

DIVORCEmate Tools One 2009 Software & Shared Parenting

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Child Support Guidelines, Section 9

Where a parent has access or physical custody of the child(ren) not less than 40% of the time, section 9 of the Child Support Guidelines (“CSG”) says that child support is determined having regard to the applicable Table amount for each parent (s.9(a)), the increased costs of the shared parenting arrangement (s.9(b)), and the condition, means, needs and other circumstances of the parties and the children (s.9(c)). The methodology for a shared parenting arrangement as set out in the CSG must consider a number of factors, but in the final analysis, the offset of the Table amounts is the starting point, and thereafter judicial discretion is required.

“Not less than 40% of the time” Threshold

In shared parenting situations, there is no universally accepted method for determining when the 40% threshold has been met, which can be extremely problematic. Many courts avoid “rigid calculations” (see *Froom v. Froom* (2005), 11 R.F.L. (6th) 254 (Ont. C.A.)) or “tight accounting” (see *Berry v. Hart* (2003), 233 D.L.R. (4th) 1 (B.C.C.A.)).

In the case of *Froom v. Froom*, the Ontario Court of Appeal in a 2-1 decision declined to find that the trial judge had erred in counting days, rather than hours, and noted that many courts “seek to avoid rigid calculations and, instead, look at whether physical custody of the children is truly shared.” It is interesting to note that had the court counted hours rather than days (a more accurate calculation according to the minority), the children would have been in the father’s care for only 36.7% and 32.09% of the time for 2003 and 2004 respectively.

Joint parenting does not automatically qualify as shared parenting because joint parenting arrangements vary greatly and may mean no more than the right to make decisions concerning the child.

Contino – Quantum of Child Support under Section 9

The courts have applied different “formulas” to calculate quantum of support in shared parenting situations.

In its long awaited decision, *Contino v. Leonelli-Contino*, 2005 SCC 63, the Supreme Court of Canada examined the application of section 9 of the Child Support Guidelines, namely the shared custody provision.

In reviewing section 9, the Supreme Court held that this section expressly provides a particular regime for shared custody, quite distinct from the presumptive rule of section 3 requiring support according to the Tables.

The S.C.C. further found that all three factors listed in subsections (a), (b) and (c) of section 9 must be considered equally; none prevail. Nor is there a presumption in favour of awarding more or less than the Guidelines amount.

Under section 9(a), the court must consider the financial situations of both parties. The simple set-off of the parties' respective Table amounts is a *starting point*, that must then be followed by an examination of the continuing ability of the recipient parent to meet the needs of the child, given that many costs are fixed. Courts must be especially careful in variation applications where a rigid application of a set-off would result in a drastic change in support. Each party's actual contributions must be compared to the Table amount he/she would be required to contribute, to determine whether adjustments to the simple set-off amount are necessary. The court retains discretion to vary the set-off amount where it would lead to a significant variation in the household standards of living.

Section 9(b) recognizes that the total cost of raising children may be greater in shared custody situations than in sole custody situations. The court must therefore look at the payor parent's increased costs and the actual spending patterns of both parents to determine whether shared custody has resulted in increased costs globally. These expenses will be apportioned between the parties in accordance with their respective incomes.

Finally, section 9(c) requires the court to analyze the resources and needs of both parents and the children (which includes a comparison of the parties' respective net worth). The court will consider the standard of living of the child in each household and the ability of each parent to absorb the costs required to maintain an appropriate standard of living.

It is important to note that the analysis in sections 9(b) and (c) requires actual evidence to be led on increased costs by way of financial statements and/or children's expense budgets. The court should demand this information from the parties when it is lacking or deficient. The court should not make "common sense" assumptions about the payor parent's costs, nor apply a multiplier to account for the fixed costs of the recipient parent, as has been done in previous cases.

Tax Considerations of Shared Parenting

A party may claim the eligible dependant credit (formerly, the equivalent-to-spouse credit) if a party is single, divorced, separated and not supporting his/her spouse, or widowed and has a dependant person (child under age 19 years old, infirm child, parent or grandparent who is living with him/her) whom the party is supporting. The dependant child must be related to the party claiming the credit by blood, marriage, common-law partnership or adoption.

It is important to note that the payor of child support cannot claim the dependant credit for any child for whom he or she is paying support.

