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The Application of the Child Support Guidelines to Incomes over \$150,000 per Year

Section 4 of the *Child Support Guidelines* provides two approaches for determining the amount of child support payable when the payor's income is in excess of \$150,000 per annum.

Section 4 of the *Guidelines* reads as follows.

4. Where the income of the spouse against whom a child support order is sought is over \$150,000, the amount of a child support order is:
 - (a) the amount determined under section 3; or
 - (b) if the court considers that amount to be inappropriate,
 - (i) in respect of the first \$150,000 of the spouse's income, the amount set out in the applicable table for the number of children under the age of majority to whom the order relates;
 - (ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs, and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and
 - (iii) the amount, if any, determined under section 7.

Pursuant to section 4(a) of the *Guidelines*, the amount of child support is determined in accordance with section 3 of the *Guidelines*, which says that unless otherwise provided, the amount of a child support order for children under the age of majority is:

- (a) the amount set out in the applicable table according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
- (b) the amount, if any, determined under section 7.

The wife and mother of two children earned \$63,000 per year and received \$30,000 in support... The husband earned \$945,538 per year.

Therefore, section 4(a) merely allows for the calculation of child support payable in situations where income of the payor is over \$150,000 per year to be the same as where the income of the payor is under \$150,000 per year. Insofar as the income of the payor exceeds \$150,000, the monthly table amount of child support is increased by a designated percentage as set out in the *Guidelines*.

Where, however, the court considers the payment of child support payable

under section 3 for incomes in excess of \$150,000 per annum to be inappropriate, the court is then to consider section 4(b) of the *Guidelines*.

Accordingly, when applying section 4(b) of the *Guidelines*, the Court must have regard to subparagraphs (i), (ii), and (iii) of 4(b), as set out above. Therefore, the first \$150,000 of annual income is considered as if the annual income were up to \$150,000 only. Thereafter, the court then considers the balance of the payor's income in excess of \$150,000 by determining what it considers appropriate by having regard to the condition, means, needs, and other circumstances of the children, and the financial ability of each spouse to contribute to the support of the children. Last, the court is mandated to take into account the special or extraordinary expenses, if any, under section 7 of the *Guidelines*.

The leading case in Canada regarding the application of section 4 is the decision of the Supreme Court of Canada in *Francis v. Baker*, [1999] 3 S.C.R. 250; [1999] S.C.J. 52; (1999) 50 R.F.L. (4th) 288. The husband appealed from a decision of the Ontario Court of Appeal that dismissed his appeal from an award of child support. The wife and mother of two children earned \$63,000 per year and received \$30,000 in support from the husband. She applied for increased child support pursuant to the *Child Support Guidelines*. The husband earned \$945,538 per year.

The trial judge chose not to depart from the application of section 4(a) of the *Guidelines* in that she felt it was not inappropriate so as to require her to depart from the guideline amount. The wife was awarded child support of \$10,034 per month. The trial judge also awarded the wife discretionary expenses above those listed in her budget. The Ontario Court of Appeal held that there was no discretion to vary an award of child support downward under section 4, and upheld the exercise of the discretion by the trial judge to award the Table amount of child support.

The husband's appeal to the Supreme Court of Canada was dismissed. The Court said the meaning of the word, "inappropriate," in section 4, was to be considered within the scheme and objectives of the *Guidelines*, and was held to mean unsuitable rather than merely inadequate. The principles distilled from *Francis v. Baker* were summarized by Mr. Justice Finch (now Chief Justice) in *Metzner v. Metzner*, (2000) 9 R.F.L. (5th) 162 (B.C.C.A.) as follows.

1. It was Parliament's intention that there be a presumption in favour of the Table amounts in all cases.
2. The *Guidelines* figures can only be increased or reduced under section 4 if the party seeking such a deviation has rebutted the presumption that the applicable Table amount is appropriate.
3. There must be clear and compelling evidence for departing from the *Guidelines* figures.
4. Parliament expressly listed in section 4(b)(ii) the factors relevant to determining both appropriateness and inappropriateness of the Table amounts or any deviation therefrom.
5. Courts should determine Table amounts to be inappropriate and so create more suitable awards only after examining all circumstances including the factors expressly set out in section 4(b)(ii).
6. Section 4(b)(ii) emphasizes the "centrality" of the actual situation of

the children. The actual circumstances of the children are at least as important as any single element of the legislative purpose underlying the section. A proper construction of section 4 requires that the objectives of predictability, consistency, and efficiency on the one hand, be balanced with those of fairness, flexibility, and recognition of the actual "condition, means, needs, and other circumstances of the children" on the other.

7. While child support payments unquestionably result in some kind of wealth transfer to the children, which results in an indirect benefit to the non-paying parent, the objectives of child support payments must be kept in mind. The *Guidelines* have not displaced the *Divorce Act*, which has as its objective the maintenance of children rather than household equalization or spousal support.

