For Better or Worse: Parenting Time and Child Support
(The “40% Rule”)

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INTRODUCTION

1. This paper is intended to address some of the thorny issues that arise from the application of s. 7 of the Child Support Guidelines and will cover the following topics:

   (1) **Calculating 40%**: How do you define 40%? Does it include sleeping hours? School hours? (paragraphs 5 – 26)

   (2) **Three factor-analysis and litigants’ expectations of adjustment**: Section 9 requires the court to look at three factors: (a) the amount set out in the applicable tables for each spouse; (b) the increased costs arising from the shared custody arrangement; and (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought. Litigants tend to think that if they can get to 40%, then the adjustment is automatic, though it is not. What are the leading cases that have reinforced that the analysis is required? (paragraphs 27 – 35)

   (3) **Motivation of parents seeking 40%**: What is the motivation of the parent who seeks 40% of time with the child? Is it just to get a reduction of child support? Is it for reasons of social acceptance - the parent wants to be perceived as an equal? Or is it for other reasons? (paragraphs 36 – 46)

   (4) **Critiques of section 9 and prospects for amendment**: Are the critiques leading to a consensus as to the repeal or amendment of s. 9? (paragraphs 47 – 73)
SECTION 9 AND THE ANALYTICAL FRAMEWORK

2. Section 9 of both the *Federal Child Support Guidelines*, Can. Reg. 97-175, and the *Ontario Child Support Guidelines*, Ont. Reg. 391/97, govern child support in situations of “shared custody”. The provisions are almost identical, though in the provincial Guidelines, the provision includes reference to “a parent” in addition to “a spouse” as follows:

9. Where a parent or 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 parents or spouses;

(b) the increased costs of shared custody arrangements; and

(c) the conditions, means, needs and other circumstances of each parent or spouse and of any child for whom support is sought.


4. Justice Chappel, in *Scott v. Chenier, 2015 ONSC 7866*, at para. 39, summarizes the most important principles from *Contino* relating to the interpretation of section 9 and the manner in which child support calculations should be approached in shared parenting scenarios as follows:

1. In shared parenting arrangements, there is no presumption in favour of the parent who has less time with the child paying the *Table* amount of child support. Rather, the court must determine the quantum of child support in accordance with the three factors listed in section 9.

2. However, a finding that a shared parenting arrangement exists does not automatically dictate a deviation from the *Table* amount of child support. In some cases, a careful review of all of the factors set out in section 9 may lead the court to conclude that the *Table* amount remains the appropriate figure.

3. None of the three factors listed in section 9 prevail over the others. In reaching an appropriate child support figure, the court must consider the overall situation of shared custody, the costs to each parent of the arrangement and the overall needs, resources and situation of each parent. The weight to be accorded to each of the three factors set out in section 9 will vary according to the particular facts of each case.
4. The court emphasized that the purpose of section 9 is to ensure a fair and reasonable amount of child support. It concluded that in adopting section 9 of the *Guidelines*, Parliament made a clear choice to emphasize the need for fairness, flexibility and the actual condition, means, needs and circumstances of each parent and the child, even if this meant sacrificing to some degree the values of predictability, consistency and efficiency.

5. The calculation of child support pursuant to section 9 involves a two-step process. First, the court must determine whether the 40% threshold has been met. Second, if the threshold has been crossed, the court must consider the factors outlined in section 9 to determine the appropriate quantum of support.

6. With respect to section 9(a), the amounts set out in the applicable *Tables* for each parent, the court stated that the simple set-off approach outlined in section 8 of the *Guidelines* may be a useful starting point as a means of bringing consistency and objectivity to the child support determination. This is particularly so in cases where the parties have provided limited information and the incomes of the parties are not widely different. However, the court emphasized that the simple set-off approach has no presumptive value in carrying out the support calculation. It cautioned against a rigid application of the set-off approach, noting that the set-off figure may not be appropriate when a careful examination of the respective financial situations of the parties and their household standards of living raises concerns about the fairness of a drastic reduction in child support to the recipient.

7. The court held that the judge has the discretion to modify the simple set-off amount where "considering the financial realities of the parents, it would lead to a significant variation in the standard of living experienced by the children as they move from one household to another, something which Parliament did not intend" (at paragraph 51). It emphasized that the court should insofar as possible strive for a result that avoids the child experiencing a noticeable decline in their standard of living as they move between households.

8. The court highlighted that one consideration in carrying out the section 9 analysis is whether one parent is actually incurring a higher share of the child’s costs than the other, such as costs relating to clothing and activities.

9. With respect to subsection 9(b), the court emphasized that this section does not refer only to the increased expenses which the payor parent has assumed as compared to the expenses that they would be incurring if they had the child less than 40% of the time. This subsection recognizes that the total global cost of raising the child in a shared custody arrangement may be higher than in a primary residence arrangement. It requires the
court to consider the total additional costs attributable to the situation of shared custody. In carrying out this analysis, evidence of necessary duplication of fixed costs arising due to the shared child care arrangement may be important.

10. The court recognized that not every dollar spent by a parent who has the child over the 40% threshold is a dollar saved by the recipient parent. It stated that in the absence of evidence to the contrary, it is possible to presume that the recipient parent’s fixed costs have remained the same, and that their variable costs have only marginally decreased by the other parent’s increase in time with the child.

11. Financial statements and/or child expense budgets are necessary in order for the court to properly carry out the child support analysis pursuant to section 9. The judge should not make assumptions regarding additional costs attributable to a shared parenting arrangement in the absence of any evidence relating to this issue.

12. The court’s discretion under section 9 is sufficiently broad to bring a parent’s claim for section 7 expenses into the analysis under that section, taking into consideration all of the factors outlined in section 9.

ISSUE 1: CALCULATING 40%

5. The question of how to calculate 40% has generated quite a lot of litigation, and as such, it has been considered by numerous courts across the country. Various answers have been proposed.

6. There are two aspects to this question:
   (a) What is the time measurement that should be used to calculate the 40% (i.e. minutes, hours, days, or overnights)?
   (b) What counts as “physical custody”? How do you treat time that a child is sleeping or in school?

