

DEVELOPING CHILD SUPPORT GUIDELINES IN SINGAPORE

Lessons from Canada

The courts in Singapore currently award child support in a discretionary manner without the use of guidelines or tables. To promote consistency and reduce legal costs, Sundaresh Menon CJ established a committee in 2017 to develop child support guidelines in Singapore. This article examines how Singapore can learn from Canada's positive experience with its Federal Child Support Guidelines over the past 23 years while avoiding the problems caused by the exceptions within the guidelines that conferred discretion upon judges to deviate from the presumptive table amount in special situations. An approach which balances the objectives of certainty and predictability with fairness and flexibility will be proposed for Singapore.

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I. Introduction

1 In 2017, Sundaresh Menon CJ announced at the Opening of the Legal Year that a committee had been established to develop child support¹ guidelines in Singapore to “improve consistency and cost-effectiveness in cases involving children”.² This inter-disciplinary and cross-agency committee, jointly led by Valerie Thean JC (as she then was) and Gerard Ee,³ consisted of actuaries, policy makers and family law practitioners.⁴

1 In Singapore, child support is referred to as child maintenance. However, in order to maintain consistency with the terminology used in Canada, the term “child support” will be used throughout this article.

2 See the Honourable the Chief Justice Sundaresh Menon, “Response by Chief Justice Sundaresh Menon: Opening of the Legal Year 2017” (9 January 2017) at para 44.

3 Gerard Ee was the then President of the Council of the Institute of Singapore Chartered Accountants.

4 See Valerie Thean, “Access to Family Justice: Anchoring Deeper, Extending Wider”, speech delivered at the Family Justice Courts Workplan 2017 (20 February 2017) at para 13 and the Honourable the Chief Justice Sundaresh Menon, “Response by Chief Justice Sundaresh Menon: Opening of the Legal Year 2017” (9 January 2017) at para 44.

While the child support guidelines were expected to be released by early 2018,⁵ the committee has yet to release its report or recommendations.⁶

2 It might be said that the committee's task is not an easy one given that it has to take into account various competing interests, such as the tension between rules and discretion⁷ in designing child support guidelines that are suitable for Singapore's family justice system. In fact, Thean JC alluded to this tension in the course of delivering her speech at the Family Justice Courts Workplan 2017.⁸ In her view, while child support law would benefit from certainty, judicial discretion must also be exercised flexibly where special exceptions exist.⁹

3 Indeed, Canada's "very positive"¹⁰ experience with the Federal Child Support Guidelines¹¹ over the past 23 years¹² suggests that it is extremely important to carefully design exceptions to the table amount

5 See Priscilla Goy, "New Guidelines on Child Maintenance Expected Next Year" *The Straits Times* (16 January 2017).

6 In a recent report released in September 2019 by the Committee to Review and Enhance Reforms in the Family Justice System, co-chaired by Debbie Ong J (Presiding Judge of the Family Justice Courts), no mention was made of the child support guidelines: see *Report of the Committee to Review and Enhance Reforms in the Family Justice System* (13 September 2019).

7 As a central theme in family law, the tension between rules and discretion has generated a wealth of academic commentary: see, eg, John Dewar, "Reducing Discretion in Family Law" (1997) 11(3) *Austl J Fam L* 309; Emma Hitchings & Joanna Miles, "Rules versus Discretion in Financial Remedies on Divorce" (2019) 33 *Intl JL Pol'y & Fam* 24; Carl E Schneider, "The Tension Between Rules and Discretion in Family Law: A Report and Reflection" (1993) 27 *Fam LQ* 229; Cass R Sunstein, "Problems with Rules" (1995) 83 *Cal L Rev* 953; Mary Ann Glendon, "Fixed Rules and Discretion in Contemporary Family Law and Succession Law" (1985–1986) 60 *Tul L Rev* 1165; and Nicholas Bala, "Judicial Discretion and Family Law Reform in Canada" (1986) 5 *Can J Fam L* 15. This tension between rules and discretion will be explored in greater detail below.

8 See Valerie Thean, "Access to Family Justice: Anchoring Deeper, Extending Wider", speech delivered at the Family Justice Courts Workplan 2017 (20 February 2017) at para 14.

9 See Valerie Thean, "Access to Family Justice: Anchoring Deeper, Extending Wider", speech delivered at the Family Justice Courts Workplan 2017 (20 February 2017) at para 14.

