

**SUPREME COURT OF NOVA SCOTIA**  
**(FAMILY DIVISION)**

**Citation:** Foss v. Foss, 2011 NSSC 115

**Date:** 20110310  
**Docket:** 1201-059561  
**Registry:** Halifax

**Between:**

Clinton Floyd Foss

Petitioner

v.

Dawn Louise Foss

Respondent

**Judge:** The Honourable Justice Elizabeth Jollimore

**Heard:** March 10, 2011

**Written Decision:** March 24, 2011

**Counsel:** Clinton Floyd Foss on his own behalf  
Barbara MacLellan, on behalf of Dawn Louise Foss

**By the Court:**

**Introduction:**

[1] The *Federal Child Support Guidelines*, SOR/97-175 have accustomed us to a rote calculation of child support. In contrast, section 9 emphasizes the objectives of fairness, flexibility and recognition of the actual conditions, means, needs and other circumstances of each parent and the children, even if to the detriment of predictability, consistency and efficiency, as Justice Bastarache explained at paragraph 33 of *Contino v. Leonelli-Contino*, 2005 SCC 63.

[2] This is an application to vary child support where parents now share custody of their two daughters.

**Background**

[3] Clint Foss and Dawn Foss divorced in 2008. Their Corollary Relief Judgment provided that they would have joint custody of their two daughters and the girls' primary care would be with their mother. The Corollary Relief Judgment stated the parents' goal that the girls would be with each parent equally as the parents agreed.

[4] The Corollary Relief Judgment stated that Mr. Foss' annual income was \$40,000.00. Ms. Foss was unemployed at the time and her annual income was \$9,150.00. Mr. Foss was ordered to pay monthly child support of \$500.00. The Judgment stated this amount was slightly lower than that dictated by the *Child Support Guidelines* by virtue of special circumstances, though the reasons for this were not recorded as required by section 15.1(6) of the *Divorce Act*, R.S.C. 1985, c. 3 (2<sup>nd</sup> Supp.). Mr. Foss was ordered to pay significantly less than his proportionate share of the children's expenses if they were enrolled in the Excel program. Mr. Foss was ordered to maintain the children's health and dental insurance. The amount of that expense wasn't stated and that cost might explain why other amounts were less than mandated by the *Child Support Guidelines* or less than a proportionate sharing. The Corollary Relief Judgment also calculated an amount of arrears owed by Mr. Foss who had overpaid child support during one period of time and underpaid it during another.

[5] Mr. Foss applied to vary his child support payments in May 2010. His application also sought to vary the terms of the Corollary Relief Judgment relating to parenting time and transporting the girls for their time with each parent. The parents were able to resolve these issues on their own. I particularly note that they sought the assistance of a third party to determine the best interests of their older daughter and they followed the recommendations they received. As parents, they have the satisfaction of knowing that they made a decision in their daughter's best interests and that they did so co-operatively.

[6] They attempted to resolve the variation of child support payments through personal negotiation and took part in the court's conciliation process. They weren't successful in resolving

this very difficult issue but this detracts little from the importance of their success in resolving the application about their daughters' parenting time and reflects more on the complexity of the calculation of child support in cases of shared parenting.

### **Preliminary issue: a change in circumstances**

[7] Before I may vary a child support order, I must be satisfied that there is a change in circumstances that has occurred since the making of the child support order sought to be varied. This is required by section 17(4) of the *Divorce Act*.

[8] The girls now alternate between their parents' homes weekly. Until this change occurred, the girls' primary home was with their mother and the parents attempted to share the girls' time equally. The change in the girl's parenting arrangement is modest. Mr. Foss quite correctly says that the real change that has occurred since the last child support order was made has to do with the parents' incomes and not the girls' residence.

[9] Mr. Foss' income was \$40,000.00 in 2008. His annual income is now \$55,000.00. As well, Dawn Foss' annual income has increased. When the divorce was granted she wasn't working and her annual income was \$9,150.00. Her income is now approximately \$34,500.00 for the purposes of the *Child Support Guidelines*. In fixing \$34,500.00 as Dawn Foss' income, I have adjusted her earnings for her payment of union dues as required by section 16 of the *Guidelines* and section 1(g) of Schedule III of the *Guidelines*.