(a) Time Measurement

7. In Contino, the Supreme Court of Canada did not comment on how the 40% threshold referred to in section 9 of the Guidelines should be calculated, as that issue was not before the court. In Froom v. Froom, 2004 CarswellOnt 5596 (S.C.), Coats J. had found the father surpassed the threshold, reaching 42 per cent by counting days. On appeal, in Froom v. Froom (2005), 11 R.F.L. (6th) 254 (Ont. C.A.), Catzman and Laskin JJ.A affirmed that finding, even though the father’s counsel conceded that counting hours would have knocked his time below 40 per cent. At para. 2, Catzman and Laskin JJ.A stated that there is no universally accepted method of calculating the 40% time period, and that rigid calculations of time are not necessarily appropriate. Rather, courts should look at whether physical custody of the children is “truly shared”.
8. Many cases decided since *Froom* have highlighted that the method chosen for calculating the 40% threshold is often critical to the outcome of the support analysis, as different measurements of time may yield different percentages. As the Court of Appeal noted in *Froom*, at para. 1, at times, calculating in days versus hours makes just the difference that moves the access parent into a situation where they exercise 40% access. In “The TLC of Shared Parenting: Time, Language and Cash” (2013) 32 C.F.L.Q 315 [“TLC of Shared Parenting”], at p. 329, Rollie Thompson acknowledges that often different ways of calculating time will yield different results, and that the “cruder methods of days or overnights are more likely to get a claimant past the threshold than a more finely-tuned (and exhausting) hourly method.”

9. In *L. (L.) v. C. (M.), 2013 ONSC 1801*, after a trial with two self-represented parents, Justice Czutrin had produced a very detailed parenting order, with the mother as primary parent and very specific times for drop off and pick up. The parents came back to court to argue about time. The mother argued “hours” and the father argued “days”/“overnights”, to get different results.

10. Czutrin J. emphasizes that the question of calculating the 40% threshold to trigger the operation of section 9 should not be relevant at the time when the court is *setting* the custody and access schedule, as the court must, at that point, be wholly and exclusively motivated by the best interests of the child. However, he writes at para. 17 that “[w]hile the court cannot be motivated by a target percentage of access and custody time when *making an order*, the court is at times called upon to *interpret the existing order* to determine whether the parties’ access falls above or below 40 per cent” (emphasis added).

11. In the following excerpt from *L. (L.) v. C. (M.),* at paras. 27, 31-32, and 34-37, Czutrin J. reviews the leading cases on how to calculate time under section 9 of the Guidelines, concluding that there is considerable authority for calculating the 40 per cent threshold on an *hourly basis*:

27 The majority decision of Court of Appeal in *Froom* states that there is no universal method for calculating access time and they uphold the trial judge's analysis based on "days, not hours" (*Froom*, at paras. 1-2). The dissent, however, would have allowed the appeal and set aside the trial judge's decision because "the hours calculation produces an accurate figure in this case, and the days calculation produces an erroneous figure" (*Froom*, at para. 5).

[…]

31 While there is debate over the best method for calculating access time, according to the late Professor McLeod in the Annual Review of Family Law, the issue is not as unclear as the majority in *Froom* asserted (McLeod and Mamo, Annual Review of Family Law, 2010 (Toronto: Carswell, 2010) at 294)). In commenting on *Froom* the review states, "[w]ith respect, the overwhelming weight of authority in Ontario and the other provinces supports calculating the 40% threshold on an hourly basis." This approach is applied by the court in *Rockefeller v. Rockefeller*, [2005] O.J. No. 1736 (Ont. S.C.J.). Its appropriateness is also affirmed in *Gauthier v. Hart*, 2011 ONSC 815, [2011] O.J. No. 1169 (Ont.)
S.C.J.), although in that case the parties' evidence did not support an hourly calculation so it was not applied.

32 While the notions of flexibility and robust consideration of the parties' circumstances are laudable, I do not see this as mutually exclusive from an hourly accounting of how the parties divide their child's time.

[...]

34 As demonstrated in Gauthier v. Hart and Maultsaid, the courts do not have discretion to round up or down to reach (or avoid) a finding that a parent has access 40 per cent of the time. Forty per cent is fixed as a firm threshold. It is acknowledged that when parents are exercising that level of access, child support determinations need to be approached in a different manner given the reality of the costs incurred by parents in these types of access and custody arrangements.

35 It is therefore desirable to be as precise as possible when determining the reality of the parents' access and custody situation. As the Alberta Court of Appeal stated in C. (L.) v. C. (R.O.), 2007 ABCA 158, [2007] A.J. No. 513 (Alta. C.A.), "there is no place for 'deeming' parenting time to be what it is not". Arguably it is equally unfavourable to deem non-parenting time. If we are rounding up or down to larger portions of a day rather than using the most precise information available, "deeming parenting time" is inevitable.

36 While it is important for the courts to not get lost in the numbers entirely, there will necessarily be an accounting of time and a question of whether the party exercising access does so in a manner that exceeds or falls short of 40 per cent.

37 The two most common approaches to calculating access and custody time are in days, and in hours. If using days, to reach 40 per cent, the access parent must have the child in his or her care for 146 days per year (Handy v. Handy, [1999] B.C.J. No. 6 (Sask. K.B.). When calculating in hours, the 40 per cent threshold lies at 3504 hours per year (Claxton v. Jones, [1999] B.C.J. No. 3086 (B.C. Prov. Ct.)).

12. Czutrin J. concludes that the overwhelming weight of authority in Ontario and the other provinces support calculating the 40% threshold on an hourly basis, and that this threshold is met at 3504 hours per year. This method avoids inaccurately ‘deeming parenting time’.

