

## SECTION 9 AND SECOND FAMILIES

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*This article examines the implications of section 9 of the Federal Child Support Guidelines for second families. The authors consider how underemployment or unemployment has been factored into the assessment of child support. The authors further discuss how increased household costs have been valued, how the courts have dealt with the argument that “free” childcare is being or should be provided in a new relationship, and the relevance of economies of scale created by the establishment of second families. Section 9 invites the courts to take into account the “conditions, means, needs and other circumstances” of spouses and children; the authors analyse cases dealing with increased household income and sharing of expenses where a spouse repartners, as well as the financial obligations of each spouse to the children. The authors conclude by commenting on the fairness of the current treatment of second families under Canadian law.*

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*Le présent article examine les répercussions de l'article 9 des Lignes directrices fédérales sur les pensions alimentaires pour enfants sur les familles reconstituées. Les auteurs montrent comment le sous-emploi ou le chômage ont été pris en compte dans l'évaluation de la pension alimentaire pour enfants. Ils examinent également comment l'augmentation des dépenses courantes du ménage a été évaluée, la manière dont les tribunaux se sont penchés sur l'argument selon lequel les services de garde d'enfants « gratuits » sont offerts ou devraient être offerts dans une nouvelle relation, ainsi que la pertinence des économies d'échelle provenant de l'établissement de nouvelles familles.*

*L'article 9 invitant les tribunaux à tenir compte « des ressources, des besoins et d'une façon générale, de la situation » des époux et des épouses et des enfants; les auteurs examinent des causes portant sur l'augmentation des revenus du ménage et le partage des dépenses lorsque l'un des conjoints trouve un autre partenaire, ainsi que les obligations financières de chaque époux à l'égard des enfants. En conclusion, les auteurs commentent l'équité du traitement actuellement réservé aux deuxièmes familles dans la loi canadienne.*

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### 1. Introduction

Child support in Canada is governed by the Federal Child Support Guidelines (CSG).<sup>1</sup> These Guidelines generate “table amounts” of child support based on the number of children of the marriage for whom the support order is sought. The table amounts do not, however, increase in direct proportion to any increase in the number of children of the marriage in the custodial spouse’s home. Rather, the table amounts adjust for the economies of scale that are presumed to be present for each additional child added to a family. Thus, for example, a non-custodial parent in Ontario earning \$50,000 per year will pay \$500 per month in child support for one child, and \$750 per month in child support for two children of the marriage who both reside with the custodial parent.<sup>2</sup>

This model presumes that contribution to the support of children by a non-custodial spouse should be fixed solely according to the income of the payor, without regard to the overall or actual means or needs of the payor (or of the recipient). This is consistent with the CSG’s salutary objectives of simplifying child support determination, putting children first, and fairly allocating the burden of child support as between the parties.<sup>3</sup>

However, this model imposes a greater economic burden on a payor spouse with two children from two relationships than on a payor spouse with two children that live in the same home for which support is being paid. For example, while a non-custodial parent with an income of \$50,000 per year with two children of the marriage residing in *one* home will pay \$743 per month in child support to the custodial spouse, a non-custodial parent with the same income and two children from separate relationships will pay \$900 in total monthly support (\$450 to each custodial spouse).<sup>4</sup> The additional burden of the fact that the two children are raised in two different homes rather than one home is thus borne solely by the non-custodial spouse. This remains consistent with the CSG’s objectives of simplifying child support determination and putting children first, but increases the burden of the support of the children only on the non-custodial spouse.<sup>5</sup>

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<sup>1</sup> *Federal Child Support Guidelines*, SOR/97-175 [CSG]; provincial legislation uniformly mirrors the CSG (with the exception of Quebec).

<sup>2</sup> CSG, *supra* note 1, Schedule I, Tables for the province of Ontario.

<sup>3</sup> *Ibid.*, at s 1.

<sup>4</sup> *Ibid.*, Schedule I, Tables for the province of Ontario.

<sup>5</sup> The authors do not intend to imply by this statement that the CSG policy is incorrect or unfair. Rather, it merely serves to highlight the issue addressed in this paper – the burden as between parents where both are equally custodial.

Contributing to a complex picture of family structures in Canada, following the breakdown of a relationship, *most* parties will eventually repartner, and many will form new families with more children.<sup>6</sup> Rollie Thompson has dubbed child support issues arising from serial family formation “The Second Family Conundrum.”<sup>7</sup> Courts and legislators face a challenge in balancing the objectives of simplified child support determination, putting children first, *and* fairly allocating the burden of child support as between the parties. Quite obviously, the existence of children from multiple parents living in a single household (or from a single parent living in multiple households) impacts the financial circumstances of both the payor and recipient households.<sup>8</sup> The objective of this paper is to consider how second-family circumstances are addressed when determining child support specifically under section 9, the “shared custody” provision.

Section 9 is a unique CSG provision; the Supreme Court of Canada has stated that “shared custodial arrangements requir[e] the application of an entirely different formula” guided by different principles than the remainder of the CSG.<sup>9</sup> Section 9 governs situations where *both* parents have physical custody of the children for at least 40 per cent of the time (resulting in “shared custody”),<sup>10</sup> and it is the only CSG provision that allows judges to craft support orders not presumptively based on the table amount.

Given the unique and discretionary scope of section 9, and the high rates of serial family formation in Canada, we expected that litigants (and their lawyers) would at least attempt to have second-family circumstances considered directly under section 9 in shared custody contexts. We found not only that second families were considered under section 9 in a variety of ways, but also that second family circumstances can have a significant

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<sup>6</sup> 20 years after separation, 69% of women and 82% of men have formed new unions; see Vanier Institute of the Family, *Families Count: Profiling Canada's Families* (Ottawa: Vanier Institute of the Family, 2010) at 46.

<sup>7</sup> DA Rollie Thompson, “The Second Family Conundrum in Child Support” (2001) 18 Can J Fam L 227 [Thompson, “Conundrum”].

<sup>8</sup> Where the non-custodial parent is simply paying the table amount (that is, where the custodial parent has in excess of 60% care of the subject children) the CSG mechanism for dealing with these potentially difficult second-family situations is a claim of “undue hardship” under s 10. A claim under s 10 can be made to change the amount of support, *inter alia*, where one of the spouses has a legal duty to support a child other than a child of the marriage. Securing support adjustment for any reason under s 10 is, however, notoriously difficult.

<sup>9</sup> *Contino v Leonelli-Contino*, 2005 SCC 63 at para 3, [2005] 3 SCR 217 [Contino].

<sup>10</sup> CSG, *supra* note 1, s 9.

impact on the final quantum ordered, both increasing *and* decreasing the quantum of support otherwise payable.<sup>11</sup>

In what follows, we will:

- 1) Summarize our findings, setting out the main ways in which second families are accounted for under ss. 9(a), (b), and (c);
- 2) To the extent possible, comment on how practitioners might expect second family issues to affect the quantum of child support ordered; and
- 3) Close with some short reflections on the overall concepts of fairness associated with how second families are treated in Canadian family law.

## *2. Brief Overview of Section 9*

Section 9 of the CSG deals with “shared custody” and provides as follows:

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.

Each sub-section of section 9 is explained in greater detail in the following sections of this paper. As a summary, section 9(a) mandates a determination of the parties’ incomes and the “set off” amount calculated by subtracting the amount owed in child support by the lower-income party from the amount owed in child support from the higher-income party. Section 9(b) involves a comparison of childcare and household budgets to determine the actual cash flows of each household. Section 9(c) is the broadest in scope, and typically involves a comparison of each party’s standard of living.

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<sup>11</sup> Our observations are based on a thorough review of the Ontario s 9 cases and a less extensive review of the s 9 cases from other Canadian jurisdictions (Quebec excluded).

The leading case on section 9 is the 2005 Supreme Court of Canada decision *Contino v Leonelli-Contino*.<sup>12</sup> Prior to *Contino*, courts applying section 9 were roughly split between a strict “set off” approach (effectively treating shared custody like split custody<sup>13</sup>), and a return to the analysis of fact-based discretion that had preceded the CSG in cases like *Paras v Paras*.<sup>14</sup> Following *Contino*, courts must now consider all three section 9 sub-provisions, and must focus on actual evidence of means and needs – “formulaic” or “common sense” approaches are not appropriate.<sup>15</sup>

Although *Contino* strove to provide clear direction, the section 9 analysis remains complex even at the best of times,<sup>16</sup> and its discretionary approach has produced a wide range of treatments of second-family circumstances. In fact, the high evidentiary burden now required by section 9, as well as the uncertainty of the analysis, may explain why many parties forego the cost of a full section 9 analysis and simply settle on the set off amount.

### 3. Chart of Second-Family Circumstances Impacting a Section 9 Analysis

The chart below highlights some of the ways second families have impacted the section 9 analysis in quantifying child support:

CSG Section	Second Family Scenario	Discussed In
Section 9(a) – “income for table amounts”	<i>Under/Unemployment</i> arising from obligations to children/spouses from second families.	Part 5
Section 9(b) – “increased costs of shared custody”	<i>Increased Household Costs</i> arising from costs of children of second families.	Part 6
	<i>“Free” Childcare</i> from new relationships where a spouse repartners.	Part 7
	<i>Economies of Scale</i> where spouses already maintain larger residences for children of second families.	Part 7

*continued ...*

<sup>12</sup> *Contino*, *supra* note 9; several academic works have discussed various aspects of s 9, but the second-family context has not yet been given a thorough treatment.