In cases of shared custody, the Canada Revenue Agency (“CRA”) has indicated in the past that neither parent is entitled to claim the eligible dependant credit, presumably on the basis that each is paying an amount of child support to the other, even if the amount results in one net payment. To get around this past treatment, agreements were usually structured to reflect only one party as paying support to the other in cases of shared custody (ie. as opposed to reflecting the support paid as the net amount paid by way of setoff of each party’s payment to the other). However, recently, in its 2008 General Income Tax and Benefit Guide (the “2008 Guide”), the CRA has indicated that where the child resides with both parents throughout the year (ie. both parties required to make support payments for the child), either parent may make the claim for the eligible dependant credit, provided the parents agree. If the parents cannot agree on who is entitled to make the claim, neither parent will be able to claim the credit. It would therefore appear that it is not necessary to worry about papering the agreement/order to reflect support as being paid by only one party. It would also appear that the higher income earner (ie. the one who could most benefit from the credit from a tax perspective) could claim the credit as long as the parties agree. On that basis, it would also appear possible for each party to be able to claim the eligible dependant credit where there are two or more children in shared custody. Nevertheless, one must bear in mind that the 2008 Guide is just that – a guide – and CRA retains the ultimate decision-making power with respect to these credits.

Please also note that the credit cannot be claimed by more than one individual in the year for the same child, nor can the credit be claimed if the party is remarried, has a new common law spouse or is claiming a spousal credit.

As far as the Canada Child Tax Benefit (“CCTB”) (including the Universal Child Care Benefit (“UCCB”)) and the refundable children’s GST credits (“GST credits”) are concerned, a policy of the CRA requires these benefits to be rotated between the parents in a “shared eligibility situation” on a six-month on, six-month off basis. While the policy statement says that CRA will not actively pursue enforcement of this policy, this rotation of benefits will be implemented where an application is made by one party (or both), or where non-compliance is discovered by CRA. For further information, refer to the CRA’s website: http://www.cra-arc.gc.ca/benefits/faq_eligibility-e.html.

With respect to child care expenses, a party may deduct his/her child care expenses for tax purposes, up to the allowed maximum deduction (\$7,000/child for children under 7 years of age; \$4,000/child for children 7 to 16 years of age). Separated parties who share custody and support obligations both have a potential claim for child care expenses incurred by each of them in respect of the same children. Be aware that CRA will scrutinize the nature of the child care expenses to ensure that they relate to the children and are incurred while the children are living with each respective parent.

Steps when using DIVORCEmate 2009 TOOLS One software in Shared Custody Situation

- 1) Whenever one or more of the children will be in a shared parenting situation (e.g. one child in sole custody and one in shared), set the Parenting Situation drop down box on the Start Page to either “Shared (No Rotated Benefits)” or “Shared (Rotated Benefits)”, whichever is most applicable.
 - a. Use the “Shared (No Rotated Benefits)” Option when you want to allocate the full amount of the CCTB (including the UCCB) and the GST credits to only ONE party (as you direct under 3)a. below), despite the shared parenting situation, CONTRARY to the CRA policy requiring these benefits/credits to be rotated between the parties in a “shared eligibility situation” on a six-month on, six-month off basis. While CRA will not actively pursue enforcement of this policy, be aware that this rotation of benefits will be automatically implemented where an application is made by one party (or both) or where non-compliance is discovered by CRA.
 - b. Use the “Shared (Rotated Benefits)” Option when you want to rotate the CCTB (including the UCCB) and the GST credits between the parties on a six-month on, six-month off basis, in accordance with the above-noted CRA policy mandating this rotation of benefits for parties in a “shared eligibility situation”.
- 2) Once you select one of the shared parenting situations (either 1)a. or 1)b. above), a warning will appear, advising you to set the number of children for the calculation of the offset of the Table amounts, and advising you to consider s. 9(b) and (c). Once you click “OK”, you will be moved to a modified “Children” tab where you will need to complete both the top and bottom sections of this screen.
- 3) In order to easily complete this screen, simply click the green “Child Input Help” button located at the bottom of the screen. You will then be asked to indicate the number of children and complete the following information for each child: name (optional), age, living situation (ie. with father, mother or shared custody), and whether or not a table amount is payable for the child. The software will then complete the screen according to the information provided.

Please note that the software assumes that the *net* recipient of child support will claim the shared child(ren) for tax and benefit purposes, including the eligible dependant credit (although see note above regarding CRA’s treatment of this credit in the 2008 Guide, allowing the allocation of this credit to either party in shared custody arrangements upon agreement). However, if the “Shared (Benefits Rotated)” option has been chosen in accordance with the CRA policy, the benefits to be allocated to the net recipient will be limited, since the Canada Child Tax Benefit, the Universal Child Care Benefit, and the children’s portion of the GST

credits will be automatically rotated between the parties on a six month off, six month on basis for the shared child(ren).

