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Via email: claire.farid@justice.gc.ca

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284 Wellington Street
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Dear Ms. Farid:

Re: Child Support in Shared Care

I write on behalf of the Canadian Bar Association Family Law Section (CBA Section) to suggest changes to the Child Support Guidelines (Guidelines) for situations of shared care. A rebuttable presumption that the straight offset be applied in these cases would be more consistent with the goals of the Guidelines.

The CBA is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice. The CBA Section consists of lawyers from across Canada who specialize in family law, and act for all parties in family law disputes.

The objectives of the Guidelines are:

- a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
- b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
- c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
- d) to ensure consistent treatment of spouses and children who are in similar circumstances.¹

The Guidelines were a marked departure from the previous principles for determining child support, which were based solely in discretion.²

¹ [Federal Child Support Guidelines](#), SOR/97-175 at s. 1.

² See [Paras v Paras](#) 1970 CanLII 370 ONCA.

In *Contino v Leonelli-Contino*, Justice Bastarache examined the issue of child support for children whose parents shared their care, and wrote:

... s. 9 must here be interpreted with these objectives in mind. Parliament, in adopting s. 9, deliberately chose to emphasize the objectives of fairness, flexibility and recognition of the actual conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought, even if to the detriment of predictability, consistency and efficiency to some degree.³

There is tension between the stated objectives of the Guidelines. A review of cases decided since *Contino* show that these objectives cannot be easily satisfied in situations of shared care by the protocols set out in that case.

Review of the Case Law Since *Contino*

In “The TLC of Shared Parenting: Time, Language and Cash,”⁴ Professor Rollie Thompson examined cases decided post-*Contino*. He found that the straight offset had become the default in 65% of s. 9 cases, despite the wide discretion offered by *Contino*. He also concluded that s. 7 expenses were typically dealt with separately from the analysis of child expense budgets.

In “The Cost of Shared Parenting: An Analysis of Section 9 from 2016 to 2017,”⁵ Beth Ambury reviewed 70 cases and found that in 85% of them the court ordered support in cases of shared care based on a straight offset.

We conducted a review of approximately 30 cases decided between January 1, 2020 and January 31, 2021, which similarly showed that almost all cases awarded child support based on a straight offset either with or without a separate s. 7 order.⁶ This was the common result, whether the courts did a *Contino* style analysis, adverted to s. 9 without much (or any) analysis, or simply applied the straight offset.

Courts across Canada have been divided on how to deal with requiring a full analysis of s. 9, and the additional evidence that is required by s. 9(b) and (c). At least in Ontario and Manitoba, courts have held that it is an error of law not to consider and apply all of the s. 9 factors.⁷ On the other hand, the Newfoundland Court of Appeal has held that in the absence of evidence on s. 9(b) and (c), a straight set-off should apply.⁸

In *Briggs v Kasdorf*, the court specifically found that although neither party gave evidence to allow the court to consider s. 9(b) and (c), it was not in the interests of justice to adjourn for the provision of additional evidence.⁹

³ [Contino v. Leonelli-Contino](#), 2005 SCC 63.

⁴ Rollie Thompson, [The TLC of Shared Parenting: Time, Language and Cash](#), 2018 2018 27th Annual Institute of Family Law Conference 16, 2018 CanLIIDocs 10853.

⁵ Beth Ambury, [The Cost of Shared Parenting: An Analysis of Section 9 from 2016 to 2017](#), (2020) 39 CFLQ 1

⁶ Review by Sharon Kravetsky Q.C., CBA Family Law Section Chair.

⁷ *Cherewyk v. Cherewyk*, 2018 MBCA 13 (CanLII), at para. 25; *Verkaik v. Verkaik*, 2020 ONSC 7993 (CanLII) (Div. Ct.), at para. 28; and see *Smederovac v Eichkorn*, 2020 MBCA 57 (CanLII), at paras. 33 & 45.

⁸ *Burgess v. Burgess*, 2016 NLCA 11, at paras. 10 & 13.

⁹ [Briggs v. Kasdorf](#) 2020 BCSC 1702.