<sup>13</sup> *CSG*, *supra* note 1 at s 8.

<sup>14</sup> [1971] 1 OR 130 (CA).

<sup>15</sup> *Contino*, *supra* note 9 at para 57.

<sup>16</sup> *LMAM v CPM*, 2011 MBQB 46 at para 215, (2011), 96 RFL (6th) 365; *Kristmanson v Kristmanson*, 2013 SKQB 387 at para 20, (2013), 431 Sask R 311.

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CSG Section	Second Family Scenario	Discussed In
<i>Section 9(c) – “means, needs &amp; circumstances”</i>	<i>Increased Household Income</i> where a spouse repartners.	Part 7
	<i>Shared Costs of Living</i> where a spouse repartners.	Part 7
	<i>Financial Obligations to Children</i> of second families who reside with a spouse full or part time.	Part 7

Set out below is a more detailed conceptual analysis of how second families have affected the section 9 analysis.

#### 4. Section 9(a): The Table Amounts

Section 9(a) instructs that the “table amounts” of each party must be considered in determining the final amount of child support ordered.

Although judges sometimes refer to the amounts in section 9(a) as the “Guideline” amounts, *Contino* confirmed that this section refers only to the “table” amounts, and “thus preclud[es] consideration under that paragraph of all of the discretionary factors that are allowed under the Guidelines for departure from the Table amounts.”<sup>17</sup> Thus section 9(a) is “relatively narrow”<sup>18</sup> in application, and any amounts determined under this section, while providing a “useful starting point” for a section 9 analysis,<sup>19</sup> do not technically constitute a maximum or minimum amount of support that may be ordered.<sup>20</sup>

Section 9 mandates no particular mechanism for considering the parties’ table amounts,<sup>21</sup> but *Contino* adopted the “simple set off” approach, drawn from section 8. Under this approach, the amount owed in child support by the party with the lower income is subtracted from the amount owed in child support by the party with the higher income, resulting in the “set off” amount payable by the higher-income party. The set off amount, however, has no presumptive value because it may not reflect the actual spending patterns of the parties.<sup>22</sup> A full analysis of

<sup>17</sup> *Contino*, *supra* note 9 at para 26.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid* at para 41.

<sup>20</sup> *Ibid* at para 49.

<sup>21</sup> *Ibid* at para 41.

<sup>22</sup> *Ibid* at para 50.

sections 9(b) and 9(c) is required in order to create an award that is appropriate for the financial realities of both parties.<sup>23</sup>

Despite the purportedly narrow scope of section 9(a), *Contino* provides that courts may, through sections 9(b) and 9(c), “modify the set-off amount” based on the financial realities of the parents.<sup>24</sup> Thus although 9(a) has no presumptive force, the set off amount nevertheless plays a powerful role within section 9 analyses: it provides the *reference point* around which an appropriate level of support is determined. For example, although theoretically an award could exceed a parent’s table amount, in practice securing an award in excess of the table amount is probably not possible, absent some “unusual” factor such as very high extraordinary expenses.<sup>25</sup> Similarly, orders below the set off amount are rare.

From our review, in the vastly overwhelming majority of cases, the table amounts and set off amount determined under section 9(a) provide judges with the upper and lower limits of an appropriate award – an award tends to be fixed within the bookends of the set off and the unreduced table amount of the higher-income party.<sup>26</sup>

The initial determination of income is thus extremely important under section 9, particularly because, unlike under section 9(c), under section 9(a) any financial contribution from a party’s new spouse is not properly considered.<sup>27</sup> It is only the *parents’* incomes that provide the reference points against which the final quantum is to be assessed. Despite this fact, second family issues are not irrelevant to a consideration of income under section 9(a) – rather, the question remains: to what extent should income be imputed in shared custody contexts when a spouse has decided to stay home and care for children of a subsequent relationship or otherwise not fulfill their duty to *maximize* their own income<sup>28</sup> because of reliance on the second spouse’s means?

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<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid* at para 51

<sup>25</sup> *Hofsteede v Hoffsteede* (2006), 24 RFL (6th) 406 at para 48 (Ont Sup Ct) [*Hofsteede*].

<sup>26</sup> A comparable approach might be that taken under the Spousal Support Advisory Guidelines (SSAG) determinations, where courts use the SSAG limits as reference points to determine the fairness of a final award.

<sup>27</sup> *Johnson v Johnson*, 2011 BCCA 190, (2011), 100 RFL (6th) 19 [*Johnson*].

<sup>28</sup> *Drygala v Pauli* (2002), 61 OR (3d) 711 (ONCA); *Lamontagne v Lamontagne*, 2006 ONCJ 498, (2006), 171 ACWS (3d) 687.

*A) Second-family Obligations may Result in a Spouse's Under/Unemployment*

Imputed income is governed by section 18(1) of the CSG, which provides, among other things, that a court may impute income to parents who are intentionally under- or unemployed.<sup>29</sup> A substantial and jurisdictionally divergent<sup>30</sup> body of law has arisen from this provision, with the result being that, outside of the context of shared custody, a non-custodial parent who elects to stay home with children of prior or subsequent relationships after the expiry of any statutory or contractual maternity leave will have full or partial income imputed to him or her.<sup>31</sup>

Imputed income cases<sup>32</sup> emphasize the principle that a payor's support obligations to his or her children take precedence over desires to change career paths or to stay home and care for children of prior or subsequent relationships. In other words, a mother who stays home with very young children will *not* have income imputed to her and will pay reduced child support to the custodial father, but a mother who chooses to stay home with children of a subsequent relationship beyond the expiry of maternity leave will have income imputed to her.

The situation, however, may be different within a shared custody regime. Strictly with respect to the set off amount determined under section 9(a), in shared custody, any decrease in the lower-income parent's income is immediately felt by the higher-income parent as a corresponding *increase* in child support obligation (excluding considerations under sections 9(b) and 9(c)). This is distinct from non-shared custody contexts, where a decrease in the non-custodial parent's income means that the custodial parent receives less money. This is because, in shared custody contexts, *each* parent has a child support responsibility to the other (while the child is in the other's care) quantified on the basis of his or her own income.

The issue of underemployment in shared custody arose in *Loscerbo v Loscerbo*, a 2008 Manitoba trial decision affirmed on appeal.<sup>33</sup> In *Loscerbo*, the father argued that the mother, who was staying home with

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<sup>29</sup> CSG, *supra* note 1.

<sup>30</sup> RollieThompson, "Slackers, Shirkers and Career-Changers: Imputing Income for Under/Unemployment" (2007) 26 Can Fam LQ 135 [Thompson, "Slackers"].

<sup>31</sup> For a description of this trend (which excludes Alberta), see Thompson, "Slackers," *ibid.*

<sup>32</sup> Excluding Alberta.

<sup>33</sup> 2008 MBQB 183,(2008), 57 RFL (6th) 186, aff'd at 2010 MBCA 1, (2010), 251 Man R (2d) 99 [*Loscerbo*].



two very young children from her subsequent relationship, should have income imputed to her for the purposes of section 9(a), raising the issue of whether under/unemployment based on the needs of children of subsequent relationships within the context of shared parenting is appropriate, and, if not, whether the rationale for imputation of income differs from the non-shared custody context. The mother in *Loscerbo* asserted an income of \$84,700, while the father asked the court to impute an income of \$93,456, as the lower amount was a result of several unpaid leaves the mother had taken in order to care for her children of a subsequent relationship.

The Manitoba Court of Queen's Bench commented that, "absent the other children in the mother's household" the mother would be under-employed<sup>34</sup> – because the two children whose support was at issue were aged 12 and 13, and staying home with them from time to time would be a matter of "personal choice" and not "necessity."<sup>35</sup> However, the mother was staying home also to care for the needs of her other children, ages 4, 6, 12, and 16. As the Court put it, "The issue then becomes who bears the financial burden of the mother's choices respecting her new life and household":<sup>36</sup>

If I find that the mother was legitimately under-employed as a result of her new children and stepchildren's needs, this would mean that her obligation to contribute to the support of these parent's children in the shared custody arrangement would be reduced by virtue of her choosing to work less than full-time to meet the needs of her four other children. *The result would be that the father would have to contribute more for their support because of the mother's new family.*<sup>37</sup>

The Court compared the mother's position to that of an applicant under section 10 of the CSG,<sup>38</sup> noting that the threshold for departure as a result of undue hardship for second family obligations was "extremely high" and that the situation of imputed income was "no different."<sup>39</sup> The mother's income was therefore imputed at \$93,456. Assessed against the father's income of \$120,000, the set off amount was \$320 per month.

*Loscerbo* seems to suggest that a parent cannot be "legitimately under-employed" by virtue of the needs of children of subsequent relationships because do to so would be to directly increase the other parent's financial

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<sup>34</sup> *Ibid* at para 9.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid* at para 10.

