Revue générale de droit

A Practitioner's Guide to The Economic Implications of Custody and Access under the *Divorce Act* and the *Federal Child Support Guidelines*

Julien D. Payne, Q.C., LL.D., F.R.S.C.

Volume 32, Number 1, 2002

URI: https://id.erudit.org/iderudit/1028051ar
DOI: https://doi.org/10.7202/1028051ar

See table of contents

Publisher(s)

Éditions Wilson & Lafleur, inc.

ISSN

0035-3086 (print)
2292-2512 (digital)

Explore this journal

Cite this article

Payne, J. D. (2002). A Practitioner's Guide to The Economic Implications of Custody and Access under the *Divorce Act* and the *Federal Child Support Guidelines*. *Revue générale de droit*, *32*(1), 1–36. https://doi.org/10.7202/1028051ar

Article abstract

The following analysis provides a bird's eye view of the economic impact of custody and access dispositions on child support orders granted pursuant to sections 8 and 9 of the *Federal Child Support Guidelines*. It is written for the benefit of legal practitioners and judges in Québec and provides a succinct but relatively comprehensive review of child support orders under the federal guidelines in cases where each parent has custody of one or more of their children (Guidelines, section 8) or where each parent shares custody of or access to their children not less than forty per cent of the year (Guidelines, section 9). It then proceeds to deal with the priority accorded to child support over spousal support as required by section 15.3 of the *Divorce Act*. In conclusion, it addresses the implications of child rearing responsibilities in the context of spousal support orders, with particular attention being directed to section 15.2(6)(b) of the *Divorce Act*. For a more detailed analysis of these issues, readers are referred to the author's electronic book Child Support in Canada, which is reproduced on Quicklaw, at db pdcs (data base *Payne's Digests on Child Support*).

DOCTRINE

A Practitioner's Guide to The Economic Implications of Custody and Access under the *Divorce Act* and the *Federal Child Support Guidelines*

JULIEN D. PAYNE, Q.C., LL.D., F.R.S.C.
Lawyer, Ottawa

ABSTRACT

The following analysis provides a bird's eye view of the economic impact of custody and access dispositions on child support orders granted pursuant to sections 8 and 9 of the Federal Child Support Guidelines. *It is written for the benefit of legal practitioners and judges in Québec and provides a succinct but relatively comprehensive review of child support orders under the federal guidelines in cases where each parent has custody of one or more of their children (Guidelines, section 8) or where each parent shares custody of or access to their children not less than forty per cent of the year (Guidelines, section 9). It*

RÉSUMÉ

L'analyse suivante donne une vue d'ensemble de l'incidence économique qu'ont les dispositions relatives à la garde et au droit d'accès sur les ordonnances alimentaires au profit d'un enfant qui sont rendues en application des articles 8 et 9 des Lignes directrices fédérales sur les pensions alimentaires pour enfants. *Elle a été rédigée à l'intention des praticiens du droit et des juges au Québec et passe en revue brièvement mais de façon assez complète les ordonnances alimentaires au profit d'un enfant conformément aux lignes directrices fédérales dans des cas où les deux parents ont chacun la garde d'un ou de plusieurs de leurs enfants (Lignes directrices, article 8)*

then proceeds to deal with the priority accorded to child support over spousal support as required by section 15.3 of the Divorce Act. *In conclusion, it addresses the implications of child rearing responsibilities in the context of spousal support orders, with particular attention being directed to section 15.2(6)(b) of the* Divorce Act. *For a more detailed analysis of these issues, readers are referred to the author's electronic book Child Support in Canada, which is reproduced on Quicklaw, at db pdcs (data base* Payne's Digests on Child Support*).*

ou lorsque les deux parents partagent la garde de leurs enfants ou exercent leur droit d'accès auprès d'eux pendant au moins quarante pour cent de l'année (Lignes directrices, article 9). Puis, elle traite de la priorité accordée aux aliments de l'enfant par rapport aux aliments de l'époux, comme le prescrit l'article 15.3 de la Loi sur le divorce. *En conclusion, elle aborde les répercussions des responsabilités relatives à l'éducation des enfants dans le cadre des ordonnances alimentaires au profit d'un époux, avec une attention particulière apportée à l'alinéa 15.2(6)b) de la* Loi sur le divorce. *Les lecteurs intéressés par une analyse plus détaillée de ces questions sont invités à consulter le livre électronique de l'auteur Child Support in Canada, qui est reproduit sur Quicklaw, à db pdcs (data base* Payne's Digests on Child Support*).*

TABLE OF CONTENTS

INTRODUCTION

The economic implications of custody and access could cover the entire fields of child support and spousal support. Accordingly, it is necessary to define the terms of reference of this analysis. The topics covered will be confined to the following areas: (I.) Split and Shared Custody Arrangements and (II.) The Impact of Child Support and Child Rearing on Spousal Support.

Each topic will be addressed from the standpoint of the busy trial judge who needs a fast fix in light of relevant case law, rather than a socio-economic evaluation of the implications of spousal and child support orders. Those who are interested in pursuing the author's thoughts on broader policy issues are invited to examine (i) Julien D. Payne, *An Evaluation of Spousal and Child Support Rights and Obligations on Marriage Breakdown and Divorce in Canada*, prepared for the Department of Justice, Canada, 1988, at *Quicklaw, db ppfl (Payne's Publications on Family Law)*, d=115; and (ii) Julien D. Payne, *A Review of Spousal and Child Support Under the Domestic Relations Act of Alberta*, prepared for the Alberta Institute of Law Reform, October 8, 1991, at *Quicklaw, db ppfl*, d=27 to 42; *Supplemental Report*, November 12, 1991, at *Quicklaw, db ppfl*, d=43.

I. SPLIT AND SHARED CUSTODY ARRANGEMENTS

A. ARTICLES

Pierre R. BOILEAU, Bob GILL, Cheryl GOLDHART, Sandra M. BURKE, Sheila J. CAMERON, Robyn L. ELLIOTT, "Child Support Guidelines Across The Country : Section 9 of the Guidelines", C.B.A. National Family Law Section, *The Family Way*, June 2000, at 6-8;

Julien D. PAYNE, "A Bird's Eye View of 'Birdnesting' and Other Forms of Co-Parenting", at *Quicklaw, db ppfl*, d=117;

Carol ROGERSON, "Child Support Under the Guidelines in Cases of Split and Shared Custody" (1998), 15 *Can. J. Fam. L.* 11, *database SFLN (Quicklaw)*, d=70.

B. RELEVANT PROVISIONS OF *FEDERAL CHILD SUPPORT GUIDELINES*

Sections 8 and 9 of the *Federal Child Support Guidelines* provide as follows :

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.

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.

C. SPLIT CUSTODY

Section 8 of the *Federal Child Support Guidelines* provides that, where each spouse or former spouse has custody of one or more children, the amount of a child support order is the difference between the amount that each would otherwise pay if a child support order were sought against each of them.[1]

Section 8 of the *Federal Child Support Guidelines* may be applied where each of the parents provides a home for one or more of their dependent children, even though one of the children is an adult attending university in respect of whom "neither parent has custody".[2] Pursuant to section 3(2)(b) of the *Federal Child Support Guidelines*, a trial judge may be justified in deviating from the applicable table amount because one of the children is over the age of provincial majority and is not totally dependent on either parent.[3]

There have been cases wherein a court has increased the normal amount payable in cases of split custody under section 8 of the *Federal Child Support Guidelines*, because the child would be required to live frugally in one parental household, while enjoying a luxurious lifestyle in the other parental houselold.[4] Deviation from the normal amount payable under section 8 is usually encountered in extraordi-

---

1. *S.E.H.* v. *S.R.M.*, [1999] B.C.J. No. 1458 (S.C.) (split custody involving biological child and stepchild; set off under section 8 of *Child Support Guidelines*); *Walters* v. *Walters*, [1999] B.C.J. No. 1752 (S.C.); *Watson* v. *Watson*, [1999] N.S.J. No. 272 (S.C.); *Berkman-Illnik* v. *Illnik*, [1997] N.W.T.J. No. 93 (S.C.); *Holtby* v. *Holtby*, [1997] O.J. No. 2237 (Gen. Div.); *Ninham* v. *Ninham*, [1997] O.J. No. 2667 (Gen. Div.); *Westcott* v. *Westcott*, [1997] O.J. No. 3060 (Gen. Div.); *J.P.* v. *B.G.*, [2000] O.J. No. 1753 (Sup. Ct.); *Rudulier* v. *Rudulier*, [1999] S.J. No. 366 (Q.B.); *Apresland* v. *Apresland*, [1999] S.J. No. 416 (Q.B.); *Meakin* v. *Meakin*, [1999] S.J. No. 649 (Q.B.). Compare *Dudka* v. *Dudka*, [1997] N.S.J. No. 526 (T.D.).

2. *Khoee-Solomonescu* v. *Solomonescu*, [1997] O.J. No. 4876 (Gen. Div.); see also *Sutcliffe* v. *Sutcliffe*, [2001] A.J. No. 629 (Q.B.); *Davis* v. *Davis*, [1999] B.C.J. No. 1832 (application of section 8 of *Child Support Guidelines* in circumstances involving split custody over summer months when adult child not away at university); *Kavanagh* v. *Kavanagh*, [1999] N.J. No. 358 (S.C.).

3. *Richardson* v. *Richardson*, [1997] O.J. No. 2795 (Gen. Div.); see also *Alexander* v. *Alexander*, [1999] O.J. No. 3694 (Sup. Ct.).