10 See Carol Rogerson, "Child Support, Spousal Support and the Turn to Guidelines" in *Routledge Handbook of Family Law and Policy* (John Eekelaar & Rob George eds) (Abingdon, Oxon: Routledge, 2014) at p 158.

11 SOR/97-175.

12 The Federal Child Support Guidelines (SOR/97-175) were implemented on 1 May 1997: see Julien D Payne & Marilyn A Payne, *Child Support Guidelines in Canada, 2017* (Toronto: Irwin Law, 2017) at p 8 and Julien D Payne & Marilyn A Payne, *Canadian Family Law* (Toronto: Irwin Law, 7th Ed, 2017) at p 389.

and calibrate the degree of discretion conferred upon judges.¹³ As Ross Finnie aptly noted, the manner in which child support guidelines are structured plays a crucial role in determining their failure or success.¹⁴ Therefore, in the light of Singapore's limited experience with child support guidelines thus far, this article argues that it would be desirable for Singapore to learn from the positive aspects of Canada's Federal Child Support Guidelines while avoiding the problems caused by some of the provisions that created exceptions to the presumptive table amount.¹⁵

4 This article proceeds as follows. Part II¹⁶ provides an overview of the current child support law in Singapore. As will be shown, the approach taken by the Singapore courts is a discretionary one.¹⁷ This leads to a lack of certainty, predictability and consistency.¹⁸ Arguments both for as well as against the use of child support guidelines in Singapore will then be examined, bearing in mind the unique features of Singapore's family justice system. Part III¹⁹ reviews Canada's Federal Child Support Guidelines, including the historical developments that led to the guidelines. The main part of the article lies in Part IV,²⁰ which evaluates how exceptions to the table amount and the degree of discretion conferred upon judges in individual circumstances could be structured in Singapore, taking into account the lessons learnt from Canada's experience. Part V²¹ concludes the article.

13 See Carol Rogerson, "Child and Spousal Support in Canada: The Guidelines Approach Part 1" (2011) 14 Ir J Fam L 72 at 72.

14 See Ross Finnie *et al*, *Child Support: The Guideline Options* (Montreal: The Institute for Research on Public Policy, 1994) at p 13.

15 Given the challenging nature of family justice, Sundaresh Menon CJ emphasised that it is important for Singapore to learn from the experiences of other jurisdictions. For that reason, an International Advisory Council (comprising of internationally renowned judges, academics and experts) was established to study best practices in other jurisdictions and devise solutions: see the Honourable the Chief Justice Sundaresh Menon, "Response by Chief Justice Sundaresh Menon: Opening of the Legal Year 2016" (11 January 2016) at para 34.

16 See paras 5–20 below.

17 See Valerie Thean, "Access to Family Justice: Anchoring Deeper, Extending Wider", speech delivered at the Family Justice Courts Workplan 2017 (20 February 2017) at para 12.

18 See Valerie Thean, "Access to Family Justice: Anchoring Deeper, Extending Wider", speech delivered at the Family Justice Courts Workplan 2017 (20 February 2017) at para 12.

19 See paras 21–29 below.

20 See paras 30–82 below.

21 See paras 83–84 below.

II. Child support law in Singapore

A. Current legal position

5 Currently, the Singapore courts determine the amount of child support to be awarded in a discretionary manner.²² As a starting point, a parent’s “independent and non-derogable”²³ duty to maintain his or her children is statutorily enshrined in s 68 of the Women’s Charter,²⁴ which provides as follows:

Except where an agreement or order of court otherwise provides, it shall be the duty of a parent to maintain or contribute to the [child support] of his or her children, whether they are in his or her custody or the custody of any other person, and whether they are legitimate or illegitimate, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof.

6 In assessing what is a reasonable amount of child support, the court must consider a list of non-exhaustive factors stipulated in s 69(4) of the Women’s Charter:

- (a) the financial needs of the wife, incapacitated husband or child;
- (b) the income, earning capacity (if any), property and other financial resources of the wife, incapacitated husband or child;
- (c) any physical or mental disability of the wife, incapacitated husband or child;
- (d) the age of each party to the marriage and the duration of the marriage;
- (e) the contributions made by each of the parties to the marriage to the welfare of the family, including any contribution made by looking after the home or caring for the family;
- (f) the standard of living enjoyed —
...
(iii) by the child before a parent neglected or refused to provide reasonable [child support] for the child;
- (g) in the case of a child, the manner in which he was being, and in which the parties to the marriage expected him to be, educated or trained; and

22 See Valerie Thean, “Access to Family Justice: Anchoring Deeper, Extending Wider”, speech delivered at the Family Justice Courts Workplan 2017 (20 February 2017) at para 12.

