Syrtash Collection of Family Law Articles
SFLRP/2004-011

Support Issues with Backlash: Sometimes Misunderstood Tax Implications of Support Awards

By Susan Roberts

Presented at the National Family Law Conference
in LaMalbaie, Quebec
July 14, 2004
[Posted on Quicklaw July 28, 2004]

* Posted by John Syrtash with permission of the author.

Contents:

Support Issues with Backlash: Sometimes Misunderstood
Tax Implications of Support Awards

Introduction

¶ 1 Frequently in the family law area, support issues are resolved without regard for the tax implications of the arrangements that have been made, or with a misunderstanding of those implications. The desired, expected or agreed upon outcome may not be achieved if it contravenes the provisions of the Income Tax Act (ITA). Without a general understanding of the relevant provisions of the ITA, including deductions, credits, benefits and subsidies, the parties to the support award (child, spousal, or both) may be disappointed to find that they did not get what they bargained for. Their counsel may have liability issues to address and the Court may inadvertently make Orders with unintended results.

¶ 2 For most spouses, the bottom line is what they will have left in their pockets at the end of the day after the payment or receipt of support. Our tax system plays a very large part in determining how much that will be. Most realize that tax law has an impact on spousal support in terms of the net amount one spouse will receive or the other spouse will pay, due in large part to the income tax inclusion and deduction rules that apply to most spousal support payments. The interrelated effects of other components, such as benefits and subsidies, appear not to be as well understood.

¶ 3 With respect to child support under the Federal Child Support Guidelines (Guidelines) and the provincial and territorial counterparts, the income tax inclusion and deduction rules no longer apply so there is often a misconception that this support will not be affected by tax issues. While tax does not have the same direct effect on the net amount of support retained by the recipient, nonetheless, the ITA does have a significant impact on the necessary calculations. For example:

* The definitions of income in the Guidelines use the ITA as a starting point.
* Many of the adjustments to income in Schedule III of the Guidelines are taken from the ITA.
* Child support related to special expenses in Section 7 of the Guidelines must be calculated net of tax and benefit considerations.
* The calculation of household income ratios in Schedule II of the Guidelines requires the incorporation of actual taxes payable.
* Where income is imputed from cash based sources, a backwards tax calculation may be necessary to determine a reasonable pre-tax equivalent.

¶ 4 All of these areas are affected by current tax laws.

Limitations and Constraints

¶ 5 Tax can be very complex. This paper will cover selected tax areas and is intended to provide insight into certain issues only. In any particular case, many more areas may be involved or greater detail may be required, and researching the actual section(s) in the ITA is recommended. To reference sections, the same is readily available through links from the Canada Revenue Agency's (CRA) website, even though the ITA is not the most user friendly document to read. This website also provides interpretation bulletins and information circulars outlining CRA's policies on a variety of tax issues. Information is also available by contacting CRA, although CRA is not bound by any opinions that it gives, unless they are in the form of an advance tax ruling. Advance tax rulings may only be obtained for situations that are anticipated, but have not yet happened, and the rulings are only binding on CRA to the extent that the facts of the situation have not changed from those for which the ruling was made. If you are in doubt about the tax implications of a situation, then it may be well worth your while to consult a tax specialist, or have your client do so directly. This would not only be for your client's sake, but also in relation to potential liability for you if your client's expectations regarding benefits or net dollars do not match reality due to a misunderstanding of the tax treatments.

¶ 6 Tools, such as computer software programs, are available to aid in the calculation of both child and spousal support. But one should not be lulled into complacency by the use of these tools or assume that the software will some how "take care" of the tax complexities. Software cannot read minds; it can only do what it is told to do. A software program will either have input fields for the required tax parameters, such as indicating whether a spouse is remarried or living common law, or it will make an assumption that will deal with the issue. Either way it is critical that the software user understand the effect of the tax treatment on the calculations being made. In the first instance, the user must know how to answer the questions or set the tax parameters in the program for each case that is done. In the second instance the user must know what assumptions the program is making (e.g.: all spouses are single) in order to know whether the results may be relied upon. If assumptions are involved and even identified, it is still necessary to know how those assumptions may be affecting the results. None of this is possible without a basic understanding of the potential tax issues. How does the user know if the right or complete data has been entered into the software program if the user doesn't understand what is required to begin with? How does the user know that the software has produced the appropriate answer if there is no understanding of what is involved? Regardless of who inputs the data, how can a decision based on the computer output be made if the decision-maker does not know what data was input or what assumptions were made? And how can the results of the calculations possibly be explained to anyone else - the client, opposing counsel, or the Court?

¶ 7 Tax rules and amounts change regularly. Software that calculates tax effects must be updated to stay abreast of these changes. Regardless of the tools used, it is important that they be current.

¶ 8 Does this mean everyone has to be a "tax expert" in order to calculate child support or effectively analyze spousal support alternatives? No. But the results, and their potential limitations, will not be understood if there isn't at least a basic understanding of the necessary input. Further, the right questions will not be asked to obtain the information needed to do the calculations or analysis if there is no understanding of the basic, potential tax parameters.

¶ 9 The tax courts have made it very clear that misunderstanding the provisions of the ITA does not give anyone the ability to vary from or circumvent those provisions. Parties cannot agree that a certain party will claim the eligible dependent credit or collect the Child Tax Benefit if that party does not qualify under the appropriate legislation. Regardless of what an order from a family court says, provisions which conflict with the ITA can not be enforced. This fact is clearly expressed in any number of tax court cases. As an example, Tardif T.C.J., in Clark v. Canada, [2002] T.C.J. No. 22, Tax Court of Canada, January 18, 2002, Docket: 2000-3983 (IT)], says at paragraph 14:

> An agreement, no matter how clear, has no effect against the Minister if it contains provisions contrary to the Act's provisions; in other words, an agreement that binds the signatories does not bind the Minister against whom it cannot be raised. In the case at bar, although the appellant's former spouse waived rights under the Act through an agreement, this had no effect on the Minister's obligation to pay him all the benefits resulting from the Act. The Minister could not ignore or disregard reality...

Spousal Support

¶ 10 Currently there is no fixed formula for the determination of spousal support. Depending upon the circumstances, roles, and length of the marriage in question, an analysis of disposable incomes (or cash flows) may be considered when setting amounts. Spousal support payments, which fall within the ITA definition of "support", will be affected by the income inclusion and deduction rules in Sections 56 and 60 of the ITA. This means that anything that affects the individual's income tax position will affect the tax and benefit components of the disposable income analysis. Omissions or errors could produce

inaccurate tax results, distort the analysis and lead to unintended results. All of the major tax components discussed later could affect a spousal support analysis. Further, spousal support has an interrelated effect on child support under Section 7 of the Guidelines and on other areas, such as hardship analysis and income imputation. As well, other unconventional payments, as discussed under the heading "Specific purpose and third party payments", such as mortgage payments, will only be awarded the beneficial tax treatment if the Orders are worded to comply with the provisions of the ITA.

Child Support

¶ 11 With the advent of the Federal Child Support Guidelines and the corresponding adoption by most of the provinces and territories of those Guidelines, there appears to be a misconception that there is no longer a need to consider the income tax implications when dealing with child support issues and calculations, because the taxation and tax deductibility of child support has been removed from the our tax system. Simplicity was the sales pitch. However, when all the areas of the Guidelines requiring computations are considered, the only amount not directly affected by current tax law is the support amount in Section 3 pursuant to the Guideline tables.

¶ 12 Often the ability to provide equity and fairness under the Guidelines is found in Sections 7 and 10 of the Guidelines, as this is where a child support amount may be "fine tuned" to meet the specific needs of a family. Both these sections require calculations that incorporate extensive tax criteria. In particular, with respect to special expenses, Section 7(3) of the Guidelines states:

> In determining the amount of an expense referred to in subsection (1), the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense...

¶ 13 The standards of living test found in Schedule II of the Guidelines, to support a claim of undue hardship under section 10, requires the computation of "actual taxes payable" for each member of the household. Even the determination of income, which is the foundation of all calculations under the Guidelines, including the table amount, may require an understanding of tax and tax calculations. How can these requirements be fulfilled if there is no understanding of which tax parameters may affect a particular Section 7 expense, or the extent to which they may change the ratios that open the door to Section 10, or affect the analysis of income?

Tax Implications of Income Determination under the Guidelines

¶ 14 Under our Canadian tax system, different sources of income are taxed differently. In developing the Guideline tables, the assumption of employment or self-employment income was made. Many of the adjustments to income found in Schedule III of the Guidelines have been taken directly from the ITA, complete with the tax act definitions. If the tax terminology and implications are not properly understood, then the correct assessment and reasonable adjustments under the Guidelines may not be made in a particular circumstance. Further, when imputing income under Sections 17, 18, and/or 19, "grossing up" cash-based amounts for deemed tax effects may be required.

Section 7 - Special Expenses

¶ 15 Due to the direction in Section 7(3) to "take into account any subsidies, benefits or income tax deductions or credits relating to the expense", the fact that tax will have an impact on this area of child support is obvious; however, the type of tax effect is not as clear.

¶ 16 As explained in greater detail under "Tax Deductions vs. Tax Credits", the type of tax effect an expense will have is dependent on whether it creates a tax deduction or a tax credit. The amount of the tax effect of an expense is specific to the tax position of the individual who has initially incurred the expense. For example, if the individual's tax liability is already zero, the addition of a tax deduction to the calculation will not have any impact on that tax liability. If the individual has income that is being taxed in one of the higher tax brackets, a tax deduction will produce greater tax savings than if that income was only being taxed in the lowest bracket.

¶ 17 Of the six specific types of expenses detailed in section 7(1) of the Guidelines, all have potential tax effects, except 7(1)(f) "extraordinary expenses for extracurricular activities." The tax effects of the other five areas will be discussed in detail under the headings of the related tax areas as follows:

* Child Care Expenses for 7(1)(a) - child care expenses;
* Medical Expenses for 7(1)(b) - medical and dental insurance premiums and 7(1)(c) - health related expenses;
* Medical Expenses and Donation Credits for 7(1)(d) - extraordinary expenses for primary or secondary school education; and
* Tuition and Education Tax Credit for 7(1)(e) - post secondary education.

Major Tax Areas

¶ 18 Tax areas of particular concern when dealing with support issues include:

* the concepts of tax deductions and credits, and their effect on support calculations;
* the definition and claim criteria of the "spouse or common-law partner amount" tax credit (formerly the "spousal" or "married" credit);
* the eligibility criteria for receiving the Child Tax Benefit (CTB);
* the definition and claim criteria of the "amount for eligible dependent" (AED) tax credit (formerly the "equivalent to spouse" or "equivalent to married" credit);
* the definition and claim criteria of "child care expenses" for income tax purposes;
* the definition and claim criteria of the "medical expense" tax credit;
* the definition and claim criteria for the "donation" tax credit related to certain primary or secondary school fees;
* the definition and claim criteria of the "tuition and education" tax credit; and
* the definition and claim criteria of "support" for income tax purposes.

Tax Deductions vs. Tax Credits

¶ 19 Often items that are allowed for tax purposes are described as "deductions" without considering the question: "Deductions from what?" There is a significant difference between tax deductions and tax credits. In simplified terms, tax deductions reduce income and therefore reduce the base that the taxes, and perhaps other items such as benefits, are calculated on. For example, the person claiming the deduction may now qualify for a higher amount from a particular subsidy or benefit program. Further, the type of income that a deduction is applied to may be very important in determining the overall effect of the deduction. Remember, "income" is not a generic term. There are many different definitions of income and it is important to know which one is used for a particular purpose.

¶ 20 If someone says "My income is $50,000" he or she may be referring to any one of a number of definitions of "income", such as:

1. Income for purposes of the table amount in Section 3 of the Guidelines;
2. Income for purposes of Section 7 of the Guidelines;
3. Income described as "total income per line 150 of a personal income tax return";
4. Income described as "net income for income tax purposes";
5. Income described as "taxable income for income tax purposes";
6. Income that is equivalent to available cash (i.e.: disposable income); or
7. Income under some other definition.

¶ 21 Each one of these types of "income" is significantly different from the others and is used in a specific way in support calculations. For example, the definition of "total income per line 150 of a personal income tax return" is not the same as "income for purposes of the table amount in Section 3 of the Guidelines" because it does not include the adjustments under Schedule III of the Guidelines, nor does it include amounts imputed or adjusted pursuant to Sections 17, 18, or 19 of the Guidelines. Are there instances where the amounts (after applying the definitions) are the same? Certainly. Income for purposes of determining the Guideline table amount may be the same amount as total income per line 150 if all the other adjustments required by the Guidelines are zero. Can it be assumed that they will always be the same? Absolutely not. How tax parameters will affect "income" will depend entirely on which definition of "income" is being used.

¶ 22 With regard to tax considerations and support calculations, tax deductions may reduce either "total income" (definition #3, above) in determining "net income" (definition #4, above) or "net income" in determining "taxable income" (definition #5, above). For example, "child care expenses" under Section 7 of the Guidelines may create a tax deduction that would reduce "total income" in determining "net income." Spousal support paid may also be a tax deduction that has the same effect. This is significant as the definition of "net income for tax purposes" often governs the amounts to be dispersed through our various social programs such as the CTB, the GST credit, and provincial components to the CTB initiative. Therefore, tax deductions that reduce total income in determining net income often increase the amount received from these social programs. In so far as the calculation of child support is concerned, this has a direct bearing on the application of the Section 7(3) directive to take into account any subsidies and benefits. Tax deductions that reduce net income in determining taxable income would not have an effect on the amounts received from these social programs at all, unless the program specifically included consideration of the deduction in the benefit calculation.

¶ 23 In contrast to tax deductions, tax credits do not change "income" amounts. They only offset taxes otherwise payable and in some cases may produce a refund. Therefore, the effect of a tax credit is generally limited to income tax savings without the added benefit of an increase in amounts from subsidy or benefit programs. Items such as medical expenses or post secondary tuition costs do not reduce total income, net income, or taxable income, and will not change the amount received from a particular social program, unless the program is designed to factor in the tax credit. However, tax credits may change the ultimate amount of tax owing, but normally the balance owing cannot fall below zero, unless the particular tax credit is refundable. For example, the federal refundable medical credit may produce a refund over and above reducing income taxes owing to zero.

Eligibility to Claim

¶ 24 Section 7(3) of the Guidelines states that the courts must take into account

> ...any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense. (emphasis added)

¶ 25 How should "eligibility to claim" be interpreted? Does this phrase have a different meaning under the Guidelines than it does for tax purposes? The fact that a certain expense may provide a tax deduction or credit under the ITA, does not mean that all taxpayers incurring such an expense are "eligible" to claim the amount for income tax purposes. For example, the fact that an individual paid daycare expenses does not necessarily make him or her "eligible" to claim a tax deduction for that expense if it was incurred so someone else could go out to work. Similarly, if a child care expense is incurred, which would otherwise be "eligible" for a tax deduction, but a receipt is not obtained, clearly, the tax criteria is not met, but does this also mean the "eligibility" criteria is not met for purposes of the child support calculation? As explained later under the heading "Child Care Expenses", to be deductible for tax, child care expenses must be supported by receipts issued by the payee. In D.L. v. F.K., [1998] N.W.T.R. 337, [1998] N.W.T.J. No. 42, Vertes J. determined at paragraph 20 that "eligibility to claim" under Section 7(3) of the Guidelines meant:

> ...it is irrelevant if the applicant does not claim the day care expense as a deduction because of the lack of receipts. The availability of such a deduction must be taken into account. If the respondent is responsible for any portion of this expense, then it must be based on the after-tax cost to the applicant. (emphasis added)

¶ 26 On the other hand, Gass J. in Mundle v. Mundle, [2001] N.S.J. No. 111, 2001 NSSF 15, 14 R.F.L. (5th) 364, 192 N.S.R. (2d) 297, 599 A.P.R. 297 stated that:

> [12] ...In other words, it would not be fair to apportion the full cost of child care when in reality the full cost is not actually incurred. Conversely where there is no deduction to the claimant, it would not be fair for the payor to pay only that portion of after tax cost when in reality the claimant is responsible for the actual full amount of child care costs for their child.
> [13] Here I have considered the availability of the deduction and conclude that there is no deduction available and there is no eligibility to claim the deduction because there are no receipts provided. (emphasis added)

¶ 27 "Availability" in Laviolette was not tied to the actual criteria required by the ITA; whereas, in Mundle it was. The different treatment in caselaw may be rationalized by the notions of choice and reasonability, having regard to the premise, under the Guidelines, that the support amount must be "fair." In Mundle, even though the child care provider would not provide receipts, it was determined that this was the best choice of care for the children. This resulted in a lack of "availability" for the tax deduction pursuant to the ITA criteria. The payor was thus required to pay his proportionate share of the actual cost incurred by the recipient spouse. In other cases, however, the Court has found that there was potential "availability" that could be realized by the support recipient if he/she elected to obtain receipts. The choice not to obtain receipts was not reasonable in the particular circumstances. Thus, for purposes of determining the additional amount of child support, the amount was calculated as though the availability was realized. It is therefore important that the necessary enquiries be made to determine whether there is actual availability for tax purposes and if not, why not. Is it due to the choice of the recipient spouse or a condition imposed by the child care provider? While this unrealized potential can make a difference to the Guideline child support, the decision in a support analysis will not change the reality of the tax outcome. If there is no receipt there will be no tax deduction.

¶ 28 If an amount is characterized as a "reimbursement" and tax law precludes a claim for a reimbursed amount (as it does in virtually all circumstances), the individual is not "eligible" to claim that portion of the amount for tax purposes, and it, arguably, should not be included in the tax impact for Guidelines purposes either. Even establishing "eligibility" does not necessarily determine the amount of the tax effect. In tax calculations the sum of the parts may be greater than the whole. Individuals may

have many credits and deductions available to them, but may only be able to use a portion of them due to their income levels.

Spouse or Common-law Partner Amount

¶ 29 In a support situation, the fact that one or both of the parties is remarried or living in a common-law relationship may impact the income tax and benefits calculations. If the quantum of spousal support is based on an assumed after tax amount, calculated as if the recipient was single, the actual after tax amount may be different if the recipient is considered to have a spouse for tax purposes. For example, where the person had a child, the fact that he or she now had a common-law spouse would preclude the ability to shelter income with the "amount for eligible dependent" tax credit (discussed later) and result in a larger portion of the spousal support being taxed; thus less being retained on an after tax basis. With respect to child support, having a spouse will not change the table amount of support under Section 3 of the Guidelines unless it changes the analysis of income, but it could change the results of the net amount of Section 7 expenses, or the household income ratio in an undue hardship argument. It could even change the result that would be determined where a cash-based source of income was grossed up to a pre-tax amount.

¶ 30 The fact that an individual is remarried or living common-law may also affect support analysis and calculations through the impact this situation has on the eligibility to receive benefits, such as the GST credit or the CTB and related provincial/territorial programs. The income limitations in most social programs are based on a concept of "family net income." In addition to increased taxes, thousands of dollars may be foregone because the individual no longer qualifies for benefits that would have been available had he or she been single. For example, a single parent earning less than $22,000 per year, with one child, will receive approximately $2,958 from the CTB program in 2004/2005 ($4,611 if the child is disabled) and the amount will increase if there are more children. When a new spouse's income is considered in the determination of "family net income", the entitlement may quickly drop. If this is not considered in support calculations, outcomes may be misleading. For example, disposable income may be overstated in a spousal support analysis where the party would receive more CTB if there were no new spouse. In a child support calculation, where the new spouse has income, the net tax effects in Section 7 applied to child care expenses may be wrong because the individual now receives fewer benefits and has less tax-sheltered income due to the new spouse.

¶ 31 Where there is a new spouse, there may be the potential for claiming the "spouse or common-law partner amount" for tax purposes. This claim:

* would reduce the tax amount used in the analysis of disposable incomes for spousal support consideration;
* would change the household income ratio determined under Schedule II of the Guidelines by reducing the tax amount used. This is in addition to the change in household composition used in that calculation; and
* could change the tax effect of special expenses, such as child care, medical, or post-secondary expenses, in the calculation of child support under Section 7 of the Guidelines.

