CASE COMMENT: CONTINO v. LEONELLI-CONTINO

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published at (2003), 42 R.F.L. (5th) 326-333
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There are some good things to be said about the Court of Appeal decision in *Contino v. Leonelli-Contino*, 2003 CarswellOnt 4099, 42 R.F.L. (5th) 295 (Ont.C.A.) ("*Contino"*). First, it overturns the Divisional Court decision, reported at 2002 CarswellOnt 4092, 30 R.F.L. (5th) 266, which was plainly wrong, in reasoning and result. Second, it rejects the "pro-rated set-off" as a formulaic basis for child support pursuant to s. 9 of the *Federal Child Support Guidelines*.. Third, it acknowledges that there should be some reduction where parents share custody and the Court's result of $400 is a significant reduction from the table amount, on its face. Fourth, it takes the s. 9 issues seriously and makes many good points along the way.

Unfortunately, their decision reflects bad concepts, bad math, and sometimes bad law. *Contino* adds a bunch of new calculations to the existing cacophony of section 9 methods. To obtain the child support amount, the Ontario Court of Appeal takes the "straight set-off" of table amounts, increases it by a case-specific "multiplier" of 1.676 and then adds a further dollar amount for "variable expenses" based upon a *Paras* calculation, all as an exercise of its discretion in this particular case. We now have three appeal court decisions, adopting three different approaches: *Contino*; *Green v. Green*, 2000 CarswellBC 1048, 6 R.F.L. (5th) 197 (B.C.C.A.)(pure discretion, about 25% off); and *Slade v. Slade,* 2001 CarswellNfld 12, 13 R.F.L. (5th) 187 (Nfld.C.A.)(straight set-off).

At this point, only an amendment to s. 9 of the *Guidelines* can restore some consistency. In the *Report to Parliament*, the Department of Justice proposed "a presumptive formula", namely "the difference between the table values for each parent given the total number of children in the shared custody arrangement": Canada, Department of Justice, *Children Come First: A Report to Parliament Reviewing the Provisions and Operation of the Federal Child Support Guidelines* (Ottawa, 2002), Vol. 1 at 22. The presumption would be rebuttable, hence retaining judicial discretion to order another amount. Unfortunately, with the custody and parenting amendments to the *Divorce Act* in parliamentary limbo, there has been no move yet to amend s. 9.

1. Basic Concepts: Table Amounts and Section 9(a)

Contino is an "equal time" case, where the 17-year-old son spent 50 percent of his time with each parent, starting in 2000 with the addition of a second overnight each week. The father's Guidelines income was fixed at $87,315 and the mother's at $68,000. The father had been paying $500 per month until 1998 and then $563 per month thereafter. On the father's application to vary based upon shared custody, Rogers J. applied the "pro-rated set-off plus multiplier" and then rounded off to $100 a month. The Divisional Court went for the full table amount of $688, based upon its erroneous "deviation" approach. The father appealed.

Even though this is an "equal time" case, the Ontario Court of Appeal is fixated upon the "40 per cent threshold" and the "cliff effect" and trading "dollars for days". Again and again, the Court returns to the precipice of the cliff, to the hypothetical father exercising access for 39 per cent of the time, whose access then bumps across 40 percent. Suddenly, the mother's child support drops from $688 in this case, to $64 on a pro-rated set-off or $128 on a straight set-off.

But the shared custody provision is not about tiny little increments. Our Child Support Guidelines -- unlike Quebec's -- make no adjustment for increased or extended access short of "shared custody". Non-custodial or access parents do spend money during their time with their children, but the federal Guidelines make no reduction for any such expenditures, not until the child spends more than 40 per cent of the time with the non-primary parent. That threshold is set very high, precisely to protect the financial position of the primary parent, who gets the full table amount right up to that threshold. So long as the threshold is set high, with no adjustment below it and adjustment only above it, there will inevitably be a "cliff effect". That raises broader issues of litigation incentives, parental behaviour and the 40 per cent threshold, which I will have to put aside here.

"Shared custody" is distinguished from "ordinary custody", for child support purposes, by section 9 of the Guidelines. For shared custody, there should be a different starting premise than the table amount for the higher income parent. If two parents spend equal time and money with the child and have equal incomes, then child support *ought to be zero, not* the table amount. Each parent has equal ability to sustain the additional costs of shared custody and each would have similar fixed and variable costs. If both the Continos earned $68,000 a year, the proper amount of child support should probably be zero.

