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— Franks & Zalev - This Week in Family Law

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A Note About Julien Payne

We want to take a moment to acknowledge the passing of Julien Payne and his extraordinary contribution to family law. He was one of Canada's preeminent family law experts and he will be sorely missed.

Contents

Might the Hot Mess Dumpster Train go to Ottawa? Probably Not.

***Graves v. Graves* — Leave Application to the Supreme Court of Canada (2026 CarswellAlta 199 (C.A.))**

We have written critically about s. 9 of the *Child Support Guidelines*, SOR/97-175 o-so-many times. Let's be honest: it's a section that is easy to criticize. In the November 2, 2020 (2020-42) edition of *TWFL*, we called it "A Hot Mess Inside a Dumpster Fire Inside a Train Wreck." Since then, we have seen case after case where appellate courts send matters back for a "full *Contino* analysis" — that most families cannot afford to produce. Now, once again, someone is asking the Supreme Court of Canada to do something about it. Will they? Probably not. But it is worth discussing why they should. (And we do note that our predictions of the results of SCC leave applications are . . . well . . . not so good.)

Graves v. Graves involved a variation application over a modest amount of child support, brought in morning chambers on a thin record.

The parents share parenting of two children. The mother brought a morning chambers application to increase the father's imputed income. The parties urged the court to proceed despite the limited record, and the father conceded that some imputation was appropriate.

According to the mother's leave materials, she had been paying $1,075 a month in child support based on a straight s. 9(a) set-off using her *Guideline* income and a prior imputation to the father of about $28,000. She asked the court to impute him with income in the range of $75,000 to $90,000, which would have reduced her set-off to roughly $200-$400 per month.

The chambers judge expressed concern that he could not properly determine child support on the scant evidence before him, noting he could not decide child support in a shared custody situation without a full *Contino* analysis - but that he would deal with the matter on a limited basis. Although he found no material change in circumstances, he imputed additional income to the father, referencing minimum-wage benchmarks and the father's concession around $37,000, and imputed income at $40,000. The resulting order was not labelled "interim" on its face.

The mother appealed the chambers judge's order to the Alberta Court of Appeal, but her appeal was dismissed.

The Alberta Court of Appeal accepted that the chambers judge was not equipped to conduct a full *Contino* analysis on the evidentiary record. But it also concluded that, in the circumstances, it was reasonable to impute additional income consistent with the father's concession rather than leave support at a level both parents recognized to be artificially low.

Although the order was not labelled "interim", the court concluded it should be treated as such, which meant that the matter could be revisited on a fuller record at a further hearing without the need to show a material change in circumstances.

The result was a familiar one: the court cannot do the full *Contino* analysis on the record before it — but it cannot leave the issue undecided either. So it does something in between. None of this changes the starting point under *Contino*: simple set-off under s. 9(a) starts the analysis but has no presumptive value, and the courts must still look at the ss. 9(b) and (c) factors on the record before it.

The mother applied for leave to appeal to the Supreme Court of Canada on March 26, 2026.

In her leave application, the mother frames the case as a modest morning chambers application where the judge effectively said he could not decide child support without a full *Contino* record. As the chambers judge put it during the hearing:

> The Supreme Court of Canada says I can't do that . . . The parties have to bring forward all of the information required under *Contino* . . . Am I to ignore that just because it is inconvenient and inexpedient? You know I can't do that.

The application argues that, post-*Contino*, courts disagree on what s. 9 demands (true); that the evidentiary burden is disproportionate to the stakes in many shared-parenting cases (also true); and that judges should be able to make proportionate s. 9 determinations on the evidentiary record ordinary families can reasonably assemble (also also true).

It frames the central question this way: Does *Contino* permit a proportionate s. 9 determination on the available record, or does it require the full-dress exercise every time?

Will the SCC grant leave?

Almost certainly not.

And it's not for lack of prior attempts. Parties have tried to have the Supreme Court of Canada revisit s. 9 and *Contino* before — without success. For example:

1. In *Wiechern v. Wiechern* (SCC docket 38910) — from 2018 CarswellMan 264 (Q.B.) and 2019 CarswellMan 787 (C.A.) — the leave materials raised a shared-custody/s. 9 issue about whether support should increase based solely on the payor's income. Leave was dismissed with costs on March 12, 2020.

2. In *T.J.K. v. M.A.K.* (SCC docket 39283) — from 2019 CarswellAlta 1480 (Q.B.) and 2020 CarswellAlta 909 (C.A.) — the leave materials squarely asked: "What is the scope and breadth of section 9 of the Guidelines?" in an equal-time case disputing set-off. Leave was dismissed with costs on November 19, 2020.

