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CHILD SUPPORT AND SHARED PARENTING IN CANADA: A "REALITY CHEQUE"

Courtney Palmer*

Introduction

Few relationships present more difficulties and value-laden debate than does that of parent and child. Those charged with the well-being and upbringing of the next generation face a large amount of both internal and external pressures in doing so. Central to the debate are questions regarding the respective roles, rights and responsibilities of parent and child. There are no simple answers and the issues are only rendered more complicated when one considers the appropriate involvement, if any, of the state in governing the conduct of parent and child.[1]

In Canadian family law and public policy, discourse on liberal individualism and the role of the welfare state populate the debate regarding a parent's obligation to make "child support" payments following a separation or family breakdown. At one end of the spectrum, child liberationist theorists provocatively argue that children of all ages should have the right to work for money.[2] Alternatively, others argue that poverty among children is a major social problem that falls on the shoulders of the welfare state.[3] Arguably both satiating and fueling the debate, the federal government introduced the *Federal Child Support Guidelines*[4] (the "*Guidelines*"), which came into effect on May 1, 1997.

The public and academic reception of the *Guidelines* was, and continues to be, one of mixed reviews.[5] It is one particular area of heated debate that is the subject

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[1] For a general discussion of the dual role of the state and parents in the lives of children (in the American context) see Leslie J Harris, Lee E Teitelbaum & Tamar R Birckhead, *Children, Parents, and the Law[:] Public and Private Authority in the Home, Schools, and Juvenile Courts*, 3d ed (New York: Wolters Kluwer, 2012).

[2] Richard Farson, *Birthrights* (New York: Macmillan Publishing, 1974) at 27; John Holt, *Escape From Childhood* (New York: EP Dutton & Co, 1974) at 149.

[3] Paul Miller & Anne H Gauthier, "What Were They Thinking? The Development of Child Support Guidelines in Canada" (2002) 17 CJLS 139 at 157.

[4] SOR/97-175 [*Guidelines*].

[5] See e.g. Krista Robson, "'Wrapped in the Flag of the Child': Divorced Parents' Perceptions of and Experiences with the Federal Child Support Guidelines" (2008) 24 Can J Fam L 283.

of this paper: that is, the payment of child support where the child resides with both parents for an equal, or substantially equal, amount of time. Such a factual circumstance falls under the purview of section 9 of the *Guidelines*, which is reproduced and discussed in greater detail below. The purpose of this paper is to provide a critical analysis of section 9 from a family law policy perspective. It is the thesis of this paper that the current formulation of section 9 is practically unworkable and fails to achieve important fundamental objectives of family law policy—it is in need of a "reality cheque." As will be elaborated upon further, section 9 is presently unworkable due to its complexity and evidence-heavy requirements, as well as its disregard by the legal profession in practice.

The argument unfolds in four parts. Part I summarizes the development of the child support system in Canada and provides an overview of section 9 of the *Guidelines*. Part II outlines and defends basic family law policy objectives by which the current regime, as well as potential reforms, may be evaluated. Then, Part III engages with the case law and critiques the ability of section 9, in its current formulation, to achieve these policy objectives. Finally, Part IV highlights the need for reform and speaks to the challenges of reform in this area.

Part I: Overview – The Federal Child Support Guidelines & Section 9

A. The Federal Child Support Guidelines

Prior to the introduction of the *Guidelines* in 1997, child support orders across Canada were a matter of pure judicial discretion. Judges would determine, on a case-by-case basis, the amount of child support to be paid based on considerations of the financial needs of the child and the parents' respective abilities to pay.[6] Prior to 1997, critics of the child support regime argued that it was rendering child support amounts that were too low, inconsistent, and unpredictable.[7] By contrast, the determination of basic child support under the present "guidelines" system is based on the use of two variables, namely the number of children and the payor parent's annual income, with a standard formula that generates a pre-determined level of support.[8] The *Guidelines* were designed to respond to the criticisms of the time and "ensure that children get an appropriate level of support from both parents."[9] They were also designed to "make it faster, easier, and less expensive for parents to arrive at an amount."[10]

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[6] This method of calculating child support is frequently referred to as the "*Paras*" method, deriving its name from the Ontario Court of Appeal decision in *Paras v Paras* (1970), [1971] 1 OR 130, 2 RFL 328 (CA).

[7] *Children Come First: A Report to Parliament on the Provisions and Operation of the Federal Child Support Guidelines, Volume 1* (2002), online: Department of Justice Canada <http://www.justice.gc.ca> at 1 ["*Children Come First, Vol 1*"].

[8] For a detailed overview of the formula used in creating the child support tables in the *Guidelines*, see Child Support Team, *Formula for The Table of Amounts Contained in The Federal Child Support Guidelines: A Technical Report*, CSR-1997-1E (December 1997), online: Department of Justice Canada <http://www.justice.gc.ca> [*Technical Report*].

[9] *Children Come First, Vol 1, supra* note 7 at 3.

[10] *Ibid.*

The impetus to develop the *Guidelines* may be attributed to a multitude of social, economic, and political factors. A significant driving factor was legislative reform introducing the concept of a "no-fault" divorce,[11] which facilitated a rise in the number of divorces and subsequent lone-parent families in Canada throughout the 1970s and 1980s.[12] During this time, influential scholarly research and public discourse pointed to the rising divorce rates[13] and prevalence of "deadbeat dads"[14] as the primary causes of increased poverty among children and female lone-parents.[15] Notwithstanding strong critiques of these correlations, and amid a political environment of crippling welfare expenditures, the federal government pushed towards improving and strengthening the child support system.[16] In further support for a guidelines regime, advocates for reform cited the inconsistent and arbitrary nature of the case-by-case system, as well as the need to facilitate one's ability to plan for his or her likely child support obligations or entitlement upon separation.[17]

The *Guidelines* came into effect on May 1, 1997, and introduced an entirely new scheme for the determination of child support under the federal *Divorce Act*.[18] Sec-

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[11] The federal *Divorce Act* of 1968 provided, for the first time, a Canada-wide law of divorce and introduced the concept of a no-fault divorce. In 1985, the modern *Divorce Act* enacted further reform, reducing the requisite separation period to establish a "breakdown of the marriage" from three or five years, to one year in all cases. See *Divorce Act,* RSC 1985, c 3 (2nd Supp), s 8.

[12] The Vanier Institute for the Family reports that the divorce rate in Canada increased five-fold from 1968 to 1995. See Dr Anne-Marie Ambert, *Divorce: Facts, Causes & Consequences*, 3d ed (Ottawa: Vanier Institute for the Family, 2009) at 7, online: <http://www.vanierinstitute.ca>. The Department of Justice has reported analogous trends in the rapid rise, during the 1970s and 1980s, of the proportion of children living in lone-parent families. See Nicole Marcil-Gratoon & Céline Le Bourdais, *Custody, Access and Child Support: Findings from The National Longitudinal Survey of Children and Youth*, CSR-1999-3E (1999) at 4, online: Department of Justice Canada <http://www.justice.gc.ca>.

[13] For example, in 1985, American sociologist Lenore Weitzman published highly influential research claiming that no-fault divorce laws in California were the cause of increased poverty among women and children. Weitzman reported that following a divorce, a woman's standard of living decreased by 73 percent, while a man's increased by an average of 42 percent. See Lenore Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (New York: The Free Press, 1985) at 338.

[14] In 1997, Professor Mary Jane Mossman described how the term "deadbeat dads" was gaining increasing popularity as an explanation for problems relating to child support. See Mary Jane Mossman, "Child Support or Support for Children? Re-thinking 'Public' and 'Private' in Family Law" (1997) 46 UNBLJ 63 at 64-66 [Mossman, "Child Support"].

[15] *Children Come First: A Report to Parliament on the Provisions and Operation of the Federal Child Support Guidelines, Volume 2* (2002), online: Department of Justice Canada <http://www.justice.gc.ca> ["*Children Come First, Vol 2*"] ("lone-parent families headed by women have the highest incidence of low income […] [and] also account for a disproportionate share of all children living in low-income situations" at 13-14).

[16] Millar & Gauthier, *supra* note 3 at 140-143, describe how the claims of Lenore Weitzman, *supra* note 13, were subsequently proven to be inaccurate or gross exaggerations, but were nonetheless highly influential in the development of child support guidelines in Canada. Millar & Gauthier also argue that the *Guidelines* were implemented with the purpose of relieving the government of its duty to address child poverty. See also Mossman, "Child Support," *supra* note 14, for a discussion of the overall trend towards the privatization of responsibilities for the economic support of dependants in family law.

