), 30 R.F.L. (4th) 333, [1997] B.C.J. No. 1191 (S.C.) (May 15, 1997).

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Special or extraordinary expenses

7. (1) In a child support order the court may, on either spouse's request, provide for an amount to cover the following expenses, or any portion of those expenses, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense, having regard to the means of the spouses and those of the child and to the family's spending pattern prior to the separation: Burggraaf v. Burggraaf (1998), 40 R.F.L. (4th) 26, CarswellOnt 2862, [1998] O.J. No. 2696 (Gen. Div.) (May 19, 1998). Nataros v. Nataros (1998), 40 R.F.L. (4th) 308 (B.C.S.C.) (April 23, 1998).

(a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;

Rebak v. Rebak (1998) CarswellBC 2693 (C.A.) (December 7, 1998).
Meenink v. Meenink (1998), 39 R.F.L. (4th) 372 (Ont. Ct. Gen. Div.) (May 14, 1998).
Nataros v. Nataros (1998), 40 R.F.L. (4th) 308 (B.C.S.C.)

(April 23, 1998).
Greenwood v. Greenwood (1998), 37 R.F.L. (4th) 422, [1998] B.C.J. No. 729 (S.C.) (March 31, 1998).
Yaremchuk v. Yaremchuk (1998), 158 D.L.R. (4th) 180, [1998] A.J. No. 258 (Q.B.) (March 11, 1998).
Spanier v. Spanier (1998), 40 R.F.L. (4th) 329 (B.C.S.C.) (March 2, 1998).
Loewen v. Traill (1998), 36 R.F.L. (4th) 231, [1998] B.C.J. No. 466 (S.C.) (February 25, 1998).
Fibiger v. Fibiger (1998), 38 R.F.L. (4th) 258, [1998] B.C.J. No. 187 (S.C.) (January 30, 1998). Marshall v. McNeil (1998), 36 R.F.L. (4th) 264, [1998] S.J. No. 64 (Q.B.) (January 20, 1998).
MacDonald v. Rasmussen (1998), 38 R.F.L. (4th) 294, [1998] S.J. No. 9 (Q.B.) (January 12, 1998).
Doege v. Doege (1998), 37 R.F.L. (4th) 52, [1998] S.J. No. 8 (Q.B) (January 2, 1998).
Forzley v. Forzley (1997), 34 R.F.L. (4th) 105, [1997] B.C.J. No. 2881 (S.C.) (December 18, 1997).
Harman v. Harman (1997), 34 R.F.L. (4th) 121, [1997] B.C.J. No. 2836 (S.C.) (December 16, 1997).
Williams v. Williams (1997), 32 R.F.L. (4th) 23, [1997] N.W.T.J. No. 49 (S.C.) (August 14, 1997).
Bially v. Bially (1997), 28 R.F.L. (4th) 418, [1997] S.J. No. 352 (Q.B.) (May 28, 1997).

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(b) that portion of the medical and dental insurance premiums attributable to the child;

White v. Rushton (1998), 37 R.F.L. (4th) 373, [1998] B.C.J. No. 422 (S.C.), (1998), 38 R.F.L. (4th) 454 (S.C.) (May 12, 1998).
Yaremchuk v. Yaremchuk (1998), 158 D.L.R. (4th) 180, [1998] A.J. No. 258 (Q.B.) (March 11, 1998).
Middleton v. MacPherson (1997), 150 D.L.R. (4th) 519, 29 R.F.L. (4th) 334, [1997] A.J. No. 614 (Q.B.) (June 12, 1997).

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(c) health-related expenses that exceed insurance reimbursement by at least

$100 annually per illness or event, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;

Johb v. Johb (1998), 157 D.L.R. (4th) 754, 38 R.F.L. (4th) 11, [1998] S.J. No. 178 (Q.B.) (March 12, 1998), rev'd [1998] S.J. No. 603 (C.A.) (August 28, 1998).
Lewkowski v. Lewkoski (1998) 40 R.F.L. (4th) 86, CarswellOnt 1775 (Gen. Div.) (April 20, 1998).
Carnall v. Carnall, [1998] S.J. No. 493 (Q.B.) (June 30, 1998), var'g (1998), 37 R.F.L. (4th) 392, [1998] S.J. No. 211 (Q.B.) (March 26, 1998).
Andries v. Andries (1998), 159 D.L.R. (4th) 665, 36 R.F.L. (4th) 175, [1998] M.J. No. 196 (C.A.) (April 9, 1998).
Seiferling v. Langmaier (1998), 36 R.F.L. (4th) 296, [1998] S.J. No. 84 (Q.B.) (February 5, 1998).
Fibiger v. Fibiger (1998), 38 R.F.L. (4th) 258, [1998] B.C.J. No. 187 (S.C.) (January 30, 1998).
Marshall v. McNeil (1998), 36 R.F.L. (4th) 264, [1998] S.J. No. 64 (Q.B.) (January 20, 1998).
Doege v. Doege (1998), 37 R.F.L. (4th) 52, [1998] S.J. No. 8 (Q.B) (January 2, 1998).
Glen v. Glen (1997), 34 R.F.L. (4th) 13, [1997] B.C.J. No. 2806 (S.C.) (December 3, 1997).
Krislock v. Krislock (1997), 34 R.F.L. (4th) 420, [1997] S.J. No. 698 (Q.B.) (November 20, 1997).
Brodland v. Brodland (1997), 34 R.F.L. (4th) 79, [1997] S.J. No. 688 (Q.B.) (November 5, 1997).
Andersen v. Andersen (1997), 32 R.F.L. (4th) 177, [1997] B.C.J. No. 2496 (S.C.) (October 31, 1997).
Ewart v. Miller (1997), 34 R.F.L. (4th) 408, [1997] S.J. No. 661 (Q.B.) (October 27, 1997).
Walkeden v. Zemlak (1997), 33 R.F.L. (4th) 52, [1997] S.J. No. 601 (Q.B.) (October 3, 1997).
Middleton v. MacPherson (1997), 150 D.L.R. (4th) 519, 29 R.F.L. (4th) 334, [1997] A.J. No. 614 (Q.B.) (June 12, 1997).
Willson v. Willson (1997), 34 R.F.L. (4th) 242, [1997] B.C.J. No. 2456 (S.C.) (June 6, 1997).

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(d) extraordinary expenses for primary or secondary school education or

for any educational programs that meet the child's particular needs;

Nataros v. Nataros (1998), 40 R.F.L. (4th) 308 (B.C.S.C.) (April 23, 1998).
Pohlod v. Bielajew (1998), 38 R.F.L. (4th) 35, [1998] O.J. No. 1770 (Gen.Div.) (April 3, 1998).
Greenwood v. Greenwood (1998), 37 R.F.L. (4th) 422, [1998] B.C.J. No. 729 (S.C.) (March 31, 1998).
Carnall v. Carnall, [1998] S.J. No. 493 (Q.B.) (June 30, 1998), var'g (1998), 37 R.F.L. (4th) 392, [1998] S.J. No. 211 (Q.B.) (March 26, 1998).
Cochrane v. Zarins (1998), 36 R.F.L. (4th) 434, [1998] B.C.J. No. 756 (C.A.) (March 20, 1998).
Francis v. Baker (1997), 150 D.L.R. (4th) 547, 28 R.F.L. (4th) 437, [1997] O.J. No. 2196 (Gen.Div.) (May 22, 1997) aff'd (1998), 157 D.L.R. (4th) 1, 34 R.F.L. (4th) 317, [1998] O.J. No.924 (C.A.) (March 10, 1998).
Burton v. Burton (1997), 158 D.L.R. (4th) 174, 167 N.S.R. (2d) 155, [1997] N.S.J. No. 560 (S.C.) (February 10, 1998).
Wallace v. Wallace (1998), 156 D.L.R. (4th) 762, 36 R.F.L. (4th) 428, [1998] B.C.J. No. 203 (S.C.) (February 2, 1998).
Fibiger v. Fibiger (1998), 38 R.F.L. (4th) 258, [1998] B.C.J. No. 187 (S.C.) (January 30, 1998).
Miller v. McClement (1997), 35 R.F.L. (4th) 83, [1997] S.J. No. 761 (Q.B.) (December 10, 1997).
Krislock v. Krislock (1997), 34 R.F.L. (4th) 420, [1997] S.J. No. 698 (Q.B.) (November 20, 1997).
Brodland v. Brodland (1997), 34 R.F.L. (4th) 79, [1997] S.J. No. 688 (Q.B.) (November 5, 1997).
Thomson v. Howard (1997), 33 R.F.L. (4th) 45, [1997] O.J. No. 4431(Gen.Div.) (October 23, 1997).
R.(E.K.) v. W.(G.A.) (1997), 32 R.F.L. (4th) 202, [1997] M.J. No. 501 (Q.B.) (October 17, 1997).
Stamoulos v. Pavlakis (1997), 32 R.F.L. (4th) 75, [1997] B.C.J. No. 2206 (S.C.) (October 1, 1997).
Middleton v. MacPherson (1997), 150 D.L.R. (4th) 519, 29 R.F.L. (4th) 334, [1997] A.J. No. 614 (Q.B.) (June 12, 1997).

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(e) expenses for post-secondary education; and

Carnall v. Carnall, [1998] S.J. No. 493 (Q.B.) (June 30, 1998), var'g (1998), 37 R.F.L. (4th) 392, [1998] S.J. No. 211

(Q.B.) (March 26, 1998).
Budyk v. Sol, [1998] M.J. No. 252, (C.A.) (May 14, 1998).
Garrison v. Garrison (1998), 38 R.F.L. (4th) 435, [1998] O.J. No. 2029 (Gen.Div.) (May 14, 1998).
Soulière v. Leclair (1998), 38 R.F.L. (4th) 68 (Ont. Ct. (Gen.Div.)) (March 24, 1998).
Evans v. Evans (1998), 35 R.F.L. (4th) 158, [1998] S.J. No. 91 (Q.B.) (February 4, 1998).
Miller v. McClement (1997), 35 R.F.L. (4th) 83, [1997] S.J. No. 761 (Q.B.) (December 10, 1997).
Glen v. Glen (1997), 34 R.F.L. (4th) 13, [1997] B.C.J. No. 2806 (S.C.) (December 3, 1997).
Blair v. Blair (1997), 34 R.F.L. (4th) 370, [1997] O.J. No. 4949 (Gen.Div.) (November 28, 1997).
Holizki v. Reeves (1997), 34 R.F.L. (4th) 414, [1997] S.J. No. 746 (Q.B.) (November 24, 1997).
Andersen v. Andersen (1997), 32 R.F.L. (4th) 177, [1997] B.C.J. No. 2496 (S.C.) (October 31, 1997).
Chrones v. Scott (1997), 33 R.F.L. (4th) 115, [1997] S.J. No. 596 (Q.B.) (October 14, 1997).
Hughes v. Hughes (1997), 30 R.F.L. (4th) 179, [1997] N.B.J. No. 261 (Q.B.) (June 6, 1997).

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(f) extraordinary expenses for extracurricular activities.

McLaughlin v. McLaughlin,[1998] B.C.J. No. 2514 (C.A.) (October 30, 1998).
Johb v. Johb (1998), 157 D.L.R. (4th) 754, 38 R.F.L. (4th) 11, [1998] S.J. No. 178 (Q.B.) (March 12, 1998), rev'd [1998] S.J. No. 603 (C.A.) (August 28, 1998).
Carnall v. Carnall, [1998] S.J. No. 493 (Q.B.) (June 30, 1998), var'g (1998), 37 R.F.L. (4th) 392, [1998] S.J. No. 211 (Q.B.) (March 26, 1998).
Sanders v. Sanders, [1998] A.J. No 565 (C.A.) (May 20, 1998).
Camirand v. Beaulne (1998), 160 D.L.R. (4th) 749, [1998] O.J. No. 2163 (Gen.Div.) (May 15, 1998).
White v. Rushton (1998), 37 R.F.L. (4th) 373, [1998] B.C.J. No. 422 (S.C.), (1998), 38 R.F.L. (4th) 454 (S.C.) (May 12, 1998).
Fichter v. Kofoed (1998), 161 D.L.R. (4th) 189, [1998] S.J. No. 338 (C.A.) (May 6, 1998) aff'g (1997), 32 R.F.L. (4th) 1, [1997] S.J. No. 558 (Q.B.) (September 29, 1997).

Young v. Young (1998) CarswellBC 1038 (S.C.) (April 21, 1998).
Campbell v. Martijn (1998), 40 R.F.L. (4th) 41 (P.E.I.S.C.) (April 20, 1998).
Fung-Sunter v. Fabian (1998), 38 R.F.L. (4th) 266, [1998] B.C.J. No. 861 (S.C.) (April 16, 1998).
Andries v. Andries (1998), 159 D.L.R. (4th) 665, 36 R.F.L. (4th) 175, [1998] M.J. No. 196 (C.A.) (April 9, 1998).
Greenwood v. Greenwood (1998), 37 R.F.L. (4th) 422, [1998] B.C.J. No. 729 (S.C.) (March 31, 1998).
Raftus v. Raftus (1998), 159 D.L.R. (4th) 264, 37 R.F.L. (4th) 59, 166 N.S.R. (2d) 179, [1998] N.S.J. No. 119 (C.A.) (March 25, 1998).
Cochrane v. Zarins (1998), 36 R.F.L. (4th) 434, [1998] B.C.J. No. 756 (C.A.) (March 20, 1998).
Yaremchuk v. Yaremchuk (1998), 158 D.L.R. (4th) 180, [1998] A.J. No. 258 (Q.B.) (March 11, 1998).
Spanier v. Spanier (1998), 40 R.F.L. (4th) 329 (B.C.S.C.) (March 2, 1998).
Young v. Young (1998), 39 R.F.L. (4th) 110, CarswellBC 403, B.C.J. No. 453 (S.C.) (March 2, 1998).
Wallace v. Wallace (1998), 156 D.L.R. (4th) 762, 36 R.F.L. (4th) 428, [1998] B.C.J. No. 203 (S.C.) (February 2, 1998).
Marshall v. McNeil (1998), 36 R.F.L. (4th) 264, [1998] S.J. No. 64 (Q.B.) (January 20, 1998).
Forzley v. Forzley (1997), 34 R.F.L. (4th) 105, [1997] B.C.J. No. 2881 (S.C.) (December 18, 1997).
Miller v. McClement (1997), 35 R.F.L. (4th) 83, [1997] S.J. No. 761 (Q.B.) (December 10, 1997).
Benvie v. Mills (1997), 34 R.F.L. (4th) 313, [1997] N.S.J. No. 499 (C.A.) (December 9, 1997).
Racette v. Gamauf (1997), 35 R.F.L. (4th) 357, [1997] P.E.I.J. No. 123 (S.C.) (December 3, 1997).
MacLeod v. Druhan (1997), 34 R.F.L. (4th) 206, [1997] N.S.J. No. 573 (Fam.Ct.) (December 2, 1997).
Lamparski v. Lamparski (1997), 35 R.F.L. (4th) 52, [1997] B.C.J. No. 2730 (S.C.) (November 21, 1997).
Krislock v. Krislock (1997), 34 R.F.L. (4th) 420, [1997] S.J. No. 698 (Q.B.) (November 20, 1997).
Blackburn v. Elmitt, [1997] B.C.J. No. 2569 (S.C.) (November 18, 1997).
MacDonald v. Rasmussen (1998), 38 R.F.L. (4th) 294, [1998] S.J. No. 9 (Q.B.) (January 12, 1998).
Brodland v. Brodland (1997), 34 R.F.L. (4th) 79, [1997] S.J. No. 688 (Q.B.) (November 5, 1997).
Ewart v. Miller (1997), 34 R.F.L. (4th) 408, [1997] S.J. No. 661 (Q.B.) (October 27, 1997).

