FAMILY COURT OF NOVA SCOTIA

Citation: *R.A.B. v. C.W.R.*, 2016 NSFC 14

Date: 2016-06-01
Docket: Pictou No. FPIC MCA 095493
Registry: Pictou

Between:

R.A.B.

Applicant

v.

C.W.R.

Respondent

Judge:	The Honourable Judge Timothy G. Daley
Heard	March 10, 2016; April 15, 2016; and May 18, 2016, in Pictou, Nova Scotia
Counsel:	Amber Snow, for the Applicant C.W.R., self-represented

By the Court:

[1] This decision relates to a dispute between the applicant R.A.B. and the respondent, C.W.R.. The parties have already settled all matters concerning custody and access for their three children I.B.R., born March 27, 2007, R.B.R., born February 11, 2010, and N.B.R. born October 9, 2011. Put simply, the parties agree to joint custody in a shared parenting arrangement such that the children spend equal time with each of their parents.

[2] As well, as a result of an interim hearing, the issue of therapy for the children has been resolved by this Court. It was determined that the oldest child, I.B.R., will see a therapist under certain conditions and that the two younger children will not. The terms of that interim order have been settled and that issue is no longer the subject of this hearing.

[3] There are two remaining issues for determination by this Court. The first issue is whether any child maintenance is to be paid and if so, the amount and who should pay it. The second issue is a determination of special and extra-ordinary expenses, specifically whether any or all expenses claimed by the parties qualify, and if so, what each party's contribution shall be to those expenses.

Background

[4] Before providing my decision on these issues I will first confirm that these parties have been together in a common-law relationship for approximately 13 years. R.A.B. says the parties separated on November 1, 2014, and C.W.R. says the parties separated in October of 2014, when R.A.B. asked him to separate, which he interpreted as telling him she wanted a separation. For the purpose of determining the outstanding issues before me, I find that the parties separated as of November 1, 2014, when R.A.B. and the children left the family home.

The Act and Guidelines

[5] In order to determine the issues, it is necessary that I make reference to and apply the various sections of *Maintenance and Custody Act* (the *Act*) and the *Child Maintenance Guidelines* (the *Guidelines*). Each party made an application pursuant to section 18 of the *Act* seeking a determination of custody and access issues, which have already been resolved by agreement.

[6] Each party also made an application pursuant to Section 9 of the *Act* for determination of child maintenance.

[7] Section 8 of the *Act* sets out the duty to pay maintenance as follows:

> Every one
>
> (a) who is a parent of a child that is under the age of majority; or
> (b) who is a guardian of a child that is under the age of majority where the child is a member of the guardian's household,
>
> is under a legal duty to provide reasonable needs for the child except where there is lawful excuse for not providing the same.

[8] The authority of the Court to make maintenance orders is found in section 9 as follows:

> Upon application, a court may make an order, including an interim order, requiring a parent or guardian to pay maintenance for a dependent child.

[9] I am directed by section 10 to use the *Guidelines* as follows:

> When determining the amount of maintenance to be paid for a dependent child, or a child of unmarried parents pursuant to Section 11, the court shall do so in accordance with the Guidelines.

[10] The *Guidelines* are made pursuant to section 55 of the *Act*. It is helpful to review the objectives of the *Guidelines* which are set out in section 1 as follows:

> **1** The objectives of these Guidelines are
>
> **(a)** to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
>
> **(b)** to reduce conflict and tension between spouses by making the calculation of child support orders more objective;

> **(c)** to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
>
> **(d)** to ensure consistent treatment of spouses and children who are in similar circumstances.

Undue Hardship Claim

[11] C.W.R. has made a claim of undue hardship as part of his response to R.A.B.'s application and has filed the appropriate documentation in support of that claim. I find, however, that given this is a shared parenting arrangement, and upon reviewing the decision of *Contino v Leonelii-Contino*, 2005 SCC 63 from the Supreme Court of Canada, a claim of undue hardship is inappropriate in such circumstances. As noted in *Contino* at paragraph 72 the Court held as follows:

> 72 The Court of Appeal, when reversing the decision of the Divisional Court, posited that a reduction in support under s. 9 will sometimes result in undue hardship to the recipient parent and that in such cases the court will need to consider the provisions of s. 10(1) of the Guidelines. In my opinion, there is no need to resort to s. 10, either to increase or to reduce support, since the court has full discretion under s. 9(*c*) to consider "other circumstances" and order the payment of any amount, above or below the Table amounts … It is not that "other circumstances" of each spouse and "hardship" are equivalent terms, it is that the discretion of the court, properly exercised, should not result in hardship. It may be that s. 10 would find application in an extraordinary situation, but that is certainly not the case here.

[12] I will note at this point that I cannot find that this case approaches an "extraordinary situation" contemplated by the Court in *Contino* in any respect. I therefore find, consistent with the decision in *Contino*, that a claim of undue

hardship pursuant to section 10 should not and will not be considered in this case. That said, I can and should take into account the evidence C.W.R. has presented in support of the undue hardship claim in my analysis under section 9 of the *Guidelines*.

