

Section 4(b) of the Federal Child Support Guidelines:

ALLISON

FIELDBERG IS A

SECOND YEAR LAW

STUDENT AT THE

UNIVERSITY OF

VICTORIA. SHE

COMPLETED HER

B.A. (HONOURS)

IN ENGLISH

LITERATURE AT

THE UNIVERSITY

OF CALGARY.

Why Two Kicks at the Can isn't Fair

I. Introduction

When family dissolution occurs, custodial parents ask that child support be paid by the non-custodial parent. This demand, upheld in the courts and in legislation, illustrates our society's basic belief concerning the family: it is a social unit in which parents have obligations of support and responsibility to their children even after the family comes apart. The Federal Child Support Guidelines (the "Guidelines") came into effect on May 1, 1997 and are the mechanism by which courts now decide what dollar figure a non-custodial parent must contribute to his or her child's living expenses.¹ Enactment of the Guidelines signalled a departure from the traditional approach to deciding corollary relief, whereby judicial discretion determined support levels according to the needs of the child and the means, needs, and circumstances of the parents as demonstrated by the budgets produced by each party. Under the Guidelines, the amount of child support a non-custodial parent must pay is now directly correlative to this parent's income and the number of dependent children in the family, and is referred to as a "Table amount."²

The Guidelines are intended to make child support awards more consistent, to decrease the friction between parents making disparate claims of their ability to contribute, to make the calculation of child support more objective, and to decrease the number of cases going to court. In short, the Table amounts were intended to eliminate to a large degree the perceived subjectivity and idiosyncrasy of child support awards up to this point.³ Section 1 of the Guidelines explicitly states this legislative intent.⁴

To some degree, the Guidelines have met these goals. Judges now rely on Table amounts to determine child support awards, and although still a complex process, this determination is assumed to be more objective.⁵ However, there is still a large element of judicial discretion and therefore subjective decision-making evident in the determination of child support awards for wealthy families. Where the non-custodial parent has an income in excess of \$150,000, judges may choose between two different subsections of the Guidelines to

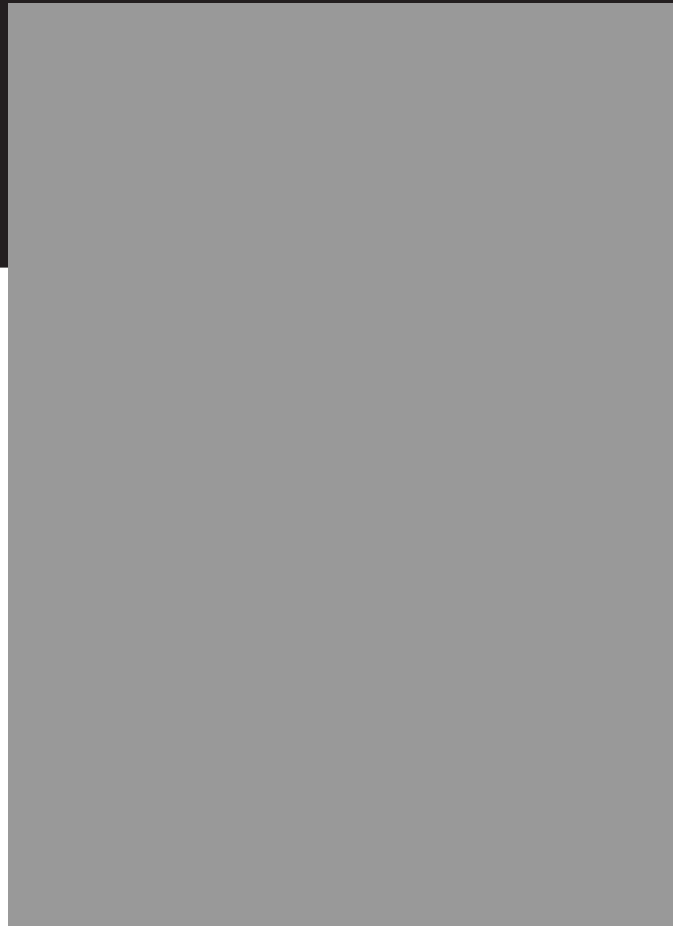
1 Federal Child Support Guidelines, SOR/97-175.