Thomson v. Howard (1997), 33 R.F.L. (4th) 45, [1997] O.J. No. 4431(Gen.Div.) (October 23, 1997).
R.(E.K.) v. W.(G.A.) (1997), 32 R.F.L. (4th) 202, [1997] M.J. No. 501 (Q.B.) (October 17, 1997).
Walkeden v. Zemlak (1997), 33 R.F.L. (4th) 52, [1997] S.J. No. 601 (Q.B.) (October 3, 1997).
Middleton v. MacPherson (1997), 150 D.L.R. (4th) 519, 29 R.F.L. (4th) 334, [1997] A.J. No. 614 (Q.B.) (June 12, 1997).
Bially v. Bially (1997), 28 R.F.L. (4th) 418, [1997] S.J. No. 352 (Q.B.) (May 28, 1997).
See also:
Thomson v. Howard (1997), 33 R.F.L. (4th) 45, [1997] O.J. No. 4431 (Gen.Div.) (October 23, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

Sharing of expense

> (2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

Carnall v. Carnall, [1998] S.J. No. 493 (Q.B.) (June 30, 1998), var'g (1998), 37 R.F.L. (4th) 392, [1998] S.J. No. 211 (Q.B.) (March 26, 1998).
Budyk v. Sol, [1998] M.J. No. 252, (C.A.) (May 14, 1998).
Burton v. Burton (1997), 158 D.L.R. (4th) 174, 167 N.S.R. (2d) 155, [1997] N.S.J. No. 560 (S.C.) (February 10, 1998).
Marshall v. McNeil (1998), 36 R.F.L. (4th) 264, [1998] S.J. No. 64 (Q.B.) (January 20, 1998).
Corkum v. Corkum (1998), 36 R.F.L. (4th) 367, [1998] N.S.J. No. 34 (S.C.) (January 8, 1998). G
len v. Glen (1997), 34 R.F.L. (4th) 13, [1997] B.C.J. No. 2806 (S.C.) (December 3, 1997).
Holizki v. Reeves (1997), 34 R.F.L. (4th) 414, [1997] S.J. No. 746 (Q.B.) (November 24, 1997).
Lamparski v. Lamparski (1997), 35 R.F.L. (4th) 52, [1997] B.C.J. No. 2730 (S.C.) (November 21, 1997).
Andersen v. Andersen (1997), 32 R.F.L. (4th) 177, [1997] B.C.J. No. 2496 (S.C.) (October 31, 1997).
Thomson v. Howard (1997), 33 R.F.L. (4th) 45, [1997] O.J. No. 4431 (Gen.Div.) (October 23, 1997).
R.(E.K.) v. W.(G.A.) (1997), 32 R.F.L. (4th) 202, [1997] M.J.

No. 501 (Q.B.) (October 17, 1997).
Bially v. Bially (1997), 28 R.F.L. (4th) 418, [1997] S.J. No. 352 (Q.B.) (May 28, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

Subsidies, tax deductions, etc.

> (3) In determining the amount of an expense referred to in subsection (1), the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.

Carnall v. Carnall, [1998] S.J. No. 493 (Q.B.) (June 30, 1998), var'g (1998), 37 R.F.L. (4th) 392, [1998] S.J. No. 211 (Q.B.) (March 26, 1998).
Kelly v. Kelly (1998) 38 R.F.L. (4th) 444, [1998] A.J. No. 228 (Q.B.) (February 27, 1998), add'l reasons at [1998] A.J. No. 423 (Q.B.) (April 17, 1998).
Andries v. Andries (1998), 159 D.L.R. (4th) 665, 36 R.F.L. (4th) 175, [1998] M.J. No. 196 (C.A.) (April 9, 1998).
Holizki v. Reeves (1997), 34 R.F.L. (4th) 414, [1997] S.J. No. 746 (Q.B.) (November 24, 1997).
Chrones v. Scott (1997), 33 R.F.L. (4th) 115, [1997] S.J. No. 596 (Q.B.) (October 14, 1997).
Middleton v. MacPherson (1997), 150 D.L.R. (4th) 519, 29 R.F.L. (4th) 334, [1997] A.J. No. 614 (Q.B.) (June 12, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

Split custody

> 8. Where each spouse has custody of one or more children, the amount of a child support order is the difference between the amount that each spouse would otherwise pay if a child support order were sought against each of the spouses.

Burns v. Burns (1998), 40 R.F.L. (4th) 32, CarswellOnt 2478 (Gen. Div.) (June 19, 1998).
Tkach v. McCrary (1998), 36 R.F.L. (4th) 119, [1998] B.C.J. No. 117 (S.C.) (January 22, 1998).

Herbert-Jardine v. Jardine (1997), 39 R.F.L. 13, CarswellOnt 5574 (Gen. Div.) (December 31, 1997).
MacLeod v. Druhan (1997), 34 R.F.L. (4th) 206, [1997] N.S.J. No. 573 (Fam.Ct.) (December 2, 1997).
Ninham v. Ninham (1997), 29 R.F.L. (4th) 41, [1997] O.J. No. 2667 (Gen.Div.) (June 27, 1997).
Holtby v. Holtby (1997), 30 R.F.L. (4th) 70, (Ont.Ct. (Gen.Div.)) (May 30, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

Shared custody

9. 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 order 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.

Cross v. Cross (1998), 40 R.F.L. (4th) 242 (B.C.S.C.) (June 30, 1998).
Burns v. Burns (1998), 40 R.F.L. (4th) 32, CarswellOnt 2478 (Gen. Div.) (June 19, 1998).
Hunter v. Hunter (1998), 37 R.F.L. (4th) 260, [1998] O.J. No. 1527 (Gen. Div.) (March 27, 1998).
MacNaught v. MacNaught (1998), 37 R.F.L. (4th) 79, [1998] P.E.I.J. No. 27 (S.C.) (March 20, 1998).
Yaremchuk v. Yaremchuk (1998), 158 D.L.R. (4th) 180, [1998] A.J. No. 258 (Q.B.) (March 11, 1998).
Billark v. Billark (1998), 36 R.F.L. (4th) 361 (Ont. Ct. (Gen. Div.)) (March 9, 1998).
Spanier v. Spanier (1998), 40 R.F.L. (4th) 329 (B.C.S.C.) (March 2, 1998).
Kyle v. Kyle (1998), 37 R.F.L. (4th) 286, [1998] S.J. No. 55 (Q.B.) (February 9, 1998).
Bodmand v. Bodman (1998), 38 R.F.L. 210 (4th) 210, [1998] M.J. No. 62 (Q.B.) (February 6, 1998).
Herbert-Jardine v. Jardine (1997), 39 R.F.L. 13, CarswellOnt 5574 (Gen. Div.) (December 31, 1997).
Dennis v. Wilson (1997), 35 R.F.L. (4th) 146, [1997] O.J. No. 4663 (C.A.) (November 17, 1997).

Mertler v. Kardynal (1997), 35 R.F.L. (4th) 72, [1997] S.J. No. 720 (Q.B.) (November 17, 1997).
Rosati v. Dellapenta (1997), 35 R.F.L. (4th) 102, [1997] O.J. No. 5047 (Gen.Div.) (November 12, 1997).
Brodland v. Brodland (1997), 34 R.F.L. (4th) 79, [1997] S.J. No. 688 (Q.B.) (November 5, 1997).
Meloche v. Kales (1997), 35 R.F.L. (4th) 297, 35 O.R. (3d) 688 (Gen.Div.) (October 3, 1997).
Middleton v. MacPherson (1997), 150 D.L.R. (4th) 519, 29 R.F.L. (4th) 334, [1997] A.J. No. 614 (Q.B.) (June 12, 1997).
Hall v. Hall (1997), 30 R.F.L. (4th) 333, [1997] B.C.J. No. 1191 (S.C.) (May 15, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

Undue hardship

10. (1) On either spouse's application, a court may award an amount of child support that is different from the amount determined under any of sections 3 to 5, 8 or 9 if the court finds that the spouse making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship.

Van Gool v. Van Gool, [1998] B.C.J. No. 2513 (C.A.) (October 30, 1998).
Adams v. Loov (1998), 40 R.F.L. (4th) 222, (Alta. Q.B.) (June 16, 1998).
Schaber v. Schaber (1998), 40 R.F.L. (4th) 323 (Sask. Q.B.) (April 29, 1998).
Camirand v. Beaulne (1998), 160 D.L.R. (4th) 749, [1998] O.J. No. 2163 (Gen.Div.) (May 15, 1998).
Robinson v. Domin (1998), 39 R.F.L. (4th) 92, CarswellBC 1103 (S.C.) (May 11, 1998).
Nishnik v. Smith (1998), 39 R.F.L. (4th) 105, CarswellSask 105, 164 Sask. R. 225 (Q.B.) (February 23, 1998).
Benvie v. Mills (1997), 34 R.F.L. (4th) 313, [1997] N.S.J. No. 499 (C.A.) (December 9, 1997).
Racette v. Gamauf (1997), 35 R.F.L. (4th) 357, [1997] P.E.I.J. No. 123 (S.C.) (December 3, 1997).
Andersen v. Andersen (1997), 32 R.F.L. (4th) 177, [1997] B.C.J. No. 2496 (S.C.) (October 31, 1997).
Thomson v. Howard (1997), 33 R.F.L. (4th) 45, [1997] O.J. No. 4431 (Gen.Div.) (October 23, 1997).

O'Hara v. O'Hara (1997), 33 R.F.L. (4th) 37, [1997] S.J. No. 482 (Q.B.) (July 23, 1997).



Circumstances that may cause undue hardship

(2) Circumstances that may cause a spouse or child to suffer undue hardship include the following:
(a) the spouse has responsibility for an unusually high level of debts reasonably incurred to support the spouses and their children prior to the separation or to earn a living;

Adams v. Loov (1998), 40 R.F.L. (4th) 222, (Alta. Q.B.) (June 16, 1998).
Nishnik v. Smith (1998), 39 R.F.L. (4th) 105, CarswellSask 105, 164 Sask. R. 225 (Q.B.) (February 23, 1998).
Jackson v. Holloway (1997), 35 R.F.L. (4th) 272, [1997] S.J. No. 691 (Q.B.) (November 10, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

(b) the spouse has unusually high expenses in relation to exercising access to a child;

Duffield v. Duffield (1998), 36 R.F.L. (4th) 374, [1998] B.C.J. No. 184 (S.C.) (January 30, 1998).
Petrocco v. Von Michalofski (1998), 36 R.F.L. (4th) 278, [1998] O.J. No. 200 (Gen.Div.) (January 16, 1998).
Beeler v. Beeler (1997), 32 R.F.L. (4th) 397, [1997] S.J. No. 612 (Q.B.) (October 21, 1997).
Walkeden v. Zemlak (1997), 33 R.F.L. (4th) 52, [1997] S.J. No. 601 (Q.B.) (October 3, 1997).
Williams v. Williams (1997), 32 R.F.L. (4th) 23, [1997] N.W.T.J. No. 49 (S.C.) (August 14, 1997).
Willson v. Willson (1997), 34 R.F.L. (4th) 242, [1997] B.C.J. No. 2456 (S.C.) (June 6, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

(c) the spouse has a legal duty under a judgment, order or written separation agreement to support any person;

White v. Rushton (1998), 37 R.F.L. (4th) 373, [1998] B.C.J. No. 422 (S.C.), (1998), 38 R.F.L. (4th) 454 (S.C.) (May 12, 1998).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

(d) the spouse has a legal duty to support a child, other than a child of the marriage, who is

(i) under the age of majority, or
(ii) the age of majority or over but is unable, by reason of illness, disability or other cause, to obtain the necessaries of life; and

Camirand v. Beaulne (1998), 160 D.L.R. (4th) 749, [1998] O.J. No. 2163 (Gen.Div.) (May 15, 1998).
Dancak v. Dancak (1998), 38 R.F.L. (4th) 227, [1998] B.C.J. No. 526 (S.C.) (March 10, 1998).
Nishnik v. Smith (1998), 39 R.F.L. (4th) 105, CarswellSask 105, 164 Sask. R. 225 (Q.B.) (February 23, 1998).
Reiter v. Reiter (1997), 36 R.F.L. (4th) 102, [1997] B.C.J. No. 2835 (S.C.) (December 9, 1997).
Jackson v. Holloway (1997), 35 R.F.L. (4th) 272, [1997] S.J. No. 691 (Q.B.) (November 10, 1997).
Walkeden v. Zemlak (1997), 33 R.F.L. (4th) 52, [1997] S.J. No. 601 (Q.B.) (October 3, 1997).
Middleton v. MacPherson (1997), 150 D.L.R. (4th) 519, 29 R.F.L. (4th) 334, [1997] A.J. No. 614 (Q.B.) (June 12, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

(e) the spouse has a legal duty to support any person who is unable to obtain the necessaries of life due to an illness or disability.

Ferrigan v. Ferrigan, O.J. No. 895, 36 R.F.L. (4th) 206, Ont.Ct. (Gen.Div.) (February 13, 1998).
Petrocco v. Von Michalofski (1998), 36 R.F.L. (4th) 278, [1998] O.J. No. 200 (Gen.Div.) (January 16, 1998).
O'Hara v. O'Hara (1997), 33 R.F.L. (4th) 37, [1997] S.J. No. 482 (Q.B.) (July 23, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

Standards of living must be considered

(3) Despite a determination of undue hardship under subsection (1), an application under that subsection must be denied by the court if it is of the opinion that the household of the spouse who claims undue hardship would, after determining the amount of child support under any of sections 3 to 5, 8 or 9, have a higher standard of living than the household of the other spouse.

Adams v. Loov (1998), 40 R.F.L. (4th) 222, (Alta. Q.B.) (June 16, 1998).
Camirand v. Beaulne (1998), 160 D.L.R. (4th) 749, [1998] O.J. No. 2163 (Gen.Div.) (May 15, 1998).
White v. Rushton (1998), 37 R.F.L. (4th) 373, [1998] B.C.J. No. 422 (S.C.), (1998), 38 R.F.L. (4th) 454 (S.C.) (May 12, 1998).
Robinson v. Domin (1998), 39 R.F.L. (4th) 92, CarswellBC 1103 (S.C.) (May 11, 1998).
Soulière v. Leclair (1998), 38 R.F.L. (4th) 68 (Ont. Ct. (Gen.Div.)) (March 24, 1998).
Duffield v. Duffield (1998), 36 R.F.L. (4th) 374, [1998] B.C.J. No. 184 (S.C.) (January 30, 1998).
Petrocco v. Von Michalofski (1998), 36 R.F.L. (4th) 278, [1998] O.J. No. 200 (Gen.Div.) (January 16, 1998).
Jackson v. Holloway (1997), 35 R.F.L. (4th) 272, [1997] S.J. No. 691 (Q.B.) (November 10, 1997).
Thomson v. Howard (1997), 33 R.F.L. (4th) 45, [1997] O.J. No. 4431 (Gen.Div.) (October 23, 1997).
O'Hara v. O'Hara (1997), 33 R.F.L. (4th) 37, [1997] S.J. No. 482 (Q.B.) (July 23, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

Standards of living test

(4) In comparing standards of living for the purpose of subsection (3), the court may use the comparison of household standards of living test set out in Schedule II.

Adams v. Loov (1998), 40 R.F.L. (4th) 222, (Alta. Q.B.) (June 16, 1998).