[10] The changes in the parents' incomes are a change in circumstances that has occurred since the making of the order Mr. Foss seeks to vary. As a result, I may consider his application.

### **The application**

[11] In dealing with Mr. Foss' application, I'm governed by the Supreme Court of Canada's decision in *Contino v. Leonelli-Contino*, 2005 SCC 63. There's no dispute that this is a case of shared custody, so I can move directly to determining the appropriate amount of child support.

[12] Mr. Foss has noted that approaches to setting child support in shared parenting circumstances vary: in some decisions, he says, the judge seems to stop at section 9(a) after calculating the difference between the amounts each parent would pay the other, while in other cases the judge's analysis goes farther. Without knowing specifically the cases Mr. Foss has read, I speculate the judges in the former cases were handicapped by a lack of sufficient and appropriate evidence to complete the analysis mandated by the Supreme Court's decision in *Contino v. Leonelli-Contino*, 2005 SCC 63. While Justice Basterache says, at paragraph 57, the appropriate response to that situation is an adjournment, many judges may be reluctant to add to the delay litigants may have experienced or to increase their costs.

[13] I'm not similarly handicapped. While the evidence I have is not complete, I have much more material than is usually the case. Dawn Foss has provided her own Statement of Income

and a Statement of Income for her mother, with whom she and her children live. She has also provided a Statement of Expenses showing the expenses of her household, allocating them between herself and her mother and identifying many of the children's direct expenses. Similarly, Mr. Foss has provided his own Statement of Income and a Statement of Income for his wife, Kerry Foss. He has also provided a Statement of Expenses showing the expenses of his household, allocating them between himself and his wife and identifying some of the expenses for the children in their household. Each parent has provided a Statement of Property. This information has been invaluable in allowing me to perform the analysis required by *Contino v. Leonelli-Contino*, 2005 SCC 63.

**Step one: section 9(a)**

[14] The first step of my analysis is identified at paragraph 44 of *Contino v. Leonelli-Contino*, 2005 SCC 63 as determining a simple set-off. At an annual income of \$55,000.00, Mr. Foss would pay \$742.00 for the support of his two daughters. At an annual income of \$34,500.00, Ms. Foss would pay \$487.00 to Mr. Foss for the support of their daughters. The set-off amount is \$255.00.

[15] The set-off amount has no presumptive value. According to Justice Bastarache at paragraph 49 in *Contino v. Leonelli-Contino*, 2005 SCC 63, the value of the set-off is bringing my focus on both parents' contribution, measuring each parents' fixed and variable costs so I can make adjustments to consider the increased costs attributable to shared custody and, then, further adjustments to ensure "the final outcome is fair in light of the conditions, means, needs and other circumstances of each spouse and child for whom support is sought."

**Step two: section 9(b)**

[16] The second step of my analysis involves taking into account any additional costs that arise by virtue of shared custody. This requires me to consider the exact nature of the girls' shared parenting arrangement. With shared parenting, the parents now share transporting the girls between households. In the past, this was largely, if not entirely, Mr. Foss' responsibility. Ms. Foss says that she now incurs an expense of \$40.00 each month for driving all of her children for their access. Ms. Foss has a third child and she assumes some responsibility for his transportation. In contrast, Mr. Foss' expense for transporting his daughters has decreased.

[17] There are a number of features that make this parenting arrangement successful for the parents and their daughters. The first is the parents' willingness to make the arrangement work. The next most significant contributor to the success of the arrangement is the girls' maternal grandmother, Marie MacIsaac. In many shared custody arrangements parents live in close proximity to each other. That isn't the case for Clint Foss and Dawn Foss. Clint and Kerry Foss neither live nor work in the immediate vicinity of Dawn Foss' home. The girls attend school near Dawn Foss' home. When the girls live with their father, in order for Clint and Kerry Foss to get to work on time each day, they take the girls to Dawn Foss' home early in the morning. At the end of the school day, regardless of where the girls are living any particular week, they return

to Dawn Foss' home where their grandmother supervises them until Dawn Foss returns home from work or Clint and Kerry Foss arrive to collect them. Ms. MacIsaac's presence enables the girls to share their time with their mother and father while maintaining their enrollment in their schools and continuing their relationships with friends and classmates who live in the vicinity of their schools.