Section 9 Analysis

[13] It is appropriate to consider section 9 of the *Guidelines*. That section reads as follows:

> 9 Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
>
> **(a)** the amounts set out in the applicable tables for each of the spouses;
>
> **(b)** the increased costs of shared custody arrangements; and
>
> **(c)** the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[14] In this case, the first part of the two-part test, pursuant to section 9 as set out in *Contino*, has been satisfied in that the parties already agree to, and have parented the children, in a shared parenting arrangement for some time. Therefore, I will not spend any time on that portion of the test.

[15] The second part of the test in *Contino* requires me to determine the appropriate amount of maintenance with reference to the three subparagraphs pursuant to section 9.

[16] I should note that this stage of the analysis in the *Contino* decision relates to a proceeding under the *Divorce Act* while this matter proceeded under the *Maintenance and Custody Act*. That said, the *Child Support Guidelines* under the *Divorce Act* and the *Child Maintenance Guidelines* under the *Maintenance and Custody Act* are identical, including the language of the purposes of the respective *Guidelines*, the wording of section 9 of each, and all other relevant sections and schedules that I will refer to in this decision. As has been found by many courts in many prior decisions, *Contino* is applicable to Provincial *Guidelines*, including those of Nova Scotia, in all respects.

[17] I will also note that *Contino* makes clear that section 9 is a self-contained provision. In other words, through the analysis required pursuant to section 9 an appropriate level of child maintenance, if any, can and should be determined in a shared parenting arrangement. As noted earlier, there is therefore no need to refer to section 10 or any other substantive provisions of the *Act* which might otherwise assist in the determination of child maintenance except as required pursuant to section 9.

Incomes of Parties

[18] The starting point under section 9 (a) is to determine the amount of child maintenance set out in the applicable tables for each of the parents. To do so, I must determine the income of each parent. Income is defined under section 2 (1)(c) of the *Guidelines* to mean the annual income determined under sections 15 to 20 of the *Guidelines*.

[19] Section 15 requires that I determine the parents' annual income in accordance with section 16 to 20 unless there is an agreement in writing between the parents regarding their incomes, which I may then consider. There is no such agreement in this case except where noted below and thus, I must make reference to sections 16 to 20.

[20] Section 16 says the following:

> 16 Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.

[21] In reviewing C.W.R.'s income, I apply this section and adjust his income according to Schedule III.

[22] I do not find that sections 17 and 18 are applicable in this case. I do find that section 19, which deals with imputing income, is applicable and must be considered.

Section 19 Analysis – Imputing Income

[23] I find that the relevant portions of section 19 are as follows:

> 19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
>
> **(a)** the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
> …
>
> (g) the spouse unreasonably deducts expenses from income;
>
> (2) For the purpose of paragraph (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the *Income Tax Act*. [Canada]

[24] With respect to R.A.B.'s income, she tendered a Statement of Income sworn June 12, 2015, and an Amended Statement of Income sworn November 4, 2015. In the former she swears to a gross professional income of $2,967.20 per month and notes that this is "before subtracting business expenses". She includes a Universal Child Care Benefit of $200 per month and a Child Tax Benefit of $857.29 per month for a total income of $4,024.49 per month.

[25] In her Amended Statement of Income of November 4, 2015, she swears to a self-employment monthly income of $2,967.20, again noting that this is "before subtracting business expenses," and the Child Tax Benefit of $235.47. She notes that she is no longer receiving the Universal Child Care Benefit and it was her evidence that the Child Tax Benefit had been reduced because of the implementation of a shared parenting arrangement. She therefore claims a total annual income of $35,606.40. Her income is from self-employment as a massage therapist. It was her evidence in her affidavit of April 8, 2016, that she conducts her business from her residence because she can no longer afford the rent in a prior location.

[26] It is important to note that it was her position at the hearing, and as confirmed through her counsel on inquiry by the Court, that she is not seeking to have the Court consider any business expenses for the purpose of deduction against her gross income. It was clear that she and her counsel were aware that she could take a position that such deductions were legitimate in reducing her income for purposes of determination of child maintenance, but she chose not to do so. Thus, for the purpose of determining R.A.B.'s income, I will use her figure of $35,606.40.

[27] I must now consider C.W.R.'s position that section 19 should apply and I should impute a higher income to R.A.B. on the basis that she is under-employed. I am mindful of the fact that the burden of proof to adduce sufficient evidence to persuade me on the balance of probabilities that I should impute a higher income to R.A.B. rests with C.W.R..

[28] In her affidavit sworn November 4, 2015, R.A.B. says in part that she is self-employed as a registered massage therapist. She works evenings on Wednesday, Thursday and Friday and during the day on Thursday, Friday and Saturday. She says that she arranges her work schedule to minimize the cost of child care.

[29] She also says that she is unable to do any more massages than she now does. She says that the work is physically demanding and that she is seeing an osteopath because of the toll that work has taken on her body. She does not provide any evidence to support her position that she is unable to do any further work, nor does she provide any documentation or opinion evidence from the osteopath or a physician that she is limited in her work.