White v. Rushton (1998), 37 R.F.L. (4th) 373, [1998] B.C.J. No. 422 (S.C.), (1998), 38 R.F.L. (4th) 454 (S.C.) (May 12, 1998).
Soulière v. Leclair (1998), 38 R.F.L. (4th) 68 (Ont. Ct. (Gen.Div.)) (March 24, 1998).
Bodmand v. Bodman (1998), 38 R.F.L. 210 (4th) 210, [1998] M.J. No. 62 (Q.B.) (February 6, 1998).
Reiter v. Reiter (1997), 36 R.F.L. (4th) 102, [1997] B.C.J. No. 2835 (S.C.) (December 9, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

Reasonable time

(5) Where the court awards a different amount of child support under subsection (1), it may specify, in the child support order, a reasonable time for the satisfaction of any obligation arising from circumstances that cause undue hardship and the amount payable at the end of that time.

Reasons

(6) Where the court makes a child support order in a different amount under this section, it must record its reasons for doing so.

ELEMENTS OF A CHILD SUPPORT ORDER

Form of payments

11. The court may require in a child support order that the amount payable under the order be paid in periodic payments, in a lump sum or in a lump sum and periodic payments.

Hunt v. Hunt-Smolis (1998), 39 R.F.L. (4th) 143, CarswellAlta 427 (Q.B.) (May 12, 1998).
Andries v. Andries (1998), 159 D.L.R. (4th) 665, 36 R.F.L. (4th) 175, [1998] M.J. No. 196 (C.A.) (April 9, 1998).
Greenwood v. Greenwood (1998), 37 R.F.L. (4th) 422, [1998] B.C.J. No. 729 (S.C.) (March 31, 1998).
Sagl v. Sagl (1997), 31 R.F.L. (4th) 405, [1997] O.J. No. 2837 (Gen.Div.) (July 11, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

Security

12. The court may require in the child support order that the amount payable under the order be paid or secured, or paid and secured, in the manner specified in the order.

Greenwood v. Greenwood (1998), 37 R.F.L. (4th) 422, [1998]
B.C.J. No. 729 (S.C.) (March 31, 1998).
MacNaught v. MacNaught (1998), 37 R.F.L. (4th) 79, [1998]
P.E.I.J. No. 27 (S.C.) (March 20, 1998).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

Information to be specified in order

13. A child support order must include the following information:
(a) the name and birth date of each child to whom the order relates;
(b) the income of any spouse whose income is used to determine the amount of the child support order;
(c) the amount determined under paragraph 3(1)(a) for the number of children to whom the order relates;
(d) the amount determined under paragraph 3(2)(b) for a child the age of majority or over;
(e) the particulars of any expense described in subsection 7(1), the child to whom the expense relates, and the amount of the expense or, where that amount cannot be determined, the proportion to be paid in relation to the expense; and
(f) the date on which the lump sum or first payment is payable and the day of the month or other time period on which all subsequent payments are to be made.

Lee v. Lee, [1998] N.J. No. 247, (C.A.) (September 18, 1998).

VARIATION OF CHILD SUPPORT ORDERS

Circumstances for variation

14. For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances:
(a) in the case where the amount of child support includes a determination

made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof;

(b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support; and

(c) in the case of an order made before May 1, 1997, the coming into force of section 15.1 of the Act, enacted by section 2 of chapter 1 of the Statutes of Canada, (1997).

SOR/97-563, s.2

Meuser v. Meuser (1998), CarswellBC 2813, (C.A.) (December 4, 1998), var'd (1998), 40 R.F.K. (4th) 295 (B.C.S.C.) (May 6, 1998).
Garard v. Garard, [1998] B.C..J. No. 2076 (C.A.) (September 9,1998).
Wang v. Wang, [1998] B.C..J. No. 1966 (C.A.) (August 21, 1998).
Burns v. Burns (1998), 40 R.F.L. (4th) 32, CarswellOnt 2478 (Gen. Div.) (June 19, 1998).
Fung-Sunter v. Fabian (1998), 38 R.F.L. (4th) 266, [1998] B.C.J. No. 861 (S.C.) (April 16, 1998).
Halley v. Hannon (1998), 40 R.F.L. (4th) 60, 1998 CarswellNfld 75 (U.F.C.) (April 3, 1998).
Kopciuch v. Kopciuch, [1998] S.J. No. 153, (C.A.) (February 20, 1998).
Duffield v. Duffield (1998), 36 R.F.L. (4th) 374, [1998] B.C.J. No. 184 (S.C.) (January 30, 1998).
Vanderstoep v. Vanderstoep (1998), 35 R.F.L. (4th) 385, [1998] B.C.J. No. 229 (S.C.) (January 27, 1998).
Klain v. Klain (1998), 36 R.F.L. (4th) 214, [1998] N.S.J. No. 20 (C.A.) (January 23, 1998).
Kuntz v. Chow (1998), 37 R.F.L. (4th) 280, [1998] S.J. No. 23 (Q.B.) (January 23, 1998).
Corkum v. Corkum (1998), 36 R.F.L. (4th) 367, [1998] N.S.J. No. 34 (S.C.) (January 8, 1998).
Mingo v. Mingo (1997), 35 R.F.L. (4th) 91, [1997] O.J. No. 4855 (Gen.Div.) (November 21, 1997).
Blackburn v. Elmitt (1997), 34 R.F.L. (4th) 183, [1997] B.C.J. No. 2569 (S.C.) (November 18, 1997).
Katzer v. Egeland (1997), 33 R.F.L. (4th) 416, [1997] S.J. No. 672 (Q.B.) (November 7, 1997).
Meloche v. Kales (1997), 35 R.F.L. (4th) 297, 35 O.R. (3d) 688 (Gen.Div.) (October 3, 1997).

Holtby v. Holtby (1997), 30 R.F.L. (4th) 70, (Ont.Ct. (Gen.Div.)) (May 30, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

INCOME

Determination of annual income

15. (1) Subject to subsection (2), a spouse's annual income is determined by the court in accordance with sections 16 to 20.

Clark v. Kubek (1998), 37 R.F.L. (4th) 244, [1998] A.J. No. 168 (Q.B.) (January 22, 1998).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

Agreement

(2) Where both spouses agree in writing on the annual income of a spouse, the court may consider that amount to be the spouse's income for the purposes of these Guidelines if the court thinks that the amount is reasonable having regard to the income information provided under section 21.

Calculation of annual income

16. Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by Revenue Canada and is adjusted in accordance with Schedule III.

Lee v. Lee, [1998] N.J. No. 247, (C.A.) (September 18, 1998).
Blain-Hughes v. Blain (1998), 39 R.F.L. (4th) 327 (Ont. Ct. Gen. Div.) (July 14, 1998).
Meenink v. Meenink (1998), 39 R.F.L. (4th) 372 (Ont. Ct. Gen. Div.) (May 14, 1998).
Lewkowski v. Lewkoski (1998) 40 R.F.L. (4th) 86, CarswellOnt 1775 (Gen. Div.) (April 20, 1998).
Moro v. Miletich (1998), 40 R.F.L. (4th) 115, CarswellOnt 1194 (Gen. Div.) (March 26, 1998).
Young v. Young (1998), 39 R.F.L. (4th) 110, CarswellBC 403,

B.C.J. No. 453 (S.C.) (March 2, 1998).
Burton v. Burton (1997), 158 D.L.R. (4th) 174, 167 N.S.R. (2d) 155, [1997] N.S.J. No. 560 (S.C.) (February 10, 1998).
Kyle v. Kyle (1998), 37 R.F.L. (4th) 286, [1998] S.J. No. 55 (Q.B.) (February 9, 1998).
Addison v. Dornian (1998), 36 R.F.L. (4th) 335, [1998] M.J. No. 50 (Q.B.) (February 5, 1998).
Needham v. Needham (1998), 36 R.F.L. (4th) 395, [1998] B.C.J. No. 202 (S.C.) (February 2, 1998).
Clark v. Kubek (1998), 37 R.F.L. (4th) 244, [1998] A.J. No. 168 (Q.B.) (January 22, 1998).
Doege v. Doege (1998), 37 R.F.L. (4th) 52, [1998] S.J. No. 8 (Q.B) (January 2, 1998).
MacDonald v. MacDonald, [1998] A.J. No. 1262 (C.A.) (December 17, 1997).
Depeel v. Abramyk (1997), 35 R.F.L. (4th) 152, [1997] S.J. No. 749 (Q.B.) (November 27, 1997).
Lamparski v. Lamparski (1997), 35 R.F.L. (4th) 52, [1997] B.C.J. No. 2730 (S.C.) (November 21, 1997).
Krislock v. Krislock (1997), 34 R.F.L. (4th) 420, [1997] S.J. No. 698 (Q.B.) (November 20, 1997).
Mertler v. Kardynal (1997), 35 R.F.L. (4th) 72, [1997] S.J. No. 720 (Q.B.) (November 17, 1997).
MacDonald v. Rasmussen (1998), 38 R.F.L. (4th) 294, [1998] S.J. No. 9 (Q.B.) (January 12, 1998).
Andersen v. Andersen (1997), 32 R.F.L. (4th) 177, [1997] B.C.J. No. 2496 (S.C.) (October 31, 1997).
Phillips v. Phillips (1997), 32 R.F.L. (4th) 218, [1997] B.C.J. No. 2376 (S.C.) (October 20, 1997).
Kelly v. Kelly (1997), 33 R.F.L. (4th) 16, [1997] S.J. No. 604 (Q.B.) (October 14, 1997).
Klaver v. Klaver (1997), 32 R.F.L. (4th) 223, [1997] O.J. No. 4127 (Gen.Div.) (October 3, 1997).
Stamoulos v. Pavlakis (1997), 32 R.F.L. (4th) 75, [1997] B.C.J. No. 2206 (S.C.) (October 1, 1997).
Cederland v. Cederland (1997), 32 R.F.L. (4th) 35, [1997] N.W.T.J. No. 59 (S.C.) (September 9, 1997).
Sagl v. Sagl (1997), 31 R.F.L. (4th) 405, [1997] O.J. No. 2837 (Gen.Div.) (July 11, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

Pattern of income

17. (1) Where the court is of the opinion that the determination of a spouse's annual income from a source of income under section 16 would not provide the fairest determination of the annual income from that source, the court may determine the annual income from that source

(a) where the amount in respect of the source of income has increased in each of the three most recent taxation years or has decreased in each of those three years, to be the amount from that source of income in the spouse's most recent taxation year;

Miller v. McClement (1997), 35 R.F.L. (4th) 83, [1997] S.J. No. 761 (Q.B.) (December 10, 1997).
Depeel v. Abramyk (1997), 35 R.F.L. (4th) 152, [1997] S.J. No. 749 (Q.B.) (November 27, 1997).



(b) where the amount in respect of the source of income has not increased or decreased as described in paragraph (a), to be the average of the amount received by the spouse from that source of income in the three most recent taxation years, or such other amount, if any, that the court considers appropriate; or

Dancak v. Dancak (1998), 38 R.F.L. (4th) 227, [1998] B.C.J. No.526 (S.C.) (March 10, 1998).
Greenwood v. Greenwood (1998), 37 R.F.L. (4th) 422, [1998] B.C.J. No. 729 (S.C.) (March 31, 1998).
Seiferling v. Langmaier (1998), 36 R.F.L. (4th) 296, [1998] S.J. No. 84 (Q.B.) (February 5, 1998).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

(c) where the spouse has received a non-recurring amount in any of the three most recent taxation years, to be such portion of the amount as the court considers appropriate, if any.

Blain-Hughes v. Blain (1998), 39 R.F.L. (4th) 327 (Ont. Ct. Gen. Div.) (July 14, 1998).
White v. Rushton (1998), 37 R.F.L. (4th) 373, [1998] B.C.J. No. 422 (S.C.), (1998), 38 R.F.L. (4th) 454 (S.C.) (May 12, 1998).
See also:

Lee v. Lee, [1998] N.J. No. 247, (C.A.) (September 18, 1998).
Spanier v. Spanier (1998), 40 R.F.L. (4th) 329 (B.C.S.C.) (March 2, 1998).
Burton v. Burton (1998), 36 R.F.L. (4th) 133 (Sask. Q.B.) (January 19, 1998)
MacDonald v. Rasmussen (1998), 38 R.F.L. (4th) 294, [1998] S.J. No. 9 (Q.B.) (January 12, 1998).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

Non-recurring losses

(2) Where a spouse has incurred a non-recurring capital or business investment loss, the court may, if it is of the opinion that the determination of the spouse's annual income under section 16 would not provide the fairest determination of the annual income, choose not to apply sections 6 and 7 of Schedule III, and adjust the amount of the loss, including related expenses and carrying charges and interest expenses, to arrive at such amount as the court considers appropriate.

Stamoulos v. Pavlakis (1997), 32 R.F.L. (4th) 75, [1997] B.C.J. No. 2206 (S.C.) (October 1, 1997).
Holtby v. Holtby (1997), 30 R.F.L. (4th) 70, (Ont.Ct. (Gen.Div.)) (May 30, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

Shareholder, director or officer

18. (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include

Schaber v. Schaber (1998), 40 R.F.L. (4th) 323 (Sask. Q.B.) (April 29, 1998).

(a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or

Beeching v. Beeching (1998), 40 R.F.L. (4th) 15, CarswellSask 432, 169 Sask. R. 18, [1998] S.J. No. 355 (Q.B.) (May 8, 1998).

(b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

Adjustment to corporation's pre-tax income

(2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

Schroder v. Schroder (1998), 38 R.F.L. (4th) 395, [1998] A.J. No. 518 (Q.B.) (May 13, 1998).
Needham v. Needham (1998), 36 R.F.L. (4th) 395, [1998] B.C.J. No. 202 (S.C.) (February 2, 1998).
Depeel v. Abramyk (1997), 35 R.F.L. (4th) 152, [1997] S.J. No. 749 (Q.B.) (November 27, 1997).
Blackburn v. Elmitt (1997), 34 R.F.L. (4th) 183, [1997] B.C.J. No. 2569 (S.C.) (November 18, 1997).
McKay v. McKay (1997), 35 R.F.L. (4th) 69, [1997] S.J. No. 666 (Q.B.) (November 3, 1997).
Kelly v. Kelly (1997), 33 R.F.L. (4th) 16, [1997] S.J. No. 604 (Q.B.) (October 14, 1997).
Stamoulos v. Pavlakis (1997), 32 R.F.L. (4th) 75, [1997] B.C.J. No. 2206 (S.C.) (October 1, 1997).
Sagl v. Sagl (1997), 31 R.F.L. (4th) 405, [1997] O.J. No. 2837 (Gen.Div.) (July 11, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

Imputing income

19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
(a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

Van Gool v. Van Gool, [1998] B.C.J. No. 2513 (C.A.) (October 30, 1998).
Furlong v. Furlong, [1998] A.J. No. 1173 (C.A.) (October 20, 1998).
Melzack v. Germain, [1998] O.J. No. 2341, (C.A.) (June 11, 1998).
Hunt v. Hunt-Smolis (1998), 39 R.F.L. (4th) 143, CarswellAlta 427 (Q.B.) (May 12, 1998).
M. (S.A.J.) v. M. (D.D.) (1998), 40 R.F.L. (4th) 95, CarswellMan 178 (Q.B.) (April 3, 1998).
Campbell v. Campbell (1998), 37 R.F.L. (4th) 228, [1998] S.J. No. 180 (Q.B.) (March 17, 1998).
Yaremchuk v. Yaremchuk (1998), 158 D.L.R. (4th) 180, [1998] A.J. No. 258 (Q.B.) (March 11, 1998).
Carson v. Buziak (1998), 40 R.F.L. (4th) 50 (Sask. Q.B.) (February 18, 1998).
Burton v. Burton (1998), 36 R.F.L. (4th) 133 (Sask. Q.B.) (January 19, 1998)
Miller v. McClement (1997), 35 R.F.L. (4th) 83, [1997] S.J. No. 761 (Q.B.) (December 10, 1997).
Macdonald v. Rasmussen (1997), 34 R.F.L. (4th) 451, [1997] S.J. No. 667 (Q.B.) (November 6, 1997).
Williams v. Williams (1997), 32 R.F.L. (4th) 23, [1997] N.W.T.J. No. 49 (S.C.) (August 14, 1997).



