

FAMLNWS 2020-42
Family Law Newsletters
November 2, 2020

— Franks & Zalev - This Week in Family Law

Aaron Franks and Michael Zalev

© Thomson Reuters Canada Limited or its Licensors (excluding individual court documents). All rights reserved.

Contents

- Section 9 of the *Child Support Guidelines*: A Hot Mess Inside a Dumpster Fire Inside a Train Wreck
- Everything You'll *Ever* Need to Know About Severance

Section 9 of the *Child Support Guidelines*: A Hot Mess Inside a Dumpster Fire Inside a Train Wreck

Smederovac v. Eichkorn (2020), 41 R.F.L. (8th) 270 (Man. C.A.) - Steel, Mainella, and Simonsen JJ.A.

Jake Tapper, one of the CNN anchors, recently described the presidential debate between Joe Biden and Donald Trump as a "hot mess inside a dumpster fire inside a train wreck." Funny, but we thought he may have been referring to section 9 of the *Child Support Guidelines*.

Shortly after the Supreme Court of Canada released *Contino v. Leonelli-Contino* (2005), 19 R.F.L. (6th) 272 (S.C.C.), its seminal decision about child support in shared parenting cases under s. 9 of the *Child Support Guidelines* (the "*Guidelines*"), Professor Rollie Thompson raised some significant concerns about how the Court's decision would actually work in practice. In his excellent annotation, which you will find if you open the *Contino* decision on Westlaw, Professor Thompson noted as follows:

Justice Bastarache wrote the reasons of the Court (Fish J. dissented). The Court's reasons really divide into three parts:

- (1) a series of propositions about section 9 that are mistaken and thus rejected;
- (2) a general method for calculating child support under s. 9; and
- (3) an application of the method to the facts of the case.

The first two parts are very helpful, while the last part produces a conclusory result: \$500 a month on these facts. Not \$400 (Court of Appeal), not \$688 (Divisional Court), not \$100 (motions judge). We know why each of the lower courts got it wrong, but we are left wondering why \$500 was "right".

.....

The Supreme Court also repeats the frequent complaints of courts in section 9 cases, demanding more "information" and more "evidence" from the parties. The Court of Appeal is criticised for using "common sense" assumptions about parental spending in shared custody cases, even apart from its erroneous use of a multiplier. **That's the problem with the exercise of "discretion", it requires a surfeit of facts, partly because we never know which facts will turn out to be important, which facts will move this decision-maker on this day in this case.**

But these are family litigants, real parents, not cost accountants. Most have limited resources, more limited than the Continos. Many will not have lawyers or will have limited legal advice. And, even if they were cost accountants, some of this cost information remains essentially indeterminate: how much of the costs of housing or cable television or car should be allocated to the child's expense budget? would mom or dad have rented a smaller apartment or lived in

a different neighbourhood without their child care responsibilities? did the power bill go up because that teenager has so many showers or was that because of something else? . . . [emphasis added]

Over the last 15-years, it has become clear that Professor Thompson had good reason to be concerned about how *Contino* would actually work in practice, and the Manitoba Court of Appeal's recent decision in *Smederovac v. Eichkorn* provides yet another example of why the shared parenting provisions of the *Guidelines* simply **must** be amended.

The parties in *Smederovac* cohabited from 2009 to 2015 and had two children together. In 2018, they agreed to a shared parenting arrangement, but they could not agree on what the appropriate amount of child support should be under s. 9 of the *Guidelines*.

The trial judge found that the father was earning \$100,729 a year, and that the mother was earning \$175,000 a year. A straight set-off, therefore, would have required the mother to pay the father \$876.40 a month. The trial judge, however, was of the view that the mother had a higher standard of living because her house was "much more expensive and luxurious" than the father's, and that she had access to various benefits that the father did not have because she was self-employed.

As a result, the trial judge ordered the mother to pay the father \$1,500 a month in child support (i.e. \$623.60 a month more than the set-off amount) so that the standard of living in his home would be comparable to the standard of living in the mother's home.

The mother appealed, and asked the Manitoba Court of Appeal to vary the trial judge's order to provide that she would only have to pay the father the straight set-off amount of \$876.40 a month.