<sup>37</sup> *Ibid* at para 11 [emphasis added].

<sup>38</sup> See *supra* note 7.

<sup>39</sup> *Loscerbo*, *supra* note 33 at paras 12-13.

obligation to the subject children. By contrast, some section 9 cases have taken no issue with *temporary* reductions in income related to care for young children of subsequent relationships.<sup>40</sup> One court found that no income should be imputed because it was impractical to ask the mother to work for \$10 per hour when the costs of childcare would exceed the amount earned.<sup>41</sup>

*Loscerbo* does identify the need to prevent the potential issue of accounting for second-family obligations *doubly* under section 9. As we have argued, the income amounts and set off determined appear to have a more discernable impact on the final quantum than do nebulous considerations of second-family obligations under ss. 9(b) and (c), so that it is likely to a party's advantage in presenting such a case to focus on arguments about under-employment as a result of second families under section 9(a) rather than solely under the factors set out in sections 9(b) and 9(c).

#### 6. Section 9(b): The Increased Costs of Shared Custody

On a plain reading of section 9(b), the sub-provision was meant to account for the fact that a parent who suddenly has to care for a child more than 40 per cent of the time may incur more costs than he or she did before; the cost of food will almost certainly increase and it might be necessary, for example, to purchase a larger house or a vehicle. As so many courts and commentators have noted,<sup>42</sup> however, increased time with children does not necessarily result in increased costs to the formerly non-custodial parent, and, more importantly, does not usually result in a *decrease* of costs to the formerly custodial parent. Further, courts have noted that many section 9 cases deal with initial and not variation orders, and so there is nothing for courts to compare the "increased" costs to, since the parties are embarking on a regime of shared custody from the time of separation.

In light of these issues, *Contino* broadened the scope of section 9(b),<sup>43</sup> clarifying that, despite this section's wording, under this section courts must consider the general "budgets and actual expenditures of both parents in addressing the needs of the children"<sup>44</sup> to make sure that expenses relating to the children are apportioned between both parents relative to their respective incomes.<sup>45</sup> Although frequently there is a dearth of evidence

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<sup>40</sup> *TLR v RWR*, 2006 BCSC 292, (2006), 147 ACWS (3d) 835 [TLR].

<sup>41</sup> *Milani v Milani*, [2009] OJ No 936 (Sup Ct) (QL) [Milani].

<sup>42</sup> As summarized by *Contino*, *supra* note 9 at para 53.

<sup>43</sup> *Ibid* at para 52.

<sup>44</sup> *Ibid*.

<sup>45</sup> *Ibid* at para 53.

under this section, there are cases where detailed childcare budgets have been presented to the court and particular aspects of those budgets are assessed and deemed reasonable or unreasonable.<sup>46</sup>

Second-family concerns can figure into childcare budgets under section 9(b) in at least the following ways: A second family may be seen as a *burden* on the parent, where the costs of caring for children who are not the subject children may be accounted for within the parent's household budget, creating higher costs for that parent; or, a *benefit* to the parent, because of additional "free" services a repartnered spouse's current spouse may provide, such as "free childcare" and/or economies of scale within the larger, new family unit.

*A) Child Care and Household Budgets: A Second Family may Increase the Costs for a Spouse's Childcare and Household Budget.*

In *TLR v RWR*, the BC Supreme Court found that the mother's budget for section 9(b) properly included child care expenditures, notwithstanding the fact that these expenditures were associated only with her two other, younger children, and not with the children for whom support was at issue:

... The statement shows other expenditures of \$280 per month for diapers, formula and baby clothes. Those expenses, totalling \$410 per month, do not relate to G.M.R. or M.B.R., but they do illustrate that costs associated with the plaintiff's other children have a significant impact on the financial well being of G.M.R. and M.B.R. and on the plaintiff's ability to provide for them.<sup>47</sup>

Similarly, in *JLB v MDO*, a 2012 BC trial decision, the Court allowed the father to budget some "modest" costs relating to the care of his current spouse's three children under section 9(b).<sup>48</sup> In *MN v JJG*, a 2010 BC trial decision, the Court wrote that, although the father's expenses under section 9(b) seemed high, they were in fact realistic given the large family he supported (a family of six).<sup>49</sup> Lastly, in *LAB v MLB*, a 2012 BC trial decision, the Court accepted that the father and his current spouse had purchased a five-bedroom house because they wanted each child (their two biological children and the two subject children) to have a room, and that

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<sup>46</sup> See e.g. *Loscerbo*, *supra* note 33.

<sup>47</sup> *TLR*, *supra* note 40 at para 41; it should be noted that the *TLR* Court did not undertake its analysis with the headings "ss 9(a), (b) and (c)," but the consideration of budgets came after discussing the set off, and so ostensibly falls under s 9(b).

<sup>48</sup> *JLB v MDO*, 2012 BCSC 1107, [2012] BCJ No 1561 (QL) [*JLB*].

<sup>49</sup> *MN v JJG*, 2010 BCPC 319, (2010), 195 ACWS (3d) 1073 [*MN*].

this was more expensive than might otherwise have been needed, and so properly accounted for under section 9(b).<sup>50</sup>

With respect to section 9(b) *Contino* held that a court should consider “all of the payor parent’s costs”<sup>51</sup> and “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.”<sup>52</sup> This would appear to include the costs of the new family and to be beyond the strict language of section 9(b), but would be consistent with a purposive approach to these provisions. Whether these costs are more properly considered under section 9(b) or as a general factor under section 9(c) is not clear, however, and different courts have taken different approaches. Either way, such “second family” issues have been considered to be material factors in quantifying support under section 9.

*2) Child Care and Household Budget: A Second Family may Reduce Costs in a Spouse’s Childcare and Household Budget.*

As detailed below, second families can sometimes *decrease* a party’s expenses for the section 9(b) analysis.

*a) “Free Childcare”*

Courts sometimes comment that formerly non-custodial parents with new spouses have the advantage of “free childcare” to the extent that the unemployed new spouse, typically female, is able to stay at home and care for the children when the parent is unavailable.<sup>53</sup> This can have a significant impact during budget comparison if the other parent is single and spends money on daycare services. Similarly, in *Durose v Young*, a 2011 trial decision, the Court noted, under section 9(c), that although the father made significantly more income (in fact, double the wife’s income), “he live[d] alone and ha[d] no one to help him.”<sup>54</sup> This suggests that a new spouse’s presence in the new household can impact the analysis even if he or she is not contributing financially.

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<sup>50</sup> *LAB v MLB*, 2012 BCSC 1066, [2012] BCJ No 1503 (QL).

<sup>51</sup> *Contino*, *supra* note 11 at para 52 [emphasis in original].

<sup>52</sup> *Ibid* [emphasis added].

<sup>53</sup> See e.g. *Milani*, *supra* note 41.

<sup>54</sup> *Durose v Young*, 2011 ONSC 1920 at para 9, (2011), 200 ACWS (3d) 167 [*Durose*].

*b) Economies-of-Scale*

Courts have sometimes found, particularly on applications to vary as a result of increased access, that the formerly non-custodial parent's housing costs have *not* increased, precisely because he or she was already caring for other children of a subsequent relationship.<sup>55</sup> In *Moorehouse v Moorehouse*, a 2007 Ontario trial decision, the Court found that the set off did not account for the fact that the mother had "additional" costs as a single parent, which the father, who had repartnered, did not have:

[The set-off] does not reflect the additional costs faced by Mrs. Moorehouse as a single parent having to maintain a residence for herself and her son. Mr. Moorehouse is able to share many of his present expenses with his common law spouse. The additional costs he incurs to provide a bedroom and food for one more child when there are already two children in his home are proportionally much less than those expenses for Mrs. Moorehouse.<sup>56</sup>

*Seguin v Masterson*, a 2004 Ontario decision, observed that, when assessing the increased costs of shared custody under section 9(b), the increased housing expenses of having a child an additional 50 per cent of the time were "minimal" in light of the fact that the father had a new spouse whose child was already living with them in the household.<sup>57</sup> This case, and the case of *Moorehouse* would appear to have more relevance on a support review which flows from a change from a *sole* custody to a *shared* custody situation.

In summary, section 9(b) has, since *Contino*, been interpreted with less emphasis on the "increased" costs of shared custody than on the *global* costs of childcare in each household and how those costs are (and should be) apportioned between the parents.

*7. Section 9(c): The Conditions, Means, Needs, and Circumstances*

According to *Contino*, section 9(c) means that the court must analyse the "resources and needs" of the parents and children at issue, in order to verify the assumptions inherent in the table amounts and set off.<sup>58</sup>

Often, analyses under this provision boil down to a comparison of household standards of living; this is in part because *Contino* is clear that

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<sup>55</sup> See e.g. *Hofsteede*, *supra* note 25.

<sup>56</sup> *Moorehouse v Moorehouse*, [2007] OJ No 374 (Sup Ct) (QL) at para 46 [Moorehouse].

<sup>57</sup> *Seguin v Masterson*, [2004] OTC 441 at para 18 (Sup Ct) [Seguin].