The SCC takes few family cases; the record here is quite thin; the dollar amounts quite small (not that the amount should be a determining factor — the amount in issue in *Contino* itself was only about $500); and the Court of Appeal upheld the order and held that it was merely an interim order that could be revisited at trial — none of this screams "leave granted."

The application nevertheless makes a fair point.

Cases like this are effectively invisible to the Supreme Court. The families most affected by *Contino's* demands are the same ones who cannot afford the litigation required to challenge them. If the SCC waits for a perfect vehicle, it may never see the problem that impacts the most families.

What this case illustrates is not just cost, but the tensions that arise in a section 9 case. Courts routinely say they cannot properly decide s. 9 issues without a full *Contino* record. But they are routinely asked to decide them anyway, on incomplete evidence, in forums designed for speed and proportionality. The result is what happened here: an order that is not quite final, not quite interim, and not at all the product of the analysis the law appears to require.

To be fair, not all of this can be laid at *Contino's* feet. Shared parenting cases are factually complex, and income imputation is rarely straightforward. But *Contino* has come to stand for a level of evidentiary "completeness" that often sits uneasily with how these cases are *actually* litigated. Budgets, where available, are meant to verify or adjust the set-off - not to become a mandatory spreadsheet exercise. And s. 9(c) offers broad discretion, capable of accounting for real-world costs without forcing a rigid accounting exercise.

As Professor Rollie Thompson observed in his annotation to *Contino* when the decision was first released just over 20 years ago, this is not just a doctrinal problem but a practical one. The exercise of discretion under s. 9 "requires a surfeit of facts", with courts demanding ever more "information" and "evidence" from the parties. But these are "family litigants, real parents, not cost accountants," many with limited resources. Even where the evidence is available, much of it is inherently indeterminate — for example, how much of household costs should properly be attributed to the child(ren). The analysis *Contino* contemplates is not just expensive; it is often elusive.

We would also add that when *Contino* was decided in 2005, self-represented litigants were far less common. Today, they make up a significant portion of family law files. Shared parenting arrangements are also far more common than they were back in 2005.

For many families, the s. 9 dispute is over a few hundred dollars a month — money that matters to children — but the process required by *Contino* — and by our court system — to determine the "right" amount costs exponentially more.

Will *Graves v. Graves* be the case that prompts the Supreme Court to revisit *Contino*? Probably not.

But kudos to counsel for leaning in and giving it the old *Contino* try.

How Not to Handle Alleged Conflicts

***Children's Aid Society of Toronto v. K.Y.* (2025), 22 R.F.L. (9th) 69 (Ont. C.J.) — Harris J.**

This is a rare and significant *voir dire* ruling in a child protection trial in which Justice Harris excluded the evidence of a clinician from the Office of the Children's Lawyer (the "OCL") for failing to meet threshold reliability under the principled hearsay approach. At its core, the decision delivers a rather blunt reminder about litigation about children: a child's voice should only be received through a process that is demonstrably — and structurally — independent.

To be clear, this was not a case about misconduct or sharp practice. The problem was quite ordinary and, therefore more instructive. Silence, assumptions, and refusing to grapple with a seemingly obvious conflict allowed an otherwise manageable issue to calcify into a fatal evidentiary one. When independence is assumed, or treated as implicit rather than proved, even well-intentioned evidence can be lost.

The proceeding began in mid-2024, when the Children's Aid Society of Toronto ("CAST") started a protection application seeking a final six-month order placing the child in the care and custody of two respondents identified as *kith caregivers* — that is, non-family members from the child's existing community network, as opposed to "kin", who are relatives — subject to CAST supervision and without terms and conditions.

CAST subsequently amended its application to seek an order granting custody of the child to the kith caregivers, and the OCL assigned counsel to represent the child, along with a clinician to assist in placing the child's views and preferences before the court.

Not wasting any time, on the first day of trial, the father challenged the admissibility of the OCL clinician's proposed evidence regarding the child's views and preferences on the basis that she had a conflict of interest. The alleged conflict? The clinician had worked for CAST for 27 years and was currently employed as an intake worker, but had not disclosed her employment with CAST — one of the other parties to the case — to either the parties or the court. Instead, the issue came to light only because the father's counsel had personal knowledge of the clinician's employment status.

The OCL submitted "nothing to see here" — that there was no actual conflict of interest and that any perceived conflict was mitigated by the surrounding circumstances and the importance of hearing the child's voice. CAST and the kith caregivers took a similar position. The mother and father, however, both argued that a conflict existed and that the evidence should be excluded, stressing the OCL's required independence from CAST, the need for the child's views to be unbiased and transparently disclosed, and that the issue came to light only because of the father's counsel's personal knowledge.

A *voir dire* followed to determine whether the OCL clinician could give evidence about the child's views and preferences.