[17] See Ross Finnie, "The Government's Child Support Package" (1997) 15 Can Fam LQ 79 (WL Can).

[18] *Guidelines*, *supra* note 4. In 1997, the federal *Divorce Act* was amended to require that all child support orders made pursuant to it be made in accordance with the *Guidelines* (now see *Divorce Act*, *supra* note 11, s 15.1). The majority of the provinces subsequently adopted either identical or substantially similar guidelines to govern child support orders made under provincial legislation. In Ontario, the

tion 3 of the *Guidelines* establishes the presumptive rule whereby, unless otherwise provided for in the *Guidelines*, the amount of a child support order shall be the amount set out in the applicable table plus the amount, if any, of special or extraordinary expenses as determined under section 7.[19] As noted above, the table amount is based on only two variables: the annual income of the payor parent, and the number of children to whom the order relates.

This standard methodology reflects key principles and assumptions, which were adopted in the course of creating the *Guidelines.* First, the schedule of table amounts is based on the operational principles that families with higher incomes spend more on their children than do families with lower incomes,[20] and parents with equal incomes should be equally responsible for the financial costs of their children.[21] Second, the *Guidelines* adopt an "obligor's model" of support wherein the amount of child support varies with the income of the payor parent, but not with the income of the recipient parent. This model thus reflects the critical presumption that financial expenditures on a child vary with the income of the primary-resident, recipient parent as a simple matter of course.[22] Finally, the presumptive table amounts are premised on the "typical" fact scenario where the child spends the vast majority of his or her time with the primary-resident, recipient parent, and that parent bears the ultimate responsibility for all child-related expenditures.[23]

B. Section 9 – "Shared Custody"

In specific factual circumstances, the *Guidelines* recognize the breakdown of one or more of these core principles or assumptions and authorize a departure from the presumptive rule in section 3.[24] The focus of this paper is on one such set of circumstances: where a child resides with each parent for substantially equal

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Uniform Federal and Provincial Child Support Guidelines Act, SO 1997, c 20, amended the *Family Law Act*, RSO 1990, c F.3, to provide that all child support orders made pursuant to it be made in accordance with the *Child Support Guidelines (Ontario),* O Reg 391/97, which are virtually identical to the federal *Guidelines* (now see *Child Support Guidelines (Ontario)*, O Reg 463/11). The exception was the province of Québec, which agreed with the overall reasoning of standardized guidelines but disagreed with certain assumptions made under the federal *Guidelines.* As a result, Québec created its own guidelines, which are based on an "income shares" model wherein the calculation for support is based on the income of both parents. The Québec guidelines apply to all applications based on the Civil Code of Québec and to all divorce applications if both spouses habitually reside in Québec. For detailed descriptions and comparisons between the federal and Québec models, see Tina Maisonneuve, "Child Support Under the Federal and Quebec Guidelines: A Step Forward or Behind" (1999) 16 Can J Fam L 284.

[19] *Guidelines*, *supra* note 4, s 3(1).

[20] *Technical Report*, *supra* note 8 at 1.

[21] *Ibid.*

[22] Government of Canada, *Budget 1996: The New Child Support Package* (Ottawa: 6 March 1996) at 13; see also *Premi v Khodeir* (2009), 198 CRR (2d) 8 (available on CanLII) (Ont Sup Ct) (constitutional challenge to an obligor's model of child support rejected).

[23] *Technical Report*, *supra* note 8 at 2; see also Carol Rogerson, "Child Support Under the Guidelines in Cases of Split and Shared Custody" (1998) 15:2 Can J Fam L 11 at para 12.

[24] See e.g. *Guidelines*, *supra* note 4, s 3(2) (children over the age of majority), s 4 (payors with annual income over $150,000), s 5 (spouse in place of a parent), s 7 (special or extraordinary expenses), s 8 (split custody), s 9 (shared custody), and s 10 (undue hardship).

amounts of time. This form of residential arrangement, referred to throughout this paper as "shared parenting,"[25] is addressed in section 9 of the *Guidelines*:

> 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.[26]

In its current formulation, section 9 requires that the court make two distinct determinations. The first is whether the 40 percent threshold is satisfied. Then, if and when the threshold is satisfied, the second determination is the appropriate quantum of child support.

The decision to allow for a departure from the presumptive table amount where the residential arrangements for a child approach or attain that of shared parenting is at the very outset a complicated question of family policy. In addition, there are subsequent implemental decisions, such as how to define and identify a shared parenting arrangement and how to calculate a fair and equitable amount of support, which give rise to further questions and debate. In light of such complex policy concerns, it is not at all surprising that the wording of section 9 was the subject of intense debate during the drafting of the *Guidelines.* Fifteen years later, the policy debate has far from ceased. In fact, with respect to calls for reform, jurisprudence under section 9 appears to have only added "fuel to the flame." Senior family law practitioners and scholars have described the current child support system in cases of shared parenting as "broken"[27] and the cause of a "seemingly endless stream of litigation."[28] However, prior to asserting the practical successes or failures of the current formulation of section 9, or any proposed reforms thereto, it is imperative to review the underlying policy objectives for child support payments in shared parenting arrangements.

Part II: Policy Objectives Regarding Child Support & Shared Parenting

The success or failure of a child support system is ultimately measured by how the underlying issues and policy objectives are defined.[29] For example, if one defines child support as a matter of public concern that ought to be the responsibility

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[25] While section 9 is entitled "shared custody," it is best to describe this type of arrangement as "shared *parenting*" or "joint *physical* custody" to avoid unnecessary confusion with the notion of "custody," which technically refers only to legal decision-making authority.

[26] *Guidelines*, *supra* note 4, s 9.

[27] Phillip Epstein, *Epstein's This Week in Family Law* 38 (15 September 2012) (WL Can).

[28] Kim Hart Wensley, "Shared Custody – Section 9 of the Federal Child Support Guidelines: Formulaic? Pure Discretion? Structured Discretion?" (2004) 23 Can Fam LQ 63 at 63.

[29] See Mossman, "Child Support," *supra* note 14 (Mossman describes how the manner in which the problem of child support is defined has a large impact on the solution developed to address it).

of the state, then a system which increasingly privatizes this responsibility onto family members would be regarded as a failure. Conversely, if one defines child support as a private issue and favours policy initiatives that limit state involvement in family life, then that same system would likely be regarded as a success.

This Part outlines five broad-based policy goals or objectives pursuant to which a child support system for shared parenting may be evaluated. These objectives are derived from a variety of sources, including provisions of the *Guidelines* and other child-related legislation, established principles of equity, and interdisciplinary research. These five objectives are neither infallible nor exclusive. Furthermore, it is acknowledged that these objectives may overlap in theory or in practice, and may promote or compete with one another in any given set of circumstances. Notwithstanding these caveats, it is proposed that a child support system which best achieves these objectives is preferable to one which does not.

1) Child support awards should reflect the realities of the parties & the actual costs of raising a child

An award of child support that is based on incorrect assumptions about how parties arrange their post-separation lives or about the extent of child-related expenditures will be ineffective in rendering justice to either party. Public policy based on factual assumptions that do not accord with a large percentage of Canadian families is undesirable. A successful child support system should reflect the actual and evolving, needs, means, and circumstances of payors, recipients, and children.

In the past, misleading and incorrect assumptions about how individuals form interdependent relationships or contribute to the generation of familial wealth gave rise to discriminatory treatment and alarming outcomes.[30] While assumptions and inferences remain present in both substantive and procedural law, the goal of family law is no longer—or at the very least *ought* not to be—about promoting traditional notions or assumptions of what a family should be. Rather, as explained by Meg Luxton, "[t]he challenge for contemporary thinking about families is to focus on functions and practices—on what people do to take care of themselves and each other, to have and raise beloved children, and to ensure as best as possible, the well-being of themselves, their households, their communities and their society."[31]

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[30] See e.g. *Murdoch v Murdoch* (1973), [1975] 1 SCR 423, 13 RFL 185 (the Supreme Court denied Irene Murdoch any interest in the ranch property registered in her husband's name, based on the finding of the trial judge that her substantial non-financial contributions to the parties' home and ranching business were nothing more than that what was ordinarily expected of a rancher's wife); *Pettkus v Becker*, [1980] 2 SCR 834, 19 RFL (2d) 165 (Rosie Becker tragically committed suicide in the aftermath of her tiresome, although ultimately successful, struggle to apply the doctrine of unjust enrichment to unmarried cohabitating couples); *M v H*, [1999] 2 SCR 3, 46 RFL (4th) 32 (landmark decision recognizing that denying same-sex partners the statutory rights afforded to unmarried heterosexual couples following the breakdown of a relationship constitutes unjustified discrimination on the basis of sexual orientation).