[30] In her affidavit sworn April 8, 2016, R.A.B. provides further information. She says that she would like to do more massages each week but is limited in doing so both by the number of clients that book appointments and her physical

limitations. She goes on to explain that shortly after she and C.W.R. separated he removed her from his health benefits and as a result she no longer has coverage for massage therapy and osteopath services for herself, which she had previously used regularly. She says both services were beneficial to her in her physically demanding work.

[31] She says that she currently works 25 to 30 hours per week in her business and depending on the number of appointments, does 17 one hour massages per week.

[32] She goes on to say that she has looked for other jobs to supplement her income, but if she does so it will increase the cost of child care which would offset any financial gain she might experience.

[33] She says she is limited in work due to commitments to the children in that if she obtained a traditional job, she would have to work past 2:00 p.m., requiring the need for afterschool childcare at additional cost.

[34] She did indicate that she considered applying for a job with Access Nova Scotia for income between $32,000 and $40,000 per year which is approximately what she says she makes now. That work would require her to work more hours and would increase child care costs. She goes on to explain that a part-time job

would pay her $10.20 per hour and she would be available to work Monday, Tuesday, and Wednesday for eight hour shifts paying a gross salary of $244 per week. From that, she would have to pay additional child care costs of $105 per week, $60 for gas to travel to and from Scotsburn where she resides leaving her only $79.80 per week before deductions. This would likewise reduce her availability for the children.

[35] She maintained she has searched for jobs online and as of April 7, 2016, no jobs for her skill set and experience were available in Pictou County.

[36] She explained that despite the claim of C.W.R. that she had the opportunity to become an osteopath, she had considered this, but it would have cost her another $35,000 with no guarantee of any net benefit to her or the family.

[37] In her direct evidence at the hearing she confirmed again she works at home a total of 17 hours per week doing massages. She says she advertises and clients come to her home for the service. She says she can do four to five treatments per day.

[38] She explains she picks up the children at approximately 2:20 p.m. each day from school and takes one child to piano if applicable, then drops the children off at their father's, then returns to work. She travels to and from school with the

children on Monday, Tuesday and Wednesday each week and takes the children to and from dance on Monday, Tuesday and Wednesday as well. On Thursday she picks up the children from school, takes them to dance and then to their father's, and on Friday she takes them directly to their father's. She resides in Scotsburn and C.W.R. resides in New Glasgow.

[39] On cross-examination, R.A.B. indicates she receives $70 per hour plus tax for her services and charges $100 for a 1 ½ hour massage, plus tax. She agreed on cross-examination that she does an average of seven one hour massages per week, though she has 17 hours available.

[40] When asked why she needs child care when the children are with her, she explained that she needs to be available to do bookkeeping for her business. She agreed that when all three children begin attending school in September, 2016, this will reduce the need for child care and she may be able to increase her amount of work.

[41] She confirmed in cross-examination that her plan for the future was to look for jobs online and that she would do whatever it takes to support the children.

[42] At the end of her examination, the Court asked R.A.B. what her anticipated 2016 income would be and she testified that she anticipates a gross income of

between $30,000 and $31,000. She agreed that her business rent would be zero given that she was working from home.

[43] The leading decision in determining imputed income in Nova Scotia is *Smith v. Helppi,* 2011 NSCA 65, a decision of the Court of Appeal in which the Court held at paragraph 16 as follows:

> [16] Mr. Smith argues that the judge erred in imputing income as he did. What a judge is to consider in doing so was summarized in *Gould v. Julian*, 2010 NSSC 123 (CanLII), where Justice Darryl W. Wilson stated:
>
> > [27] Factors which should be considered when assessing a parent's capacity to earn an income were succinctly stated by Madam Justice Martinson of the British Columbia Supreme Court, in Hanson v. Hanson, 1999 CanLII 6307 (BC SC), [1999] B.C.J. No. 2532, as follows:
> >
> > 1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor". . . .
> >
> > 2. When imputing income on the basis of intentional under- employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability to work, freedom to relocate and other obligations.
> >
> > 3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at a lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
> >
> > 4. Persistence in unremunerative employment may entitle the court to impute income.

> 5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
>
> 6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.
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> . . .
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> [33] In Nova Scotia, the test to be applied in determining whether a person is intentionally under-employed or unemployed is reasonableness, which does not require proof of a specific intention to undermine or avoid child maintenance obligations.

[44] In all of the circumstances, I find that while working as a massage therapist is a physically demanding occupation, C.W.R. has established on a balance of probabilities that R.A.B. is under-employed and that such under-employment cannot be justified pursuant to section 19(a). I have no evidence before me, other than the statement made by R.A.B., that she cannot work more and that she is under the care of an osteopath, to explain why she only works the limited time she does. I accept her evidence in cross-examination that she does on average seven massages per week. I do respect that she would like to be more available to the children and has travel and bookkeeping responsibilities. However, I find that given her obligation under the *Act* and the *Guidelines* to make a reasonable effort to provide an income that will assist in support of the children, she is able to work more and income should be imputed to her.