4. *Scharf* v. *Scharf*, [1998] O.J. No. 199 (Gen. Div.); see also *Snyder* v. *Snyder*, [1999] N.B.J. No. 32 (Q.B.); *Farmer* v. *Conway*, [1998] N.S.J. No. 536 (T.D.).

nary cases, where there are grossly disparate lifestyles.[5] In the absence of a finding of undue hardship, however, section 8 of the guidelines provides no residual discretion to the court to deviate from the differential between the two table amounts, as articulated in that section.[6] Although there may be little difference from an economic standpoint between split custody under section 8 of the guidelines and shared custody under section 9 of the guidelines, the broad discretion conferred on the court by section 9 is not mirrored in the provisions of section 8, in the absence of an intermingling of split and shared custody arrangements involving the same family.

The application of section 8 of the guidelines may result in an order that falls short of equalizing the children's lifestyles.[7]

Where parents have a split custody arrangement but the income of one of the parents falls short of the minimum threshold under the applicable provincial table, the other parent will be required to pay the full table amount of support for the child in the custody of the low or no income parent.[8]

In addition to ordering payment of the differential between the two table amounts pursuant to section 8 of the *Federal Child Support Guidelines*, a court may order a sharing of special or extraordinary expenses under section 7 of the guidelines in proportion to the respective parental incomes,[9] or in such other proportion as the court deems reasonable.[10]

---

5. *Plante* v. *Plante*, [1998] A.J. No. 1206 (Q.B.); *Inglis* v. *Birkbeck*, [2000] S.J. No. 227 (Q.B.).

6. *Grandy* v. *Grandy*, [1999] N.J. No. 268 (U.F.C.); *K.O.* v. *C.O.*, [1999] S.J. No. 29 (Q.B.); see also *Inglis* v. *Birkbeck*, *ibid.*

7. *Kendry* v. *Cathcart*, [2001] O.J. No. 277 (Sup. Ct.).

8. *Estey* v. *Estey*, [1999] N.S.J. No. 226 (S.C.); *Hamonic* v. *Gronvold*, [1999] S.J. No. 32 (Q.B.); Compare *K.O.* v. *C.O.*, [1999] S.J. No. 29 (Q.B.) (shared custody).

9. *Sutcliffe* v. *Sutcliffe*, *supra*, note 2; *Albright* v. *Albright*, [1998] B.C.J. No. 1424 (S.C.); *Mooney* v. *Mooney*, [1998] B.C.J. No. 2136 (S.C.); *Patrick* v. *Patrick*, [1999] B.C.J. No. 1245 (S.C.); *Sayong* v. *Aindow*, [1999] N.W.T.J. No. 43 (S.C.); *Schmid* v. *Smith*, [1999] O.J. No. 3062 (Sup. Ct.).

10. Compare *Tooth* v. *Knott*, [1998] A.J. No. 1395 (Q.B.); *infra*, D. "Access or Shared Custody for Forty Per Cent of Year".

D. ACCESS OR SHARED CUSTODY FOR FORTY PER CENT OF YEAR

Section 9 of the *Federal Child Support Guidelines* provides that where a spouse or former 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 a child support order must be determined by taking into account (a) the amounts set out in the applicable tables for each of the spouses or former spouses; (b) the increased costs of shared custody arrangements; and (c) the conditions, means, needs and other circumstances of each spouse or former spouse and of any child for whom support is sought.

There has been judicial divergence across Canada as to the application of section 9 of the *Federal Child Support Guidelines* where the custody of only some of the children is shared.[11] In *Wouters* c. *Wouters*,[12] M.-E. Wright, J., of the Saskatchewan Court of Queen's Bench concluded that a two-stage analysis should occur when there is a hybrid of custody arrangements. The starting point should deal with those children whose custody is not shared. They must be dealt with as a distinct entity from the children whose custody is shared because the discretion conferred by section 9 of the *Federal Child Support Guidelines* does not extend to them. They are not part of the shared parenting arrangement encompassed by section 9 of the guidelines. The presumptive rule arising under section 3 of the guidelines applies to children whose custody is not shared. It is only after the support obligation owing to these children under section 3 of the guidelines has been addressed that the court should turn its attention to the application of section 9 of the guidelines to the support of those children whose custody is shared.

The spouse who invokes section 9 of the guidelines has the onus of proving that he or she cares for the child at least

11. See *Blair* v. *Callow* (1999), 41 R.F.L. (4th) 44 (B.C.S.C.), *Burns* v. *Burns* (1999), 40 R.F.L. (4th) 32 (Ont. Gen. Div.) and *Tweel* v. *Tweel* (2000), 186 Nfld. & P.E.I.R. 99 (P.E.I.S.C.); *Atchison* v. *Atchison*, [2000] S.J. No. 693 (Q.B.); *Wouters* v. *Wouters*, [2001] S.J. No. 232 (Q.B.).

12. *Supra*, note 11.

40 per cent of the time,[13] which is the equivalent of 146 days[14] or 3504 hours[15] of the year. The calculations may be undertaken on an hourly, weekly or monthly basis, depending on the circumstances of the case.[16]

Section 9 of the *Federal Child Support Guidelines* requires a determination of the percentage of the year during which the parent who invokes the section "exercises" a right of access or "has" physical custody or responsibility for the children.[17] The relevant criterion is the amount of time that the children are in the care and control of the parent, not the amount of time that the parent is physically present with the children.[18] A custodial parent will be credited with time that a child spends sleeping or at school, except for those hours when the non-custodial parent is actually exercising rights of access or the child is sleeping in the non-custodial parent's home.[19] Where there is shared custody, the court should review the family history to determine which parent assumed the responsibility for dealing with the school and, particularly, which parent would first be contacted in the event of an emergency.[20] However, the allocation of school time to only one of the parents may not be reflective of the spirit or reality of the shared parenting arrangement, where both parents have significant involvement in their children's lives and schooling.[21] For example, both parents may actively participate at the same

---

13. *Tooth* v. *Knott*, *supra*, note 10; *Kolada* v. *Kolada*, [2000] A.J. No. 342 (Q.B.); *Crofton* v. *Sturko*, [1998] B.C.J. No. 38 (S.C.); *McAfee* v. *McAfee*, [1998] B.C.J. No. 413 (S.C.); *Hamm* v. *Hamm*, [1998] N.S.J. No. 139 (T.D.); *Webb* v. *Webb*, [1999] O.J. No. 507 (Gen. Div.); *MacNaught* v. *MacNaught*, [1998] P.E.I.J. No. 27 (T.D.); *Hus* v. *Hus*, [1998] S.j. No. 803 (Q.B.).

14. *Handy* v. *Handy*, [1999] B.C.J. No. 6 (S.C.); *Harder* v. *Harder*, [2000] B.C.J. No. 467 (S.C.); *Hamm* v. *Hamm*, *supra*, note 13.

15. *Claxton* v. *Jones*, [1999] B.C.J. No. 3086 (Prov. Ct.).

16. *Giene* v. *Giene*, [1998] A.J. No. 1305 (Q.B.); *Carroll* v. *Staples*, [2001] A.J. No. 31 (Q.B.); *Lussier* v. *Lussier*, [2001] O.J. No. 169 (Ct. Just.); compare *Anderson* v. *Anderson*, [2000] B.C.J. No. 522 (S.C.).

17. *Giene* v. *Giene*, *ibid.*; *Kolada* v. *Kolada*, [1999] A.J. No. 609 (Q.B.); *Hall* v. *Hall*, [1997] B.C.J. No. 1191 (S.C.).

18. *Crofton* v. *Sturko*, *supra*, note 13; *Kolada* v. *Kolada*, *supra*, note 13; *McAfee* v. *McAfee*, [1998] B.C.J. No. 413 (S.C.); *Hamm* v. *Hamm*, [1998] N.S.J. No. 139 (T.D.).

19. *Cusick* v. *Squire*, [1999] N.J. No. 206 (S.C.).

20. *Mavridis* v. *Mavridis*, [1999] B.C.J. No. 1935 (S.C.).

21. *Penner* v. *Penner*, [1999] M.J. No. 88 (Q.B.) (application under *Manitoba Child Support Guidelines*).

time in school or extra-curricular activities involving their children. It has been asserted that section 9 of the guidelines requires the non-custodial parent to exercise access or physical custody for 40 per cent of the total custodial time, presuming that the custodial parent starts with 100 per cent of that time.[22] Where the children are spending relatively equal time with each parent, however, it may be inappropriate to presume that one of the parents is the "custodial parent" and the other is the "support payor". Indeed, the parent who might be perceived as the custodial parent may also be the support payor, if his or her income substantially exceeds that of the other parent.[23] The court must consider the existing *de facto* arrangements, as distinct from the access or shared custody regime under any pre-existing order or agreement.[24] Section 9 of the guidelines can apply to either a sole custodial or joint custodial arrangement where the threshold 40 per cent criterion has been met.[25] In cases involving adult children attending university, section 9 may be invoked even though neither parent can be said to have the child in his or her custody. No joint custody or joint guardianship order is necessary in order for "shared custody" to arise within the meaning of section 9 of the *Federal Child Support Guidelines*. Conversely, the existence of an order for joint custody is no guarantee that the 40 per cent criterion under section 9 of the guidelines has been satisfied.[26] The breakdown of time sharing must be such as to fall within the 40 per cent rule.[27] No residual judicial discretion exists to deviate from the applicable provincial table amount of basic child support in cases that fall just short of reaching the 40 per cent plateau.[28]

Shared custody or access may be minimal in some months but considerable in others but it must average 40 per