(b) the spouse is exempt from paying federal or provincial income tax;

Schaber v. Schaber (1998), 40 R.F.L. (4th) 323 (Sask. Q.B.) (April 29, 1998).
Le Bourdais v. Le Bourdais (1998), 36 R.F.L. (4th) 387, [1998] B.C.J. No. 217 (S.C.) (January 20, 1998).
Ninham v. Ninham (1997), 29 R.F.L. (4th) 41, [1997] O.J. No. 2667 (Gen.Div.) (June 27, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

(c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;

Garrison v. Garrison (1998), 38 R.F.L. (4th) 435, [1998] O.J. No. 2029 (Gen.Div.) (May 14, 1998).
R.(E.K.) v. W.(G.A.) (1997), 32 R.F.L. (4th) 202, [1997] M.J. No. 501 (Q.B.) (October 17, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

(d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;

Laflamme v. Laflamme (1998), 38 R.F.L. (4th) 335, [1998] A.J. No 292, (Q.B.) (March 20, 1998).

(e) the spouse's property is not reasonably utilized to generate income;

MacDonald v. MacDonald, [1998] A.J. No. 1262 (C.A.) (December 17, 1997).

(f) the spouse has failed to provide income information when under a legal obligation to do so;

Garrison v. Garrison (1998), 38 R.F.L. (4th) 435, [1998] O.J. No. 2029 (Gen.Div.) (May 14, 1998).
Ireland v. McMillan (1997), 36 R.F.L. (4th) 48, [1997] M.J. No. 638 (Q.B.) (December 18, 1997).
Cederland v. Cederland (1997), 32 R.F.L. (4th) 35, [1997] N.W.T.J. No. 59 (S.C.) (September 9, 1997).
Sagl v. Sagl (1997), 31 R.F.L. (4th) 405, [1997] O.J. No. 2837 (Gen.Div.) (July 11, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

(g) the spouse unreasonably deducts expenses from income;

Cooke v. Colomy (1998), 38 R.F.L. (4th) 342, [1998] M.J. No. 223, (Q.B.) (May 6, 1998).
Nataros v. Nataros (1998), 40 R.F.L. (4th) 308 (B.C.S.C.) (April 23, 1998).
Laflamme v. Laflamme (1998), 38 R.F.L. (4th) 335, [1998] A.J. No. 292, (Q.B.) (March 20, 1998).
Cornelius v. Andres (1998), 36 R.F.L. (4th) 436, [1998] M.J. No. 86 (Q.B.) (February 19, 1998).
Kyle v. Kyle (1998), 37 R.F.L. (4th) 286, [1998] S.J. No. 55

(Q.B.) (February 9, 1998).
Addison v. Dornian (1998), 36 R.F.L. (4th) 335, [1998] M.J. No. 50 (Q.B.) (February 5, 1998).
Seiferling v. Langmaier (1998), 36 R.F.L. (4th) 296, [1998] S.J. No. 84 (Q.B.) (February 5, 1998).
Needham v. Needham (1998), 36 R.F.L. (4th) 395, [1998] B.C.J. No. 202 (S.C.) (February 2, 1998).
Clark v. Kubek (1998), 37 R.F.L. (4th) 244, [1998] A.J. No. 168 (Q.B.) (January 22, 1998).
Holtby v. Holtby (1997), 30 R.F.L. (4th) 70, (Ont.Ct. (Gen.Div.)) (May 30, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

(h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income; and

Forzley v. Forzley (1997), 34 R.F.L. (4th) 105, [1997] B.C.J. No. 2881 (S.C.) (December 18, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

(i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

Jackson v. Jackson (1997), 35 R.F.L. (4th) 194, [1997] O.J. No. 4790 (Gen.Div.) (November 24, 1997).
See also:
Sanders v. Sanders, [1998] A.J. No 565 (C.A.) (May 20, 1998).
Polson v. Polson (1998), 38 R.F.L. (4th) 449, [1998] O.J. No. 2112 (Gen. Div.) (May 20, 1998).
Young v. Young (1998) CarswellBC 1038 (S.C.) (April 21, 1998).
Halley v. Hannon (1998), 40 R.F.L. (4th) 60, 1998 CarswellNfld 75 (U.F.C.) (April 3, 1998).
Penner v. Penner, [1998] A.J. No. 218 (C.A.) (February 27, 1998).
Biamonte v. Biamonte (1998), 36 R.F.L. (4th) 349, [1998] O.J. No. 541 (Gen. Div.) (February 9, 1998).
Doege v. Doege (1998), 37 R.F.L. (4th) 52, [1998] S.J. No. 8 (Q.B) (January 2, 1998).
Forzley v. Forzley (1997), 34 R.F.L. (4th) 105, [1997] B.C.J.

No. 2881 (S.C.) (December 18, 1997).
Harman v. Harman (1997), 34 R.F.L. (4th) 121, [1997] B.C.J.
No. 2836 (S.C.) (December 16, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

Reasonableness of expenses

(2) For the purpose of paragraph (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act.

Needham v. Needham (1998), 36 R.F.L. (4th) 395, [1998] B.C.J.
No. 202 (S.C.) (February 2, 1998).
Doege v. Doege (1998), 37 R.F.L. (4th) 52, [1998] S.J. No. 8
(Q.B) (January 2, 1998).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

Non-resident

20. Where a spouse is a non-resident of Canada, the spouse's annual income is determined as though the spouse were a resident of Canada.

Garrison v. Garrison (1998), 38 R.F.L. (4th) 435, [1998]
O.J. No. 2029 (Gen.Div.) (May 14, 1998).
Fibiger v. Fibiger (1998), 38 R.F.L. (4th) 258, [1998]
B.C.J. No. 187 (S.C.) (January 30, 1998).

INCOME INFORMATION

Obligation of applicant

21. (1) A spouse who is applying for a child support order and whose income information is necessary to determine the amount of the order must include the following with the application:
(a) a copy of every personal income tax return filed by the spouse for each of the three most recent taxation years;
(b) a copy of every notice of assessment or re-assessment issued to the spouse for each of the three most recent taxation years;
(c) where the spouse is an employee, the most recent statement of earnings indicating the total earnings paid in the year to date, including

overtime or, where such a statement is not provided by the employer, a letter from the spouse's employer setting out that information including the spouse's rate of annual salary or remuneration;

Schaber v. Schaber (1998), 40 R.F.L. (4th) 323 (Sask. Q.B.) (April 29, 1998).
Macdonald v. Rasmussen (1997), 34 R.F.L. (4th) 451, [1997] S.J. No. 667 (Q.B.) (November 6, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

(d) where the spouse is self-employed, for the three most recent taxation years

(i) the financial statements of the spouse's business or professional practice, other than a partnership, and
(ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the spouse does not deal at arm's length;

(e) where the spouse is a partner in a partnership, confirmation of the spouse's income and draw from, and capital in, the partnership for its three most recent taxation years;
(f) where the spouse controls a corporation, for its three most recent taxation years

(i) the financial statements of the corporation and its subsidiaries, and
(ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the corporation, and every related corporation, does not deal at arm's length; and

(g) where the spouse is a beneficiary under a trust, a copy of the trust settlement agreement and copies of the trust's three most recent financial statements.

General:

Gray v. Gray (1997), 33 R.F.L. (4th) 273, [1997] O.J. No. 4652 (Gen. Div.) (November 10, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

Obligation of respondent

> (2) A spouse who is served with an application for a child support order and whose income information is necessary to determine the amount of the order, must, within 30 days after the application is served if the spouse resides in Canada or the United States or within 60 days if the spouse resides elsewhere, or such other time limit as the court specifies, provide the court, as well as the other spouse or the order assignee, as the case may be, with the documents referred to in subsection (1).

Thomson v. Howard (1997), 33 R.F.L. (4th) 45, [1997] O.J. No. 4431 (Gen.Div.) (October 23, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.
Special expenses or undue hardship

> (3) Where, in the course of proceedings in respect of an application for a child support order, a spouse requests an amount to cover expenses referred to in subsection 7(1) or pleads undue hardship, the spouse who would be receiving the amount of child support must, within 30 days after the amount is sought or undue hardship is pleaded if the spouse resides in Canada or the United States or within 60 days if the spouse resides elsewhere, or such other time limit as the court specifies, provide the court and the other spouse with the documents referred to in subsection (1).

Income over $150,000

> (4) Where, in the course of proceedings in respect of an application for a child support order, it is established that the income of the spouse who would be paying the amount of child support is greater than $150,000, the other spouse must, within 30 days after the income is established to be greater than $150,000 if the other spouse resides in Canada or the United States or within 60 days if the other spouse resides elsewhere, or such other time limit as the court specifies, provide the court and the spouse with the documents referred to in subsection (1).

Making of rules not precluded

(5) Nothing in this section precludes the making of rules by a competent authority, within the meaning of section 25 of the Act, respecting the disclosure of income information that is considered necessary for the purposes of the determination of an amount of a child support order.

Failure to comply

22. (1) Where a spouse fails to comply with section 21, the other spouse may apply

(a) to have the application for a child support order set down for a hearing, or move for judgment; or
(b) for an order requiring the spouse who failed to comply to provide the court, as well as the other spouse or order assignee, as the case may be, with the required documents.

Costs of the proceedings

(2) Where a court makes an order under paragraph (1)(a) or (b), the court may award costs in favour of the other spouse up to an amount that fully compensates the other spouse for all costs incurred in the proceedings.

Adverse inference

23. Where the court proceeds to a hearing on the basis of an application under paragraph 22(1)(a), the court may draw an adverse inference against the spouse who failed to comply and impute income to that spouse in such amount as it considers appropriate.

Failure to comply with court order

24. Where a spouse fails to comply with an order issued on the basis of an application under paragraph 22(1)(b), the court may

(a) strike out any of the spouse's pleadings;
(b) make a contempt order against the spouse;
(c) proceed to a hearing, in the course of which it may draw an adverse inference against the spouse and impute income to that spouse in such amount as it considers appropriate; and
(d) award costs in favour of the other spouse up to an amount that fully compensates the other spouse for all costs incurred in the proceedings.

Continuing obligation to provide income information

25. (1) Every spouse against whom a child support order has been made must, on the written request of the other spouse or the order assignee, not more than once a year after the making of the order and as long as the child is a child within the meaning of these Guidelines, provide that other spouse or the order assignee with

(a) the documents referred to in subsection 21(1) for any of the three most recent taxation years for which the spouse has not previously provided the documents;

(b) as applicable, any current information, in writing, about the status of any expenses included in the order pursuant to subsection 7(1); and

(c) as applicable, any current information, in writing, about the circumstances relied on by the court in a determination of undue hardship.

Ireland v. McMillan (1997), 36 R.F.L. (4th) 48, [1997] M.J. No. 638 (Q.B.) (December 18, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

Below minimum income

(2) Where a court has determined that the spouse against whom a child support order is sought does not have to pay child support because his or her income level is below the minimum amount required for application of the tables, that spouse must, on the written request of the other spouse, not more than once a year after the determination and as long as the child is a child within the meaning of these Guidelines, provide the other spouse with the documents referred to in subsection 21(1) for any of the three most recent taxation years for which the spouse has not previously provided the documents.

Obligation of receiving spouse

(3) Where the income information of the spouse in favour of whom a child support order is made is used to determine the amount of the order, the spouse must, not more than once a year after the making of the order and as long as the child is a child within the meaning of these Guidelines, on the written request of the other spouse, provide the other spouse with the documents and information referred to in subsection (1).

Information requests

(4) Where a spouse or an order assignee requests information from the

other spouse under any of subsections (1) to (3) and the income information of the requesting spouse is used to determine the amount of the child support order, the requesting spouse or order assignee must include the documents and information referred to in subsection (1) with the request.

SOR/97-563, s.3

Time Limit

(5) A spouse who receives a request made under any of subsections (1) to (3) must provide the required documents within 30 days after the request's receipt if the spouse resides in Canada or the United States and within 60 days after the request's receipt if the spouse resides elsewhere.

Deemed receipt

(6) A request made under any of subsections (1) to (3) is deemed to have been received 10 days after it is sent.

Failure to comply

(7) A court may, on application by either spouse or an order assignee, where the other spouse has failed to comply with any of subsections (1) to (3)

(a) consider the other spouse to be in contempt of court and award costs in favour of the applicant up to an amount that fully compensates the applicant for all costs incurred in the proceedings; or

(b) make an order requiring the other spouse to provide the required documents to the court, as well as to the spouse or order assignee, as the case may be.

Unenforceable provision

(8) A provision in a judgment, order or agreement purporting to limit a spouse's obligation to provide documents under this section is unenforceable.

Provincial child support services

26. A spouse or an order assignee may appoint a provincial child support service to act on their behalf for the purposes of requesting and receiving income information under any of subsections 25(1) to (3), as well as for the purposes of an application under subsection 25(7).

COMING INTO FORCE

Coming into force

27. These Guidelines come into force on May 1, 1997.

SCHEDULE I

(Subsection 2(1))

FEDERAL CHILD SUPPORT TABLES

Notes:

1. The federal child support tables set out the amount of monthly child support payments for each province on the basis of the annual income of the spouse ordered to pay child support (the "support payer") and the number of children for whom a table amount is payable. Refer to these Guidelines to determine whether special measures apply.
2. There is a threshold level of income below which no amount of child support is payable. Child support amounts are specified for incomes up to $150,000 per year. Refer to section 4 of these Guidelines to determine the amount of child support payments for support payers with annual incomes over $150,000.
3. Income is set out in the tables in intervals of $1,000. Monthly amounts are determined by adding the basic amount and the amount calculated by multiplying the applicable percentage by the portion of the income that exceeds the lower amount within that interval of income.

Example:
Province: British Columbia
Number of children: 2
Annual income of support payer: $33,760
Basic amount: $480
Percent age: 1.20%
Lower amount of the income interval: $33,000
The amount of monthly child support is calculated as follows:
$480 + [1.2% x ($33,760 - 33,000)] $480 + [1.2/100 x $760]
$480 + [0.012 x $760]$480 + $9.12 = $489.12

4. There are separate tables for each province. The amounts vary from one province to another because of differences in provincial income tax rates. The tables are in the following order:

(a) Ontario; (b) Quebec; (c) Nova Scotia; (d) New Brunswick; (e) Manitoba; (f) British Columbia; (g) Prince Edward Island; (h) Saskatchewan; (i) Alberta; (j) Newfoundland; (k) Yukon; and (l)

Northwest Territories.

5. The amounts in the tables are based on economic studies of average spending on children in families at different income levels in Canada. They are calculated on the basis that child support payments are no longer taxable in the hands of the receiving parent and no longer deductible by the paying parent. They are calculated using a mathematical formula and generated by a computer program.
6. The formula referred to in note 5 sets support amounts to reflect average expenditures on children by a spouse with a particular number of children and level of income. The calculation is based on the support payer's income. The formula uses the basic personal amount for non-refundable tax credits to recognize personal expenses, and takes other federal and provincial income taxes and credits into account. Federal Child Tax benefits and Goods and Services Tax credits for children are excluded from the calculation. At lower income levels, the formula sets the amounts to take into account the combined impact of taxes and child support payments on the support payer's limited disposable income.