[31] Meg Luxton, *Changing Families, New Understandings* (Ottawa: Vanier Institute for the Family, 2011) at 2, online: <http://www.vanierinstitute.ca>.

2) *Child support awards should be fair and consistent*

The general pursuit of fairness and consistency in child support awards is unlikely to engender strong contention. The *Guidelines* were proposed and developed amid strong concerns of arbitrary awards under the case-by-case system and introduced with the explicit objectives to "establish a fair standard of support for children […] [and] ensure consistent treatment of spouses and children who are in similar circumstances."[32] Moreover, notions of fairness and equal treatment accord with the rule of law and appeal to one's natural sense of equity and justice.[33]

However, where a provision impacts numerous actors with diverse and competing interests, the pursuit of a fair outcome becomes eminently more complex and calls for the making of difficult policy choices. The following excerpt of an article authored by Carol Rogerson aptly describes the complexities in achieving fair and consistent child support awards in cases of increased access and shared parenting:

> There are two dimensions to the fairness claim. The first is fairness between the payor and the support recipient, who is arguably being relieved of some of the costs assumed by the payor. The second is fair and consistent treatment of the payor as compared to payors at the same income level who may not be spending any money directly on their child apart from the payment of child support.[34]

In other words, fairness demands that two parents, regardless of whether they are recipients or payors, who directly incur substantially similar child-related costs should be subject to similar support obligations or entitlements. Additionally, it is proposed that in order for a legal system to be effective, actual fairness must be complemented by perceived fairness. If a child support system is unable to maintain the public confidence that it is resilient to contemptible attempts to "scam the system," it will lose its integrity as an instrument of adjudication.

3) *A child support system should encourage certainty and efficiency in the legal process*

There is a general and growing concern that the family legal system is unaffordable, extremely lengthy, overly complex, and clogged with unrepresented litigants.[35] With child support being one of the most prevalent issues in family law disputes, a scheme that generates unpredictable results through a timely and costly process will hinder access to justice for families in transition. On the other hand, a scheme that operates with increased certainty and demands minimal documentary or *viva*

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[32] *Guidelines*, *supra* note 4, ss 1(a), 1(d).

[33] The legal maxim of the "rule of law" mandates that the law is supreme and thereby preclusive of the influence of arbitrary power. See *Roncarelli v Duplessis*, [1959] SCR 121, 16 DLR (2d) 689; *Reference re Language Rights Under s 23 of the Manitoba Act, 1870 & s 133 of Constitution Act, 1867,* [1992] 1 SCR 212, (*sub nom Reference re Manitoba Language Rights (No 2)*) 88 DLR (4th) 585.

[34] Rogerson, *supra* note 23 at para 13.

[35] See Chief Justice Warren K Winkler, "Family Law and Access to Justice: A Time for Change" (Remarks delivered at the 5th Annual Family Law Summit, The Law Society of Upper Canada, Toronto, 11 June 2011), online: Court of Appeal for Ontario <http://www.ontariocourts.on.ca>.

voce evidence will not only reduce the complexity and expense of those disputes that do proceed to litigation, but will also facilitate early settlements.[36]

4) The calculation of child support should reflect the best interests of the child

In Canada, the "best interests of the child" is the cardinal rule governing all interaction between the law and the lives of children.[37] The policy underlying child support should be no different, though there are two points that warrant brief discussion.

First, it would be erroneous to measure "best interests" in terms of the absolute dollar amount of support paid by the payor parent. The "best interests of the child" refers to the particular child before the court and thus, in the context of support, is focused on the total amount of resources reasonably available for the support of *that* child. Whether separated or not, parents earning a combined annual income of $200,000 are certainly capable of expending more resources on their child, in absolute terms, than are parents earning a combined annual income of only $25,000.[38] Yet this fact alone does not bring about the conclusion that the "best interests" of the former child are met and those of the latter are not. Rather, it is more accurate to conceive of "best interests" in the context of a child support system as demanding that the combined financial resources of the parents be appropriately *distributed* to best meet the child's needs. Where the family is intact in one household, it is assumed that this maximally efficient distribution of resources occurs naturally. However, where parents have separated, child support guidelines must step in to render a distribution that is in the child's "best interests."

To borrow a term from microeconomic theory, there will be a "deadweight loss" if child support guidelines cause an inefficient allocation of parental resources such that the financial burden on one parent does not correspond to an improvement in the other parent's ability to meet the child's financial needs. Such an economic inefficiency and excess burden on one parent is undesirable from both an economic welfare and family law policy perspective.

Second, it is proposed that the "best interests" of a child may be adversely impacted by the methodology used to calculate support and the factors considered relevant therein. To retain a child-centred objective, there ought to be no provisions that promote conflict or otherwise incentivize parents to alter their behaviour in a way that is detrimental to the best interests of the child, simply in order to receive a more favourable financial outcome.[39] The creation of such perverse

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[36] See the objectives of the *Guidelines*, *supra* note 4, s 1 ("to reduce conflict and tension between spouses by making the calculation of child support more objective" at s 1(b), and "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…" at s 1(c)). See also Part I for a discussion of how the need for certainty and efficiency were a driving force in the development of the *Guidelines*.

[37] See *Young v Young*, [1993] 4 SCR 3, 108 DLR (4th) 193; and *P(D) v S(C)*, [1993] 4 SCR 141, 108 DLR (4th) 287.

[38] See *Technical Report*, *supra* note 8 (it is an assumption built into the formula of the table amounts that "[f]amilies with higher incomes spend more on their children than do families of lower income" at 1).

[39] See Silvia Bernardini & Jennifer Jenkins, *An Overview of Risks and Protectors for Children's Outcomes: Children of Separation and Divorce*, 2002-FCY-2E (2002), online: Department of Justice <http://www.justice.gc.ca> ("[c]ompared to other divorce factors associated with child maladjustment

incentives is clearly at odds with the cardinal rule of "best interests." The colloquial term of "dollars for days" is often used to describe such concerns and is discussed in greater detail below.

5) Child support laws should encourage positive parenting arrangements

The final objective stems from a specific policy choice made under the general principle of "best interests" discussed above. It is proposed that a child support scheme should encourage co-operative parenting arrangements that allow for a child to spend as much as time as possible with two loving and devoted parents. This is often referred to as the "maximum contact" principle and has been explicitly endorsed by Parliament in subsection 16(10) of the *Divorce Act*.[40] In addition, legal commentators have noted the growing trend towards legislative encouragement of shared parenting arrangements in cases other than those involving vioviolence or abuse.[41] While legislative direction need not (and should not) be blindly accepted as good public policy, additional support offered by interdisciplinary research authenticates the "new frontier" of shared parenting.[42]

By no means is shared parenting a feasible or optimal arrangement for all families. In cases involving abuse or extremely high conflict, it is likely to exacerbate the difficulties faced by both parents and children in adjusting to life after separation.[43] However, developmental research continues to recognize that cooperation and collaboration among separated spouses are powerful positive forces in child adjustment.[44] Psychologists, social workers, and parenting experts recognize that "when parents remain physically and emotionally engaged with their children […] they provide a protective buffer against the multitude of relational and environmental changes that children experience after separation."[45]

Additionally, there has been an ongoing ideological shift away from the binary model of post-divorce parenting, where a child was allocated to the "winning" sole custodial parent, usually the mother, towards a model that recognizes the "indis-

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(absence of non-resident parent, troubled parent-child relationships and economic disadvantage), the relationship between parental conflict and child maladjustment is consistent and strong" at 13).

[40] Subsection 16(10) of the *Divorce Act*, *supra* note 11 states that "[i]n making an order [for custody], the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact."