[45] I note R.A.B.'s evidence that her income may be somewhat reduced in 2016, but I also take into account that business rent will no longer be an expense. I noted earlier that she did not advance a claim of any business expenses against her gross income.

[46] I find it reasonable that she can work more hours than she does, which currently amounts to an average of seven massages each week. I also find it reasonable to impute to her the ability to generate at least a further $100 per week in earnings. This amounts to a gross of $5,200 per year in addition to the $35,606.40 she earned and claims in her sworn statement of income. Therefore, I impute to her a total income of $40,806.40 per year. To this will be added the child tax benefit of $235.47 per month or $2,825.64 per year for a total income of $43,632.04.

[47] Based on this imputed income, the amount of child maintenance she would be obliged to pay under the *Guidelines* for three children would be $817.49 per month.

[48] Turning now to C.W.R., his sworn Statement of Income dated July 17, 2015, claimed a gross employment income with the Nova Scotia Government of

$4,886.84 per month and confirmed the deductible union dues of $61.08 per month, for a total gross income of $4,825.75 per month, or $57,909.12 per year.

[49] In a Statement of Income sworn August 21, 2015, C.W.R. again indicated gross income from his employment with the Nova Scotia Government, specifically Nova Scotia Housing, of $4,886.84 and union dues of $61.80 per month. He then included income from a rental property, specifically a duplex he purchased after separation where he resides with the children on one side, and rents the other side for $1,100 per month before deductions. He therefore showed a total gross monthly income for child maintenance of $5,925.76.

[50] C.W.R. then filed a Statement of Income sworn October 1, 2015, in which he claimed the same employment income and union dues, a rental income of $1,100 per month, travel income of $500 per month (which I understand to be money paid by his employer for travel expenses) and the Child Tax Benefit of $350 per month, for a total monthly income of $6,740.76.

[51] Finally, in his affidavit sworn May 13, 2016, C.W.R. attaches a copy of his 2015 income tax return which shows income from employment was $56,989.26. It also attaches a schedule of a Statement of Real Estate Rentals showing gross income from rent of $7,700 and deductible expenses of insurance, interest,

maintenance and repairs, office expenses and property taxes, as well as utilities in total of $5,982.93. This left a net income of $1,717.07 and a capital cost allowance of the same amount of $1,717.07.

[52] I note that Schedule III of the *Guidelines* requires that I adjust C.W.R.'s income by including in it any capital cost allowance. Given that the rental property in question was purchased part way through the year, the rental income report of C.W.R. of $1,100 per month and the rent income indicated on his 2015 tax return of $7,700, I inferred that he received seven months' worth of rent. I've been asked by R.A.B. to adjust his capital cost allowance to reflect a full 12 month period. I find this to be a reasonable position to take and based on my understanding of the evidence that he had the property for the last seven months of 2015, I shall adjust his capital cost allowance to reflect a full 12 months and increase the capital costs allowance from $1,770.07 to $2,943.55 per year.

[53] With respect to his rental income, I note that his capital cost allowance is a set off of his net rental income and no further adjustments based on these expenses is required.

[54] I must also include the Child Tax Benefit he receives which he reports as $315 per month on his statement of income of October 1, 2015, for an annual total of $3,780.

[55] Finally, Schedule III of the *Guidelines* requires that I adjust C.W.R.'s income by reducing it by the amount of union dues paid by him. His income tax return for 2015 indicates dues of $711.10 and I will reduce his income by that amount.

[56] Therefore, I find that his total income is the sum of his 2015 line 150 income of $56,989.26, plus Child Tax Benefit of $3,780, plus the capital cost allowance for 12 months of $2,943.55, minus the union dues of $711.10, for a total annual income of $63,001.71. The applicable child maintenance amount under the Nova Scotia Table for three children based on this income is $1,151.

[57] In accordance with *Contino*, I must do a set off for the purpose of the analysis under section 9(a) and I find that that set off amount of child maintenance is $1,151 less $817.49 for a net of $333.51, payable by C.W.R. to R.A.B..

Section 9(b)

[58] Respecting the issue of possible increased costs of shared custody arrangements pursuant to section 9(b), in *Contino* the Court held at paragraphs 52 and 53 as follows:

> [52] What should the courts examine under this heading? Section 9(*b*) does not refer merely to the expenses assumed by the payor parent as a result of the increase in access time from less than 40 percent to more than 40 percent, as argued in this Court. This cannot be for at least two reasons. First, it would be irreconcilable with the fact that some applications under s. 9 are not meant to obtain a variation of a support order, but constitute a first order (see Payne, at p. 261). Second, as mentioned earlier, the Table amounts in the Guidelines do not assume that the payor parent pays for the housing, food, or any other expense for the child. The Tables are based on the amount needed to provide a reasonable standard of living for a single custodial parent (see *Formula for the Table of Amounts Contained in the Federal Child Support Guidelines: A Technical Report*, at p. 2). This Court cannot be blind to this reality and must simply conclude that s. 9(*b*) recognizes that the *total cost* of raising children in shared custody situations may be greater than in situations where there is sole custody: *Slade v. Slade*, at para. 17; see also Colman, at pp. 71-74; Wensley, at pp. 83-85. Consequently, *all* of the payor parent's costs should be considered under s. 9(*b*). This does not mean that the payor parent is in effect spending more money on the child than he or she was before shared custody was accomplished. As I discuss later in these reasons, it means that the court will generally be called upon to examine the budgets and actual expenditures of both parents in addressing the needs of the children and to determine whether shared custody has in effect resulted in increased costs globally. Increased costs would normally result from duplication resulting from the fact that the child is effectively being given two homes.
>
> 53 A change in the actual amount of time a payor parent spends with a child will therefore give rise under s. 9(*b*) to an inquiry in order to determine what are, in effect, the additional costs incurred by the payor as a result of the change in the custodial arrangement. I say this because not all increases in costs will result directly from the actual amount of time spent with the child. One parent can simply assume a larger share of responsibilities, for school supplies or sports activities for example. For these reasons, the court will be called upon to examine the budgets and actual child care expenses of each parent. These expenses will be apportioned between the parents in accordance with their respective incomes.

[59] In this case, C.W.R. maintains that he cannot afford to pay any child maintenance in large part because he has significant housing costs resulting from the separation and shared parenting arrangement. Specifically, he purchased a duplex and resides in one half and rents the other half. This mortgage debt was incurred post separation.

[60] In his affidavit of May 13, 2015, C.W.R. attaches as an exhibit a statement of budget costs for his rental unit. The statement indicates the rental unit itself has total expenses of $1,105.86 per month on average consisting of its mortgage costs (principal, interest and taxes), insurance, maintenance, water, oil and electricity and that he has rental income for that unit of $1,100 per month. While he expresses some concern that he would be at risk if there was no renter, the evidence before me is that the unit was rented when he purchased the duplex and that the rental agreement has been renewed. While there is always risk of the unit sitting empty, that is not a sufficient ground to alter child maintenance under s.9 (b). Moreover, it is clear from his evidence that the rental unit either breaks even, or in accordance with his tax return, generates a small profit per month and I cannot find that this is added in any way to his expenses for shared parenting.

[61] Further, the mortgage that he attributes to his side of the duplex, which is identical to the mortgage costs for the rental site, is $537.60 per month. The remainder of his expenses attributable to his side of the duplex are quite reasonable and in my view do not in any way reflect a circumstance where he is experiencing increased costs for shared parenting related to housing.

[62] It was C.W.R.'s evidence and his representations to the Court that if he were required to pay any child maintenance whatsoever he would run a deficit. In fact his statement of expenses shows a deficit without payment of child maintenance. He does not explain how this has been sustained and did not identify any of those expenses which were the result of the shared parenting arrangement.

[63] As for R.A.B., she did file a supplementary affidavit of May 11, 2016, which sets out her mileage totals for transportation for the children. While I will not go through each in detail, I cannot find that these represent a significant or material increase in cost of shared parenting though they are not insignificant. She does regular transportation but, as I understand the evidence, C.W.R. also transports the children and therefore incurs the related costs of depreciation, maintenance, and gas expenses. I do accept that it is likely that R.A.B. experiences a higher obligation for driving, but I do not find that this arises out of the shared parenting

arrangement but rather out of the parties' decision that she will do more driving than C.W.R..

[64] As with C.W.R., I have carefully reviewed the statement of expenses for R.A.B. and find no evidence of increased costs of shared parenting. Likewise, her evidence in her affidavits and at the hearing reveal nothing more than her mileage as a potential increased cost.

[65] I therefore find that neither party has demonstrated that there are increased expenses as a result of shared parenting and find there is nothing to support an adjustment pursuant to section 9(b) of the *Guidelines*.

Section 9(c)

[66] Finally, respecting section 9(c) of the *Guidelines*, I must take into account the conditions, means, needs and other circumstances of each parent and of any child for whom maintenance is sought. The Supreme Court in *Contino* comments on this is follows:

> 54 It is clear then that not every dollar spent by a parent in exercising access over the 40 percent threshold results in a dollar saved by the recipient parent: *Green v. Green*, at para. 27. Professor Rogerson refers to this at pp. 20-21:
>
> > On the other hand, allowing such an adjustment raises many concerns. Increased time spent with a child does not necessarily entail increased spending on the child. Furthermore, dollars spent by an access or secondary

> custodial parent do not necessarily translate into a dollar for dollar reduction in expenditures by the primary custodial parent, many of whose major child-related costs are fixed — such as housing and transportation; any savings will typically be only with respect to a small category of expenditures for food and entertainment. Particularly in cases where there is a significant disparity in income between the parents, reductions in the basic amount of child support may undermine a lower-income custodial parent's ability to make adequate provision for the child or children, and will certainly exacerbate the differences in standard of living between the two parental homes.

Indeed, irrespective of the residential arrangement, it is possible to presume, in the absence of evidence to the contrary, that the recipient parent's fixed costs have remained unchanged and that his or her variable costs have been reduced only modestly by the increased access. Thus, when no evidence is adduced, the court should recognize the *status quo* regarding the recipient parent.

