

Grant Taylor



# Many Ways to Calculate Child Support in Shared Custody Arrangements

**S**ection 9 of the *Child Support Guidelines* creates a concept of shared custody, which it defines as follows.

9. Where a spouse exercises a right of access to, or has the 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:
- the amounts set out in the applicable tables for each of the spouses;
  - the increased costs of shared custody arrangements; and
  - the conditions, means, needs, and other circumstances of each spouse and of any child for whom support is sought.

**The “pro-rated set-off” is where the custodial parent’s Guideline amount would be multiplied by the access parent’s percentage of time.**

Shared custody as a concept under the *Child Support Guidelines* (the Guidelines) does not come into existence until one spouse exercises access to the child or children for 40 per cent or more of the time over the course of a year and does not provide a formula for payment of child support under such a regime. The Courts have reflected on this issue and made certain pronouncements with respect to how child support should be paid to the “custodial” parent by the “non-custodial” parent.

The “straight set-off” was applied in *Middleton v. MacPherson*, which simply

sets off the Guideline amounts without any further calculations, that is, subtract the table amount for the custodial parent from the table amount for the access parent.

Simply put, each parent’s Guideline amount is calculated as if the other parent were the custodial parent without any calculation of access time. Then the higher amount (usually not the custodial parent’s amount) is subtracted from the lower amount and the difference is paid to the custodial parent by the non-custodial parent.

The “pro-rated set-off” is where the custodial parent’s Guideline amount would be multiplied by the access parent’s percentage of time. This number would then be subtracted by the access parent’s Guideline amount, multiplied by the custodial parent’s percentage of time.

The “straight pro-rate” takes the percentage of time the custodial parent has the children, multiplied by the Guideline’s amount for the access parent.

The “pro-rate with multiplier” approach is where the amount calculated under a pro-rated set-off would be applied to a multiplier of 1.5. In following this approach, the Courts would be assuming that 50 per cent of a custodial parent’s childcare expenses are fixed costs.

In the *Evetts* case, Madam Justice Prowse re-stated that Section 9 of the *Guidelines* is one of the few places that permits the Courts some discretion with respect to the factors set forth in subparagraphs (a) to (c) of Section 9. She emphasized what she said for the Court in *Green v. Green* about the various approaches or formulae that may be applied in fixing child support under Section 9.

In her view it is not limited to the four approaches set out here; she went on to say those approaches mentioned in *Green* and subsequently in *Evetts* were never intended to be definitive or exhaustive. Accordingly, and depending on the circumstances of each case and the ingenuity of counsel, more approaches may ultimately be given judicial approval. The problem, of course, is which one to apply in any given circumstances, especially in view of the stated objectives of the *Guidelines* to:

- a. establish a fair standard of support for children that ensures they continue to benefit from the financial means of both spouses after separation;
- b. reduce conflict and tension between spouses by making the calculation of child support orders more objective;
- c. improve the efficiency of the legal process by giving Courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
- d. ensure consistent treatment of spouses and children who are in similar circumstances.

*Evetts* was an appeal from a decision of a chambers judge in which the appellant (Mr. Evetts) was ordered to pay child support plus certain special expenses for medical and dental coverage. The appellant argued that the chambers judge erred in his interpretation and application of the

legislation regarding extraordinary expenses and erred in his findings that the amount expended by the appellant for hockey for the child was not extraordinary and that Mr. Evetts must bear those costs alone.

**She had only worked part-time out of the home before and had a grade 12 education.**

The Court of Appeal found there was no basis for interfering with the amount of child support awarded by the chambers judge or with the manner in which he arrived at that amount. The chambers judge was not satisfied that the application of the straight set-off approach advocated by Mr. Evetts would achieve fairness between the parties or was adequate support for their son.

Accordingly, the Court of Appeal approved of the manner in which the chambers judge applied his discretion in this case in determining the approach to take in calculating how much child support would be appropriate in a shared custody arrangement.

Also of note is that the *Evetts* decision of the British Columbia Court of Appeal stands for the proposition that extraordinary expenses will not be awarded where the applicant has a substantially greater income than the opposing party and where that income is clearly sufficient to support the costs claimed. Thus, the expenses for the son’s hockey were disallowed as an extraordinary expense as the Courts noted Mr. Evetts’ income was both sufficiently higher than the respondent’s income, as well as high enough to easily cover the costs of his son’s hockey expenses.

Section 9(b) also poses problems for the parties as in the case of *Boruck v. Boruck* where the judge re-adjusted downward the father’s payable table amount, notwithstanding the mother’s limited earning capacity. The parties had been living in Castlegar but the mother moved to Trail for part-time work at Safeway. She had only worked part-time out of the

home before and had a grade 12 education. For *Guideline* purposes, Mrs. Boruck’s income was \$4906.24 and Mr. Boruck’s income was \$77,846. According to the *Guidelines*, Mr. Boruck would pay \$1309 per month for three children, while Mrs. Boruck would pay nothing.

The Court was required to examine the increased costs of the shared custody arrangement with week on/week off custody of the three children and their required travel between Trail and Castlegar to go to school every day when living with their mother in Trail. No evidence was adduced as to the exact amount by which costs would be increased as a result of the shared custody; the Courts agreed, however, that Mr. Boruck would have increased costs of food, some transportation, recreation, and miscellaneous expenses, compared to exercising his access to the children on a less frequent basis.

Even after taking into account the spousal support paid by Mr. Boruck to Mrs. Boruck, Mrs. Boruck’s financial circumstances were more difficult to consider with respect to the condition, means, needs, and other circumstances of each spouse than those of Mr. Boruck, especially given the fact she would have the added expense of travelling from Trail to Castlegar for the children’s schooling and recreational activities.

As Madam Justice Brown said,

Further, travelling with the children to Castlegar every day of every second week will impede her efforts to increase her earnings and improve her financial circumstances. While she currently lives with Mr. Huber, and he shares expenses with her, there is a significant disparity in her circumstances as compared with Mr. Boruck’s.

Having taken all these factors into account and after acknowledging that greater precision was not possible, the Court concluded that Mr. Boruck’s child support payments to Mrs. Boruck be reduced by \$250 per month from the *Guideline* amount of \$1309 per month.

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Thus, the increased costs associated with equal time-sharing parenting regimes in this case justified the reduction of the full table amount payable by the father, even where the mother's earning capacity is limited.

As suggested by Madam Justice Prowse in *Evetts*, much discretion is allowed a Court when making a determination as to the amount of child support payable when the parents of children are involved in a shared custody arrangement. Given the permissive language of Section 9 of the Guidelines and the anomalous results associated with various table calculations, a Court may refuse to apply formulaic calculations of the amount of child support payable.

Formulaic approaches may tend to over-emphasize the importance of the factors in Section 9(a), while underestimating the economic factors set out in Section 9(c), especially where there is a substantial disparity in parental incomes. Accordingly, even though the Court must pay lip service to the factors set out in Section 9, the Court is really left with full discretion to make any determination it wishes in a shared custody regime. ▲

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