¶ 32 The criteria for claiming the "spouse or common-law partner amount" is found in Section 118(1)(a) of the ITA under the heading "married status." It is a non-refundable tax credit available to a taxpayer who, at any time in the year:

(a) is married or in a common-law partnership;

(b) supports the spouse or common-law partner; and
(c) is not living separate and apart from the spouse or common-law partner by reason of a breakdown in their relationship.

¶ 33 The spouse or common-law partner must have "net income for tax purposes" (for 2004) of $7,484 (or less) for federal tax purposes, as the maximum credit is $6,803 and begins to be reduced when "net income for tax purposes" is greater than $680. The income level for the corresponding provincial or territorial credit varies depending on the province or territory. This credit is subject to indexation federally and in most provinces and territories, so the amount of income it may shelter from tax is increasing each year. For 2004, the provincial/territorial credit ranges from $6,055 for Newfoundland and Labrador to $14,337 for Alberta.

¶ 34 What constitutes a "common-law partnership" may vary depending on the legislation being applied. For income tax purposes, "common-law partner" is defined in Section 248(1) of the ITA and means a person who:

(a) cohabits at that time in a conjugal relationship with the taxpayer, and
(b) has so cohabited with the taxpayer for a continuous period of at least one year, or
(c) would be the parent of a child of whom the taxpayer is a parent.

¶ 35 In order to end a common-law partnership for tax purposes, once it is established per the rules above, the taxpayer and person must be living separate and apart for a period of at least 90 days, including the time in question, because of a breakdown in their conjugal relationship. In applying the definition of "common-law partnership" it is important to note that the ITA has the benefit of hindsight, whereas the Guidelines operate on a prospective basis.

Child Tax Benefit

¶ 36 The CTB is a government program designed to assist low and low-middle income families with the cost of raising children. It provides tax free benefits based on family size and income levels. CRA issues an excellent guide called "Your Canada Child Tax Benefit" (T441), which outlines the federal and many of the related provincial and territorial programs. The federal portion of the program has three components:

* the basic benefit;
* the National Child Benefit Supplement (NCBS); and
* the Child Disability Benefit (CDB).

¶ 37 The last component is the most recent change and is available for "qualified dependants" (as defined below) for whom a disability credit may be claimed. It is effective as of July 2003 and payments were to have begun by March 2004.

¶ 38 In situations where the child(ren) reside primarily with one parent, the ability for one party to meet the CTB eligibility criteria discussed below is relatively straight forward. However, in a growing number of cases, the Court is awarding, or parties are agreeing to, a shared arrangement with time and responsibility falling equally on both parents. Unfortunately, the eligibility criteria for receiving the CTB and related programs do not easily accommodate shared parenting arrangements. Administratively, it is CRA's position that true "equality" rarely exists when it comes to parenting situations, and on balance, one parent expends more than the other parent with respect to the factors listed in point (c) below.

¶ 39 In support calculations, CTB may affect any analysis of disposable incomes and will impact the calculation of net child care expenses used in determining Section 7 child support. However, there will be no affect on the household income ratios per Schedule II of the Guidelines because that calculation does not include any consideration of benefits and subsidies.

¶ 40 The following summarizes the criteria that must be met to receive the CTB:

(a) the person must be an "eligible individual" as defined by Section 122.6 of the ITA, which means all of the following conditions must apply:

* the person must reside with the "qualified dependant" (referred to hereafter as "child" for simplicity). "Qualified dependant" is also defined by Section 122.6 of the ITA and will be discussed later.
* the person must be the parent that primarily fulfils the responsibility for the care and upbringing of the child. Note the presumption described in (b) below.
* the person must be resident in Canada or establish sufficient residential ties to Canada to be considered a resident. Employees, their families and servants, of another country who reside in Canada are specifically excluded.
* the person or the person's spouse or common-law partner must be:

(i) a Canadian citizen;
(ii) a "permanent resident" per the Immigration and Refugee Protection Act (IRPA);
(iii) a "protected person", per the IRPA; or
(iv) a "temporary resident", per the IRPA, who has live in Canada throughout the last 18 months.

(b) where the child resides with the female parent, the female parent is presumed to fulfil the responsibility for the care and upbringing of the child. This is not mentioned in the CRA guide, but is in the definition of "eligible individual."

(c) Regulation 6302 of the ITA lists the factors that constitute "care and upbringing" as follows:

* the supervision of the daily activities and needs of the child,
* the maintenance of a secure environment in which the child resides,
* facilitating medical care for the child on a regular basis and as required,
* facilitating educational, recreational, athletic or similar activities for the child,
* attending to the hygienic needs of the child on a regular basis,
* providing guidance and companionship to the child on a general basis, and lastly
* the existence of a court order in respect of the child that is valid in the jurisdiction in which the child resides.

(d) per Regulation 6301 of the ITA, the presumption in (b) above does not apply where:

* the female parent declares in writing to the Minister that the male parent fulfils the responsibility for the care and upbringing of the child,
* the female parent, is herself a "qualified dependant" of an "eligible individual" and both file notices with the Minister with respect to the same child,
* there is more than one female parent of the child who resides with the child and each files a notice with the Minister with respect to the same child, or
* more than one notice is filed with the Minister with respect to the same child

and each person who filed lives at a different location than the others who filed.

Where more than one (otherwise qualifying) person applies for the CTB for the same child, the Minister will determine the "eligible individual" based on an assessment of the factors described in (c) above. Given the factors, there are rarely any circumstances where more than one person meets the criteria to the same degree. For example, often only one of the parties has a job or lifestyle that allows for tending to the child at a moment's notice.

(e) a "qualified dependant" is defined as:

* a person under 18 years of age;
* whose spouse, if there is one, has not claimed the "married" credit; and
* is not a person for whom a special allowance is payable under the Children's Special Allowances Act.

¶ 41 In situations where it is determined that a person has been paid the CTB in error, the legislation considers the person's eligibility status at the beginning of the month or months in question per Section 122.61. Where there is a change in status mid-month, the change would not apply until the beginning of the next month. If the person has become eligible to receive the CTB, he or she has up to eleven months from the end of the month he or she became eligible to notify the Minister. Payments retroactive to the first full month of eligibility will be made. On the other hand, if a person ceases to be eligible, the Minister must be informed by the end of the following month. Unfortunately, when relationships break down and the child moves from one parent to the other, parents often fail to notify the Minister. The issue comes to light when the other parent applies for the CTB and by then a significant amount of overpayment may have accumulated. Because the amounts may be significant there is an incentive for the other parent to apply. Even if the parent, with whom the child is now living, agrees not to apply for the CTB, the first parent no longer qualifies to receive the money.

¶ 42 The amount of the CTB basic entitlement is based on the number of children with supplements for three or more children and for children under the age of 7. The supplement for children under the age of 7 is reduced by 25% of the total child care expenses claimed. This will have a very direct effect on the calculation of net child care expenses under Section 7(1)(a) of the Guidelines, as discussed later. In most provinces and territories the base amount is the same for each child; however, in Alberta, the base amount increases with the child's age.

¶ 43 The NCBS provides decreasing amounts for the first, second and three or more children, in addition to the basic entitlement discussed above. The CDB provides a flat amount per disabled child, which is added to the other two components.

¶ 44 Since the CTB is designed to primarily benefit low income families, all three elements of the entitlement are also reduced at specified income levels. In this regard, the definitions of "adjusted income" and "base taxation year" are important. Under Section 122.6 of the ITA, "adjusted income" means the total of all amounts which would be income for the year for the taxpayer or the taxpayer's spouse or common-law partner (as defined previously). Generally this equates to "family net income" and most of the CTB forms and guides refer to it as that. However, Section 3 of the ITA discusses income in positive terms and 3(f) deems a negative amount to be zero; therefore, one spouse's loss can not be used to reduce the other spouse's income.

¶ 45 For CTB purposes, the income used in the calculation is determined by the "base taxation year" which creates a lag in the income effect. The "base taxation year" is defined as:

* the taxation year ending on December 31 of the second preceding calendar year, where the benefit entitlement is for any month between January and June, and
* the taxation year ending on December 31 of the preceding calendar year, where the benefit entitlement is for any month between July and December.

¶ 46 Essentially, this results in the income reduction being based on the last filed tax return. For example in 2004 the "base taxation year" for January to June is 2002 and for July to December is 2003. Where a spouse dies or the spouses are living separate and apart for a period of at least 90 days due to a break down in the relationship, the benefit will be recalculated to exclude that spouse's income, upon notification to the Minister.

¶ 47 In terms of the effect of support awards, the amount of CTB entitlement will potentially be reduced by taxable spousal support received and increased by taxable spousal support paid. This is a direct effect of the income reductions being based on "net income" and spousal support being taxable/tax deductible. With respect to child support under the Guidelines, there is an interrelated effect on a claim under Section 7(1)(a) - child care expenses. As discussed later, "child care expense" is a potential tax deduction that reduces net income and may increase an individual's CTB entitlement as a result. Where there are children under the age of 7, this entitlement may be reduced due to the erosion or loss of the supplement for children under age 7, discussed previously. In calculating the Section 7 amount "net of subsidies, benefits ..." these factors will come into play and directly affect the amount on which the pro-rata sharing, per Section 7(2) of the Guidelines, is based.

¶ 48 The following chart outlines the maximum CTB amounts for 2004:

	January to June	July to December
Basic Benefit	$ per child	$ per child
* standard benefit	$1,169.00	$1,208.00
* supplement for 3 or more	$82.00	$84.00
* supplement for under 7	$232.00	$239.00
base income amount	$33,487.00	$35,000.00
reduction for amount over base	2.5% (1 child) 5.0% (greater than 1 child)	2.0% (1 child) 4.0% (greater than 1 child)
	January to June	July to December

NCBS	$ per child	$ per child
* first child	$1,463.00	$1,511.00
* second child	$1,254.00	$1,295.00
* three or more	$1,176.00	$1,215.00
base income amount	$21,529.00	$22,615.00
reduction for amount over base	12.2% (1 child)	12.2% (1 child)
	22.7% (2 children)	22.7% (2 children)
	32.6% (greater than 2 children)	32.5% (greater than 2 children)

	January to June	July to December
CDB	$ per child	$ per child
* standard benefit	$1,600.00	$1,653.00
base income amount	$33,487.00***	$35,000.00***
reduction for amount over base	12.2% (1 child)	12.2% (1 child)
	22.7% (2 children)	22.7% (2 children)
	32.6% (greater than 2 children)	32.5% (greater than 2 children)

*** The CDB base is determined by the total number of children for whom the CCTB is being received, not just the disabled child(ren). The threshold shown is for families with one child.

Amount for Eligible Dependent

¶ 49 The "amount for eligible dependent" (AED) tax credit is one of the most common personal tax

components that should be considered in the calculation and analysis of support, as its availability is often triggered by a breakdown of the family relationship. Federally, and in most provinces and territories, it is also one of the largest tax credits. Not only will this credit impact the tax components of support calculations, but the wording of a support order may have a direct impact on an individual's ability to claim the credit.

¶ 50 Per Sections 118(1)(b), 118(4) and 118(5) of the ITA this credit is available if all of the following provisions are met:

(a) a claim has not been made for the "spouse or common-law partner amount" by the taxpayer (as discussed above),
(b) the taxpayer, at any time in the year:

* is unmarried and does not live in a common-law partnership; or
* is married or in a common-law partnership but does not support or live with that spouse or common-law partner and is not supported by that spouse or common-law partner.

In other words, the person must be single.

* maintains and lives in a "self-contained domestic establishment" and actually supports, in that establishment, an individual who:

(i) is resident in Canada, unless it is a child of the taxpayer,
(ii) is wholly dependent on the taxpayer (and perhaps others) for support,
(iii) is related to the taxpayer, and
(iv) is under the age of 18 or dependent by reason of mental or physical infirmity, except in the case of a parent or grandparent of the taxpayer.

(c) the taxpayer may only make one claim, regardless of how many individuals meet the description above.
(d) only one claim per "domestic establishment" is allowed.
(e) only one taxpayer may make a claim for the individual described above.
(f) where more than one taxpayer may be entitled to make a claim for an individual described above, the claim will be denied to all if they cannot agree on which one will make the claim. This means that if there is only one child and both parents meet all the criteria, neither will be able to claim the credit if they cannot agree on who will make the claim.
(g) this credit may not be combined with a claim for the "in-home care of relative" credit or the "infirmed dependent" credit.
(h) this credit may not be claimed if the taxpayer is required to pay "support" (as defined by subsection 56.1(4) of the ITA and discussed later) for the individual described above. Note that regardless of whether support is actually paid, the fact that there is an Order describing an obligation to pay is enough to disqualify the taxpayer. If the order or agreement creates an "offset" situation, as may be seen in "shared" custody arrangements (per Section 9 of the Guidelines), both parties to the order may be seen as being "required to pay", even though a net payment from one to the other may result. This will effectively prevent either party from claiming the AED for any of the individuals with respect to whom payment is implied. With regard to the tax interpretation of the wording of the order or agreement, such things as details of the offsetting amounts, or the use of the word "net" or similar terminology, may be

interpreted as a requirement that both parties are to pay and unintentionally prevent either party from claiming this credit. Only CRA or the tax courts can provide a definitive answer.

¶ 51 The AED amounts are the same as the "spouse or common-law partner amount." To recap, the dependent must have "net income for tax purposes" (for 2004) of $7,484 or less for federal tax purposes, as the maximum credit is also $6,803 and begins to be reduced when "net income for tax purposes" is greater than $680. The income level for the corresponding provincial or territorial credit varies depending on the province or territory and is subject to indexation federally and in most provinces and territories, so the amount of income it may shelter from tax is also rising each year. For 2004, the provincial/territorial credits range from $6,055 for Newfoundland and Labrador to $14,337 for Alberta. When combined with the "basic personal exemption" this credit has a significant tax impact for low income earners, as shown in the Appendix A. Income of at least $14,815 will be sheltered from federal tax. This amount may be more when the tax credits for CPP and EI are added. The amount sheltered from provincial/territorial tax ranges from $13,465 in Newfoundland and Labrador to $28,674 in Alberta.

Child Care Expenses

¶ 52 For personal tax purposes, child care may be a tax deduction that is deducted from "total income" in arriving at "net income for income tax purposes." As noted previously, this means that not only will it have the effect of reducing the income base that income tax is calculated on; it will also reduce the income base for the calculation of certain subsidies and benefits.

¶ 53 In a child support order, an amount may be requested to cover child care expenses per Section 7 (1)(a) of the Guidelines, if the expense has been "incurred as a result of the custodial parent's employment, illness, disability or education or training for employment." Since the criteria for claiming a child care expense for personal tax purposes is not the same as that outlined in Section 7, the net amount established by applying 7(3) for the pro-rata sharing in 7(2) may differ significantly depending on who pays the child care expense initially. To claim child expenses for income tax purposes, all of the following criteria found in section 63 of the ITA must apply:

(a) the amount claimed must have been paid by the taxpayer or a "supporting person" of the "eligible child." Amounts which are payable but not yet paid do not qualify. Child care expenses paid by employers, corporations, or by family members, other than a "supporting person" as defined in the ITA, would likely not qualify for the deduction. "Supporting person" is defined in subsection 63(3) of the ITA and means:

* a person, other than the taxpayer, who resided with the taxpayer at any time during the year and at any time within in 60 days after the end of the year, and
* is the parent of the "eligible child",
* the taxpayer's spouse or common-law partner, or
* any other individual who claimed the "eligible child" as an eligible dependent (formerly called equivalent to spouse or equivalent to married).

(b) the amount must be paid, as or on account of "child care expenses". For example, A and B each require child care for C, every other week. If B pays the full amount to the child care provider and A pays B 50% of the amount "on account" of those expenses, A may be able to claim a deduction for the amount paid to B, providing all the other required criteria is met.

(c) "Child care expenses" are defined in subsection 63(3) of the ITA and must be an

expense incurred in the year, in Canada (with a possible exception for those living on the Canada/US border) for child care services to enable the taxpayer or "supporting person" to:

* be employed,
* carry on a business either alone or as an active partner,
* carry on research or any similar work in respect of which a grant is received,
* attend a designated educational institution or secondary school and be enrolled in a program of at least three consecutive weeks duration that requires at least 10 hours per week or 12 hours per month on the course, and

the services must be provided by a resident of Canada (again with a possible exception for those living on the Canada/US border) but not by:

* the child's father or mother,
* a "supporting person" of the taxpayer,
* a person who is under 18 and related to the taxpayer, or
* a person who is claimed as a dependent for tax purposes by the taxpayer or "supporting person."

(d) the amount must be for child care expenses incurred for services rendered in the year. The amount paid may only be claimed in the taxation year the services were rendered.
(e) the amount must be in respect of an "eligible child" of the taxpayer. Per subsection 63 (3) of the ITA, this means:

* a child of the taxpayer or the taxpayer's spouse or common-law partner, or
* a child who is dependent on the taxpayer or the taxpayer's spouse or common-law partner and whose income does not exceed the basic personal exemption,

if, at any time during the year, the child

* was under the age of 16, or
* dependent on the taxpayer or on the taxpayer's spouse or common-law partner and had a mental or physical infirmity.

(f) the amount has not been deducted by another individual.
(g) the taxpayer is not entitled to a reimbursement or other form of assistance of the amount. If the court order says that A will reimburse B for A's proportionate share of the child care expense then the amount paid by A to B may not be claimed by B as part of B's child care expense tax deduction.
(h) the amount must generally be claimed by the taxpayer or "supporting person" with the lower "earned income". The specific exceptions to this rule include situations where the lower income earner is a student in attendance at a designated educational institution or secondary school, certified by a medical doctor as incapable of caring for children due to a mental or physical infirmity, or was in prison for at least two weeks during the year. "Earned income" as defined in subsection 63(3) of the ITA includes:

* all amounts reported as income from an office or employment, including taxable benefits and tips, and amounts that would otherwise be statutory exemptions, such as employment income earned by a treaty Indian living and working on a reserve,

* exempt income of volunteer emergency personnel,
* amounts allocated under an employees' profit sharing plan and benefits received under a stock option plan,
* disability pensions received under CPP or QPP and other qualifying provincial plans,
* earnings supplements provided under certain Government of Canada sponsored projects, as well as, financial assistance amounts under Part II of the Employment Insurance Act and other similar programs, and
* net research grants and the taxable portion of scholarships, bursaries etc.

(i) the payment must be supported with the proper form (T778) and a receipt(s) issued by the payee with the payee's valid social insurance number if the payee is an individual. This means that a person (A) who has "reimbursed" another individual (B) for child care expenses paid by B must still obtain a receipt from B before the being able to claim a tax deduction for the child care expense.
(j) The amount claimed must be the lesser of:

* 2/3 of the claimant's "earned income" for the year,
* the total of the annual child care expense paid in respect of the "eligible child (ren)" of the taxpayer, and
* the annual maximums, defined as "annual child care expense amount" in subsection 63(3) of the ITA. These currently are $7,000 for a child age 6 and under, $4,000 for a child age 7 to 16, and $10,000 for a disabled child, regardless of age.

¶ 54 In a child support situation, can the tax effect potentially flow through to the other party? It must be recognized that both parties are receiving a benefit, even though only one party may be entitled to the tax deduction. The other party receives a benefit due to the reduced amount that is used in the calculation of the pro-rata sharing per Section 7(2) of the Guidelines.

¶ 55 Is there potentially a more direct tax effect for the other party? This will depend on whether the result of a calculation under Section 7 of the Guidelines, is considered child support or a reimbursement of expenses for tax purposes. The distinction is important. In applying the Guidelines, establishing whether the result is child support or an expense reimbursement is critical in determining the amount of the tax effect, since the reimbursed portion of an expense should not be claimed in determining the tax effect to begin with, as discussed in (f) above. This means that the "reimbursement" must be determined before the tax effect may be calculated, but the tax effect will determine the amount of "reimbursement."

¶ 56 Added to this is the fact that within the concept of pro-rating, as described by the Guidelines, there is an implication of reimbursement. The whole process is often described in terms of calculating the other party's "share" of the expense(s) in question. It is curious, however, that the same confusion does not arise with the application of the table amount, although, there too an obligation to cover living expenses is translated into dollars based on respective income levels. Perhaps this is because the expenses that the table amount is meant to cover, are not specifically identified.