[41] See e.g. Helen Rhoades, "The Rise and Rise of Shared Parenting Laws" (2002) 19 Can J Fam L 75 at 75.

[42] Patrick Parkinson, *Family Law and the Indissolubility of Parenthood* (New York: Cambridge University Press, 2011) at 91.

[43] See Paul R Amato & Tamara D Afifi, "Feeling Caught Between Parents: Adult Children's Relations With Parents and Subjective Well-Bring" (2006) 68:1 Journal of Marriage and Family 222; Dr Claire Sturge & Dr Danya Glaser, "Contact and Domestic Violence – The Experts' Court Report" (2000) 30 Family Law 615.

[44] See Kari Adamsons & Kay Pasley, "Coparenting Following Divorce and Relationship Dissolution" in Mark A Fine & John H Harvey, eds, *Handbook of Divorce and Relationship Dissolution* (New Jersey: Lawrence Erlbaum Associates, 2005) 241.

[45] Marsha Kline Pruett & Tracy Donsky, "Coparenting After Divorce: Paving Pathways for Parental Cooperation, Conflict Resolution, and Redefined Family Roles" in James P McHale & Kristen M Lindahl, eds, *Coparenting[:] A Conceptual and Clinical Examination of Family Systems* (Washington: American Psychological Association, 2011) 231 at 236.

solubility of parenthood" and the two-household "bi-nuclear" family.[46] Empirically, the 1990s observed a rapid rise in the popularity of joint custody orders.[47] Today, society applauds parents who are able to develop creative and cooperative post-separation parenting arrangements, such as shared parenting or nesting.

Part III: Section 9 of the *Guidelines*

Having developed a working policy framework, as well as having noted the limitations and caveats of this framework, an inquiry into section 9 jurisprudence follows. As previously noted, an analysis under section 9 of the *Guidelines* has two components. First, the court must be satisfied that the payor "parent or 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." [48] Second, and only if it determines that the threshold has been met, the court is authorized to depart from the presumptive rule in section 3 and calculate child support in accordance with the three factors enumerated in section 9. In this Part, the two components of a "section 9 case" will be presented, in turn, by way of a brief overview of case law followed by a critical analysis framed by the policy objectives discussed in Part II.

A. Determining Whether The 40 Percent Threshold Has Been Met

(i) Case law

The imposition of a numerical threshold into section 9 was a contentious issue throughout the drafting process. Earlier versions of the *Guidelines* referred to the sharing of physical custody "in a substantially equal way"[49] or alternately, the equal sharing of "overnight physical custody"[50] to authorize a departure from the table amounts. The contention continues today in full force. In a recent comment on parents' ability to satisfy the threshold requirement, senior family lawyer Phil Epstein notes that "[s]ection 9 (shared custody cases) continue to bedevil the courts since we have not agreed in Canada as to how to count the 40 per cent threshold."[51] The overarching and predominant debate is whether 40 percent should be considered in a holistic fashion, or if the courts should engage in a detailed exercise of time accounting.[52] Quite simply, the case law offers little to no consensus.[53]

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[46] Parkinson, *supra* note 42, uses the term "indissolubility of parenthood" to refer to the enduring nature of the family despite the separation of parents.

[47] Heather Juby, Nicole Marcil-Gratton & Céline Le Bourdais, *When Parents Separate: Further Findings From the National Longitudinal Survey of Children and Youth*, FCY-6E (2004) at 23, online: Department of Justice Canada <http://www.justice.gc.ca>.

[48] *Guidelines, supra* note 4, s 9 (reproduced in full in Part I).

[49] Draft of 27 June 1996, as cited by Rogerson, *supra* note 23 at para 24.

[50] Draft of 13 December 1997, as cited by Rogerson, *ibid.*

[51] Phillip Epstein, *Epstein's This Week in Family Law* 33 (21 August 2012) (WL Can).

[52] Additional issues that commonly arise in child support cases under section 9 of the *Guidelines* include how to account for time when the child is at school, sleeping, or in the care of a nanny. Generally, the current case law supports allocating those hours in favour of the parent who is responsible for the child during that time (see *Torrone v Torrone*, 2010 ONSC 661; *Sirdevan v Sirdevan*, 2010 ONSC 2375, 75 RFL (6th) 190; *Froom v Froom* (2005), 11 RFL (6th) 254 (available on CanLII) [*Froom*]). However, there are other cases that have taken the approach that school time is neutral (see *Barnes v Carmount*, 2010 ONSC 3925, 7 RFL (7th) 399), or that the primary parent is deemed to have custody and care of the

In *Mehling v Mehling,* the Manitoba Court of Appeal reviewed reported decisions from across Canada and favoured a flexible and holistic approach to calculating 40 percent.[54] Speaking for a unanimous court, Justice Hamilton wrote:

> The approach must remain flexible to enable the judge to take into account the varied circumstances of different families. By doing so, the assessment will be more realistic, and more holistic, than a strict mathematical calculation of the time with each parent. In my view, this is keeping with the equitable goals of s. 9.[55]

Similarly, appellate courts in British Columbia and Ontario have noted that there is no universally accepted method for determining 40 percent but that it is necessary to avoid rigid calculations and consider whether parenting is truly shared.[56] In *Froom v Froom*, the Ontario Court of Appeal held that it is not a reversible error to calculate 40 percent on the basis of days rather than hours.[57]

However, these cases are seemingly completely irreconcilable with *Gauthier v Hart*, a 2011 decision of the Ontario Superior Court of Justice.[58] In that case, while making note of the Court of Appeal decision in *Froom v Froom*, Justice MacKinnon suggested that the authority in Ontario is to calculate 40 percent on the basis of hours over the course of the year.[59] Justice MacKinnon then proceeded to exercise enormous care in tediously calculating the time that the father exercised access to his two children. In the end, despite errors, omissions and inconsistencies in the calendars of both parties, the father was held to be one and one-half days short of the threshold, exercising access for 39.6 percent of the time over the course of a year.[60]

(ii) Policy Objectives & The 40 Percent Threshold

The requirement that a payor parent prove a parenting time "quota" of 40 percent before he or she is eligible for relief from the presumptive table amount is objectionable from a policy standpoint.

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child for all hours that the child is not in the direct physical care of the access parent (see James G McLeod & Alfred A Mamo, "Annual Review of Family Law" (2011) at § 2, citing *Dorosh v Dorosh*, 2004 SKQB 379, 253 Sask R 97; *Brougham v Brougham*, 2009 BCSC 897, CarswellBC 1750 (WL Can)).

[53] *Children Come First, Vol 2, supra* note 15 at 66.

[54] *Mehling v Mehling*, 2008 MBCA 66, 62 RFL (6th) 25 [*Mehling*]. For a recent decision relying on the authority of *Mehling* (*ibid*), see *S (GE) v C (F),* 2012 NBQB 165, CarswellNB 292 (WL Can).

[55] *Mehling*, *ibid* at para 43.

[56] See e.g. *Maultsaid v Blaid*, 2009 BCCA 102, 78 RFL (6th) 45; *Froom*, *supra* note 52.

[57] *Froom*, *ibid*.

[58] 2011 ONSC 815, 100 RFL (6th) 178 [*Gauthier*].

[59] *Ibid* (Justice MacKinnon cited *D'Urzo v D'Urzo* (2002), 30 RFL (5th) 277 as the primary source of this authority at para 24).

[60] *Gauthier, supra* note 58 at paras 24, 29. See also *Petterson v Petterson*, 2010 SKQB 418, 92 RFL (6th) 241 at para 32, where the court accepts *Mehling*, *supra* note 54, as good and binding law requiring a functional and holistic approach to the 40 percent analysis, and then does a precise mathematical calculation to conclude that the father had the child 39.3 percent of the time, and thus fell under the 40 percent threshold.

First, the 40 percent threshold component of section 9 fails to reflect how parents actually share time in the course of shared parenting arrangements. A child's life is not divisible into convenient blocks of time, like a timeshare in a vacation home, which may be allocated 60 percent to one parent and 40 percent to another. Children are active and dynamic individuals with schedules and needs that are constantly in a state of flux. Extra-curricular activities, school trips, and parents' work schedules are merely a few examples of the many circumstances likely to force a parenting arrangement to change over the course of a year. Even if parents were to calculate the days or hours in a year and attempt to allocate parenting time with the express purpose of effecting a time division of, for example, 42 and 58 percent, it is certain that adjustments will be required. Consider an adjustment from a pick-up time of 2:45 p.m. to 4:30 p.m. because the child joins the school volleyball team. Should that adjustment, which neither changes the intention nor the financial implications of the shared parenting agreement, determine whether section 9 is operable? It is submitted that it should not.

