

PART 1: SPECIAL OR EXTRAORDINARY EXPENSES, UNDUE HARDSHIP AND DISCLOSURE OF INCOME INFORMATION

Question 1: How can the Guidelines better reflect the concept of “extraordinary expenses”?

Is this a significant concern? No
 Yes

Comments/Other concerns:

This is only a significant concern with respect to extra-curricular activities. The debate has really turned on the nature of the test for determining whether an extra-curricular activity is an “extraordinary expense” in relation to the table amounts. Is it a “subjective” test, which takes into account the joint incomes of the parties, or is it an “objective” test, which does not.

The Section believes that the determination most consistent with the overall approach of the *Guidelines* is the one found, for example, in the British Columbia Court of Appeal case *McLaughlin v. McLaughlin*, (October 30, 1998, File No. CA023706). There, the Court used the subjective test, taking into account the parents’ joint incomes to determine whether an extracurricular expense is “extraordinary”.

Question 2: Should subsection 10(2) list other circumstances to clarify that the amount of child support may be increased on the grounds that a child or the receiving parent would suffer undue hardship? What other circumstances could be added to the list?

Is this a significant concern? No
 Yes

Comments/Other concerns:

This issue was raised in the Section’s October 1996 submission on the Working Draft of the Guidelines.

The Section believes that this is a concern but not a significant concern. It is a concern because there is a common misconception among some judges and lawyers that “undue hardship” can only be used by a non-custodial parent to lower support. The Section’s position is that there may be circumstances where a custodial parent should be able to use the provision to increase support. One example might be the complete failure of the non-custodial parent to exercise access, with the result that the custodial parent bears all of the living costs of the child. Another might be the legal responsibility of the custodial parent to support others.

Comments/Other concerns:

A distinction should be made between disclosure requirements (dealt with in Question 8) and filing requirements (dealt with in Questions 7 and 9). The obligations with respect to materials to be filed in court can be quite onerous. This is especially true for many litigants who have limited financial resources. The parties should be able to consent to these lesser filing requirements in order to save money.

Question 8: Should the Guidelines allow a parent to produce for the other parent a Revenue Canada computer printout instead of an income tax return and notices of assessment and reassessment, if the other parent consents?

Is this a significant concern? No
 Yes

Comments/Other concerns:

The answer to this question is “no”. The Section is concerned that unrepresented litigants will not appreciate the differences between the detailed information given on a tax return and notice of assessment/reassessment and the information given in a Revenue Canada printout. Those litigants may consent to limited disclosure when it is not in their interests. Further, there is a concern about consent in the context of domestic violence. Spouses in such circumstances may more readily consent to limited disclosure when it is not in their interests.

Question 9: Should parents have the option of filing with the court a Revenue Canada computer printout instead of an income tax return and notices of assessment and reassessment, subject to the court’s discretion to ask for the disclosure of full income information?

Is this a significant concern? No
 Yes

Comments/Other concerns:

Again, a distinction should be made between disclosure requirements (dealt with in Question 8) and filing requirements (dealt with in Questions 7 and 9). The parties should be able to consent to these lesser filing requirements in order to save money.

PART 2: WORDING AND INTERPRETATION

1. Section 7: Special or extraordinary expenses

Issue 1: Spending Patterns

PROPOSED SOLUTION:

CHANGE 7. (1)... having regard to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

TO 7. (1)...having regard to the means of the spouses and those of the child and, **if applicable**, to the family's spending pattern prior to the separation:

Agree Disagree

Comments/Other Concerns:

Alternative wording:

Issue 2: Health-related expenses

PROPOSED SOLUTION:

CHANGE (c) health-related expenses that exceed insurance reimbursement by at least \$100.00 annually per illness of event, including...

TO (c) health-related expenses that exceed insurance reimbursement by at least \$100.00 annually, including...

Agree Disagree

Comments/Other Concerns:

Alternative wording:

2. Section 13: Information to be specified in an order

PROPOSED SOLUTION:

CHANGE (e) the particulars of any expense described in subsection 7(1), the child to whom the expense relates, and the amount of the expense or, where that amount cannot be determined, the proportion to be paid in relation to the expense; and

TO (e) **where an expense is determined under any of paragraphs 7(1)(a) to (f), the amount determined in respect of each applicable paragraph and the name of the child to whom the expense relates; and**

Agree Disagree

Comments/Other Concerns:

There are two competing interests in this proposal. On the one hand, enforcement of support orders requires that actual amounts be set out in the order instead of proportions of expenses. On the other hand, allowing proportions to be in the order allows for flexibility and eliminates the need for parents to keep returning to court when the child's activities change. On the whole, the Section believes that proper enforcement of orders should be the priority.

We do question the need for specifying the individual amounts under each paragraph in section 7(1). This may create problems where one type of section 7 expense decreases at the same time as another type increases. For example, child care expenses in the pre-school years often diminish at the same time as activities and/or private school expenses increase in the school-age years. Again, the concern is about legal expenses for parents who have to change orders when activities change.

Alternative wording:

3. Sections 16 and 17 and subsection 2(3): Pattern of Income

PROPOSED SOLUTION:

CHANGE 17. (1) Where the court is of the opinion that the determination of a spouse's annual income from a source of income under section 16 would not provide the fairest determination of the annual income from that source, the court may determine the annual income from that source.