## SCHEDULE II

(Subsection 10(4))

## COMPARISON OF HOUSEHOLD STANDARDS OF LIVING TEST

Definitions

1. The definitions in this section apply in this Schedule.

"average tax rate"
" taux d'imposition moyen "
"average tax rate" means the rate determined by dividing the federal and provincial taxes payable on a person's annual income determined under sections 15 to 20 of these Guidelines by the person's taxable income.
"child"
" enfant "
"child" means a child of the marriage or a child who
(a) is under the age of majority; or
(b) is the age of majority or over but is unable, by reason of illness, disability or other cause to obtain the necessaries of life.
"household"
" ménage "
"household" means a spouse and any of the following

persons residing with the spouse

(a) any person who has a legal duty to support the spouse or whom the spouse has a legal duty to support;
b) any person who shares living expenses with the spouse or from whom the spouse otherwise receives an economic benefit as a result of living with that person, if the court considers it reasonable for that person to be considered part of the household; and
(c) any child whom the spouse or the person described in paragraph (a) or (b) has a legal duty to support.

SOR/97-563, s.10

Soulière v. Leclair (1998), 38 R.F.L. (4th) 68 (Ont. Ct. (Gen.Div.)) (March 24, 1998).



"taxable income"
" revenu imposable "
"taxable income" means the annual taxable income determined using the calculations required to determine "Taxable Income" in the T1 General form issued by Revenue Canada.

Test

2. The comparison of household standards of living test is as follows:

STEP 1

Establish the annual income of each person in each household by applying the formula:
A - B
where :
A is the person's income determined under sections 15 to 20 of these Guidelines, and
B is the federal and provincial taxes payable on the person's taxable income.
Where the information on which to base the income determination is not provided, the court may impute income in the amount it considers appropriate.

STEP 2

Adjust the annual income of each person in each household by:

(a) deducting the following amounts, calculated on an annual basis:

(i) any amount relied on by the court as a factor that resulted in a determination of undue hardship, except any amount attributable to the support of a member of the household that is not incurred due to a disability or serious illness of that member,

(ii) the amount that would otherwise be payable by the person in respect of a child to whom the order relates, if the pleading of undue hardship was not made,

(A) under the applicable table, or

(B) as is considered by the court to be appropriate, where the court considers the table amount to be inappropriate,

(iii) any amount of support that is paid by the person under a judgment, order or written separation agreement, except

(A) an amount already deducted under subparagraph (i), and

(B) an amount paid by the person in respect of a child to whom the order referred to in subparagraph (ii) relates; and

(b) adding the following amounts, calculated on an annual basis:

(i) any amount that would otherwise be receivable by the person in respect of a child to whom the order relates, if the pleading of undue hardship was not made,

(A) under the applicable table, or

(B) as is considered by the court to be appropriate, where the court considers the table amount to be inappropriate.

SOR/97-563, s.11(1),(2)

STEP 3

Add the amounts of adjusted annual income for all the persons in each household to determine the total household income for each household.

STEP 4

Determine the applicable low-income measures amount for each household based on the following:
Low-income Measures

| Household Size | Low-income Measures Amount |
|---|---|
| One person | |
| 1 adult | $10,382 |
| Two persons | |
| 2 adults | $14,535 |
| 1 adult and 1 child | $14,535 |
| Three persons | |
| 3 adults | $18,688 |
| 2 adults and 1 child | $17,649 |
| 1 adult and 2 children | $17,649 |
| Four persons | |
| 4 adults | $22,840 |
| 3 adults and 1 child | $21,802 |
| 2 adults and 2 children | $20,764 |
| 1 adult and 3 children | $20,764 |
| Five persons | |
| 5 adults | $26,993 |
| 4 adults and 1 child | $25,955 |
| 3 adults and 2 children | $24,917 |
| 2 adults and 3 children | $23,879 |
| 1 adult and 4 children | $23,879 |
| Six persons | |
| 6 adults | $31,145 |
| 5 adults and 1 child | $30,108 |
| 4 adults and 2 children | $29,070 |
| 3 adults and 3 children | $28,031 |
| 2 adults and 4 children | $26,993 |
| 1 adult and 5 children | $26,993 |
| Seven persons | |
| 7 adults | $34,261 |
| 6 adults and 1 child | $33,222 |
| 5 adults and 2 children | $32,184 |
| 4 adults and 3 children | $31,146 |
| 3 adults and 4 children | $30,108 |
| 2 adults and 5 children | $29,070 |
| 1 adult and 6 children | $29,070 |
| Eight persons | |
| 8 adults | $38,413 |

| | |
|---|---|
| 7 adults and 1 child | $37,375 |
| 6 adults and 2 children | $36,337 |
| 5 adults and 3 children | $35,299 |
| 4 adults and 4 children | $34,261 |
| 3 adults and 5 children | $33,222 |
| 2 adults and 6 children | $32,184 |
| 1 adult and 7 children | $32,184 |

STEP 5

Divide the household income amount (Step 3) by the low-income measures amount (Step 4) to get a household income ratio for each household.

STEP 6

Compare the household income ratios. The household that has the higher ratio has the higher standard of living.

White v. Rushton (1998), 37 R.F.L. (4th) 373, [1998] B.C.J. No. 422 (S.C.), (1998), 38 R.F.L. (4th) 454 (S.C.) (May 12, 1998).
Soulière v. Leclair (1998), 38 R.F.L. (4th) 68 (Ont. Ct. (Gen.Div.)) (March 24, 1998).
Reiter v. Reiter (1997), 36 R.F.L. (4th) 102, [1997] B.C.J. No. 2835 (S.C.) (December 9, 1997).
O'Hara v. O'Hara (1997), 33 R.F.L. (4th) 37, [1997] S.J. No. 482 (Q.B.) (July 23, 1997).
Middleton v. MacPherson (1997), 150 D.L.R. (4th) 519, 29 R.F.L. (4th) 334, [1997] A.J. No. 614 (Q.B.) (June 12, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

## SCHEDULE III

(Section 16)
ADJUSTMENTS TO INCOME

Employment expenses

1.Where the spouse is an employee, the spouse's applicable employment expenses described in the following provisions of the Income Tax Act are deducted:
(a) paragraph 8(1)(c) concerning expenses of clergyman's residence;

(b) paragraph 8(1)(d) concerning expenses of teacher's exchange fund contribution;
(c) paragraph 8(1)(e) concerning expenses of railway employees;
(d) paragraph 8(1)(f) concerning sales expenses;
(e) paragraph 8(1)(g) concerning transport employee's expenses;
(f) paragraph 8(1)(h) concerning travel expenses;
(g) paragraph 8(1)(i) concerning dues and other expenses of performing duties;
(h) paragraph 8(1)(j) concerning motor vehicle and aircraft costs;
(i) paragraph 8(1)(l.1) concerning Canada Pension Plan contributions and Employment Insurance Act remiums paid in respect of another employee who acts as an assistant or substitute for the spouse;
(j) paragraph 8(1)(n) concerning salary reimbursement;(k) paragraph 8(1)(o) concerning forfeited amounts;
(l) paragraph 8(1)(p) concerning musical instrument costs; and
(m) paragraph 8(1)(q) concerning artists' employment expenses.
SOR/97-563, s.12

Kyle v. Kyle (1998), 37 R.F.L. (4th) 286, [1998] S.J. No. 55 (Q.B.) (February 9, 1998).
Depeel v. Abramyk (1997), 35 R.F.L. (4th) 152, [1997] S.J. No. 749 (Q.B.) (November 27, 1997).
Krislock v. Krislock (1997), 34 R.F.L. (4th) 420, [1997] S.J. No. 698 (Q.B.) (November 20, 1997).
Phillips v. Phillips (1997), 32 R.F.L. (4th) 218, [1997] B.C.J. No. 2376 (S.C.) (October 20, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.
Child support

2. Deduct any child support received that is included to determine total income in the T1 General form issued by Revenue Canada.

SOR/97-563, s.13

Spousal support

3. (1) To calculate income for the purpose of determining an amount

under an applicable table, deduct the spousal support received from the other spouse.

Moro v. Miletich (1998), 40 R.F.L. (4th) 115, CarswellOnt 1194 (Gen. Div.) (March 26, 1998).

Special or extraordinary expenses

(2) To calculate income for the purpose of determining an amount under section 7 of these Guidelines, deduct the spousal support paid to the other spouse.

Blair v. Blair (1997), 34 R.F.L. (4th) 370, [1997] O.J. No. 4949 (Gen.Div.) (November 28, 1997).
Lamparski v. Lamparski (1997), 35 R.F.L. (4th) 52, [1997] B.C.J. No. 2730 (S.C.) (November 21, 1997).
Krislock v. Krislock (1997), 34 R.F.L. (4th) 420, [1997] S.J. No. 698 (Q.B.) (November 20, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

Social assistance

4. Adjust social assistance income to include the amount determined to be attributable to the spouse.

Dividends from taxable Canadian corporations

5. Replace the taxable amount of dividends from taxable Canadian corporations received by the spouse by the actual amount of those dividends received by the spouse.

Addison v. Dornian (1998), 36 R.F.L. (4th) 335, [1998] M.J. No. 50 (Q.B.) (February 5, 1998).
Kelly v. Kelly (1997), 33 R.F.L. (4th) 16, [1997] S.J. No. 604 (Q.B.) (October 14, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.
Capital gains and capital losses

6. Replace the taxable capital gains realized in a year by the spouse by the actual amount of capital gains realized by the spouse in excess of the

spouse's actual capital losses in that year.

Mertler v. Kardynal (1997), 35 R.F.L. (4th) 72, [1997] S.J. No. 720 (Q.B.) (November 17, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

Business investment losses

7. Deduct the actual amount of business investment losses suffered by the spouse during the year.

Dancak v. Dancak (1998), 38 R.F.L. (4th) 227, [1998] B.C.J. No. 526 (S.C.) (March 10, 1998).

Carrying charges

8. Deduct the spouse's carrying charges and interest expenses that are paid by the spouse and that would be deductible under the Income Tax Act.

Lamparski v. Lamparski (1997), 35 R.F.L. (4th) 52, [1997] B.C.J. No. 2730 (S.C.) (November 21, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

Net self-employment income

9. Where the spouse's net self-employment income is determined by deducting an amount for salaries, benefits, wages or management fees, or other payments, paid to or on behalf of persons with whom the spouse does not deal at arm's length, include that amount, unless the spouse establishes that the payments were necessary to earn the self-employment income and were reasonable in the circumstances.

Dancak v. Dancak (1998), 38 R.F.L. (4th) 227, [1998] B.C.J. No. 526 (S.C.) (March 10, 1998).
Lamparski v. Lamparski (1997), 35 R.F.L. (4th) 52, [1997] B.C.J. No. 2730 (S.C.) (November 21, 1997).
Andersen v. Andersen (1997), 32 R.F.L. (4th) 177, [1997] B.C.J. No. 2496 (S.C.) (October 31, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

Additional amount

10. Where the spouse reports income from self-employment that includes the self-employment income for the 12 months ending on December 31 of the reporting year plus an additional amount earned in a prior period, deduct the amount earned in the prior period, net of reserves.

Kelly v. Kelly (1997), 33 R.F.L. (4th) 16, [1997] S.J. No. 604 (Q.B.) (October 14, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

Capital cost allowance for property

11. Include the spouse's deduction for an allowable capital cost allowance with respect to real property.

Addison v. Dornian (1998), 36 R.F.L. (4th) 335, [1998] M.J. No. 50 (Q.B.) (February 5, 1998).
Seiferling v. Langmaier (1998), 36 R.F.L. (4th) 296, [1998] S.J. No. 84 (Q.B.) (February 5, 1998).
Doege v. Doege (1998), 37 R.F.L. (4th) 52, [1998] S.J. No. 8 (Q.B) (January 2, 1998).
Lamparski v. Lamparski (1997), 35 R.F.L. (4th) 52, [1997] B.C.J. No. 2730 (S.C.) (November 21, 1997).
Beeler v. Beeler (1997), 32 R.F.L. (4th) 397, [1997] S.J. No. 612 (Q.B.) (October 21, 1997).

Note: This site provides a non-exhaustive list of reported cases and some unreported appellate court decisions. Additional cases both reported and unreported can be found using other sources of case law.

Partnership or sole proprietorship income

12. Where the spouse earns income through a partnership or sole proprietorship, deduct any amount included in income that is properly required by the partnership or sole proprietorship for purposes of capitalization.

SOR/97-365, s.14

Employee stock options with a Canadian-controlled private corporation

13. (1) Where the spouse has received, as an employee benefit, options to purchase shares of a Canadian-controlled private corporation and has exercised those options during the year, add the difference between the value of the shares at the time the options are exercised and the amount paid by the spouse for the shares and any amount paid to acquire the options to purchase the shares, to the income for the year in which the options are exercised.

Disposal of shares

(2) If the spouse has disposed of the shares during the year referred to in subsection (1), deduct from the income for that year the difference determined pursuant to that subsection.

MacDonald v. MacDonald, [1998] A.J. No. 1262 (C.A.) (December 17, 1997).

Lexicon

A.J. : Alberta Judgments from Quicklaw
A.Q. : Quebec Judgments from Quicklaw
B.C.J. : British Columbia Judgments from Quicklaw
D.L.R.: Dominons Law Reports
J.E. : Jurisprudence Express
M.J. : Manitoba Judgments from Quicklaw
N.J. : Newfoundland Judgments from Quicklaw
N.B.J. : New Brunswick Judgments from Quicklaw
N.W.T.J. : Northwest Territories Judgments from Quicklaw
O.J. : Ontario Judgments from Quicklaw
Q.J. : Quebec Judgments from Quicklaw
R.F.L. : Reports on Family Law
S.J. : Saskatchewan Judgments from Quicklaw
Y.J. : Yukon Judgments from Quicklaw

**Syrtash Collection of Family Law Articles**
SFLRP/1999-007

# Pensions - The Pay Out: A Review of "If and When" and "Double-Dipping" Issues*

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January 1999

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PENSIONS - THE PAY OUT

¶ 1

> "I confess that there is one word which, given the choice, I would prefer to not to hear in a matrimonial proceeding: pension."
> Iurincic v. Iurincic [1998] O.J. No. 2197, Quinn, J.

The reaction of Quinn, J. in Iurincic v. Iurincic is shared by many who have grappled with the complex process involved when the value of a pension forms part of the equalization payment. The purpose of this paper is to explore two aspects of payments from a pension.

¶ 2 Part A will focus on the "if and when" approach to deferring the portion of the equalization payment which is comprised of the pension as an asset, in the context of the Family Law Act of Ontario. Part A will also review the evidence required to be presented to a court, whether requesting or resisting an "if and when" or deferred payment on account of the pension and will address measures necessary to protect the recipient spouse during the waiting period.

¶ 3 Part B of the paper will review the issue often called "double-dipping". The basis of that issue is whether the non-pensioned spouse is entitled to receive spousal support from pension income when the pension has already been equalized through the property provisions of the Family Law Act.

## A. DEFERRING THE PENSION PAYMENT: THE "IF AND WHEN" SOLUTION

### 1. Background

¶ 4 The early case law under the Family Law Act R.S.O. 1990, c.F.3 (as amended) ("The Act") indicated that the equalization payment should be made by way of a lump sum payment either immediately or at the earliest possible date after the determination of the equalization payment. The Ontario Act, unlike family property legislation in other provinces, does not provide for reapportionment of assets but is rather based on a debtor-creditor relationship resulting in a payment obligation.

¶ 5 The Family Law Act requires a three stage process in determining the property rights on the breakdown of the marriage:

a. The spouses must each calculate their respective net family properties under s. 4 of the Act.
b. The net family properties are equalized under s. 5 of the Act, by way of an application under s. 7. The spouse with the lesser net family property is entitled to a payment equal to one-half the difference between the two net family properties, subject to the discretion of the court to vary the equalization entitlement under s. 5(6) if equalization would be unconscionable.
c. It is only after the entitlement has been determined, that the court can consider how the equalization payment will be made, having regard to s. 9 of the Family Law Act. Section 9 provides:

> 9(1) In an application under section 7, the court may order,
>
> (a) that one spouse pay to the other spouse the amount to which the court finds that spouse to be entitled under this Part;
> (b) that security, including a charge on property, be given for the performance of an obligation imposed by the order;
> (c) that, if necessary to avoid hardship, an amount referred to in clause (a) be paid in instalments during a period not exceeding 10 years or that payment of all or part of the amount be delayed for a period not exceeding 10 years; and
> (d) that, if appropriate to satisfy an obligation imposed by the order,
>
> (i) property be transferred to or in trust for or vested in a spouse, whether absolutely, for life or for a term of years, or
> (ii) any property be partitioned or sold.