¶ 57 The changes made to the ITA with the advent of the Guidelines, Section 60(b) in particular (as detailed later under "Tax deductible support"), make it clear that the intention was to remove the tax deductibility of child support amounts. If the CRA considers amounts calculated under Section 7 of the Guidelines as reimbursements, due to the wording of an Order, it may create unintended tax consequences for the parties involved. Unfortunately, the basis for calculating the other party's support obligation often doesn't meet the tax criteria for a deduction or credit. The end result will often be the

denial of some, or all, of the amount to both parties. Taking child care expense as an example, the following would be a potential effect of treating the calculated result as a reimbursement instead of child support:

> A and B are separated and have one child - C. A has C from Friday evening to Monday morning every second weekend. C is with B the rest of the time. A and B both work regular 9 to 5 jobs during the week. C is in daycare during weekdays and B pays 100% of the daycare cost. The child support order provides that A will pay B the appropriate table amount plus A's "share" of child care expense. That "share" was calculated based on the tax effect the child care expense would normally have for B. A feels the additional amount of support (over and above the table amount) constitutes payment of the child care expense and wants to claim the amount as a tax deduction. If A's "share" is a reimbursement, B cannot claim a tax deduction for that portion of the daycare cost, so the amount the A's "share" was calculated on was understated by the tax and benefits breaks that B will not receive. B is not "eligible" to claim a deduction for reimbursed amounts. On the other hand, A will not be able to claim a tax deduction even though the order may imply that A is paying "on account of child care expenses", as A does not meet the rest of the tax criteria, including having C during the work week and paying the amount in order to be able to work, run a business or attend school.

¶ 58 As illustrated, making one party ineligible to claim a tax deduction or benefit does not necessarily transfer that tax deduction or benefit to the other party. Regardless of the intention of the parties, the wording of the court order may determine how CRA interprets the matter. And while wording may create confusion as to whether an amount is child support or an expense reimbursement, the fact that Section 7(3) of the Guidelines requires a determination of tax effects, only adds to the problem. If the Section 7(2) pro-ration was based on gross amounts, a calculation based on the reimbursement concept would be feasible.

Medical Expenses

¶ 59 Section 7 of the Guidelines has three separate categories where tax creditable medical expenses may come into play:

* 7(1)(b) medical and dental insurance premiums - private health care insurance premiums may be part of a taxpayer's overall medical claim, as noted above and described in Section 118.2(2)(q) of the ITA.
* 7(1)(c) health related expenses - anything in this category that falls within the tax definition of medical expense should qualify.
* 7(1)(d) primary and secondary school fees - certain components of expenses related to primary or secondary schooling for a disabled child may qualify as a tax creditable medical expense.

¶ 60 When considering medical expenses in a child support calculation, it is important that each item being claimed is only claimed in one category, so there is no duplication of expenses. However, when determining the income tax effect it is critical to look at the total qualifying medical expenses of the party because of the nature of the tax calculation. Individual amounts may not produce a credit because they are less than the income threshold (described in (c) of the tax definition below) that must be overcome before a claim is triggered. However, when they are added to the individual's other medical expenses, a tax credit may result. Also, for both Guideline and tax purposes only the amounts net of reimbursement (e.g. from insurance plans) may be claimed.

¶ 61 Under Section 118.2 of the ITA, a taxpayer may claim a tax credit for certain medical expenses. The criteria may be summarized as follows:

(a) the amounts must have been incurred in a twelve month period ending in the year, unless the taxpayer died and then the amounts must be claimed within a 24 month period that includes the date of death,
(b) the amounts must be paid, not payable,
(c) the total of the amounts claimed must be greater than 3% of the taxpayer's net income to a maximum prescribed amount; currently $1,813 federally for 2004 and ranging between $1,614 in Newfoundland and Labrador and $1,865 in Alberta. This amount is indexed federally and in most provinces and territories.
(d) unless otherwise provided for in the ITA, the payments must be made to a:

* medical practitioner,
* dentist, or
* registered nurse

who is qualified to practice under the laws of the province (or applicable foreign law, if relevant) where the expenses were incurred. This would include licensed pharmacists filling prescriptions issued by one of the above.

(e) the amounts must have been incurred for a "patient" which is defined in Section 118.2 (2) as:

* the individual,
* the individual's spouse or common-law partner, or
* the individual's dependant per Section 118(6) as anyone who is dependent on the taxpayer for support at any time in the year and is:

(i) the child or grandchild of the individual or the individual's spouse or common-law partner, or
(ii) the parent, grandparent, brother, sister, uncle, aunt, niece or nephew of the individual or the individual's spouse or common-law partner, if resident in Canada at any time in the year.

This means that for purposes of the medical claim the dependant does not necessarily have to reside with the taxpayer, only be dependent on the taxpayer for support at some time during the year.

(f) where medical expenses are incurred on behalf of a dependant (other than a spouse or common-law partner) and the dependant has income in excess of the basic personal amount, the total medical expense claim, net of the income threshold, must be reduced. The allowable claim is 68% of the calculated credit, after applying the lowest tax bracket percentage.
(g) the list of acceptable expenses is extensive, including (but not limited to):

* most prescription medications,
* private health care premiums,
* artificial aids such as limbs, wheelchairs, braces, eyes, hearing aids, etc.,
* prescribed diagnostic procedures,
* ambulance charges to or from a hospital,

* reasonable travelling expenses using commercial or private conveyances, if incurred under certain conditions,
* cost, training, and care of an animal to assist a patient who is blind, profoundly deaf, or has a prolonged impairment that markedly restricts the use of the patient's arms or legs,
* amounts for the care and training of a patient at a school institution, or other appropriate place, with the special equipment, facilities or personnel the patient needs, due to the patient's mental or physical handicap. The need must be certified by a qualified person.

When in doubt, the actually wording in the ITA in 118.2(2) and information bulletin IT-519R2 (Consolidated) should be checked.

(h) expenses, such as attendant care expenses, cannot be claimed again, if they have been claimed as part of another tax expense.
(i) the portion of an expense that has, or will be, reimbursed cannot be claimed. This again creates a circular calculation problem if amounts determined by Section 7 of the Guidelines are considered to be "reimbursements."

Donation Credit Related to Religious Schools

¶ 62 While qualifying donations, in general, may be included in the calculation of a taxpayer's tax liability and may potentially affect all the areas of a support calculation that are impacted by tax considerations, there is one specific type of donation that may have a direct impact on the calculation of child support under Section 7(1)(d) of the Guidelines. This is the donation credit related to fees paid to

* religious schools, or
* secular schools, with identifiable costs for a religious component of their curriculum

provided the school is a registered Canadian charitable organization as defined in the ITA. In these situations, there may be a donation tax credit that directly relates to the amount of primary or secondary school fees being claimed for child support purposes. While the ability to obtain a donation credit for fees paid for religious study is not specifically addressed in the ITA, it has been established by case law and a number of income tax bulletins and circulars issued by CRA. These publications imply that religious studies are considered to be charitable in nature; however, in Canada (Minister of National Revenue - M.N.R.) v. McBurney, Federal Court of Appeal, September 27, [1985] F.C.J. No. 821, 85 D.T.C. 5433, in particular, the Court confirms the Minister's policy, set out in Information Circular 75-23, for calculating the "donation" portion of amounts paid to schools with both religious and academic components in their curriculum. Unless the costs of providing the religious component of the curriculum are segregated in the school's records, only the amount paid in excess of the school's total operating cost per child will be allowed.

¶ 63 Once the fact is established that there is an amount that qualifies as a donation credit, it is calculated in the same manner as any other donation credit. The first $200 of the total, of all the individual's donations, is credited at the lowest rate of personal tax; currently 16% federally and varying from a low of 4% for Nunavut to a high of 11% for Saskatchewan for 2004. The remainder would be credited at the highest personal tax rate; currently 29% federally and varying from 11.16% for Ontario to 18.02% for Newfoundland and Labrador. Since Alberta has a "flat tax" system, it uses a deemed rate of 12.75% for this credit only.

Tuition and Education Credit

¶ 64 The rules for the tuition and education tax credit must potentially be considered when either party to a support application is a student, as this credit will affect the individual's tax situation and any consideration of disposable income. The rules are also important in the situation where child support is being sought under Section 7(1)(e) of the Guidelines. First and foremost, it is important to realize that the tax credit belongs to the student, not to the person who may have paid for the education. Unused amounts may be carried forward by the student and not necessarily transferred to any other party. Where a transfer is available, the amount is limited, as discussed below, and the student has the choice as to who will receive the tax credit.

¶ 65 For personal tax purposes, an amount may be claimed for qualifying post-secondary tuition fees. To claim this credit the following must apply:

(a) the student must be enrolled in an educational institution in Canada during the year that is

* a university, college, or other educational institution providing courses at a post-secondary level, or
* certified by the Minister of Human Resources Development to be an educational institution providing courses that will furnish a person with skills, or improve that person's skills, in an occupation (for example, a trade school).

(b) in the case of a university, college etc. the fees must be in respect of courses at a post-secondary level. Where such institutions also provide high-school upgrading or equivalency courses, those courses generally do not qualify.
(c) in the case of a trade school, the student must be 16 years of age or older and the course (s) must provide or improve the student's skills in an occupation.
(d) the fees paid must be paid in respect of the calendar year they are being claimed.
(e) the fees must be in excess of $100 per educational institution.
(f) the fees cannot be claimed if they are reimbursed by the student's employer, unless the reimbursement is included in computing the student's income.
(g) the fees claimed cannot include such items as:

* student association fees,
* property to be acquired, such as books and supplies.

(h) in addition to the tuition credit, an education credit may also be available where the student is enrolled in a qualifying educational program at a designated educational institution.
(i) the education credit is calculated as the number of months of qualifying full or part-time attendance multiplied by the current rate. For 2004, the full-time rate federally is $400 per month and the part-time rate is $120 per month. The related provincial and territorial amounts vary from a low of $200 and $60 for full and part-time, respectively, to a high of $445 and $133.
(j) the unused portion of the current year's tuition and education tax credit may be carried forward by the student for future use, or transferred, at the discretion of the student, to the student's spouse, common-law partner, parent or grandparent, depending on the circumstances. A parent or grandparent is defined by default in the ITA through the definition of "child" in Section 252(1) and by the relationships described in Section 252 (2). They include the parent or grandparent of the student's spouse or common-law

partner.

(k) the student must use all of the credit possible to eliminate tax before any amount may be transferred to the student's spouse, common-law partner, parent, or grandparent.

(l) if the student's spouse claims the student for purposes of the spousal credit or claims any spousal transfers from the student, transfer of the unused tuition and education tax credit is not available to a parent or grandparent of the student.

(m) amounts that have been carried forward from a previous year may not be transferred.

(n) the amount that may be transferred is the lesser of:

* the unused tuition and education tax credit for the current year, and
* $5,000, federally and in all provinces and territories except Ontario, where the maximum is indexed to $5,562 for 2004.

¶ 66 Applying the effect of this credit in the calculation of the net Section 7 amount effectively reduces the obligation of the other parent to contribute to the child's education through the child support calculation. If the party who paid the education amount initially did not receive any benefit from the tuition and education tax credit, it is debatable whether the other's obligation should be artificially reduced.

Support - Defined

¶ 67 The rules covering "support" receipts and payments are found in Sections 56 and 60 of the ITA. Section 56.1(4) specifically defines support as an amount with all of the following characteristics:

(a) it is payable or receivable as an allowance on a periodic basis. "Periodic" means a series of payments, although the frequency may vary.

(b) it is for the maintenance of the recipient (spousal support), children of the recipient (child support), or both.

(c) the recipient has discretion as to the use of the amount. Certain third party payment exceptions are discussed below, and

(d) either

* the recipient is the spouse or common-law partner or former spouse or common-law partner of the payer, and
* the recipient and payer are living separate and apart because of the breakdown of their marriage or common-law partnership, and
* the amount is receivable under an order of a competent tribunal or written agreement,

(e) or

* the payer is the natural parent of the child of the recipient, and
* the amount is receivable under an order made by a competent tribunal in accordance with the laws of a province.

¶ 68 A "child support amount" is defined under the same section and, simply put, means any "support amount" (as defined above) that is not identified as being solely for the support of the recipient.

¶ 69 Under these definitions, payments made directly to the children will not qualify as "support" amounts, because they are not being paid to the spouse. In addition, lump sum payments that can not be traced back to the "periodic" support amount will not be treated as "support" amounts. Case law and

CRA policy has indicated that lump sum payments that may be traced directly to the "periodic" amounts in arrears may be accorded "support" treatment under the ITA if they can be shown as merely a timing difference between when the support was owing and when it was paid. For example, A has been ordered to pay B $500 per month in spousal support. A has been delinquent in making the payments and has outstanding arrears of $9,000. A pays B $5,000, reducing the arrears still owing to $4,000. This lump sum payment equates to ten periodic payments and does not change or extinguish A's obligation. As such, the $5,000 payment should qualify as a "support" amount and be taxable to B and deductible to A.

¶ 70 On the other hand, if the amount paid releases the payer from arrears, or extinguishes a future obligation, or both, the payment will not qualify as "support" because it is not being paid for the maintenance and support of the recipient and/or child(ren); it is being paid to release the payer from an obligation.

Specific Purpose and Third Party Payments

¶ 71 Generally, specific purpose and third party payments do not meet the "discretion" criteria discussed in (c) of the support definition above. Sections 56.1(2) and 60.1(2) of the ITA operate to deem such payments as being payable to and receivable by the recipient, and deem the recipient to have discretion as to the use of the amounts where the order or written agreement provides that these ITA sections will apply. While it is preferable that the order or agreement specifically refers to these sections in order to ensure the desired tax treatment, the tax courts have extended this treatment in cases where the wording of the order or agreement clearly stated that the parties understood the payments would be taxable to the recipient and deductible to the payer. This means that, in a properly worded order, payments made on behalf of the recipient for a mortgage or utilities, would be accorded "support" treatment for tax purposes as if they had been paid directly to the recipient and could be used at his or her discretion. Having said this however, Sections 56.1(2) and 60.1(2) specifically exclude the following:

(a) expenditures on a "self-contained domestic establishment" in which the payer resides,
(b) expenditures on tangible property unless it is on account of the following deductible expenses:

* medical or educational expenses,
* expenses incurred for the maintenance of the dwelling where the recipient resides. This could include property taxes, utilities etc.,
* expenditures for the purchase or improvement of the dwelling in which the recipient resides. The maximum deduction is 20% of the original principal that was financed in respect of the expenditures.

Reimbursed or Repaid Support Amounts

¶ 72 In situations where the "support" amount is reimbursed or repaid under a court order, Section 56.1(2) of the ITA, for reimbursements, and Section 60.1(2), for repayments, effectively ensure that the original treatment of the receipt or payment is reversed. If the original support amount was included in income then any repayment may be deducted. If the original support amount was deducted from income then any reimbursement must be included in income.

Taxable Support

¶ 73 The amount of support that must be included in income is determined in Section 56(1) of the

ITA by the following formula:

A - (B + C)

where:

A is

* the total of all support amounts (as defined above) received after 1996 and before the end of the year, by the taxpayer from a particular person;
* the taxpayer must have been living separate and apart from that person at the time the amount was received.

B is

* the total of all child support amounts that became receivable, by the taxpayer from that person;
* the child support amounts must be receivable under an agreement or order on or after its "commencement day" (as defined below) and before the end of the year; and
* the period of support must have begun on or after its "commencement day."

C is

* the total of all support amounts received by the taxpayer from that person after 1996 and previously included in the taxpayer's income.

Tax Deductible Support

¶ 74 The corresponding deduction is found in Section 60(b) of the ITA and is calculated by the following formula:

A - (B + C)

where:

A is

* the total of all support amounts (as defined above) paid after 1996 and before the end of the year, by the taxpayer to a particular person;
* the taxpayer must have been living separate and apart from that person at the time the amount was paid.

B is

* the total of all child support amounts that became payable, by the taxpayer to that person;
* the child support amounts must be payable under an agreement or order on or after its "commencement day" (as defined below) and before the end of the year; and
* the period of support must have begun on or after its "commencement day."

C is

* the total of all support amounts paid by the taxpayer to that person after 1996 and previously deductible in computing the taxpayer's income.

¶ 75 Effectively, these formulas take the total amount of "support" received or paid and reduce it by the child support receivable or payable. As a result, there will be no income inclusion or tax deduction if there are child support arrears. Payments after 1996 are specifically identified because that is when the Guidelines came in and the tax laws were changed with respect to the treatment of child support. Pre-May 1997 orders that do not have a "commencement day", as defined below, will still receive the tax inclusion/deductible treatment for the child support component. Part C of each formula ensures that amounts previously reported are not included twice.

¶ 76 The "commencement day" of an order or agreement is defined by Section 56.1(4) of the ITA and means:

(a) the day the order or agreement was made if it is made after April 1997.
(b) if the order or agreement was made before May 1997 then it is the earliest day after April 1997 (if any) that is:

* specified as the "commencement day" in a joint election filed with the Minister by the payer and recipient,
* where the order or agreement is varied after April 1997 to change the child support amounts payable to the recipient, the first day the varied payment is required to be made. This does not include changes due to a reasonable formula or index that was included in the original order or agreement, such as applying a cost-of-living index to the periodic amount,
* where a subsequent order or agreement is made after April 1997 which changes the total child support amounts payable to the recipient by the payer, the day of the first such subsequent order or agreement, and
* the day specified in the order or agreement, or any variation thereof, as the commencement day of the order or agreement for purposes of the ITA.

¶ 77 Triggering a "commencement day" will remove the tax inclusion and deductibility of a child support order made prior to May 1, 1997.

Payments Made Prior to the Date of the Order or Agreement

¶ 78 Where payments have been made prior to the date of an order or agreement, Section 56.1(3), for payments received, and Section 60.1(3), for payments made, allow the order or agreement to deem the receipts/payments to have been received or paid under the order or agreement for ITA purposes. Such treatment may apply to payments made in the year or preceding taxation year. Further, to accommodate the definition of "commencement day", the order or agreement is deemed to have been made on the day which the first amount was received or paid, except where the order or agreement is made after April 1997 and it varies a child support amount. In such cases, these sections deem the "commencement day" to be the day the first payment of the varied amount is or was required to be made.

Conclusion

¶ 79 Clients have become more sophisticated. Through readily available, low-cost resources, such as

the internet, they have access to a wealth of information and misinformation. However, they do have a vested interest in getting the right answers. And while they may not understand the intricacies of the issues there is a greater awareness that the issues exist. Misunderstanding those issues may lead to expectation gaps. The more you are able to help your clients avoid unintended tax results when dealing with their support issues, the more you may have shrunk the expectation gap and the more value you will have provided.

Appendix A: Summary of Tax Credits

	Federal	AB	BC	MB	NB	NL
Basic Personal Amount	8,012	14,337	8,523	7,634	7,756	7,410
AED	6,803	14,337	7,298	6,482	6,586	6,055
Total	14,815	28,674	15,821	14,116	14,342	13,465

	NS	NT	NU	ON	PE	SK	YK
Basic Personal Amount	7,231	11,415	10,495	8,044	7,412	8,264	8,012
AED	6,140	11,415	10,495	6,830	6,294	8,264	6,803
Total	13,371	22,830	20,990	14,874	13,706	16,528	14,815

** Quebec has special rules that are not comparable to the other provinces and territories, and therefore have not been included in the above summary.

Bibliography

Federal Child Support Guidelines (as amended, effective August 1, 2001 (SOR/01-292)

Canadian Income Tax Act with Regulations (77th Edition 2004: R.S.C. 1985 (5th supp.) c. 1, as amended, Consolidated to February 20, 2004). Toronto: CCH Canadian Limited, 2004.

MALLIN, MICHAEL G. Preparing Your Income Tax Returns: 2004 Edition for 2003 Returns. Toronto: CCH Canadian Limited, 2004.

Websites:

www.ccra-adrc.gc.ca
www.canlii.org

www.knotia.ca
www.westlawecarswell.com

Susan Roberts - Biography

Susan Roberts is currently the president of ChildView Inc., a company that specializes in the development, manufacturing and distribution of software that focuses on the calculation and analysis of child and spousal support in Canada.