Second, the threshold of 40 percent is arbitrary and gives rise to a "cliff effect" whereby two payors who are functionally similar are subject to different treatment by the law.[61] As illustration, consider the following circumstances: support payors A and B earn the same annual income and incur substantially similar child-related expenses but, *over the course of a year*, support payer B exercises access to child Y for 18 hours more than support payor A exercises access to child X.[62] Following the approach taken in *Gauthier v Hart*, support payor B would be able to avail himself or herself of the judicial discretion permitted under section 9.[63] Conversely, support payor A would remain subject to the strict table formula which calculates the amount of support based on the underlying presumption that all of child X's financial needs are being directly incurred by the recipient, primary-resident parent.

The "cliff effect" and arbitrariness of using 40 percent of a child's *time* as a trigger for permitting a departure from the presumptive table amounts, as opposed to referring to the actual *expenditures* spent on the child, raises serious concerns of fairness, equity, and the potential for abuse of the system.[64] Shortly after the *Guidelines* were introduced, Justice Eberhard of the Ontario Court (General Division) commented on the unhelpful process of adding up time spent with a child:

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[61] See generally *Children Come First, Vol 2*, *supra* note 15 (discussion of the "cliff effect" at 66-67).

[62] There are 8,760 hours in a year (365 days x 24 hours). Assume that parent A exercises access to, or has physical custody of, child X for 39.9% of the time, which on an hourly accounting, consists of 3,495.24 hours (8,760 hours x 0.399). Assume that parent B exercises access to, or has physical custody of, child Y for 40.1% of the time, which on an hourly accounting, consists of 3,512.76 hours (8,760 hours x 0.401). The difference in the amount of time spent with each child is a mere 17 hours and 31 minutes (3,512.76 hours – 3,495.24 hours).

[63] While the amount of child support ordered under section 9 may not *necessarily* be less than the presumptive table amount, what is material to highlight for these purposes is that support payor B has the *opportunity* to submit arguments under section 9 and support payor A does not.

[64] See e.g. *Lavoie v Wills*, 2000 ABQB 1014, 13 RFL (5th) 93 (in relation to the father's claim under section 9, the court observed that the father "has fraudulently used (and tried herein to again use) a judicial system, intended to protect innocent parties such as primary care givers and children, to abuse his rights he otherwise legitimately would have, while ignoring his obligations and attempting to thwart justice" at para 26).

> The 40% delineation offers no clue as to how expenses of housing, feeding, clothing and other such expenses usually subsumed in the regular expenses of children that are addressed by the table amounts in the Guidelines, are paid. Many access parents who have the children somewhat less than 40% of their hours still bear the expense of providing child suitable accommodation and must nevertheless pay the table amount. *Time tells me little about who arranges for the children's material needs*.[65]

The third policy objective, that of certainty and efficiency, poses an interesting challenge. Generally, statutory bright-line tests are introduced for the purpose of increasing certainty and efficiency in dispute resolution. In many areas of law, legislatures constrain judicial discretion in favour of providing the public and lawyers with clear and advance notice of legal liability by way of a bright-line test. As a result, individuals are presumed to be able to plan their affairs accordingly, so as to avoid liability, or be inclined to settle with knowledge of the likely outcome of litigation. If the 40 percent threshold in section 9 was in fact effective in realizing these benefits, it would likely be defensible on those grounds. However, as the case law makes abundantly clear, disagreements regarding what "40 percent" means and how to calculate it remain widespread among the judiciary, lawyers, and parties.

Fourth, an increase in quantity of time with a child does not necessarily translate into meaningful parenting time or increased child-related expenditures. However, as long as quantity of time with a child remains the threshold to trigger section 9, regardless of the quality of that time, it is hours and days that will be the subject of negotiation and litigation. The time threshold provides an incentive for parents to argue over the minute details of strict access schedules, giving rise to a phenomenon referred as "stopwatch litigation." [66] To value a child's time in terms of money saved or money received, or trading "dollars for days," is completely inconsistent with the pursuit of a child's best interests. Such a valuation does nothing to promote the healthy development and self-worth of children and adolescents. Additionally, the potentially drastic impact of the "cliff effect," in terms of dollars saved or dollars received, promotes a fertile field for litigation over access schedules. As argued by Noel Semple, the process of litigating over a child's "best interests" may be in and of itself a contradiction in terms, as the judicial procedure used to resolve custody and access disputes is focused on protecting the rights and interests of the adult parties, not those of the child.[67]

Fifth, the financial incentives and disincentives created by equating time with money fail to promote cooperative and flexible post-separation parenting arrangements that allow for children to spend liberal amounts of time with both

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[65] *Rosati v Dellapenta* (1997), 35 RFL (4th) 102 at para 5, [1997] OJ No 5047 (Gen Div) [emphasis added].

[66] See *Children Come First, Vol 2, supra* note 15 at 67. Also, for example, consider the case of *McGrath v McGrath*, 2006 NLUFC 32, 27 RFL (6th) 420 in which the father, in an attempt to show that he had the children in his care for more than 39.732 percent of time tendered into evidence time-stamped photos showing one of the sons at his home on Monday, January 16, 2006 at 07:41 p.m., Thursday, January 19, 2006 at 08.53 p.m., etc. (at para 14).

[67] See Noel Semple, "Whose Best Interests? Custody and Access Law and Procedure" (2010) 48 Osgoode Hall LJ 287.

parents. The requirement that one parent continue to pay child support to the other, while they are both caring for the child for a substantially equal amount of time, has been described as "a public policy declaration against time sharing by parents."[68] In *Berry v Hart,* the payor father applied for a reduction in the amount of his child support obligation pursuant to section 9.[69] The recipient mother contended that the children were with the father 39.37 percent of the time; the payor father alleged that he cared for the children 41 percent of the time.[70] In the course of rendering the decision, Justice Saunders for the British Columbia Court of Appeal observed the following:

> Although Parliament did not directly address the situation of child time-sharing in statutory language, s. 9 of the Guidelines now formally links time to money. In a world where the budget of one or both parents is likely to be pinched, this linkage can create real pressure to increase or decrease parent-child time where it is near the 40/60 divide…[71]

Justice Saunders continued by citing Master Joyce (as he then was) in *Hall v Hall,* reflecting the ongoing concern that section 9 of the *Guidelines* may be inconsistent with the intent of maximum contact in section 16 of the *Divorce Act*:[72]

> I have a very real concern that this new regime may encourage the custodial parent to discourage the maximum contact between the children and the other parent for fear of the economic consequences which may result. The custodial parent, or the parent with primary responsibility for the care of children, may be reluctant to agree to an order for "liberal and general access" unless the order makes it clear that the generosity does not exceed 40%. I question whether this is in the best interests of the children.[73]

In summary, the 40 percent threshold creates perverse incentives for parents to increase or limit time with a child for financial gain, fails to accurately reflect the reality of children's lives in shared parenting arrangements, discourages attempts at shared parenting, creates an arbitrary and unfair "cliff effect," and, while arguably having the potential to increase efficiency and certainty by way of a statutory bright-line test, stimulates lengthy and costly litigation over (literally) hours and minutes. It is submitted that any numerical threshold, whether it be 20, 35, or 50 percent, would give rise to substantially similar concerns.

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[68] Marygold S Melli & Patricia R Brown, "The Economics of Shared Custody: Developing an Equitable Formula for Dual Residence" (1994-1995) 31 Hous L Rev 543 at 545.
[69] *Berry v Hart*, 2003 BCCA 659, 48 RFL (5th) 1 [*Berry*].
[70] *Ibid* at para 2.
[71] *Ibid* at paras 5-6.
[72] *Divorce Act*, *supra* note 11, s 16(10).
[73] *Berry, supra* note 69 at para 7, citing *Hall v Hall* (1997), 30 RFL (4th) 333 at para 11, 35 BCLR (3d) 311 (BC Master).