The legislative objectives are intended to ensure "that a divorce will affect the children as little as possible."

8. The court must have all necessary information before it in order to determine inappropriateness under section 4. If the evidence provided is a child expense budget, then "the unique economic situation of high income earners" must be considered.
9. The test for reasonableness of expenses will be a demonstration by the paying parent that the budgeted expense is so high "as to exceed the generous ambit within which reasonable disagreement is possible." *Bellenden v. Satterthwaite*, [1948] 1 All E.R. 343 at 345.

The relevant principles were also summarized by Mr. Justice Laskin of the Ontario Court of Appeal in *R. v. R.* (2002) 58 O.R. (3d) 656 (Ont. C.A.) in

a case dealing with wealthy parents. He said at paragraph 39:

Although the considerations relevant to an appropriate child support order will differ from case to case, the courts must at least have regard to the objectives of the *Divorce Act* and the *Guidelines*, and to the factors expressly listed in section 4(b)(ii) of the *Guidelines*. The legislative objectives are intended to ensure "that a divorce will affect the children as little as possible" and the factors in section 4(b)(ii) further that intent by emphasizing "the centrality of the actual situation of the children."

Child support should meet a child's reasonable needs. For children of wealthy parents, reasonable needs include reasonable discretionary expenses. A paying parent who claims the table amount is inappropriate must, therefore, demonstrate that budgeted child expenses are so high that they "exceed the generous ambit within which reasonable disagreement is possible," in short, that the budgeted expenses are unreasonable. Table amounts that so far exceed a child's reasonable needs that they become a transfer of wealth between the parents or spousal support under the guise of child support will be inappropriate.

Thus, in deciding whether the payor has rebutted the presumption by presenting clear and convincing evidence that the *Guidelines* are not appropriate, it will be relevant to consider: the parties' lifestyle before and after separation, the budget or plan the receiving parent has for the children, along with the values and aspirations of the family when it was a unit. These are only some of the factors that may bear upon appropriateness of the *Guidelines*; per Donald, J. A. in *Macdonald v. Macdonald* 2002 BCCA 46; [2002] B.C.J. 121.

Accordingly, in *Francis v. Baker*, since the husband had failed to demonstrate that the trial judge

improperly exercised her discretion to award the Table amount, his appeal failed. He also failed to satisfy the court that there was an upper limit on child support payments.

In *Macdonald v. Macdonald*, (supra), a decision of the British Columbia Court of Appeal, dated January 24, 2002, the Court upheld Madam Justice Loo who sat on appeal of a Master's decision in an interim application for child support. The Master made an order for payment of interim maintenance for the children of \$59,500 per month based on the father's average annual income of \$4,500,000. In this case, the Master applied the Table amounts. Madam Justice Loo found the Table amount was excessive. As part of her judgment, Loo, J. said, at paragraph 37:

The test to be applied is not just looking at the table amount and determining that the children are entitled to a lifestyle commensurate to that amount. The Master erred when he failed to take into account the condition, means, needs, and other circumstances of the children, *and* the financial ability to [*sic*] the plaintiff to contribute to their support as required under section 4(b)(ii).

Mrs. Macdonald was trained as a journeyman goldsmith but she also received income from a family trust from her family: \$93,750 in 1996; \$268,750 in 1997; \$49,500 in 1998; \$100,000 in 1999; and \$68,250 in 2000. Accordingly, she had a considerable financial ability to contribute to the children's support as set out in section 4(b)(ii).

During the same time period, her husband's income from his employment as Vice President of RBC Dominion Securities was \$785,744 in 1996; \$2,106,992 in 1997; \$3,806,977 in 1998; \$3,200,568 in 1999; and \$6,518,160 in 2000.

In dismissing Mrs. Macdonald's appeal, the Court of Appeal emphasized that it was not making a decision as to the *quantum* of the interim award as decided by Madam Justice Loo, but only the principles associated with the appeal, and

specifically left it to the trial judge to determine the quantum of child support appropriate at the end of the day. The trial of the issue of child and spousal support took 17 days. Judgment was delivered by Mr. Justice Sigurdson on October 15, 2002, at which time he determined that child support would be \$18,000 per month, or \$216,000 per year.

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Conclusion

Not all cases concerning child support where the payor's income is in excess of \$150,000 per annum can be determined strictly on the Table amount. Conditions relevant to a child support order vary from case to case which, in many cases, is determined by how much in excess of \$150,000 the payor's income is. In each case it is important to consider the condition, means, needs, and other circumstances of the children as well as the financial ability of the payee to contribute to the support of the children, pursuant to section 4(b)(ii) of the *Guidelines*, if the amount determined under the Tables is considered to be inappropriate. It has to be kept in mind that the payments, whatever amount is determined, are not to be a wealth transfer or a substitute for spousal maintenance dressed up as child support. ▲

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