22. *Yaremchuk* v. *Yaremchuk* [1998] A.J. No. 258 (Q.B.); *Sumner* v. *Wadden*, [1999] N.J. No. 238 (S.C.); *Meloche* v. *Kales*, [1997] 35 O.R. (3d) 688 (Gen. Div.).
23. *Giene* v. *Giene*, [1998] A.J. No. 1305 (Q.B.).
24. *Borutski* v. *Jabbour*, [2000] O.J. No. 5173 (Sup. Ct.).
25. *Lopatynski* v. *Lopatynski*, [1998] A.J. No. 1312 (Q.B.).
26. *Crofton* v. *Sturko*, [1998] B.C.J. No. 38 (S.C.); *Hall* v. *Hall*, [1997] B.C.J. No. 1191 (S.C.); *Ball* v. *Ball*, [1998] S.J. No. 572 (Q.B.).
27. *Mol* v. *Mol*, [1997] O.J. No. 4060 (Gen. Div.).
28. *Good* v. *Good*, [1998] B.C.J. No. 2316 (S.C.).

cent of the time over the course of a year.[29] Where there is no formal written agreement or order in place, a court should exercise caution before applying section 9 of the guidelines to what may be short term parenting arrangements. An application may be deemed premature where no track record has been established.[30] Where a new access schedule has been devised to reduce the stressful environment in which the children have been living, a court may adjourn an application to vary child support until the access regime has been in force for a minimum of six months, so that there will be a reliable record on which the court can determine the amount of time spent by the children with each parent and the application of section 9 of the guidelines to that situation.[31]

One unfortunate aspect of section 9 of the guidelines is that it may lead to a situation where spouses argue about access or shared custody in an attempt to avoid or take advantage of section 9[32] either at the time of the original application for child support or thereafter. Several courts have expressed concern about the arbitrariness and possible unfair operation of the 40 per cent threshold and its potential detrimental impact on parenting arrangements.[33] For example, the custodial parent or the parent with primary responsibility for the care and upbringing of the children may be reluctant to agree to an order for "liberal and generous access", unless the order makes it clear that the generosity does not exceed 40 per cent of the child's time with the other parent.[34] There is a real concern that section 9 of the guidelines may induce a custodial parent to discourage maximum contact between the child and the non-custodial parent because of the economic consequences that may ensue under section 9 of the guidelines.[35] Conversely,

29. *Hus* v. *Hus*, [1998] S.J. No. 803 (Q.B.); see also *McAfee* v. *McAfee*, [1998] B.C.J. No. 413 (S.C.).

30. *Ibid.*

31. *Murphy* v. *Murphy*, [1999] B.C.J. No. 318 (S.C.).

32. *Lopatynski* v. *Lopatynski*, [1998] A.J. No. 1312 (Q.B.); *McKerracher* v. *McKerracher*, [1997] B.C.J. No. 2257 (S.C.); *Simpson* v. *Simpson*, [1999] P.E.I.J. No. 73 (S.C.); *Propp* v. *Dobson*, [1998] S.J. No. 703 (Q.B.).

33. *Dennett* v. *Dennett*, [1998] A.J. No. 440 (Q.B.); *McAfee* v. *McAfee*, [1998] B.C.J. No. 413 (S.C.); *Hall* v. *Hall*, [1997] B.C.J. No. 1191 (S.C.); *McKerracher* v. *McKerracher*, *ibid.*; *Rosati* v. *Dellapenta*, [1997] O.J. No. 5047 (Gen. Div.); *MacNaught* v. *MacNaught*, [1998] P.E.I.J. No. 27 (T.D.).

34. *Hall* v. *Hall*, *supra*, note 33.

35. *Hall* v. *Hall*, *ibid.*; *Propp* v. *Dobson*, *supra*, note 32.

a non-custodial parent may seek access or shared custody for forty percent of the child's time for the sole purpose of reducing the amount of child support that would otherwise be payable.[36] The forty per cent criterion under section 9 of the federal and provincial child support guidelines has serious limitations in that it excludes the quality of time spent with the children and may result in a "default assignment" of school hours to the custodial parent who has primary care of the children when they are out of school.[37] Where child custody and access are in issue as well as as child support, the forty per cent criterion under section 9 of the guidelines should be viewed in light of section 16(8) of the *Divorce Act*, which endorses the best interests of the child as the determinative consideration in custody and access disputes, and in light of section 16(10) of the *Divorce Act*, which endorses the principle of maximum contact between the child and each parent in so far as it is consistent with the child's best interests.[38] Where appropriate, potential detrimental effects of section 9 of the guidelines may be averted by the court's endorsement of pre-existing shared parenting arrangements that have prevailed over a significant period of time.[39]

If the spouses or former spouses share the care of the child on a relatively equal basis, the court may calculate the table amount that each would pay if child support were sought against that spouse or former spouse and order a set off of the lower amount against the higher amount, but the court is not bound by the strict formula that applies to split custody under section 8 of the *Federal Child Support Guidelines*.[40] Whereas the split custody provisions of section 8 of the *Federal Child Support Guidelines* are quite straightforward, the shared custody provisions of section 9 of the guidelines are more complex and require the court to look beyond the differential in the

---

36. *Ball* v. *Ball*, [1998] S.J. No. 572 (Q.B.).

37. *Penner* v. *Penner*, [1998] M.J. No. 353 (Q.B.) (application under *Manitoba Child Support Guidelines*).

38. *Penner* v. *Penner*, *ibid.*

39. *M.A.F.* v. *W.A.F.*, [1998] S.J. No. 224 (Q.B.); *Gore-Hickman* v. *Gore-Hickman*, [1999] S.J. No. 503 (Q.B.).

40. *Middleton* v. *MacPherson*, [1997] 51 Alta. L.R. (3d) 152 (Q.B.); *Soderberg* v. *Soderberg*, [1998] N.W.T.J. No. 128 (S.C.); *A.E.C.* v. *G.B.H.*, [1998] N.S.J. No. 580 (Fam. Ct.); *Cuddy* v. *Cuddy*, [1999] O.J. No. 1399 (Sup. Ct.); *K.O.* v. *C.O.*, [1999] S.J. No. 29 (Q.B.). See *supra*, II. C. "Split Custody".

applicable table amounts. The criteria defined in section 9 confer a substantial discretion on the court to determine the appropriate amount of child support.[41] Although section 9(a) of the guidelines does not explicitly require it, courts often prefer a strict set off of the two table amounts where no cogent evidence has been adduced to satisfy section 9(b) and (c) of the guidelines.[42] An alternative approach has been to consider the percentage of time that the child spends with each spouse and to adjust the table amounts to reflect unequal time sharing and then set off the lower amount against the higher amount in order to determine the amount of child support to be paid.[43] Another judicial approach has been to simply take 60 per cent of the payor's guideline amount as the appropriate amount of child support to be paid.[44] Still other courts have relied on detailed budgets and expenses which results in a wide variety of conclusions by different courts. The approach adopted may be conditioned by the evidence, or lack thereof, with which the court is faced.[45] Section 9 of the guidelines does not take a simplistic approach. Given the myriad of configurations and circumstances that may be encountered in shared parenting arrangements, none of the formulas devised by the courts have provided any definitive methodology, nor were they intended to.[46] That is not to say that formulas cannot be of assistance in applying section 9 of the guidelines. Indeed it

41. *Green* v. *Green*, [2000] B.C.J. No. 1001 (C.A.).

42. See, for example, *Giene* v. *Giene*, [1998] A.J. No. 1305 (Q.B.); *Donovan* v. *Donovan*, [1999] M.J. No. 451 (Q.B.) (application under *Manitoba Child Support Guidelines*); *Slade* v. *Slade*, [2001] N.J. No. 5 (C.A.); *Cowther* v. *Diet*, [1998] O.J. No. 5376 (Gen. Div.); *Soderberg* v. *Soderberg*, *supra*, note 40; *Flanagan* v. *Flanagan*, [1999] P.E.I.J. No. 84 (S.C.); *Dalen* v. *Shedden*, [1998] S.J. No. 802 (Q.B.); *Peters* v. *Peters*, [1999] S.J. No. 392 (Q.B.).

43. *Carroll* v. *Staples*, [2001] A.J. No. 31 (Q.B.); *Creighton* v. *Creighton*, [1997] B.C.J. No. 1938 (S.C.); *Penney* v. *Boland*, [1999] N.J. No. 71 (U.F.C.); *Burns* v. *Burns*, [1998] O.J. No. 2602 (Gen. Div.).

44. *Spanier* v. *Spanier*, [1998] B.C.J. No. 452 (S.C.).

45. *P.M.C.* v. *R.L.C.*, [2001] N.S.J. No. 72 (Fam. Ct.); *Atchison* v. *Atchison*, [2000] S.J. No. 693 (Q.B.).