23 See *AUA v ATZ* [2016] 4 SLR 674 at [40].

24 Cap 353, 2009 Rev Ed.

(h) the conduct of each of the parties to the marriage, if the conduct is such that it would in the opinion of the court be inequitable to disregard it.

7 In addition, s 69(4) of the Women’s Charter directs the court to take into account “all the circumstances of the case”. As can be seen, the Singapore courts are not directed towards a specific goal in assessing the amount of child support.²⁵ In some cases, the courts do not even make reference to the factors in s 69(4) of the Women’s Charter but simply conclude that a certain amount of child support is appropriate. Two cases illustrate this point. In *ABX v ABY*,²⁶ Andrew Ang J concluded that a monthly sum of \$2,500 was a “fair amount” of child support.²⁷ The second case is *Cheong Tack Wai v Wan Sook Yin*,²⁸ where S Rajendran J held that it was “appropriate” to order the wife to pay \$500 per month as child support.²⁹

8 Therefore, in the light of the discretionary approach adopted by the courts, it is suggested that the child support law in Singapore should be reformed.

B. Proposal to introduce child support guidelines in Singapore

9 As mentioned above, a committee was established in 2017 by Menon CJ to design child support guidelines in Singapore.³⁰ On one view, this can be seen as being part of a shift from discretionary standards to more rule-like provisions that has taken place in many family justice systems around the world in an attempt to promote efficient dispute resolution and out-of-court settlement.³¹ As commentators have noted, this shift from discretion to rules allows cases to be resolved more easily,

25 See Leong Wai Kum, *Elements of Family Law in Singapore* (Singapore: LexisNexis, 3rd Ed, 2018) at para 12.111.

26 [2014] 2 SLR 969.

27 See *ABX v ABY* [2014] 2 SLR 969 at [74].

28 [2003] SGHC 29.

29 See *Cheong Tack Wai v Wan Sook Yin* [2003] SGHC 29 at [6].

30 See the Honourable the Chief Justice Sundaresh Menon, “Response by Chief Justice Sundaresh Menon: Opening of the Legal Year 2017” (9 January 2017) at para 44.

31 See Carol Rogerson, “Shaping Substantive Law to Promote Access to Justice: Canada’s Use of Child and Spousal Support Guidelines” in *Delivering Family Justice in the 21st Century* (Mavis Maclean *et al* eds) (Oxford: Hart Publishing, 2015) at p 51. In fact, such a shift is also consistent with a recommendation made by Canada’s Action Committee on Access to Justice in Civil and Family Matters (led by former Supreme Court of Canada Justice Thomas Albert Cromwell) that “substantive family laws should be simpler and offer more guidance by way of rules, guidelines and presumptions”: see Canada, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, October 2013) at p 19.

which in turn reduces the courts' burdens and the spouses' own legal costs.³² In a similar vein, it is suggested that introducing child support guidelines in Singapore should be welcomed for the following reasons.

(1) *Positive reception by the legal community in Singapore*

10 First, the legal community in Singapore has responded positively to the idea of developing child support guidelines. Most importantly, the benefits of child support guidelines have been recognised by the judiciary.³³ For instance, Menon CJ noted that child support guidelines would promote cost-effectiveness and consistency³⁴ while reducing acrimony between spouses.³⁵ Similarly, Thean JC explained that child support guidelines would ensure parity in the amount of child support awarded to children who are in similar situations, and free valuable judicial time and court resources.³⁶ These views were also echoed by two District Judges of the Family Justice Courts, who opined that child support guidelines would provide guidance to the courts and facilitate settlement between spouses.³⁷

11 Notably, other stakeholders in the family justice system have also supported the introduction of child support guidelines. On the academic front, Leong Wai Kum argued that child support guidelines would lead to more consistent awards being granted by the court.³⁸ Furthermore, family law practitioners interviewed commented that child support guidelines would help to resolve family disputes more quickly, thereby reducing the legal fees that spouses have to pay. Lastly, child support guidelines would

32 See John Dewar, "Family Law and its Discontents" (2000) 14(1) Intl J L Pol'y & Fam 59 at 67.

33 Apart from the Judiciary, even the then Minister for Social and Family Development, Tan Chuan-Jin, was of the view that the child support guidelines are a "valuable and accessible tool" for spouses, practitioners and judges: see Tan Chuan-Jin, "Remarks by Tan Chuan-Jin", speech delivered at the Family Justice Practice Forum 2017 (14 July 2017) at para 18.