[18] This arrangement places a burden on Dawn Foss' household to provide meals and snacks for the girls that would otherwise be Mr. Foss' responsibility. While one of the girls wakes early enough to have breakfast at her father's during the week she lives with him, the other doesn't and she has breakfast at her mother's each week day. Each parent packs lunches for the girls to take to school. Mr. Foss tries to pack enough so that there's an after school snack. When there isn't, the snack is supplied by Dawn Foss. In this regard, the shared parenting arrangement has not reduced her expense for feeding the girls as much as a shared parenting arrangement might.

[19] Mr. Foss doesn't give the girls a regular allowance. He gives them money when they ask for it. Since the girls go to their mother's home every day after school, she finances the requests for spending money that come with after school errands, activities and time with their friends. Dawn Foss' Statement of Expenses shows that she incurs more for these expenses than Mr. Foss does. Her expense for this is \$140.00 each month. Mr. Foss has no similar expense.

[20] The additional costs that arise by virtue of the shared custody arrangement are costs of \$160.00 each month. In determining this amount, I have allocated one-half of Ms. Foss' access transportation expense of \$40.00 to her daughters and one-half to her son.

### **Step three: section 9(c)**

[21] At paragraph 68 of Justice Bastarache's decision he tells me that section 9(c) vests me with "a broad discretion for conducting an analysis of the resources and needs of both the parents and the children" and reminds me to be especially concerned with the children's standard of living in each household and each parent's ability to manage the costs of maintaining the appropriate standard of living.

[22] At this step I am to recognize that a shared parenting arrangement may not result in any saving by Ms. Foss. Justice Bastarache, at paragraph 54 of *Contino v. Leonelli-Contino*, 2005 SCC 63, says it's possible to presume, in the absence of evidence to the contrary, that Ms. Foss' fixed costs are unchanged and her variable costs have been reduced only modestly.

[23] I am mindful of Justice Bastarache's comment at paragraph 51 of his reasons in *Contino v. Leonelli-Contino*, 2005 SCC 63: "one of the overall objectives of the *Guidelines* is, to the extent possible, to avoid great disparities between households." While this comment was made in his remarks about section 9(a) of the *Guidelines*, it was in the context of explaining why I retain discretion to modify the set-off amount if, considering the parents' financial realities, the set-off would "lead to a significant variation in the standard of living experienced by the children as they move from one household to the other".

[24] Ms. Foss has presented me with comparisons of the total incomes in each household, the assets of each parent (for Mr. Foss, this includes the assets he shares with his wife), the allocation of children's expenses and the monthly parenting responsibilities in each household. Her analysis shows that the annual gross income in Clint Foss' home is almost double the annual gross income in her own home. It shows that Clint and Kerry Foss have more assets: they are paying a mortgage on their fully furnished home, they have two cars and savings and Kerry Foss contributes to a pension, while Dawn Foss rents space in her mother's home, has a few furnishings, one vehicle and a pension.

[25] Both parents pay for the girls' day-to-day clothing; they equally share the cost of coats, boots, school trips and camps. Each maintains health insurance for the girls. They divide the cost of school and music supplies on the basis that each parent pays for these items for one of the girls. Additionally, Mr. Foss has provided the older girl with a cell phone. Dawn Foss solely pays the costs for her son and Kerry Foss pays some of the expenses for her two daughters.

[26] My analysis differs somewhat from Ms. Foss'. With regard to the income in each home, I consider all the income available in Ms. Foss' home. I've itemized this below, discounting income for the payment of income taxes. I note that while Dawn Foss' Statement of Income discloses the payment of income taxes each month, her tax summaries show her actual annual income tax bill is on the order of \$1,400.00.

