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Family Law Newsletters
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— Franks & Zalev - This Week in Family Law

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The Road to Some Appeals are Paved with Good Section 9 Intentions

Green v. Roome (2025), 17 R.F.L. (9th) 1 (Alta. C.A.) — Antonio, Fagnan and Feth, JJ.A.

Issues: Alberta — Section 9 of the *Child Support Guidelines*

The parents were in a shared parenting situation.

The father appealed part of a child support order that directed him to pay 50% of the private school fees unilaterally incurred by the mother, without prior consultation.

The court below found the school fees to be neither reasonable nor necessary on an analysis under s. 7 of the Alberta *Child Support Guidelines*, Alta Reg 147/2005 (the "*Guidelines*"). One would have thought that might be the end of the matter; but given the shared parenting arrangement, the court below then went on to consider whether the father should be required to contribute towards the school fees in determining child support under s. 9 of the *Guidelines* and ordered that the father was responsible for 50% of those school fees.

Before the Court of Appeal, the father sought to set that part of the order below aside and asked that the mother repay $8,566.85 to him for his 50% of the school fees.

At the original hearing, the parties wanted the court to apply ss. 3 and 7 of the *Guidelines* despite the shared parenting arrangement. They proposed that child support be determined by setting off their *Guidelines* obligations and that the court then decide whether certain additional expenses were "special or extraordinary", and if so, the allocation of those expenses between the parties.

The court at first instance (correctly) found that s. 3 of the *Guidelines* did not apply given the shared parenting. Rather, the court was bound to apply the s. 9 framework, including an analysis of the "condition, means, needs and other circumstances" of each parent and the child, "grounded in robust evidence."

However, as that was not the case the parties had come to court expecting to argue, the parties' evidence was far more narrow than a s. 9 analysis demanded. Neither had proffered evidence of their assets or monthly budgets or overall expenses and liabilities so as to allow for some sort of household comparison of standards of living.

Although the court below asked the parties if they might want to adjourn the hearing to allow them to gather the necessary evidence, the parties opted to proceed on the existing materials. Understandably, the parties did not want to delay.

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The court below began — as we suggest everyone does in a s. 9 situation — with a straight setoff analysis under s. 9(a) of the *Guidelines*. The mother earned less than the father and the parties' incomes were not disputed.

The Chambers Judge then looked at the assorted, contested extraordinary expenses, including private school fees. Considering s. 7 of the *Guidelines*, the court found that the private school fees were neither necessary nor reasonable. Therefore, under s. 7, the private school expenses did not qualify.

Now, one might think the analysis might stop there . . .

However, the Chambers Judge continued and opined that, in a shared parenting case, a s. 7 analysis does not necessarily end the matter. He concluded that if the school fees were not shared, the mother's child support contribution would be disproportionate and the child would likely experience a "material difference in the standard of living as he moves between the two households." And based on that, the Chambers Judge ordered the father to share equally in the cost of the private school fees for 2023-2024.

The father argued two errors: (1) the mother should not have been allowed to claim recovery for special or extraordinary expenses she unilaterally incurred without prior consultation; and (2) an extraordinary expense that was specifically found to *not* qualify as a s. 7 expense could not then ground an obligation to contribute under s. 9.

As noted by the Court of Appeal, the court below had the best of intentions, proceeding with a practical process that would avoid further litigation expenses. Unfortunately, however, while relying on s. 9, the Chambers Judge did not have the requisite evidence and, therefore, could not perform a full and proper s. 9 analysis.

As the Supreme Court of Canada reminded us in one of the understatements of the last 20 years, "[t]he determination of an equitable division of the costs of support for children in shared custody situations is a difficult matter; it is not amenable to simple solutions": *Contino v. Leonelli-Contino* (2005), 19 R.F.L. (6th) 272 (S.C.C.) at para. 82 ("*Contino*").

Section 9 of the *Guidelines* creates its own unique child support regime: *B.P.E. v. A.E.* (2015), 71 R.F.L. (7th) 79 (B.C. S.C.), rev'd (2016), 84 R.F.L. (7th) 33 (B.C. C.A.). It has also been suggested that parties cannot contract out of s. 9: *Murphy v. Murphy* (2013), 39 R.F.L. (7th) 320 (Ont. S.C.J.), (rev'd on other grounds) (2015), 56 R.F.L. (7th) 257 (Ont. C.A.). We have some trouble with this statement. What about the objectives set out in ss. 1(b) and (c) of the *Guidelines*: (b) to reduce conflict and tension between parents by making the calculation of child support orders more objective; and (c) to improve the efficiency of the legal process by giving courts and parents guidance in setting the levels of child support orders and encouraging settlement?