<sup>58</sup> *Contino*, *supra* note 9 at para 68.

there should not be too great a discrepancy as children move from house to house, as this might damage the parenting arrangement by incentivizing children to spend more time at the wealthier home.<sup>59</sup>

A *parent's* relative household standard of living may also be relevant to his or her ability to “absorb” the costs of caring for the subject children.<sup>60</sup> Section 9(c) thus has a dual focus, the balance of which courts have struggled over – first, analysis under this sub-provision may work to prevent too great a disparity in household standards of living, and, second, such analysis may recognize that the more affluent parent is better situated to bear a greater share of the costs of childcare. Because *Contino* provides for an unstructured analysis under this provision, different judgments focus on significantly different factors, and the precise relationship between all the things a judge can or should consider – total household standards of living, ability to pay, and the needs/means of the parents, the subject children, and any other children, as reflected in childcare and household budgets and the assumptions and inferences of the court – is not clear. In one case, for example, the Court ordered an amount above the set off where the father had “more room to spare” in his budget,<sup>61</sup> even though the household standards of living were roughly equal.

Given the very broad scope of section 9(c), we would expect second families to be taken into account most frequently under this sub-provision, and that is in fact the case. There are several ways that second families can impact (or be considered within) the section 9(c) analysis, but they can be grouped into the following two categories: either the second family (typically a new partner, but sometimes a new child who contributes to household expenses) *benefits* the parent by providing a second income or otherwise sharing household costs, or the second family *burdens* the parent by creating new financial obligations. Our review groups the analyses according to this division.

*A) A Second Family may Benefit the Spouse by Increasing His or Her Household Income or Standard of Living*

Although early interpretations of section 9 did not always consider parental repartnering to be relevant to shared custody child support determination,<sup>62</sup> and although *Contino* did not specify that the *total* household income of

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<sup>59</sup> *Ibid* at para 51; Carol Rogerson, “Child Support Under the Guidelines in Cases of Split and Shared Custody” (1998) 15 Can J Fam L 11.

<sup>60</sup> *Contino*, *supra* note 9 at para 79.

<sup>61</sup> *Loscerbo*, *supra* note 33.

<sup>62</sup> See e.g. *JM v PG* (2002), 25 RFL (5th) 78 (Ont Sup Ct); *Britt v Matychuk-Britt*, [2000] OJ No 535 (Sup Ct) (QL).

each spouse must be accounted for under section 9(c), it is now generally accepted across the provinces that a repartnered spouse should have his or her current partner taken into account in some way under section 9. There are, however, also shared custody cases where the fact of repartnering is mentioned by the court but ignored or not meaningfully considered under section 9(c).<sup>63</sup>

Under section 9(c), repartnering as a parental “benefit” can be accounted for in at least two ways: the new partner may be seen as (1) a second source of household income, and/or (2) a means of sharing household costs.

### 1) *New Spouse’s Income*

A repartnered parent may have his or her current partner’s income included as part of his or her “household income” for the purposes of either comparing household standards of living, or considering the relative abilities of the parents to absorb the costs of childcare.<sup>64</sup> In at least one case, the court allowed the mother to rebut the presumption that having a

<sup>63</sup> *Chalifoux v Chalifoux*, 2006 ABQB 535, (2006), 151 ACWS (3d) 80; *JLB*, *supra* note 48; *MEL v PRH*, 2010 NBQB 436, [2010] NBJ No 457 (QL); *TDB v LNU*, 2010 NBQB 408, (2010), 367 NBR (2d) 360; *C v S*, 2010 NBQB 252, (2010), 373 NBR (2d) 77; *AL v CM*, 2010 NBQB 46, [2010] NBJ No 34 (QL); *MM v AM*, 2008 NBQB 305, (2008), 370 NBR (2d) 16; *Condly v Berube*, 2008 NBQB 148, (2008), 330 NBR (2d) 361; *Matthews v Taylor*, 2012 NLTD(G) 24, (2012), 320 Nfld & PEIR 5; *Shurvell v Shurvell*, 2012 SKQB 380, (2012), 406 Sask R 86 [*Shurvell*]; *Petersen v Petersen*, 2008 SKQB 187, (2008), 328 Sask R 23.

<sup>64</sup> *Dunn v Dunn* (2008), 56 RFL (6th) 154 (Ont Sup Ct) [*Dunn*]; *Clarke v Clarke*, [2007] OJ No 4570 (Sup Ct) (QL) [*Clarke*]; *Lebrun v Lebrun*, [2006] OJ No 4513 (Sup Ct) (QL); *Hartlen v Hartlen* [2002] OJ No 5946 (Sup Ct) (QL); *South v Tichelaar* (2001), 20 RFL (5th) 175 (Ont Sup Ct); *Dagenais v Blais*, 2010 ABQB 324, [2010] AJ No 1620 (QL) (where evidence deficient); *Croken v Croken*, 2008 ABQB 431, [2008] AJ No 778 (QL); *MDH v MNH*, 2013 BCSC 248, [2013] BCJ No 275 (QL); *Flick v Flick*, 2011 BCSC 264, [2011] BCJ No 345 (QL); *Earles v Earles*, 2006 BCSC 221, [2006] BCJ No 346 (QL) [*Earles*]; *JSG v MFG*, 2011 MBQB 177, (2011), 266 Man R (2d) 300; *Klein v Martin*, 2010 MBQB 159, (2010), 254 Man R (2d) 176 [*Klein*]; *Rolls v Whittaker-Rolls*, 2010 MBQB 12, (2010), 249 Man R (2d) 104; *Loscerbo*, *supra* note 33; *Church v Chafe*, 2010 NLTD(F) 31, (2010), 301 Nfld & PEIR 30; *Lane v Hustins-Lane*, 2005 NLUFC 42, (2005), 253 Nfld & PEIR 45 [*Lane*]; *Hogan v Fagan*, 2003 NLSCUFC 29, (2003), 233 Nfld & PEIR 19; *Neil v Neil*, 2003 NLSCUFC 17, (2003), 227 Nfld & PEIR 255; *Plourde v Morin*, 2005 NSSC 332, (2005), 257 NSR (2d) 1 [*Plourde*]; *Doucette v Kelleher* 2005 NSSC 92, [2005] NSJ No 539 (QL); *MacNaught v MacNaught* (1998), 169 Nfld & PEIR 153 (PEISC); *HAK v TJW*, 2013 SKQB 70, [2013] SJ No 156 (QL) [*HAK*]; *Amos v Fischer*, 2013 SKQB 49, (2013), 413 Sask R 126 [*Amos*]; *Soanes v Soanes*, 2007 SKQB 254, [2007] SJ No 370 (QL) [*Soanes*]; *MAB v HIL*, 2010 YKSC 8, [2010] YJ No 32 (QL) [*MAB*]; *Gannon v Gannon*, 2014 NSSC 113, [2014] NSJ No 163 (QL); see *Mayer v Mayer*, 2013 ONSC 7099, [2013] OJ No 6087 for interaction with s 5 of the CSG.

second household income increased her standard of living, finding that to include that new spouse's income in calculating the household income ratio would unfairly penalize the mother because her new partner spent his money only on himself.<sup>65</sup>

Sometimes, precise incomes are not listed, only the fact that the parent, or each parent, has a new spouse who is gainfully employed.<sup>66</sup> In *Dean v Brown*, a 2002 decision by the Nova Scotia Court of Appeal, the Court held that, under the circumstances, repartnering was a "neutral" factor under section 9(c) because "each parent [had] a partner who [was] employed and in each household there [were] other children requiring support," without getting into a numerical comparison of incomes.<sup>67</sup> Further, the very fact that one parent has repartnered with an employed spouse, and the other has not, has sometimes proved extremely significant; in *Milani v Milani*, a 2009 Ontario trial decision, the Court ordered the father to pay the unreduced table amount largely as a result of total household income disparity:

The picture of the needs and circumstances of the parties is evident from their budgets and financial statements. It is simple to summarize. The mother, who is going it alone with a small and uncertain income, is struggling. The father, whose wife earns a similar income to his from her pension, is not struggling. He has the benefit of a greater household income and a wife who is willing and able to stay at home with the children when necessary. In all the circumstances, I think that an appropriate weighing of the three factors listed in s.9 of the guidelines would lead me to order the father to pay the unreduced table amount.<sup>68</sup>

Finally, purchases that a parent and his or her new spouse have made together that affect the household standard of living may also be independently accounted for; in *Durose v Young*, for example, the mother and her new partner had purchased a boat which contributed to their higher standard of living.<sup>69</sup>

Although courts typically view a new spouse's income as relevant in some way, there exists significant variation as to *how* relevant that income is. In *McWilliams v Couture*, a 2014 New Brunswick trial decision, the

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<sup>65</sup> *Stewart v Stewart*, 2006 MBQB 118, (2006), 28 RFL (6th) 193, aff'd 2007 MBCA 66, (2007), 214 Man R (2d) 199.

<sup>66</sup> *Purnell v Romero-Sierra*, [2007] OJ No 1834 (Sup Ct) (QL) [*Purnell*]; *Froom v Froom*, [2004] OTC 1173 (Sup Ct) [*Froom*]; *Jeans v Jeans*, 2004 NLSCUFC 11, (2004), 236 Nfld & PEIR 82 [*Jeans*].