13. Although Justice Czutrin’s decision does not impact the Court of Appeal’s holding in Froom that there is no universally accepted method for determining the 40% threshold, many cases have cited L. (L.) v. C. (M.) as authority that counting time in hours is the most appropriate approach. This passage from L. (L.) v. C. (M.) and the approach of counting hours has been cited as authority in the following cases: Al-Halabi v. Rawdah, 2015 ONCJ 685, at para. 23; McGillen v. McGillen, 2015 ONSC 6547, at para. 31; Iusi-Johnston v. Iusi, 2015 ONSC 6266, at para. 15; Ciutcu v. Dragan, 2014 ONCJ 602, at para. 50 (40.1% based on hours); Hamilton v. Stratten, 2014 ONSC 5080, at para. 53 (“less than one percent over 40% threshold”); Roberts v. Callender, 2015 ONCJ 247, at para. 29; and M. (A.L.) v. O. (N.J.), 2015 BCSC 70, at para. 96.

14. In Spry v. Esteves, 2016 ONSC 2842, at para. 281, Justice Lemon agrees that although there is not only one method of calculating time under section 9, hours has often been applied,
and that the weight of authority suggests that the 40% threshold is met if the parent has the child in their care for 3504 hours per year, which is determined on a case-by-case basis.

(b) What counts as “physical custody”?

15. There have been a number of approaches put forward by courts about how to address time children spend sleeping, at school, at activities or with a nanny.

16. In earlier cases, litigants attempted to argue that only “direct” parenting time should be considered by courts, excluding sleeping, school and day care time. As Thompson points out in TLC of Shared Parenting at p. 330, once these times are removed, it is often quite easy for the non-primary parent to reach 40%. In other cases, litigants argued that the starting assumption was that the primary parent had 100% of the “custodial” time, and the non-primary parent had to pry out 40% of the time from that total. That view has also been discounted.

17. Czutrin J. addresses this issue as well in L. (L.) v. C. (M.), at para. 38, emphasizing that the relevant period is the amount of time the child is in the “care and control of the parent”, not the amount of time that the parent is physically present with the child. It is the parent who is responsible for the child’s wellbeing at the given time period that gets the time credited to their side of the ledger. The calculation includes the time the child “spends in swimming lessons, at day care, at school, or with a nanny, so long as the parent claiming this time is the parent who during that period is "responsible for their well-being" (Sirdevan v. Sirdevan, [2009] O.J. No. 3796 (Ont. S.C.J.).”

18. In terms of how this approach is applied in practice, Czutrin J. writes at para. 39 that a custodial parent will be credited with time that a child spends sleeping or at school, except for those hours when the non-custodial parent is actually exercising rights of access or the child is sleeping in the non-custodial parent’s home (Cusick v. Squire, [1999] N.J. No. 206 (Nfld. T.D.)). If there is a fixed drop-off time for the access parent to deliver the child to school or daycare and the child returns to the custodial parent at the end of that day, the time during school or daycare is typically credited to the custodial parent (Maulsaid, at para. 20; Barnes v. Carmount, 2011 ONSC 3925, [2011] O.J. No. 3717 (Ont. S.C.J.), at para. 43).


The relevant period for the calculation of time under section 9 is the amount of time that the child is in the general care and control of the parent, and not the time that the parent is physically present with the child (L. (L.) v. C. (M.), Supra., at para 38). The time attributed to a parent includes all time during which the parent is the one who is responsible for their well-being (Sirdevan v. Sirdevan, [2009] O.J. No. 3796 (Ont. S.C.J.)).
Time at School

20. In *Torrone v. Torrone*, 2010 ONSC 661, at para. 9, the court says that “[i]n-school time should be credited to the parent who is responsible for the child while he or she is in school.” This approach has been followed in many cases. However, this issue is not as clear in some circumstances, particularly where there are two parents with shared care and joint custody who are both actively involved in their child’s life. In such cases, some courts have looked at time where both parents are reachable, including school time, as “neutral time” for the purposes of s. 9: see *Cabana v. Cabana*, 2015 ONSC 3151, at para. 21.

21. In *TLC of Shared Parenting*, at p. 330, Thompson summarizes the challenges with allocating time at school:

   The more recent cases continue to struggle with the allocation of school or day care time. There is general agreement in the cases that the task is to assess which parent is “responsible” for the child during the school hours. Even that doesn’t solve the problem, with two active shared custody parents, both of whom are active on the school front. Some courts have identified helpful factors in allocating responsibility (*Barnes v. Carmount, 2011 ONSC 3925* and *Ferguson v. Ferguson, 2005 PESCTD 16*). Following Justice Aston’s suggestion, one would think which parent makes the lunch or provides lunch money would be a good indication.

22. The factors from *Ferguson* and *Barnes* to determine which parent is responsible for dealing with the school, as outlined in *Barnes* at para. 49, include (a) whether one or both parents’ names are on a list at the school; (b) the relative availability and proximity of the parent during school hours; (c) who enrolls the child; (d) who goes to the parent teacher meetings; (e) who signed the report card; (f) who pays the bill (in the case of day care); (g) who signed the notes to the teacher; and (h) who responds to telephone and written messages from the teacher or the school.

23. In *Barnes*, at paras. 69-70, the court applied this criteria and determined that both parents met each of them, ultimately finding that the father and mother were equally responsible for the children while they were at school. Unlike other cases, which had specific access schedules, here there were two homes, joint custody, joint decision-making and the father’s care periods as set out in the agreement are stated to be a minimum. Therefore the court found, at para. 74, that “on the facts of this case that, both by the agreement and what has actually taken place, the parties have jointly shared and continue to jointly share the responsibility for the children while they are at school” and therefore that the time at school “should be treated as neutral.”

(c) Where does that leave us?

24. Many have latched on to Czutrin J.’s decision in *L.(L.) v. C.(M.)* as authority that “hours” are the proper unit of measurement. Though this decision has been widely cited for this
proposition, Thompson, at p. 329, argues that this is incorrect, as the Ontario Court of Appeal has clearly stated in *Froom* that there is no universally accepted manner for calculating the amount of time children spend with each parent. *Froom* has caused frustration for some lawyers and judges who call for “one standard method” of time calculation, to remove the uncertainty and the impetus for litigation.