But that wasn't the case. Mr. Contino made $87,315. A straight set-off of one-child table amounts would generate $128 a month, as the table amounts should adjust properly for differences in income. But that seems to be a small amount for a $20,000 difference in gross income. "Too low", say many courts, like the Ontario Court of Appeal, in comparison to the full table amount of $688. Many courts then respond with a "multiplier", to bump up the number. Some courts just pick a number in between the set-off amount and the full table amount, as the B.C. Court of Appeal did in *Green*.

One of the problems is that the one child table amounts under the Child Support Guidelines are generally too low, especially through the middle income brackets. Offsetting inadequate table amounts just drives home the severity of the problem. The one child table amounts disadvantage all custodial parents, not just those sharing custody. According to statistics, the median number of children in shared custody is 1.75, i.e. mostly one or two children, and the median income for shared custody payors is $50,000, compared to roughly

$31,000 for shared custody recipients: *Report to Parliament*, above, Vol. 1 at 19. Thus, the *Contino* situation is typical, i.e. one child and a $20,000 difference in incomes. The greater the disparity in parental incomes, then the larger the set-off amount and the less noticeable is the problem: if Ms. Leonelli-Contino only made $25,000 a year, for example, then the set-off would generate $466.

Still, the Ontario Court of Appeal in *Contino* accepts that a straight set-off of table amounts "can be useful as a starting point (para. 54) and "in most cases and particularly in a case such as this where there is limited information and the incomes of the parties are not widely divergent, we think a formula based on the Table amounts is the most appropriate starting point" (para. 57). In the end, "the simple set-off approach [is] the starting point that is most faithful to the wording of s. 9" (para. 67).

2. Increased Costs under Section 9(b): So You Add a Multiplier...

Faced with the low number in *Contino*, the Ontario Court of Appeal adds on a multiplier. And what a multiplier, the highest ever seen, 1.676. How did they do that?

The Court rejects the "pro-rated set-off", at paras. 59-60, which produced the amount of $64 a month for the Continos. Under this method, you take 50 per cent of each parent's table amount, to reflect their 50 per cent of the time with the child. (If the father had the one child for 40 per cent of the time, then this method would derive 60 per cent of the father's table amount to be paid to the mother and then subtract 40 per cent of the mother's table amount.) Conceptually, this seems correct, but it fails to recognise the "redundant costs" of shared custody. Thus the use of the 1.5 "multiplier" to bulk up the pro-rated set-off, as was done in the early leading case of *Hunter v. Hunter,* 1998 CarswellOnt 1509, 37 R.F.L. (4th) 260 (Ont.Gen.Div.). And that's what the motions judge did in *Contino*, to get up to $96, then rounded to $100.

What's the logic of a "multiplier"? The Court of Appeal gives its explanation in a few places, in theory (paras. 71-74, 87) and in application to this case (paras. 90-91). A commonly-used multiplier is 1.5 or a 50 per cent increase in the set-off amount. Underpinning that number is an assumption that, taking the child-related spending of both parents, together they would spend 1.5 times the amount in a shared custody arrangement compared to a sole custody arrangement. Here's the math: each parent is stuck with fixed and duplicated costs which are assumed to amount to 50 per cent of their respective budgets, to which is then added the non-duplicated variable costs which would amount to the other 50 percent of the "custodial" parent's budget in a sole custody setting, but are now spread over two households, i.e. 50 plus 50 plus 50 means a multiplier of 1.50 over-all.

This is an assumption, a ball-park estimate, not based upon any empirical studies of spending by parents in shared custody settings. Sometimes this is called the "Colorado" multiplier, one of three American states that apply a 1.5 multiplier to their income shares formula (whereas our table amounts derive from a percentage-of-income formula).

Why are total costs higher in shared custody cases? As we all know, there are certain

costs, mostly "fixed costs", that are "redundant" or "duplicated" in each household. The Court of Appeal concentrates upon the costs of accommodation. "Fixed and duplicated costs" would include housing costs, utilities, furniture and household effects, the fixed portion of transportation costs, some element of clothing costs, some toys and personal effects, etc. Then there are costs that are truly "variable" with time, some of which are noted by the Court of Appeal, i.e. food, the variable portion of transportation costs, some aspects of child care, most recreation and entertainment expenses, some school costs and vacation expenses. I say "truly variable", as the increase for one parent here does mean a decrease for the other. Then there are "other expenses", expenses that tend to be lumpy and are neither duplicated nor variable with time, i.e. clothing, some medical expenses, most section 7 expenses (including child care and major school and extra-curricular expenses), a whole raft of minor extra-curricular and school-related expenses, summer camps. On this topic and many others, an excellent article is Melli and Brown, "The Economics of Shared Custody: Developing an Equitable Formula for Dual Residence" (1994), 31 Houston L.Rev. 543.