…

56 Moreover, as asserted by Prowse J.A. in *Green v. Green*, at para. 35, it is important that the parties lead evidence relating to s. 9(*b*) and (*c*). This evidence has often been lacking, with the result that the courts have been forced either to make assumptions about increased costs (as was done by the Court of Appeal in the present case), or to dismiss the application under s. 9 for lack of an evidentiary foundation

57 In my opinion, courts should demand information from the parties when it is deficient. . . .

[67] The Court went on to instruct that in this analysis, I should rely on the parties' financial statements and child expense budgets as fairly reliable sources of information, or adjourn the motion to provide additional evidence. I took the latter approach in this matter and adjourned this hearing to permit the parties to adduce further evidence. In doing so, I am mindful of the Supreme Court's instruction that

I cannot rely on “common sense" assumptions about the costs incurred by either party.

[68] In the present circumstance, I find that I do not have any material evidence of the conditions, means, needs and other circumstances of the parties that would persuade me on a balance of probabilities that I should make any further adjustment to child maintenance pursuant to section 9(c).

[69] From C.W.R.’s statement of expenses he claims RESP contributions and has made RRSP contributions. He pays significant amounts for extracurricular activities. He claims the total mortgage expenses of the duplex when one half of that is attributable to the rental unit discussed. He claims significant food costs of $1,255 and entertainment costs with the children of $400 per month without any proof of those costs. In each case C.W.R. may well incur all of these costs, but he will have to decide if they are sustainable as child maintenance takes priority.

[70] In his affidavit of November 18, 2015, C.W.R. says that he has purchased clothing for the children since January 1, 2015, in the amount of $2,217.54 to which R.A.B. replies that she has purchased clothing as well.

[71] C.W.R. explains that the decision to buy the duplex was in part motivated by his concern for the long term security of his children and that is laudable. But the

shorter term priority of child maintenance must be addressed over the next number of years by both parties and other variable expenses may have to take a lower priority position. I cannot find that any adjustment to the child maintenance amount should be made as a result of his means, needs, conditions, and circumstances.

[72] As for R.A.B., she claims a deficit of $975.55 per month but does not explain how this is sustained. She says that her debt payment of $500 per month to her father is the result of a CRA tax debt she incurred for the business which arose because C.W.R. would not allow her to pay adequate amounts to CRA prior to separation. I find merit in her position that this should be taken into account in the analysis of her means, needs, conditions, and circumstances. On the other hand, as C.W.R. points out, R.A.B. lives with her mother, rent and housing expenses are free, and she does not pay rent for her business. After a careful review, I cannot find that an adjustment to child maintenance should be made as a result of her means, needs, conditions, and circumstances.

[73] Taking all of this into account, particularly the condition, means, needs and other circumstances of the parties and the children, I conclude that the proper amount of child maintenance is payable by C.W.R. to R.A.B. at the set off amount

determined pursuant to section 9(a) of the *Guidelines* in the amount of $333.51 per month.

Retroactive Child Maintenance

[74] R.A.B. seeks a retroactive award of child maintenance to the date of separation. C.W.R. maintains that he cannot afford child maintenance in any event and opposes that position.

[75] C.W.R. has paid no child maintenance since separation. I have already determined that the parties separated on November 1, 2014. I have already determined that C.W.R. must pay child maintenance. There is nothing in the evidence that persuades me that a retroactive child maintenance award should not be granted. The obligation to pay child maintenance is a fiduciary one and cannot lightly be waived by a Court, nor should it be.

[76] The only question remaining is when did the shared parenting arrangement begin? If it began after separation, the full amount of child maintenance for the time between separation and the implementation of share parenting might be owed by C.W.R..

[77] R.A.B. says she had primary care of the children but at some point a change to a shared parenting arrangement was made by agreement. Unfortunately, the only evidence of when that occurred is contained in the Amended Statement of Income of R.A.B. sworn November 4, 2015, which identifies a reduction in the Child Tax Benefit as a result of the implementation of the shared parenting arrangement. I take this as evidence that the shared parenting arrangement began prior to November 4, 2015.

[78] C.W.R. says in his affidavit sworn July 17, 2015, that from the date of separation the parties agreed to a shared parenting arrangement.

[79] It is also important to note the decision of the Supreme Court of Canada in *D.B.S. v S.R.G.,* 2006 SCC 37 in which the Court set out the parameters and analysis for retroactive child maintenance claims. It is helpful in reading that decision to note that the Court held:

> 97 Lest I be interpreted as discouraging retroactive awards, I also want to emphasize that they need not be seen as exceptional. It cannot only be exceptional that children are returned the support they were rightly due. Retroactive awards may result in unpredictability, but this unpredictability is often justified by the fact that the payor parent chose to bring that unpredictability upon him/herself. A retroactive award can always be avoided by appropriate action at the time the obligation to pay the increased amounts of support first arose.