The *Voir Dire*

During the *voir dire*, the OCL clinician testified that she had worked with the OCL for about 11 years and had been a full-time CAST employee for 27 years, where she currently worked as an intake worker. She initially described her access to CPIN — the Child Protection Information Network — as limited, but later acknowledged that she had broad technical access to child protection files, subject only to internal policy.

She further testified that she did not perceive a conflict of interest, that there were no ethical walls or access restrictions in place, that she had reviewed CAST materials to understand the file, and that she did not disclose her CAST employment to the child. Although she swore two affidavits outlining her professional experience, she acknowledged that she did not disclose her CAST employment because she "didn't feel that it was necessary."

Following re-examination, it emerged that CAST counsel had provided proposed re-examination questions to OCL counsel to put to the clinician, a fact CAST counsel acknowledged when raised by mother's counsel. That was certainly not the best way to show "distance."

After hearing the evidence on the *voir dire*, Justice Harris had to determine whether the OCL clinician's proposed evidence was admissible under the principled approach to hearsay — specifically, whether it was both reliable and necessary (for further discussion of the principled approach, see *Do You Hear What I Say?* and *This Brief Evidence Refresher Brought to You by the Hearsay Rule* in the January 25, 2021 (2021-03) and July 3, 2023 (2023-26) editions of *TWFL*; see also *The Ten Evidence "Rules" That Every Family Law Lawyer Needs to Know* by Professor Thompson, available on Westlaw at 35 C.F.L.Q. 28).

Reliability

Relying on the Supreme Court of Canada's decision in *R. v. Bradshaw*, 2017 CarswellBC 1743 (S.C.C.) and Justice Sherr's synthesis of *Bradshaw* in the child protection context in *Children's Aid Society of Toronto v. G.S.* (2018), 5 R.F.L. (8th) 464 (Ont. C.J.) at para. 16, Justice Harris confirmed that the reliability branch of the principled approach to hearsay requires the court to identify the specific hearsay dangers arising from the absence of contemporaneous cross-examination — including concerns relating to perception, memory, narration, or sincerity — and then determine whether those dangers are adequately addressed with other circumstantial guarantees of trustworthiness.

Those dangers can be addressed in two ways. *Procedural reliability* focuses on whether there are adequate substitutes for in-court testimony and cross-examination — such as video recordings, prior sworn statements, or other mechanisms that allow the trier of fact to meaningfully test the statement's truth and accuracy. *Substantive reliability*, by contrast, looks to whether the statement is inherently trustworthy based on the circumstances in which it was made and any corroborating or conflicting evidence. The two approaches are not mutually exclusive and may operate in tandem. Where the conduit for a child's statements is a professional tasked with independent representation, the adequacy of those safeguards takes on particular importance.

After considering the evidence on the *voir dire*, Justice Harris concluded that the OCL clinician's evidence did not meet the threshold reliability requirement due to the clinician's conflicting interests and the circumstances in which the evidence was generated. Central to that conclusion were the clinician's undisclosed full-time employment with CAST, her failure to disclose that employment in two sworn affidavits, and the OCL's failure to produce her *curriculum vitae* before trial — likely an innocent error — but sometimes a price must be paid for even innocent mistakes.

Those concerns were reinforced by the clinician's *voir dire* evidence, which included inconsistent and contradictory accounts of her access to CPIN, her review of CAST materials, and her interactions with CAST workers, as well as her characterization of the roles of CAST and the OCL as "complementary." The reliability concerns were further exacerbated by the absence of any ethical walls or access restrictions, the fact that CAST workers in the case were the clinician's co-workers, the failure to disclose her CAST employment to the child, and the conduct/cooperation of OCL and CAST counsel during the *voir dire*, which suggested aligned efforts to support CAST's position.

These issues were particularly problematic given well-established principles governing the OCL's role, including that:

• the OCL owes the children it acts for undivided loyalty, independence, and good faith, and must act free from competing institutional interests (*Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2018 CarswellOnt 9575 (C.A.) at para. 69); and

• while parents and children's aid societies operate under different and sometimes competing imperatives, the OCL's role is singular — to protect the child's interests (*Family and Children's Services v. N. (K.)*, 2017 CarswellOnt 4327 (C.J.) at para. 21).

Necessity

Despite rejecting the clinician's evidence for lack of reliability, Justice Harris went on to consider necessity and concluded that it, too, had not been established. There were other available and potentially more reliable sources of the child's views and wishes, including evidence from the child's therapist (who had the child's consent to disclose information), as well as from CAST workers, the kith caregivers, and the parents. In those circumstances, Justice Harris concluded that the OCL clinician's evidence was not necessary.