B. Calculating the Amount of Child Support

(i) Case law

If the access or secondary-resident parent satisfies the threshold requirement, section 9 provides that the amount of child support shall be determined by taking into account: (a) the applicable table amounts for each spouse; (b) the increased costs of the shared custody arrangement; and (c) the conditions, means, needs, and other circumstances of the parties and children.[74] Not dissimilar to the threshold determination of 40 percent, the actual calculation of support under section 9 has varied considerably and has been plagued with uncertainty since the *Guidelines* came into force.

Prior to 2005, the jurisprudence revealed a variety of approaches used to calculate support pursuant to section 9. For example, early cases favoured a strong presumption of a straight "set-off" of the table amounts of each parent.[75] The "pro-rating set-off" approach also received some favourable attention in Ontario in the late 1990s and early 2000s.[76] Under this approach, the table amount payable by parent A is multiplied by the percentage of the child's time that is spent with parent B, and vice versa; the two resulting values are then set-off against one another with the payor obliged to pay the difference. Finally, there was the so-called "multiplier" approach, which increased the set-off amount (basic or prorated) by a certain percentage, typically 50 percent (or a "multiplier" of 1.5), to account for the increased and duplicative costs inherent in a shared parenting situation.[77]

The need for clarification and direction was clearly evident by the time the Supreme Court of Canada released its long-awaited decision in *Contino v Leonelli-Contino* in November of 2005 ("*Contino*").[78] In *Contino,* the Supreme Court of Canada pronounced several principles regarding the calculation of child support under section 9, which may be summarized as follows:[79]

(1) In cases where section 9 is properly invoked, there is no presumption that the table amount applies.[80] Further, there is no presumption that the amount of child support should be more or less than the table amount.[81]

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[74] *Guidelines*, *supra* note 4, s 9 (reproduced in full in Part I).

[75] See e.g. *Middleton v MacPherson* (1997), 204 AR 37, 150 DLR (4th) 519 (QB); *Hubic v Hubic* (1997) 157 Sask R 150, CarswellSask 399 (WL Can) (QB). Note that this is the same approach mandated by section 8 of the *Guidelines* for cases of split custody (*supra* note 4, s 8).

[76] See e.g. *Moran v Cook* (2000), 9 RFL (5th) 352, CarswellOnt 2391 (WL Can) (Ont Sup Ct); *Harrison v Harrison* (2001), 14 RFL (5th) 321, CarswellOnt 420 (WL Can) (Ont Sup Ct) (in these cases, the pro-rated set-off approach was applied only with respect to the amount that exercised access exceeded 40 percent of the time). See also *Hunter v Hunter* (1998), 37 RFL (4th) 260, CarswellOnt 1509 (WL Can) (Ont Ct J (Gen Div)) [*Hunter*] (the pro-rated set-off was then subject to a multiplier). Note that the "pro-rating" or "apportioning" approach has been adopted in some American jurisdictions, including Idaho, Utah, and West Virginia.

[77] See e.g. *Hunter*, *ibid*; *Slade v Slade*, 2001 NFCA 2, 13 RFL (5th) 187 [*Slade*]. In addition, the Ontario Court of Appeal had embraced in the use of a multiplier in *Contino v Leonelli-Contino* (2003), 67 OR (3d) 703, 42 RFL (5th) 295 (CA), rev'd [2005] 3 SCR 217, 19 RFL (6th) 272. The multiplier approach is also used in the American jurisdictions of Alaska, Colorado, and the District of Columbia.

[78] *Contino v Leonelli-Contino*, [2005] 3 SCR 217, 19 RFL (6th) 272 [*Contino*].

[79] For a detailed summary and overview of the Supreme Court of Canada decision, see Rollie Thompson, Annotation on *Contino v Leonelli-Contino*, [2005] 3 SCR 217, 19 RFL (6th) 272 (WL Can).

[80] *Contino*, *supra* note 78 at paras 22-29.

(2) The three factors enumerated in paragraphs 9(a), (b) and (c) are conjunctive and must be afforded equal weight in the analysis.[82]
(3) The starting point for calculating support is a straight set-off of each parent's table amounts under paragraph 9(a). However, that is not the end of the inquiry and the set-off amount has no presumptive value.[83] The court explicitly rejects the use of any "formulaic" or "mathematic" approach to the calculation of child support under section 9, inclusive of pro-rating and the use of a multiplier.[84]
(4) Paragraph 9(b) demands that each party adduce evidence of their actual respective child-related expenses incurred in the shared parenting arrangement.[85] The actual total amount of child-related expenses are to be apportioned between the parents in accordance with their respective incomes.[86]
(5) The court is to retain broad discretion under paragraph 9(c) to engage in a contextual and fact-specific analysis of each case.[87] Once again, the parties are required to present sufficient evidence, including statements of net worth, detailed statements of income and assets, and a detailed household budget, to assist the court in exercising its discretion.[88] At this stage, the court is to be particularly concerned with "the standard of living of the child in each household and the ability of each parent to absorb the costs required to maintain the appropriate standard of living in the circumstances."[89]

In terms of its impact on subsequent judicial determinations of child support in situations of shared parenting, the *Contino* decision may be characterized as largely *under*whelming. The reported cases highlight the difficulties of demanding such an extensive production of documentary evidence. In many instances, cases are adjourned or sent back to trial citing a lack of sufficient evidence.[90] In other cases, courts merely continue to award the basic set-off amount, either because the parties agree to such an approach, or there is simply no other pertinent evidence available.[91] In a relatively recent decision out of British Columbia, Justice Baird ordered a "two-stage" adjustment to the father's child support obligation pursuant to section 9 of the *Guidelines*.[92] For one year, the father's support obligation was

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[81] *Ibid* at paras 30-31.
[82] *Ibid* at para 27.
[83] *Ibid* at para 49.
[84] *Ibid* at paras 38-39, 52-67.
[85] *Ibid* at paras 52-53, 55-56.
[86] *Ibid* at para 56.
[87] *Ibid* at paras 61, 68-72.
[88] *Ibid* at para 52-53, 55-56.
[89] *Ibid* at para 68.
[90] See e.g. *Adams v Nobili*, 2011 ONSC 6614, CarswellOnt 12960 (WL Can); and *Conway v Conway*, 2011 ABCA 137, 96 RFL (6th) 1.
[91] Jane Murray & Justice J Mackinnon, "'Eight Days a Week' Post-*Contino*: Shared Parenting Cases in Ontario" (2012) 31 Can Fam LQ 113 at 135. See e.g. *O'Halloran v O'Halloran*, 2010 ONSC 571, 81 RFL (6th) 88.
[92] *P (M) v B (N)*, 2010 BCPC 272, 96 RFL (6th) 222.

reduced from the full table amount ($608.00) to an amount that was twice that of the current set-off amount (approximately $400.00). Thereafter, the order stipulated that the father pay the set-off amount on an ongoing basis.[93] In the course of the entire decision, there is not one single reference to *Contino*.[94]

In 2012, Jane Murray and Justice Mackinnon published a comprehensive study of the 47 decisions of the Ontario Superior Court released between 2006 and 2010 that included a determination of child support pursuant to section 9.[95] The authors conclude that "the *Contino* analysis has had little impact on the quantum of shared parenting child support awards."[96] Rather, the authors argue, the determining factor in the majority of such awards continues to be the approximate equalization of the net disposable income ("NDI") of both parents:

> In shared parenting cases, we identified a range which, in more than one-half of the cases, the recipient of support retained between 44 per cent and 50 per cent of the parents' combined NDI. If the range were broadened to 43 per cent to 51 per cent, then 25 out of 37 shared parenting cases would be found in that range. The mean NDI retained by the recipient was 47 per cent, very close to the 48.26 per cent observed in the *Magical Mystery Tour* [similar analysis of cases decided in 2002 and 2003] […] Although *Contino* was decided by the Supreme Court of Canada in 2005, that decision does not appear to have materially impacted the distribution of NDI in shared custody cases.[97]

It is noteworthy that there are relatively few cases litigated under section 9 of the *Guidelines*.[98] Presumably, parents who are able to cooperate and communicate to share parenting time have a greater propensity to reach an agreement with respect to support. However, in no way does that presumption—which itself is not guaranteed in any given case—relieve the need for a child support system that is comprehensive, fair, and efficient. Individuals who negotiate, either formally or informally, do so in the shadow of the law with a view to their respective entitlements and obligations should they proceed to court. If those entitlements and obligations are unclear or unfair, then negotiations and settlements are likely to breakdown.[99]