[80] In that decision, the Court also held that the date for calculation of the retroactive award should be the date of effective notice as explained below:

> 121 Choosing the date of effective notice as a default option avoids this pitfall. By "effective notice", I am referring to any indication by the recipient parent that child support should be paid, or if it already is, that the current amount of child support needs to be re-negotiated. Thus, effective notice does not require the recipient parent to take any legal action; all that is required is that the topic be broached. Once that has occurred, the payor parent can no longer assume that the *status quo* is fair, and his/her interest in certainty becomes less compelling.

[81] I find it reasonable to apply the child maintenance amount determined pursuant to section 9 of the *Guidelines* to the retroactive claim of R.A.B. and make it effective as of the date of separation of November 1, 2014, which I find to be the date of effective notice.

[82] I do not find that there is any basis to deny a full retroactive award of child maintenance based on the factors set out in *D.B.S. v. S.R.G.*. In the absence of more definitive evidence, I find that the calculation of child maintenance payable under section 9 of the Guidelines will be effective as of November 1, 2016. Therefore, C.W.R. must pay child maintenance effective November 1, 2014, a total of 18 months retroactively at $333.51 per month for a total of $6,003.18. This amount will be paid by monthly instalment of $150 each, in addition to the child maintenance ordered pursuant to section 9 in this decision, until the arrears based

on the retroactive calculation are paid in full. While this will no doubt create financial challenges for C.W.R., his failure to recognize any obligation to pay any child maintenance whatsoever since separation has placed him in this circumstance. The children are entitled to this maintenance and have been since the date of separation and it must now be paid by him.

Section 7 Expenses

[83] The remaining issue for this Court's determination is the matter of special, or extraordinary, expenses pursuant to section 7 of the *Guidelines*. The relevant portions of section 7 are as follows:

> 7 (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation::
>
> **(a)** child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
>
> **(b)** that portion of the medical and dental insurance premiums attributable to the child;
>
> **---**
>
> **(f)** extraordinary expenses for extracurricular activities.

Definition of "extraordinary expenses"

> **(1.1)** For the purposes of paragraphs (1)(d) and (f), the term ***extraordinary expenses*** means

(a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or

(b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account

(i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,

(ii) the nature and number of the educational programs and extracurricular activities,

(iii) any special needs and talents of the child or children,

(iv) the overall cost of the programs and activities, and

(v) any other similar factor that the court considers relevant.

Sharing of expense

(2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

Subsidies, tax deductions, etc.

(3) Subject to subsection (4), 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, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.

Universal child care benefit

(4) In determining the amount of an expense referred to in subsection (1), the court shall not take into account any universal child care benefit or any eligibility to claim that benefit.

R.A.B.'s Position

[84] Respecting the so-called section 7 expenses, R.A.B. has filed a Statement of Special or Extraordinary Expenses sworn June 12, 2015, in which she claims the following:

> $100 per month for preschool for R.B.R.
>
> $120 per month approximately for child care for R.B.R.
>
> $120 per month approximately for child care for N.B.R.

[85] The approximate total of these expenses is $340 per month. She attaches no receipts to her statement.

[86] In her affidavit sworn November 4, 2015, R.A.B. says the following:

> C.W.R. pays $105 for eight weeks of ballet for the girls
>
> C.W.R. pays $75 per month for swim lessons for R.B.R. and N.B.R.
>
> The parties equally share $300 per year for swim lessons for I.B.R.

[87] In her affidavit sworn November 4, 2015, R.A.B. maintains that C.W.R. has refused to contribute to her child care costs unless the child care was provided by his 73-year-old mother. She maintains that he had fired his mother on several occasions because she was absent minded and that she is also hearing impaired.

Since that time, she maintains he has used his mother several times. She states that each party has been paying their own child care costs since separation.

C.W.R.'s Position

[88] C.W.R. also filed a Statement of Special or Extraordinary expenses sworn November 18, 2015, in which he claims the following expenses:

$83 per month for swimming classes for all three children

$88.04 per month for dance classes for I.B.R. and N.B.R.

$180 per month for childcare cost for N.B.R.

$15.42 per month baseball costs for I.B.R. and R.B.R.

[89] These expenses total $366.50 per month. C.W.R. did not provide receipts in support of this claim. He does indicate in his sworn statement the following: "all receipts are scanned into computer for taxes. Child care is gifted with no receipts."

[90] In his affidavit sworn July 17, 2015, C.W.R. maintains that he pays for the children's health care, which I assume to be the health care premiums through his employer, to cover them for medical and dental benefits and maintains that he pays for all sporting activities. Further, he says that he pays for child care when the

children reside with him. He also states that although he offered to pay for the cost of child care for R.A.B., she refused.

[91] In his affidavit of November 18, 2015 C.W.R. says he has paid the following costs without contribution from R.A.B.:

$596.49 for swimming for all three children

$400 for swim team for I.B.R.

$129.99 for baseball for I.B.R.

$54.99 for baseball for R.B.R.

$1,064.30 for dance for I.B.R. and N.B.R.

[92] These expenses total $2,245.77. C.W.R. did not provide receipts in support of this claim.

[93] In his *viva voce* evidence, C.W.R. maintained that he has paid $920 in costs for the children including dance classes and costumes for the girls, ballet for N.B.R., swimming for all three children and baseball costs including gear for two children.