25. However, Thompson argues at p. 330 that the desire for a single method is misguided, as it may make the lives of lawyers easier, but it also creates opportunities for strategic behaviour.\(^1\) Second, Thompson argues that by retaining some freedom on method, judges have some scope at the margins to allow cases of “true shared custody” and to disallow those that aren’t, all without injecting too much subjectivity into the test.

26. Therefore, although there is no general consensus on the proper method for calculating time, there are several general principles that can be gleaned from the case law, as summarized by Justice Parfett in *Kelly v. Wright*, 2014 ONSC 6285, at para. 6, and *Gilby v. Goddard*, 2014 ONSC 1363, at para. 10:

1. It is desirable to be as precise as possible when determining the reality of the parents’ access and custody situation. (*L.(L.) v. C.(M.),* at para. 35)

2. Where an agreement is specific as to when access time starts and ends, an hourly accounting is preferable. (*Ibid. at para. 31*)

3. Time spent at school or daycare should not be excluded from the time attributed to the primary residential parent. (*Ibid. at para. 38; Torrone v. Torrone*, 2010 ONSC 661 at para. 9), although in some circumstances with two active and involved parents, time spent at school or daycare will be “neutral time” attributed to both parents: see *Barnes v. Carmount*.

4. In order to reach the 40% threshold set out in section 9 of the Federal Child Support Guidelines, a parent must spend a minimum of 3,504 hours with the child over the course of a year. (*Ibid. at para. 37*)

**ISSUE 2: THREE FACTOR-ANALYSIS AND LITIGANTS’ EXPECTATIONS OF ADJUSTMENT**

27. The Supreme Court of Canada in *Contino v. Leonelli-Contino*, at para. 37, explained that, “[t]he framework of s. 9 requires a two-part determination: first, establishing that the 40 percent threshold has been met; and second, where it has been met, determining the appropriate amount of support.”

28. Although litigants may think that if they get to 40% of time with their child, the adjustment of their child support will be automatic, this is not the case. Once the 40% has been

\(^1\) See discussion below, under Issue 3: Motivation of Parents Seeking 40%.
met, pursuant to s. 9 of the Guidelines, there are three factors for courts to consider in determining the appropriate amount of child support:

(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.

29. Bastarache J. in *Contino*, at para. 30, recognized that once the 40% threshold is reached, a consideration of the three factors under section 9 is mandatory, though there is no automatic reduction. He stated as follows:

> These comments may lead some parents to think that there should be an automatic reduction in the amount of child support in a case such as this one. In my opinion, there is only an automatic deviation from the method used under s. 3, but not necessarily from the amount of child support. As submitted by the mother, it is quite possible that after a careful review of all of the factors in s. 9, a trial judge will come to the conclusion that the Guidelines amount will remain the proper amount of child support (see, e.g., *Berry v. Hart* (2003), 233 D.L.R. (4th) 1, 2003 BCCA 659 (B.C. C.A.)).

Section 9 Analysis is Mandatory

30. As stated clearly by Bastarache J., the analysis under section 9 is mandatory. As Czutrin J. writes in *L. (L.) v. C. (M.)*, at para. 20, “it is not that the “court can”, but rather, the court *must* proceed under s. 9 when the 40 per cent access threshold is achieved” (emphasis in original). This statement has been followed in *Scott v. Chenier*, 2015 ONSC 4866, at para. 39; *Khairzad v. McFarlane*, 2015 ONSC 7148, at para. 66; *Spry v. Esteves*, 2016 ONSC 2842, at para. 282; and *Reynolds v. Higuchi*, 2016 ONSC 1997, at para. 7.

No Automatic Adjustment

31. While judges do not have discretion about whether or not to apply section 9, they have discretion about how to weigh the three factors. Renaud J. in *Easton v. McAvoy*, 2005 ONCJ 319, at para. 33, interprets *Contino* as “remind[ing] us that *section 9* does not trigger a simple mathematical set-off after a comparison of parents’ incomes but rather each case is examined on its merits.” There is no “presumptive” amount based on set-off amounts or Guidelines table amounts – it is only the starting off point before embarking in a more nuanced examination of the context: see *Martin v. Martin*, 2007 MBQB 296, at para. 11. Mackinnon J. emphasizes this point in *Gauthier v. Hart*, 2011 ONSC 815, at para. 34, noting that “achieving the 40 percent threshold does not necessarily mean that less child support will be paid, but only that the court can consider the issue under s. 9 of the *Federal Child Support Guidelines*. ”
32. In *Reynolds v. Higuchi*, 2016 ONSC 1997, the father applied to vary an existing final child support order that was made when the 40% threshold was already in place. Justice Hood summarizes the relevant principles as follows, at paras. 7 – 8:

7 All three factors must be considered once the 40% threshold is met, as it is here. There is no discretion as to when the section is to be applied; discretion exists only in relation to the quantification of the child support. The three factors are conjunctive, none should prevail. However, as the Supreme Court stated in *Contino v. Leonelli-Contino*, [2005] 3 S.C.R. 217 (S.C.C.) at para. 4:

> Adjustments are hard to evaluate. More time spent with a child may not involve increased spending or significant savings for the other parent. Where there is a significant disparity of incomes, a new formula can mean a drastic change in the amount of support for the lower-income parent, who was previously the custodial parent, and exacerbate the differences in the standard of living of the two households.

8 Nor is there an automatic deviation from the amount of child support once the 40% threshold is met. The court may still conclude that the Guidelines amount is proper. There is no presumption in favour of reducing the child support obligation downward from the Guidelines amount. Nor should Mio suffer a noticeable decline in her standard of living as she moves from one household to another. [Emphasis added.]

33. In *Scott v. Chenier*, 2015 ONSC 7866, at para. 39, Justice Chappel also emphasizes that finding that a shared parenting arrangement exists does not automatically dictate a deviation from the Table amount of child support, but rather that in some cases a careful review of all of the factors set out in section 9 may lead the court to conclude that the Table amount remains the appropriate figure. See also *Pettis v. Tremblay*, 2015 ONSC 7053, at paras. 62 – 68; and *Desjardins v. Bouey* (2013), 39 R.F.L. (7th) 289 (Alb. Q.B.), 2013 ABQB 714.