Susan obtained her Bachelor of Commerce degree (with distinction) from the University of Alberta in 1988 and joined Gardiner Karbani Audy + Partners, Chartered Accountants, upon graduation. In 1996 she worked with Barry Gardiner, FCA, on an analytical project with respect to the (then proposed) Federal Child Support Guidelines (Guidelines) and then became involved with the development of software focusing on the Guidelines. As ChildView Inc. developed she assumed the role of general manager in 1998 and president in 2001, adding the company's federal and provincial income tax research to her agenda in 1999. In 2000 she did a research project for the Department of Justice Child Support Team in Ottawa on alternative models for the standards of living test. Since 1997 she has done numerous workshops across Canada for justice departments, family law practitioners, and others on the intricacies of calculations within the Guidelines, and the interrelationship between the Guidelines and the Income Tax Act.

Syrtash Collection of Family Law Articles
SFLRP/2004-010

Update on Child Support

By John T. Syrtash,
Beard Winter LLP (Toronto)

July 21, 2004
[Posted on Quicklaw July 23, 2004]

INDEX

Introduction

¶ 1 This paper is not intended to be an exhaustive review. It deals with the more disputed issues on child support. We attempt to highlight those areas most frequently encountered by practitioners in the courts, but have expressly refrained from dealing with shared custody or "section 9 Guideline issues" which have been assigned to another writer in this conference. Similarly, the topic of section 7 under the Guidelines or "extraordinary expenses" I cover in another paper, also at this conference. Finally, although most of the research is dependent upon my own Syrtash Family Law NetLetter and Digests found in source "SFLN" on Quicklaw by LexisNexis Canada, I acknowledge both James G. McLeod and Alfred A. Mamo's Annual Review of Family Law (Thompson Carswell, 2003) and Professor Julian Payne's Family Law Collection (source "PDFL" on Quicklaw by LexisNexis Canada) for their guidance. I also thank my Toronto assistant, Vanessa Mackie, currently an Ontario Bar Admissions Candidate, who has been diligently and faithfully assisting in summarizing my NetLetter cases weekly over the past year.

¶ 2 Please note: Ultimately every principle recited in this paper is inextricably tied to the very specific facts of the families in each case, an apparently banal but important warning. It is all too tempting to remove from each case some facile idea and attempt to apply it to a completely foreign situation without carefully reviewing those specific facts. Doing so with child support cases would be a mistake.

1. Parties - Identifying the players:

1.1 When is a child still a "child" for child support purposes?

¶ 3 Under the Divorce Act, s. 2(1), a person who is under the age of majority is still a child for the purposes of support if they are under "parental charge" or, over the age of majority under parental charge and unable to withdraw from parental control or obtain the necessities of life as a result of health, education or other cause. The provincial statutes are somewhat different. For example, Ontario s. 31(1) of the Family Law Act allows for child support if the individual is (a) under the age 18 or (b) over the age of 18 and in full time attendance in school, to the extent the parent is capable of doing so. Other provincial statutes take similar to the Ontario Family Law Act or the Divorce Act, with the Divorce Act being the more liberal statute. Generally speaking, irrespective of whether a case has been cited under a provincial statute or the Divorce Act, if an adult child is in school up to the end of his first post-secondary degree, the courts continue to deem such a child to be "a child of the marriage" for child support purposes even where the payer is of modest means or the child is residing away from the recipient mother's home to attend school: McGowan v. McGowan, [2002] O.J. No. 1813. Similarly in McConnell v. McConnell, the Saskatchewan Court of Queen's Bench found that adult children attending university were considered to be children of the marriage for child support purposes despite that they were over the age of majority and that they were in receipt of student loans: [2002] S.J. No. 117. In Richardson v. Richardson, [2002] O.J. No. 2463 (Ont. S.J.), the father was ordered to pay child support based on his annual income of $210,000.00 for the support of his daughter who was in attendance at university despite the fact that she did not take a full time course load. A B.C. Supreme Court found that a child pursuing an education in the United States, even after three years of post-secondary education in Canada, was still a "child of the marriage" and entitled to child support, even though his relationship between father and son was strained: Smith v. Smith, [2002] B.C.J. No. 1413. Even if a party's ability to provide support for post-secondary costs are limited where the payer must also support a second family, there may still be an obligation to provide if the payer's resources are greater than the other party (Kocko v. Kocko, [2004] O.J. No. 50 (C.J., p.41). It even appears that obtaining a bachelor's degree may not necessarily result in a finding of self-sufficiency, depending on the parties' circumstances. In a recent Nova Scotia decision, a 22 year old daughter, enrolled in her fifth year of university, was still considered a "child of the marriage" for child support purposes and would be so considered should she be accepted into the B.Ed program or post-graduate study in some related field, even where parents were of modest means (husband's income was deemed to be $71,000.00 with two other children). The court would not permit payments to continue, however, if the daughter had enrolled in some field unrelated to a B.Ed. program, in which case she would be deemed to be a "hanger": Wolfe v. Wolfe, [2002] N.S.J. No. 152, 2002 NSSF 18. By "hanger" the Court in Wolfe (at para. 18) adopted as follows the reasoning in Yaschuk v. Logan, [1992] N.S.J. No. 99, 110 N.S.R. (2d) 278, the then Nova Scotia Supreme Court - Appeal Division considered claims of support for children over 16 years of age and attending university. At p. 292, the Court stated:

> We were referred to a number of authorities dealing with 'a child of the marriage'. In each case involving a claim for support of a child over 16 who is other than ill or disabled, it is necessary to carefully examine the 'other cause' advanced as a reason for dependency. The court must be careful not to be carried away with claims on behalf of a would-be 'hanger on' in perpetuity. Most of such cases involve the perennial student,

> but it must be remembered that an education that will fit a child for a career can be properly regarded as a necessity. This is particularly so in a family, such as this, where the parents have in the upbringing of the children established an expectation that higher education would be provided. The means and circumstances of the parent must be carefully considered. The court must also consider the child's aptitude and general fitness to pursue higher education and to what extent. The judgment which must be exercised in each case is particularly within the province of the trial judge.

¶ 4 In keeping with the idea that the student must have clear career or educational objectives, another father was not required to pay child support for his son during several "transitional periods" during which he was not attending school, as the son had no educational objectives during those periods: Nikita v. Nikita, [2002] O.J. No. 1893. (C.J.). In one case, a father was not obliged to pay any child support for his daughter as she failed to comply fully with an order requiring that she provide her father with confirmation of her enrollment in an academic program, M.B. v. N.S., [2002] Q.J. No. 4602 (Que. S.C.). In a different approach, the B.C. Court of Appeal in Brander v. Brander, [2002] B.C.J. No. 1398, 2002 BCCA 394, refused to grant an appeal of a decision that a 20 year old son who was attending a post-secondary institution was not a child of the marriage, but it ensured that the father received sufficient information about his son's expenses and educational progress as a condition in the form of a disclosure order.

¶ 5 On the issue of "withdrawal" from parental control, a party will not be relieved of obligation to support adult children through their post-secondary education if the court is not convinced that a child unilaterally terminated the parent-child relationship: Martin v. Martin, [2003] M.J. No. 375 (Q.B.). However, the adult child who is not in school and living with a boyfriend is usually not considered to be a child of the marriage (see Bartkowski v. Bartkowski, [2003] B.C.J. No. 720, 2003 BCSC 490, 37 RFL (5th) 242 SC, [2003] Carswell B.C. 712; Andrias v. Andrias, 38 RFL 5th) 246; Ritchie v. Ritchie, [2003] Carswell Sask 338, and Sigurdson v. Sigurdson, [2003] M.J. No. 143, 2003 MBCA 63 (C.A.)). Similarly a mother was not required to pay child support where the child had unilaterally terminated his relationship with her, failed school and was 19 years old: Pepin v. Jung, [2003] O.J. No. 1779 (S.C.J.).

¶ 6 In B.C., if offspring have already begun working fulltime they may have cut themselves from the opportunity of obtaining assistance for post-secondary education. In a recent decision, two 19 year old children who already had full-time jobs were held not to be "children of the marriage" for the purposes of child support, despite the fact that they had both indicated an interest in pursuing post-secondary education: C.G. v. S.G., [2003] B.C.J. No. 1489. The case could be distinguished on its facts given that the children had available to them an educational trust fund for post-secondary purposes and the father's criminal conviction and health restrictions reduced his earning capacity severely. Nonetheless, the Court found that the children were "capable" of withdrawing from their parents' charge and it was partly on this basis that the claim for any child support was denied so that they could attend school. However, given the liberal and generous wording of the Divorce Act, a parent could surprisingly still be found liable for child support even though the child is no longer pursuing post-secondary education, but this is still dependant on whether the child has withdrawn from parental control. Therefore in Herriot v. Herriot, [2003] B.C.J. No. 1274, another B.C. court found that a child was entitled to child support for the period of time in question after attaining the age of majority, even though he failed his university courses for that time and was required to withdraw. The reasoning of the Court is that the child had the "best of intentions" to succeed, even though his educational goals were beyond his reach: "...he and others genuinely believed it was possible for him to succeed."(para 48.) To extend the principle of support even further, an Albertan child who is over the age of majority was still considered a child of the marriage, despite the fact that he was not attending school, because the mother was still looking after him arising from a substance abuse problem (alcoholism and drugs) but only until the time the child no longer continued to live with the mother and abandoned his attempt to be under her parental control for

his problem. It was only at that stage that he was no longer a child of the marriage for child support purposes. Until that time, the other parent was obligated to pay child support and the dependent offspring was considered a child of the marriage: A.E.L. v. J.D.L., [2002] A.J. No. 441. Similarly, in a recent decision of Madame Justice Hoy of the Ontario Superior Court of Justice, an adult child with emotional problems was ruled to be entitled to ongoing child support while engaged in part-time work at a horse ranch while attending her school part-time. The adult child boarded at a horse ranch, and not even at the recipient spouse's home, which was in her best interest and those of a younger sibling. The mother was entitled to the applicable table payable amount of support under the Guidelines. She was deemed to be a child of the marriage in the meaning of the Divorce Act because of her disability, even though she was only attending school part time: Dodd v. Dodd, [2003] O.J. No. 5192. To summarize, the Courts appear to be extending the concept of dependency of adult children quite aggressively unless, subject to the means of the parties, including that of the children.

1.2 Non-Biological "Parents" or Who's my Daddy?

¶ 7 Since the Supreme Court decision in Chartier v. Chartier, [1999] 1 S.C.R. 242 (S.C.C.), it has become well-established law that a person cannot unilaterally withdraw from a relationship with a child in which he or she stands in the place of a parent. Such cases are complex in which the child's wishes are seriously considered among one of many factors. Most of the recent cases in which the prospective payer has been involved in the daily lives of his spouse's children or common law spouse's children have led to a finding that a person had a "settled intention" of taking the place of a parent irrespective of whether or not there was an existing biological parent in the picture or whether or not the person unilaterally withdrew from the family. However, in the case of Carson v. Carson, [2003] S.J. No. 574 (Q.B.), the Court recently ruled that where the natural father of two children was in regular contact with them and where that natural parent could meet the children's present needs entirely from his own resources, it would be inappropriate on an interim basis to compel a non-biological psychological "parent" to pay any child support, even though he may be a "second father" to the children. Similarly in McKeith v. Goodenough, p.20, [2003] A.J. No. 1122, the Alberta Court of Queen's Bench dismissed a claim for child support against the step parent where it found that there was no evidence or submission that supplementary financial support was necessary in a situation where the biological father was providing sufficient ongoing financial support for the child.

¶ 8 However, in Peters v. Evinson, [2003] B.C.J. No. 948, Edwards J. of a B.C. court refused to reduce the child support payable by a father or step father, who stood in loco parentis to two of the mother's three children despite the fact that the biological father of one of the children paid $200.00 per month in support. Although the Court ruled that it had the discretion to reduce the amount it refused to exercise it in the father's favour without explaining why. Similarly in Hamilton v. Hamilton, [2002] N.S.J. No. 172, the Nova Scotia Supreme Court ordered the step father to pay $100.00 per month to support his wife's children from a previous relationship, despite the fact that their own father was already contributing $675.00 per month for their support. In what appears to be the most recent appellate ruling on the subject the Manitoba Court of Appeal in Monkman v. Bealieu, [2003] M.J. No. 24, restated the principles in Chartier confirmed that it would not serve the best interests of the child if a person who assumed a parental role could unilaterally terminate an in loco parentis relationship. It confirmed that there would be no distinction in the application of the in loco parentis test whether the parties were married or unmarried. The crucial element was the relationship between the child and the adult, not the relationship between the adults. In determining the amount of support that a child was entitled to receive the stepparent, the Court of Appeal provided a new guiding principle, at least in Manitoba: the amount of support a child was entitled to receive from a stepparent should not be reduced by the amount that the existing biological non-custodial parent should be paying if there was no prospect of income from the biological parent. In Monkman, the biological father was incarcerated and there was no chance of his being able to provide any support. Presumably, if there was such an income producing parent or even a

parent with the ability to pay, a stepparent could receive such a reduction. One has to wonder if this case in Manitoba is a definitive statement for that Province, such that all future courts will be obliged to deduct the amounts that biological parents are capable of providing from their incomes when a stepparent is being asked to provide from his resources, even if such natural parents are not actually paying anything.

¶ 9 There have been recent special exceptions to finding "settled intention" where stepparents have been able to avoid being so found for child support purposes. In L.S. v. C.S., [2002] O.J. No. 1890, a person was required to make child support payments for only two of the three Ontario children who were not biologically his but with whom he had been residing. Since he did treat two of these children as his own the Court ruled that he had formed the requisite "settled intention" to parent them during the course of his relationship with their mother. However, he was not required to pay child support for the third child. In order to have a settled intention between a child as one's own a person must have made a conscious choice to do so. In this case the mother concealed the facts of the third child's parentage. DNA testing disclosed it was not his child, such that the person could not have made a conscious choice as to whether to treat his partner's child as his own or not. In Sweezey v Lefebre, [2002] O.J. No. 1379 (S.C.J.), a mother's partner was not found to be in loco parentis to a child due to the short period of cohabitation and the lack of emotional bond, such that it is still possible, on the evidence, to dispute the allegation of "settled intention" if the relationship is a brief one.

¶ 10 Much therefore depends in determining whether in loco parentis applies on the facts. There is always an investigation about the circumstances pertaining to the individual relationship of the child and the parents and the individual involved. Subject to a brief relationship or situations of fraud it appears that the courts will be more tempted to impose child support obligations depending upon whether or not a biological parent is already supporting the children or supporting them sufficiently or (in Manitoba) "capable of doing so". If the children have great financial need or if the custodial parent is suffering from financial hardship it appears that the courts are finding it more tempting to uncover more legal entanglements with the children, even if it means imposing financial obligations where the natural parent is already paying. The decisions across the county are contradictory on the issue of "double recovery," although the Manitoba Court of Appeal may have given the bar more certainty, at least in situations where the biological parent is earning a Guideline income or should be doing so.

¶ 11 From the vantage point of the biological parent who is the non-custodial parent, the Ontario Court of Appeal will not permit him to reduce his child support by relying on the ability to pay of an estranged stepparent under section 5 of the Ontario Child Support Guidelines. The Ontario Court of Appeal will not permit a biological parent to reduce any amounts from his child support obligations on the grounds that a stepparent was involved with his children under section 5. Only the recipient of support has standing to bring such an application and not the other payer of such support: Wright v. Zaver, [2002] O.J. No. 1098, 59 O.R. (3rd) 26 (C.A.). (The court made this decision under the Ontario Support Guidelines but the wording is identical to the Federal Child Support Guidelines).

2. Determination of Income under the Child Support Guidelines

2.1 Basic Obligation

¶ 12 Pursuant to s. 15.1(3) of the Divorce Act and s. 3 of the Federal Child Support Guidelines and Provincial Guidelines the presumptive amount set out in the applicable table depends upon and what is presumed to be based upon the payer's income in accordance with the tables for the Province where the payer lives or (if outside of Canada or if unknown) the Province where the recipient parent resides. S. 3 (b)(v) of the Guidelines.

¶ 13 The payer is obliged to pay to each recipient the same amount no matter to how many custodial parents he must pay. For instance, if he had three ex-partners he cannot pay an amount "pro rata" to each such partner using the amount under the tables for all of the children together. (Assuming that all such children are all under the age of majority): Meuser v. Meuser, [1998] B.C.J. No. 2808, 43 R.F.L. (4th) 140 (C.A.) paragraph 17, 18; Sinclair v. Sinclair, [2001] B.C.J. No. 1000; 2001 BCSC 716.

¶ 14 Without question the determination of income then becomes one of the most vexing issue, particularly for self employed payers. Under Section 16-20 of the Guidelines the Court primarily is to look at line 150 of a parent's tax return for the previous year, subject to several qualifications.

2.2 Timing of Determination of Income

¶ 15 When completing or reviewing a family law financial statement or making arguments the advocate is always confronted with the same question: at what point in time does the Court begin to evaluate a parent's income under the Guideline legislation, especially for interim motions that comprise the bulk of the hearings in our system.

¶ 16 Madam Justice Allen of Manitoba appears to have best summarized the current spirit of many courts when she determined that the fairest method of determining income for support purposes on an interim application was to determine what the father will likely receive that year based on his "year-to-date earnings", especially if they appear to reflect earnings from the previous year in accordance with the tax return for that year: Spiring v. Spiring, [2002] M.J. No. 424, 2002 MBQB 274:

> I am unaware of cases in Manitoba which subtract national sums from a loco parentis parent's obligation on the basis that a biological payor has a theoretical ability to provide support in a certain sum.

¶ 17 See also decisions such as K.C. v. S.B., [2003] O.J. No. 1124 (S.C.J.) (at para 25). The courts, as in K.C. v. S.B. often estimate a payer's yearly income for the entire current year based on a year-to-date performance or based on the current pay stubs rather than the payer's tax return for the previous calendar year. This method may appear to contradict the very wording of Sections 15 and 16 of the Guidelines which specifically mandate that the spouse's annual income shall be determined using the sources of income set out under the heading "total income" in the T1 general form issued, subject only to adjustments in accordance with Schedule III and subject to other special conditions dealing with irregular patterns of income and other special rules concerning shareholders, imputation of income issues, Schedule III exemptions including deductions such as employment expenses, child support, spousal support and other special expenses. Nonetheless the court's first mandate is to apply a payer's total income in his previous year's tax return, subject to these special exemptions, exceptions and adjustments are narrowly defined. The prevailing practice appears to ignore such wording by ignoring the payer's previous tax return and by estimating a parties "current" income at the very time the payer is earning it rather than applying a historical figure, even though that figure is far more certain and legislatively mandated. At best, the previous return is used as a figure for historical comparison which is arguably not how the legislation is worded. In fairness, the courts appear to be relying on the general wording of section 2(3) of the Guidelines. "Where for the purposes of these Guidelines any amount is determined on the basis of specific information, the most current information must be used." However, if many Courts are inherently relying on this section, one has to ask if this general principle can override the specific wording of sections 15 and 16 that directs the court to apply the figure on line 150. As a tool of unravelling any statutory ambiguity between sections 2(3) and 15, 16, should the court not apply the doctrine of "expressio unis est exclusio alterius?" In Howarth v. Howarth, [2003] O.J. No. 4930 (S.C.J.), Mr. Justice MacKenzie refused to except evidence as to what the payer's anticipated income would be in the current calendar year on an interim motion for support and relied entirely upon the payer's income as

reported in his tax return filed for the previous calendar year (at paragraph 14). The court did not appear to accept that the payer's future or current income was an acceptable standard given the express wording of Section 15 and 16 of the Guidelines.

2.3 Averaging

¶ 18 Under section 17 of the Guidelines it is not uncommon for counsel and the courts often to average fluctuating incomes over the past three years. This practical way to deal with the problem has prompted the British Columbia Court of Appeal to reverse a lower court for not having arithmetically averaged three years of a payer's income and having to rely entirely upon his previous years income, which increased his liability for child support (Cornelissen v. Cornelissen, [2003] B.C.J. No. 2714 at page 52). The court noted that the payer's last year income was $944,000.00 whereas the average over three years was only $523,000.00. However, Matheson J. in Carriere v. Carriere, [2003] S.J. No. 568, at page 56 found that averaging a father's income for over the last three years was not appropriate as his income had increased over same time period. Notwithstanding the temptation to average income with wild fluctuations where income has steadily increased or decreased over the past three years, averaging was also found to be inappropriate in Snodgrass v. Snodgrass, [2004] N.B.J. No. 27, 2004 NBQB 45 paragraph 29. The court found that fluctuation averaging would be unfair and unreasonable in Mr. Snodgrass' particular circumstances such that in instances where party's income has fluctuated over several years, the court may deem it more fair and reasonable to determine income in the most recent year, adjustable according to the party's next income tax filing. The recipient would then have "options" if the payer's income was significantly higher (see paragraph 32 of Snodgrass).