<b>Dawn Foss' household income</b>	
<b>Income source</b>	<b>Income amount</b>
Dawn Foss' after-tax earnings	33,100.00
Canada Child Tax Benefit	10,067.52
Dawn Foss' HST Credit	326.00
Marie MacIsaac's OAS	12,623.04
Marie MacIsaac's CPP	3,293.28
Marie MacIsaac's HST Credit	283.56
<b>Gross annual household income</b>	<b>59,693.40</b>

[27] I note that I have not shown the rent Ms. MacIsaac receives. She receives this from Dawn Foss, so this rental income is already included in Dawn Foss' income.

[28] The income in Mr. Foss' household is as shown below.

<b>Clint Foss' household income</b>	
<b>Income source</b>	<b>Income amount</b>
Clint Foss' after-tax earnings	42,105.52
Kerry Foss' after-tax earnings	35,899.12
Canada Child Tax Benefit	201.00
Gross annual household income	78,205.64

[29] For so long as Dawn Foss has the Canada Child Tax Benefit and HST Credits available to her, her household income comprises less than forty-four percent of the households' combined income. Her household's income is approximately seventy-six percent of the income of Clint Foss' household.

[30] I start by considering the girls' direct costs which the parents have itemized. Some of the girls' expenses are being equally shared, such as coats, boots, school trips and camps. Because the parents don't earn equal amounts, this arrangement imposes a greater financial burden on Dawn Foss than it imposes on Clint Foss.

[31] According to Clint Foss' Statement of Expenses, in his household, the monthly expense for clothing for his two daughters and Kerry Foss' two daughters is \$40.00. In contrast, Dawn Foss pays \$60.00 each month for clothing for herself and the girls. The arrangement for purchasing the girls' clothes is one which costs Dawn Foss more than it costs Clint Foss: she pays more than an equal share and more than a proportionate share of this expense.

[32] Each parent assumes responsibility for one girl's music and school supplies. Ms. Foss pays \$33.00 each month toward these expenses, while Mr. Foss pays \$18.40 toward the music cost and \$25.00 each month toward the school supplies of three of the children who spend time in his home. Assuming the school supplies cost is equally divided among the children (the daughter for whom he's responsible and the two daughters for whom Kerry Foss is responsible), then Mr. Foss' expense for music and school supplies for his daughter is \$26.73 each month. This sharing isn't a proportionate sharing of expenses by the parents. If expenses were shared proportionately, Dawn Foss would pay approximately forty-four percent of these expenses while Clint Foss would pay fifty-six percent. Instead, Ms. Foss is paying fifty-five percent of these costs. Again, the allocation sees Mr. Foss paying less than an equal share and less than a proportionate share of these costs.

[33] The parents' Statements of Expenses also show that the girls' costs are disproportionately borne by Dawn Foss. Expenses for haircuts, over-the-counter medications and gift giving aren't

equally divided between the households. Dawn Foss has greater expense for these items. The parents spend equal amounts on the children's entertainment. While there's cable television in each household, the internet is available to the girls only at their father's home. The child-related expenses that are greater in Mr. Foss' home are his expense for taking vacations, providing a cell phone and having a dog for the older daughter. Dawn Foss doesn't budget any amount for these discretionary expenditures. These are additional circumstances which disclose a disparity between the standards of living in the parents' respective homes.

[34] Viewing the parents' Statements of Expenses, Dawn Foss has approximately \$254.27 more each month in direct expenses for the children than Clint Foss. This amount is calculated by totaling the excess amount she pays for clothing, school and music supplies, haircuts, over the counter medication, gifts, entertainment and those costs which arise directly from the shared parenting arrangement. This amount doesn't recognize that Mr. Foss can afford to spend an additional \$110.00 on the girls that Dawn Foss cannot afford.