34 See the Honourable the Chief Justice Sundaresh Menon, "Response by Chief Justice Sundaresh Menon: Opening of the Legal Year 2017" (9 January 2017) at para 44.

35 See Family Justice Courts, *Annual Report 2017 – Family Justice: Strengthening the Fundamentals* (Singapore: Family Justice Courts, 2017) at p 9.

36 See Valerie Thean, "Access to Family Justice: Anchoring Deeper, Extending Wider", speech delivered at the Family Justice Courts Workplan 2017 (20 February 2017) at para 13.

37 See Kevin Ng *et al*, "Family Justice Courts – Innovations, Initiatives and Programmes: An Evolution over Time" (2018) 30 SAclJ 617 at 644, para 75.

38 See Leong Wai Kum, *Elements of Family Law in Singapore* (Singapore: LexisNexis, 3rd Ed, 2018) at para 12.124.

also prevent spouses from inflating the child's expenses in order to obtain a higher amount of child support.³⁹

(2) *Consistency with core objectives of Singapore's family justice system*

12 Second, the introduction of child support guidelines is in line with the two core objectives of Singapore's family justice system, which include resolving family disputes expeditiously and economically while protecting the well-being of a child.⁴⁰

13 Although an adversarial system of litigation exists in Singapore,⁴¹ it has been well recognised that family justice occupies a special and unique field in the legal landscape.⁴² What this means is that family proceedings are expected to be conducted in a less adversarial manner⁴³ in order to safeguard the interests of children.⁴⁴ In that regard, by specifying outcomes in advance,⁴⁵ child support guidelines play an important role in allowing spouses (especially litigants who are self-represented)⁴⁶ to resolve disputes themselves more readily and to plan ahead⁴⁷ as they would have a better idea of what the court would likely award and can manage their expectations.⁴⁸ In some cases, this may even encourage

39 See Priscilla Goy, "New Guidelines on Child Maintenance Expected Next Year" *The Straits Times* (16 January 2017).

40 See Leong Wai Kum, "From Substantive Law towards Family Justice for the Child in Divorce Proceedings in Singapore" (2018) 30 SAclJ 587 at 592, paras 15–17 and Leong Wai Kum, *Elements of Family Law in Singapore* (Singapore: LexisNexis, 3rd Ed, 2018) at paras 19.023–19.026.

41 See Debbie Ong, "Supporting, Healing and Reconstructing", speech delivered at the Family Conference 2019 (3 July 2019) at para 10.

42 See *Report of the Committee to Review and Enhance Reforms in the Family Justice System* (13 September 2019) at p 7.

43 See Debbie Ong, "Supporting, Healing and Reconstructing", speech delivered at the Family Conference 2019 (3 July 2019) at para 10.

44 See Debbie Ong, "Every Outcome, a Way Forward", speech delivered at the Family Justice Courts Workplan 2019 (18 February 2019) at para 15. See also *Report of the Committee to Review and Enhance Reforms in the Family Justice System* (13 September 2019) at p 7.

45 See John Dewar, "Family Law and its Discontents" (2000) 14(1) *Intl J L Pol'y & Fam* 59 at 67–68.

46 In Singapore, there is a higher number of litigants who are self-represented in family proceedings: see Debbie Ong, "Supporting, Healing and Reconstructing", speech delivered at the Family Conference 2019 (3 July 2019) at para 9.

47 See D A Rollie Thompson, "Rules and Rulelessness in Family Law: Recent Developments, Judicial and Legislative" (2000) 18 *Can Fam LQ* 25 at 28.