¶ 19 The Alberta Court of Queen's Bench has also ruled that it is appropriate where payer's income fluctuates to consider not only the scope of the fluctuation but also the circumstances which give rise to fluctuation. Financing costs (debt repayment obligations) resulting from a large cash payment to the wife in the separation agreement affected the payer's net income for child support purposes in the case of Stafford v. Stafford, [2003] A.J. No. 351. Accordingly, the fluctuation in the payer's income was assessed in light of these financing costs and his guideline income was reduced accordingly.

2.4 Imputing Income (Section 19)

¶ 20 Under Section 19 of the Guidelines the court has a broad discretion to impute such an amount to a spouse as it considers appropriate in the circumstances and the courts have used their discretion without hesitation. In Moffat v. Moffat, [2003] O.J. No. 3912 (S.C.J.), a father was deemed by the court to have become intentionally under-unemployed so as to thwart his child support obligations under the Guidelines when he elected to retire early from his profession. In Tynan v. Moses, [2002] B.C.J. No. 197 (S.C.), a father who started an unprofitable business after being terminated from his high-paying employment failed to show that the change in his income was significant and long lasting. The court declined to vary his income available for child support purposes and imputed his income at the higher rate. The income may also be imputed, even if the evidence available is minimal, where an individual fails to provide financial information where under a legal obligation to do so: C.A.C. v. G.P., [2004] S.J. No. 164 (Q.B.). Throughout the entire literature the failure of a party to provide sufficient financial information augments his child support obligations, irrespective of under which section of the Divorce Act or Child Support Guidelines it may be decided.

¶ 21 In a decision important for farmers the court has found that while non-cash expenses, such as capital cost allowance expenditures or inventory adjustments by a farming operation are not automatically classified to be included as "income" for child support purposes under the Guidelines, these types of "non-cash expenses" can be taken into account for imputation purposes. (see Hudson v. Markwart, [2003] S.J. No. 264 (Q.B.). Hudson imputes such expenses as income. It is possible that this

case can be distinguished since had the court not so categorized these expenses the payer's income would have been "negligible" and the recipient would not have received any child support. It is therefore possible that in other circumstances such expenses may not necessarily be so imputed and may be considered "legitimate business expenses". See, for instance, the B.C. decision in Egan v. Egan, [2002] B.C.J. No. 896, where a CCA deduction on a car allowance for business purposes was considered to be reasonable. As a general rule and as a matter of common practice courts will commonly add back "personal expenses deducted for tax purposes into income". The Court found that determining a farmer's income for the purposes of child support was an "art more than a science", due to the deductions allowable on a farmer's income tax return: Baird v. Webb, [2002] S.J. No. 48 (Q.B.). Due to the deductions allowable on a farmer's income tax return the court therefore added back a number of personal expenses if he deducted for tax purposes.

2.5 Avoiding Sloppiness and Schedule III

¶ 22 At this point it may be trite but important to remind solicitors to review Schedule III of the Guidelines when acting on behalf of spouses when either preparing or reviewing a payer's tax returns and financial statements. The requirements of both Schedule III and common sense demand great care when listing or reviewing expenditures in the family law budget as compared to the statement of business expenditures in the tax return. It is not uncommon for mistaken or sloppy counsel to "double account" the same amount for personal expenditures for automobile, entertainment, home use of shelter and other such expenditures, thereby inflating family law budgets and deficit positions. More importantly, taxable incomes are often artificially and improperly deflated by the amount that many of these expenditures that are "personal" in nature and are not entirely attributable to an expense that is truly business related. Similarly in Schedule III many of the tax deductions that cannot be deducted for child support purposes are often missed, such as the deduction for an allowable capital costs allowance with respect to real property that many payers deduct for the use of their home offices, such as realty taxes, and mortgage costs shown on their business expenses in their tax returns which are not allowable for the purposes of their Guideline incomes for child support under Schedule III. Similarly counsel should be careful to exclude and add back into income carrying charges and interest expenses (Section 8 Schedule III), non-arms' length salaries (Section 9 Schedule III), business investment losses, (Section 7 Schedule III) among other items.

2.6 Bad Faith and Underemployment

¶ 23 The Ontario Court of Appeal has found that under Section 19 it is not necessary that there would be "bad faith" in order to impute income to an underemployed parent for child support purposes. In Drygala v. Pauli, [2002] O.J. No. 3731, 61 O.R. (3d) 711, the Court found that the trial judge did not err in imputing income to the father, even though the father did not act "intentionally" within the meaning of Section 19(1)(a) of the Guidelines when he chose to attend university full time rather than to work. During the marriage the respondent earned $21.00 per hour as a certified tool and dye maker and there was no bad faith in the payer's decision to go back to school. It was a correct career decision but the decision can still lead to imputation of income in the recipient's favour for leaving employment, which was a voluntary act (on the facts, however the court did lower the quantum of income that the lower court imputed). It is also long been understood that one's lifestyle can override the numbers that the payer provides to the court. Therefore an income of $50,000.00 was imputed to the father who was a sophisticated businessman on an interim child support motion, despite evidence that he was only earning $24,000.00 per year. Based on his lifestyle and savvy as a businessman, evidence on his corporate letter head, and other materials provided to the court, the court had no trouble imputing income that defied all the financial evidence the father attempted to represent: Beatty v. Beatty, [2002] P.E.I.J. No. 59, 2002 PESCTD 42 (S.C.). A prospective payer must also be very careful if he operates on a purely cash basis with no records. If he admits to any historical income then the court may seize upon that information in

the absence of any other information. In Bensadoun v. Bensadoun, [2002] O.J. No. 2023, the Ontario Superior Court of Justice imputed income of $175,000.00 per year to a father who operated his lucrative businesses on a purely cash basis with no records, but admitted to historical income of $150,000.00 in a previous year.

¶ 24 The courts have been so quick to find underemployment within the meaning of Section 19, that it appears that the onus of proof has been reversed in the recipient's favour when a payer makes a career change or may not be working at his potential. In the Saskatchewan case of Franklin v. Custer, [2002] S.J. No. 319 (Q.B.) a trial was ordered to determine whether or not a father was underemployed for the purposes of determining requisite child support. However, the onus was on the father to prove that his employment was commensurate with his ability and training. The Courts of Appeal have been no less forgiving in White v. White, [2002] N.S.J. No. 248. The court upheld a trial judge's decision to impute income to a father when he left a secure job to enter the e-commerce field. In the most significant decision yet in Ontario, the Ontario Court of Appeal in Riel v. Holland, [2003] O.J. No. 3901, recently held that an employment decision that would leave children receiving a significant decrease in monthly support must be justified in a compelling way. Otherwise, a court may consider that employment decision intentional under employment. Therefore, the court held that an electric contractor in a lucrative business could not abandon it to take a less paying position. The court found that the electric contractor under Section 19(1)(a) was intentionally under employed because of the strong financial results of his company in previous years and his conduct to take a lower paying position constituted a "voluntary act" referred to in Drygala v. Pauli, supra. Riel v. Holland also imputed a greater income to the same businessman since he used his corporation to pay personal expenses, thereby deriving a substantial tax benefit from the way he organized affairs under a corporate umbrella. By deriving the tax benefits and being able to do so, the court remarked upon the striking differences and tax consequences between salaried employees and persons in receiving forms of income. The court specifically relied on Section 19 (1)(d) of the Guidelines, which states that one of the objectives of the Guidelines is to "ensure consistent treatment of spouses and children who are in similar circumstances" (see paragraph 35 of the decision):

> Interpretations of Sections 18-19 of the Guidelines that would impute the same income for child support purposes, the two parents, one sharing a salary of $128,000.00 and paying tax at $48,000.00 and the other receiving business income of $128,000.00 and paying tax at $5,000.00 would be remarkably out of step with a "consistent treatment" objective of the Guidelines. Accordingly, the Court of Appeal ruled that where significant amounts of untaxed business income are used for payment of personal expenses "grossing up" business income to place it on a par with what it would be on a salaried income" is perfectly correct within the context of Section 19(1) (paragraph 36).

¶ 25 However a party is not intentionally underemployed if there is evidence that he is greatly restricted for legitimate reasons in his ability to work or change his employment circumstances. In the Newfoundland case of Holloway v. Holloway, [2003] N.J. No. 291, 2003 NLSCTD 168, the court found exceptional conditions where conditions of union employment for the payer and the lack of union jobs in this particular situation made it so restrictive for the individual that it was impossible for him to work beyond the means that he found available to him. Similarly, in Grabarek v. Barton, [2002] B.C.J. No. 81 (S.C.), the court reduced the father's child support obligation as he had been laid off from his job and income was not imputed to him, notwithstanding a possible inheritance which was due from his parent's estate. Once again, where there is no financial disclosure, particularly where the payer occasions considerable delay in the proceedings, a court will likely impute income towards the payer. In L.W. v. L.K.W., [2003] B.C.J. No. 1611, 2003 BCSC 1083 the court imputed $46,000.00 per year against the father who failed to provide full financial disclosure to the court and delayed the proceedings interminably. If however, the payer has a proven medical disability, he or she may avoid his or her income being so imputed. In Riad v. Riad, [2002] A.J. No. 1338, 2002 ABCA 254, the Alberta Court of

Appeal overturned a lower court and found the trial judge erred in imputing income to a mother with bipolar disorder while she was attending school. It appears that when an individual has a diagnosed problem beyond his or her control then a court will not impute income since it can hardly be thought that the payer is indulging in a "voluntary act". Accordingly, no income was imputed to a father where he was continuously employed, despite the fact that his present income was less than his previous income, so long as his income drop is based on reasons beyond his control such as illness or loss of job, as was the case in Landry v. McLean, [2002] O.J. No. 3538, where the father suffered from asthma and he was laid off. A court should also be careful to assume that a payer is able to work because of the judge's general knowledge of economic factors or the economic climate of the country or province where the payer resides. For this reason, the Nova Scotia Court of Appeal ruled that the trial judge erred in taking "judicial notice" of economic factors in imputing income to the father in determining his liability for child support purposes: Dean v. Brown, [2002] N.S.J. No. 439, 2002 NSCA 124.

¶ 26 On the general question of job searches and what defines the scope of a payer's duty to look for work when he is unemployed: it appears that a payer parent must not unreasonably restrict his or her employment search. In the face of child support obligations, it may be necessary for the payer to find employment outside his field at a reduced level of income. For this reason, in Nahu v. Chertkow, [2003] B.C.J. No. 1940, 2003 BCSC 1285 (S.C.), a father was employed by a large firm and was earning approximately $160,000.00 a year, was highly educated and well qualified but had been unable to find new employment consistent with his previous experience. He had not worked at any employment since leaving his law firm some 15 months before the hearing, but surprisingly had no credit card debts. The court imputed an income of $100,000.00 per year and ordered child support accordingly. The court ruled that where there is no available market for a payer parent's particular area of expertise, it is incumbent upon that parent to look for other viable options and take reasonable steps to find other appropriate employment. The courts have also imputed income from sources other than employment. In Sharpe v. Sharpe, [2004] M.J. No. 56, 2004 MBCA 26 (C.A.) the court confirmed a lower court's decision by imputing income of a lottery winner at a higher rate of interest (8%) than the payer was conceding (being 6%) on winnings of $2.5 million. The court also ordered the father to provide financial disclosure or evidence regarding how he invested the winnings. This opened the lower court to impute income under Section 19(1), especially since it only had expert opinion of the wife as to what higher interest the court should impute. On another issue the court ruled in favour of the presumption of the tables relying on Francis v. Baker, [1999] 3 S.C.R. 250 (S.C.C.) (see below).

3. Factors that may reduce arrears and vary support

¶ 27 One very successful argument in reducing arrears and varying support orders is the argument that to do so would facilitate access between a payer and his children. In Llewellyn v. Llewellyn, [2002] B.C.J. No. 542 (C.A.), the Court reduced the father's monthly payment of his child support arrears to facilitate access to his children after the children's mother moved to "the lower mainland" of the province. Similarly, in Roemer v. Roemer, [2003] S.J. No. 499 (Q.B.), the court, after varying the primary residence of two children, ordered that the mother did not have to pay child support for one year given the consequent hard costs of access. Similarly in Ash v. Sammut, [2003] B.C.J. No. 2027 (S.C.), the court ruled that where the costs of access may vary, the Guideline support amount was reduced by the amount of travel costs to British Columbia from Ontario were incurred (where the payer normally resides). In the recent decision in Fulop v. Fulop, [2004] A.J. No. 270 (Q.B.), the court considered the applicant's evidence of a serious downturn in financial ability and decreased his support obligations. But the court would not reduce his accumulative arrears arising from the stringent tasks set out in Haisman v. Haisman, [1994] A.J. No. 553, 22 Alta. L.R. (3d) 66 (C.A.). The payer had not established on a balance of probabilities that he would not, in the future, be able to pay the arrears over the balance of his working life. The Alberta Court of Appeal decision in Haisman has cast a long shadow. The court had ruled that the judge should not vary or rescind an order for the payment of child support so as to

eliminate arrears unless he or she is satisfied that the former spouse cannot pay and will not be able to pay the arrears. Going along with this principle a father's child support arrears were rescinded for a period of time that he was incarcerated. Otherwise the court found that the remainder should stand: McConnell v. Dunk, [2003] A.J. No. 1069 (Q.B.).

¶ 28 Pursuant to the abolishment of the "one year rule" and defying a reluctance by many courts to accept delays in the enforcement of arrears, the Manitoba Court of Appeal found that a motion judge erred in finding that the wife had delayed in bringing a motion to enforce arrears of paying private school tuition. In Steele v. Koppanyi, [2002] M.J. No. 201 (C.A.), the wife had given a reasonable explanation for not pursuing a motion to enforce the husband's arrears. In 1997 when the husband brought his motion for joint custody, his stated earnings were such that he was not able to pay the tuition. She, therefore, sought no point in pursuing the matter. She later found out that he was actually been earning over $30,000.00 per year.

¶ 29 In short, if there is any reasonable explanation for delay, arrears will often be enforced.

¶ 30 However, if there has been an overpayment in child support it will normally not be recovered if the application is not brought in a timely manner. In Janes v. Janes, [2002] N.J. No. 151 (S.C.), the court denied a father's application to recover overpayments because he did not do so quickly enough and also thought that such recovery would be unfair to the mother. However, this is especially true if the overpayment takes place over a long period of time and the payer takes too long to apply for a refund "such that the children's best interest maybe in danger". Accordingly in Lacey v. Fitzgerald, [2003] S.J. No. 735, 2003 SKQB 44 (Q.B.), the court refused to recognize an "overpayment" of child support where after a divorce judgment in which the wife is recited as having custody, the parties nonetheless began immediately thereafter to share time with the child on a more equitable manner for several years. However, where there has been no delay and the payer suffered a dramatic decrease in his income within the same fiscal year, then he may be entitled to a repayment of child support. Therefore in Surrette v. Johnson, [2002] O.J. No. 4779, [2003] C.C.S. 4017 (S.C.J.), the payer unilaterally reduced his child support and ultimately the court credited him for his overpayments against any arrears. The court ruled that the husband had overpaid and the recipient should have made an immediate adjustment to his child support given the policy of the Guidelines given a large decrease in his income. If more information comes to light that a payer could not possibly have known at the time of the original order then he may revisit the issue by submitting fresh financial information and apply for the refund of an overpayment. See, for instance, Sampson v. Sampson, [1997] O.J. No. 5356 (S.J.), where the recipient mother deceitfully failed to disclose to the payer father that the children were longer in school. However, by his own dilatoriness or carelessness, another payer had not bothered to learn the true state of facts and simply waited three and a half years to produce a tax return to plead a reduction of his income. His delay could not be rewarded with an order to cancel arrears: Mindel v. MacNeil, [2004] O.J. No. 1179 (C.J.). In short, the key tests for bringing a successful application for a refund for an overpayment appears to be, the ability by which the payer has to pay, the speed by which the payer applies for one, the means by which the recipient is being asked to repay the amount, and the nature of the deceit of one of the parties, if any.

3.1 Second Families

¶ 31 It appears that only material changes that are beyond the control of a payer that will permit him to apply for a variation. For this reason the advent of a second family is usually not an acceptable excuse. A father's application to vary child support for one son of his first relationship, due to new child care obligations for another son of a different relationship, was dismissed, as the court found the father's self-imposed domestic responsibilities in his second relationship and consequent underemployment to be unreasonable: Donovan v. Lee, [2002] M.J. No. 226 (Q.B.). For similar decisions, see also Kocko v.

Kocko, [2002] O.J. No. 50 (C.J.), Parker v. Parker, [2003] S.J. No. 139 (S.C.), and C.A.T. v. L.C.T., [2003] B.C.J. No. 2182.

4. Varying Support Orders - Retroactive Increases

¶ 32 A payer's application for a refund of an overpayment of arrears is often tied to a recipient's application for enforcement and retroactive increases in child support. Commencing in 2002 the Ontario Court of Appeal found that the coming into the force of the Guideline legislation created a right to a variation of a pre-existing order for child support; Wright v. Zaver, [2002] O.J. No. 1098, 59 O.R. (3d) 26 (C.A.). Moreover, several recent decisions have now made it clear that "a payer who fails to pay what he or she should have paid, when he or she should have paid it should expect to be ordered to pay retroactively what should have been paid previously": see commentary by James McLeod/A. Mamo, Annual Review of Family Law (Carswell 2003, p.152): Bemrose v. Fetter (2003) 2003 CarswellOnt 1725 (S.C.J.) and other cases cited in MacLeod, supra. In addition see S.L.R v. C.D.R., [2003] B.C.J. No. 2738, 2003 BCCA 528 (C.A.) (but where part of the retroactive increase disallowed because of the recipient's delay in applying for relief); B.P.D.N. v. C.M.N., [2002] A.J. No. 230, 2002 ABQB 125 (Q.B) at A.J. para 13; Gagnier v. Gagnier, [2002] O.J. No. 2183 (Prov. Crt.) (but only partly increased because of recipient's delay in applying for relief; Edie v. Edie, [2003] A.J. No. 167, 2003 ABQB 70 (Q.B.) (retroactive increase awarded, but only back to date on which the Applicant first began to demand financial information from the Respondent); McDougall v. McDougall, [2002] M.J. No. 93, 2002 MBQB 70 (Q.B.) (retroactive to when variation application filed and not to date of original Petition); Newman v. Tibbetts, [2004] N.B.J. No. 72, 2004 NBQB 81 (Q.B.) (retroactive increase ordered, but only to date of application); Fruman v. Krause, [2004] S.J. No. 165, 2004 SKQB 114 (Q.B.) (support increased back to the date of voluntary agreement between the parties for partial increase;) Pearce v. Murphy, [2004] O.J. No. 367 (S.J.) ($325,000 in retroactive child support ordered where disparity in incomes between payer and recipient is 6.5: 1); and MacKinnon v. MacKinnon, [2004] O.J. No. 374 (S.J.) (where Court accepted sophisticated recalculation of doctor/payer's income, with some modifications, when awarding retroactive support).

¶ 33 However there is a critical distinction between applications made on an interim motion for retroactive support as opposed to applications made at trial. Given that most cases never reach the elusive finality of trial, this distinction becomes critical. According to McLeod and Mamo, the courts should be reluctant to order retroactive increases at interim hearings because the Court will understandably prefer to leave the issue to the trial judge, where the evidence will be more completely developed and tested or because the judge at the interim hearing may not wish to prejudice the outcome at trial: see McLeod, supra. See also the decisions in Reeves v. Reeves, [2003] P.E.I.J. No. 50, 2003 PESCTD 36 (S.C.-T.D.); Clavelle v. Clavelle, [2004] S.J. No. 261, 2004 SKQB 177 (Q.B.) and White v. White, [2003] O.J. No. 5306 (S.J.), where retroactive interim relief was declined in deference to the trial judge. Yet other courts have not hesitated to make such orders on an interim basis. For instance, in Lakhani v. Lakhani, [2003] O.J. No. 4041, an Ontario Superior Court recently ruled that where the wife has acted in good faith and the husband has been largely responsible for the delay in the filing of a motion for interim spousal support, the court may order the husband to pay retroactive interim support from the date of the wife's request for interim financial relief. The court further ruled that such an order may be declared to be without prejudice to the wife's right to claim retroactive relief at trial from the date of the spousal separation. Similarly, retroactive interim child support was ordered in T.L.J. v. K.D.J., [2003] A.J. No. 649, 2003 ABQB 436 (Q.B.) albeit only to the date of application and not back to the date of separation, but only because the mother had delayed her application and not because of any theoretical concern with the hearing being held on an interim basis as opposed to being held at trial. See also MacIntosh v. MacIntosh, [2003] A.J. No. 728, 2003 ABQB 498 (Q.B.); J.D.O. v. S.K.O., [2003] A.J. No. 728; 2003 ABQB 498 (at O.J. para 9); and Perry v. Perry, [2004] O.J. No. 237 (S.C.J.).