This has, in our view, been a major problem with s. 9. Parties are rarely able or prepared to bring forward the evidence necessary to properly prosecute a child support claim under s. 9 of the *Guidelines* — but, at the same time, courts are mandated to apply s. 9, and it is a reversible error to not do so, and appellate courts regularly send cases back where the analysis has not been done properly or was done on insufficient evidence: *Marchand v. Boudreau* (2012), 15 R.F.L. (7th) 7 (N.S. C.A.); *Woodford v. MacDonald*, 2014 CarswellNS 218 (C.A.); *Dyck v. Bell* (2015), 71 R.F.L. (7th) 10 (B.C. C.A.); *Conway v. Conway* (2011), 96 R.F.L. (6th) 1 (Alta. C.A.); *A.S.L. v. L.S.L.* (2020), 38 R.F.L. (8th) 351 (N.B. C.A.); *G.F. v. J.A.C.F.*, 2016 CarswellNB 152 (C.A.); *Verkaik v. Verkaik* (2020), 49 R.F.L. (8th) 69 (Ont. Div. Ct.).

Few appellate courts have blessed lower courts just doing the best with the evidence they have in a s. 9 situation as the Alberta Court of Appeal did in *Bradley v. Bradley*, 2023 CarswellAlta 3084 (C.A.). In *Bradley*, the Alberta Court of Appeal suggested that courts should be entitled to proceed on the basis that each party knows that the needs of the children are a relevant factor and made a considered choice at the evidence they presented to the court. Or, as determined by the Newfoundland and Labrador Court of Appeal, where there is insufficient evidence of s. 9 factors, the basic set-off applies: *Burgess v. Burgess* (2016), 75 R.F.L. (7th) 259 (N.L. C.A.).

In any case, s. 9 sets out three factors (seemingly in descending order of ease of application) that must be considered when determining child support in a shared parenting situation:

(a) the amounts set out in the applicable tables for each of the parents,

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(b) the increased costs of shared parenting arrangements, and

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

As explained in *Contino* and in *MacDonald v. Brodoff* (2020), 42 R.F.L. (8th) 278 (Alta. C.A.) (at paras. 12-15), applying these factors is a contextual exercise The set-off contemplated under s. 9(a) provides just a "starting point" from which the court must depart if the set-off amount is inappropriate in light of the s. 9(b) and (c) factors [*Contino* at para. 41].

As set out by the Court of Appeal (citing *Contino*):

> [12] . . . Child support is adjusted so as to equalize, insofar as possible, the standard of living the child experiences in each parent's home and to recognize the increased costs of shared parenting. To achieve these ends, **robust evidence and thorough analysis are generally necessary** to balance "the objectives of predictability, consistency and efficiency on the one hand . . . with those of fairness, flexibility and recognition of the actual 'condition[s], means, needs and other circumstances'" of the parties and any child for whom support is sought: *Contino* at para 33; Guidelines, s 9(c). [emphasis added]

Here, the court below applied the s. 9 framework — requiring "robust evidence and thorough analysis" to an isolated expense — school fees. Proper s. 7 expenses can be examined directly in s. 9 as part of the overall consideration (*Contino* at para. 71). Section 9(c) is "conspicuously" broader than s. 7.

However, here, the very limited evidence — mainly consisting only of the parties' incomes — and little about their households, expenses, and overall financial means, could not support the mandated contextual analysis or any conclusion about any possible imbalance between the standards of living in the two households. Although the court found that the child would experience a "material difference" between households — that was precisely the sort of "common sense" assumption rejected by the Supreme Court in *Contino* (paras. 57 and 58). Common sense has no place here, apparently. The s. 9 analysis also did not explain how the school fees, undertaken unilaterally by the mother, and found to be **un**necessary and **un**reasonable, warranted child support.

As for the fact that the expenses had been incurred without the father's consent, the Court of Appeal agreed with the court below that " . . . a lack of consultation is generally treated as a relevant — sometimes decisive — factor in gauging a parent's exposure to s. 7 expenses." [See, for example, *Joe-Joe v. Joe-Joe* (2023), 94 R.F.L. (8th) 492 (Alta. K.B.) at paras. 21-26; *R. v. Vaughan*, 2014 CarswellAlta 96 (Q.B.) at parass 38-39, aff'd 2014 CarswellAlta 2177 (C.A.) at paras 27-31; *Sherbo v. Sherbo*, 2021 CarswellAlta 594 (Q.B.) at para 53; *Sydor v. Sydor*, 2005 CarswellOnt 2893 (C.A.); *Williams v. Mapson*, 2015 CarswellBC 1337 (S.C.); *Iliuta v. Li*, 2025 CarswellOnt 15445 (C.A.).]