The Manitoba Court of Appeal started by first providing a useful summary of how courts are supposed to deal with claims under s. 9 of the *Guidelines*:

[19] In the *Contino* decision, the Supreme Court of Canada confirmed that, in shared custody situations where the 40 per cent threshold has been established, **there was not any presumption that the table amount was the appropriate amount, nor was there any formula mandated**. Rather, Bastarache J observed (at para 24):

. . . **The court "must" determine the amount of child support in accordance with the three listed factors** once the 40 percent threshold is met. There is no discretion as to when the section is to be applied: discretion exists only in relation to the quantification of child support . . .

[20] Still, it is not a discretion that is meant to set aside all rules and predictability. **The three factors structure the exercise of the discretion and are to be considered in a holistic fashion with none of them prevailing. The weight of each factor under section 9 will vary according to the particular facts of each case** (see para 82).

[21] **The first factor in section 9(a) requires the court to consider the set-off amount** (the amounts set out in the applicable tables for each of the parents). **However, that is to be considered as a starting point only in the calculation, not an end point**. A court will depart from the set-off amount or make adjustments to it if it is inappropriate in light of the factors considered under sections 9(b) and 9(c).

[22] **Under section 9(b), the court will be called upon to examine the budget and actual expenditures of both parents in addressing the needs of the children and to determine whether shared custody has, in effect, resulted in increased costs globally**. Increased costs would normally result from duplication resulting from the fact that the child is effectively being given two homes. The court would then apportion the total of such expenses between the parents according to their respective incomes (see *Contino* at paras 52-53).

[23] As for section 9(c), Bastarache J wrote as follows (at para 68):

Section 9(c) vests in the court a broad discretion for conducting an analysis of the resources and needs of both the parents and the children. . . The court will be especially concerned here with the standard of living of the child in each household and the ability of each parent to absorb the costs required to maintain the appropriate standard of living in the circumstances.

[emphasis added]

The Manitoba Court of Appeal agreed with the Saskatchewan Court of Appeal's decision in *Wetsch v. Kuski* (2017), 1 R.F.L. (8th) 290 (Sask. C.A.) that "[t]he purpose of section 9 is not to equalize household incomes, but rather to make adjustments for any significant and appreciable variations in household standards of living and the financial realities of the parties, including the ability to absorb costs related to maintaining a similar standard of living[.]"

Upon reviewing the trial judge's decision, the Court of Appeal concluded that she had made a number of errors when she applied s. 9 to the facts of the case, including that she "did not explain in what way the standard of living of the children differed in a material way between the two households", or "how the amount of \$623.60 was arrived at[.]"

In what can only be described as a well-meaning yet colossal understatement, the Court of Appeal opined that it might be time for *Contino* "to be reconsidered to provide parties with more clarity and minimize litigation[.]" However, based on the law as it currently stands, the Court concluded that it had no choice but to send the matter back to be reheard in the court below because the record did not contain the evidence it would have needed to conduct a proper *Contino* analysis of its own. That being said, the Court also strongly encouraged the parties to try to resolve the matter, bearing in mind that "they have probably paid more in legal fees than they stand to gain in further litigation, not to mention the ongoing emotional trauma to the parties, as well as their children."

The Court of Appeal's decision is clearly correct based on the law as it currently stands. However, in our view, the law as it currently stands simply does not work. It creates significant financial incentives for parents to argue about the parenting schedule to either meet or defeat the 40 percent threshold for engaging s. 9; it requires parents to incur significant costs to gather, organize and marshal the necessary evidence for a proper *Contino* analysis; it leads to highly unpredictable results; and it often leads to appellate courts sending the matter back to be heard on better evidence.

Faced with *Contino*, several appellate courts across the country have found that it is an error of law for courts to not consider and apply the s. 9 factors - which then requires the matter to be sent back for a rehearing: *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.). Anecdotally, many of these parties, rather than face the cost of a re-hearing, simply choose to settle their case. That is not how the system is supposed to work. That is not "justice."

Our compliments to the Newfoundland Court of Appeal who decided that, absent sufficient evidence of all the s. 9 considerations mandated by the Supreme Court of Canada in *Contino*, the basic set-off amount simply applies - that may not be *strictly* accurate in law (the Court relies on para. 54 of *Contino* to get there), but it is entirely practical in the court of common sense: *Burgess v. Burgess* (2016), 75 R.F.L. (7th) 259 (N.L. C.A.).