46. *Green* v. *Green*, [2000] B.C.J. No. 1001 (C.A.); *Penner* v. *Penner*, [1999] M.J. No. 88 (Q.B.) (application under *Manitoba Child Support Guidelines*) (multiplier of 1.5 applied after pro-rating of table amounts in light of custodial time); *Slade* v. *Slade*, [2001] N.J. No. 5 (C.A.); *Weismiller* v. *Jolkowski*, [2000] O.J. No. 1775 (Sup. Ct.). For a comprehensive review of the diverse judicial approaches to section 9 of the *Federal Child Support Guidelines*, see *Carroll* v. *Staples*, *supra*, note 43.

may be appropriate to test the facts of the particular case against the diverse approaches that have been judicially endorsed. In the final analysis, however, a broad discretion vests in the court to determine the appropriate disposition.[47] Notwithstanding that many courts favour a straight set off of the table amounts under section 9(a) of the guidelines where there is no convincing evidence of increased costs of shared custody arrangements nor of the conditions, means, needs and other circumstances of either spouse or of the children that warrant a different amount from the set off amount, there will be cases where a straight set off would be inappropriate, as for example, where that amount of support would provide a much lower standard of living in one household than in the other. Although section 9 should not be perceived as spousal support nor as a means of equalizing the respective household incomes, the court must ensure that there is an adequate amount of resources to meet children's needs in both households.[48] The interests of the children will not be served if the amount of child support is barely enough to meet their basic needs in the lower income home, while they enjoy a luxurious lifestyle in the other home. Furthermore, the less affluent parent may feel obliged to provide a similar environment to that of the more affluent parent or run the risk that the child will prefer to make the more affluent home his or her primary residence. A court may take into account a consequential increase in spending in the less affluent home in determining the amount of child support under section 9 of the guidelines.[49] It is important that the financial circumstances in the two households not be so divergent as to tempt a child to make the more affluent household his or her primary residence for financial reasons alone.[50] In these circumstances, paragraphs 9(b) and (c) of the guidelines take on a special importance, because the application of section 9(a) alone would fly in the face of section 16(8) and (10) of the *Divorce Act*, which postu-

47. *Green* v. *Green*, *ibid.*

48. *Ames* v. *Ames*, [1999] B.C.J. No. 1816 (S.C.) (mother with modest income entitled to full table amount of child support); *Orth* v. *Orth*, [1999] S.J. No. 886 (Q.B.) (full table amount reduced by thirty per cent).

49. *Herbert-Jardine* v. *Jardine*, [1997] O.J. No. 5404 (Gen. Div.).

50. *Herbert-Jardine* v. *Jardine*, *ibid.*; see also *Penner* v. *Penner*, [1999] M.J. No. 88 (Q.B.) (application under *Manitoba Child Support Guidelines*).

late the determinative criterion of the best interests of the children in custody and access dispositions and the vital importance of maintaining maximum contact between the children and both of their parents after divorce.[51] Given the permissive language of section 9(a) of the guidelines and the anomalous results associated with various table calculations, a court may refuse to apply a formulaic computation of the amount of child support payable under a shared custody arrangement. Whatever may result from the application of section 9(a) and (b) of the guidelines, the comparative means and needs of the parties and their children may compel another result. Having regard to the language of section 9(c) of the guidelines, the court has an ultimate discretion to do what seems appropriate in all the circumstances. Where there is a substantial difference between the incomes or earning capacities of the parties, the parent with significantly greater means must bear proportionally more of the burden of providing child support. Any other disposition would fail to comply with section 1(a) of the guidelines, whereby a fair standard of support should be established to ensure that the children continue to benefit from the means of both parents after separation.[52] A court may conclude that the economic realities are such as call for no abatement of the full table amount and no set off, where any other disposition would generate wide disparities in the child's amenities in the respective households which might tempt the child, for financial reasons, to make the more affluent home his or her primary residence.[53] A set off of the respective table amounts may also be deemed inappropriate where one parent bears the lion's share of the children's expenses. In these circumstances, the court may order the full table amount of child support to be paid by the parent who incurs few, if any, of the expenses,[54] or such lesser amount as has been determined under a prior consent

51. *Giene* v. *Giene*, [1998] A.J. No. 1305 (Q.B.).

52. *Fonseca* v. *Fonseca*, [1998] B.C.J. No. 2772 (S.C.); see also *Green* v. *Green*, [1999] B.C.J. No. 1994 (S.C.); compare *Peacock* v. *Peacock*, [1999] N.B.J. No. 313 (Q.B.) (inter-action between sections 5 and 9 of *Federal Child Support Guidelines*).

53. *Weismiller* v. *Jolkowski*, [2000] O.J. No. 1775 (Sup. Ct.).

54. *Richards* v. *Richards*, [1998] B.C.J. No. 2657 (S.C.); *Johnstone* v. *Johnstone*, [1998] O.J. No. 5337 (Gen. Div.).

order.[55] The full table amount is also payable, notwithstanding that the 40 per cent criterion under section 9 of the guidelines is satisfied, where the income of the parents falls below the minimum threshold for the payment of child support under the applicable provincial table.[56] Where there are adequate resources to meet the child's needs in both households, the court may order the payment of the differential between the two table amounts, together with a sharing of special or extraordinary expenses falling within section 7 of the child support guidelines in proportion to the respective parental incomes.[57] Section 9 (c) of the guidelines confers a broad discretion on the court, which envisages a consideration of many factors, including but not limited to special or extraordinary expenses falling within section 7 of the guidelines.[58] Special and extraordinary expenses may be granted in shared custody situations pursuant to section 7 of the guidelines or they may be considered under the broader provisions of section 9(c) of the guidelines.[59]

Increased costs of shared custody under section 9(b) of the guidelines will only be considered where evidence of those costs has been adduced.[60] Increased costs to the spouse who invokes section 9 of the *Federal Child Support Guidelines* would include increased food and travel costs. An analysis of increased costs has been said to involve some kind of "before and after" comparison which should be addressed by counsel or the parties,[61] but any such comparison may be impractical if the shared custody arrangements follow immediately upon spousal separation. It should also be borne in mind that increased expenses incurred by one parent are not necessarily offset by reduced expenses being incurred by the other

---

55. *Richards* v. *Richards*, *ibid.*

56. *Flanagan* v. *Heal*, [1998] S.J. No. 805 (Q.B.).

57. *Collin* v. *Doyle*, [1999] A.J. No. 105 (Q.B.); *Warn* v. *Warn*, [1999] B.C.J. No. 971 (S.C.).

58. *A.E.C.* v. *G.B.H.*, [1998] N.S.J. No. 580 (Fam. Ct.); see also *McCurdy* v. *Morisette*, [1999] B.C.J. No. 2292 (S.C.); *Penner* v. *Penner*, [1999] M.J. No. 88 (Q.B.) (application under *Manitoba Child Support Guidelines*).

59. *Slade* v. *Slade*, [2001] N.J. No. 5 (C.A.).

60. *Schick* v. *Schick*, [2000] N.W.T.J. No. 12 (S.C.); *Hubic* v. *Hubic*, [1997] S.J. No. 491 (Q.B.).

61. *MacNaught* v. *MacNaught*, [1998] P.E.I.J. No. 27 (T.D.).

parent. Furthermore, housing, food, clothing and other expenses incurred by the respective parents are not necessarily correlated to the time spent with each parent and such expenses are often difficult to calculate for the purpose of invoking paragraph 9(b) of the guidelines. Although a standardized affidavit might help to alleviate the problem to some degree, difficulties would continue to exist.[62]

It has been suggested that the reference in section 9(b) of the guidelines to the increased costs of shared custody refers to the need to reduce the amount payable by the higher income spouse in order to reflect that spouse's increased costs from having the children,[63] but this suggestion imposes an unduly restrictive interpretation on the provisions that is not explicitly required by section 9(b) and pays insufficient attention to ongoing infrastructure costs that exist, regardless of any shared parenting arrangement. In the absence of direct evidence quantifying any increased costs to either party associated with shared parenting arrangements, some courts have ordered an increase of fifty per cent in the amount of child support that is fixed after comparing the amounts set out in the applicable tables for each of the spouses or former spouses,[64] although there is nothing to be found in the federal or provincial *Child Support Guidelines* in Canada that endorses this inflexible approach which has been borrowed from a foreign jurisdiction, namely Colorado.[65] The use of a 1.5 multiplier has also been deemed justified where there is a significant income disparity between the parties[66] and where one parent had the ability to spend more time with the child while retaining employment.[67] Several courts have concluded that evidence of

62. *Green* v. *Green*, [2000] B.C.J. No. 1001 (C.a.).

63. *Lopatynski* v. *Lopatynski*, [1998] A.J. No. 1312 (Q.B.); *Piller* v. *Piller*, [1998] N.J. No. 179 (S.C.).

64. *Murphy* v. *Murphy*, [1998] N.J. No. 304 (S.C.); *Dilny* v. *Dilny*, [1999] N.J. No. 37 (S.C.); *Hunter* v. *Hunter*, [1998] O.J. No. 1527 (Gen. Div.); *Dorey* v. *Snyder*, [1999] O.J. No. 1820 (Gen. Div.); see also *Penner* v. *Penner*, *supra*, note 58.

65. *Green* v. *Green*, [2000] B.C.J. No. 1001 (C.A.); see also *Carroll* v. *Staples*, [2001] A.J. No. 31 (Q.B.); *Slade* v. *Slade*, [2001] N.J. No. 5 (C.A.); *Wouters* v. *Wouters*, [2001] S.J. No. 232 (Q.B.).

66. *Stanford* v. *Cole*, [1998] N.J. No. 300 (S.C.); *Grandy* v. *Grandy*, [1999] N.J. No. 268 (U.F.C.); *C.R.* v. *I.A.*, [2001] O.J. No. 1053 (Sup. Ct.).

67. *Grandy* v. *Grandy*, *ibid.*

increased costs should be adduced before any additional amount can be added.[68] The use of a 1.5 multiplier has been favoured however, because of the almost impossible evidentiary hurdles imposed by section 9(b) and (c) of the guidelines, especially for unrepresented parties. If, however, specific information respecting either increased costs of shared parenting or the conditions, means, needs and other circumstances of each spouse and the child is provided, the court may conclude that the multiplier approach is inappropriate.[69] As Vertes, J. cogently observed in *Soderberg* v. *Soderberg*:

> While one can assume that there are increased costs to shared custody, one cannot assume what those costs are. The application of a formula may have the benefit of simplicity but it sacrifices accuracy. If there are identifiable increased costs, then it is up to the parties to identify them. If not then the court should be entitled to assume that the costs can be met from the application of the table amounts.[70]

In the final analysis, section 9(c) of the guidelines contemplates a wide judicial discretion[71] in determining the appropriate order, if any,[72] to be made. The court must weigh each of subsections (a) (b) and (c) of the guidelines rather than simply perform the specific calculation referred to in section 8 of the guidelines.