<sup>67</sup> *Dean v Brown*, 2002 NSCA 124 at para 16, (2002), 209 NSR (2d) 70.

<sup>68</sup> *Milani*, *supra* note 41.

<sup>69</sup> *Durose*, *supra* note 54.



Court wrote that it “must look at the income of both a parent and persons who share living expenses with the parent or from whom a parent otherwise receives an economic benefit as a result of living with that person,”<sup>70</sup> suggesting a much broader application of such considerations in determining relative standards of living. Similarly, in *Ortynski v Ortynski*, the BC Supreme Court held that the father benefitted from “wealthy and generous parents” who would likely continue to contribute generously to their grandchildren, despite having no legal obligation to do so.<sup>71</sup>

By contrast, in *Desjardins v Bouey*, the Alberta Court of Queen’s Bench noted that the section 9(c) analysis “required” evidence of any contributions made by new partners or spouses, apart from income alone.<sup>72</sup> Further, in *Dey v Malhotra*,<sup>73</sup> a 2013 Ontario trial decision, when the mother sought disclosure of the father’s present wife’s income, the Court held that, with respect to child support determination, a new partner’s income was not relevant unless there was a claim for undue hardship,<sup>74</sup> and declined to order disclosure. The Court instead accounted for the father’s repartnering as a matter of household expense sharing only.<sup>75</sup>

In finding that a new spouse’s income was not relevant outside of a section 10 analysis, *Dey* disagrees with much of the Canadian jurisprudence on the issue of new partner income. For example, in *HAK v TJW*, the Saskatchewan Court of Queen’s Bench held that “[t]he ability to absorb increased costs can be the result of resources available to that parent’s household. Accordingly, the income information of the respondent’s present spouse [was] relevant,”<sup>76</sup> and the Court ordered partial disclosure of the spouse’s income. Notably, in *Hofsteede v Hofsteede*, a 2006 Ontario trial decision, the Court actually “imputed” an income of \$30,000 to the mother’s new spouse (the same amount that the father’s new spouse made) despite the fact that the mother’s new spouse’s tax return showed an income of \$11,700, reasoning that the mother’s new spouse should be able to earn at least as much as the father’s!<sup>77</sup> Lastly, in *Sirdevan v Sirdevan*, a decision determining interim relief, the Ontario Superior Court noted that the precise reasons for the mother’s new partner’s unemployment might become meaningful at trial.<sup>78</sup>

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<sup>70</sup> *McWilliams v Couture*, 2014 NBQB 86, (2014), 419 NBR (2d) 115.

<sup>71</sup> *Ortynski v Ortynski*, 2014 BCSC 73, [2014] BCJ No 49 (QL).

<sup>72</sup> *Desjardins v Bouey*, 2013 ABQB 714, (2013), 93 Alta LR (5th) 265.

<sup>73</sup> 2013 ONSC 2469, (2013), 35 RFL (7th) 72 [*Dey*].

<sup>74</sup> *Ibid* at para 16.

<sup>75</sup> *Ibid* at para 27.

<sup>76</sup> *HAK*, *supra* note 64 at para 5.

<sup>77</sup> *Hofsteede*, *supra* note 25.

<sup>78</sup> *Sirdevan v Sirdevan*, 2010 ONSC 2375 at para 124, (2009), 99 OR (3d) 424; see also *Magee v Faveri*, [2007] OJ No 4826 (Sup Ct) (QL) [*Magee*].

Other courts have held that a repartnered parent's current spouse's *own* first or second family obligations may effectively "reduce" that person's income for the purposes of section 9(c). In several cases, courts have disregarded or adjusted a party's new spouse's income downward to reflect that person's obligations to his or her own children.<sup>79</sup> In *Campbell v Campbell*, a Manitoba decision, the parties had roughly equivalent incomes of around \$39,000; the father's new spouse earned \$55,000, but was in a shared custody arrangement herself with respect to two children of a previous marriage, and gave evidence that she incurred "significant" costs with respect to that regime.<sup>80</sup> The father and his new spouse also had one child together. The Court adjusted the father's new spouse's income downward to reflect her shared custody obligations and the expense of the subsequent child, so that the household standards of living were found, after this adjustment, to be "approximately equal" despite the father's repartnering.<sup>81</sup> Similarly, another court commented that the payor parent might be entitled to a reduction when his current spouse went on maternity leave, although this would depend on whether or not the savings in daycare offset the reduction in household income.<sup>82</sup>

Notwithstanding the fact that the income of repartnered spouses is generally important to comparing household standards of living, where the incomes of current spouses "equalize" household incomes for parents who would otherwise be in disparate financial states, the parent with the higher income is not thereby relieved of his or her child support obligations. This was settled in *Evans v Watson* where the father argued that, because both parents had repartnered and now had similar household incomes (based mostly on the father's income and the mother's new spouse's income), and because the goal of section 9(c) was, in the father's view, to equalize household incomes, no child support should be paid. The Ontario Superior Court disagreed:

In my view, [the *Contino* excerpts] do not support the interpretation Mr. Watson has put on them. They do not stand for the proposition that child support should equalize household incomes where parents have re-partnered and share equal custody of their children. An equitable division of child support costs is to be made between the parents. The set off amount may be modified where it would lead to "significant variations" in standards of living between the households or to "avoid great disparities" between households.<sup>83</sup>

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<sup>79</sup> *Purnell*, *supra* note 66; *Magee*, *ibid*; *PV v DB*, 2007 BCSC 237, (2007), 35 RFL (6th) 338 [PV]; *Earles*, *supra* note 64.

<sup>80</sup> *Campbell v Campbell*, 2010 MBQB 107 at para 24, (2010), 86 RFL (6th) 371.

<sup>81</sup> *Ibid* at para 26.

<sup>82</sup> *Evans v Watson*, 2010 ONSC 1550, (2010), 84 RFL (6th) 228 [Evans].

<sup>83</sup> *Ibid*.

In ordering the set off amount, the Court wrote that to do otherwise would be to effectively shift the father's child support obligation to the mother's new spouse.<sup>84</sup> *Evans* has thus helped clarify the jurisprudence on the extent to which orders under section 9 should prevent great disparities in household standards of living, and affirmed the general judicial unwillingness to "transfer" support obligations to new spouses.<sup>85</sup> As detailed below, however, although the effect may be the same, courts seem relatively content to consider contribution to *expenses* by a second, gainfully employed spouse – perhaps "six of one and half a dozen of the other."

Frequently, where a repartnered spouse has a significantly higher total household income than the other, single spouse, the amount of support ordered will fall between the set off and the full table amount.<sup>86</sup> However, the converse is not often true. Less frequently is the higher-income spouse ordered to pay *less than* the set off amount as a result of the lower-income spouse's repartnering.<sup>87</sup> An example of this situation occurred in *Klein v Martin*, a 2010 Manitoba trial decision,<sup>88</sup> which involved a single father who made \$215,000, and a repartnered mother who made \$20,000 (imputed). The mother's current partner made in excess of \$200,000. The set off was \$3,067, and the court ordered \$2,900, as a result of "the husband's income, the nature of his employment and at source deductions, the income attributed to the wife, the wife's current relationship, the wife's failure to obtain any employment, the ages and needs of the children."<sup>89</sup> It may be that this case can be explained (indirectly) by virtue of the fact that both families in question were "over \$150,000.00"<sup>90</sup> and thus there was little concern about the objectives of meeting the needs of the children, as opposed to fairly apportioning the financial burden between the two spouses.

#### *b) Shared Costs of Living*

A repartnered parent will usually have the fact that he or she is sharing household expenses with a new partner considered with respect to his or

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<sup>84</sup> *Ibid* at para 20.

<sup>85</sup> See also *Clarke*, *supra* note 64; *Dunn*, *supra* note 64; *Callaghan v Campbell*, [2005] OTC 783 (Sup Ct).

<sup>86</sup> See e.g. *Milani*, *supra* note 41; *Amos*, *supra* note 64.

<sup>87</sup> But see *Smith v Bartlett*, 2013 MBQB 173, (2013), 295 Man R (2d) 85 [Bartlett].

<sup>88</sup> *Klein*, *supra* note 64.

<sup>89</sup> *Ibid* at para 35.