- 4) If you choose not to use the “Child Input Help” button, there are two sections of the modified “Children” tab to complete:
 - a. Step 1: The top section deals solely with the treatment of the children for tax purposes. You must specify the number of children for whom the parent has primary care responsibilities. This may also include children from a second family for whom the parent is the primary caregiver. The total number of children input should add up to the actual number of children. The numbers in this section determine who is entitled to claim the eligible dependant credit (although see notes above regarding CRA’s treatment of this credit in the 2008 Guide) and other government benefits/credits/social program amounts relating to the children. The CCTB (including UCCB) and GST credits are treated differently depending on which shared parenting situation option you chose:
 - (i) In the “Shared (No Rotated Benefits)” option, CCTB (including UCCB) and GST credits will be allocated to the party you specify as the primary care giver for each child, (CONTRARY to the CRA policy);
 - (ii) In the “Shared (Rotated Benefits)” option, CCTB (including UCCB) and GST credits will be rotated between the parties on a six-month on, six-month off basis, despite whom you have specified as the primary care giver for each child (in accordance with the CRA policy);
 - b. Step 2: The bottom section deals solely with the treatment of the children for the purposes of determining the appropriate Table amount of child support to be paid/received pursuant to the Child Support Guidelines. Input the number of children for whom a party will receive the Table amount of support. A child in a shared parenting situation should be reflected in each party’s column in order to determine the Table amount offset (i.e. the ‘starting point’ in s. 9(a) of the CSG).
- 5) You must then go to the “Special Expenses” tab, and consider s. 9(b) “increased shared parenting costs” and s. 9(c) “conditions, means, needs and other circumstances of parents and children.”
 - a. For s. 9(b), input the first party’s contribution to the other party’s increased costs resulting from a shared parenting arrangement on the first party’s side. (This will increase the first party’s child support obligation). Input the contribution the first party expects from the other party on the

other party's side. (This will decrease the first party's child support obligation).

- b. For s. 9(c), input the first party's contribution to the other party's conditions, means, needs and other circumstances on the first party's side. (This will increase the first party's child support obligation.) Input the contribution the first party expects from the other party on the other party's side. (This will decrease the first party's child support obligation.)

[Keep in mind that the S.C.C. in *Contino* held that a claim for special or extraordinary expenses can be examined directly in section 9(c), which is conspicuously broader than section 7. Given this comment, it may be that no expenses should be input as special expenses under this tab, and that instead only section 9(c) should be used to increase/decrease the Table amounts offset to account for special or extraordinary expenses. However, until such time as the courts are comfortable using their discretion to vary the Table amounts offset under sections 9(b) and (c), it is likely prudent to continue to delineate and proportionately share section 7 expenses under this tab.]

- 6) Other areas of the software to keep in mind in shared parenting situations:
 - a. If you adjusted child support pursuant to s. 9(b) and (c) in accordance with *Contino*, when doing your Spousal Support Advisory Guidelines calculation under the "Spousal Support" tab, you will need to adjust the Table amount of child support paid under the "Adjustment to Table amount of child support" field found under the Optional Input area.
 - b. In the "Eligible Dependant Amount" field under the "Tax Credits" tab, the software will automatically assign the credit depending on how the children were input under the modified "Children" tab. If you used the Child Input Help button, please note that the software assumes that the *net* recipient of child support will claim the shared child(ren) for tax and benefit purposes, including the eligible dependant credit. However, in the 2008 Guide, CRA appears to allow the credit to be allocated to either party in shared custody arrangements provided the parties can agree on the allocation (see note above), in which case you may wish to override the default by clicking on the field and clicking OK.
 - c. In the "Child care expenses" fields on the Start Page, remember that separated parties who share custody and support obligations both have a potential deduction for child care expenses incurred by each of them in respect of the same children, provided the expenses are incurred while the children are living with each respective parent. Be aware that CRA will scrutinize the nature of the child care expenses to ensure that this is the case.

- d. You may view the parties' respective benefits and refundable credits under the "Spousal Support" tab, "Benefits & Credits" button. This information is a summary of the benefits and refundable credits included in the scenario 1 calculations. Note that when the benefits are rotated in the "Shared (No Rotated Benefits)" option, it may well be that one party will receive no benefits (other than the UCCB) during his/her six month rotation if his/her family income exceeds the eligibility threshold. As set out previously, however, the policy of the CRA requires parties in a "shared eligibility situation" to rotate the CCTB and the refundable GST credits between them on a six-month on, six-month off basis. While the policy statement says that CRA will not actively pursue enforcement of this policy, this rotation of benefits will be implemented where an application is made by one party (or both), or where non-compliance is discovered by CRA.

- e. Given the S.C.C.'s comments in *Contino* requiring actual evidence to be led on increased costs of shared parenting by way of financial statements and/or children's expense budgets, be aware that our "Forms One" software allows the parties to create a children's budget and a proposed budget from the Financial Statement (Form 13 or 13.1).