2 Schedule 1 to the Guidelines outlines the Table amounts correlative to income and the number of children.

3 Allan Shipley, "Custody Law Reform in Ontario: The Children's Law Reform Act", in B. Landau, ed., *Children's Rights and the Practice of Family Law* (Toronto: Carswell, 1986), at 164.

4 See note 1 section 1.

5 In the *Paras* formula, the determination of child support was based on totaling up the amount of support required and apportioning that amount between the two parents. This involved a determination of each party's ability to contribute and made the quantum of child support especially difficult to ascertain.



award child support. Pursuant to section 4(a), Judges award the Table amount of support for the first \$150,000 plus a percentage of the income exceeding \$150,000, depending on the number of dependent children in the family. If the court finds this amount “inappropriate”, it can depart from this calculation under section 4(a) and use section 4(b) to award child support based on the Table amount for the first \$150,000 of income and then for the balance, determine child support based on the means, needs, and other circumstances of the children.

This paper will highlight the problems inherent in section 4(b) and comment on how this subsection produces a disparity in the way in which child support is calculated between families whose incomes are above \$150,000 and those whose incomes are under this amount. To illustrate, when a parent’s income is below \$150,000, child support is calculated by *two* measures: the Table amount is awarded, plus any special or extraordinary expenses calculated under section 7 that can be justified as necessary in relation to the child’s best interests and reasonableness of the expense.⁶ By contrast, families with incomes over \$150,000 have *three* measures to determine child support if the level is determined under section 4(b): the Table amount in respect of the first \$150,000, plus the amount the court, in its discretion, considers appropriate in regards to the balance of the income, *plus* any special or extraordinary expenses under section 7.⁷

⁶ Section 3 of the Guidelines outlines this presumptive rule.
⁷ See note 1 section 4.

As a result, wealthy families have two opportunities by which to claim discretionary expenses and poorer families have only one opportunity. This is clearly unfair, as the application of section 4(b) broadens the means by which wealthy families can claim support as compared to families with incomes under \$150,000. Therefore, it is necessary to rein in the use of section 4(b) through stricter budget analysis, lessening the degree of latitude given wealthy families in the provision of discretionary expenses, and by limiting the use of section 4(b) to provide for estate planning. Judicial discretion in itself is not necessarily the problem, as many of the Guidelines require judicial discretion in their application.⁸ The problem however, as exemplified in *Baker v. Francis* in reference to budget analysis, is that wealthier families apply for child support under a lesser degree of judicial scrutiny than do poorer families.

II. *Baker v. Francis*

Baker v. Francis (“*Baker*”), decided by the Supreme Court of Canada in September 1999, affirms the use of section 4(b) as a means to determine child support for wealthy families.⁹ Although the child support level in this case was determined using section 4(a), this case is useful in that it discusses section 4(b), as well as the use of budgets in the determination of child support for the wealthy family. In *Baker*, the parties married in 1979, had two children, and divorced in 1987. At the time of the divorce, the appellant Baker was employed as a lawyer in a large Toronto firm, while the respondent Francis worked as a high school teacher. Shortly after the divorce, the appellant experienced a dramatic upsurge in his financial situation. Through a career change from lawyer to president and CEO of 7-Up Canada Inc., his net worth rose to an estimated \$78,000,000.

The case was first brought before the Ontario Divisional Court in 1997.¹⁰ At that time, the appellant father’s annual income was \$945,538. As his income greatly exceeded \$150,000, there existed no articulated Table amount. Therefore, in order to determine child support, the trial judge used section 4(a) to determine a child support award of \$10,034 per month for the family’s two children who were then aged 11 and 13.¹¹

At the Ontario Court of Appeal, the appellant Baker argued that the Court should use section 4(b)(ii) of the Guidelines to craft a more “appropriate” award.¹² He was, in essence, arguing that the child support level determined under section 4(a) greatly exceeded his children’s reasonable needs and was therefore “inappropriate.”¹³ However, the Ontario Court of Appeal affirmed the trial judge’s decision, finding that the amount of support awarded by the trial judge was not inappropriate, as inappropriate must mean “inadequate.”¹⁴

Although Baker continued his appeal to the Supreme Court of Canada, Supreme Court Justice Bastarache, speaking for the unanimous majority, affirmed the decision of the Ontario Court of Appeal. He stated that the trial judge did not abuse her discretion by applying section 4(a) to award child support which greatly exceeded the last-stated Table amount correlative to an income of \$150,000.¹⁵ Bastarache affirmed the trial judge’s award by stating that to focus

8 A few examples of where judicial discretion is also invoked are section 3(2)(b), where child support is awarded for children over the age of 19, and section 5, where support is awarded against a spouse acting in place of a parent.