[94] In cross-examination C.W.R. agreed that he had paid $400 and R.A.B. had paid $200 for swimming in 2015.

[95] He also says that he pays health care premiums of $101.25 bi-weekly through his employer, but is unsure if that covers him and the children, or just the children.

Analysis

[96] I am satisfied that each party incurs child care expenses which are reasonable and due to work obligations and that these, therefore, qualify as expenses pursuant to section 7(1)(a). Unfortunately neither party clearly indicated if they are able to deduct that expense against their income. Without that evidence, I find that the gross amounts will apply.

[97] Taking into account section 7(1)(f) and the definition of special or extraordinary expenses set out in section 7(1)(a), I am satisfied that the extra-curricular activity costs claimed qualify as extraordinary expenses. I do so taking into account the expense in relation to each party's income, each of which is modest, and the cost of the activity and the nature and number of the activities. It is clear that both parents want the children to participate in these activities. The issue is who should pay and in what amount.

[98] Unfortunately, as with the child care costs, the parties did not identify the tax implications of these costs pursuant to section 7(3). I will therefore not apply any tax adjustment to the expenses for purposes of the calculation of contribution.

[99] I find that the contribution to health care premiums is a special expense pursuant to section 7(1)(b) but neither party identified what portion of this is attributable to the children and what is attributable to C.W.R.. I think it reasonable to assume that both C.W.R. and the children are covered under that policy and I will apply a 50 percent discount to that expense to account for the portion of the premium attributable to C.W.R. and thus not shareable.

Retroactive Expense Claims

[100] I am satisfied that, taking into account the various expenses paid by each party for section 7 expenses since separation, the difficulty in determining who, if anyone, may benefit from a tax deduction or credit, and the challenge of attribution of the health care premium, there shall be no retroactive payment of section 7 expense claim costs of either party to the other. Each has spent considerable funds for the children on expenses identified under section 7 and there is little to be gained in parsing the details further.

Prospective Expenses

[101] To determine the contribution of each party to the ongoing expenses of the children under section 7, it is required that I determine the ratio of contribution under section 7(2), though I note that this is a guiding principle and I have discretion in this area. C.W.R.'s income was determined to be $63,001.71 and R.A.B.'s income was determined to be $43,632.04. The ratio of their incomes is 59 percent for C.W.R. and 41 percent for R.A.B.. I find that these ratios are reasonable and suitable in the circumstance.

[102] At this point there are several options I could employ in determining how the expenses should be shared between the parties. First, I can determine an annual cost of these expenses and attribute them in proportion of the parties' incomes, requiring a monthly adjustment to the child maintenance set off calculation already determined. Second, I could apply this calculation only to those expenses that are likely to be incurred over the course of a year, specifically child care and health insurance premiums. The remainder, the extracurricular activity costs, which arise from time to time through the year, could be shared by the parties in proportion to their incomes as the expenses are incurred. Third, I could apply the principle of sharing each expense as it is incurred on a monthly basis between the parties in proportion to their incomes. It is this approach that I will adopt.

[103] I will order that all ongoing section 7 expenses, specifically child care costs, health care premiums in the amount of $50.63 per month, and extra-curricular activity costs for swimming, swim team, baseball and dance be shared by the parties with C.W.R. paying 59 percent of any expense and R.A.B. paying 41 percent of any expense. The parties will exchange receipts and other proof of expense on a monthly basis and will calculate the appropriate adjustments based on these ratios and based on who has paid the expenses that month. The parties will retain receipts of all such expenses for proof, if required, at a later date.

Summary

[104] There will be an order of joint custody of the children in a shared parenting arrangement on the same terms as granted in the interim order of this Court of August 17, 2015.

[105] C.W.R. will pay to R.A.B. child maintenance in the amount of $333.51 per month commencing on the first day of June 2016, and continuing the first of each month thereafter.

[106] In addition, C.W.R. will pay to R.A.B. retroactive child maintenance totaling $6,003.18. This amount shall be paid by C.W.R. to R.A.B. in equal instalments of

$150 per month commencing the first day of June 2016, until the total amount of retroactive child maintenance is paid in full.

[107] There will be no retroactive award of section 7 expenses to either party.

[108] Each party will contribute to ongoing expenses for the children including child care costs, health care premiums in the amount of $50.63 per month, and extracurricular activity costs for swimming, swim team, baseball and dance and any other extracurricular activities as agreed between the parties. For those expenses, C.W.R. will pay 59 percent of the gross amount and R.A.B. will pay 41 percent of the gross amount of each expense. The parties will pay expenses as they arise and exchange receipts or other proof of the expense on a monthly basis and will calculate the appropriate adjustments based on these ratios and what each party has paid of those expenses for that matter. The parties will retain receipts of all such expenses for proof, if required, at a later date.

[109] The order will contain the usual disclosure provisions for annual tax returns of each party and the order may be registered with the Director of Maintenance Enforcement at the request of either party.

[110] Counsel for R.A.B. will draw this order.

Timothy G. Daley, JFC