E. TAX IMPLICATIONS OF SPLIT AND SHARED CUSTODY

In cases of shared parenting, the Canada Child Tax Benefit is legally payable to the parent who fulfills the primary responsibility for the care and upbringing of the child, although the Canada Customs and Revenue Agency (formerly

---

68. *Soderberg* v. *Soderberg*, [1998] N.W.T.J. No. 128 (S.C.); *Burns* v. *Burns*, *supra*, note 43; *Cowther* v. *Diet*, *supra*, note 42; *Mertler* v. *Kardynal*, [1997] S.J. No. 720 (Q.B.).

69. *Stanford* v. *Cole*, *supra*, note 66.

70. *Supra*, note 68.

71. *Murphy* v. *Murphy*, [1998] N.J. No. 304 (S.C.); *Billark* v. *Billark* (1998), 36 R.F.L. (4th) 361 (Ont. Gen. Div.); *Bishop* v. *Bishop*, [1998] O.J. No. 4878 (Gen. Div.); *Cuddy* v. *Cuddy*, [1999] O.J. No. 1399 (Sup. Ct.); *K.O.* v. *C.O.*, [1999] S.J. No. 29 (Q.B.).

72. *Billark* v. *Billark*, *ibid.*

Revenue Canada) may be prepared as an administrative matter to allow parents to split the credit on a six months' rotational basis, if the parents agree.[73]

With respect to the "equivalent to spouse credit" under section 118(1)B(b) of the *Income Tax Act*, the current legal position is summarized in the following observations :

> The "equivalent-to-spouse" credit under 118(1)B(b) is available to a single parent with a child under 18. The old 118(5) prohibited the credit to a single parent who was required to pay deductible child support with respect to that child. The new 118(5) reflects the 1996 Budget change eliminating the deduction for child support under agreements or court orders signed after April 1997 (see 60(b) and 56.1(4) "child support amount"). Despite the changes to the inclusion/deduction system, a single parent continues to be precluded from claiming the credit for a child in respect of whom the parent is required to make child support payments during the year. This treatment is consistent with the new child support guidelines, which assume that the equivalent-to-spouse credit will be claimed by the custodial spouse.[74]

The "equivalent-to-spouse" credit may not be available to either parent in shared custody situations involving child support payments. In a booklet prepared for family law practitioners by PricewaterhouseCoopers, the following statements appear :

> A shared custody situation may inadvertently result in both parents being denied access to the equivalent-to-spouse credit. This may arise when both parents are technically required to pay an amount in respect of the same child and the amounts

---

73. *Pollak* v. *R.*, [1999] T.C.J. No. 52 (T.C.C.); see also *McGregor* v. *McGregor*, [1999] A.J. No. 1422 (Alta. Q.B.) (order for Child Tax Benefit to be shared on basis of alternating six-month periods for benefits accruing before December, 1999; future payments to be made exclusively to the mother whose marginal income would produce a greater amount for the benefit of the child). See also MARMER PENNER, "Canada Child Tax Benefit — Which Parent Is Entitled To It?", *Money & Family Law*, Vol. 15, No. 10, October 2000, p. 78.

74. D.M. SHERMAN, *The Practitioner's Income Tax Act*, 16th edition, Toronto, Carswell, 1999, p. 742.

are then offset. In this case, the higher income spouse will be required to pay a net amount based on the difference.

Revenue Canada has indicated that it may not allow either parent to claim the credit. In several published responses to taxpayer enquiries, Revenue Canada has stated that it will refer to the wording of the order or agreement to determine if both parents have an obligation for support.

Other restrictions

The following restrictions are important:

- the credit cannot be claimed by more than one individual in the year for the same child, nor can the claim be shared by individuals each claiming a portion of the credit;
- a payer who is precluded from claiming the credit in respect of a particular child because he or she is paying child support for that child, still may be able to claim a credit in respect of another child for which no child support is being paid; and
- a divorced or separated individual will not be entitled to claim the credit if he or she has remarried or has a new common-law spouse. A person who remarries may be entitled to claim the credit in the year of remarriage.[75]

II. THE IMPACT OF CHILD SUPPORT AND CHILD REARING ON SPOUSAL SUPPORT

A. ARTICLES

Thomas BASTEDO, "Impact of Child Support Guidelines on Spousal Support", *Matrimonial Affairs*, CBAO Family Law Section Newsletter, Vol. 11, No. 3, November 1999, at 1-2 and 22-30.

75. PRICEWATERHOUSE COOPERS, *Tax Rules for Family Law Practitioners 1999-2000*, p. 20. See also *Shewchuk* v. *Canada*, [2000] T.C.J. No. 398 (T.C.C.), applying section 118(5) of the *Income Tax Act*. And See DEPARTMENT OF JUSTICE, Canada, *Child Support Newsletter*, Vol. 10, Winter 2000, p. 2.

Stephen GRANT and Kori LEVITT, "Child and Spousal Support : What Hath the Guidelines Wrought?" Federation of Law Societies and Canadian Bar Association, *The 2000 National Family Law Program*, St. John's, Newfouldland, July 10-13, 2000, chapter 23-2.

B. Lynn REIERSON, "the Impact of Child Support Guidelines on Spousal Support Law and Practice", Federation of Law Societies and Canadian Bar Association, *The 2000 National Family Law Program*, St. John's, Newfoundland, July 10-13, 2000, chapter 23-1.

B. PRIORITY OF CHILD SUPPORT OVER SPOUSAL SUPPORT; EFFECT OF CHILD SUPPORT ORDER ON ASSESSMENT OF SPOUSAL SUPPORT

1. Relevant Statutory Provisions

Section 15.3 of the *Divorce Act* provides as follows :

Priority to child support

15.3(1) Where a court is considering an application for a child support order and an application for a spousal support order, the court shall give priority to child support in determining the applications.

Reasons

15.3(2) Where, as a result of giving priority to child support, the court is unable to make a spousal support order or the court makes a spousal support order in an amount that is less than it otherwise would have been, the court shall record its reasons for having done so.[76]

Consequences of reduction or termination of child support order

15.3(3) Where, as a result of giving priority to child support, a spousal support order was not made, or the amount of a spousal support order is less than it otherwise would have been, any subsequent reduction or termination of that child

76. See *Pitt* v. *Pitt*, [1997] B.C.J. No. 1949 (S.C.) wherein the judgment was amended to reflect section 15.3(2) of the *Divorce Act*.

support constitutes a change of circumstances for the purposes of applying for a spousal support order, or a variation order in respect of the spousal support order, as the case may be.

2. Commentary

Section 15.3 of the *Divorce Act* addresses the situation where the application for child support and the application for spousal support involve members of the same family. It does not establish priorities as between sequential families. For example, a former divorced wife's order for spousal support will not be subject to a statutory priority in favour of the obligor's children from a second subsequently dissolved marriage. The difficulties that have plagued the courts respecting the competing claims of sequential families remain unresolved.

Although section 15.3(1) of the *Divorce Act* requires the court to give priority to child support over spousal support, this does not signify that special or extraordinary expenses should be ordered under section 7 of the *Federal Child Support Guidelines* to supplement the basic amount of child support payable under the applicable provincial or territorial table, where such a supplementary allocation would render the custodial spouse destitute.[77] The priority of child support, including section 7 expenses,[78] over spousal support that is mandated by section 15.3(1) of the *Divorce Act* does not preclude the court from giving consideration to spousal support and looking at the overall picture in determining the appropriate contribution, if any, to be made to special or extraordinary child related expenses.[79] An order for interim spousal support may be subject to reduction in the event of a subsequent successful claim for special or extraordinary expenses under section 7 of the child support guidelines.[80]

---

77. *Lyttle* v. *Bourget*, [1999] N.S.J. No. 298 (S.C.); *Kaderly* v. *Kaderly*, [1997] P.E.I.J. No. 74 (T.D.); see also *Cameron-Masson* v. *Masson*, [1997] N.S.J. No. 207 (Fam. Ct.).

78. *Andrews* v. *Andrews*, [1999] O.J. No. 3578 (C.A.) (priority over spousal support given to extraordinary expenses for children's schooling pursuant to section 38.1(i) of Ontario *Family Law Act*).

79. *Nataros* v. *Nataros*, [1998] B.C.J. No. 1417 (S.C.).

80. *Shentow* v. *Bewsh*, [1998] O.J. No. 3142 (Gen. Div.).

The inter-relationship between spousal support and special or extraordinary expenses under section 7 of the *Federal Child Support Guidelines* has generated the following dilemma. Spousal support paid to the other spouse or former spouse is not deductible from the obligor's income in determining the applicable provincial or territorial table amount of child support.[81] Spousal support received from the other spouse is deducted from the overall income of the recipient spouse for the purpose of determining the applicable table amount of child support.[82] To calculate the income of each spouse or former spouse for the purpose of any order for special or extraordinary expenses under section 7 of the *Federal Child Support Guidelines*, spousal support payments must be deducted from the payor's income and included in the recipient's income.[83] Section 3(1) and (2) of Schedule III of the *Federal Child Support Guidelines*, which expressly deal with the payment and receipt of spousal support with respect to the applicable table amount of child support and special or extraordinary expenses sought under section 7 of the guidelines, are poorly drafted and generate uncertainty as to their potential effect. In *Sherlow* v. *Zubko*,[84] these subsections were interpreted as excluding from consideration spousal support paid by or to another spouse who is not a party to the child support claim before the court. Consequently, the court refused to impute income to a spouse on the basis of spousal support received from a prior spouse, notwithstanding that such spousal support constitutes taxable income that might properly fall within the ambit of section 16 of the *Federal Child Support Guidelines*. In the context of an application for child support under the *Ontario Child Support Guidelines*, which are substantively identical to the federal guidelines, Lack, J., of the Ontario Superior Court, has offered the fol-

81. *Mabbett* v. *Mabbett*, [1999] N.S.J. No. 125 (S.C.); *Westcott* v. *Westcott*; [1997] O.J. No. 3060 (Gen. Div.).