We don't know how many lawyers, trial courts, appellate courts and academics need to say it, or how many times it need be said, but as Philip Epstein put it many years ago in the September 25, 2012 edition of *TWFL*, "[s]ection 9 doesn't work well and most jurisdictions have wrestled over how to deal with shared parenting and child support. We need a new model. This one is broken." We could not agree more.

If it ain't broke, don't fix it; but when it's clearly broke, please do.

Everything You'll Ever Need to Know About Severance

Hicks v. Gazley, 2020 CarswellAlta 1634 (Q.B.) - Lema J.

Section 8 of the *Divorce Act* allows a Superior Court to grant a divorce if "the spouses have lived separate and apart for at least one year immediately preceding the determination of the divorce proceeding and were living separate and apart at the commencement of the proceeding."

Subsection 11(1) of the *Divorce Act* also provides that, before a court can grant a divorce, it **must** satisfy itself that "reasonable arrangements have been made for the support of any children of the marriage, having regard to the applicable guidelines."

While these are the only statutory requirements for obtaining a divorce, the case law has established additional principles for courts to consider when deciding whether to grant a divorce. In *Hicks v. Gazley*, Justice Lema thoroughly reviewed the case law about this issue, and provided a comprehensive summary of the applicable principles.

The parties in *Hicks* were married in 2014 and separated in 2018. The husband was in a new relationship, and was planning to marry his new partner on September 19, 2020. As the husband could not remarry without first divorcing the wife, and as the husband and wife had still not yet resolved their case, the husband brought a motion to sever the divorce.

As the husband and wife did not have any children together, s. 11(1) of the *Divorce Act* did not apply. However, the wife took the position that the husband's motion should be dismissed because he had not complied with his disclosure obligations or provided complete answers to his undertakings.

Based on the Alberta Court of Appeal's decision in *Brousseau v. Brousseau*, 2017 CarswellAlta 330 (C.A.), Justice Lema concluded that the "test for severance [in a divorce context] is ultimately whether it is fair in the circumstances." Similar tests for severance (some also require a proof of lack of prejudice) are applied by courts across Canada. See e.g. *Clow v. Palmer* (2009), 73 R.F.L. (6th) 65 (P.E.I. C.A.) at para. 35, where the Prince Edward Island Court of Appeal noted that, "the rule allowing a divorce to be severed should be used only in cases where no prejudice results, it is fair in the circumstances and there is compliance with s.11(1)(b) of the *Divorce Act*." See also *Behnami v. Mirakhor* (2013), 40 R.F.L. (7th) 403 (Sask. Q.B.); *Mullin v. Sherlock* (2015), 73 R.F.L. (7th) 373 (Ont. S.C.J.); and *Dhillon v. Dhillon* (2017), 97 R.F.L. (7th) 199 (B.C. S.C.).

Although Justice Lema could have just decided the motion based on whether he thought the husband's request for severance was fair, he took the time to provide a comprehensive summary of the factors that courts across Canada have considered when considering whether to grant a motion to sever the divorce. A companion list was also provided in *Spiring v. Spiring*, 2004 CarswellMan 515 (Q.B.).

As Justice Lema explained in his decision, factors that favour granting a request to sever a divorce include the following:

- where the *only objection was outstanding custody and access* issues, and those issues *had in fact been addressed* by order. ("Case management will hopefully help the parties resolve [the actually outstanding issues]"): *Brousseau v. Brousseau* at para 3;
- asserted "*legal disadvantage*" to claim for spousal support groundless in light of separation-agreement waiver of such support: *Baginski v. Baginski* [2018 ONSC 525 at para. 30];
- asserted prejudice to spouse via *loss of benefits coverage* on divorce *not recognized* (separation agreement obliged benefit-carrying spouse to continue benefits only "for so long as [benefits are] available to her for his benefit" - no indirect duty to hold back pursuit of divorce): *Baginski* at para 31;
- asserted prejudice to particular child support (*loss of benefit coverage*) groundless in light of consent order obliging benefit-carrying spouse to cover child: *Baginski* at para 34;
- where opposing spouse would no longer (if severance and divorce) be covered by would-be severer's health benefits, but coverage already lost and that spouse able to obtain her own coverage: *Splett v. Pearo* [2011 ONSC 5329 at paras. 94-97];
- asserted legal disadvantage if would-be severer *died intestate and other party is no longer a spouse for the purposes of certain succession legislation not recognized* (support obligations partly secured by life-insurance beneficiary designations, "no evidence . . . that such an intestacy is likely to occur", legislative provision preserving an equalization