Only one case made an adjustment from the offset, based on the mother providing after school care for both parents.¹⁰ Two cases were adjourned for further evidence (*D.W. v S.S.*¹¹ and *Ramchala (Holland) v Holland*¹²). This was the most common result in Court of Appeal decisions we reviewed. Nine cases were sent back for a hearing at the lower level and additional financial disclosure was ordered, based on the original court's failure to obtain sufficiently detailed information to permit a full *Contino* analysis. Four Court of Appeal cases post-*Contino* reviewed and upheld decisions where the set off had been ordered.

Much has been written about determining child support in shared care since *Contino*. In *J.C.M. v. M.J.M.*,¹³ the New Brunswick Court of Appeal described s. 9 as “a vexing section for both lawyers and courts alike.” The Alberta Court of Appeal said in *MacDonald v. Brodoff*:

... engaging in a full *Contino* analysis is prohibitively expensive for most family law litigants because a fulsome analysis depends on a robust evidentiary record. This includes at minimum, statements of assets and liabilities and detailed household budgets that outline not only the total family expenditures, but those related to the children – both fixed and variable. Determining a child expense budget is a daunting and somewhat murky exercise. For example, what portion of a parent’s fixed expenses, such as the mortgage, utilities and food, should be attributable to the child? Unless the other parent is prepared to accept those budgets at face value, probing or verifying those budgets through questioning adds an additional layer of delay and expense.¹⁴

In most cases, applying *Contino* is not practical. The difficulty and expense inherent in meeting the requirements of s. 9(b) and (c) of the Guidelines fails to fulfill the Guidelines’ objectives of ensuring that children continue to benefit from the means of both their parents, increases conflict and tension between parents, reduces the objectivity of child support calculations, and is detrimental to an efficient court process.

Parties who spend a lot of time and money for the application of a *Contino* analysis generally do not return to analyze and vary child support when incomes or special expenses change. The Guidelines do not give self-represented parties guidance on how to navigate these complex calculations. Recalculation programs are unable to assist families with calculating support in shared care.

Proposal for Presumption of Straight Offset

We propose a presumption that the straight offset be applied in cases of shared care. This presumption would provide guidance to parents and courts, increase predictability, consistency and court efficiency and reduce parental conflict by making child support calculations more objective. This would also allow parents to easily adjust support as incomes change and would allow recalculation services (where available) to recalculate support based on a specified formula. A presumption would also increase access to justice by increasing the simplicity, predictability and objectivity of calculations of child support in situations of shared care. This proposal accords with Justice Canada’s recommendations in its 2002 Report to Parliament.¹⁵

¹⁰ [Van Berkel v. Van Berkel](#) 2021 ABQB 57.

¹¹ [D.W. v. S.S.](#), 2020 NSSC 306.

¹² [Ramachala \(Holland\) v. Holland](#), 2020 ABQB 432.

¹³ [J.C.M. v. M.J.M.](#), 2018 NBCA 42 (CanLII).

¹⁴ [MacDonald v. Brodoff](#), 2020 ABCA 246 at para. 59

¹⁵ Justice Canada, [Children Come First: A Report to Parliament Reviewing the Provisions and Operation of the Federal Child Support Guidelines](#), Vol. 1 (2002) at 22.

Making the straight offset a presumption would leave open the possibility for parties to rebut the presumption in unusual cases where it would be inappropriate, as with other provisions in the Guidelines that permit these arguments. For example, s. 3(2) relates to adult children directs that child support be determined as if the child was under the age of majority. Section 3(2)(b) states that if the court considers that approach to be inappropriate, it will set the amount of child support it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

Our proposal for a rebuttable presumption would not run afoul of Justice Bastarache's comment in *Contino* that:

The specific language of s. 9 warrants emphasis on flexibility and fairness. The discretion bestowed on courts to determine the child support amount in shared custody arrangement calls for the acknowledgment of the overall situation of the parents (conditions and means) and the needs of the children. The weight of each factor under s. 9 will vary according to the particular facts of each case.¹⁶

Justice Bastarache also emphasized:

... it will be important to keep in mind the objectives of the Guidelines mentioned earlier, requiring a fair standard of support for the child and fair contributions from both parents. The court will be especially concerned here 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.¹⁷

The objectives of the Guidelines do not focus on standards of living, nor is this specifically identified in s. 9. This consideration only appears in claims of undue hardship. The Guidelines do not mandate any adjustment of support based on standards of living in cases where children reside primarily with one parent. Child support is not increased beyond the table amount where the parent with primary responsibility has a lower standard of living than the parent who pays support, nor is it reduced where the parent with primary responsibility has a greater standard of living than the support payor, despite the differences in the standard of living the children may experience during time spent in each household. In all these cases, courts have held that the table amount is an appropriate measure. Even in cases where undue hardship is claimed, support is not adjusted based solely on the existence of a lower standard of living.

This issue is even more noteworthy in cases of split parental responsibility, where children could experience different standards of living based on the parent with whom each resides. No concern has been raised about this possibility. According to s. 8, support in these cases is calculated based on a straight offset.¹⁸

Special and Extraordinary Expenses

Contino mandates an analysis of child expense budgets including expenses that might otherwise be s. 7 expenses in the rubric of s. 9. This is meant to ensure that each parent is contributing to children's costs and one parent is not disproportionately bearing these expenses.

¹⁶ [Contino v. Leonelli-Contino](#), 2005 SCC 63 at para 39.

¹⁷ [Contino v. Leonelli-Contino](#), 2005 SCC 63 at para 68.

¹⁸ Where each spouse has custody of one or more children, the amount of a child support order is the difference between the amount that each spouse would otherwise pay if a child support order were sought against each of the spouses.

Where these expenses are considered as part of a global *Contino* analysis, parties often do not come back to vary support when these expenses change. There will inevitably be changes to things like childcare expenses, health needs, extracurricular activities, and education. If base child support and s. 7 expenses are considered separately, it is easier to adjust s. 7 expenses without a complex re-evaluation of every element of a *Contino* analysis. Our review of recent cases found that courts that ordered the straight offset were prepared to make separate orders for s. 7 expenses when asked to do so by the parties.

One possible concern with our proposal is that it may fail to consider expenses normally borne only by one parent. These are items that do not fit in the current definition of s. 7 expenses and are usually paid for by the recipient of child support. For example, if one parent had primary care/ parental responsibility and received child support, that parent would generally be responsible for purchasing all clothing including outerwear. Unlike ordinary clothing, which each parent in a shared care circumstance purchases for use in their own home, outerwear is typically purchased only once for use by the children wherever they are. There has been no discussion of, or adjustment made, for this in any of the cases we reviewed where the straight offset was ordered.

This concern should be ameliorated by creating a new category of s. 7 expenses that must be considered in cases of shared care/parental responsibility. This category could be in a new s. 7(1.2) and include items such as haircuts, outerwear or other items or services where the cost incurred benefits the children in both homes.

We also recommend a revised s. 7 that could apply in all cases, regardless of whether the children reside primarily with one parent or in a shared care circumstance. Section 7 does not currently contemplate many expenses that are realities for today's families, such as cell phones, computers, tablets, bicycles and sporting equipment not associated with formal lessons, memberships, expenses for drivers' licenses, insurance for vehicles driven by children, pets, and graduation expenses. If there is no appetite for expanding the enumerated s. 7 expenses, a general category of expenses subject to the court's discretion could be added for use in appropriate cases.

Our suggested changes would better address the objectives of the Guidelines for the growing number of children who reside in shared care arrangements. These changes would ensure that children continue to benefit from the financial means of both their parents. It would reduce conflict between parents by offering an objective method to calculate support, promote efficiency and consistency in child support orders, and improve access to justice. The cases decided since *Contino* show that the framework in that case does not benefit most families who parent their children in shared care circumstances. It is time for a change.

We appreciate Justice Canada's willingness to hear our concerns and suggestions. We value our ongoing relationship and our work together for the good of Canadian families. We welcome the opportunity to speak to you about this or any other topic.

Yours truly,

(original letter signed by Nadia Sayed for Sharon Kravetsky)

Sharon Kravetsky, Q.C.
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