**Cases of Shared Parenting where Courts Order Table Support**

34. In many cases, after engaging in a section 9 analysis, courts order child support amounts that are different from the Table amount. However, in the following cases, despite having the child for more than 40% of the time, the payor parent is nevertheless ordered to pay the Table amount of child support:

- *Reynolds v. Higuchi*, 2016 ONSC 1997: On a motion to change child support, the father applied to reduce an existing final child support order that was made, based on the Table amount, when the 40% threshold was already in place. Justice Hood notes, at para. 10, that while the father filed his childcare budget for his daughter as evidence, there was no evidence as to increased costs of the shared custody arrangements, or of increased costs resulting from duplication from the child living in two homes, since the previous order in 2014. Justice Hood specifically notes, at para. 11, that regarding the third factor, “I am mindful of commentary that where there is a significant disparity in income between the parents, as is the case here, reductions in
the basic amount of child support may undermine a lower-income custodial parent's ability to make adequate provision for the child and will exacerbate the differences in the standard of living between the two parental homes.” Justice Hood analyzes the evidence in light of the three factors and identifies his concern, at paras. 16-17, that “the variation sought by the father will have a deleterious impact upon the standard of living of Mio in the respondent's home and will create a disparity between the two homes for Mio.” Due to this reason, and for the reason that the applicant was unable to establish any increase in costs attributable to such shared custody since the order was made in 2014, Justice Hood dismisses the applicant’s motion, maintaining the order for Table child support.

- **Purnell v. Romero-Sierra, 2007 CarswellOnt 2985 (S.C) at para. 38:** McLaren J. found that the father’s time with the son equaled about 42.85 per cent during most of the year, with vacation times increasing that number slightly. This still left the mother with the balance of time and the responsibility of purchasing most things that the child needed. Justice McLaren writes that “I am not aware of any increased cost that the father has by having the child six nights out of fourteen, instead of five, other than food. There is nothing about the conditions, means, needs and other circumstances of each spouse or the child that warrants a reduction.” Justice McLaren ordered the Table amount of child support.

- **M. (T.J.) v. M. (P.G.) (2002), 25 R.F.L. (5th) 78, 2002 CarswellOnt 356 (Ont. S.C.):** Where the father earned 62% of the parties' combined income, the fact that he may have met the 40% threshold under s. 9 did not warrant a variation of the Table amount. However, the substantial amount of time the father spent with the children provided a shield to him against the wife’s claims for add-on expenses under s. 7.

- **Ward v. Ward (2000), 7 R.F.L. (5th) 197 (Ont. S.C.):** The father was ordered to pay the full Table amount, notwithstanding qualification for relief under section 9, because the mother required the full amount to provide the children with accommodation and amenities comparable to those provided by the father. In this case, the discrepancy between the father's and the mother's income was quite wide.

35. These cases all reinforce that if a litigant gets to 40% of access time, courts must consider all three factors under section 9, but that no adjustment is automatic. In fact, after going through the analysis, a court may nevertheless order Table child support, if the circumstances warrant such an order. In the cases where despite having more than 40% of access time, a payor parent still must pay Table child support, generally there is wide disparity of income between the parties, and the court is attempting to maintain similar standards of living for the child(ren) across both homes.

**ISSUE 3: MOTIVATION OF PARENTS SEEKING 40%**

36. Though there seems to be a dearth of information or research on this topic, due likely to the fact that motivation is very hard to ascertain or measure, some points may be gleaned from comments by judges on this topic, and by statements in the literature.
**Motivation: To Reduce Child Support**

37. The only motivation of parents seeking 40% commented upon in case law is the reduction of child support. Often, when one party seeks to reduce the other’s access time, or to refute the other parent’s request for more time with the child, the party will argue that the claim for shared custody is motivated solely by financial reasons: see *Stewart v. Stewart*, 2006 MBQB 118 at para. 8. Drastic changes made by one parent to restrict the level of access by the other parent have attracted suggestions that it is done in order to keep access below 40%: see *Riss v. Greenough*, [2003] O.J. No. 1574, at para. 3. In *Green v. Green*, 2000 BCCA 310, Prowse J.A. confirmed this at para. 23, stating that “access parents have been accused of seeking increased access solely to reduce child support payments, rather than out of a desire spend more time with their children.”

38. Thompson, in TLC of Shared Parenting at p. 347, comments that he often hears from lawyers that parties claim shared custody, not out of a desire to share the care of their children, but for opportunistic, even abusive reasons — control, greed, anger, etc. He explains that their drive for shared custody is not even dissuaded by the explanation that more time with their children will mean more spending on those children, which will likely be much higher than how much they would save on the monthly child support under the *Contino* analysis.

39. In a few cases judges also shared their perception that one of the parties was seeking 40% of access time merely to reduce their child support obligation. In *Ascento v. Davies*, 2012 ONCJ 491, at para. 41, in rejecting an application from the father for joint custody, Sherr J. notes as part of the “best interests” analysis that the father’s statement that he wanted the child 50% of the time, or at least 40% of the time, “seemed more related to reducing his child support obligation (as provided for in section 9 of the *Ontario Child Support Guidelines*) than any thought-out plan for the child.”

40. Similarly, in *L.(L) v. C.(M.)*, 2012 ONSC 3311, Justice Czutrin writes at para. 86 that “[w]hile at first I did not believe that the father's desire to have joint custody and as close to equal time as possible with J was at all motivated by child support issues, the evidence is consistent that the amount of child support he might have to pay was a major consideration for the father.” He comments that while the father denied “his motivation for more than 40% time was to avoid full table child support, he wanted me to conclude that the mother resisted his request for more time because of her financial motivation for full table support.” Czutrin J. finds that the mother’s evidence and willingness to settle demonstrate that her parenting position was not motivated by her concern for table child support, but rather that her parenting decisions were at all times motivated by a sincere desire to meet her child’s best interests.