position on death of a spouse, and other legislation permitting support claims by divorced spouse): *Beasley v. Beasley* [2019 ONSC 1562 at paras. 66-70];

- would-be severer "has a fiancée [overseas] whom he wishes to marry and bring to Canada": *Butt v. Mansoor* [2018 ABQB 927 at para. 46];
- where equalization claims "can be dealt with . . . regardless of whether the divorce is severed from the corollary relief" and the *only argument against severance was that "other relief had not been granted."* Per Lemay J, citing *Al-Saati v. Fahmi*, 2015 ONSC 1114 (Ont. S.C.J.) (Gray J.): ". . . disadvantage must mean a legal disadvantage, rather than using the divorce as leverage for other issues" [in the context of an Ontario rule permitting severance where (in part) "neither spouse will be disadvantaged by the order"]: *E.M.B. v. M.F.B.* [2020 ONSC 2474 at paras. 33-34];
- severance "*will not negatively affect either of the parties . . . Nor is there any other potential unfairness which may arise. . . . granting of a divorce may relieve the children of the marriage from any pressure relating to a potential reconciliation of their parents*": *Oosterhuis v. Oosterhuis* [2015 ABQB 757 at para. 27];
- [where severance opponent points largely to prejudice in matrimonial-property sphere] ". . . the divorce action and the matrimonial property action are distinct causes of action . . . There is *no legal basis for this Court to deny a divorce simply on the basis that the matrimonial property action remains unresolved*": *Marbach v. Marbach* [2008 ABQB 516 at paras. 43-44];
- where severance opponent was "fearful that if the husband gets the divorce he wants now, he will *delay* the balance of the proceedings." However, court found *wife was responsible for the delay*. Court also found no disadvantage to wife, in remaining litigation, arising from severance: "*Neither can I see how the granting of a severance would put the husband in a stronger position in the balance of the litigation. In a complicated case such as this, a desire for judicial "tidiness" should yield to the request to end the marital status of the parties*": *Spiring v. Spiring* [2004 MBQB 258 at paras. 53-54];
- where asserted prejudice concerned *impact on opposing spouse's rights (property claims) in another jurisdiction (India) but evidence of such rights lacking*: *Singh v. Kaur* [2015 ONSC 1279 at paras. 13-25];
- where would-be severer wishes to *remarry, over decade-long separation, "limited issues and specific assets to fight over", and short runway to trial* to resolve them: *Boyd v. Boyd*, [2008 ABQB 497 at paras. 19-26]; and
- where granting severance would *disrupt in-progress case management efforts*: *Lindsay v. Lindsay* [[2010] O.J. No. 204 (Ont. S.C.J.), as cited in *Chateauvert v. Chateauvert*, 2019 ONSC 81 (Ont. S.C.J.) at para 67]. [emphasis in original]

On the other hand, the following factors weigh *against* granting severance:

- "*where it is preferable if all matters [divorce and corollary relief] proceed at one time*": *Miles v. Miles* [2004 ABQB 361 at para. 5];
- *no urgent need* for severance: *Miles* at para 5. See also *Bhullar v. Bhullar* [1997] B.C.J. No. 2845 (B.C. S.C.)] at para 26;
- *no compelling evidence* suggesting severance would be *advantageous*: *Miles* at para 5;
- the would-be severer's "*possible departure from the jurisdiction would make enforcement of any subsequent [spousal support] order . . . difficult*": *Bhullar* at para 26;
- a divorce might *impede one spouse's claims for relief in another jurisdiction*: *Bhullar* at para 26;