9 *Baker v. Francis*, [1999] Can. Sup. Ct. LEXIS 58.

10 *Francis v. Baker* (1997), 150 Dominion Law Reports (4th) 547.

11 See above at 559.

12 (1998) 157 Dominion Law Reports (4th) 9.

13 See above at 7.

14 See above at 14.

15 See note 9 at 5.

solely on the size of the child support payment to determine its appropriateness disregards how this child support payment actually meets the needs of the child.¹⁶ Secondly, in regards to section 4(b), Bastarache stated:

The plain wording of s.4(b)(i) dictates that these [wealthy] children can predictably and consistently expect to receive, at a minimum, the Table amount for the first \$150,000 of their parents' income. They can further expect that a fair additional amount will be awarded for that portion of income which exceeds \$150,000.¹⁷

Clearly, Bastarache affirms that the child support award for that portion of income that exceeds \$150,000 can be fairly determined under section 4(b)(ii) if the amount under section 4(a) is found to be inappropriate. Implicitly, the Court affirms also that it is fair that wealthy families have two opportunities to rely on judicial discretion to increase the level of support awarded beyond the Table amount of \$150,000.

By contrast, for families with incomes within the stated Table amounts, there is only one avenue by which discretionary expenses can be awarded. For these families, there is no legislative imperative for judges to take two “stabs” at providing discretionary expenses like there is under section 4(b). In this way, for children of poorer families, the definition of “support” and the means by which it is determined is narrower than for the children of wealthier families.¹⁸ In this endorsement of section 4(b), the Court fails to recognize the disparity produced by the section and therefore fails to make any recommendations as to how its application can be made more fair.

III. Budget Analysis

One way to make the application of section 4(b) more fair is to adopt a different means of budget analysis. Unfortunately, the *Baker* judgment does not provide an alternative means by which to use budgets in the case of the wealthy family, but instead, only goes so far as to recognize their inherently problematic nature. To illustrate, in *Baker* the Supreme Court of Canada found that consistent with section 21(4) of the Guidelines, a custodial parent is required to provide certain financial information in the form of a child expense budget when the non-custodial parent earns more than \$150,000.¹⁹ These budgets are used to determine child support under section 4(b)(ii) and inform the court as to how special or extraordinary expenses should be awarded under section 7. However, the Court states that custodial parents need not justify each and every budgeted expense,²⁰ acknowledging that the “inherent imprecision” of child expense budgets must be kept in mind.²¹ Instead, budgets should constitute evidence of a *general* living standard, and speak to the reasonable needs of the child even in their over or underestimation of actual expenses.²²

As a result, *Baker* allows that the accuracy of budgets in the case of wealthy families need not be subject to rigorous examination by the court. Although rightly acknowledging the difficulty in using budgets, in that when family members live together as a household it is almost impossible to dissect which aspect of a particular expense is attributable to a particular individual, the Court seems unsympathetic to the fact that for poorer families, budgets *are*

16 See above at 44.

17 See above at 32.

18 Laura Morgan, “Child Support and the Anomalous Cases” (1996) 13 Canadian Journal of Family Law at 207.

19 See note 9 at 37.

20 See above at 40.

21 See above at 40.

22 See above at 39.

strictly scrutinized in the presumption that poorer families should not be liberal with their expenses.