41. In Epstein’s commentary on *L.(L) v. C.(M.)*, in “Epstein’s This Week in Family Law, Fam. L. Nws. 2013-22”, Epstein writes that, “[t]here is always a concern in high-conflict cases that one parent tries to lessen the time that the child has with the other parent in order to make sure that the threshold is not reached and on the other hand often one parent seeks more time in order to reduce the child support obligation. It is a vexing issue and has been with us since the Guidelines were first promulgated.”
42. Nicholas Bala and Marie Gordon in “Kids and Cash: Interconnections of Child-Related and Economic Issues in Family Proceedings” (2012) 31 C.F.L.Q. 309 [“Kids and Cash”] at p. 323 reinforce this issue, writing that: “[t]he linkage of how much time a parent spends with a child and how much support that parent might have to pay for the child means that s. 9 of the Guidelines is at times a “perfect storm” for parents who war over the “time-and-money” conundrum.” They argue that imbedded in section 9 is an incentive for parents who wish to reduce their child support obligations, or conversely do not wish to lose any child support that they might otherwise receive.

43. As discussed below under issue 4, the 40 percent threshold in section 9 creates a “bright-line” test. As Thompson notes, “bright-line” tests will inevitably create opportunities for “opportunistic behavior”, i.e. for parents to engineer their time around the threshold to obtain child support goals.” This opportunistic behaviour includes the primary parent refusing additional time to the other parent, or the non-primary parent seeking that little bit of extra time.

40% Not a “Best Interests” Consideration

44. Czutrin J. in L.(L) v. C.(M.), 2012 ONSC 3311, at para. 87, emphasizes that custody and access determinations should never be motivated by a percentage. He writes that:

Parenting decisions whether by a court, arbitrator or parents alone, or with the assistance of mediators or other qualified family law professionals, must be child focused and the outcomes should seldom, if ever, be about counting days or minutes or motivated by the 40%. I must decide a schedule that focuses on the child’s best interests and should not look at percentages.

45. Czutrin J. then goes on to note, at para. 91, that “neither the Divorce Act nor the Children’s Law Reform Act makes reference to the 40% Child Support Guidelines issue or achieving that minimum percentage as a best interest consideration.”

46. Therefore, though a reduced child support obligation may motivate parents to seek increased access time, this factor may not be considered by courts or any decision-maker in setting a custody and access schedule that is in the child(ren)’s best interests.

ISSUE 4: CRITIQUES OF S. 9 AND PROSPECTS FOR AMENDMENT

47. Some decisions reflect on the difficulties posed by both section 9 and by the approach laid out in Contino. As the BC Court of Appeal wrote in 2000 in Green v. Green, at paras. 19-20, “Section 9 of the Guidelines is one which has given rise to a great deal of controversy, both before and after its enactment.” Problems have arisen both in determining whether the 40 percent threshold has been reached, and once it is reached, how to adjust the Table amount.

Critique of S. 9

48. There are a number of bases of critique of s. 9 of the Guidelines.
a) **Ambivalence of language**

49. Thompson, in TLC of Shared Parenting, comments that the language in section 9 is ambivalent, as it refers to both “a right of access” and “physical custody”, but its actual measure is one of “time”.

b) **The choice of a 40% threshold**

50. Many have critiqued the choice of 40%, based on the fact that it is too high, arbitrary, or that it creates a “cliff effect”.

51. In analyzing Parliament’s decision to set the threshold at 40 per cent, Thompson writes at p. 324, “[t]here is no “magic” in the “40 per cent” threshold in our Guidelines.” He cites examples of other jurisdictions, such as Australia which sets a threshold at 35% with an adjustment for care between 14 and 34%, and the U.S. states with formulaic adjustments range wildly from 14 to 45%, with most falling between 25 and 40%.

52. Thompson considers the policy concerns that must be balanced in setting a threshold for a shared custody adjustment including: protecting the economic position of the primary parent; recognizing the direct spending of the other parent; providing an objective method of identification; and minimizing incentives for opportunistic behavior by either parent. He notes that the former two and the latter two are in direct conflict.

53. Thompson explains at p. 325 that in choosing a high threshold, the Guidelines preserve the position of the primary parent over that of the non-primary parent. This choice means a “substantial cliff effect”, once the threshold has been passed, precisely because the non-primary parent’s substantial spending will now be recognized above the threshold. He notes that while a time-based measure for the threshold is fairly objective, the downsides are that it creates opportunities for opportunistic behavior, and discounts unduly the serious spending undertaken by most parents in the 30 to 40 per cent range.

54. Master Joyce in an early and prescient decision in *Hall v. Hall (1997)*, 35 B.C.L.R. (3d) 311 (B.C. Master), at para. 11 questions the arbitrariness of a 40% threshold, and the negative behaviour it incentivizes for parties:

> I must say that I am distressed that one of the results of this new scheme of legislations [sic] seems to be that courts are now required to track the hours which the children spend under the care of or subject to the primary responsibility of one parent or the other. I have to question whether such an exercise is in the best interests of the child. The figure of 40% seems quite arbitrary. Up to that magic number the court has no ability to recognize access costs, which might be quite significant, unless the matter can be brought within the "hardship" section of the Guidelines (s. 10). Once the magic number is reached the court is given a wide discretion to apportion the costs associated with the care of the children in accordance with all relevant financial circumstances of the parties. I have a very real concern that this new regime may encourage the custodial parent to
discourage the maximum contact between the children and the other parent for fear of the economic consequences which may result. The custodial parent, or the parent with primary responsibility for the care of children, may be reluctant to agree to an order for "liberal and general access" unless the order makes it clear that the generosity does not exceed 40%. I question whether this is in the best interests of the children.

c) Setting 40% threshold spurs litigation

55. Another common complaint is that setting a specific threshold incentivizes fighting between parties. In *Green v. Green*, Prowse J.A states at para. 21:

> A review of many of the cases decided under s. 9 reveals that the question of whether an access parent has met the 40 percent threshold necessary to permit the court to depart from the Guidelines tables is one that has generated considerable litigation. In some cases, parents have kept a minute-by-minute account of the time they have spent with their children (sometimes reflected in pages of computer print-outs) in order to make, or refute, a claim that s. 9 applies. Children's waking time, sleeping time, school time, time with grandparents and friends, sick time, and so on, have been recorded and analyzed to determine whether they constitute part of a parent's access time under s. 9. Trial judges have justifiably bemoaned the unfortunate focus of these efforts, which have resulted in a fertile ground for dispute between even those parents who formerly were able to agree to a shared parenting arrangement.