The Court of Appeal divides all child-related costs into "fixed" and "variable" costs, a two-way division that is probably too simple for conceptual or practical purposes. Their later analysis of "variable costs" under s. 9(c) reveals the problems with their two category approach.

There are numerous conceptual problems with multipliers, in general and in this appeal. First, there is already a multiplier built into the "straight set-off". Rather than using a pro-rated or partial table amount, the full table amount is used, as if one child spent all his or her time with each parent. This built-in multiplier can best be understood by comparing the split custody set-off for two children (one in each house) with the shared custody "straight set-off" amounts (as if two children were in each house): see *Report to Parliament*, above, Vol. 2 at 74. To add another multiplier on top of the full one-child amount, as in *Contino*, is double-counting.

Second, the Court of Appeal focusses upon the cost of accommodation in its analysis, more specifically the mother's child budget allocation for housing costs. Most "fixed" costs are also "joint" costs, i.e. both mother and child share the benefits of a house or car or television. It is therefore as much a matter of policy and judgment, as empiricism, in allocating these fixed costs to the "child budget", especially in individual cases. Here, the Court notes that each parent simply attributed 50 per cent of their respective general shelter and grocery costs to the child's budget (para. 16). It is hard to imagine that 67.6 per cent of a child's budget would be housing costs, at these income levels, as was found to be the case in *Contino*, at para. 90 (and this paragraph become almost nonsensical at times, as the Court inadvertently uses "variable costs" in one sentence and then "fixed costs" in the next sentence, when it really means "total child costs" each time). Even standard multipliers of 1.5 or 1.35 have been questioned as too high, based upon "normal" shared parenting expenditures, as in Melli and Brown, above.

Third, there is a difference between increased costs overall and how those increased costs are distributed between the parents. A multiplier speaks to the overall increase, but not the distribution. In practice, the increased costs of shared custody -- the duplication of housing, furniture, basic supplies of toys and clothing -- are borne by the "non-custodial" or "non-primary" parent or the parent moving out of the family home, usually the payor father. To require a higher payment, by way of multiplier (or even the full table amount, as some suggest),

then makes this payor parent pay twice for duplicated costs, once through higher child support to the primary parent and then once directly for their own housing and other duplicated costs.

Fourth, a multiplier may bulk up the child support number for parents whose incomes are not that far apart. But once the income disparity increases, a multiplier soon generates child support amounts larger than the full table amount. Is support to be "capped" at the table amount, or can the multiplier push it above and beyond? For one child, using a 1.5 multiplier, assuming that Mr. Contino still earns $87,315, once Ms. Leonelli-Contino's income were to drop below $25,000 the amount of child support exceeds the full table amount. If the much higher multiplier of 1.676 is used, that threshold is passed once her income were to drop below $32,000. This issue was also raised in the *Report to Parliament*, above, Vol. 2 at 74.

Further, note the difference in treatment of the mother's housing expenditures and the father's in *Contino*. The mother spends 67.6 per cent of her child budget on housing and thus the Court adopts a 1.676 multiplier. Of course, the father has higher accommodation costs as a result of shared custody too, right? No, says the Court of Appeal, the father did not prove "when he provided the child with his own bedroom and what if any additional costs this entailed" (at para. 92), presumably compared to the exercise of 39 per cent access (see para. 76). So there is no evidence of "increased costs... occasioned by the increased access" (para. 92). There's no excuse for this asymmetrical and unfair treatment of each parent's fixed and duplicated housing costs.

3. Then You Look at Actual Spending under Section 9(c)

But we're not done with this formula yet. First, you take a "straight set-off" of table amounts, i.e. $688 minus $560, or $128. Second, you use a multiplier, 1.5 if there's no evidence or 1.676 based on the specifics of Ms. Leonelli-Contino's budget, i.e. $128 times 67.6 per cent, or another $87. Then, third, you look at the child budgets of both parents, to see who spends what, the "actual spending pattern", as the Court does here in para. 93. It would appear that you add up the "variable expenses" in both households and then allocate contributions based upon a *Paras*-type formula, much like the sharing of s. 7 expenses, here 55/45 by the father. The father's "proper share" of the variable expenses, based upon his income share, was thus $370, but he only showed $270 of variable expenses in his own budget, which means he owed another $100 to the mother. Hence the total of $315. A further $85 is then added on, as the father's contribution to the RESP created by the mother, awkwardly described by the Court as a "special expense", but that's another issue.