48 See Ross Finnie *et al*, *Child Support: The Guideline Options* (Montreal: The Institute for Research on Public Policy, 1994) at p 12.

spouses to share information and collaborate in calculating the amount of child support.⁴⁹

14 Related to the point above,⁵⁰ child support guidelines would preserve the welfare of a child because they allow the determination of child support to be more objective and enable spouses to resolve their disputes in a manner which reduces acrimony.⁵¹ In the words of two District Judges of the Family Justice Courts:⁵²

... having bright-line rules, as opposed to a discretionary case-by-case approach, may go a long way towards helping to reduce conflict between parents and advance the well-being of the child. Uncertainty in the law (with ensuing wide judicial discretion) feeds parties' appetite to carry on litigating to the detriment of the child who is caught in continued conflict. On the other hand, bright-line rules would reduce the scope of potential litigation between parents.

(3) *Avoiding the difficulty of estimating the child's financial needs on a case-by-case basis*⁴⁹

15 Apart from promoting consistency and predictability in the amount of child support awarded in similar cases,⁵³ child support guidelines also allow courts to avoid the difficulty of estimating the child's financial needs on a case-by-case basis.⁵⁴ As is well known, the process of estimating the child's expenses is highly arbitrary and often prone to error.⁵⁵ While the costs of some items such as clothing may be straightforward to estimate, others such as food, transportation and

49 See Department of Justice, Canada, *Federal Child Support Guidelines: The Complete Workbook* (Ottawa: Department of Justice Canada, 1997) at p 5.

50 The two core objectives of Singapore's family justice system are linked and operate together. This is because the child's welfare will be preserved if the spouses are able to resolve their disputes expeditiously and economically: see Leong Wai Kum, "From Substantive Law towards Family Justice for the Child in Divorce Proceedings in Singapore" (2018) 30 SAclJ 587 at 592, para 18.

51 See Valerie Thean, "Access to Family Justice: Anchoring Deeper, Extending Wider", speech delivered at the Family Justice Courts Workplan 2017 (20 February 2017) at para 14.

52 See Kevin Ng *et al*, "Family Justice Courts – Innovations, Initiatives and Programmes: An Evolution over Time" (2018) 30 SAclJ 617 at 644, para 75.

53 See Ross Finnie *et al*, *Child Support: The Guideline Options* (Montreal: The Institute for Research on Public Policy, 1994) at p 12.

54 See Ross Finnie, *Good Idea, Bad Execution: The Government's Child Support Package* (Ottawa: The Caledon Institute of Social Policy, 1996) at p 1.

55 See Ross Finnie *et al*, *Child Support: The Guideline Options* (Montreal: The Institute for Research on Public Policy, 1994) at p 33.

holidays are not.⁵⁶ Viewed in that manner, estimating the child's expenses is an art rather than a science:⁵⁷

No clear rules. Lots of room for different approaches. Lawyers can be made to confess that they actually do the calculations in a variety of ways, and then choose the method that works best for their client. So the result is once again arbitrary differences in outcomes, and conflict for the divorcing couple.

16 Furthermore, by moving away from the need to estimate a child's expenses on a case-by-case basis, child support guidelines also reduce the need for spouses to submit voluminous documents such as receipts to support their claims.⁵⁸ Unfortunately, the discretionary approach adopted by the Singapore courts means that spouses often have to do so. For instance, r 25(1)(a) of the Family Justice Courts Practice Directions provides that spouses are required to submit the following list of documents:

- (i) the party's list of monthly expenses for himself or herself;
- (ii) the party's list of monthly expenses for the parties' children;
- (iii) documents and receipts to prove the monthly expenses;
- (iv) documents to prove the parties' respective debts;
- (v) the party's payslips and CPF statements for the last 6 months;
- (vi) the party's evidence of employment (eg. employer's letter or employment contract);
- (vii) the party's Notice of Assessment of Income for the past 3 years;
- (viii) the party's updated bank passbooks and/or updated bank statements (including sole and joint accounts); and
- (ix) the party's bank deposit slips to show payment/non-payment of [child support].

17 In this regard, the recent case of *UTL v UTM*⁵⁹ offers an excellent illustration of the mathematical exercise that the court has to perform in order to assess the child's financial needs without the help of child support guidelines. Here, Tan Puay Boon JC undertook a detailed item

56 See Ross Finnie *et al*, *Child Support: The Guideline Options* (Montreal: The Institute for Research on Public Policy, 1994) at p 32.