<sup>90</sup> Although not the subject of this paper, it may be that some interesting conceptual analysis of the little used "discretion" in incomes over \$150,000 can directly and indirectly explain some of the divergences in the application of s 9.

her ability to absorb the costs of childcare, and/or with respect to comparative standards of living.<sup>91</sup> In some cases, shared household costs may be a rebuttable presumption where finances are in fact kept separate,<sup>92</sup> while, in others, courts may infer the household cost contributions of the current spouse despite evidence to the contrary,<sup>93</sup> or impose a “liability” on a parent’s current spouse to contribute to household expenses where he or she may not have been doing so already.<sup>94</sup>

In 2011, in *Johnson v Johnson*, the BC Court of Appeal addressed the issue of whether or not the mother’s new fiancé’s “mortgage contributions” were properly assessed as part of the mother’s “income” under section 9(a), or considered instead under sections 9(b) and/or 9(c).<sup>95</sup> In *Johnson*, the father had been receiving rental income from a tenant in his home, and the chambers judge evidently accounted for the mother’s spouse’s mortgage payments similarly. The Court of Appeal found that the chambers judge was in error in accounting for the mortgage contributions under section 9(a), that these contributions were not “income” any more than the fiancée’s income would be her income for the purposes of determining the table amount, and that the chambers judge may have been entitled to take the contributions into account under section 9(b) or 9(c), but only if there had been a material change in circumstances justifying a variation.<sup>96</sup>

Where one parent shares household expenses and another does not, this may mean that the award is adjusted in favour of the single parent. In *Amlani v Moledina*, for example, each parent earned in excess of \$500,000, and the Court ordered \$5,726 per month in child support, which included a \$500 per month “housing expense” to account for the fact that, “because of her personal circumstances,” the (single) mother received no direct or

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<sup>91</sup> *Grindley v Grindley*, 2012 ONSC 4538, [2012] OJ No 3717 (QL); *Chalouz v Bailliu*, 2010 ONSC 1397, [2010] OJ No 1001 (QL); *Liang v Guo*, [2009] OJ No 3393 (QL); *Greenburg v Greenburg*, [2009] OJ No 5377 (QL); *Moorehouse*, *supra* note 56; *Ward v Ward* (2000), 7 RFL (5th) 197 (Ont Sup Ct); *Moreau v Fliesen*, 2008 BCSC 1358, (2008), 62 RFL (6th) 122; *Earles*, *supra* note 64; *McLachlan v McLachlan*, 2010 MBQB 189, (2010), 256 Man R (2d) 130; *Greene v Lundrigan*, 2011 NLTD(F) 55, (2011), 316 Nfld & PEIR 263; *Gosse v Sorensen-Gosse*, 2009 NLUFC 37, (2009), 292 Nfld & PEIR 322 [Gosse]; *Hemond v Galano*, 2013 ONSC 6929, [2013] OJ No 5144 (QL).

<sup>92</sup> *Zanewycz v Zanewycz*, [2007] OJ No 3567 (Sup Ct) (QL); *NP v MCP*, 2012 BCSC 1843, [2012] BCJ No 2581 (QL).

<sup>93</sup> *Durose*, *supra* note 54; *Amlani v Moledina*, 2011 ONSC 1225, (2011), 98 RFL (6th) 367 [Amlani].

<sup>94</sup> *Hofsteede*, *supra* note 25.

<sup>95</sup> *Johnson*, *supra* note 27.

<sup>96</sup> *Ibid* at para 15.

indirect financial assistance for her housing expenses.<sup>97</sup> Further, in *Smith v Bartlett*, a curious 2013 Manitoba trial decision, the Court actually awarded less than the set off amount where the father made \$81,000 and the mother had effectively no income, because the mother had no housing or living expenses as a result of the support of her parents and boyfriend.<sup>98</sup> Lastly, in *Amos v Fischer*, the Saskatchewan Court of Queen's Bench ordered the set off amount, notwithstanding the fact that the father's income was more than double the mother's, writing, "While [the father] earns significantly more money than [the mother], that consideration is off set by the fact that [the mother] shares most of her core household expenses with her new husband which allows her to absorb the costs required to maintain [the child's] standard of living."<sup>99</sup>

These cases notwithstanding, however, courts will often just note if a parent's housing costs are low as a result of a new spouse's contributions to utilities, rent/mortgage and food, but not articulate the precise effect of this finding, if any, on the quantum ordered.<sup>100</sup> Such observations may occur even when the spouse's new partner only lives with him or her on a part time basis.<sup>101</sup>

## 2) *A Second Family may Burden the Spouse by Creating Increased Costs*

With respect to second families as a "burden," there are essentially two kinds of scenarios: either (1) the higher-income/payor parent seeks to decrease the amount of child support by asserting a lower standard of living, notwithstanding his or her higher income, and/or a lesser ability to pay because of multiple family obligations; or (2) the lower-income/recipient parent seeks to increase the amount of child support by asserting a lower standard of living and/or a lesser ability to pay because of multiple family obligations. In either scenario, considerations of biological children, stepchildren, and children of prior families via court-ordered support are found in the case law.

There are many cases where such second family circumstances exist but are not considered, and it is very difficult to predict precisely how such circumstances will impact the final quantum ordered. Very rarely, on the other hand, and more typically in early cases, do we see courts holding

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<sup>97</sup> *Amlani*, *supra* note 93 at para 118.

<sup>98</sup> *Bartlett*, *supra* note 87 at para 80.

<sup>99</sup> *Amos*, *supra* note 63 at para 35.

<sup>100</sup> For a typical example, see *Stead v Stead*, [2005] OTC 1043 (Sup Ct).

<sup>101</sup> *Murphy v Murphy*, 2014 ONSC 2624, (2014), 44 RFL (7th) 448.

expressly that costs relating to new families, and specifically subsequent children, are not properly accounted for under section 9.<sup>102</sup>

*a) Payor Spouse Financial Obligations to Subsequent Children*

The most recent Ontario authority on this issue is *Smith v Tomlinson*, a 2013 trial decision.<sup>103</sup> In *Tomlinson*, the two parties were seeking an initial and final order with respect to child support for their 17-year old daughter, within a shared custody regime. The father was single, made \$87,247, and paid \$600 per month in support to a child of a previous relationship. The mother, whose financial disclosure was insufficient, had income imputed to her at \$120,000. She had repartnered, and was supporting her unemployed husband and his 16-year old son. She had also recently spent \$30,000 on her wedding and \$40,000 as a down payment for her new home. The set off was \$258 per month. In ordering an award of \$450 per month, the Court was persuaded in large part by the mother's superior ability to bear the increased costs of shared custody.<sup>104</sup> The Court found, according to the budgets, that the father paid additional costs of \$258 per month with respect to the subject daughter.<sup>105</sup> Thus, the Court actually ordered the mother to pay more than (1) the set off amount, and (2) the amount "needed" by the father according to his own budgets, because it found her to be better able to absorb the costs.

In making this determination, the Court assessed a number of other factors, including the following: the mother was a homeowner and had more assets than the father; the father had support obligations to another child; the mother had never paid child support to the father despite the fact the he was the primary caregiver; and the mother had wrongfully claimed child tax benefits for the daughter.<sup>106</sup> The Court was clearly not sympathetic, however, with respect to the mother's assumed obligations to her new husband and son:

The court was provided with little evidence about why the mother's husband is unable to work and contribute to the family's expenses. He has worked in the past as a chef and one would think that he should be able to find *some* form of employment in the food industry after two years, to contribute to his family's expenses...The mother chose to enter into this arrangement (supporting her husband and his son) knowing that her husband was unemployed and that she has a support responsibility for her daughter...The mother chose to pay \$30,000 for a wedding and contributed towards

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<sup>102</sup> See e.g. *Coles v Coles*, 2002 BCSC 577, [2002] BCI No 1142 (QL).

<sup>103</sup> 2013 ONCJ 218, [2013] OJ No 1909 (QL) [*Tomlinson*].

<sup>104</sup> *Ibid* at para 64.

<sup>105</sup> *Ibid* at para 61.

<sup>106</sup> *Ibid* at para 63.

the \$40,000 down-payment for her house in the past year, despite these debts. It is difficult for her to argue now that she cannot afford to pay child support for her daughter due to her recent financial choices.<sup>107</sup>

The language of section 10 is echoed in the *Tomlinson* Court's reasoning.

Structurally, the *Tomlinson* approach to section 9(c) is typical; courts will often list a variety of factors under this sub-provision, some of which (implicitly or explicitly) "offset" others. Notably, a payor parent's financial obligations to subsequent children are frequently found to be offset by his or her superior income or financial position. In *Hodge v Jones*, for example, an Ontario decision, the Court found that although the payor father had two young children and a household income of approximately \$100,000, and the mother had no new children and a total household income in excess of \$200,000, a support amount just above the set off was appropriate: "[The father] is feeling the usual financial pressures of a very young family. I don't consider those pressures to be undue having regard to the fact that he has been able to increase his net worth over the past four years."<sup>108</sup> Again we see the language of section 10.

Although a different outcome was reached in *PV v DB*, a 2007 BC decision, similar reasoning was used. In *PV*, the Court declined to award any support, even though the set off amount was \$95. The Court reached this decision by apportioning the actual costs spent on the child by the parties and subtracting them from the set off, finding that the remaining sum would be \$20 per month and negligible. The Court also noted, however, that this finding accorded well with the fact that "the means of the parties [were] relatively equal,"<sup>109</sup> which the Court determined by considering the financial burdens and assets of the parties, deciding ultimately that "the [father's] slightly better asset position [was] offset by the fact that he [had] a new family and two additional children to support."<sup>110</sup>

The "offset" approach was also used in *Plourde v Morin*, a 2005 Nova Scotia trial decision.<sup>111</sup> In *Plourde*, the payor father sought to reduce a child support award that had been in place since the parties' separation because of the birth of his twin sons. Both parties had repartnered with employed spouses. The mother and her new partner cared for two children of her partner's former relationship 50 per cent of the time. The father's

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<sup>107</sup> *Ibid.*

<sup>108</sup> *Hodge v Jones*, 2011 ONSC 2363 at para 37, [2011] OJ No 1763 (QL) [*Hodge*].