Unfortunately, the Court of Appeal then continues to say that, whether assessed under s. 7 or s. 9, consultation is "encouraged" but "not always required." We wish the court had not said that. In our view, in all but exceptional circumstances, prior consent (whether explicit or implicit) should be required. One parent should not be able to commit the other's dollars without prior discussion or prior court approval, especially given how s. 7 expenses can impact the division of net disposable income.

Here, according to the Court of Appeal, the lack of consultation was not determinative. The conclusion that the father should pay the mother for 50% of the school fees was an error, based on a "common sense assumption" about how extraordinary expenses impacted the standard of living in the mother's house, rather than the broader inquiry required under s. 9(c) to determine the "condition, means, needs and other circumstances of each parent and of any child" in determining support under a shared parenting arrangement.

Unfortunately, the Court of Appeal decided to not answer one interesting question arising from these fact: can an extraordinary expense found not to qualify for child support under s. 7 still qualify for child support under s. 9? No answer. But the court is careful to point out that this case should not be considered as authority to suggest that an extraordinary expense may be found *not* to qualify for child support under s. 7 and then be re-assessed under s. 9.

Credibility Cannot be Compartmentalized

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Outram v. College of Massage Therapists of Ontario, 2025 CarswellOnt 11504 (Div. Ct.) — McWatt A.C.J. Ont. S.C.J., Sachs and Faieta JJ.

Issues: Ontario — Evidence — Credibility

We family lawyers deal with issues of credibility all the time — so when a good case examining credibility is released, even if not a family law case — we want you to know about it.

Outram involved a registered massage therapist accused of professional misconduct (of the sexual kind) by a patient following a massage session. One specific allegation (that we will refer to as the "genital allegation"), however, came late to the party; that allegation was not in the complainant's original statements to the College or to police. Rather, this specific allegation was not disclosed until some months later.

During the hearing, the Discipline Committee panel (the "Panel") found the complainant to be generally reliable, except with respect to the genital allegation. The Panel found that piece of the complainant's testimony to be inconsistent and implausible — and rejected that portion of the evidence.

Notwithstanding the significant adverse credibility finding regarding the genital allegation, the Panel relied on other aspects of the complainant's credibility to support findings of professional misconduct. The Panel found that — aside from the evidence regarding the genital allegation, on which the complainant's evidence had "internal inconsistencies" and was "implausible" — the complainant was otherwise a generally reliable witness.

The massage therapist appealed to the Divisional Court, primarily on the basis that the Panel had erred in assessing the complainant's credibility without properly factoring in significant negative credibility findings that had been made against her.

The Divisional Court started with a general proposition:

> [25] When making findings of fact . . . it is crucial for fact finders to assess the credibility of witnesses in the context of the evidence as a whole. Importantly, a finding of a lack of credibility in one aspect of a witness's testimony does not automatically render the entirety of their evidence as non-credible. However, where a witness' testimony is found to contain significant negative credibility markers, that evidence, assessed in light of all the other evidence in the case, may not render clear, convincing, and cogent evidence — enough to satisfy proof on a balance of probabilities.

The court's concern, however, was that the Panel had engaged in a compartmentalized issue-by-issue analysis of the complainant's credibility, not stepping back to consider how some significant adverse findings of credibility on one issue might or should impact the credibility or reliability of the complainant's credibility in general. That is, any concerns about the complainant's reliability should have been viewed in the context of her reliability *as a whole*, rather than being limited to one particular incident at a time.

Even though the Panel had serious questions as to the complainant's credibility regarding the genital allegation, the Panel did not go further and assess credibility *as a whole* in relation to *all* the allegations against the massage therapist:

> [39] Where a trier of fact finds significant inconsistencies in the evidence of a witness and rejects the witness's evidence on an issue, it is incumbent upon it to consider how the inconsistencies and rejection affect the witness's overall credibility and reliability [citations omitted]. The trier must not place evidence on each allegation in separate silos; it must consider the totality of the evidence in light of any inconsistencies [citations omitted]

The Divisional Court emphasized that the Panel had dismissed the genital allegation on account of very serious issues with the complainant's credibility and reliability on that issue.

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However, despite that credibility determination on that allegation — finding the allegations to be "inconsistent and implausible", the Panel did not then consider how these adverse findings affected the complainant's overall honesty and reliability. Rather, they merely used the finding to determine that the genital allegation was not made out.

This was an error. The Panel should have considered the impact of the evidence that was not accepted on the complainant's overall reliability.

The Panel had failed to do a full and proper analysis of the complainant's reliability. Although the Panel knew the central issue was the credibility and reliability of the complainant, it accepted the flawed evidence of the complainant. And it then did not address how this major inconsistency and implausibility affected her overall credibility and reliability. This was a palpable and overriding error.

A *proper* analysis of the complainant's credibility would have shown her to be significantly less credible and far from giving the required clear, convincing and cogent evidence required in this discipline proceeding.

Appeal allowed.

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