57 See Ross Finnie *et al*, *Child Support: The Guideline Options* (Montreal: The Institute for Research on Public Policy, 1994) at p 33.

58 See Priscilla Goy, "New Guidelines on Child Maintenance Expected Next Year" *The Straits Times* (16 January 2017).

59 [2019] SGHCF 10.

by item assessment of what the child’s reasonable expenses would be by adjudicating between the wife’s estimates and the husband’s estimates:⁶⁰

S/N	Description of expenses	Wife’s proposed figures (\$)	Husband’s proposed figures (\$)	Court’s estimate (\$)
a)	Food	1,274.00	200.00	600.00
b)	Personal grooming	20.00	20.00	20.00
c)	Transport	41.00	41.00	41.00
d)	Mobile phone	50.00	50.00	50.00
e)	Clothing, shoes, etc	100.00	100.00	100.00
f)	Entertainment/hobbies	100.00	100.00	100.00
g)	Health supplements	100.00	100.00	100.00
h)	Insurance policies	500.00	0	500.00
i)	Healthcare expenses	Not sought.	50.00	50.00
j)	Dental expenses	20.00	20.00	20.00
k)	Miscellaneous expenses	100.00	100.00	100.00
l)	School fees	13.00	13.00	13.00
m)	Tuition/Enrichment classes	2,956.00	1,500.00	1,500.00
	TOTAL:	5,274.00	2,294.00	3,194.00

18 With the introduction of child support guidelines, the courts would no longer be required to scrutinise individual budgets except in special cases where exceptions apply.⁶¹ This is certainly desirable because the courts often do not have all they need in terms of documentary proof given that spouses do not conduct their lives in contemplation of eventual litigation or breakdown of the marriage.⁶²

(4) *Potential disadvantages of child support guidelines*

19 For the sake of completeness, the disadvantages of child support guidelines must be mentioned. Put simply, critics argue that child

60 See *UTL v UTM* [2019] SGHCF 10 at [105]. For another interesting case where the court had to perform detailed calculations and decide between the estimates submitted by the spouses, see *Wong Ser Wan v Ng Cheong Ling* [2006] 1 SLR(R) 416 at [86]–[105].

61 See Carol Rogerson, “Child Support, Spousal Support and the Turn to Guidelines” in *Routledge Handbook of Family Law and Policy* (John Eekelaar & Rob George eds) (Abingdon, Oxon: Routledge, 2014) at p 155.

62 See Kevin Ng *et al*, “Family Justice Courts – Innovations, Initiatives and Programmes: An Evolution over Time” (2018) 30 SAclJ 617 at 644, para 75 and Valerie Thean, (*cont’d on the next page*)

support guidelines reduce the scope for judges to consider the particular circumstances of each individual case,⁶³ which may result in unfairness due to the “sacrifice of fine-tuned individual justice”.⁶⁴ Furthermore, if the outcomes generated by the child support guidelines are perceived to be unfair by spouses, there may be increased non-compliance with child support orders.⁶⁵

20 Despite such criticisms, it is suggested that the arguments in favour of child support guidelines far outweigh the concerns about the fairness of such guidelines. To alleviate the concerns raised by critics, the solution would be to introduce discretion within each of the exceptions to the child support guidelines in order to provide some form of individualised justice where appropriate.⁶⁶ At the end of the day, there must be a “right mix” of rules and discretion.⁶⁷ Put another way, the correct balance can be achieved if an appropriate point along the spectrum from rules to discretion is chosen for special circumstances.⁶⁸ This will be examined in detail below.⁶⁹

III. Canada’s Federal Child Support Guidelines

A. *Historical developments*

21 Having examined Singapore’s child support law, this part turns to Canada’s Federal Child Support Guidelines. Before the Federal Child Support Guidelines came into effect in 1997,⁷⁰ the determination of child

“Access to Family Justice: Anchoring Deeper, Extending Wider”, speech delivered at the Family Justice Courts Workplan 2017 (20 February 2017) at para 12.

63 See Ross Finnie, *Good Idea, Bad Execution: The Government’s Child Support Package* (Ottawa: The Caledon Institute of Social Policy, 1996) at p 1.

64 See Carol Rogerson, “Child and Spousal Support in Canada: The Guidelines Approach Part 1” (2011) 14 Ir J Fam L 72 at 72.