56. Another critique of section 9 is that it measures time rather than spending, and time is not always a proxy for spending. This problem was identified by Justice Eberhard in an early decision in *Rosati v. Dellapenta* (1997), 35 R.F.L. (4th) 102 (Ont. Gen. Div.), at para. 5:

> This crass focus concerning the number of hours spent told me nothing whatsoever about who bears the expenses of parenting. The 40% delineation offers no clue as to how expenses of housing, feeding, clothing and other such expenses usually subsumed in the regular expenses of children that are addressed by the table amounts in the Guidelines, are paid. Many access parents who have the children somewhat less than 40% of their hours still bear the expense of providing child suitable accommodation and must nevertheless pay the table amount. Time tells me little about who arranges for the children's material needs.

57. In “Kids and Cash”, at p. 332, Bala and Gordon encourage counsel litigating over section 9 to be prepared to address not only the issue of how much time the children spend in the care of each parent, but also the potentially complex issues of spending on the children, on both direct
costs and on an apportionment of household costs attributable to the children. They argue that alternatively, “counsel need to be prepared to make an argument that given the relative resources of the parties, the court should forego a detailed inquiry into expenses and make a decision based on “rough justice”.”

e) Difficult to furnish evidence for 9(b) and 9(c)

58. To apply section 9, parties must lead evidence relating to ss. 9(b) and (c) of “the increased costs of shared custody arrangements” and “the conditions, means, needs and other circumstances of each spouse [parent] and of any child for whom support is sought.” In Green, at para. 35, Prowse J.A. writes that such evidence is often lacking, resulting in courts either making assumptions about increased costs, or refusing to apply section 9 for lack of an evidentiary foundation, which the court notes is “particularly unsatisfactory in cases of in-person litigants who often have little idea about the nature of the evidence which is required.” The court suggests a standard form affidavit to attach to the Guidelines for parties to fill in, however noting that, “having said that, I recognize that it is not always easy for an access parent to demonstrate precisely what costs have increased as a result of increased access, and by how much.”

59. The evidentiary problem has manifested itself in case law as well, exemplified by MacKinnon J in Gauthier v. Hart, 2011 ONSC 815, who notes at para. 24 that: “there were errors, omissions and inconsistencies in both calendars. Neither parent tracked hours. I have relied on both calendars to some extent, supplemented by the father's notes and both parents’ testimony and have done my best to make the required findings as to the residential custody for both children. The task was difficult because of the discrepancies in the parents' recording and recollection but also because the record of overnights does not necessarily reflect accurately the reality of time spent with each parent.”

Attempts to Change Section 9

60. Thompson explains at p. 333 that in its 2002 Report to Parliament, the Department of Justice did recommend a change to section 9, to use a presumptive formula based upon the difference between Table values for each parent given the total number of children in the shared custody arrangement. A presumption would increase predictability and certainty, while leaving room for a discretion to rebut the presumptive formula in appropriate circumstances.

61. However, Thompson explains that section 9 was never revised in this fashion, as the Supreme Court's decision in Contino intervened in November 2005.

62. In Contino, at para. 4, Justice Bastarache speaks of the policy concerns inherent in section 9, and the policy reasons both for and against some adjustment to the Table child support amount for a payor with shared custody. Many of these reasons have been mentioned above:

The application of the factors under s. 9 of the Guidelines have proven to pose serious difficulties. The problems have been addressed in terms of fairness. As mentioned by
Pushing in favour of some adjustment is a concern for fair and consistent treatment of payors who incur increased expenses during the time they spend with the child. There are two dimensions to the fairness claim. The first is fairness between the payor and the support recipient, who is arguably relieved of some costs assumed by the payor. The second is fair and consistent treatment of the payor as compared to payors at the same income level who may not be spending any money directly on their children apart from the payment of child support.

But then adjustments are hard to evaluate. More time spent with a child may not involve increased spending or significant savings for the other parent. Where there is a significant disparity of incomes, a new formula can mean a drastic change in the amount of support for the lower-income parent, who was previously the custodial parent, and exacerbate the differences in standard of living in the two households. There is also a concern that shared custody can entail more cost in duplication of services and leave less money for support.

63. Bastarache J. then continues that “against this backdrop, the role of the Court is to interpret the Guidelines as drafted by Parliament.” The question is whether the Supreme Court was successful in interpreting section 9 to provide more clarity and ensure fairness.

Did Contino clarify the law?

64. After Contino, the pressing need for revision seemed to dissipate, because the Court’s solution seemed to avoid many of the worst problems. In turn, however, the Supreme Court created some new problems for section 9. As Thompson writes at p.5, “living with Contino has not proven easy for anyone, given its broadly discretionary approach.”

65. Courts across jurisdictions have commented that the section 9 analysis under Contino is “complex, even at the best of times”: see LMAM v. CPM, 2011 MBQB 46, at para. 215; and Kristmanson v. Kristmanson, 2013 SKQB 387, at para. 20.

66. Jane Murray and Justice J. Mackinnon J., in “Eight Days a Week” Post-Contino: Shared Parenting Cases in Ontario” (2012) 31 CFLQ 113, look at Ontario Superior Court cases of shared parenting decided between 2006 and 2010 and conclude that the Contino analysis has had little impact on the quantum of shared parenting child support awards. They propose the idea that the distribution of NDI should be a factor in the section 9 analysis.