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[93] *Ibid* at para 29.
[94] *Ibid* generally.
[95] Murray & Mackinnon, *supra* note 91 (of the 47 cases reviewed, 37 were cases where the child resides with each parent for at least 40 percent of the time, i.e. shared parenting arrangement, and 10 were "hybrid" cases where at least one child is in a shared parenting arrangement and at least one child resides with one parent for more than 60 percent of the time, at 114).
[96] *Ibid* at 135.
[97] *Ibid* at 134. With respect to the cases in which the child support award led to a distribution of NDI that was outside the "range of equalization," Murray & Mackinnon highlight the presence of the following reoccurring factors: spousal support was also awarded, the order was temporary with specific temporary factors to consider, there was a previous agreement, or one of the parties earned an extremely high income (*ibid* at 135).
[98] *Children Come First, Vol 1, supra* note 7 (data from the February 2001 Survey of Child Support Awards revealed that of all types of custody arrangements, shared custody cases were the least likely to be contested, at 14).
[99] See Child Support Team, *The Child Support Guidelines Through the Eyes of Mediators and Lawyers*, BP23E (2000), online: Department of Justice Canada <http://www.justice.gc.ca> (survey results indicate

(ii) Policy Objectives & The Calculation of Child Support Pursuant to Section 9 and Contino

The efficacy of *Contino* in meeting the target policy objectives in Part II is dependent on whether one focuses on its theoretical underpinnings or considers its application in practice. It is submitted that in theory, the *Contino* approach reflects the financial realities of parties and treats similarly situated parents equally, thus creating a legal framework that pursues the "best interests of the child" and encourages creative and cooperative parenting arrangements. However, it is concurrently submitted that in application, the *Contino* approach is extremely inefficient and expensive. The length of proceedings, costs of adducing evidence, risks of adjournment, and uncertainty in the exercise of judicial discretion all give rise to acrimonious litigation. These same factors also deter cooperative and shared parenting if the amount of child support remains a contested issue.

One financial reality of shared parenting is that it demands a substantial duplication of fixed costs, such as housing, utilities, and furniture. These are expenditures that are neither reduced nor obviated when a child spends a substantial amount of time in the care of another parent. Conversely, certain other child-related expenditures, such as food, entertainment, and childcare, do vary with the amount of the time the child spends in the care of one parent or the other.[100] The *Contino* requirement that parties adduce evidence of their actual child-related expenditures guarantees, in theory, that the support order will reflect the unique cost-structure of the parties and give effect to the most efficient distribution of parental resources, thus eliminating any "deadweight loss" to the ultimate benefit of the child.

In addition, the approach articulated by the Supreme Court of Canada theoretically achieves both aspects of the fairness objective.[101] Firstly, payor and recipient parents would be, in proportion to their respective incomes, equally responsible for the total costs of raising their child. Secondly, two payors who earn the same income, and who may even spend the same amount of *time* with their child, but incur differing amounts of *direct expenditures* on the child, would not be subject to the same obligation for support.[102] Parents who perceive the child support process and outcome to be "fair" are likely to be less litigious and less adversarial, also to the ultimate benefit of the child.

However, the theoretical underpinnings of a child support regime are immaterial if they do not translate into practice. In practice, the approach proposed by the Supreme Court of Canada in *Contino* is extremely time consuming and expensive. The costs of preparing detailed budgets and statements of net worth, as well as attacking those prepared by the other side, is beyond the means of self-represented,

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that mediators and lawyers consider the *Guidelines* to be lacking in direction for negotiating support in cases of shared parenting, at 12).

[100] Melli & Brown, *supra* note 68 at 554-59.

[101] See Part II above "*2) Child support awards should be fair and consistent.*"

[102] This is assuming of course that both payor parents have met the 40 percent threshold.

and most likely even represented, litigants.[103] In *Martin v Martin*, Justice Little makes the following statement in respect of *Contino* and section 9 of the *Guidelines*:

> For either the represented litigant or the self-represented litigant, "fairness" may become an elusive commodity […] When does disproportionately complex litigation (having regard for the evidence required and the amount actually at stake) and the disproportionate frequency with which it can be advanced through variation proceedings year after year, need to give way to relative certainty? Predictability, particularly with respect to child support issues is exceedingly important. Family law after all is a place where sometimes people will spend $200 to gain $100 either because the "principle of the thing," or one's sense of having once been wronged, demand it—demands, in turn, often supercharged by other emotional, even irrational catalysts.[104]

The Newfoundland Court of Appeal espoused a similar viewpoint in *Slade v Slade*:

> The appellant argues that the trial judge's failure to consider all of the elements listed in s. 9 of the Guidelines is an error warranting an overturning of the decision […] Yet, as a practical matter, if full information was demanded in every case the system would probably come to a halt and in many of those cases the additional information would not make a material difference to the final order.[105]

Therefore, separating parents who are notionally capable of cooperating and communicating so as to share parenting time are discouraged from doing so by the uncertainty inherent in the language of section 9 and the cumbersome approach outlined in *Contino*. The payor parent is faced with the uncertainty and perceived unfairness that his or her obligation may remain unchanged from the table amount, despite incurring (often substantial) increased costs due to a "bi-nuclear" shared parenting arrangement. Likewise, the recipient parent is fearful that a court may order a significant departure from the table amount, despite him or her being relieved of few actual costs. Moreover, both parties are forced to engage with an expensive, document-heavy and litigious process within a family law system that is already struggling with an overload of cases and procedural delays.

Finally, there are indicia in the case law that the cumbersome, complex, and evidentiary-laden nature of a proper *Contino* analysis may increase the reluctance

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[103] See commentary in *Martin v Martin*, 2007 MBQB 296, 46 RFL (6th) 286 [*Martin*] ("[s]elf-represented litigants have little hope of being able to construct such an evidentiary record on their own. If they try there will inevitably be multiple appearances before the court […] If the other side is represented by counsel they too may have additional unwarranted costs as a consequence of multiple appearances" at para 83). In addition, senior practitioner Phillip Epstein recently commented, in *Epstein's This Week in Family Law* 38 (15 September 2012) (WL Can): "*Contino* is a nightmare in the sense that it is beyond the means of self-represented parties to adduce the appropriate evidence to assist the judge, and most lawyers cannot afford to spend the time necessary to do a proper *Contino* analysis."

[104] *Martin*, *supra* note 103 at paras 84-85.

[105] *Slade*, *supra* note 77 at para 21.

of a court to find that a parent has satisfied the 40 percent threshold.[106] To the extent that this is true, the undesirable results and objectionable incentives created by the 40 percent threshold, as described above, are only further exacerbated.

Part IV: The Need for, and Challenges of, Reform

The current formulation of section 9 is not working; it is neither encouraging nor supportive for parents in transition, it is unworkable for lawyers, it is criticized and often ignored by the courts, and it ultimately discourages cooperative post-separation parenting arrangements that are optimal for children. At the time the *Guidelines* were passed, the "fathers' rights movement" was at the forefront of a wave of debates concerning child custody law reform. In the view of this vocal minority, the *Guidelines*, in combination with the custody and access regime of the time, were resulting in fathers bearing increasing financial responsibility for raising their children, but failing to enjoy a corresponding increase in parenting time.[107] While pure speculation, it may have been that the sheer scope of the reform initiatives at the time, combined with the strong advocacy of one set of stakeholders, contributed to a wording of section 9 that failed to reflect the interests of all parties and the changing nature of post-separation parenting. Somewhat less disparagingly, it is also "appreciated that government policies on the family do not necessarily work as intended and that they often have unforeseen consequences…"[108] Regardless, it is now fifteen years later and policy makers today have more than a decade of case law, as well as a more nuanced understanding of post-separation parenting theories, with which to develop and enact reform. The purpose of this final Part is to highlight the main challenges that confront a reform to section 9.