65 See Ross Finnie, *Good Idea, Bad Execution: The Government’s Child Support Package* (Ottawa: The Caledon Institute of Social Policy, 1996) at p 1.

66 See Carol Rogerson, “Child and Spousal Support in Canada: The Guidelines Approach Part 1” (2011) 14 Ir J Fam L 72 at 72.

67 See Joanna Miles, “Should the Regime Be Discretionary or Rules-based?” in *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Jessica Palmer *et al* eds) (Cambridge: Intersentia, 2017) at p 262.

68 See Carol Rogerson, “Child and Spousal Support in Canada: The Guidelines Approach Part 1” (2011) 14 Ir J Fam L 72 at 72.

69 See paras 30–82 below.

70 See Julien D Payne & Marilyn A Payne, *Canadian Family Law* (Toronto: Irwin Law, 7th Ed, 2017) at p 389 and Julien D Payne & Marilyn A Payne, *Child Support Guidelines in Canada, 2017* (Toronto: Irwin Law, 2017) at p 8.

support was based heavily upon unfettered judicial discretion.⁷¹ The courts used the Ontario Court of Appeal decision of *Paras v Paras*⁷² (“*Paras*”) as a guide, where Kelly JA explained the approach to be adopted:⁷³

Ideally the problem could be solved by arriving at a sum which would be adequate to care for, support and educate the children, dividing this sum in proportion to the respective incomes and resources of the parents and directing the payment of the appropriate proportion by the parent not having physical custody.

22 Put simply, the approach in *Paras* directed the court to order an amount of child support that would maintain the child at the same standard of living if the family had not broken up.⁷⁴ This is done by apportioning the costs required to maintain the child’s needs between the parents in proportion to the parents’ respective incomes.⁷⁵ Such a formula, however, was criticised by various commentators, who highlighted that there was a disjuncture between the *Paras* formula and the actual amount of child support awarded.⁷⁶ For instance, Carol Rogerson noted that:⁷⁷

Although frequent reference is made to *Paras*, and although in some cases the courts actually work through the *Paras* calculations in a very structured, explicit way, in many of the cases, after examining the financial positions and budgets of the spouses the courts simply conclude, with little explanation, that a certain sum is appropriate for child support.

23 Further criticisms of the *Paras* formula include the fact that the amount of child support ordered by the court is often not even sufficient to equalise the standard of living between the child’s household and the non-custodial parent’s household.⁷⁸ Moreover, the *Paras* formula fails to take into account situations such as high-income earners, third parties or

71 See Federal/Provincial/Territorial Family Law Committee, Canada, *Child Support: Public Discussion Paper* (Ottawa: The Committee, June 1991) at p 4 and Julien D Payne & Marilyn A Payne, *Child Support Guidelines in Canada, 2017* (Toronto: Irwin Law, 2017) at p 1.

72 (1971) 14 DLR (3d) 546.

73 See *Paras v Paras* (1971) 14 DLR (3d) 546 at [19].

74 See Carol Rogerson, “Child and Spousal Support in Canada: The Guidelines Approach Part 1” (2011) 14 Ir J Fam L 72 at 75.

75 See *Paras v Paras* (1971) 14 DLR (3d) 546 at [19].

76 See Carol Rogerson, “Judicial Interpretation of the Spousal and Child Support Provisions of the *Divorce Act, 1985* (Part II)” (1990) 7 Can Fam LQ 271 at 274 and Canada, Federal/Provincial/Territorial Family Law Committee, *Child Support: Public Discussion Paper* (Ottawa: The Committee, June 1991) at pp 2–3.

77 See Carol Rogerson, “Judicial Interpretation of the Spousal and Child Support Provisions of the *Divorce Act, 1985* (Part II)” (1990) 7 Can Fam LQ 271 at 283.