¶ 34 However, the recent decision of the Ontario Court of Appeal in Walsh v. Walsh, [2004] O.J. No. 254, [2004] C.C.S. 1944, has put new hurdles in the way of interim applications. The Ontario Court of Appeal recently redefined the law of retroactive child support by restricting the rights of recipients on an interim application with a very narrow interpretation of Section 25(1) of the Guidelines which gives the recipient parent the means to request from the payer information about his yearly income from year to year before which the recipient may apply for retroactive increase in child support. Walsh was an appeal by the payer father from a decision allowing the applicant's mother's motion for retroactive support on an interim basis. The parties divorced in 1997, and were granted joint custody of their two children, with the children to live primarily with the applicant. The respondent was ordered to pay child support based on an imputed income of $175,000.00 pursuant to the Guidelines. The divorce judgment did not require the respondent to disclose his annual income to the applicant. In 2002, the applicant learned that the respondent's income had increased substantially in each year after the order was made. On the interim motion, Judge Snowie on the Ontario Superior Court held that she had jurisdiction under the Guidelines to calculate child support from time to time and calculated support retroactively from 1998 to 2001, ordering the father to pay a shortfall of $42,917.88 for those years. The Ontario Court of Appeal allowed the appeal. The judge erred by ordering an interim retroactive increase in child support without finding a "change in circumstances or need on the part of the children". The court could only order an increase in child support on an interim motion where the need was "urgent or pressing". Moreover, nothing in the Divorce Act, the Guidelines or the case law gave a judge a free standing right to recalculate and adjust child support retroactively. Unless, in the absence of a contractual duty or court order, directing the payer to give financial disclosure in a timely fashion yearly, the court was not permitted to award a retroactive increase in child support as a result of a failure to disclose unless the recipient had made an express and request or disclosure in each year under Section 25(1) of the Guidelines. The court did acknowledge that there were limited cases where a court could infer an implied duty to disclose in a separation agreement by a payer as the Ontario Court of Appeal so implied in the case of Marinangeli, [2003] O.J. No. 2819, [2004] C.C.S. 4815. In Marinangeli the husband had liquidated $1,000,000.00 in stock options shortly after entering into Minutes of Settlement, thereby triggering a significant material change in circumstances (see below).

¶ 35 The significance of the Ontario Court of Appeal decision in Walsh cannot be overstated. Unless the recipient can prove that she asked the payer to disclose his income in writing from the previous year or from year to year and if there are no provisions in the parties' separation agreement or Minutes of Settlement or the court order obliging the payer to disclose his income periodically, then in the absence of evidence of "pressing need or urgency" there may be no case for retroactivity, according to the Ontario Court of Appeal. We treat Walsh and this surprising new development on the law of retroactive child and spousal support more intensively at SFLRP/2004-001 (Syrtash Collection of Family Law Articles, Syrtash Family Law NetLetter, source "SFLN" on Quicklaw by LexisNexis Canada, February 6, 2004). However it is worth noting that the case prompts certain concerns.

¶ 36 Since the Guideline legislation became law, many lawyers have assumed that the advocate only had to show a change in the payer's yearly income to obtain an increase in child support, subject only to the argument that the recipient could not show undue delay. Section 3 of the Guidelines have something called "presumptive rule" that stipulates that the amount of child support can only be determined with reference to a table related to the payer's gross yearly income in each province. One presumably did not have to show "a material change in circumstances" i.e., the material needs of a child or the recipient's ability to pay (See Wright v. Zaver, supra. (Ont. C.A.)) Walsh appears to suggest that this may no longer the law. At least on an interim application, one now has to show a "compelling case for need" by the children if the recipient has failed to make a request for updated financial disclosure in the previous year or years. Even then, the receiving spouse can only make such a claim at trial and not after a motion, a preliminary procedure which is a great deal less expensive. Unless the wife had requested the information about his income each year, which she hadn't, the Court of Appeal found it would have been

an unfair "transfer of wealth" to surprise a payer such as Mr. Walsh with a court order that would compel him to pay retroactive child support for all those years retroactively unless there was evidence that the children urgently "needed the money". The lower court presumably thought that the Child Support Guideline legislation did not require such evidence because of this presumptive rule, meaning the Guideline tables and the rule in Wright v. Zaver. However, Mr. Justice Laskin has now warned that the wording of Section 25(1) of the Guidelines has put the onus squarely on the recipient and her counsel such that it is not merely enough to show that Mr. Walsh's income has increased.

¶ 37 As a result, in our view it is incumbent upon every recipient receiving support to be careful to send registered letters insisting upon tax returns and other proof of income from the person responsible for paying child support shortly after tax season each year so that she has proof that she made the inquiry. (Even then, the payer can always deny receipt of the letter.) If the payer's income has increased then if the request was properly made then the recipient presumably will not have to wait until an expensive trial to demonstrate the needs of her child. Walsh may now have effectively made matrimonial lawyers representing recipients who fail to include mandatory disclosure clauses for payers negligent. If such lawyers fail to insist that such clauses be included in separation agreements, Minutes of Settlements or Consent orders, they make it more difficult for the recipient clients later to claim retroactive child support, at least in Ontario. At the very least, such lawyers should consider obtaining written acknowledgments from clients who fail to obtain such clauses during negotiations documenting they were advised to do so. If opposing counsel refuses to include such a clause, Walsh appears to compel counsel to advise his client either to litigate for such a provision in a Court order or to ensure that she has given counsel written acknowledgment of the need to make timely requests for disclosure each year.

¶ 38 Walsh was recently followed in Ramdatt v. Ramdatt, [2004] O.J. No. 578 (S.C.J.), where the mother had acquiesced to the amount that the father was voluntarily paying in child support for a short five month interval between the date of separation and the date of the commencement of the application. Similarly there was some interval between the date of application and the date of the first interim order of only two months. There was no evidence that the mother had served any notice on the father demanding any increase to reflect the increase in the father's income. Any support for the period before the first interim order was not increased retroactively such that the principles of Walsh were applied in denying any retroactive adjustment of the child support to account for the fathers increase in salary during such time period.

¶ 39 In Marinangeli, supra, Minutes of Settlement provided for the variation of the periodic child and spousal support in the event of a material change in circumstances. The court decided that in such a situation a payer spouse and parent whose financial circumstances thereafter changed as a result of the significant exercise of stock options and a substantial increase in salary, plus bonus, may have an implied obligation to notify the other spouse of these changes and the failure to do so may justify orders for retroactive child and spousal support to a date proceeding an application to vary. In Marinangeli the subject Minutes of Settlement showed these stock options as a "contingent interest" with a value shown as "unknown". That interest was not a factor in determining the support obligation at the time that the Minutes were signed. The possibility of the future exercise of such options had been revealed, but was not realized. The court determined that, once realized, shortly after the Minutes were signed, an implied obligation arose since there was clearly insufficient time for the wife to make fresh inquiries of disclosure (i.e., the earliest time to request information under Section 25(1) of the Guidelines was not until the following tax season.) Marinangeli can be easily distinguished from the facts in Walsh where Mrs. Walsh had ample opportunity to make inquiries and did not do so. In Marinangeli, the husband also could not rely on the argument that these stock options were already equalized and could not also be included for Guideline income. Marinangeli also reaffirmed the principles on how to deal with retroactivity as applied to child support applications by citing the principles in L.S. v. E.P., [1999] B.C.J.

No. 1451, 67 B.C.L.R. (3d) 254 (C.A.). In L.S. v. E.P. supra, Rowles J.A., provides a very helpful summary of the criteria for making or declining to make an award retroactive child support under the Divorce Act at paragraph 67 as follows:

> A review of the case law reveals that there are a number of factors which have been regarded as significant in determining whether to order or not order retroactive child maintenance. Factors militating in favour of ordering retroactive maintenance include:
>
> (1) the need on the part of the child and the corresponding ability to pay on the part of the non-custodial parent;
> (2) some blame worthy conduct on the part of the non-custodial parent such as incomplete or misleading financial disclosure at the time of the original order;
> (3) necessity on the part of the custodial parent to encroach on his or her capital or incur debt to meet the child rearing expenses;
> (4) an excuse for delay in bringing the application with a delay is significant; and
> (5) notice to the non-custodial parent have an intention to pursue maintenance followed by negotiations to that.
>
> Factors which militated against ordering retroactive maintenance include:
>
> (1) the order would cause an unreasonable or unfair burden to the non-custodial parent, especially to the extent that such a burden would interfere with ongoing support obligations;
> (2) the only purpose of the award would be to redistribute capital or spousal support in the guides of child support;
> (3) a significant, unexplained delay in bringing the application [paragraph 72]

This recent reaffirmation of these principles to approach cases of applications for retroactivity by the Ontario Court of Appeal can explain much of the contradictory cases in the literature.

¶ 40 There is considerable disagreement on an interim application as to how far back a child support order can be made given the ongoing principles in Noullett v. Rolling, [2003] A.J. No. 1077 (Q.B.). In this recent trial decision the court ordered an Albertan father to pay retroactive child support back to 1998 despite the fact that the mother did not make the claim until 2002, as he should have know that he was underpaying. By contrast a B.C. court in Squire-Capozzi v. Capozzi, [2003] B.C.J. No. 2136, restricted retroactive child support back only to the date of the recipient's application, despite the fact that the court found that the father had the means to pay increased support and had not been forthcoming about his financial circumstances. There was a five-year delay in bringing the application and no adequate explanation in the reason for bringing the application so late.

¶ 41 In Rafuse v. Conrad, [2002] N.S.J. No. 208, 2002 NSCA 60, the Nova Scotia Court of Appeal found it to be an error in principle for a lower court to have retroactively varied a child support order from the same day the previous order was made, as the original order is presumed to be appropriate for some time after it is made. This was an appeal brought by the father of the decision of a motions judge that varied child support retroactively in accordance with the father's income. The trial judge had ordered retroactively in accordance with the husband's change of income (which appears to make sense) since the income change went back as far as the date of the previous order and presumably was based on historical principles. However for an order to have some retroactive effect the original order had to last for some period of time "except the court of appeal's order was made effective to a later period" (This is

a good example of law overriding reality and common sense). Retroactive child support will apparently not be ordered in cases where the payer has already been paying more than the Guideline amount. Therefore a Family Scotia Family Court refused to make such an order to assist two university aged daughters where the husband had already been overpaying: Abudulai v. Abudulai, [2003] N.S.J. No. 235.

¶ 42 In a further inconsistency, a Saskatchewan court refused to retroactively order any child support going back four years in Pearson v. Pearson, [2002] S.J. No. 548 as the father had been paying support consistently while the mother had not had to encroach on her capital to pay child care expenses and had no excuse for failing to bring her motion in a timely fashion. It appears increasingly clear that many courts require some reason for the delay in the application, while others will not, showing much inconsistency in the case law. Therefore in the appellate decision of Erickson v. Cabeza, [2002] B.C.J. No. 286 (S.C.), a retroactive child support ordered by the Provincial Court was set aside, as the wife waited eight years before making a child support claim without adequate explanation. However, the "lack of unreasonable delay by the mother in asserting her rights" is somehow cited in another B.C. case where the court ordered a very large retroactive award from birth, 16 years before the application (about $750,000.00): S.E.C. v. D.C.G., [2003] B.C.J. No. 1359, 2003 BCSC 896 (S.C.). Conversely, in a very recent Saskatchewan Court of Appeal decision the Court set aside a lower court's award of retroactive child support for a period of 3 1/2 years before the application due to its "precedential ramifications." Gilroy v. Gilroy, [2003] S.J. No. 250.

¶ 43 Lack of disclosure will also augment this liability for retroactive child support. Therefore in Rozen v. Rozen, [2002] B.C.J. No. 2192, 2002 BCCA 537, the B.C. Court of Appeal accepted fresh evidence from a recipient of a father's substantially increased Guideline income. The father had failed to provide timely disclosure prior to previous minutes of settlement and accordingly, the Court issued a new child support order retroactive to the date that the disclosure should have been made in the previous year, being three years prior to the date of appeal (the payer should have been produced his disclosure in the year 2000 and the appeal was heard in 2002). Similarly in Mellway v. Mellway, [2002] M.J. No. 59 (Q.B.), a father was ordered to pay child support retroactive to a time before the proceedings were commenced. It was found that he was aware of his obligations and intentionally avoided making disclosure with the result that the proper amount of child support could not be assessed in a timely fashion. Retroactive increases in support were also ordered in Ricketts v. Thomas, [2004] O.J. No. 130 (S.C.J.), where support for a period of time had been lower than stipulated under the Guidelines due to the payer's delay in providing disclosure.

¶ 44 It appears that failure to make timely disclosure will consistently trigger the courts appetite to make retroactive orders as it does to impute income. Although there is the curious Manitoba decision of Sawatzky v. Sawatsky, [2002] M.J. No. 489, where the spousal and child support obligations of a father were reduced, despite the fact that he refused to make full financial disclosure in accordance with income attributed to him by Revenue Canada.

¶ 45 Retroactive orders will also be awarded irrespective of when a recipient commenced her application where a recipient's circumstances are exceptional. Therefore in J.D.O. v. S.K.O., [2002] A.J. No. 487 (Q.B.), a mother was ordered retroactive child support, where differences in income between the parents were quite substantial (the mother had until recently been on social assistance). Also there was no inordinate delay in commencing the application.

¶ 46 Many of the cases revert back to the principle in the Alberta decision in Wilkinson v. Wilkinson, [1998] A.J. No. 1302, 233 A.R. 131, in which Sullivan J. considered that the overriding consideration in considering the timing of a retroactive order award or whether it should even be granted is the "best interest of the child, having regard to "exceptional circumstances, the blame worthiness of the payer and

the payee's reasonable diligent attempts to pursue a remedy". However it seems that when the courts attempt to apply this principle or the more broadly based principles set out in the jurisprudence, they continue to be inconsistent. In another apparently inconsistent decision, the Nova Scotia Court of Appeal has ruled that a court cannot order retroactive child support preceding a separation agreement or preceding a prior request for financial information: Mackenzie v. Mackenzie, [2003] N.S.J. No. 410, although such agreements that attempt to oust the Court's jurisdiction by adopting an alternative dispute resolution mechanism are not enforceable: Jay v. Jay, [2003], P.E.I.J. No. 68 (C.A.).

¶ 47 It is particularly dangerous for a payer to rely upon "ongoing negotiations" as a defence to retroactive support. It J.C.W. v. M.W., [2003] A.J. No. 1086, an Alberta Provincial Court ordered retroactive support where there were appropriate circumstances even though the parties had been negotiating the issue for over one year. In Hunt v. Smollis-Hunt, [2001] A.J. No. 1170, 2001 ABCA 229, the Alberta Court of Appeal ruled as a matter of law that the court can award child support for a period of time prior to the issuance of a divorce petition.

¶ 48 Once again, whether it will actually do so rests entirely upon how the courts apply principles were as affirmed in Marinangeli, supra.

5. Undue Hardship

¶ 49 Under Section 10 Guidelines the courts may award an amount of support that is different from the Guidelines if the court finds that the spouse making the request, or child in respect of whom the request is made, will otherwise suffer undue hardship. Courts stipulate very narrow circumstances and a high threshold which may cause a spouse or child to suffer such "undue hardship". Financial hardship in itself is insufficient, even if the payer earns less money then the payee. This fact in itself does not mean that the payer is necessarily suffering from "undue hardship" within the meaning of Section 10: Gaetz v. Gaetz, [2001] N.S.J. No. 131, 2001 N.S.C.A. 57 (C.A).

¶ 50 Moreover, the court can only grant relief under Section 10 if the applicant actually has a lower household style of living than the recipient: Campbell v. Chappell, [2002] N.W.T.J. No. 96, 2002 NWTSC 75 (at paragraph 13). However, in the B C. Supreme Court decision in Milner v. Milner, [2002] B.C.J. No. 2520 at p. 27, the court found that the father's support obligation did not create an undue hardship on him, despite the fact that his standard of living was slightly lower than the mother's. In short, merely because one has slightly lower standards of living does not automatically entitle the payer to reduce his child support obligation. In another B.C. case, the father's child support obligation was not reduced despite the fact that he otherwise met the conditions of undue hardship as he had failed to make child support payments in the past: R.D.O. v. C.J.P.O., [2003] B.C.J. No. 1179. In short, the payer must be current with his payments before he can apply for relief under the hardship provisions of the Guidelines. Before considering the cost of access as a factor in determining whether undue hardship exists, the court must assess these costs as being very high: Poirier v. Poirier, [2004] N.S.J. No. 29 (S.C.). A payer can also not rely on the circumstances that existed at the time the original order was made when asking for a variation on the basis of undue hardship. Accordingly, in Tuner v. Yerxa, [2002] N.B.J. No. 199, the father's application to reduce his child support obligation due to undue hardship was dismissed as the circumstances on which he claimed undue hardship still existed since the time of the original order: nothing had changed. The issue was res judicata. In short, there was no material change in circumstances.

¶ 51 The Guidelines also allow for a recipient to claim for increased child support on the grounds of undue hardship, but the Courts appear to be very reluctant to apply this provision. In Sabe v. MacIntosh, [2002] B.C.J. No. 1318 (S.C.), a paying mother's claim for increased child support under the undue hardship provisions was dismissed whereby the husband was asked to pay more since if such an order

was made, it would have the dramatic effect of transferring such an obligation to the payer's current new wife. In a Quebec decision, an application for increased child support beyond the table amount on the grounds of "undue hardship" for swim activities and school lunches was dismissed, since the wife was fully supported by a new partner. Moreover, none of the additional expenses were deemed by the Court to be "undue:" O.R. v. P.B., [2000] J.Q. No. 4795, [2001] C.C.S. No. 20257, (Que.S.C.). Similarly, another Quebec court resisted an undue hardship application for an increase because the family debts on which she was relying were incurred at a time when the wife was earning significantly more than the husband during the course of the marriage and because she could reduce her current expenses substantially. Finally, since the wife had exclusive possession of the home she was responsible for all of its expenses and could not rely on "undue hardship" to request an increase of the table amount to pay for its expenses: P.T. v. O.L., [2000] J.Q. no 4926, [2001] C.C.S. No. 17188 (Que. S.C.).

¶ 52 As discussed earlier, courts have also found that the mere fact that a payer has a second family to support does not in itself satisfy the requirement of "undue hardship" in order to strengthen a Guideline amount of child support: Waite v. Clemens, [2002] P.E.I.J. No. 8 (S.C.). Similarly access costs and debts associated with the second marriage were insufficient to prove that a mother suffered undue hardship in paying child support for her daughter: Hollett v. Collins-Hollett, [2002] N.J. No. 292 (S.C.).

¶ 53 In Depris v. Cladeau, [2002] M.J. No. 499, the Manitoba Court of Appeal considered the effect of Section 10 on the awarding of section 7 extraordinary expenses where adult children have plans to pursue post-secondary education. The Appellate court vacated a lower court order on the allocation of funds for such expenses. It found that issues of undue hardship had not been properly explored. However the courts will scrutinize such claims very critically. A personal choice to have a shorter amortization period on a payer's mortgage did not entitle him to qualify for a reduction in his child support on the grounds of "undue hardship". Undue hardship had to be restricted to economic circumstances beyond one's control. Accordingly the lower court decision was reversed for having considered and having applied non-economic factors to determine the issue: Gillespie v. Gromley, [2003] N.B.J. No. 369, [2003] C.C.S. No. 19788 (C.A.).