- a) Where the amount in respect of the source of income has increased in each of the three most recent taxation years or has decreased in each of those three years, to be the amount from that source of income in the spouse's most recent taxation year;
- b) Where the amount in respect of the source of income has not increased or decreased as described in paragraph (a), to be the average of the amount received by the spouse from that source of income in the three most recent taxation years, or such other amount, if any, that the court considers appropriate; or
- c) Where the spouse has received a non-recurring amount in any of the three most recent taxation years, to be such a portion of the amount as the court considers appropriate, the any.

TO 17. Where the court is of the opinion that the amount of income from a source of income under section 16 will not provide the fairest determination of the amount of income from that source, the court may take into account the spouse's income from that source over the last three taxation years and determine an amount that is fair and reasonable in light of any pattern of income or the receipt of a non-recurring amount in respect of that source of income.

Agree Disagree

Comments/Other Concerns:

When a court makes a child support order, that order is principally intended to apply in the immediate future. One of our concerns is that the emphasis on the past three years' income tends to draw the courts away from the main focus, which is on trying to determine the projected income of the non-custodial parent. Sometimes the past three tax returns will be a reliable indicator of this anticipated income and sometimes they will not. Despite the discretionary wording of the proposed section, we can foresee some courts focusing on the past three years to the exclusion of other relevant information.

Subsection 2(3) of the Guidelines directs the court to use the most current information in making its assessments. However, subsection 2(3) sometimes gets lost in the shuffle when courts are making a determination under sections 16 and 17. We believe that both sections 16 and 17 should be amended to explicitly refer to subsection 2(3). This will remind judges that their principal task is to determine a fair and reasonable amount for future income.

Alternative wording:

17. Where the court is of the opinion that the amount of income from a source of income under section 16 will not provide the fairest determination of the amount of income from that source, the court may take into account the spouse's income from that source over the last three taxation years and determine an amount that is fair and reasonable in light of **subsection 2(3) and** any pattern of income or the receipt of a non-recurring amount in respect of that source of income.

4. Section 19: Imputing Income

PROPOSED SOLUTION:

CHANGE (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment of business income; and

TO (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment of business income **or that are exempt from tax;** and

Agree Disagree

Comments/Other Concerns:

Alternative wording:

5. Section 21: Income Information

Issue 1: Disclosure

PROPOSED SOLUTION:

ADD (h) where the spouse receives income from a source other than (c) to (g), the most recent statement of income indicating the total amount paid in the year to date, including the amount of the spouse's employment insurance, social assistance, pension, workers' compensation, disability payments, or such other benefits or income as may apply, or where such a statement is not provided, a letter from the applicable source of income stating the required information.

Agree Disagree

Comments/Other Concerns:

Alternative wording:

Issue 2: Sworn Statements

PROPOSED SOLUTION:

ADD (i) if not already provided in the rules of practice of the competent jurisdiction, a sworn statement of the personal net worth of the spouse showing the value of all of the spouse's assets and liabilities.

Agree Disagree

Comments/Other Concerns:

Alternative wording:

6. Schedule III, section 1: Employment expenses

Issue 1: Expenses of clergy residence

PROPOSED SOLUTION:

REMOVE paragraph (a) in Schedule III, section 1.

Agree Disagree

Comments/Other Concerns:

Alternative wording:

Issue 2: Motor vehicle travel expenses

PROPOSED SOLUTION:

ADD (f.1) paragraph 8(1)(h.1) concerning motor vehicle travel expenses incurred by a spouse who is ordinarily required to work away from the employer's place of business or required under contract to pay motor vehicle expenses incurred in the performance of the work and did not receive a motor vehicle allowance that was not included in income or claim a deduction under another paragraph;

Agree Disagree

Comments/Other Concerns:

Alternative wording:

7. Schedule III, section 4: Social Assistance

PROPOSED SOLUTION:

CHANGE 4. Adjust social assistance income to include the amount determined to be attributable to the spouse.

TO 4. **Deduct** any amount of social assistance income that is not attributable to the spouse.

Agree Disagree

Comments/Other Concerns:

Alternative wording:

8. Schedule III, section 10: Additional amount

PROPOSED SOLUTION:

CHANGE 10. Where the spouse reports income from self-employment that included the self-employment income for the 12 months ending on December 31 of the reporting year plus an additional amount earned in a prior period, deduct the amount earned in the prior period, net of reserves.

TO 10. Where the spouse reports income from self-employment, **that in accordance with section 34.1 of the Income Tax Act** includes an additional amount earned in a prior period, deduct the amount earned in the prior period, net of reserves.

Agree Disagree

Comments/Other Concerns:

Alternative wording:

9. Schedule III, section 13: Employee stock options with a Canadian-controlled private corporation -- Disposal of shares

PROPOSED SOLUTION:

CHANGE (2) If the spouse has disposed of the shares during the year referred to in subsection (1), deduct from the income for that year the difference determined pursuant to that subsection.

TO (2) If the spouse has disposed of the shares during a year, deduct from the income for that year the difference determined pursuant to subsection (1).

Agree Disagree

Comments/Other Concerns:

Alternative wording:

ANY OTHER COMMENTS?

The Section recognizes that issues such as the “40 per cent rule”, access costs and *in loco parentis* are not “technical issues” *per se*. However, we do wish to emphasize that there has been a significant amount of confusion in the courts on these issues and the sooner they are dealt with the better.