82. *Federal Child Support Guidelines*, SOR/97-175, 8 April, 1997, Schedule III, s. 3(1); *Mosher* v. *Mosher*, [1999] N.S.J. No. 202 (S.C.).

83. *Federal Child Support Guidelines*, *id.*, Schedule III, s. 3(2) (deduction only referred to); *Sherlow* v. *Zubko*, [1999] A.J. No. 644 (Q.B.); *Hart* v. *Hart*, [1997] S.J. No. 692 (Q.B.); *Krislock* v. *Krislock*, [1997] S.J. No. 698 (Q.B.); *L'Heureux* v. *L'Heureux*, [1999] S.J. No. 437 (Q.B.).

84. [1999] A.J. No. 644 (Q.B.).

lowing criticism. Where an order for spousal support is appropriate, the calculation of income for the purposes of the guidelines is circuitous and tedious if claims are made for special or extraordinary expenses under section 7 of the guidelines or if undue hardship within the meaning of section 10 of the guidelines is pleaded. This ensues from the fact that, whereas spousal support paid or received is ignored in calculating the income of the parties for the purpose of determining the amount of child support under the applicable provincial table, the receipt of spousal support is included in a spouse's income and is excluded from the income of the payor spouse for the purposes of determining a claim for section 7 expenses. A conundrum thus results from section 38.1(1) of the Ontario *Family Law Act* which, like section 15.3 of the *Divorce Act*, provides that child support takes precedence over spousal support. While such priority is to be accorded to child support, the calculation of section 7 expenses cannot be undertaken until spousal support is assessed. A similar conundrum arises under the undue hardship provisions of section 10 of the *Child Support Guidelines* because the court must deny such a claim, if the potential obligor's household standard of living is higher than that of the recipient household, but any such comparison necessitates a prior determination of the amount, if any, of spousal support to be ordered. The problems of the court are compounded where no information has been provided dealing with the net impact of potential orders.[85]

Section 15.3 of the *Divorce Act* applies to both custodial and non-custodial parents.[86] Consequently a custodial parent's obligation to provide financially for a child of the marriage takes priority over the obligation to pay spousal support to the non-custodial parent and may result in a reduction of the amount of spousal support that would otherwise be ordered.[87] However, a custodial parent cannot avoid

85. See, for example, *Schmid* v. *Smith*, [1999] O.J. No. 3062 (Sup. Ct.); *Galliford* v. *Galliford*, [1998] B.C.J. No. 268 (S.C.) (wherein the applicant sought increased child support on the ground of undue hardship under section 10 of the *Child Support Guidelines*).

86. *Lockyer* v. *Lockyer*, [2000] O.J. No. 2939 (Sup. Ct.), para. 52.

87. *Schick* v. *Schick*, [1997] S.J. No. 447 (Q.B.).

the obligation to pay a reasonable amount of spousal support on the dissolution of a long marriage by calling upon the non-custodial parent to live at below the poverty level in order for the custodial parent to provide a child of the marriage with luxuries.[88]

Where a child has special needs due to a chronic illness, this may be taken into account in determining the ability of the payor spouse to pay spousal support when that individual is already committing significant resources to the child.[89]

A non-custodial parent who is ordered to pay periodic child support is not thereby disqualified from obtaining an order for periodic spousal support. Child support and spousal support, though necessarily intertwined, are separate concepts. The fact that the receipt of one may offset the payment of the other does not preclude an order for both kinds of relief in appropriate circumstances.[90]

Judicial opinions vary on the question whether it is appropriate or desirable to grant a nominal order for spousal support in circumstances where a substantial order is precluded by the priority accorded to a child support order. Some courts have ordered the nominal sum of $1 per year as spousal support because of the priority placed on child support obligations.[91] It has, nevertheless, been concluded that where a parent with custody is unable to afford spousal support and the non-custodial parent is unable to pay child support, a court should decline to make any support order because "in case" nominal orders serve no useful purpose in that the parties are free to re-apply in the event of a change of circumstances.[92]

---

88. *Reyher* v. *Reyher* (1993), 48 R.F.L. (3d) 111 (Man. Q.B.).

89. *Broder* v. *Broder* (1994), 93 Man. R. (2nd) 259 (Q.B.).

90. *Richter* v. *Vahamaki* (2000), 8 R.F.L. (5th) 194 (Ont. Sup. Ct.) (mother with annual income of $42,000; father with annual income of $104,000 and perhaps much more; father ordered to pay $1,000 per month as interim periodic spousal support; mother ordered to pay $605 per month per interim support of two children living with their father; child care expenses to be totally assumed by father); see also *Varcoe* v. *Varcoe*, [2001] O.J. No. 229 (Sup. Ct.) (interim orders).

91. *Comeau* v. *Comeau*, [1997] N.S.J. No. 409 (T.D.); *Young* v. *Young*, [1999] N.S.J. No. 63 (S.C.).

92. *Frydrysek* v. *Frydrysek*, [1998] B.C.J. No. 394 (S.C.).

Where the spousal incomes are approximately equal after the payment of child support, a court may refuse to order spousal support until the child support obligation is eliminated.[93]

The cessation of child support payments does not inevitably justify an increase in the amount of spousal support payments.[94]

In consequence of giving priority to child support, a court may be unable to grant a spousal support order because the obligor has no ability to pay any amount to satisfy the demonstrated need of the other spouse.[95] Although periodic spousal support may be denied or reduced where child support obligations exhaust or impair the obligor's ability to pay,[96] a lump sum spousal support payment may be a practical alternative.[97] In granting a lump sum order for spousal support, the court may expressly acknowledge a potential future right to periodic spousal support under section 15.3(3) of the *Divorce Act*.[98] Where the amount of spousal support has been reduced to accommodate child support payements, spousal support may be increased when these obligations cease.[99] A court may direct that an order for periodic spousal support shall be increased by the amount by which child support is reduced when the children cease to be entitled to support.[100] Before making such an order, it is important to keep in mind that periodic payments for child support that are ordered after

---

93. *Rupert* v. *Rupert*, [1999] N.B.J. No. 5 (Q.B.).

94. *Davis* v. *Davis*, [2000] N.S.J. No. 86 (S.C.).

95. *Bell* v. *Bell*, [1997] B.C.J. No. 2826 (C.S.); *Falbo* v. *Falbo*, [1998] B.C.J. No. 1497 (S.C.) (application for interim spousal support adjourned indefinitely); *Miao* v. *Chen*, [1998] B.C.J. No. 1926 (Prov. Ct.).

96. *Norlander* v. *Norlander* (1989), 21 R.F.L. (3d) 317 (Sask. Q.B.); see also *Kenning* v. *Kenning* (1995), 11 R.F.L. (4th) 216 (B.C. S.C.).

97. *Amaral* v. *Amaral* (1993), 50 R.F.L. (3d) 384 (Ont. Gen. Div.); *Kapogianes* v. *Kapogianes*, [2000] O.J. No. 2572 (Sup. Ct.); *Lepage* v. *Lepage*, [1999] S.J. No. 174 (Q.B.).

98. *Lepage* v. *Lepage*, *ibid.*

99. *Sneddon* v. *Sneddon* (1993), 46 R.F.L. (3d) 373 (Alta. Q.B.); *Erickson* v. *Erickson*, [1999] N.S.J. No. 159 (S.C.).

100. *McLean* v. *McLean*, [1997] O.J. No. 5315 (Gen. Div.); see also *Ralston* v. *Ralston* (1987), 79 N.S.R. (2d) 373 (S.C.); *Smith* v. *Smith* (1998), 36 R.F.L. (4th) 419, p. 425 (Ont. Gen. Div.); *Cusack* v. *Cusack*, [1999] P.E.I.J. No. 90 (S.C.).

May 1, 1997 are tax free, whereas periodic spousal support payments are deductible from the payor's taxable income and are taxable in the hands of the recipient spouse. Courts must not overlook this difference when ordering, what is in effect, the conversion of child support payments into spousal support payments at some future date. Similarly where periodic child support has been ordered, the amount should be grossed up for income tax for the purpose of calculating the obligor's income and his or her consequential capacity to pay periodic spousal support[101] or the obligor's entitlement to receive spousal support from the custodial parent.[102] An order whereby spousal support will be increased to a designated monthly amount on termination of the obligor's duty to pay court ordered child support may be expressly declared to be subject to further variation by reason of a material change of circumstances,[103] although such a declaration is presumably unnecessary.

Where the combined income of the two spousal households has been substantially diminished in consequence of the application of the *Federal Child Support Guidelines* and accompanying amendments of the *Income Tax Act*, which took effect of May 1, 1997, a court may conclude that this constitutes a change of circumstances that warrants a reduction of the amount of spousal support under a pre-existing order so that the overall reduction in total income may be shared on some equitable basis by the former spouses.[104] On an application to vary the spousal support order on this basis, the court must be provided with accurate information concerning the after tax income of the spouses before and after May 1, 1997.[105] In the absence of such information, an appellate court may conclude that a trial judge's order for a substantial reduction in the amount of court ordered spousal support cannot be sustained, having regard to the financial disparity and apparent inconsistency between the old and new orders

101. *Hana* v. *Werbes*, [1998] B.C.J. No. 1572 (S.C.).