<sup>109</sup> *PV*, *supra* note 79 at para 172.

<sup>110</sup> *Ibid.*, at para 170.

<sup>111</sup> *Plourde*, *supra* note 64.

combined household income was \$168,000 and the mother's household income was \$109,596. The parties had initially agreed to a support amount of \$900, and the set off amount in 2005 was \$786 based on their respective incomes. There were three subject children. The Court found that because there had been changes in incomes, and because the parties had entered into new relationships with new dependants, there had been a change in circumstances justifying reassessment of maintenance.<sup>112</sup> The Court ordered the set off amount, noting the following:

... while the court is mindful that the twins are in the [father's] house full time and [the mother's spouse's children] are in the [mother's] home 50 percent of the time, this is offset by the following:

- the disparity between the parties' individual and household incomes
- the additional days during the summer holiday months when the 3 [children at issue] are with their mother
- the additional transportation the mother undertakes for doctor, dental, and other appointments
- the additional incidental expenses covered by [the] mother (Halloween costumes, birthday parties, etc.)<sup>113</sup>

It is worthwhile emphasizing that the set off amount was below the \$900 that the mother had previously been receiving, that she had still been operating on a deficit in receipt of this amount, that her household income was significantly lower, and that she had second family obligations of her own. Accordingly, this is evidence of an implicit reluctance by the Court to consider any "cliff effect"<sup>114</sup> in variations which do not relate to a change in residential arrangements.

In *Johnson*, discussed earlier, the BC Court of Appeal also addressed the issue of payor parent second family obligations. In *Johnson*, the recipient mother appealed the chamber judge's decision reducing child support from \$395 per month (the set off, which had been determined to be fair by a previous court order), to \$200. The mother had repartnered, and her current partner was contributing to mortgage payments. The father had also repartnered, and his current spouse (who was in school and working part time) had brought three children into the relationship and into the father's home, as a result of which the father lost rental income he had previously been receiving.

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<sup>112</sup> *Ibid* at para 18.

<sup>113</sup> *Ibid* at para 51.

<sup>114</sup> Discussed below.



The Court of Appeal found that the chambers judge erred in finding that the father's loss of rental income was a material change of circumstances warranting a redetermination of child support under section 9, and further held that there was no reason to vary the initial order. In making this decision, the Court wrote that the father was really applying to have child support redetermined because of his remarriage and the addition of three children to his household, but that these changes were immaterial to the appropriateness of the set off amount:

I acknowledge that the father asked this Court to find that the chambers judge reached the right conclusion, even if he erred in his determination of the Guidelines income. I do not agree. The evidence was insufficient to support the conclusion either the fiancé's contribution or the loss of rental income was material to a s. 9 order. As the chambers judge decided, the evidence did not support a finding that the father's remarriage and the addition of three children to his household were a material change of circumstance.

In essence, the father asks this Court to revisit the findings of Justice Dorgan without regard to his failure to prove the real change of circumstance he alleged — that his remarriage and the addition of three children to his household make the set-off amount, properly determined, unfair having regard to the criteria in s. 9(b) and (c) of the Guidelines, including hardship considerations and the terms of the shared expenses orders. After reviewing the entire record, including the reasons and order of Justice Dorgan which must form the basis of the determination whether a variation is required or permitted, I can find no support for a variation of the order. On the materials, it seems fair. The father's overall financial situation is considerably better than that of the mother. He has a net worth in excess of \$200,000, in equity in his house and pension funds. She is in a deficit position, with no equity in her house. On one view of this application, the father is asking the mother's fiancé to contribute to his household so his two children and his wife's three children can enjoy benefits with him he sees his two children enjoying with their mother because of the generosity of her fiancé, who has six children of his own to support.<sup>115</sup>

Unfortunately, the Court of Appeal in *Johnson* did not do its own *Contino* analysis, so we do not know the mother's fiancé's income, or the relative household standards of living. This case appears to have been decided, in effect, more on the threshold issue of whether or not, when considered globally, a material change in circumstance had occurred to justify the court's intervention rather than truly on a section 9 analysis. We suggest that, if other facts which more clearly justified a review (for example, a significant change in income of either party) the "second family" consideration would more likely have played a role, in keeping with the case law, in quantifying the support payable.

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<sup>115</sup> *Johnson*, *supra* note 27 at paras 27-28.

Most frequently, we see courts “accounting for” a payor parent’s obligations to his or her new family (or prior family) under section 9(c), although the exact impact on the final quantum is not clear.<sup>116</sup> This is true particularly in very high income cases,<sup>117</sup> such as *DLD v RCC*, a 2013 BC trial decision, where the father earned over \$600,000.<sup>118</sup> In setting the award at \$4,500 (the set off was \$8,429), the Court considered “the various estimated costs associated with the children as reflected in the parties financial statements, the income and general expenses and access to equity in extravagant assets of these parties, *the amount of support being paid to the respondent’s first family*, [and] the shared custody/residence regime and its associated expenses.”<sup>119</sup>

Another typical example of how multiple family concerns are accounted for under section 9(c) is *Kovacs v Nelson*, a 2008 Ontario decision, in which the Court wrote, in ordering the set off amount, simply that it had “taken into account the shared custody arrangement and the [father’s] responsibility to his new family.”<sup>120</sup> Similarly, in *Jeans v Jeans*, a Newfoundland decision, the Court noted under section 9(c) that the father paid one-half of his household expenses, which included the expenses of two children of his current partner. The Court awarded an amount of \$450 (well above the set off amount of \$316, but far less than the unreduced table amount of \$601), in spite of the fact that the father had paid no child support since the separation, the father’s spouse earned nearly \$60,000, and that the mother made only \$18,000, was suffering from a serious spinal injury for which she required constant care, and was surviving only with the extensive financial assistance of her parents.<sup>121</sup> As is usually the case with section 9 decisions, it is not clear in *Jeans* what impact the father’s second family obligations had on the final quantum ordered, but these obligations were ostensibly accounted for alongside all the other circumstances of the parties, which, together, led to an award lower than the table amount.

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<sup>116</sup> *Lane*, *supra* note 64; *Salvador v Salvador*, [2000] OJ No 3196 (Sup Ct) (QL); *Soanes*, *supra* note 64; *BJG v DLG*, 2010 YKSC 33, [2010] YJ No 126 (QL); *Dorey v Havens*, 2011 BCSC 1777, [2011] BCJ No 2492 (QL); *Ffrench v Williams*, 2011 ONCJ 406, (2011), 2 Imm LR (4th) 266; *Lickfold v Robichaud*, [2008] OJ No 4117 (Sup Ct) (QL).

<sup>117</sup> Lending some further support for the argument that, where the first two objectives of the CSG are met due to adequate income in both households, “fairly balancing” obligations between the parties (and therefore prior/second family considerations) are more likely to play a role.

<sup>118</sup> *DLD v RCC*, 2013 BCSC 590, (2013), 32 RFL (7th) 202.

<sup>119</sup> *Ibid* at para 39 [emphasis added].

<sup>120</sup> *Kovacs v Nelson*, [2008] OJ No 311 at para 3 (Sup Ct) (QL).

<sup>121</sup> *Jeans*, *supra* note 66.

Lastly, in other cases, a payor parent's obligations to a prior or second family are mentioned in the facts, but not precisely accounted for under section 9.<sup>122</sup>

*b) Recipient Spouse Financial Obligations to Subsequent Children*

This issue was addressed in *Loscerbo*, discussed above<sup>123</sup> and affirmed by the Manitoba Court of Appeal. In *Loscerbo*, the mother repartnered. She and her new partner had two very young children together, and cared for the partner's two children from a prior relationship full time. There were two subject children. Under section 9(c), the Court considered the mother's income (imputed at \$93,456), her new partner's income (\$42,700), and the Universal Child Care Benefit for the two children under six. The father made \$120,000.

In struggling over the household standards of living comparison, the Court wrote that although the mother's household income was higher, she had four other children to support, while the father had no dependants other than the subject children.<sup>124</sup> The Court commented extensively on the difficulty of comparing household standards of living; for example, although the father had no mortgage and had a higher net worth, the mother had a more valuable home and an employment pension. In response to the father's argument that the mother's financial situation was not a consequence of their two children, the Court wrote:

... [T]he mother has made some life choices which militate against a similar standard of living as a family of eight is unlikely to be able to afford the same amenities as a family of three.

In the end result, to compare household standards of living where there are such significant differences arising from lifestyle choices and differences in employment benefits is almost impossible. In this case I find it more productive to ask whether the children's experience is measurably different as they move from one home to the other.<sup>125</sup>

The Court found that the subject children's *experiences* were basically the same from house to house.