Justice Harris went on to address a further concern arising from the conduct of the *voir dire* itself. Children, their parents, kin and kith, and the court must have confidence in the independence and integrity of the institutions in Ontario charged with representing children's interests and protecting their welfare.

Against that backdrop, the court noted that CAST's counsel acknowledged that during the *voir dire* she had provided proposed re-examination questions to OCL counsel to be put to the OCL clinician. Again — not a good look. Justice Harris reviewed the governing principles on re-examination and explained, relying on *R. v. Candir*, 2009 CarswellOnt 8014 (C.A.) at para. 148, that:

• the permissible scope of re-examination is tied to its purpose and is limited to matters arising from cross-examination;

• re-examination is rehabilitative and explanatory in nature, allowing the party who called the witness to clarify or qualify answers given in cross-examination that were damaging to that party's case;

• re-examination is not an opportunity to introduce new subject matter that should have been addressed in examination-in-chief; and

• while a trial judge may grant leave to introduce new matters on re-examination, doing so requires that the opposing party be given the right to further cross-examination on those new facts.

In the context of a *voir dire* focused on a potential conflict of interest, the involvement of CAST — an aligned party — in shaping the re-examination of the OCL clinician, was inconsistent with the limited and rehabilitative purpose of re-examination and further undermined confidence in the independence of the process as a whole.

Justice Harris ultimately refused to permit the OCL clinician to give evidence of the child's views and preferences.

This case offers a clear lesson in how ***not*** to deal with conflicts. Had the clinician's concurrent employment with CAST been disclosed at the outset, the OCL could have taken any number of sensible, orthodox steps: assigning a different clinician, seeking the informed consent of the parties to proceed notwithstanding the dual role, or, failing consent, seeking directions from the court before evidence was gathered and affidavits sworn. Any of those paths would have allowed the issue to be addressed prospectively, on a full record, and without the distorting effects of hindsight. Ignoring a possible conflict is not the best strategy.

That said, even if the potential conflict had not been identified and addressed before the OCL clinician began her work on the file, that omission would not necessarily have been fatal. Conflicts are not binary problems. With timely disclosure and concrete steps to manage and mitigate the risk, it may still have been possible for the court to be satisfied that the clinician's independence had been preserved.

Importantly, the mere existence of a potential conflict would not necessarily have been fatal. Compare and contrast this case with *Donnelly v. Luman* (2025), 20 R.F.L. (9th) 131 (Sask. K.B.), discussed in the November 10, 2025 (2025-41) edition of *This Week in Family Law*. There, the alleged conflict arose because a lawyer acting for the husband had previously met the wife at a free legal clinic. The wife argued that confidential information had been shared and that the lawyer should therefore be removed from the file. The court rejected a categorical approach. Instead, it examined what actually occurred at the clinic, the structured and limited nature of the interaction, the absence of retained documents, and the professional framework governing summary legal services. On that evidentiary record, the court was satisfied that no disqualifying conflict existed.

Here, by contrast, the response to the potential conflict was not early disclosure and mitigation — but denial. The OCL took the position that there was no actual conflict of interest and that any perceived conflict, if one existed at all, was mitigated by the surrounding circumstances and the importance of hearing the child's voice. The difficulty with that position was evidentiary. As the *voir dire* demonstrated, the surrounding circumstances were not reassuring: the conflict had not been disclosed, no structural safeguards were in place, no ethical walls existed, and the evidence itself revealed alignment rather than independence.

It was also logically problematic. It was unrealistic to suggest that no perception of conflict would arise where a clinician purporting to act independently for the child was also a long-standing employee of the very party seeking to place the child in the custody of kith caregivers over the objections of the child's parents. In those circumstances, appeals to necessity and good intentions could not cure the underlying reliability problem.

From an advocacy perspective, it would have been far more effective to acknowledge the issue directly and focus on what, if anything, had been done to manage and mitigate the risk, rather than denying the existence of the problem altogether. Where a potential conflict is obvious, attempts to minimize or dismiss it tend to invite closer scrutiny, not reassurance.

For practitioners, the lesson is clear. The child's voice is essential, but it is not the only consideration. If it is gathered through a process that cannot be shown to be independent, it becomes evidence the court cannot safely receive.

Justice Harris's well-written and considered reasons make it clear that independence is not aspirational or symbolic. It is structural. And when it fails, even well-intentioned evidence will not be admitted. Notably, following the court's decision, counsel for the OCL advised that internal changes were being made to address the issues identified in the *voir dire* — an acknowledgement the court expressly endorsed as necessary to safeguard children's interests and ensure the effective and independent representation of children in child protection proceedings. Somewhat surprisingly, no similar acknowledgement was made by CAST, notwithstanding that conflicts of this nature are an obvious risk in child protection litigation and one that child protection agencies ought to be alive to and actively managing.