102. *Stokes* v. *Stokes*, [1999] O.J. No. 5192 (Sup. Ct.).

103. *Lackie* v. *Lackie*, [1998] O.J. No. 888 (Gen. Div.).

104. *Desjardins* v. *Desjardins*, [1999] M.J. No. 70 (C.A.) (minority opinion of Huband, J.). The majority opinion of Scott, C.J.M., with Monnin, J.A. concurring, expressly declined to speculate on this issue.

105. *Ibid.*

for spousal and child support, and may direct a new hearing on the issue of the amount of spousal support.[106]

In granting an order for periodic spousal support, a court may acknowledge the amount to be less than would have been ordered but for the priority to be accorded to the needs of the children under section 15.3 of the *Divorce Act*.[107] A similar acknowledgment of the priority accorded to child support may be made where an order for lump sum spousal support is granted[108] or where an order for spousal support is denied.[109] Section 15.3(2) of the *Divorce Act* provides that where a court is unable to make a spousal support order or makes an order in a reduced amount because of the priority accorded to child support, the court "shall record its reasons for having done so". Thomas Bastedo, a senior family law practitioner from Toronto, has concluded that "it is difficult to accept that the court will insist on section 15.3(2) as a precondition for its exercise of jurisdiction under subsection (3)".[110] And as B. Lynn Reierson, a Halifax family law practitioner, has shrewdly observed:

> Although s. 15.3(3) of the *Divorce Act* establishes an automatic variation threshold, where the child support order relates to young children the opportunity to apply s. 15.3(3) to a spousal support variation application may not arise for many years. Entitlement on a compensatory basis, where need is not acute, may be very difficult to revisit at the future time.[111]

In the final analysis, there appear to be few, if any, distinct criteria to assist Canadian courts in balancing competing demands for child support and spousal support.

---

106. *S.A.J.M.* v. *D.D.M.*, [1999] M.J. No. 118 (C.A.).

107. *Langlois* v. *Langlois*, [1999] B.C.J. No. 1199 (S.C.); *Gray* v. *Gray*, [1998] O.J. No. 2291 (Gen. Div.); *Beatty* v. *Beatty*, [2000] O.J. No. 1755 (Sup. Ct.); *Whalen* v. *Whalen*, [2000] O.J. No. 2658 (Sup. Ct.).

108. *Lepage* v. *Lepage* (1999), 179 Sask. R. 34 (Q.B.).

109. *Falbo* v. *Falbo*, [1998] B.C.J. No. 1497 (S.C.).

110. T. BASTEDO, "Impact of Child Support Guidelines on Spousal Support", *Matrimonial Affairs*, CBAO Family Law Section Newsletter, Vol. 11, No. 3, November 1999, 1, p. 27.

111. B.L. REIERSON, "The Impact of Child Support Guidelines on Spousal Support Law and Practice", Federation of Law Societies and Canadian Bar Association, *The 2000 National Family Law Program*, St. John's, Newfoundland, July 10-13, 2000, ch. 23-1, p. 1.

Although the applicable table amount of periodic child support will normally be accorded priority over compensatory or even non-compensatory periodic spousal support, and the same priority may be accorded to necessary "special" expenses falling within section 7 of the *Federal Child Support Guidelines*, courts appear to be much less likely to accord priority to "extraordinary" expenses falling within the ambit of section 7 of the guidelines, where there are insufficient funds to meet those expenses and also provide a basic level of necessary spousal support.

The impact of the *Federal Child Support Guidelines* on spousal support is not confined, however, to their substantive significance in light of section 15.3 of the *Divorce Act*. The effect of specific disclosure requirements under sections 21 to 26 of the *Federal Child Support Guidelines* has spread over into the context of spousal support. As B. Lynn Reierson has stated :

> (3) Culture of Disclosure
>
> Justice Walter Goodfellow, of the Nova Scotia Supreme Court, in reviewing an early draft of this paper, pointed out to me the significant impact of disclosure on spousal support practice. A whole culture of disclosure was introduced with the Child Support Guidelines (and related amendments to Provincial rules of practice). The requirement, even in undefended proceedings, of the payor to provide specific and detailed financial disclosure as a matter of course, has changed family law.
>
> In Nova Scotia, and in other jurisdictions, the court has assumed some responsibility for ensuring ongoing disclosure by requiring the Corollary Relief Judgment to specify an exchange of financial information (including income tax returns) on an annual basis. This has deflected the payor spouse's criticism from the recipient spouse and avoided the previous requirement of making formal application to vary in order to obtain basic financial information.
>
> Particularly in spousal support cases, eking out sufficient disclosure to litigate the issue has been the responsibility of the applicant who, in many cases, did not have enough information to even know where to effectively look for the payor's resources. The previously described economic power imbal-

ance further frustrated the search for financial information. Forensic accounting services are expensive. Multiple interlocutory proceedings required to ensure complete financial disclosure from a recalcitrant payor are impractical. The cost of preparing and litigating complex financial issues is prohibitive. The party with control of resources can still often limit the court's access to evidence of the actual means available to the payor but the shift in the attitude of the courts, towards a positive obligation to disclose, provides a disincentive to obstruct the spousal support decision making process.

No doubt the expansive disclosure required by the Child Support Guidelines has directly impacted many spousal support decisions. There is also a significant indirect impact resulting from the attitude of disclosure, which spills over into spousal support cases even where child support is not an issue. The increased level of disclosure required of payors has not only increased the quantum of spousal support but has likely increased the proportion of cases settled outside of the litigation process.

The previous culture of non-disclosure benefitted the payor, to the significant detriment of the receiving spouse in a traditional relationship. The new culture of disclosure evens the playing field to some extent.[112]

C. IMPLICATIONS OF CHILD CARE DURING MARRIAGE AND AFTER DIVORCE ON SPOUSAL SUPPORT ENTITLEMENT

1. Relevant Statutory Provisions

Section 15.2(6)(a) and (b) of the *Divorce Act*, which relates to original applications for spousal support, provides as follows:

Objectives of spousal support order

15.2(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

112. *Id.*, pp. 10-11.

(a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

(b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage...

Corresponding provisions are found in section 17(7)(a) and (b) of the *Divorce Act* which govern applications to vary existing spousal support orders.

2. Commentary

Financial consequences arising from the care of a child on the dissolution of marriage, which are personal to the custodial parent in that they arise from the limitations and demands of parenting, are additional to the direct costs of raising the children that are addressed by means of the *Federal Child Support Guidelines*. Such personal financial consequences, therefore, fall properly within the ambit of sections 15.2(6) and 17(7)(b) of the *Divorce Act*.[113] The financial implications of parenting *after divorce* were elucidated by Browman, J. in *Brockie* v. *Brockie*[114] who observed :

> It must be recognized that there are numerous financial consequences accruing to the custodial parent, arising from the care of a child, which are not reflected in the direct costs of support of that child. To be a custodial parent involves adoption of a lifestyle which, in insuring the welfare and development of the child, places many limitations and burdens upon the parent. A single person can live in any part of the city, can frequently

113. *Moge* v. *Moge*, [1992] 3 S.C.R. 813; *Jesperson* v. *Jesperson* (1985), 6 R.F.L. (3d) 440 (B.C.C.A.); *Brockie* v. *Brockie* (1987), 5 R.F.L. (3d) 440, pp. 448-449 (Man. Q.B.), aff'd (1987), 8 R.F.L. (3d) 302 (Man. C.A.) (fixed term order for periodic spousal support); *Cobham* v. *Cobham* (1999), 217 N.B.R. (2d) 175 (Q.B.); *Ray* v. *Ray* (1993), 121 N.S.R. (2d) 340 (S.C.); *Imrie* v. *Imrie*, [1999] O.J. No. 3891 (C.A.); *Droit de la famille – 1115*, [1987] R.D.F. 356 (Sup. Ct.); compare *Salsman* v. *Salsman*, [1999] B.C.J. No. 2895 (C.A.) (lump sum spousal support order); *Sampson* v. *Sampson*, [1999] N.S.J. No. 379 (C.A.) (limited term order).

114. *Ibid.*

> share accommodations with relatives or friends, can live in a high-rise downtown or a house in the suburbs, can do shift work, can devote spare time as well as normal work days to the development of a career, can attend night school, and in general can live as and where he or she finds convenient. A custodial parent on the other hand, seldom finds friends or relatives who are anxious to share accommodation, must search long and carefully for daycare, schools and recreational facilities, if finances do not permit ownership of a motor vehicle, then closeness to public transportation and shopping facilities is important. A custodial parent is seldom free to accept shift work, is restricted to any overtime work by the daycare arrangements available, and must be prepared to give priority to the needs of a sick child over the demands of an employer. After a full day's work, the custodial parent faces a full range of homemaking responsibilities including cooking, cleaning and laundry, as well as the demands of the child himself for the parent's attention. Few indeed are the custodial parents with strength and endurance to meet all of these demands and still find time for night courses, career improvement, or even a modest social life. The financial consequences of all of these limitations and demands arising from the custody of the child are in addition to the direct costs of raising the child, and are, I believe, the factors to which the court is to give consideration under subsection (7)(b) [now subsection 15.2(6)(b) of the *Divorce Act*].[115]

The financial implications of child care *during the marriage* should also be reflected in spousal support orders. Indeed, this was the very essence of *Moge* v. *Moge*,[116] wherein L'Heureux-Dubé, J. observed that a woman's ability to support herself after divorce is often significantly affected by her role as primary caregiver to the children both during the marriage and after the divorce. Her sacrifices include loss of training, workplace security and seniority, absence of adequate pension and insurance plans and decreased salary levels. These losses may