[35] The set-off amount calculated pursuant to section 9(a) is \$255.00. At this point of my analysis, it appears that the set-off amount does adequately compensate Dawn Foss for the additional costs she has as a result of the shared custody arrangement and the direct parenting costs that she has and Clint Foss does not have. It isn't sufficient to allow her to afford some of the extras that are available at Clint Foss' home, such as internet, a family pet, vacation spending or a cell phone.

[36] The girls' indirect costs have not been itemized, so it's difficult to compare these. Dawn Foss itemized her contribution to the cost of her mother's mortgage, property insurance, heat and electricity, water, telephone and cable television and house repairs. I know what Ms. Foss pays for these items for herself and her children, but I cannot isolate a portion attributable to the girls. In contrast, the allocation of expenses between Clint and Kerry Foss is artificial and doesn't accurately reflect what Mr. Foss pays for himself and his children. Mr. Foss explains that the allocation of expenses is an artifact of their reliance on Kerry Foss' bank account, which has a greater overdraft than his. This explanation doesn't make sense because the allocation of expenses between them leaves Clint Foss with a monthly surplus of more than \$600.00 after paying all his costs, including his statutory deductions and income tax. It would be possible for Mr. Foss to pay more toward household costs without relying on his overdraft at all.

[37] Overall, the mortgage, property insurance, heat and electricity, water, telephone and cable television and house repairs at Marie MacIsaac's home cost \$1,807.63, while these items cost Clint and Kerry Foss \$1,911.12.

[38] The expenses for food, toiletries, household supplies and laundry have not been allocated to isolate the girls' share in either household. Regardless it's apparent that there is more available for the girls in their father's home. In Clint Foss' household, these expenses cost \$1,085.00 each month, while in Dawn Foss' household, these expenses cost \$980.00.



[39] It appears that the household costs are not dissimilar. However, in Dawn Foss' household, most of the housing cost (\$1,057.63 of \$1,807.63) is paid by her mother. Dawn Foss pays most of the expense for food, toiletries, household supplies and laundry: she pays \$640.00 of the \$980.00 monthly expense. The parents' income differential means that, to the extent that the households have similar expenditures, this is possible because of Marie MacIsaac's financial contribution. Her contribution of time and money is generous, but not consistent with the most fundamental principle of child support. The core principles of child support, as Justice Bastarache says at paragraph 38 of *D.B.S. v. S.R.G.*; *L.J.W. v. T.A.R.*; *Henry v. Henry*; *Hiemstra v. Hiemstra*, 2006 SCC 37, animate "the support obligations parents have towards their children". The most fundamental principle is that child support is an obligation of the parents. It is not Ms. MacIsaac's obligation. If Ms. MacIsaac was not subsidizing her daughter and her grandchildren, there would be a significant disparity between the standards of living in the girls' homes.

[40] The Statements of Expenses show each household is in a deficit position. Ms. Foss' deficit is a greater percentage of her household's total available after-tax income than Mr. Foss'.

[41] I return to Justice Bastarache's comments:

- (a) be especially concerned with the children's standard of living in each household and each parent's ability to manage the costs of maintaining the appropriate standard of living (at paragraph 68 in *Contino v. Leonelli-Contino*, 2005 SCC 63);
- (b) shared parenting may not result in any saving for Dawn Foss (at paragraph 54 of *Contino v. Leonelli-Contino*, 2005 SCC 63); and
- (c) "one of the overall objectives of the *Guidelines* is, to the extent possible, to avoid great disparities between households" at paragraph 51 in *Contino v. Leonelli-Contino*, 2005 SCC 63).

[42] In *Elliott v. MacAskill*, 2005 NSFC 20, Ms. MacAskill arranged her circumstances based on Mr. Elliott's child maintenance payments. The change from a parenting arrangement which barely qualified as shared parenting to one of alternate weeks didn't reduce Ms. MacAskill's costs or increase Mr. Elliott's. In order to preserve the children's standard of living, the amount of Mr. Elliott's child maintenance payments was not changed. Dawn Foss is in a similar situation: she has arranged the girls' circumstances based on monthly child support of \$500.00. Her circumstances are the foundation for the shared parenting arrangement, given its reliance on her residence with her mother, and in the neighbourhood of the girls' schools.