(See Marsham v. Marsham (1987), 7 R.F.L. (3d) 1 (Ont.H.C.) and Monger v. Monger (1994), 8 R.F.L. (4th) 157 (Ont.Gen.Div.)).

¶ 6 The three step process set out above must apply to all assets. When the equalization payment includes a pension, the method of payment can become problematic. The value of a pension may represent the most significant asset included in a spouse's net family property. This is, in part, because of the nature of a pension, being an entitlement to a future stream of income which may be inaccessible on valuation date and in part by the very high value of, in particular, defined benefit pension plans. In determining how and when the equalization payment will be made, courts have struggled with balancing the desirability of an immediate equalization payment against the hardship which might flow from such an order.

¶ 7 When considering the possibility of deferring the equalization payment on account of the pension by using the "if and when" approach, it is important to note that there is no provision under the Family Law Act for the transfer of assets absent or before a calculation of the net family property of each spouse and the ensuing equalization payment. In other words, the "if and when" treatment of the pension asset is not a method to opt out of the equalization scheme.

2. Do the Courts have Jurisdiction to Make an "If and When" Order?

¶ 8 The courts have jurisdiction to impose a trust pursuant to s. 9(1)(d)(i) of the Family Law Act. This subsection is relied on as the basis of an order to defer the portion of the equalization payment which represents the pension. Since the passing of the Family Law Act in 1986, the case law emphasized the importance of making the earliest possible payment on account of the entire equalization payment, including pension assets. This early judicial preference was confirmed by the Ontario Court of Appeal in Best v. Best (1992), 41 R.F.L. (3d) 383 (Ont.C.A.). (NOTE: As most of the readers of this paper will be aware, there are two cases dealing with pensions decided by the Ontario Court of Appeal in which the family name was Best. The one cited earlier will be referred to throughout this paper as Best [no. 1], and the latter decision, being that found at Best v Best (1997), 31 R.F.L. (4th) 1 (Ont.C.A.) will be referred to as Best [no. 2.]).

¶ 9 In Best v. Best (1992), 41 R.F.L. (3d) 383 (Ont.C.A.) [Best no.1], the parties had been married for 21 1/2 years and at the time of trial were both 45 years of age. According to the terms of the husband's pension plan, he would be unable to retire before he reached the age of 65, some 20 years off. The husband appealed the trial decision, requesting a variation of the judgment to allow the payment of the pension to be postponed and paid on an "if and when" basis once the pension was in receipt. Weiler, J.A., writing for the Court observed that critical in determining whether to order the requested postponement is the respective ages of the parties and the date when pension payments will commence. She distinguished the earlier cases of Hilderley v. Hilderley (1989), 21 R.F.L.(3d) 383 (Ont.H.C.) and Marsham v. Marsham (1987), 7 R.F.L. (3d) 1 (Ont.H.C.) which allowed an "if and when" payout. In each of those cases the pension holder was likely to retire at or before the 10 year period, being the maximum period for delaying the equalization payment set out in s. 9(1)(c) of the Act:

> "If payment of the amount representing the spouse's share of a pension

> benefit is to be postponed, under s. 9(1)(c) of the Act, it should be for a period which is no longer than 10 years. I recognize that s. 9(1)(d) of the Act does provide that, if appropriate, to satisfy an obligation imposed, property may be transferred to, or in trust for, a spouse. In the case of the pension benefit, this may be difficult having regard to the legal questions as to the nature of the ownership and control of the pension benefit, the general non-exigibility of pension benefits, and the need for cumbersome mechanisms to impose a transfer or a trust on a pension benefit. Where retirement is considerably beyond the period for which an equalization payment may be postponed under the Family Law Act, R.S.O. 1990, c.F3, a lump sum is generally appropriate because it enables both spouses to pursue their independent lives and to make plans with more certainty." (p. 388).

¶ 10 In Best [no. 1], the Court of Appeal does not state that there is no jurisdiction or that it is always inappropriate to order an "if and when" postponement of the portion of the equalization payment representing the pension benefit. Best [no. 1] does, however, stand for the proposition that the "if and when" type deferral will be rarely ordered.

¶ 11 Best v. Best (1997), 31 R.F.L. (4th) 1 (Ont.C.A.)(leave to appeal to S.C.C. granted) [Best no. 2], questions whether an "if and when" division is possible under the Act:

> "Assuming that an "if and when" arrangement could be devised within the confines of the Act,... it was within the trial judge's discretion to reject this option." (p. 23).

¶ 12 Charron, J.A., writing for the Court, noted that while the Act does not expressly provide for an "if and when" type order, it had been made or considered in a number of cases. She also noted that this type of deferred payment was a complex and problematic approach to pension payments.

¶ 13 Best v. Best (1992), 41 R.F.L. (3d) 383 [Best no. 1] and Best v. Best (1997), 31 R.F.L. (4th) 1 [Best no. 2] have not been consistently interpreted. In the case of Moro v. Miletich, [1998] O.J. No. 1799 (Q.L.), Campbell, J. is of the view that Best [no. 1] and Best [no. 2] stand for the proposition that the "as-and-when" "... approach and option is no longer an acceptable method of equalizing that pension asset" (p. 12). In contrast, in Monger v. Monger (1994), 8 R.F.L. (4th) 157 (Ont.Gen.Div.), Cusinato, J. interpreted Best [no. 1] as standing for the proposition that "... under special circumstances, and where appropriate, the court may exercise a discretion to defer the pension division until retirement on an "if and when" basis. This discretion, however, is not to be exercised without good reason." (p. 171).

¶ 14 While the Ontario Court of Appeal has not endorsed the postponement of the pension portion of the equalization payment by way of an "if and when" arrangement, it has not used opportunities in the Best cases to determine that "if and when" is never an

appropriate solution. As a result, in my view, counsel may request that the portion of the equalization payment representing the pension asset be postponed through an "if and when" arrangement. The circumstances when the court will order an "if and when" deferral will likely be rare, and only made where counsel has marshalled the evidence necessary to meet the high test required in light of the Best decisions.

3. Methods of Determining the Amount Payable Under an "If and When" Division

¶ 15 The basis of an "if and when" division is the imposition of a trust on the pension, with the pension owning spouse acting as trustee, for the benefit of the non-pensioned spouse pursuant to s. 9(1)(d)(i) of the Family Law Act. The essence of the arrangement is that the equalization payment on account of the pension is deferred until such time as the pension holder/trustee retires or terminates his or her employment and starts to receive the pension as income. At that time, the non-member spouse receives a portion of the income stream from the pension based on a formula. The various formulae represent attempts to restrict the pension payments to the non-pensioned spouse to the equalized portion only, while providing some compensation for deferring receipt of the equalization payment.

¶ 16 The types of "if and when" arrangements are:

a. The "western" or "Marsham" or "Rutherford" formula

¶ 17 This formula uses a fraction based on the period of time during which the pension was equalized divided by the total years of pension contributions. This fraction is applied against the ultimate pension income which will be received by the pension holding spouse on retirement. It will therefore include enhanced benefits resulting from post-separation or post-valuation date income increases.

¶ 18 The formula can be expressed as:

$$\frac{\text{Number of months of contribution to the pension plan during the period the parties cohabited within marriage}}{\text{Total number of months of contributions to the pension plan}} \times \frac{\text{pension benefits payable}}{2}$$

¶ 19 This formula for distributing the pension benefits has been followed or approved in Rauf v. Rauf (1992), 39 R.F.L. (3d) 63 (Div.Ct.), Bourdeau v. Bourdeau (1993), O.F.L.R. [7:039] and Hilderley v. Hilderley (1989), 21 R.F.L. (3d) 383 (Ont.H.Ct.)

¶ 20 As observed by Mr. Justice Walsh in Marsham v. Marsham (1987), 7 R.F.L. (3d) 1 (Ont.H.C.) this formula likely contravenes the equalization scheme in Part I of the

Family Law Act. The concern with this approach is that there will be an enhanced value to the asset due to post-valuation date earnings. This will yield a higher income from the pension in most defined benefit type pension plans. Using a formula which effectively assigns an equal percentage to each year of pensionable service may result in a greater benefit to the recipient spouse than that contemplated by the Family Law Act. For negotiation purposes the enhanced value may be the quid pro quo for waiting for payment.

b. The termination "if and when" formula

¶ 21 This formula fixes the income stream on valuation date and apportions that amount between the spouses when the pension holder starts to receive the pension as income. The income which will be divided is the amount of pension income to which the pensioned spouse was entitled on valuation date. The formula may be expressed as follows:

> 1/2 x the multiplying factor for each year of service x the average salary to valuation date (as provided by the Plan, often the best 5 or 6 years) x the number of years of service of cohabitation within marriage to valuation date

¶ 22 This method was used in Thompson v. Thompson (1987), 62 O.R.(2d) 425 (H.Ct.).

¶ 23 The concern with this formula is that the recipient spouse is not compensated for deferring his or her equalization payment on account of the pension. Often, a defined benefits pension plan will provide for increases or indexing for inflation, even if the employee terminates or leaves employment before being entitled to receive the pension as income. Freezing the formula in valuation date dollars may have an unfair result for the non-pensioned spouse.

¶ 24 Cusinato, J. in Monger v. Monger (1994), 8 R.F.L. (4th) 157 (Ont.Gen.Div.) adjusted the formula used in Thompson (supra) to meet this concern. The average salary to valuation date was increased by the annual indexing factor as provided under the pension plan and shared on retirement.

c. A third formula was used in Woeller v. Woeller (1988), 15 R.F.L. (3d) 120 (Ont.H.C.).

¶ 25 This formula should not be used. The difficulty with the formula is that it mixes the capitalized value of the pension with income flow, being the pension benefits payable. The formula is expressed as follows:

$$1/2 \times \frac{\text{capitalized value of the pension on valuation date}}{\text{payable}} \times \text{pension benefits on retirement}$$

the eventual total accrued value
of the pension

4. The Threshold Test

¶ 26 The test to be met before a deferred "if and when" payment on account of the pension will be made is essentially two-fold:

a. The length of the deferral: will the postponement proposed be within the 10 year period over which an equalization payment can be made pursuant to s. 9(1)(c) of the Family Law Act?
b. Hardship or Unfairness: The hardship considered is both that to the payer as well as to the recipient.

a. Length of deferral

¶ 27 "A critical factor as whether to order a postponement of the equalization payment representing the pension benefit is the respective ages of the parties and the date when the payment of the pension is to begin. Where the spouses are near retirement, sharing the pension benefit can be delayed because the waiting period is relatively short. The terms of postponement should contain protection for the payee spouse's interests." Best v. Best (1992), 41 R.F.L. (3d) 383, at 388 (Ont.C.A.) [Best no.1]. Best [no.1] stands for the principle that a lump sum is generally the appropriate way to make an equalization payment. It allows the parties to make a clean break and gives them the ability to make their own future financial arrangements. If the equalization payment, including the pension, is to be postponed, it should be for a period of no longer than 10 years.

¶ 28 In Salib v. Cross (1993), 15 O.R. (3d) 521 (Gen.Div.), aff'd on other grounds at (1995) 27 O.R. (3d) 255 (Ont.C.A.) Chapnik, J. concluded that, while the "wait-and-see" approach had been adopted in Ontario cases, it did not "...comply strictly with the equalization principles under the Act" (p. 537). She followed the principle established in Best v. Best (1992), 41 R.F.L. (3d) 383 (Ont.C.A.) [Best no.1] that the factors of the ages of the parties and the date when the pension payments would begin were critical in whether the "if and when" deferral on account of the pension would be ordered. Chapnik, J. ordered an immediate payment of the entire equalization payment because the pension holding wife was 43 years of age and so at least 13 more years away from retirement. She was not prepared to order payments over time or to take the wait-and-see approach on the payment of the pension in the circumstances.

¶ 29 In Burridge v. Burridge [1998] O.J. No. 3261 (Gen.Div.), the court ordered an "if and when" payment where the pensioned spouse was close to retirement, the marriage was of long duration and there was an indefinite spousal support obligation. Quinn, J. determined that in these circumstances the "if and when" approach "...is a more equitable option and should be applied if possible." (p. 10).

¶ 30 In Bourdeau v. Bourdeau (1993) O.F.L.R. 7:039, Mr. Justice McWilliam approved an "if and when" approach as the pension owner husband had 4 1/2 years until his retirement. The relatively short period until retirement meant that the contingencies which the court was required to assess were dramatically reduced. Another consideration was the fact that the only other significant asset was the matrimonial home, which was not sufficient to make the equalization payment on account of the pension. Further, transferring the matrimonial home to the wife would leave the husband with the pension as virtually his only asset.

b. Hardship or Unfairness

¶ 31

> "A further consideration is the hardship of the payer spouse of making an immediate payment, which should be balanced against the hardship of the payee spouse of not receiving immediate payment".
> Best v. Best (1992), 41 R.F.L. (3d) 383, at 388 [Best no. 1]

¶ 32 In Best no. 1, the Court considered the wife's need for a capital payment in order to provide a residence for herself and the children as a factor in determining the trial judge was correct in not postponing the pension payment. The only significant assets owned by this family were the pension and the matrimonial home.

¶ 33 In Salib v. Cross (1993), 15 O.R. (3d) 521 (Gen.Div.) (aff'd on other points at 18 R.F.L. (4th) 218 (Ont.C.A.), the wife, who was the pension holder, argued that the "wait and see" approach would be the fairer approach to paying out her pension. Chapnik, J. follows Best no. 1 in considering hardship to the payer balanced against the hardship to the recipient. The equalization payment could be made from the proceeds of the matrimonial home, and the wife earned substantially more than the husband and so there was no indication of hardship to the wife. This decision suggests that the unusual or extraordinary circumstances giving rise to an order for deferral on an "if and when" basis could be a situation where the pension holder would have to borrow to make an equalization payment largely composed of a pension.

¶ 34 In Grzelak v. Grzelak [1997] O.J. No. 4838 (Gen. Div.), a decision of Macdougall, J., the parties were both 41 years of age and the earliest date of retirement was the age of 50. The Court focused on the pension holder's heavy debt load and few assets in ordering an "if and when" payment on account of the pension.

¶ 35 Monger v. Monger, supra, was a trial after a 29.25 year marriage. Without the pension included as an asset, each spouse would have a nil net family property. The husband, who was the pension holder, had no assets with which to satisfy the equalization payment and support obligations. The Court determined that he was not in a position to pay on account of the pension asset, either immediately or within the 10 year period.

¶ 36 In certain circumstances, it may be unfair not to apportion and therefore share the uncertain nature of an asset between the parties: see DaCosta v. DaCosta (1992), 40 R.F.L. (3d) 216 (Ont.C.A.), where the Court of Appeal held it would be unfair to compel the husband to make an immediate payment with respect to his contingent interest in an estate. DaCosta is an example of a case where the "if and when" trust was imposed on an asset other than a pension.

¶ 37 In Burridge v. Burridge (supra), the pension holder, who was 58, was expected to retire at 60 or 65 and the bulk of the equalization payment was on account of the pension. Quinn, J. determined that the fairest way to make equalization payment on account of the pension, having regard to the spousal support obligations, the inherent uncertainties in valuing a pension and the risk that the pension holder would not live to receive the pension income, was by deferring the payment through an "if and when" arrangement. He ordered that the pension be secured only until retirement, with the non-pensioned spouse sharing the risks inherent in the pension asset. Quinn, J. reasoned that the "if and when" option treated the spouses equally and was fair and equitable in the circumstances. With respect, and without getting into the issues relating to valuing pensions, this approach would involve an element of hindsight if the trustee spouse died before the full value of the pension, as determined on valuation date, had been paid.

