



FOCUS ON FAMILY LAW

Contino v. Leonelli-Contino: Much Ado About Nothing

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Parliament, in adopting s.9 [of the Child Support Guidelines], deliberately chose to emphasize the objectives of fairness, flexibility and recognition of the actual conditions, means and needs and other circumstances of each spouse and of any child for whom support is sought, even to the detriment of predictability, consistency and efficiency to some degree. The legislator recognized in s.9 that there is a wide range of situations of shared custody depicting the reality of different families.

On November 10, 2005, the Supreme Court of Canada released its decision in *Contino v. Leonelli-Contino* ("Contino"). *Contino* is an appeal from a decision of the Ontario Court of Appeal, which reduced the monthly support payable by a father using a "set-off" method and applied a multiplier of 62 per cent to take into account the mother's fixed costs.



Practitioners across the country had anxiously awaited the decision, hoping the Court would provide a clear and practical approach to the calculation of child support in shared-custody situations, to bring a measure of consistency to this area of the law.

While the Supreme Court did provide some direction with respect to the interpretation of the statutory provision, the decision ultimately affirmed the need for courts to retain a wide range of discretion in approaching these cases. In essence, all of the excitement surrounding the release of this decision may be summarized as "*much ado about nothing*."

Section 9 of the *Child Support Guidelines* ("the *Guidelines*") allows for a variation in the table amount of

child support where the payor has a right of access to or physical custody of a child for 40 per cent or more of the year. Once

the 40 per cent threshold has been met, the Court must determine the appropriate amount of child support by taking into account:

- (a) the amounts set out in the applicable tables;
- (b) the increased costs of shared-custody arrangements; and,
- (c) the condition, means, needs and other circumstances of each parent or spouse and of any child for whom support is sought.

As Section 9 does not provide a formulaic approach to determining the amount of child support, its application has varied widely since the *Guidelines* came into force, a difficulty that was acknowledged by the Court.

Under 9(a), the Court determined that a simple set-off method may be a useful starting point. There should be no presumption, however, in favour of that amount, or any deviation from the table amounts.

Section 9(b) requires an examination of the increased costs inherent in shared-custody arrangements, including an

(continued on reverse)

Much ado about nothing *(cont'd.)*

evaluation of all of the payor parent's costs, in order to determine the *additional* costs of both parties as a result of the shared custodial arrangement. Unfortunately, both parents will now need to prepare budgets and document their actual expenditures for the children, so that the expenses can be re-apportioned by a child-support award.

With respect to Section 9(c), each case must be considered on its own facts, empowering the courts with "a broad discretion for an analysis of the resources and needs of both the parents and the children." Little direction was provided by the Court on how that discretion is to be applied, although one might assume that the parties' budgets and respective incomes should provide the starting point for the analysis, which may not be all that

dissimilar to a pre-*Guidelines* child-support analysis.

While the flexibility of such a discretionary approach allows for creative advocacy by counsel, it will undoubtedly produce significant uncertainty regarding the appropriate resolutions of these cases, as well as increased costs for each party to prepare a budget and attack the budget prepared by the other side. The flexibility will also build in an additional disincentive to a recipient parent's agreement to a shared custodial arrangement, as the other parent's time with the children is now directly tied to the amount of child support he or she must pay.

The full decision can be read on the Supreme Court of Canada's Web site at www.canlii.org/ca/cas/scc/2005/2005scc63.html.

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