Yet some of this "actual spending" has already entered into the set-off of table amounts, based upon their respective incomes. Any crude multiplier for "increased costs" will inevitably also pick up some part of these variable costs, as it certainly did in *Contino*. There's nothing wrong with using budgets to look at who pays what, especially for those “other expenses”, those"lumpy", non-duplicated costs that don't vary with time. But to reallocate all the "variable costs" here likely meant more double and triple counting.

Interestingly, the Ontario Court of Appeal says nothing about the Continos' respective

household standards of living, despite a reference to this factor in the general analysis, at para. 77. Nor is there any careful consideration of the disparities in parental incomes, another s. 9(c) factor identified. Nor is there any reference, generally or specifically, to the asset and liability positions of the parents, a factor considered by the B.C. Court of Appeal in *Green*, a factor relevant to each parent's ability to sustain the costs of shared custody. This seems odd, as the major concern of the Ontario Court of Appeal is the mother's high fixed cost of housing, after her move to Woodbridge.

4. Undue Hardship?

In reversing the Divisional Court, the Ontario Court of Appeal rules that s. 9 is not a "deviation" or "departure" provision, but an independent discretion in determining child support. The table amount does not apply, although a court is directed to "take into account" table amounts for each parent. A reduction under s. 9 will sometimes "result in undue hardship to the payee spouse". "In such cases," says the Court, at para. 83, "the court will need to consider the provisions of s. 10(1) of the Guidelines". The payee or recipient spouse might have to bring a claim to increase child support above the table amount, as the categories of undue hardship are not closed.

In practice, courts have universally refused to increase child support under s. 10, even in the compelling case where the non-custodial parent fails to exercise any access at all: Thompson, "Of Camels and Rich Men: Undue Hardship, Part II" in *Federal Child Support Guidelines: Reference Manual* (February 1999) at pp. H-42 to H-48.

But there's no need to resort to s. 10, either to increase or to reduce support, as a court has full discretion to pick whatever number it thinks proper under s. 9, anywhere from zero to a number above the table amount. This is just bad law, to draw in "undue hardship" and its legal baggage to the determination of support under s. 9.

5. Conclusion: A Discretion or a Formula?

By the time you work through all these steps in the appeal decision, it's easy to forget the big picture. Way back at the start, the Court of Appeal stated its preference for the discretionary approach to s. 9 rather than a "formulaic" approach (paras. 5-7). The three mathematical steps described above represent the Court's attempt to "structure that discretion to provide some predictability and objectivity" through the use of formulae (para. 7). Their "formulae" in turn rely heavily upon child expense budgets prepared by the parents. At one point, the appeal court even suggests that parents might revert to the individualized expense budgets and the old *Paras* pre-Guidelines approach, "such as where the expenses of caring for a child are greater than the Table amount for either parent" (para. 56). And, if there is no specific budget information, then a straight set-off of table amounts can be increased by a 50 per cent multiplier (para. 73).

It's hard to tell what lower courts will do with *Contino*, as it offers something for everyone, a veritable smorgasbord of numbers and formulas and concepts. Its real weaknesses

lie in its case-specific multiplier and its sharing of "variable expenses". Its strengths are its rejection of the pro-rated set-off in favour of the straight set-off, and its attention to the actual spending patterns of the parents.

In the end, after all the calculations, the Court orders the father to pay $400 a month child support, significantly less than the full $688 table amount but also much more than the $128 suggested by the commonly-used straight set-off of table amounts. According to my math, the Court of Appeal picked a number almost exactly half-way between the full table and straight set-off amounts. Ironically, that was the same result in the B.C. Court of Appeal in *Green*, where Justice Prowse just picked an intermediate number as an act of discretion, with no calculations. Problem is, the facts in *Green* were quite different, with a much larger disparity in incomes, two children, a 60/40 sharing arrangement, and a significantly weaker financial position for the primary parent mother.

The final amount for the Continos appears on the high side, given the small disparity in incomes and the 50/50 sharing of time, even making allowance for the "low" one child table amounts. Whatever might have been a "fair" result on this limited factual record, however, *Contino* has generated a complicated, ill-conceived and unfair method of child support determination for the many other parents who share custody of their children.