¶ 38 A review of the case law therefore indicates that the threshold test to be met is essentially two-fold. In light of Best [no. 1], the courts will not order an "if and when" type deferral on account of the pension asset if the pension holder is not likely to start receiving the pension within 10 years. The court must also find that hardship or unfairness would result from an order requiring an immediate or lump sum equalization payment on account of the pension asset.

¶ 39 On a more practical note, it helps if counsel agree to the "if and when" approach or if the recipient spouse requests the payment deferral. In Grzelak v. Grzelak, the non-pension holder's request for a deferral of the pensionable part of the equalization payment on an "if and when" basis was granted; in Monger v. Monger, counsel agreed that the "if and when" approach was the practicable, if not the only available means of satisfying the pension and in Bourdeau v. Bourdeau, both parties were satisfied with the "if and when" arrangement.

5. Evidence to be Presented

¶ 40 In Gore v. Gore, [1998] O.J. No.3574 (Gen.Div.), at p. 6, Boland, J. determined that:

> "I will not postpone the equalization payment representing the value of the pension for the following reasons:
>
> 1. There is no realistic proposal for the length of the postponement.
> 2. There is no reasonable proposal to protect the petitioner's interest.
> 3. The matrimonial home is a realisable asset out of which the payment

can be made.

4. The petitioner has no pension plan and has a need for a capital fund to invest in her future retirement."

a. Value of the Pension

¶ 41 The evidence to be presented at trial must include the value of the pension to be included in the calculation of the pension holder's net family property. It would violate the scheme of the legislation to not first establish a net family property. Without a value for the pension, it would be difficult, if not impossible, to prove that it would be a hardship to the pension holder to pay the pension portion of the equalization payment immediately. Generally an actuary will be retained to value the pension in accordance with the standards established by that profession and having regard to the various contingencies, possible ages of retirement and the terms of the plan. Walsh, J. in Marsham v. Marsham (supra) considers the expense of retaining an actuary and indicates that actuarial evidence may not always be necessary if the parties have a "realistic" value. In my experience, it is difficult to determine a realistic value without the assistance of an actuary.

b. Establishing the Equalization Payment

¶ 42 Once the value of each party's assets, including the pension, have been established in order to calculate each spouse's net family property, then it is possible to determine the equalization payment owing under s. 5 of the Act.

¶ 43 Only then is it possible to explore the method of payment in accordance with s. 9.

c. Method of Payment

¶ 44 The court will start from the proposition that the equalization payment should be made by way of a immediate lump sum payment. If a deferral is sought, the onus is on the person requesting the deferral of the equalization payment to meet the two-fold test of hardship and length of deferral.

¶ 45 The evidence which should be presented in support of a request for an "if and when" deferral on account of the pension is:

In presenting evidence regarding the length of deferral, counsel should consider:

i. The ages of the parties, particularly the age of the pension holder;
ii. The years of pensioned employment;

iii The likely time of retirement:

(1) as contemplated by the pension holder on valuation date;

(2) without the benefit of hindsight;
(3) post valuation date conduct may shed light on valuation date intentions;
(4) separation is relevant as it may give rise to an expectation of increased financial obligations;
see Best [no. 2] (under appeal to S.C.C.);

iv. Counsel may wish to introduce statistical evidence as to the probable timing of retirement (see Gore v. Gore [1998] O.J. No. 3574 (Gen.Div.), a decision of Boland, J., where the court considered statistical evidence as to the percentage of O.P.P. officers who take an early retirement); and
v. The terms of the plan and the governing legislation should be introduced in order to establish the retirement options available to the pensioned spouse.

In presenting evidence of hardship, counsel should explore:

i. The present ability for the payment to be made from realisable assets or from available income within the 10 year period;
ii. Income expectations and current income;
iii. Debt load and reasonable expenses for the recipient; and
iv. The recipient's need for an immediate capital fund, for example, to maintain dependents.

6. Checklist of Protections for the Recipient of an "If And When" Arrangement

¶ 46 To ensure that the equalization payment which is being deferred is made to the recipient, measures must be taken to protect the recipient's entitlement against various uncertainties, including death, remarriage, change of employment and reluctance to pay. The case law reflects judicial concern with protecting the recipient spouses's interests: see Best v. Best (1992), 41 R.F.L. (3d) 383 [Best no. 1], where the Court of Appeal noted that no evidence had been presented as how to protect the recipient's interests.

¶ 47 The concerns that should be addressed by counsel to protect the recipient spouse are:

a. Security

¶ 48 Most pension plans provide for a reduced annuity for a surviving spouse on the pension holder's death. This may change on separation and/or divorce. The terms of the particular pension plan and the governing legislation must be thoroughly reviewed in order to determine whether survivor's benefits remain available if the pensioned spouse dies.

¶ 49 The most often used methods of securing the outstanding equalization payment in the event of the pension holder's death are:

i. Designation of the non-pensioned spouse as beneficiary of life insurance or supplementary death benefits available through employment. The difficulty with this option is that many pension holders have group term insurance which may be reduced or eliminated on retirement. Care must be had in determining the type of insurance which is available and whether the non-pensioned spouse can be protected by group insurance after retirement. In the cases of Burridge v. Burridge [1998] O.J. No. 3261, and Monger v. Monger (1994), 8 R.F.L. (4th) 157, the pension owning spouse was required to provide security through life insurance only until retirement. Caution should be exercised before adopting this approach as the payments from the pension may fall short of meeting the recipient spouse's equalization entitlement.

ii. Courts have also ordered that "if and when" arrangements be secured against property: see Abate v. Abate (1988), 17 R.F.L. (3d) 251, where Walsh, J. ordered that pension payments be secured against the matrimonial home and DaCosta v. DaCosta (1991), 40 R.F.L. (3d) 216 (Ont.C.A.) where the court ordered that the husband was trustee for the wife's share in the husband's contingent interest in an estate on an "if and when" basis. As the property was in a foreign jurisdiction (the United States), the court ordered that the "if and when" deferral be secured against a bond or a charge on property in Ontario.

iii A charge on the pension member's estate, see Monger v. Monger (supra) where, after the husband's retirement, security was in the form of a charge on his estate, to the extent of the estate's available assets. This could be perilous if, for example assets had been transferred to a new spouse.

¶ 50 The value of the pension holder's interest in the pension plan, on valuation date, should be set out in the agreement for a number of reasons, not the least of which is the sufficiency of the security.

b. Date of retirement

¶ 51 The concern here is whether the pension holder can defer retirement beyond the date anticipated when calculating the equalization payment, leaving the recipient without the anticipated stream of income. Often, the court has specified the date at which the recipient would start receiving pension payments (see direction No. 6 in the Appendix of Further Specific Directions in Marsham v. Marsham (supra)).

¶ 52 "If and when" clauses should provide for compensation if the pensioned spouse delays retirement. This could be by way of a lump sum payment of the entire capitalized amount or the commencement of payment in the amount which would have been received had retirement not been deferred.

¶ 53 Similarly, the possibility of the pension holder taking an early retirement should be addressed. The "if and when" clauses should provide that if the pension holder takes an early retirement, the non-pensioned spouse will start to receive payments on account of the pension as soon as pension payments commence. As practitioners dealing with defined benefit plans are aware, the value of a pension will likely be higher if the pension holder takes an early retirement. This is largely because of the significantly greater period of time over which the pension will be paid. As a result, the solicitor for the recipient spouse should consult with an actuary before assuming that an early retirement will prejudice his or her client's case. Early retirement might, however, have an impact on the quantum of spousal or child support payable and may be addressed in that context.

¶ 54 While the issue of indexing of pension plan payments is likely included as part of the "if and when" formula, the impact of an early retirement on the indexing provisions of the plan should be addressed.

c. Information and communication between the non-pensioned spouse and the pension plan administrators

¶ 55 It may be appropriate for the pension holder to provide the non-pensioned spouse with an irrevocable direction enabling him or her to communicate directly with the pension holder. The concerns of the recipient may include:

i. The pension holder may terminate employment prior to retirement, of particular concern if it is possible to withdraw or roll funds into a new pension plan or another retirement vehicle;
ii. Ensuring that the member spouse does not make elections within the pension plan which are detrimental to the non-pensioned spouse's interest in the plan; and
iii. Changes to the pension plan itself, whether by way of insolvency of the plan or changes to the member's interest.

¶ 56 "If and when" clauses should address the compensation which a recipient should receive should the pension member's interest in the pension plan be affected.

d. Does the "if and when" arrangement violate the terms of s. 52 of the Pension Benefits Act, R.S.O. 1990, c.P.8.

¶ 57 This issue was addressed in Monger v. Monger,(supra). Section 52 of the Pension Benefits Act provides that a domestic contract or court order is not effective if the recipient is entitled to more than 50 percent of the pension holder's entitlement to a pension as of valuation date, without consideration of future benefits, salary or changes to

the plan, but with consideration for future vesting. As a result, it may be that a Marsham or Rutherford-type formula violates the Ontario Pension Benefits Act. In Monger, Cusinato, J. was of the view that the modified "termination" formula, which fixed the pension income at valuation date, but provided for indexing, was appropriate as s. 52 did not affect the court's ability to provide for inflation.

e. What if the non-pensioned spouse dies before the pension holder?

¶ 58 If the recipient spouse should die before the pension holder, and while the if and when payments are still being made, should the payments on account of the pension income continue to be paid to the non-pensioned member's estate or will the entire pension income revert to the pensioned spouse? The "if and when" clauses should provide for this event.

f. Bankruptcy

¶ 59 Although a beneficial interest in property, here the pension, which the bankrupt-pension holder holds as trustee (for the benefit of the recipient spouse) should survive a bankruptcy, counsel may wish to consider including "if and when" terms which specifically address the possibility of bankruptcy.

g. Income tax

¶ 60 Who will pay the income taxes owing on the portion of the pension paid to the recipient spouse? In most cases the income tax will be withheld by the pension administrator at source, and in most plans, this will mean at the pension holder's tax rate. It may be possible to have a flow-through of the tax consequences to the effect that the non-pensioned spouse, as beneficiary of an entitlement to income under a trust, may be entitled to be taxed at his or her own rate, however, an accountant should be consulted before assuming this is possible.

¶ 61 Some cases and settlements have attempted to address the tax concern by including a provision to the effect that the recipient's share of the pension payment is deemed to be spousal support for the purposes of the Income Tax Act. Care must be taken in attempting to characterize the pension payments as support as Revenue Canada may not accept what is essentially a property payment to be a deductible support obligation.

h. Enforceability

¶ 62 If it is not possible to have the pension payments made directly to the recipient by the pension administrators, the non-pensioned spouse may be forced to litigate in order to force a reluctant trustee (the pension holder) to make payments as required. Provisions which address this concern could include an immediate lump sum payment of the entire balance owing.

¶ 63 Often a "fail safe" clause is included. This gives the recipient the opportunity to re-open the terms of the pension payment and/or the "if and when" terms if the recipient, for some reason, does not receive the share to which he or she is entitled. Disputes could be reserved to the courts or arbitrated. Generally, otherwise applicable limitation periods are waived.

i Acknowledgement that both parties understand and agree to the pension holder's obligations as trustee

¶ 64 Generally, orders and settlements state that the pension holder "shall not do or omit to do any act which would prejudice the pension holder's interest under the pension plan". Counsel may consider whether a more detailed trust agreement is appropriate.

j. Many agreements and orders state that the pension plan will be severed as soon as the plan or applicable legislation permits

¶ 65 The terms of the plan or the applicable legislation may change before or after the pension is in receipt and may allow an amount to be transferred from the pension plan. Many separation agreements which have "if and when" clauses failed to make adequate provisions to protect the recipient spouse if the plan terms changed so that the pension could be paid out. The amount that the pension plan administrators are prepared to pay to the recipient under the terms of the legislation may not be in keeping with the recipient's entitlement under the Family Law Act. Further, for various reasons, including the pension plan's advantage of the large group investment, the recipient may not be able to generate a similar income to that negotiated or ordered from private investment of a lump sum payment from the pension plan. This has been the experience of many counsel dealing with the Pension Benefits Division Act, S.C. 1992, c. 46, which provides for a lump sum rollover into a locked-in retirement vehicle for the non-pensioned spouse. Even if the M.T.A. ("maximum transferable amount") is used to purchase an annuity with similar provisions to most federal pension plans (a lifetime annuity, guaranteed for 5 years and fully indexed), the income yield available to the recipient spouse rarely matches that of the pensioned spouse.

7. Considerations if acting for the pension owning spouse

¶ 66

a. Consider whether an "if and when" arrangement is appropriate for other assets, such as stock options, deferred profit savings plans (see Craig v. Craig [1998] O.J. No. 2198 (Q.L.) where an "if and when" trust obligation was imposed on proceeds of a pending lawsuit and DaCosta v. DaCosta, supra, where the Court of Appeal imposed an "if and when" trust interest on the husband's contingent interest in an estate).
b. Ensure that the pension holding spouse does not have an additional tax obligation to Revenue Canada if the Agreement sets out that

payments will be taxed in the recipient's hands.

c. Consider whether there should be some flexibility available to the pension owner. The pension owner's expectations may change, whether for personal or career reasons. Should the non-member's entitlement be reopened if there is an unexpected and involuntary change to the pension owner's expectations on valuation date?

d. In addressing the issue of securing the deferred pension payment, the cost of obtaining life insurance and the difficulties of disposing of secured property should be considered.

e. Should there be a limit on the amount paid to the recipient? An interesting point was raised by Professor McLeod in his annotation to the Monger case (supra). He queried whether the recovery of the non-pensioned spouse from the pension income should be limited to the amount initially included in the equalization payment (subject to interest). The argument would be that while the courts have jurisdiction to order how the pension entitlement will be satisfied under s. 9, the amount of the equalization payment has already been established under s. 5 and presumably there is no jurisdiction in the courts to change the amount of an entitlement by the method of payment.

## B. SPOUSAL SUPPORT: THE DOUBLE-DIPPING OR DOUBLE RECOVERY CONUNDRUM

### 1. Background

¶ 67 "The "double-dipping" conundrum can be articulated in the following manner:

> Where an equalization payment takes into account the value of the payer's pension, can the recipient then seek further support where the source of the ability to pay is the same pension whose value was previously used to determine a portion of the equalization payment?" Shadbolt v. Shadbolt (1997), 32 R.F.L. (4th) 253 (Ont.Gen.Div.) at p. 259.

¶ 68 The factors which will be relevant when determining entitlement and quantum of spousal support from pension income, when the dependent spouse has already received payment on account of the capitalized value of the pension, are:

a. The inability of the dependent non-pensioned spouse to achieve a reasonable standard of self-sufficiency, having regard to the standard of living during the relationship. This is the "need" component of the determination of spousal support, which may continue after the equalization payment has been made.

b. The inability of the dependent spouse to achieve self-sufficiency may be contrasted with the ability of the pensioned spouse to pay from the pension stream.

c. Both the inability (need) and ability must however be balanced against the unfairness to the pension holding spouse of being asked to share the same future income stream twice, once as property as part of the equalization payment and again as spousal support when the capitalized value becomes available as an income stream. This concern is the basis of the issue which is referred to as double-dipping or double recovery in this paper.