First, it is important to note the typical characteristics of the litigants in the reported cases of shared parenting child support; it is these "types" of parties that constitute the sample from which the call for reform is derived. For the most part, these litigants are relatively wealthy and have separated following a relationship during which time a child formed a recognized and valued attachment to both parents. In order to maintain two households suitable for a child to reside in, or spend extended time at, separated parents generally have some minimum level of combined income or assets.[109] Furthermore, those who proceed to court and, even more so, those who proceed to trial are persons with the financial means to access the not inexpensive court system. As cautioned by Professor Mary Jane Mossman,

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[106] See e.g. *Tonita v Fenske*, 2009 SKQB 443, 78 RFL (6th) 84 (in the course of a finding that the father had failed to satisfy the 40 percent threshold, on an interim application with conflicting evidence, Justice Gunn stated: "[e]ven if I had been satisfied that [the children] were with [the father petitioner] at least 40% of the time, more information is required [to address in a comprehensive way the factors set out in *Contino v Leonelli-Contino*]" at para 30).

[107] Jonathan Cohen & Nikki Gershbain, "For the Sake of the Fathers? Child Custody Reform and the Perils of Maximum Contact" (2001) 19 Can Fam LQ 121 at 123.

[108] Carol Smart, "Wishing Thinking and Harmful Tinkering? Sociological Reflections on Family Policy" (1997) 26:3 J Soc Pol'y 301 at 303.

[109] Median incomes for both payor and recipient parents in shared custody cases are higher than those in sole-mother custody cases and split custody cases. See *Children Come First*, *Vol 1, supra* note 7 at 19, relying on the Survey of Child Support Awards database (February 2001).

"the limited access of less wealthy persons to courts may mean that principles are established in the context of well-to-do family units, but that their utility for poorer families may be less apparent."[110] Therefore, reform to the child support regime in cases of shared parenting must ensure that it considers the interests of all to-be impacted families, and not only those whose circumstances have been (incompletely) portrayed in reported court decisions. In many respects, the current problems with the 40 percent threshold and the *Contino* analysis, as outlined in Part III, may not be unique to families of certain means or particular relationship histories. However, ongoing quantitative and qualitative research of Canadian families is imperative to maintain a complete picture of the wide variety of families for whom the *Guidelines* are to provide assistance.

The second challenge is for reform proposals to maintain a broad and non-restrictive perspective of the issues and recognize that a solution may not reside exclusively in the legal forum. The five policy objectives outlined in Part II are largely legal and equitable in nature, yet they do draw upon theories of economics and childhood development. It was additionally noted that these objectives are not exclusive. In this complex and multifarious area, legal policy makers must work alongside professionals who specialize in human behaviour, such as critical theorists, sociologists, psychologists, parenting experts and economists, to develop a reform that best meets the changing and diverse needs of Canadian families.

The third challenge presented is likely the most difficult to achieve from a politically defensible standpoint. The challenge is to focus on the practical effects of alternative reforms, rather than their desirability from a theoretical or philosophical perspective. As argued above in Part III, any fairness benefits of the *Contino* approach in theory have been negated by its practically unworkable nature.[111] There are notable political hurdles in addressing this challenge, including the fact that legislative debates occur largely in the abstract and governments are loath to accept reform that, on its face, may not appeal to the short-term outlook of the voting public.

To reframe in the rhetoric of feminist theory, the challenge in a shared parenting child support regime is to achieve substantive, rather than mere formal, equality. Formal equality assumes that equality is achieved if the law treats all persons—for example, men and women—the same. In feminist and family law reform literature, the need for substantive equality is premised on the notion that formal equality, in the nature of "[a]n ostensibly gender-neutral policy, while not excluding women per se, may result in a de facto discrimination against women."[112] Substantive equality recognizes that "for equality of results to occur, women and men may need to be treated differently."[113] It has been suggested that fundamental changes in family law in the latter part of the twentieth century achieved formal equality at the expense of substantive equality, particularly with respect to property

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[110] Mary Jane Mossman, "'Running Hard to Stand Still': The Paradox of Family Law Reform" (1994) 17 Dal LJ 5 at 11-12 [Mossman, "Running Hard"].
[111] See Part III above.
[112] Committee on the Elimination of Discrimination against Women, *The Principle of Equality*, online: The United Nations <http://www.ohchr.org>.
[113] *Ibid.*

entitlements and the emphasis on "self-sufficiency" in spousal support.[114] As a component of the changes in that era, the *Guidelines* are similarly premised on aspirations of formal equality. Reforms to the *Guidelines*, including to section 9, must shift the focus to rendering substantive equality, both in process and results, to all those who encounter the child support system. In this context, substantive equality demands a consideration of equality as between mothers and fathers, as well as between all parents who are "similarly-situated" payors or "similarly-situated" recipients, regardless of whether they are male or female.[115]

Conclusion

Section 9 of the *Guidelines* is in need of reform. The dual determinations of the 40 percent threshold and the amount of child support as per a *Contino* analysis give rise to a process and a series of results which fail to achieve the basic policy objectives of a child support regime. While the problem is clear, the articulation of the solution is not. Moreover, reform in this area is faced with the functional limitations of time and resources that plague the overloaded family court system in Canada.

Briefly, one option is legislating in favour of what many parties and lawyers are doing in practice, *despite* the present state of the law. That may be some variation of the following: where children spend a substantially equal amount of their time with, and have a similar amount of their expenses paid by both parents, the shared parenting regime is applicable. Within this regime, the presumptive amount of child support ought to be the table set-off amount, or the set-off amount "plus a little bit more." Alternatively, the presumptive amount of child support ought to equalize the parents' net disposable incomes with the view of eliminating or diminishing changes in the children's standards of living as they reside between two households. Under any of these proposed methods of calculating support, the presumptive amount ought to remain subject to judicial discretion in the presence of exigent circumstances. Retaining the power of judicial discretion ensures that, in appropriate cases, clearly unfair amounts of support will not be ordered.

If it was not sufficiently clear at the inception of section 9 that judicial discretion is inevitable where litigants present an endless variety of parenting and cost-sharing arrangements, the jurisprudence both before and after *Contino* certainly highlights that point. Attempts to conscript the exercise of such discretion in shared parenting cases, for example through bright-line thresholds, have failed to add certainty to the area and have ultimately failed the families who access the court system directly by litigating, or indirectly by negotiating and settling in the shadow of the law.

The options presented in brief above have a flexible threshold requirement with the goal of capturing the truly child-centred intent of a shared parenting arrangement. Such flexibility discourages the incentive to trade "dollars for days" as both

[114] See Mossman, "Running Hard," *supra* note 110.

[115] *Andrews v The Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1 (development of the "similarly-situated" test for considerations of discrimination and equality).

time and expenditures are variables to be considered.[116] At the same time, table set-offs and net disposable incomes are readily calculable figures which, in addition to reflecting the current and consistent trend in reported decisions,[117] limit the fear of indiscriminate discretion and a return to the chaos of *Paras*.[118] As a result, a methodology of this kind would be practically workable for the courts to render rulings and for parties and lawyers to negotiate and settle in its shadow.

As a final note, while the responsibility to pursue such reform rests with all those who strive to administer justice to families in need, inclusive of lawyers, policy makers and the judiciary, official legislative action is undoubtedly required. The statutory scheme must be amended to truly give effect to the policy objectives of fairness, efficiency, and paramountcy of the best interests of the child. The reform must bear in mind the lessons of the past and the present realities of Canadian families in transition.

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[116] *Children Come First, Vol 2, supra* note 15. In contrast to this option, the Parliamentary Report recommends that the 40 percent threshold remain unchanged (*ibid* at 72-73). The Report recognizes the advantages of employing a "substantially equal" standard, such as reducing the incentives to trade "dollars for days," but concludes that it would not demonstrably advance the Guidelines objectives (*ibid* at 73). In reaching this conclusion, the Report notes that "substantially equal" is not a defined term and is potentially too high and unfair a threshold for payor parents to meet (*ibid* at 73). In response to these concerns, this author emphasizes that the option proposed includes both a time and an expenditure variable. This allows for a payor parent to invoke the shared parenting regime when either the amount of time with the child or the level of expenditures spent on the child (or both in combination) renders the payor and the recipient similarly-situated for child support purposes.

[117] See Murray & Mackinnon, *supra* note 91 and Part III (B)(ii).

[118] See also *Children Come First, Vol 2, supra* note 15. The Parliamentary Report similarly recommends the use of a presumptive formula for calculating support in cases of shared parenting (*ibid* at 73). Specifically, the Report favours a set-off formula based on the table values for the total number of children for whom the parents share custody, without the use of a multiplier and subject to judicial discretion where that amount is deemed inappropriate (*ibid* at 73-74).