Therefore, instead of a generalized overview of a wealthy family's expenses and a subjective determination by the judge if these expenses are reasonable or not, it is necessary to expect that wealthier families present not just the expense, but what percentage of each parent's income that expense constitutes. The custodial parent must be expected to list the actual expenditure on different items such as food, clothing, or school supplies, and the percentage of total income these expenses constitute. Then, the non-custodial parent must itemize these expenses in the same way. As a result, both parents will provide the percentage of total parental income that expenses such as food, housing, and extra-curricular activities compose. Then when a judge decides child support on the basis of a budget, it will be a comparison of the relative abilities of each parent to contribute to their child's living expenses, rather than a "wish list" of expenses by one parent used to indemnify the other. This requires financial disclosure by both parties, and lends a sense of transparency to the process of deciding child support. Hopefully, this type of accounting will result in an "accountability" on the part of each parent for the expenses they incur.

IV. Special or Extraordinary Expenses under Section 7

In a similar vein, because there is often money available to provide for special or extraordinary expenses under section 7 within wealthier families, whether through the application of section 4(a) or (b), awards for special expenses often include those never contemplated prior to family breakdown. In this way, special expenses may become a tool used not to further the child's best interests, but instead to punish the non-custodial parent. As a result, the determination of special expenses could be viewed as a "win as much as you can" proposition: if there are financial resources available to provide for private kayaking lessons, the custodial parent is entitled to seek that expense on behalf of their child and claim its reasonableness, even if private kayaking lessons were not provided to the child prior to family breakdown.²³

As well, because special expenses for the wealthy family are not subject to the same degree of scrutiny as they might be for a poorer family because of the availability of financial resources, judicial decisions as to which expenses are allowed and which are not, appears capricious and arbitrary in some situations. For example, special or extraordinary expenses and their reasonableness must be determined in context with the available financial resources of the family. However, it is generally acknowledged that expenses considered extraordinary in a typical family can be quite ordinary in a wealthy one. Therefore, where a discretionary expense moves from extraordinary to reasonable in the context of a wealthy family's available financial resources is ultimately within the particular judge's discretion. As in the case of *Greenwood v. Greenwood*, a judge may find in his or her discretion that country club membership fees and the acquisition of a drum kit are reasonable discretionary expenses, but that the purchase of a

²³ The *National Post* reports in the case of *Simon v. Simon* (1997), 34 Reports of Family Law (4th) 310, that the custodial mother claimed expenses of \$10,000 for hockey camp and \$300 per hour for golf lessons; A. Matte, "Millionaire NHLer in court battle over providing child support" *National Post* (17 January 2000). Found at <http://www.nationalpost.com/home.asp?c=0001177179066>

baby grand piano is not, although none of these expenses was contemplated pre-divorce.²⁴ Instead, what is reasonable and what is extraordinary, and therefore disallowed, should be based on complete financial disclosure by both parents.

Therefore, the decision as to which special expenses will be allowed should come after a budget analysis, as outlined above, is completed. The judge will then have a more complete perspective of the financial means of each parent. Then, as with every family, these expenses must be shared by each parent with regards to their respective financial circumstances. Expenses not contemplated prior to family breakdown must be justified by the custodial parent. It is not fair to require one parent to provide for the whole expense, unless it is determined by the judge from an analysis of each parent's means, that it would be unfair to require the custodial parent to contribute. Determining section 7 expenses in this way could curb outlandish requests for special expenses by custodial parents and subject requests for special expenses to the same scrutiny as is applied to requests by poorer families.

V. Estate Planning

A further complication in determining child support for wealthy families occurs when the wealthy child's right to familial assets is enforced not only in the present, but into the future as well. Although it is clearly a benefit to wealthy children to make child support resemble estate planning, it also clearly extends beyond the legislative intent of the Guidelines, which were to allocate parental resources in the present. Within section 4(b), judicial discretion has extended child support from a determination of a child's immediate needs to a requirement that parents allocate their assets to protect that child's financial future. Laura Morgan suggests that as a result, support has a more expansive definition for wealthy families which includes post-age of majority support and post-age of majority trust funds and savings.²⁵

Clearly, child support in this case involved not only maintenance in the present, but an allocation of funds that would "vest" in the child's future in order to provide and protect for that child. Most often the disposition of child support is ordered in this way when the non-custodial, payor parent is a professional athlete. It is argued that a professional athlete's high-earning potential is short-lived, and the development of a trust acts to prevent harm to a child when his or her parent's income drops. In this way, child support acts as a protective measure for the wealthy children of professional athletes, ensuring that support levels and standard of living will not vary greatly as a result of fluctuations in the non-custodial parent's income. It also dictates that judicial discretion decide how a custodial parent will spend the child support awarded.