¶ 69 The perceived unfairness to the pensioned spouse was addressed shortly after the passing of the Family Law Act. The cases of Veres v. Veres (1987), 9 R.F.L. (3d) 447 (Ont.H.C.) and Butt v. Butt (1989), 22 R.F.L. (3d) 415 (Ont.H.C.) exemplify a reluctance to look to pension income as a basis for support if the pension had previously been equalized. In Veres v. Veres, spousal support payments terminated when the husband retired. Cusinato, J. reasoned that while the husband's pension asset might have grown post-separation, the wife was receiving spousal support during the period between separation and retirement and after the equalization owned most of the family's other assets. In Butt v. Butt, Granger, J. determined that Mr. Butt was entitled to know that his pension would be "....protected from a second attack from Mrs. Butt..." and restricted the wife's entitlement to spousal support to the period prior to retirement. These early cases likely reflect discomfort with treating pensions as a stream of income and as an asset.

¶ 70 Later cases did not follow the earlier line of reasoning, that pension income should be exempt as a basis for spousal support payments if the pension formed part of the equalization payment. In Flett v. Flett (1992), 43 R.F.L. (3d) 24 (Ont.Gen.Div.), Beckett, J. refused to follow the reasoning in the earlier decisions of Butt and Veres, holding that, "If, after equalization and taking into account the wife's income she still has needs and the husband is able to meet those needs from his total income, he should do so." (p. 34). The Court does not deal with the issue as to whether only part of the pension income should be looked to when determining the amount of spousal support to be paid. See also Nantais v. Nantais (1995), 16 R.F.L.(4th) 201 (Ont.Gen.Div.) where Brockenshire, J. held that the 25 percent of the husband's pension income which represented the amount which had been included in the equalization payment could form the basis of spousal support payments, particularly having regard to the actuarial assumptions used to value the pension. He emphasized that the nature of the pension as an asset did not change the interconnection between support and property. "The only effect on support is that this division should take place first, and then the court would look to the possibility of generating income from the assets in the hands of the disadvantaged spouse in deciding what if any support should be provided." (at p.210).

2. Shadbolt v. Shadbolt

¶ 71 The case of Shadbolt v. Shadbolt (1997), 32 R.F.L. (4th) 253 (Ont.Gen.Div.) provides a thorough review of the law and a practical approach to the issue of double dipping. It is required reading when dealing with spousal support payable from pension income.

¶ 72 In Shadbolt v. Shadbolt, Czutrin, J. conducts a thorough review of the law and determines that spousal support can continue even after the pension has been equalized:

> "Thus, as I believe the Supreme Court of Canada did in the Strang case [Strang v. Strang [1992] 2 S.C.R. 112 (S.C.C.)], the Court of Appeal [in Linton v. Linton(1990), 1 O.R. (3d) 1 (C.A.)] recognized that in Ontario there must be a consideration as to the impact of the payment of an equalization payment that includes the value of the pension in determining the quantum of support. Although not specific as to how to quantify the adjustment for the possible "double recovery", there was recognition both in the Supreme Court and the Court of Appeal of the necessity of taking into account the value of the pension at the date of separation and the amount of any growth in the value of the pension post-separation." at p. 261.

¶ 73 Czutrin, J. hold that while spousal support could be paid from pension income, in order to promote fairness, specific evidence had to be presented in order to prevent the potential of double recovery. He follows the reasoning in Linton in that the husband's obligation to pay support should not be terminated at retirement but rather revisited when he retires. Although the case of Messier v. Delage (1983), 35 R.F.L.(3d) 337 (S.C.C.) is not specifically referred to, Czutrin, J. follows the reasoning in that case by determining that it is not possible to speculate as to the amount of spousal support which would be fair. Where the value of a pension was part of the calculation of net family property, and so incorporated into the equalization payment "... it is not until such time as the person is in actual receipt of the pension that one is able to determine with certainty the extent to which there has been "double recovery"." (p. 266).

¶ 74 In order to prevent double-recovery, a separate calculation, with supporting evidence, is critical. Czutrin, J. held that to do otherwise would be unfair. While it may be necessary to produce accounting or actuarial evidence showing the stream of pension income from the portion of the pension which had not been equalized, each case will rest on its own facts. Czutrin. J. also acknowledged that the unique blending of assets which is inherent in the calculation of a party's net family property and the ensuing equalization payment will make separating the portion of the income stream which has already been equalized difficult. The difficulty may be compounded by assumptions which may ultimately be discovered to be incorrect, but were used in reaching the value included in the equalization payment, for example, assumptions regarding tax rates.

¶ 75 This analysis is attractive in that it protects the pension owning spouse by providing a credit for the equalization payment already made and provides a basis for ongoing support if the needs and means of the parties warrant ongoing support. The difficulty may be with separating and quantifying the two portions of pension income.

¶ 76 Czutrin, J. suggests that the evidence required in order to enable the court to determine the appropriate amount of spousal support after retirement in cases of "double-

dipping" where the capitalized value of the pension on valuation date has already been equalized will be:

a. Financial Statements showing the actual assets that each spouse had after equalizing the pension. (It should be noted that the Shadbolt case had unusual circumstances. It was not an application to vary spousal support on retirement. The equalization payment was being determined several years after valuation date when the pension was in pay and the husband had inappropriately reduced spousal support before the pension asset was equalized);
b. Up-to-date income tax returns, and disclosure of the income that the parties' assets produced;
c. The wife, in this case the non-pensioned spouse, was to provide an accounting of funds which she received as a result of the equalization payment and the use they were put to. The court also requested evidence of her proposals concerning the investment of the equalization payment, from an income perspective.

¶ 77 The Shadbolt case stands for the principle that spousal support can be paid from the portion of pension which has not been equalized. The appropriate amount of support after retirement can be determined only when the pension is in pay and then only with evidence of the post-equalization asset and income positions of the parties.

¶ 78 We do not have any more specific information as to how Czutrin, J. would have quantified the spousal support payable from the portion of the pension income which had not been equalized as the parties settled the ongoing amount of spousal support.

3. Other Cases Dealing With the Issue of Double-Dipping

¶ 79 In Dolman v. Dolman (1998), 38 R.F.L. (4th) 362 (Ont.Gen.Div.), Philp, J. considers the issue of double recovery where a significant part of the equalization payment was on account of the capitalized value of the husband's pension, from which he had already started to receive income. The Shadbolt decision is not referred to. Philp, J. finds that the Family Law Act of Ontario allows spousal support to continue after an equalization payment if the dependent non-pensioned spouse continues to have need and if the payer continues to have the ability to pay. Philp, J. considers the case of Brinkos v. Brinkos (1989), 20 R.F.L. (3d) 445 (Ont.C.A.), noting that the Court must look at the whole picture and exercise its discretion in an even-handed and fair fashion, as "Double recovery would be obvious and difficult to justify." (p. 374). The amount of the equalization payment is referenced, however, Philp, J. does not address the income which the wife may have available from the equalization payment, nor does he refer to the evidentiary basis for determining that spousal support of $200.00 per month would continue to be paid "until the wife's financial future is more easily defined." (p. 375).

¶ 80 The Shadbolt case was applied in Hutchison v. Hutchison (1998), 38 R.F.L.(4th) 341 (Ont.Gen.Div.). When determining the amount of spousal support, the court focused

on the portion of the husband's income stream and asset base which had not been previously equalized. Marshman, J. somewhat wistfully speculates that if an "in specie" division had been available, then the problem would not be before the Court. She looked to the portion of the husband's pension and other assets which had not been previously equalized and determined that the husband had an income of $1,075.00 per month available to him from those assets. The spousal support award of $750.00 per month was acknowledged to be the bulk of the income from the unequalized assets.

¶ 81 Shadbolt was also referred to in the case of Carter v. Carter [1998] O.J. No. 4015, a motion to suspend existing support obligations, which was dismissed, to be determined by the judge hearing the full application. Kozak, J. held that, although the initial jurisprudence under the F.L.A. stood for the principle that, after equalizing the pension, the pension should not again be the basis of spousal support payments, the later case law confirmed that spousal support continuing past the payer's retirement did not give the dependent spouse a double benefit of the pension.

¶ 82 In Campbell v. Campbell [1998] O.J. No. 3290, Mazza, J. interprets Shadbolt and Hutchison as a recent trend in the case law away from double dipping, holding that the determination of spousal support should be restricted to unequalized funds.

4. Obligation on the Recipient

¶ 83 What is the obligation of the dependent spouse in investing the equalization payment? Is he or she obliged to invest the equalization payment in a certain type of retirement vehicle? Must the support recipient erode his or her capital? Should one assume that the spouses can generate equal income from assets of equal value?

¶ 84 Actuary Tom Walker, in his article "Double-Dipping: Can a Pension be Both Property and Income?" 1994 Money and Family Law, No. 12 at p. 97, argues that it may well be necessary for the recipient to encroach on her capital to meet expenses: "It is well recognized that a borrower should not be compelled to continue monthly loan payments to the lender if the borrower has previously paid the full amount owing. "Double-dipping" is analogous to such a situation and is logically and mathematically indefensible" (p. 102). Mr. Walker argues that by converting the equalization payment funds into an annuity, the portion of the equalization payment on account of the pension would be treated essentially the same as a pension - an asset which is liquidated over the annuitant's remaining lifetime. According to this argument, it is not appropriate to treat the equalization payment which flows from the pension as an asset which would only generate income without any incursion on the capital. It may be that the nature of a pension justifies a different treatment from other equalized assets.

¶ 85 In Grunewald v. Grunewald, [1992] O.J. No. 2151, Pardu, J. indicated that the obligation on the dependent spouse to maximize income did not include having to consume her capital through the purchase of an annuity.

¶ 86 In Hutchison v. Hutchison, supra, Marshman, J. was somewhat critical of a wife who did not invest her equalization payment wisely, although acknowledging that the wife had not squandered her equalization payment either. In this case, the non-pensioned wife had carried the cost of two residences for five months, and used some $15,000.00 of capital (during a time when her income was reduced) for expenses which the judge felt should have been covered through her income. The court followed Shadbolt and focused on the portion of the payer's income and assets that had not been previously equalized and reduced the wife's support.

¶ 87 In Campbell v. Campbell, [1998] O.J. No. 3290, the Court considered the husband's argument that spousal support should terminate on his retirement, which was anticipated to take place one year after the trial. Where the applicant wife had received assets of a significant value, Mazza, J. held that she had an obligation to "make an effort to realize some income on those assets in order to achieve self-sufficiency." (paragraph 6).

¶ 88 The recipient spouse may not have an equivalent income to that of the pensioned spouse even if all assets are equalized. There may be a cash flow difference between the spouses based on the inherent nature of the assets and the resulting income potential and this differential may continue even if the capital of the asset is encroached upon.

¶ 89 Professor McLeod in the annotation to Flett v. Flett (supra) notes that income producing assets have two separate value bases: a capital value and an income value base. He argues that the value of a person's income from a small business might be very different from the market or capital value of that business.

¶ 90 There may be several reasons why the non-pensioned spouse has a lesser income stream than the pensioned spouse, when the equalization payment is paid out by way of a lump sum:

a. The employee's income may increase post-separation. If the ultimate pension income from the defined benefit plan is based on salary, the pension payments will be greater than those considered in the capitalized value of the pension on valuation date.
b. In a defined benefits pension plan, the amount of the pension payments will be "driven" by the early years of pensionable service. The amount equalized may reflect a lower value because each year of pensionable service does not have an equal value: the early years will have a lower value than the later years. As a result, a few remaining years of pensionable service after valuation date may result in a significantly higher income to the pension holding spouse than that at valuation date.
c. The non-pensioned spouse may not be capable of generating the same or similar income from the equalization payment through private investment as the pension plan administrators can, with the advantages of large group investments.

5. Is Retirement In and Of Itself a Material Change in Circumstances?

¶ 91 It is unlikely that retirement alone will be sufficient to constitute the material change in circumstances sufficient to vary spousal support. Generally, the courts have looked to all of the circumstances, at retirement, in the requantification of spousal support.

¶ 92 In Greslik v. Greslik (1996), 30 R.F.L. (4th) 411 (Ont.Gen.Div.), the parties had a relatively short marriage, 2 years, of a total of 13 years of cohabitation. The pension had not been included as part of the equalization payment. Forestell, J. held that the fact that the payer had retired was not in and of itself a material change in circumstances, but accepted that retirement was a factor to be taken into account in determining whether a material change in circumstances had occurred.

¶ 93 Madame Justice Marshman, in Hutchison v. Hutchison (supra), held that there had been a material change where the husband's income had decreased on retirement and a substantial portion of his current pension income was from previously equalized assets.

¶ 94 In Best v. Best (1997), 31 R.F.L.(4th) 1 (Ont.C.A.) [Best no. 2], the Court of Appeal declined to terminate the support order on the husband's retirement. Professor McLeod, in his annotation to that case, argues that in this case, the non-pensioned spouse had the best of both worlds. The pension was valued as though the husband would take an early retirement on valuation date and the resulting equalization payment was thus higher. The wife was also entitled to look to the husband's entire employment income for spousal support, including income earned after the assumed date of retirement used in establishing the equalization payment.

¶ 95 Where an "if and when" type arrangement for equalizing the pension asset is in effect, "double dipping" does not appear to be a problem, see Shadbolt v. Shadbolt, supra at 265 and Gorman v. Gorman (1996), 20 R.F.L. (4th) 232 (Ont.Gen.Div.).

¶ 96 Generally, a voluntary early retirement will not be sufficient to reduce spousal support obligations. In determining whether spousal support obligations should be reduced on an early retirement, the courts will have regard to the legitimacy and degree of choice in the decision to retire early. Health reasons and corporate downsizing (in the presence of the threat of lay-off) appear to have the requisite legitimacy. see Smith v. Smith (1992), 39 R.F.L.(3d) 442 (Ont.U.F.Ct) and MacDonald v. MacDonald (1988), 18 R.F.L.(3d) 398 (Ont.U.F.Ct.).

¶ 97 In Gorman v. Gorman,(supra) an "if and when" order had been made on account of the husband's pension. The husband retired early in part because of burn out. The Court held that this "self-induced" change in the payer's income was reasonable in all of the circumstances. There was no issue of double-dipping when the pension was paid from the income stream, however, the Court held that there had been a material change in circumstances because of the increase in the wife's income because of the "if and when"

payment and the decrease in the husband's income on retirement and on the payment to the wife. Support in this case continued, but decreased.

¶ 98 In Levergood v. Levergood (1995), 17 R.F.L. (3d) 423 (Ont.Gen.Div.), the husband took an early retirement, without justification, but apparently at the age contemplated in valuing the pension. The court declined to vary the support award on the basis that the retirement would have been foreseeable by the husband. The onus was on him to show that the change was not foreseeable. Leitch, J. cautions that a court should carefully scrutinize circumstances surrounding any voluntary early retirement as the basis of a reduction of the spousal support obligation.

Summary

¶ 99 The following comment by Killeen, J. in Lindsay v. Lindsay (1995), 19 R.F.L. (4th) 103 (Ont.Gen. Div.) applies not only to the uncertainty in reaching a value for the pension, but equally to the uncertainty in the present system of allocating the pension income:

> "It is not an original thought to say that pension values at the valuation date have become a significant stumbling block to settlement in middle class and upper middle class marriage cases, and that the costs which are eaten up to resolve these values are almost a matter of public scandal". (at p. 108).

¶ 100 In its "Report on Pensions as Family Property: Valuation and Division", the Ontario Law Reform Commission Makes several recommendations for reforms in the law relating to the treatment of pensions on marriage breakdown. Recommendations included a benefit split, which would create a separate pension for the non-member spouse, and the ability to transfer a portion of the commuted value of the pension. By clearly distinguishing the source and amount of pension related income to each spouse, either of these options would alleviate many of the pension related difficulties facing separating spouses, both as to how the value of the pension component of the equalization payment could be paid as an asset and in avoiding double-dipping. Without these reforms, spouses, on separation, face an uncertain, complex and often expensive path in attempting to resolve the equalization of the pension asset and spousal support on retirement.