67. Thompson in TLC of Shared Parenting at p. 339 also reviews many cases of shared custody under section 9, illustrating that ss. 9(b) and 9(c) are not used very frequently, and finding that a simple set-off has become the default solution in most section 9 cases, despite the wide discretion espoused by Contino. He writes that in the cases he reviewed, despite Contino, often child expense budgets are avoided, section 7 expenses are dealt with separately, courts make adjustments up or down from the set-off based upon some sense of “fairness”, and only
rarely do courts consider net disposable income or other measures of household standard of living, despite the Supreme Court's emphasis on that concern.

68. He notes that often courts wind up at the set-off amount because the parties choose not to introduce detailed evidence under ss. 9(b) and 9(c). Some judges are clearly not very inclined to move off the set-off, unless there is some telling evidence to do so. But many judges, once the parties put evidence before them, will exercise their discretion and produce different outcomes, outcomes that are hard to predict.

69. Epstein bemoans the complexity of the section 9 analysis under Contino and calls for a fresh approach to section 9, in “Epstein’s This Week in Family Law, Fam. L. Nws. 2014-12”, stating that:

… a Contino analysis is beyond the ability of most self-represented litigants, and frankly, most family law counsel. It is a difficult and time consuming exercise and the courts rarely engage in applying the Contino principles. Obviously, the legislation, to be fair and needs to deal with what happens when parties have shared custody. We have now had this legislation in place for enough time to take a fresh look at section 9, to standardize how time is to be counted with some precision, and find a better way of calculating child support in cases where section 9 actually applies.

70. However, Bala and Gordon write that while there have been calls from judges and commentators for the government (or appeal courts) to clarify time determinations under section 9 in order to reduce litigation and judicial timekeeping, “such clarification does not seem likely, at least in the near term future.” The authors continue as follows at p.332:

If there were regulated "bright lines" about how to calculate the 40% threshold (days, nights, school time, part days, child care etc.) it might offer much-needed clarity. However, it might just offer an even greater incentive for high-conflict litigants to tailor their demands for parenting time to accord with such further rules, and remove any flexibility in balancing the quantitative and qualitative determinations that now get judges to the 40% point. Even if there was clearer guidance about time determination, the wording of s. 9 and the requirements of Contino mean that judicial discretion is still in play about whether to apply the set-off approach or not.

Most courts of appeal emphasize the need to give trial judges significant "flexibility" and discretion in applying s. 9. Understandably judges are generally loath to allow often seemingly arbitrary determinations or calculations to determine whether s. 9 will apply, and want to discourage manipulative or strategic behaviour. Taking a "holistic approach" allows courts to consider not only the issue of time, but also parental responsibilities and understandings, as well as their respective expenses for the care of their children. This approach also tends to discourage variation applications if there is a minor change in child care in a future year. [Footnotes in original omitted.]
71. Recognizing the challenge of drafting a shared custody provision, Thompson writes at p. 347 that “it is very difficult to draft a shared custody child support provision that both provides helpful guidance to sensible parents who want to settle and also offers clear answers in contested and conflicted cases. The vast majority of shared custody parents will fall into the first camp and must always be kept in mind when we try to resolve the contested cases. In the end, section 9 of the Child Support Guidelines is just a child support provision and it cannot solve all the problems and disputes over shared parenting as a custody arrangement.”

In the children’s best interests?

72. However, there are still some voices calling for the reform of section 9, focusing on the critique that the provision is just not child-focused. The most scathing critique of section 9 of the Guidelines and a call for statutory reform comes from Little J. in *Martin v. Martin*, 2007 MBQB 296 as a postscript to that decision:

**A Brief Postscript**

80 I will conclude with something of a lament for the children whose parents engage in litigation over shared custody support issues. These remarks are not directed toward counsel (who I have taken the time to thank in Paragraph 3 of these reasons) or to counsel generally who are only too well aware of the costs of litigation. Instead I speak to these parties and others who may follow.

81 If in the exercise of my judicial discretion under Section 9 I must give consideration to the "cliff effect", then parents who litigate this issue need to think long and hard about the "sinkhole effect", too. Justice, in many cases, may be priceless, but it is also pricey.

82 For those with counsel, the provision of a sufficient and complete evidentiary record necessary to undertake a proper Section 9 analysis, as contemplated by *Contino*, requires the investment of significant funds, often outstripping the gain to be realized through a child support award.

83 Self-represented litigants have little hope of being able to construct such an evidentiary record on their own. If they try there will inevitably be multiple appearances before the court before that record can be "made right". (But this is what *Contino* (para. 57) requires the court to do — see also *Cabot v. Mikkelson*, 2004 MBCA 107 (Man. C.A.), para. 43). Even then the evidentiary record will likely remain incomplete. In that event there will have been an inevitable cost in both time and resources to the system as a whole as litigants make multiple appearances to have matters adjudicated. In many cases the parties will face additional costs for the adjournments they require. If the other side is represented by counsel they too may have additional unwarranted costs as a consequence of multiple appearances.

84 For either the represented litigant or the self-represented litigant, "fairness" may become an elusive commodity. *Contino* we should remember began with a self-represented party (*Contino*, para. 10).
When does disproportionately complex litigation (having regard for the evidence required and the amount actually at stake) and the disproportionate frequency with which it can be advanced through variation proceedings year after year, need to give way to relative certainty? Predictability, particularly with respect to child support issues is exceedingly important. Family law after all is a place where sometimes people will spend $200 to gain $100 either because the "principle of the thing", or one's sense of having once been wronged, demand it — demands, in turn, often supercharged by other emotional, even irrational catalysts.

At some point, one must wonder whether it is appropriate to consider amendments to the shared custody provisions of Section 9 if only to create a presumption — if not one in favour of the table or the set-off amount, then one in favour of the mid-point. If the range of support between the table and set-off amounts is broad enough so that a mid-point is not a sensible compromise in a particular case, that party can then bear the onus to establish a different result is appropriate.

Until such time as something is done, I can only wonder how many parents may mortgage their own and their children's futures. In this case, it is reasonably apparent this child cannot afford much more. [Emphasis added.]

Conclusion

As a result of the foregoing, is there an appetite to amend s. 9? If so, would family law professionals be able to develop consensus as to substantive changes?