The decision in *Simon v. Simon* in the Ontario Court of Appeal comments on the assignment of child support to trust funds, and limits how judges in Ontario may extend the notion of child support in this way.²⁶ In this case, a professional hockey player signed a two-year contract giving him an annual income of \$1,200,000, at which time his ex-spouse applied

24 (1998) 37 Reports of Family Law (4th) 422.

25 See note 18 at 162.

26 [1999] Ontario Journal No. 4492 (Court of Appeal) (QuickLaw).

for an increase in child support. Initially awarded \$5,000 per month, of which \$1,000 was to be paid into an interest-bearing trust account to be established and administered as the parties agreed, the mother applied to the Ontario Court of Appeal to increase the child support award to \$9,215 per month and reduce the trust fund payment to \$750 on the basis that neither party had requested the trust fund allotment be varied.²⁷

The Ontario Court of Appeal had specific comments to make in regards to the establishment of trust funds. Although counsel for the respondent father had brought forth numerous American authorities in which judges have placed child support payments in trust accounts where the payor spouse was a professional athlete, Justice MacPherson stated that absent a good reason to impose a trust, the court should not do so.²⁸ Furthermore, MacPherson states that unless there is clear evidence that the custodial parent is misusing the support payments, the presumption is that the custodial parent will do their best to provide for the child's immediate needs as well as their future care and education.²⁹ Based on argument put forth in the Saskatchewan Court of Appeal in *Bachorik v. Verdejo*,³⁰ it is the custodial parent's prerogative to direct how the child support payment is ultimately to be used. In fact, MacPherson defers to the arrangements of the parents in regards to trust funds, and this is why he refused to support the variance in the trust fund contribution and reinstated the \$750 allocation.³¹

Aside from arguments in support of a custodial parent's right to dictate how a child support award will be spent, when trust funds are allocated within a provision like section 4(b) the Guidelines' objectives are undermined because there is no legislation which states that trust funds must be put in place as a function of child support. Although estate planning in this manner is a benefit to wealthy children, the allocation of some portion of the child support award to a trust fund cannot be extended to all families who apply for support under the Guidelines and is not required by legislation. Therefore, in order to prevent this misapplication of the Guidelines, judicial discretion should refrain from designating portions of child support as trust funds and instead defer to parents to arrange how a child support payment will be spent within the family.

VI. Conclusions

If we acknowledge that the use of section 4(b) will continue, then it would be prudent for family law practitioners and judges to reexamine how budgets are used to determine child support, how special expenses are awarded, if the allocation of trust funds make sense, and how child support is awarded to wealthy families in general in a way that is unfair to poorer families. To promote legitimacy within family law, and to promote the stated goals of the Guidelines, it would be best that child support for the wealthy family be determined under section 4(a) in most cases. However, because of the endorsement in *Baker* of the appropriateness of section 4(b), this does not seem likely. If section 4(b) continues to be applied, the

27 The initial child support agreement in 1994 was comprised of child support payments of \$2200 per month, where \$750 of this award would be placed in a trust fund.

28 See note 26 at para. 37.

29 See above at para. 37.

30 *Bachorik v. Verdejo* (1999), 175 Dominion Law Reports (4th) 633.

31 See note 26 at para. 40. The Simons had a pre-existing arrangement as part of their divorce order as to how much of the child support award would go into the trust fund.

above-mentioned changes would realign section 4(b) with objective 1(b) of the Guidelines, which is to “reduce the conflict and tension between spouses by making the calculation of child support orders more objective.” This would only benefit the great number of families whose economic relationships are prescribed by the Guidelines.

We want our court system to be a just, speedy, and efficient process; the Guidelines were intended to promote these goals. However, when families spend enormous amounts of time and money in court to interpret how the Guidelines apply to their families, this litigation produces a state of affairs which certainly does nothing to promote the best interests of the children involved. As we have been told in innumerable decisions by the Supreme Court of Canada, the best interests of the child are paramount, and it is necessary to reexamine the way child support is determined for the wealthy family in order to see that it conforms.