- would-be severer *non-compliant with disclosure orders*; severing his claim for divorce "could potentially prejudice a claim [the other spouse] might have against [his] estate in the event of insolvency": *Mullin v. Sherlock* [2015 ONSC 7587 at paras. 6, 51 and 52];
- would-be severer *failing "to keep his financial disclosure evergreen until the proceedings have been disposed of*. In those circumstances, there is *no basis for determining [the other spouse] will suffer no prejudice*": *Oakes v. Oakes* [2011 ABQB 418 at para. 16];
- "*if severance granted, [the would-be severer] would be more likely to continue his past failure to comply with his disclosure obligations*". Dunlop J. added that: ". . . if [would-be severer] demonstrates compliance with his disclosure obligations, there may be a change in circumstances justifying a reconsideration of severance": *Butt* at paras 44 and 47;
- would-be severer failing to disclose pension-plan details; *risk (if divorce granted) of pension entitlements being transferred to other spouse's prejudice*: *Snow v. Snow* [2013 ABQB 408 at para. 21];
- *no evidence that other spouse is "dragging the matrimonial litigation out"*: *Butt* at para 45;
- *no evidence severance would accelerate progress of long-lagging proceeding*: *Oakes* at para 19 (better to invoke "effective case management tools");
- insufficient uncontroverted evidence of "an appropriate level of child support." Another contra factor was *outstanding requests by the severance opponent for undertakings and disclosure*. C. Jones J. deferred a decision on severance: "I need to assess *progress which has been made towards resolving corollary relief issues* before I can be comfortable arriving at the conclusion that Mr. S is acting responsibly": *S. (M.E.) v. S. (P.J.)* [2013 ABQB 281 at paras 13-14];
- severing would make it "*more difficult and more expensive for the [other spouse] to maintain her claim for spousal relief* because of the [would-be severer's possible] departure from [the] jurisdiction and his *resistance to spousal support*." On latter aspect, one signal was husband's significant (\$37K) spousal-support arrears to a former spouse. Per Veit J. (on the spousal-support aspect): "[T]here remains a *serious issue of collateral relief [spousal support] to be tried* " and "*[I]t is likely that the [spousal support] issue will not be dealt with reasonably if it is severed from the divorce judgment*": *Zimmerman v. Zimmerman* [1992 CarswellAlta 319 (Alta. Q.B.)];
- *risk of financial prejudice* (likely maintenance claim against would-be severer; that spouse having no life insurance; maintenance claim not attaching to an estate; a former spouse having no status to pursue family-maintenance relief) *outweighing prejudice to would-be severer from postponement of his proposed wedding*: *Al-Khoury v. Al-Khoury* [2011 NSSC 122 at paras. 18 19, 22-23];
- severance (and resulting divorce) would *eliminate would-be severer's "incentive to press on with the matrimonial property division"* and would lead (on his new marriage) to new-spouse support obligations jeopardizing existing spouse's support: *Pokorski v. Pokorski* [2009 ABQB 276 at para. 23];
- where severance (and a resulting divorce) might *deprive the other spouse of the benefit of medical insurance*, particularly where other spouse has chronic health problems and surgery imminent: *Shawyer v. Shawyer* [2016 ONSC 830 at paras. 48-65]; and
- where the *sole purpose of seeking severance was to ensure an Ontario divorce before foreign (Tunisian) courts deal with the opposing spouse's request for divorce there*: *Bayar-Mestiri v. Mestiri* [2020 ONSC 3620 at paras. 21-24]. [emphasis in original]

In dismissing the husband's request to sever the divorce, Justice Lema agreed with the wife that the husband had not complied with his disclosure obligations and properly answered his undertakings, and concluded that severance would be unfair to the

wife because it would reduce the husband's "incentive to provide the outstanding information and generally advance, or respond in, the remaining litigation[.]"

Although Justice Lema recognized that dismissing the husband's request for severance would prejudice him by forcing him to cancel his wedding, he found that any prejudice to the husband was "self-imposed" as "he chose to plan and book the event knowing that the wife was opposed to severance and before this application could be heard."

But that was not the end of the matter. Almost immediately after Justice Lema dismissed the motion, the husband brought yet another motion to sever the divorce. We will tell you all about it in next week's edition of *TWFL*. Some litigants just like to see their names in lights.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.