As an aside, an interesting trend that has appeared in Manitoba and which is considered in the *Lascerbo* case is that of the so-called "cliff

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<sup>122</sup> *Froom*, *supra* note 66; *Gosse*, *supra* note 91; *MAB*, *supra* note 64.

<sup>123</sup> *Loscerbo*, *supra* note 33.

<sup>124</sup> *Ibid* at para 27.

<sup>125</sup> *Ibid* at paras 31-32.

effect.” The cliff effect is a sort of residual discretionary factor following or within section 9(c). The Court of Queen’s Bench ordered an amount nearly double the set off at \$620, partly in consideration of the above factors,<sup>126</sup> but largely in order to avoid the “cliff effect” of dropping an award that was formerly \$1,026, which the mother had been relying on for nearly a decade, to \$320. Some cases subsequent to *Loscerbo* in Manitoba have followed this precedent, with the result that the “cliff effect” has been significantly more impactful in that province than elsewhere. In *Loscerbo*, the Court accepted the mother’s argument that she had been running her household in reliance on the table amount of support, and that the increase in the father’s access would not result in a significant decreased in her costs, “given the decisions she and her partner [had] made with respect to housing and other budgetary matters.”<sup>127</sup> The Court wrote that the mother had made “certain life choices in the best interests of her children” in reliance on the table amount, and that she should not bear the full cost of a change in access.<sup>128</sup>

At least some consideration of the “cliff effect” is probably warranted, given the fact that *Contino* itself placed much emphasis on the mother’s “reliance” on the award prior to shared custody; in *Contino*, the mother had made “concrete and irreversible financial decisions ... in reliance on the amount of child support then being paid to her by the father,” which were seen to be a “significant factor” in the Court’s decision.<sup>129</sup> However, once again, this would appear to be, at best, sensibly considered only in a support review which flows from a change from a *sole* custody to a *shared* custody situation. Further, it is submitted by the authors that there is little basis in policy for considering a “cliff effect” where there are adequate means in both homes.

*Loscerbo* notwithstanding, courts seem to have been sympathetic to recipient parents who have additional child obligations. For example, in *Varga v Varga*, a 2009 BC trial decision,<sup>130</sup> the Court noted under section 9(c) that the mother had “some ongoing responsibility for her two older children” one of whom lived with her and was working, and one of whom did not live with her, but was likely to stay with her from time to time.<sup>131</sup> The Court awarded \$650 in support (the set off was \$376), largely because of the great disparity in incomes and standards of living.

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<sup>126</sup> *Ibid* at para 37.

<sup>127</sup> *Ibid* at para 34.

<sup>128</sup> *Ibid* at para 35-36.

<sup>129</sup> *Contino*, *supra* note 9 at paras 122 and 146.

<sup>130</sup> 2009 BCSC 416, [2009] BCJ No 626 (QL) [*Varga*].

<sup>131</sup> *Ibid* at para 160.

Similarly, in *Seguin*, an Ontario decision, the mother was only asking for \$400 in support. Nonetheless, the Court wrote that it would have been open to granting a higher award, because the father's income was higher and the mother had greater childcare responsibilities.<sup>132</sup> The Court's reasoning had in part to do with the fact that the mother cared for an additional three-year old child of her own, and part to do with the fact that the father had repartnered with a spouse who earned in excess of \$100,000 and was already providing a home for another child (allowing the father to benefit from the economies of scale of introducing another child into their household part time). Thus the Court displayed more sympathy for the single mother's additional obligations to her biological child, than for the repartnered father's obligation to his stepchild, who, given the financial assistance of that child's mother, was actually construed as being financially beneficial within the context of section 9.

Lastly, in *TLR*,<sup>133</sup> the Court showed a high level of sympathy for the mother's second family obligations. In *TLR*, the father made \$40,000 and the mother was on maternity leave (she had had twins with her new partner). The Court noted that the mother's new spouse earned \$29,600, but that because "there [were] four persons in the mother's household, not including [the subject children]" the father actually had the higher level of income.<sup>134</sup> Support was set at \$475 because the father's financial means were better than the mother's "because of the number of persons in [the mother's] household."<sup>135</sup> The set off amount was only \$82 per month, but the Court awarded \$475 per month because "[t]he [mother] [had] the primary financial responsibility for the children, and fewer resources to care for them."<sup>136</sup>

Finally, courts frequently note in the facts that the recipient parent has another child, but then do not specifically account for it under section 9.<sup>137</sup> It is fair to say that, given the very expansive set of consideration which exist under a section 9 analysis, the presence of second family factors will not always require specific focus by a judge determining these factors.

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<sup>132</sup> *Seguin*, *supra* note 57 at para 26.

<sup>133</sup> *Supra* note 40.

<sup>134</sup> *Ibid* at paras 43-44.

<sup>135</sup> *Ibid* at para 48.

<sup>136</sup> *Ibid* at para 49.

<sup>137</sup> *Shire v Shire*, [2008] OJ No 1000 (Sup Ct) (QL); *PJG v ZIG*, 2010 ABQB 711, (2010), 503 AR 197; *Coyne v Coyne*, 2011 BCSC 1346, [2011] BCJ No 1881 (QL); *MN*, *supra* note 49; *DJG v JRG*, 2009 NBQB 203, (2009), 346 NBR (2d) 1; *Shurvell*, *supra* note 63.

### 5. Conclusion

In *Contino*, the Supreme Court of Canada wrote that section 9 is governed by “an entirely different formula” than the other CSG provisions, one “not designed with the same guiding principles.”<sup>138</sup>

Shared custody support determinations are thus “not a simple variation of the general regime” but “constitute by themselves a complete system.”<sup>139</sup> Construing section 9 as a unique element of the CSG allowed the Supreme Court of Canada to emphasize the principles of flexibility and fairness over consistency.<sup>140</sup> As we have seen, section 9 analyses can be very broad, to the extent that courts choose to exercise the “full discretion” accorded under section 9(c).<sup>141</sup> *Contino* does not, however, give courts or practitioners any guidance on the impact of second families in determining section 9 child support (despite the fact that, in *Contino*, the father had remarried). This has resulted in some variation in the case law in accounting for second family circumstances under section 9.

With respect to the role of a repartnered party’s new spouse’s *income*, we see tension in the case law between the necessity of accounting for the reality of that spouse’s financial impact on the party’s home, but also an aversion to “transferring” child support obligations from parents to their affluent second spouses (but not when considered as factor in expense reduction, where no such aversion appears to exist). This confusion has led to significant variation in how second spouses are considered under section 9.

With respect to second family obligations, particularly in older cases, we see courts occasionally following the language, and underlying policies, of undue hardship cases. This is obvious in *Tomlinson*,<sup>142</sup> *Loscerbo*,<sup>143</sup> and *Hodge*,<sup>144</sup> where courts emphasize a party’s “lifestyle choice” in starting a new family. Such comments are in line with the policy of “first family first” that crops up in so many undue hardship cases, a position that privileges first families over subsequent ones.

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<sup>138</sup> *Contino*, *supra* note 9 at para 3.

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid* at para 39.

<sup>141</sup> *Ibid* at para 72.

<sup>142</sup> *Supra* note 103.

<sup>143</sup> *Supra* note 33.

<sup>144</sup> *Supra* note 108.

“First family first” is a policy borne of “religious and moral hostility to divorce,” and has the effect of discouraging remarriage.<sup>145</sup> As Thompson argues, however, “[i]n the face of liberal, no-fault divorce laws, it is difficult today to maintain the moralizing bent of “first family first.”<sup>146</sup> This theory has certainly decreased in meaningful importance, particularly where adequate means are apparent in each household. As we have seen, the dominant mode of “interpreting” multiple family obligations is to view them as a kind of “financial detriment” to the spouse, amenable to being offset by, for example, that spouse’s superior wealth. Children from second or prior families are viewed almost exclusively as financial obligations, capable of being reduced to numerical terms.

Notwithstanding the fact that equal treatment of all children (from original and subsequent relationships) is not a purported principle of section 9, children from second families probably receive more equitable treatment under section 9 than under the high threshold of section 10 which is the only real means by which a spouse in a sole custodial relationship can bring the issue of a second family to bear. With its focus on keeping household standards of living roughly equal for the subject children, section 9 can have the effect of raising the standard of living for children of subsequent relationships who live in the parties’ homes.

While in 2001 Thompson concluded that “[s]econd families [were] still a policy conundrum in child support,”<sup>147</sup> it seems increasingly apparent that, despite the absence of conclusive significant appellate court decisions about the underlying *policies* respecting second families, second families are a significant consideration under the broad considerations of a section 9 analysis. The prominence of this factor under section 9, as opposed to a straight “table” analysis (or for that matter, a section 10 analysis) is readily explicable by the differing impact of the CSG policy of “putting children first” in the section 9 analysis where the policy of “fair apportionment” becomes critical to ensuring children are “put first” in *both* homes. This discretion, of course, comes at the price of “simplifying child support determination” and, it is hoped that any future appellate guidance will not only firmly address the *policy* towards second families but assist in concretizing the judicial guidelines for the implementation of this policy.

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<sup>145</sup> Thompson, “Conundrum,” *supra* note 7 at 255.

<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid* at 268.