115. These observations were cited with approval by L'Heureux-Dubé, J. in *Moge* v. *Moge*, *supra*, note 113, para. 81.

116. *Supra*, note 113, paras. 72-82.

arise from the woman's role as primary caregiver, regardless of whether or not she was employed outside the home.[117]

Bearing the above considerations in mind, lawyers and courts should reject any *a priori* assumption that short-term marriages with children warrant only short-term spousal support or that spousal support should be reduced or terminated when the youngest child is old enough to attend school.[118] Child care responsibilities do not end when a child enters school, although the direct and hidden costs of child rearing may change. Although it is appropriate to terminate child support when the child is economically self-sufficient, it does not follow that spousal support should be terminated, or even reduced, even when the custodial parent's responsibilities for the child have ceased to exist. The economic consequences of child rearing for the custodial parent are often permanent and irreversible in terms of loss of employment potential, including loss of the fringe benefits usually associated with employment. As Palmeter A.C.J., of the Nova Scotia Supreme Court, observed in *Gillis* v. *Gillis*, "[...] the fact that the two youngest children have left the Respondent's home does not necessarily mean that maintainance has to be reduced on any pro-rata basis or even reduced at all".[119]

On marriage breakdown and divorce, poverty is essentially a parenting problem. It is not single women with employment potential who suffer most. It is single mothers who must shoulder both economic and parenting burdens. This must be borne in mind under sections 15.2(6) and 17(7) of the *Divorce Act*. As L'Heureux-Dubé, J. has stated extrajudicially : "Through judicial discretion, these objectives must be interpreted and applied in a way that does not perpetuate

117. *Salsman* v. *Salsman*, *supra*, note 113; *Brockie* v. *Brockie*, *supra*, note 113; *Gale* v. *Gale*, [2000] M.J. No. 207 (Q.B.); *Cobham* v. *Cobham*, *supra*, note 113; *McCoy* v. *Hucker*, [1998] O.J. No. 2831 (Sup. Ct.) (husband with annual income of $180,000 ordered to pay $500 per month spousal support to wife with annual income of $64,000); *Moura* v. *Moura*, [1998] O.J. No. 5351 (Sup. Ct.); *Raczynski* v. *Raczynski*, [1998] S.J. No. 629 (Q.B.).

118. *Bromberg* v. *Bromberg*, [1998] N.S.J. No. 112 (S.C.); *Richards* v. *Richards* (1985), 45 Sask. R. 55 (Q.B.).

119. (1994), 3 R.F.L. (4th) 128, para. 9 (N.S.S.C.); see also *McCabe* v. *MacInnis*, [2000] P.E.I.J. No. 61 (S.C.). And see judgment of L'Heureux-Dubé J. in *Willick* v. *Willick*, [1994] 3 S.C.R. 670, para. 103.

the feminization of poverty and further diminish the economic condition of women after divorce".[120] If two leading family law practitioners from Toronto are to be believed, the concerns expressed by L'Heureux-Dubé, J. have been largely resolved.

Thomas Bastedo has expressed the opinion that courts are currently seeking to equalize household incomes on the dissolution of marriage. He states :

> Usually, whether the family as an income level of $25,000.00 or $30,000.00 in total on the one hand, or $300,000.00 on the other hand, court after court in Canada is equalizing, as a general rule, the disposable monies available to the family into two amounts, one going to each sector of the separated family. By the word "family" in this context, I mean the "ordinary family" which is described in the earlier part of this paper. This family generally speaking will have one or more children, will have parents who have been partners for more than seven or eight years, and will have one parent, almost invariably the father, earning significantly more funds than the other parent, almost invariably the mother. In this search of an equality of disposable monies, the theoretical distinction between "compensation" and "needs" disappears in a practical analysis based upon tax tables and computer calculations.[121]

Stephen Grant goes even further by stating :

> [W]here children of the relationship make the determination of child support under the Guidelines the primary concern, courts are either equalizing the parties' NDI (net disposable income) or doing better for the larger economic unit. Faced with the question of placing funds in the hands of parents who have primary care of their children courts now view spousal support as part of the global financial need of the newly-configured family unit, not as a discrete award, distinct from child support determined under the Guidelines. In other words, spousal support is being used to "top-up" child support to create either

120. C. L'HEUREUX-DUBÉ, "Economic Consequences of Divorce : A View from Canada" (1994), 31 *Houston L. Rev.* 451, p. 489.

121. T. BASTEDO, "Impact of Child Support Guidelines on Spousal Support", *Matrimonial Affairs*, CBAO Family Law Section Newsletter, Vol. 11, No. 3, November 1999, 1, pp. 23-24.

> equality of NDI in the new households or an excess of NDI in the household where more of the family now resides more often. In fact, as I have found in my review of the current jurisprudence, this method of dividing household incomes is prevalent, although judicial opinion of its use varies.[122]

Notwithstanding the above opinions, this author is not persuaded that courts across Canada, or even in Ontario, are seeking to equalize spousal incomes on or after divorce by means of spousal support orders or child support orders or a combination thereof. The following observations of Jenkins, J. in *Creelman* v. *Creelman* seem to be much closer to the truth in the context of spousal support orders :

> Equalization of incomes is not directed by the law, whether under the Family Law Act or the Divorce Act. Equalization of incomes, after taking into account all the financial factors regarding the incomes, assets, means and needs of the parties, may sometimes, albeit occasionally, be the result. This result tends to occur more frequently following long-term, traditional marriages, with older spouses, with low income and/or diminished or no employment potential, who have insufficient financial resources to aspire to the standard of living to which the parties were accustomed while they resided together. But the spousal support legislation sets out a list of factors that the trial judge is to take into consideration, and a list of objectives sought to be achieved, which involves more than equalizing incomes.[123]

Similar sentiments were expressed by Robertson, J., of the Ontario Superior Court, in *Lockyer* v. *Lockyer*, wherein a spousal support order was sought from the custodial parent. She oberserved :

> Although there are many differences between Mrs. Lockyer's situation and the *Sullivan* case, both cases advanced the notion of equalizing incomes of the parties after a credit for child support where the father had the responsibility for three children.

---

122. S. GRANT and K. LEVITT, "Child Support and Spousal Support : What Hath the Guidelines Wrought?", Federation of Law Societies and Canadian Bar Association, *The 2000 National Family Law Program*, St. John's, Newfoundland, July 10-13, 2000, ch. 23-2, p. 3.

123. [2000] P.E.I.J. No. 86 (S.C.), para. 35.

> The length of marriage was about the same (12 years, 5 months and 13 years). Neither mother was employed. the court in *Sullivan* rejected this approach and I do so also. It is a superficial response to a more detailed problem. The law requires a fine balance between competing interests. All factors must be weighed.[124]

Lest it be assumed that child support orders, as distinct from spousal support orders, can be granted to achieve an equalization of spousal or household incomes in circumstances involving a very high income parent, the following observations of Bastarache, J., who delivered the judgment of the Supreme Court of Canada in *Francis* v. *Baker*,[125] should be borne in mind:

> In my opinion, child support undeniably involves some form of wealth transfer to the children and will often produce an indirect benefit to the custodial parent. However, even though the Guidelines have their own stated objectives, they have not displaced the *Divorce Act*, which clearly dictates that maintainance of the children, rather than household equalization or spousal support, is the objective of child support payments. Subsection 26.1(2) of the Act states that "The guidelines shall be based on the principle that spouses have a joint financial responsibility to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation". While standard of living may be a consideration in assessing need, at a certain point, support payments will meet even a wealthy child's reasonable needs. In some cases, courts may conclude that the applicable Guideline figure is so in excess of the children's reasonable needs that it must be considered to be a functional wealth transfer to a parent or de facto spousal support. I wholly agree with the sentiment of Abella J.A. that courts should not be too quick to find that the Guideline figures enter the realm of wealth transfers or spousal support. But courts cannot ignore the reasonable needs of the children in the particular context of the case as this is a factor Parliament chose to expressly include in s. 4(b)(ii) of the Guidelines. Need, therefore, is but

124. [2000] O.J. No. 2939 (Ont. Sup. Ct.), para. 57.
125. [1999] 3 S.C.R. 350, [1999] S.C.J. No. 52, para. 41.

> one of the factors courts must consider in assessing whether Table amounts are inappropriate under s. 4. In order to recognize that the objective of child support is the maintenance of children, as well as to implement the fairness and flexibility components of the Guidelines' objectives, courts must therefore have the discretion to remedy situations where Table amounts are so in excess of the children's reasonable needs so as no longer to qualify as child support. This is only possible if the word "inappropriate" in s. 4 is interpreted to mean "unsuitable" rather than merely "inadequate".

Since the above judgment, several courts in Canada have concluded that indirect financial benefits enjoyed by a custodial parent in consequence of a very substantial amount of monthly child support being payable by the non-custodial parent should be taken into account in quantifying a spousal support order in light of the custodial parent's needs and the non-custodial parent's ability to pay.[126]

Julien D. Payne
1188 Morrison Road
Ottawa (Ontario) K2H 7L3
Tel. : (613) 829-1905
Fax : (613)
E-mail : j_d_payne@sympatico.ca

126. See *Bell* v. *Glynn*, [2000] B.C.J. No. 1505 (S.C.); *R.* v. *R.*, [2000] O.J. No. 2830 (Sup. Ct.); compare *M.M.* v. *G.C.*, [1999] Q.J. No. 4944 (Sup. Ct.); see also *Tauber* v. *Tauber*, [2000] O.J. No. 2133 (C.A.).