¶ 54 Notwithstanding earlier authority, and in keeping with other decisions recited in the foregoing, undue hardship was established in another recent decision when unusually high access expenses permitted a payer to reduce his child support obligations from $214.00 to $100.00 per month, even though the applicant acknowledged that his household standard of living was higher than the respondents. The payer was unable to work because of mental illness and was a recently discharged bankrupt. The court concluded that Section 10(2) is not on an exclusive list of circumstances that may amount to undue hardship. "Unusually high access expenses" must be considered in relation to the access parents' financial circumstances as well as all other relevant circumstances: Wainman v. Clairemount, [2004] N.S.J. No. 69. See also Poirier v. Poirier, [2004] N.S.J. No. 29, and Vinderskov v. Vinderskov, [2002] B.C.J. No. 2428, [2003] C.C.S. No. 2633 (C.A.).

¶ 55 However, when calculating an applicant's income under section 10, the Saskatchewan Court of Appeal has clarified that the court does include the GST rebate and the Child Tax Benefit when determining whether there is undue hardship: Pelletier v. Kakakaway, [2002] S.J. No. 448; see also Ash v. Sammut, [2003] B.C.J. No. 2027.

6. Special Provisions in an Agreement

¶ 56 The Divorce Act and related provisions in Provincial statutes appear to allow parties to fashion domestic contracts, Minutes of Settlements or consent orders that modify child support obligations by agreeing to confer a benefit to the child in lieu of such support or a portion of it. However, the case law

that interprets such agreements have been completely inconsistent.

¶ 57 The very recent Ontario Court of Appeal decision in Dieter v. Sampson, [2004] O.J. No. 904, appears to have given legislative provisions that defer to "special provisions" in a separation agreement intended to benefit children a very narrow scope before a Court can consider reducing the Guideline table amount. The relevant statutory provisions read as follows:

¶ 58 Section of the Ontario Family Law Act (s. 33(12)) reads:

> Despite subsection (11) [providing for support in accordance with the Guidelines], a court may award an amount that is different from the amount that would be determined in accordance with the child support Guidelines if the court is satisfied,
>
> a) that special provisions in an order or a written agreement respecting the financial obligations of the parents, or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child; and
> b) that the application of the child support Guidelines would result in an amount of child support that is inequitable given those special provisions.

¶ 59 Similarly under the section 15.1 Divorce Act:

> (5) Notwithstanding subsection (3), a court may award an amount that is different from the amount that would be determined in accordance with the applicable Guidelines if the court is satisfied
> (a) that special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child; and
> (b) that the application of the applicable Guidelines would result in an amount of child support that is inequitable given those special provisions.
>
> Reasons
>
> (6) Where the court awards, pursuant to subsection (5), an amount that is different from the amount that would be determined in accordance with the applicable Guidelines, the court shall record its reasons for having done so.

¶ 60 Similarly, under s. 17(6.2) of the Divorce Act, in making a variation order, a court may award a different amount than the stipulated Guidelines amount if (a) there are special provisions in an order, judgment or a written agreement which directly or indirectly benefit a child, and (b) the application of the Guidelines would result in an amount of child support that is inequitable.

¶ 61 However, in Deiter v. Sampson, the court ruled that the support payer/applicant has the burden of showing that a separation agreement containing a "special provision" for unequal division of family property was expressly intended to reduce the quantity of child support before the Court will consider doing so, even if the "result" of the unequal division benefited the children. On the facts, the appellate court affirmed the lower court's evidentiary concern that: "Because of the complete absence of financial or family property statements, it is not possible to know how any of the factors like property value, contribution, renovation, loans, gifting and tax implications were factored into the ultimate agreement

these parties negotiated with their counsel." Had the court stopped with this reasoning, an advocate presumably would be able to plan future agreements by creating clauses with more specific wording that more carefully tie-in the child support releases directly to the property settlements, and that attach net family property statements and memos outlining how the negotiations led to the releases for child support, attached as schedules. However, the Court of Appeal makes further statements: "The applications judge properly begins her analysis by noting that parents cannot contract away a child's right to support. Willick v. Willick, [1994] 3 S.C.R. 670 at para. 16. Thus, the mother's purported release to any child support claims in the separation agreement is of no effect. Further, the application's judge correctly applied this court's decision in Wright v. Zaver, [2002] O.J. No. 1098, by approaching the matter of special provisions objectively and with a child-centred focus. We see no error in her conclusion that there was no special benefit direct or indirect to the children from the separation agreement." In short, it appears that even if a payer had all the appropriate evidence that clearly proved material benefits in the agreement to the children in a perfectly worded separation agreement or court order, the Court would still have the overriding ability completely to ignore the special provisions sections of the Guideline legislation on the basis of a pre-Guideline Supreme Court decision and some general concerns about the need to be "child focused" based on the earlier Court of Appeal decision in Wright v. Zaver, supra, the principles from which are recited as follows:

> Section 37(2.3) of the Act sets out a three-part test for departing from the application of the Ontario Guidelines. First, the court must find "special provisions". Second, the court must determine that the special provisions benefit the child in the specified way. Third, the court must find that applying the Ontario Guidelines would result in an amount of support that is inequitable given the special provisions. Only if each part of this test is satisfied can a court depart from the application of the Ontario Guidelines under s. 37 (2.3). Section 37(2.3)(a) contemplates three types of special provisions: special provisions in an order or agreement respecting the financial obligations of the parents that directly or indirectly benefit a child; special provisions in an order or agreement respecting the division or transfer of the parents' property that directly or indirectly benefit a child; and special provisions otherwise made for the benefit of a child. A "special provision" must be one that replaces, in whole or in part, the need for support in accordance with the Ontario Guidelines. There is no reason to limit special provisions to provisions that are out of the ordinary or unusual.

¶ 62 Yet in Deiter v. Sampson, the Court of Appeal may be saying that even if the test in Wright v. Zaver is met, the Court may still override any "special provisions" since child support releases cannot contract away a child's right to child support, even though this principle was adopted by Willick, a pre-Guideline decision. In our view, the need for predictability, the essence of what should guide family law, appears to take a backseat. Dieter v. Sampson was recently followed in McConville v. McConville, [2003] O.J. No. 4912 (S.C.J.). The subject separation agreement had only recited that the husband's transfer of his interest in the matrimonial home to wife was in consideration for his wife's forfeiting a C.O.L.A. increase for child support. The agreement failed to explain the way in which the equalization of net family properties was an allocation to the child's benefit.

¶ 63 The British Columbia courts appear to take a similarly restrictive approach. In the B.C. decision in Rozen, supra, the court confirms the appellate ruling in Danchuk v. Danchuk, [2001] B.C.J. No. 755, 2001 BCCA 291 (C.A.), by outlining that the benefit to the child would have to be something extraordinary to qualify for a "special provision" to override the presumptive amounts in the Guidelines tables:

> [Para 27] As most transfers of property to a custodial parent indirectly benefit the child or children residing with that parent, something more than a benefit which is

> necessarily incidental to the transfer is required to bring the agreement within the s. 17 (6.2) exemption. Where the provision that is said to be "special" concerns the payment of money, the provision, in the minimum, must either encompass some pre-payment of child support or reflect a financial or property obligation beyond that which the law would normally impose.

Danchuk was also followed in Ritchie v. Ritchie, [2002] S.J. No. 488, 2002 SKQB 337 (Q.B.).

¶ 64 By contrast, in Anderson-Devine v. Anderson, [2004] M.J. No. 484, the Manitoba Court of Appeal permitted the husband to vary his child support payments to below the Guideline amount because of the disproportionate division of family assets and debts in the parties Minutes of Settlement, and most interestingly, this appellate court, unlike the Ontario Court of Appeal in Dieter v. Sampson, did so by inferring from the circumstances, not because of any specific wording in the Minutes. The husband had assumed much of the family's debt and had transferred to the wife his interest in the matrimonial home. Of equal importance is that the Manitoba Court applied Wright v. Zaver in its analysis. To add further confusion, the Quebec Court of Appeal also appears to be more liberally inclined towards apply the "special provisions" provisions of section 17(6.2). In J.C. v. K.S., [2003] Q.J. No. 4113, the Court had no qualms in applying this section and overruling a lower court in not permitting a father to relieve himself of his obligations to pay a large lump sum for child support ($125,000) to which he had agreed under an earlier consent order, who instead was attempting to pay child support under the child support Guidelines, a far lesser amount. On the facts, the Court of appeal did reduce the quantum of the lump sum to $70,000 since one of the two children thereafter decided to leave school rather than pursue a post-secondary education.

¶ 65 Given the difference of opinion amongst the various courts of appeal, the following frank summary of the state of the confusion as expressed by Vertes J., of the Northwest Territories Supreme Court in Waugh v. Waugh [2002] N.W.T.J. No. 76 2002 NWTSC 65 is not surprising, so much so that he declined to rule on the issue later in his reasons:

> I recognize that there is some debate in the jurisprudence as to the meaning and scope of the term "special provisions". Some judges have interpreted this to mean some provision that is out of the ordinary and replaces the need for ongoing support for the child. Others have not interpreted it so restrictively but instead have held that the "special provisions" need not be out of the ordinary or unusual so long as the provisions replace the need for support in accordance with the Guidelines. For an example of this difference of opinion one need only refer to the separate reasons for judgment delivered by Sharpe J.A. and Simmons J.A. in Wright v. Zaver (2002), 59 O.R. (3d) 26 (Ont. C.A.).

It appears the standards differ remarkably depending on the jurisdiction in which the payer resides.

7. Presumptive Rule: Payers earning in excess of $150,000

¶ 66 Where the income of the spouse against whom a child support order is sought is over $150,000, the amount of a child support order is

(a) the amount determined under section 3; or
(b) if the court considers that amount to be inappropriate,

(i) in respect of the first $150,000 of the spouse's income, the amount set

out in the applicable table for the number of children under the age of majority to whom the order relates;

(ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and

(iii) the amount, if any, determined under section 7.

¶ 67 Notwithstanding the words "considers appropriate" courts have long ago rejected the approach that if a very high amount of monthly child support results from an arithmetic calculation under the Table, that such a high figure in-itself negates the amount of support: Francis v. Baker, [1998] O.J. No. 924, 38 O.R. (3d) 481, 34 R.F.L. (4th) 317 (C.A.), affirmed, [1999] S.C.J. No. 52, [1998] 3 S.C.R. 250, 50 R.F.L. (4th) 228 (S.C.C.). The Supreme Court upheld the table amount of support despite the argument by the husband that it was an indirect wealth transfer and spousal support in disguise. Several have followed this principle, including recent interim applications: see Pakka v. Nygard, [2002] O.J. No. 3858, 61 O.R. (3d) 328 (S.C.J.) (the father was ordered to pay $15,091.54 monthly for one child based on income in excess of $2 million yearly). Similarly in Marinangeli, supra, at O.J. paragraphs 91, 92 the Ontario Court of Appeal applied Francis v. Baker by imposing the payment of private school fees in addition to the table amount of $70,102.80 per year (paid on a monthly basis). See also Rozen, (B.C.C.A.), supra, where the court upheld the table amount of $4900 monthly on $364,000 of yearly imputed income applying the reasoning in Francis v. Baker and reasoning that the amounts were not excessive. See also Sharpe v. Sharpe, supra, (Man. C.A.) refusing to change an imputed table amount. However, in L.R.V. v. A.A.V., [2003] B.C.J. No. 2888, 2003 BCSC 1886, the father was ordered to pay $8,000 monthly, about $3000 less than Guideline amount based on his estimated income of $1.9 million annual income, "given the overall size of the award" somewhat modifying the basic principle against ignoring "sheer size." More significantly, in what is the largest child support order in Canadian history to date, the Ontario Court of Appeal in R. v. R., [2002] O.J. No. 1095, 24 R.F.L. (5th) 96, reduced the table support amount for four children from $65,000 monthly to about $36,000, on the grounds that the original award was "excessive." The court also awarded the mother $5000 spousal support and $24,000 annually per child for savings each year. However, we agree with McLeod J. and Mamo A, supra, that Laskin J. still included many luxuries, including vacation homes and sailboat/golf recreational expenses under child care and further that the entire decision smacks of a substantial wealth transfer or spousal support or a "supplementary equalization" that was clearly res judicata in the guise of "child support," to which the court should not have been a party. It is true that section 4(b)(iii) mandates the court to consider "the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children" and that the children of very wealthy parents in the spirit of Willick (S.C.C.) supra, should live at their father's standard of living. However, it is arguable that if any Court should have applied the term "inappropriate" under section 4(b), this may have been it. Conversely, in a very different decision, a B.C. court declined to define an income for one very individual whose affairs were so complex, but who was so wealthy, that "he could afford any child support award that was made against him." His assets exceeded $41 million in value and on the property settlement the recipient wife received approximately $10 million. Accordingly, the court took a "budgetary approach" and awarded $12,000 monthly child support adopting the principle from Francis v. Baker, supra "that any monthly award exceeding $12,000 would "exceed the generous ambit within which reasonable disagreement is possible": see S.H.A. v. W.D.A., [2002] B.C.J. No. 1007 at paragraph 70.

8. Conclusions

¶ 68 If predictability is the goal in child support decisions, then the results are mixed.

a) In varying from the presumptive amounts calculated under section 3 of the Guidelines, relying on "special provisions" in agreements or courts orders under section 15.2 and 17(6.2) of the Divorce Act and sister provincial statutes is much harder to do in Ontario, British Columbia and Saskatchewan than it is in Manitoba and Quebec, with other provincial courts taking one side or the other.

b) To play it safe, the agreements or consent orders should be crafted expressly tying a precise calculation of the equalization or property settlement to a child benefit and explaining numerically how and why the child support release is appropriate and equitable in accordance with the Guideline legislation. Net family property statements should be attached as schedules to illustrate how the child benefit was allocated.

c) In the higher income family cases with payers earning over $150,000 yearly, the courts have generally confirmed under section 4 of the Guidelines that the table amounts will generally be upheld and not be considered a wealth transfer or a ruse for spousal support, although the recipient's advocate should nonetheless be careful to take a budgetary approach and carefully document the type of lifestyle that a child of a wealthy payer should expect to lead in order to justify the order sought. Otherwise there could be some deduction for being excessive.

d) Unless a child has unilaterally terminated his/her relationship with the payer child support will likely remain payable to the end of the first post-secondary degree, even if the child is living away mostly from home if they have been continuously non-working and in school. If they have been working and then attempt to go back and then support is sought the case law is inconsistent. Under the Divorce Act, but not all provincial legislation, child support has lately also been extended to a child who is still materially dependent and within the control of the recipient and within her control, especially if the child is suffering from some illness that is beyond her control, such as a substance abuse or emotional problem, even after the age of majority.

e) The principles in Chartier (S.C.C.) by which a stepparent cannot unilaterally withdraw from a relationship with a child in order to avoid paying child support have been recently reaffirmed in several cases. However, if a natural father is capable of providing for the material needs of the same child/children then the courts have been completely inconsistent in deciding whether or not the non-biological "parent" should be compelled to share the burden of child support. In theory, if there is a capable income producing natural parent, then according to the Manitoba Court of Appeal, his Guideline share of child support should be deducted from the stepparent's obligation monthly. However, a natural parent will not be permitted to apply to the courts for relief to deduct any amounts that a stepparent may be obliged to pay as only the recipient has that remedy to pursue.

f) In determining income, a payer cannot split his burden under the table among his children in different families "pro rata" and must pay the same amount to each former family by the number of each children in each former family.

g) The courts generally look to the very latest information in determining the income of the parties, meaning the current year as the parties are earning it, and will normally demand recent pay stubs or year to date statements, not just the previous year's income tax returns, notwithstanding the wording of sections 15 and 16 of the Guidelines that states the opposite, although there is some recent authority that contradicts this trend and implicitly relies on the wording of these sections. When looking at irregular patterns of income with wild fluctuations the courts will average incomes over the previous three years, but where the

incomes have steadily increased averaging has been found to be inappropriate. The circumstances for the fluctuations must also be examined before the averaging is arithmetically adopted and the guideline amount calculated may be reduced accordingly. Sometimes, averaging fluctuations may also be unfair to the payer and the court may simply adopt the income of the party's next income tax filing.

h) When considering whether to impute a payer's income, the court is very likely to do so if financial disclosure is incomplete and/or is not given in a timely manner. The income may also be imputed if the evidence available from the payer is minimal. Non-cash and personal expenses deducted for tax purposes can be imputed as part of income, such as capital cost allowance not related to real property, but deducted in a tax return. Other specific deductions available under the Income Tax Act but recited in Schedule III of the Guidelines but not being deductible from income for guideline purposes must be carefully scrutinized by counsel for both parties when preparing and reviewing their clients' financial statements to avoid double accounting and to reconstruct "guideline income" as opposed to income to save taxes. There can be an imputation of income where there is no "bad faith" on the part of the payer who switches careers for excellent reasons and loses his earning power as a result to do so no matter how temporarily. He is still considered to be "underemployed." The courts have not been shy in finding payers to be underemployed the moment they take a position earning less, unless underemployment or unemployment are tied to reasons beyond their control or where their options are greatly restricted.

i) Upon demonstrating only unusually high costs of transportation the courts will not hesitate to reduce or even abolish child support to facilitate access to children, with or without the application of "undue hardship" arguments under section 10 of the Guidelines. However, the evidence must be unequivocal and demonstrably significant to the payer's budget.

j) Overpayments of child support will be refunded if the application is brought in a timely manner. Otherwise, it may be prejudicial to the recipient. Such applications are often tied to variations of support orders and applications for retroactive increases in support. The basic principle across Canada, certainly at trial, is that a payer will be obliged to pay retroactively what he should have been paying when he should have paid it. On an interim application, Ontario recipient spouses will now find it very difficult to obtain any retroactive increase in child support given the narrow interpretation that the Ontario Court of Appeal has given to section 25(1) of the Guidelines in Walsh. Subject to a case for "pressing need or urgency", then in the absence of a contractual duty or court order by which the payer has an express legal obligation to make financial disclosure from time to time, a court will not be permitted on an interim application to make any retroactive order for interim child support in the absence of the recipient being able to prove that she requested such disclosure previously from the payer. The only exception to this rule would be those situations where there may be an "implied obligation" by the payer to have made such a disclosure, such as in the Ontario Court of Appeal decision in Marinangeli, where the husband's financial situation improved dramatically shortly after signing his Minutes of Settlement and several months before the recipient could have made a request for such disclosure, being tax season. Otherwise, in the balance of the country or with cases decided at trial, the retroactivity of child support increases often depends upon the extent to which

the recipient delayed her application, presumably because the longer the delay, the greater the prejudice to the payer and the greater the "windfall" to the recipient. Indeed, many of the cases stipulate this very principle. It has been well established that the Court has jurisdiction under the Divorce Act to award child support for the period of time after the separation but before the commencement of an application for support. Many cases, however, will still not permit such applications, even though they have the jurisdiction to so. However, a number of cases reach back several years, one going back 18 years to the date of birth! The argument against using delay as the sole factor for deciding the issue is that child support is the right of the child, irrespective of any fault of the recipient as to how long it may have taken her to bring the application. Moreover, in some of these cases, the husband had intentionally delayed financial disclosure or had disappeared for a number of years or had protracted the proceedings, all of which factors were beyond the control of the recipient. However, then again, in other cases, no reasons are given. So we are left with no predictability in this area, except on interim applications in Ontario in cases where there are no agreements binding payers to legal obligations for timely disclosure.

k) The Courts continue to make it very difficult for a spouse to succeed in lowering or increasing from the presumptive amount by claiming "undue hardship" under section 10 of the Guidelines. Financial hardship is insufficient, often even if the payer earns less money than the recipient. The payer has to demonstrate a lower standard of living and the payer must include his or her GST and child benefit receipt when calculating his income under section 10, and the payer must be current with his payments before making the application for relief. The mere fact of a second family will be an insufficient grounds for claiming any relief for "undue hardship", although, as mentioned, high access costs to facilitate access will suffice to reduce or even nullify child support obligations, unless they are associated with a second marriage.

¶ 69 The Guidelines were designed with to reduce child support litigation since, with the tables, it appeared that there would be little need to resort to litigation. Well, the discretion that the Guidelines have given the courts has left the Bar with many areas of predictability, but much uncertainty and judicial debate. There is no doubt that there are self-evident areas of predictability that this paper has taken for granted, such as tables themselves. In most cases the grid has obviated the need for a Paras type analysis in each case. However, the above analysis reveals many areas which require greater certainty and predictability in which the courts continue to disagree, including Courts of Appeal. There is an obvious need for further reform.