[43] I have determined that the set-off amount compensates Dawn Foss for the additional costs she incurs as a result of the shared parenting arrangement and the costs that she alone bears for the girls. However, the set-off amount doesn't allow her to replicate the extras which are available to the girls at their father's home. At present, the consistency in the girls' homes results from Marie MacIsaac's financial contribution, not from the appropriate sharing of the child

support obligation between Dawn Foss and Clint Foss. To ensure that each parent has the ability to absorb the costs required to maintain the appropriate standard of living in these circumstances, I order that Mr. Foss continue to pay child support of \$500.00 each month. Both parents should have the ability to provide the same level of comfort to the girls and this ability should derive from the parents' incomes, not the income of a non-parent.

[44] I realize this conclusion sees Clint Foss continue to pay the same amount of child support as he has since the parents divorced, though his time with the girls has increased and Dawn Foss' income has also increased. Mr. Foss might have thought that these two changes would combine to reduce his child support payment. There are a number of reasons why the conclusion I have reached is supportable, having regard to the *Guidelines*.

[45] The first reason is explained by Justice Bastarache's comments at paragraph 55 of *Contino v. Leonelli-Contino*, 2005 SCC 63. At that point, His Lordship said that considering section 9 in the context of a variation application usually raises different considerations from when section 9 is considered where there's no prior order or agreement. He explained that in the former cases, "a recipient parent when he or she first got custody may validly have incurred expenses based on a legitimate expectation of how much support would be provided, and those expenses should be taken into consideration and the court should have proper regard to the fixed costs of the recipient parent." Here, Dawn Foss has established arrangements for the children. These arrangements involve the children's school and their before and after school care. The parents want to maintain these elements of the *status quo*. In fashioning a child support award so that I respect Justice Bastarache's counsel, at paragraph 68, that I be especially concerned with the standard of living of the children "in each household and the ability of each parent to absorb the costs required to maintain the appropriate standard of living in the circumstances", I must acknowledge the expense the *status quo* entails.

[46] The second reason my decision is supportable having regard to the *Guidelines* is that the amount of child support will vary, based on the payor parent's income. This is one of the "core principles" of child support identified in the pre-*Guidelines* decisions of *Richardson*, 1987 CanLII 58 (S.C.C.) and *Willick*, 1994 CanLII 28 (S.C.C.). These decisions pre-date the *Guidelines*, but these basic principles were endorsed by the Supreme Court in *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37 at paragraph 38. Where the parents' incomes have increased, their child support obligation also increases.

### **The Canada Child Tax Benefit**

[47] Dawn Foss has asked that I order Mr. Foss not apply for the Canada Child Tax Benefit, even though he provides the girls with their primary residence for one-half of the year.

[48] Dawn Foss receives a monthly Canada Child Tax Benefit payment of \$839.00 and a monthly Harmonized Sales Tax Credit of \$326.00. These monthly payments of \$1,165.00 are integral to supporting the girls in Dawn Foss' home.

[49] There are various decisions from the Tax Court of Canada that remind me that I cannot rewrite the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). For example, in *Calogeracos v. The Queen*, 2008 TCC 389 at paragraph 29, Justice Webb commented on an order from the Ontario Court of Justice which stated that the mother would be entitled to make the equivalent to married claim for one of the couple's two children, while the father could be entitled to claim the other. His Lordship said quite clearly that an order of that court "cannot amend the requirements of the [Income Tax] Act". I am similarly constrained. I cannot order that Mr. Foss is not entitled to make a claim that the *Income Tax Act* entitles him to make.

[50] I acknowledge the importance of the government funds that Dawn Foss receives. Her receipt of them is a factor in my determination of the appropriate amount of child support to be paid to her. The money is critical to the support of the children in her home. The order shall recite that Dawn Foss receives these benefits and that their loss by virtue of Clint Foss' application for them is a change in circumstances.

[51] Ms. Foss' counsel will draft the order.

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Elizabeth Jollimore, J.S.C.(F.D.)

Halifax, Nova Scotia