Syrtash Collection of Family Law Articles
SFLRP/2004-009

Family Matters:

Mediation Revisited

By John Syrtash, B.A. (Hon.), LL.B.

December 1, 1994
[Posted on Quicklaw March 26, 2004]

¶ 1 Hockey fans in Canada and the United States have had ample cause recently to appreciate the value of mediation.

¶ 2 Indeed, the problems of the hockey "family" are apparently common to most living things. A famous mediator and social worker, Professor Howard Irving of the University of Toronto, recently recited a disturbing true story. Apparently, some naturalists were observing the rare birth of a condor chick from a safe distance through binoculars. The parents began a physical argument as to who should incubate and nest the egg. The argument became so furious that the parents accidentally kicked the egg off a mountain ledge. It promptly broke, killing the baby condor.

¶ 3 Unfortunately, divorcing parents display no consideration for their baby condors when they fight over them. They cannot begin to imagine how deeply they hurt their child when she or he witnesses such altercations, whether physical, verbal, or through the court system. One judicial official in the Ontario courts recently told me that children, when they grow up, often go back into the court files and read affidavits prepared several years before in which the parents make horrible accusations against each other and the treatment of the children. No one can begin to understand the pain that such children feel when they are grown. You can then begin to imagine what it must feel like for a child of tender years whose entire world of security rests upon what is supposed to be the foundation of a home.

¶ 4 It is no secret that children of divorced parents who can amicably arrange for visitation and custodial rights have fewer nightmares and are much better adjusted emotionally as they grow older. It is also no longer a secret that children with absentee fathers tend to have greater sexual problems and are by far statistically more inclined to exhibit criminal behaviour, particularly in the case of boys.

¶ 5 Fortunately, most people that become divorced do manage to handle their separation with a fair degree of amicability and without the intervention of lawyers or mediators. However, for the few whose divorces generate serious conflict, in front of the children, both parties should seriously consider mediation rather than spending money on expensive legal assistance, so long as there is no issue of domestic violence. If one of the spouses, usually the woman, is being physically or seriously emotionally abused, then I usually do not advise the parties to go to a mediation unless I am convinced that the mediator can "empower" the wife and allow the negotiations to take place on an "even playing field". This is virtually impossible in most cases. However, in many situations, particularly where violence or serious emotional abuse is not an issue, mediation is the best way to save children from the agony of watching their parents destroy each other.

¶ 6 Mediation is also useful in solving family disputes, including sibling rivalries that take place when siblings of other family members fight over the proceeds of an estate. Often these disputes are not really over money, but over some underlying anger caused by parental favouritism exhibited during

someone's childhood. I have been involved in several cases in which brothers and sisters spent a great deal of money fighting each other over money. However, through mediation, they realized that what they were really fighting over was that extra wink that Dad gave his "favourite" daughter or the special attention that Mom gave her "favourite" son, to the severe emotional detriment of the other children.

¶ 7 Parents beware. Ensure that you treat your children with the same love and affection because "Hell hath no Fury like a Child scorned".

¶ 8 Having now interested you in the virtues of mediation, I must unfortunately tell you that there are at least a few mediators in the business who are "quacks". The industry is not regulated in most provinces. There is an association of mediators that has standards and issues certificates based on a regulated number of hours in the practice and courses "in the field". These courses are taken by lawyers, social workers, and other mental health professionals. However, many so-called mediators have no training and can often make matters worse by appearing to take sides in the dispute rather than involving the parties in a process that leads to positive behavioral changes - kindness and "Menschlichkeit".

¶ 9 Some people also have the illusion that they can go to one single lawyer and have an agreement drafted after the lawyer helps them come to an arrangement that is satisfactory to them and the other party or parties involved. Given the state of Canadian law, once the parties have reached such an agreement, they must still go to their own lawyers to obtain dependent legal advice and obtain a certificate reflecting such advice before the agreement would be considered truly valid. Although the cost of these two lawyers would be considerably less than a "mediator" lawyer, the parties will still be paying for the assistance of three counsellors rather than the one individual. However, if the three lawyers are "conciliatory" in nature, the exercise will have been well worth it. In many cases, such mediation could save the couple and their children a great deal of money and months or years of aggravation, litigation or negotiation.

¶ 10 Alternatively, patents can seek a social worker or psychologist mediator, particularly if there are no financial issues to be resolved, but should still see their own lawyer before signing a formal separation agreement.

* This column was originally published by Mr. Syrtash in the Canadian Jewish News on December 1, 1994 as part of a series of articles comprising researched commentary and informed by over twenty three years of practice as a family law lawyer in Ontario. The issues and the laws he researches and discusses all have current application and were again reviewed by Mr. Syrtash before re-publication in this series. Mr. Syrtash invites the reader to send all comments and questions to the email address provided above.

John Syrtash is a partner and family law lawyer with the Toronto firm of Beard Winter. Neither B'nai Brith Canada, Beard Winter LLP, nor John Syrtash is liable for any consequences arising from anyone's reliance on this material, which is presented as general information and not as a legal opinion. John Syrtash can be reached at (416) 306-1733, or e-mailed at jsyrtash@beardwinter.com. You can also visit www.beardwinter.com and www.spousalsupport.com.

Syrtash Collection of Family Law Articles
SFLRP/2004-008

Family Matters:

Recent Decisions alter Spousal and Child Support Landscape

By John Syrtash, B.A. (Hon.) LL.B.

February 3, 2000
[Posted on Quicklaw March 26, 2004]

¶ 1 In a lecture to the Canada Bar Association, law professor Brenda Cosman of the University of Toronto made some pointed remarks about the current state of the law of support in Canada. She described recent Supreme Court decisions last year as radically changing the face of our jurisprudence. The cases - Bracklow, Chartier and M. v. H. - all broaden the scope for entitlement to support to a heretofore unparalleled extent. The new beneficiaries are, in their respective categories (may we have the envelopes, please):

(a) any spouse who, for any reason, is "in need", notwithstanding the length of marriage or whether the marriage had anything to do with causing that need (Bracklow):
(b) the parent of a child whose step-parent has been found to be a step-parent, notwithstanding the lack of any relationship between the child and "step-parent" (Chartier); and
(c) the romantic partner of a same-sex couple (M. v. H.).

¶ 2 Needless to say, in each case the recipient has less money available than the other spouse or parent. I would add the following. Our Spousal Support Database, which summarizes several thousand cases decided since 1992, suggests that across Canada, and particularly in Ontario, the Courts in many cases are equalizing incomes where the recipient spouse also has care and control of the children, usually in the form of custody. In fact, in the Toronto area it is becoming increasingly common to award the custodial parent (usually the wife) as much as 60-70% of both parents' total incomes in child and spousal support, leaving the payer with a net after-tax income of only 30-40% on which to survive. Much depends on the number of children involved and the parties' respective gross income levels.

¶ 3 Professor Cosman also suggests that at the same time, the ability to receive public assistance has been dramatically cut back or limited by the State and its taxpayers. I agree with her, but only up to a point. We are not exactly back to the times of the Depression, or before the New Deal when an individual in need relied almost entirely on the family and charities as opposed to the State. Notwithstanding news to the contrary, we have not eradicated the welfare state so much as limited its application. With all of their new limitations, we still enjoy the benefits of numerous supports such as socialized medicine, unemployment insurance, Canada Pension, and subsidized post-secondary institutions of learning, in addition to services like public libraries and schools. There is a plethora of government programs for fighting hunger, homelessness, and disease. I don't agree that these programs are being properly funded or well run, but they exist! We all know that taxpayers hungry for tax cuts have staged a revolution through ballot boxes across North America, including Ontario, and the Courts have heard the message: let's make family members who can pay, pay, and ease up on the public purse.

Needy Spouses at Risk

¶ 4 There are conflicting trends. Needy spouses who have no dependent children and do not enjoy an independent income are not getting significant monthly spousal support orders. The Spousal Support Database reveals that even where the husband earns $100,000 yearly and there are no children, the very most a Court has ordered is $3,000 monthly in support, even after a lengthy marriage. After taxes, this monthly payment is reduced significantly (by at least 20%). In jurisdictions outside of the Greater Toronto Area the amounts payable for spousal support are often even less, particularly in the Province of Quebec. Many people in the Family Courts are underrepresented or not represented at all. The ability of such litigants, particularly women, to obtain higher spousal support awards has thereby been compromised in many cases.

¶ 5 The amounts actually ordered are often tied to the quality of the legal representation, if any, rather than some grand plan or unified theory of support. In short, better to hire a good lawyer than to worry about the law.

* This column was originally published by Mr. Syrtash in the Canadian Jewish News on February 3, 2000 as part of a series of articles comprising researched commentary and informed by over twenty three years of practice as a family law lawyer in Ontario. The issues and the laws he researches and discusses all have current application and were again reviewed by Mr. Syrtash before re-publication in this series. Mr. Syrtash invites the reader to send all comments and questions to the email address provided above.

John Syrtash is a partner and family law lawyer with the Toronto firm of Beard Winter. Neither B'nai Brith Canada, Beard Winter LLP, nor John Syrtash is liable for any consequences arising from anyone's reliance on this material, which is presented as general information and not as a legal opinion. John Syrtash can be reached at (416) 306-1733, or e-mailed at jsyrtash@beardwinter.com. You can also visit www.beardwinter.com and www.spousalsupport.com.

Syrtash Collection of Family Law Articles
SFLRP/2004-007

Family Matters:

If Silence is Golden, then What is Gossip?

By John Syrtash, B.A. (Hon.), LL.B.

February 28, 2002
[Posted on Quicklaw March 26, 2004]

¶ 1 It may appear old-fashioned to object to Gossip. Everyone does it, right? It's fun. Life would lose its zest without the thrill of discussing someone else's misfortunes. The Jewish faith has something to teach family law lawyers about drafting.

¶ 2 In family law, lawyers are often paid to formulate incisive affidavits or prepare a witness to give oral evidence about someone other than their client. This evidence is filed as a public document in open Court.

¶ 3 However, sometimes clients in family law cases use the opportunity not just to prove a point, but indeed to destroy the character of their opponent. Revealing a deficiency in the other party's parenting skills may strengthen their case.

¶ 4 But is it really necessary to generalize and imply or say that the same individual is a monster - a terrible father or mother? The father may owe the mother money, but does that make it okay for the mother to state that he has "defrauded me of my entire inheritance"? It may be crucial to show that your opponent earns more or spends more than he or she claims. But does that give you license to claim total dishonesty?

Grave Sin under Jewish Law

¶ 5 In Jewish law, Gossip (known as Ioshon hora in the Jewish religion) is one of the gravest sins. A Jew is normally forbidden by the Torah to say anything about a third party lest it destroy that person's reputation.

¶ 6 But is this kind of evidence submitted in Court "Gossip" in the way most people in modern Canadian society understand the word? Obviously not. Notwithstanding Jewish law, people are usually free to say anything they wish in Court to try to prove their case, even if what they say may appear to be defamatory. Even in a Jewish Court, a witness is permitted to give honest evidence about direct observations (not hearsay) if what he has to say is relevant.

Statements Calculated to Hurt

¶ 7 So why should anyone be concerned with some quaint, antiquated notion of "Gossip"? We're not living in Puritanical times, ancient Israel or Mea Shearim (the very observant neighbourhood in Jewish Jerusalem).

¶ 8 However, many Judges and responsible counsel in family law have become increasingly alarmed at the extent to which clients unnecessarily exaggerate or complain about their spouse's conduct in these

affidavits or open Court.

¶ 9 Master Cork is a Toronto judicial officer who for several years adjudicated many family law hearings. He often pleaded with lawyers to restrain their clients from attacking each other needlessly when giving evidence, especially when that evidence was submitted in writing. Children and other concerned parties often read this stuff during the dispute. This happens when a parent carelessly - or deliberately - leaves such written statements on the coffee table. Often years after the dispute is over, children or others will discover these damning allegations of duplicity dishonesty, child neglect, abuse (physical, emotional and/or sexual), and depravity, which may be exaggerated or unnecessarily stated. Whether the statements are true or not, they are often calculated to be vindictively hurtful.

¶ 10 This practice is particularly reprehensible because it violates the unwritten rule that, in a visitation scenario, neither parent should speak ill of the other in the other's absence. So these statements do hurt - but they often hurt the wrong people.

¶ 11 The pain children feel when seeing their parents rip into each other is sickening. Yet not only do many fighting parents appear oblivious to these concerns, their lawyers often fail to advise their clients to adopt a more restrained approach.

Friends, Relatives Forced to Take Sides

¶ 12 It gets "better". The parents then "recruit" their friends and relatives into their own camp. These "significant others" sign similar affidavits or give oral evidence to prove their allegations. The friends and family members, who may have previously been neutral, are now involved in hurling insults and derogatory statements, not because they want to, but because they were asked to.

¶ 13 Unfortunately, it is sometimes necessary to obtain evidence from third parties that is relevant to a custody dispute. But unless the allegations are "documented" or focused with considerable detail on a truly serious allegation that a Judge must know about (such as child neglect), the process can be unnecessary and destructive.

¶ 14 Some of the allegations that I have seen in such materials are more than a complete waste of time; they trivialize the entire Court system. An unsupported allegation is one made without proof, i.e. without documents like a police report or a medical report. A parent who hurls that type of allegation may not be able to persuade a Judge. More importantly, if the allegation is exaggerated, the Court will not be pleased: it is a criminal offense to bend the truth in an affidavit or in Court. It's called perjury. Moreover, exaggerated statements will be considered Gossip - not evidence. Gossip can be damaging, both legally and spiritually.

¶ 15 Restraint, on the other hand, can be a "mitzvah" (a positive moral commandment). As incongruous as it may sound in a legal context - especially a custody case - the exercise of restraint may allow you and your counsel to prove a point without annihilating your "opponent" Restraint also garners the Court's respect and immeasurably enhances the client's credibility.

* This column was originally published by Mr. Syrtash in the Canadian Jewish News on February 28, 2002 as part of a series of articles comprising researched commentary and informed by over twenty three years of practice as a family law lawyer in Ontario. The issues and the laws he researches and discusses all have current application and were again reviewed by Mr. Syrtash before re-publication in this series. Mr. Syrtash invites the reader to send all comments and questions to the email address provided above.

John Syrtash is a partner and family law lawyer with the Toronto firm of Beard Winter. Neither B'nai Brith Canada, Beard Winter LLP, nor John Syrtash is liable for any consequences arising from anyone's reliance on this material, which is presented as general information and not as a legal opinion. John Syrtash can be reached at (416) 306-1733, or e-mailed at jsyrtash@beardwinter.com. You can also visit www.beardwinter.com and www.spousalsupport.com.

Syrtash Collection of Family Law Articles
SFLRP/2004-006

Family Matters:

England Passes Get Law in Canada's and New York's Footsteps

By John Syrtash, B.A. (Hon.), LLB.

September 5, 2002
[Posted on Quicklaw March 26, 2004]

¶ 1 According to the Yiddish newspaper, the Forverts (Yiddish Forward), England's Parliament recently passed a law to help Jewish women obtain a religious divorce ("Get") to enable them to remarry more easily. The newspaper further reports that Jonathan Sachs, the chief Rabbi of England, is happy with the law which "gives the courts the right to require from a couple a religious Get before the Court will grant a civil divorce".

¶ 2 I congratulate all the hard-working English men and women who promoted this new law. It took them many years and a great deal of effort in the face of considerable resistance.

Canada's Role in Pioneering Get Legislation

¶ 3 The law mirrors New York State law, where the idea originated with the noted American jurist lawyer Nathan Lewin, and others in the early 1980s. We in Canada had such legislation enacted in the Divorce Act of 1991, and in Ontario's Family Law Act as early as 1986!

¶ 4 However, in Canada, a spouse has to raise the Issue of his or her need for a religious divorce before a Court will prevent the civil divorce from being granted. In 1985/86 and in 1990/91, I had the privilege of drafting and promoting this legislation on behalf of the Orthodox Rabbis of Toronto and B'nai Brith Canada. These groups successfully trailblazed this initiative to assist primarily those Jewish women whose husbands were attempting to extort money or other "rights" in exchange for their consent to a Get.

Consequences of Refusing to Grant a Get

¶ 5 Since then, the incidence of "Get abuse" has shrunk dramatically. The Canadian legislation goes further than the English and the American: the "blackmailing" spouse can lose rights to property, money and even custody or access to children if he or she refuses to consent to a Get. The Canadian Courts have that power vested in them by Parliament and the Ontario legislature.

¶ 6 The Canadian Jewish Congress, various women's groups and over 50 religious denominations across Canada, including the Catholic Church, ultimately supported the Orthodox Rabbis and B'nai Brith. So did the great constitutional lawyer (now deceased), J.J. Robinette.

¶ 7 They did so for a reason. Without a Get, a Jewish woman is unable to remarry within the Jewish Faith. This means that if she gets a Canadian civil (secular) divorce - but not a religious one - then any children with her new husband would be considered under Jewish law as "illegitimate" or "mamzerim". Mamzerim can only marry other mamzerim or converts, and this rule applies to their children and their

children's children into the 10th generation!

¶ 8 Under traditional Jewish law, Rabbis and synagogues are mandated not to permit marriages between mamzerim and other Jews. There are even mamzer societies that attempt to locate prospective spouses for such people.

¶ 9 Not only are many observant Jewish woman unable to remarry, they also cannot even date or allow themselves to be alone with a man. They become socially isolated and ostracized, "chained" to their estranged husband indefinitely. Such women are called "agunah" or "agunot" (plural). It is the duty of every Jew to help such women by doing whatever is necessary to persuade their husbands to give a Get, and to do so without conditions.

Ostricisation of the Agunot

¶ 10 According to Jewish law, the Torah also prevents any Rabbi from granting a "Get" or from making a ruling to circumvent the need to obtain the husband's consent to a Get.

¶ 11 In the Torah, it is one of our 613 Mitzvot to give a Get, when one is called upon to do so. The refusal to do so is no less a sin than stealing, adultery or failing to keep a kosher diet.

¶ 12 A Jewish court can punish a man for refusing to consent to a Get, but those powers do not realistically exist outside of the State of Israel. In Israel, a man who refuses to grant a Get can be jailed or have his licenses to work or property rights compromised. In specific circumstances (not all), a Jewish man visiting Israel who refuses to grant a Get can be restrained from leaving Israel until he does so, even if he is not an Israeli citizen! (This has actually occurred.)

¶ 13 By contrast, in certain situations, a Jewish man can remarry without a Get if he obtains a rabbinical ruling called a "heter", although this practice is frowned upon by the Jewish court in Toronto and is not practiced widely in Canada. It is extremely difficult to obtain such a "heter". Even when Rabbis permit such a procedure, they usually do so on the condition that the husband provides his consent to a Get at the same time. Otherwise, the woman would be left "stranded". Since obtaining such a heter is so difficult (and expensive), a number of men have also resorted to using Canadian law to enable them to remarry religiously.

¶ 14 It is gratifying to see that England is following in the footsteps of Canada and New York. As Canadians, we should all take some satisfaction in having contributed to help the agunot.

¶ 15 We should think of the agunah and commit ourselves to help anyone in our community in her situation (or his). Give her comfort and solace. Do not leave her stranded and ostracized.

¶ 16 And if you are in a position to do so, try to persuade a "blackmailing" or "difficult" spouse to do what is right.

* This column was originally published by Mr. Syrtash in the Canadian Jewish News on September 5, 2002 as part of a series of articles comprising researched commentary and informed by over twenty three years of practice as a family law lawyer in Ontario. The issues and the laws he researches and discusses all have current application and were again reviewed by Mr. Syrtash before re-publication in this series. Mr. Syrtash invites the reader to send all comments and questions to the email address provided above.

John Syrtash is a partner and family law lawyer with the Toronto firm of Beard Winter. Neither B'nai Brith Canada, Beard Winter LLP, nor John Syrtash is liable for any consequences arising from anyone's reliance on this material, which is presented as general information and not as a legal opinion. John Syrtash can be reached at (416) 306-1733, or e-mailed at jsyrtash@beardwinter.com. You can also visit www.beardwinter.com and www.spousalsupport.com.