78 More specifically, in percentage terms, the custodial parent’s household typically has an income of between 40% and 80% of that enjoyed by the non-custodial parent: see Carol Rogerson, “Judicial Interpretation of the Spousal and Child Support Provisions of the *Divorce Act, 1985* (Part II)” (1990) 7 Can Fam LQ 271 at 274.

the difficulty of estimating the costs of children.⁷⁹ Finally, unpredictability in the amount of child support awarded led to more disputes, thereby increasing the costs of divorce and tension between spouses.⁸⁰

24 As a result of the “subjective, arbitrary and unfair” manner in which the amount of child support was being determined,⁸¹ various stakeholders of the family justice system started to look at ways to improve the discretionary system of child support in the late 1980s.⁸² After the Federal/Provincial/Territorial Family Law Committee conducted a series of major studies between 1991 and 1995,⁸³ it was recommended that child support guidelines be implemented in Canada to deal with the “excess of discretion and case-by-case variation”.⁸⁴

B. A brief overview

25 The Federal Child Support Guidelines determine child support as a “specified percentage of parental income rather than on the basis of an individualised, budget-based determination of a specified child’s needs”.⁸⁵ Put simply, a spouse’s obligation for child support is fixed mechanically

79 See Kristen Douglas, *Child Support: Quantum, Enforcement and Taxation* (Ottawa: Library of Parliament, Research Branch, 1996) at p 8.

80 See Department of Justice, Canada, *Children Come First: A Report to Parliament Reviewing the Provisions and Operation of the Federal Child Support Guidelines* vol 1 (Ottawa: Minister of Justice and Attorney General of Canada, 2002) at p 1.

81 See Philip M Epstein, “Child Support Guidelines Legislation: An Overview” in *Federal Child Support Guidelines: Reference Manual* (Ottawa: Department of Justice, Canada, 2nd Ed, 1998, looseleaf) at p 3.

82 See Department of Justice, Canada, *Children Come First: A Report to Parliament Reviewing the Provisions and Operation of the Federal Child Support Guidelines* vol 1 (Ottawa: Minister of Justice and Attorney General of Canada, 2002) at p 1.

83 See generally Department of Justice, Canada, *Child Support Discussion Paper: Backgrounder* (Ottawa: Minister of Justice and Attorney General of Canada, June 1991); Federal/Provincial/Territorial Family Law Committee, Canada, *Child Support: Public Discussion Paper* (Ottawa: The Committee, June 1991); Federal/Provincial/Territorial Family Law Committee, Canada, *The Financial Implications of Child Support Guidelines: Research Report* (Ottawa: The Committee, May 1992); and Federal/Provincial/Territorial Family Law Committee, Canada, *Report and Recommendations on Child Support* (Ottawa: Department of Justice, Communications and Consultation Branch, January 1995).

84 See Robert Leckey, “Particular Justice: Michel Bastarache and Family Law” in *At the Forefront of Duality: Essays in Honour of Michel Bastarache* (Nicolas C G Lambert ed) (Québec: Éditions Yvon Blais, 2011) at p 124.

85 See Carol Rogerson, “Shaping Substantive Law to Promote Access to Justice: Canada’s Use of Child and Spousal Support Guidelines” in *Delivering Family Justice in the 21st Century* (Mavis Maclean et al eds) (Oxford: Hart Publishing, 2015) at p 52.

based on tables.⁸⁶ The table amount⁸⁷ is based only on the payor's income and the number of children.⁸⁸ Notably, the custodial parent's income is not even required⁸⁹ as it is assumed that the child will enjoy the income of both parents as though the spouses were living together.⁹⁰ More specifically, the assumption is that the custodial parent will contribute financially to the child's welfare and that any financial contribution from the non-custodial parent will be used to improve the child's welfare.⁹¹

26 In that regard, it has been observed that determining child support is an "ultimate example of rule-based decision-making"⁹² and signifies a clear departure from the old child support regime where judicial discretion was used to determine the amount of child support.⁹³ Similar sentiments were also expressed by Rogerson in the following way:⁹⁴

As well as reflecting the priority given to the best interests of children, the enactment of the child support guidelines also exemplifies the increasing emphasis in Canadian law on developing clearer rules and reducing discretion in order to facilitate efficient dispute resolution. Increasingly the systemic advantages of average justice are being seen to outweigh the benefits of finely tuned individual justice.

27 Section 1 sets out the objectives of the Federal Child Support Guidelines:⁹⁵

(a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;

86 See Simon Fodden, *Family Law* (Toronto: Irwin Law, 1999) at p 261.

87 This table amount was calculated based on economic studies that were conducted to ascertain how much spouses at different income levels were spending on their children: see Simon Fodden, *Family Law* (Toronto: Irwin Law, 1999) at p 262.

88 See *Francis v Baker* [1999] 3 SCR 250 at [1]; Julien D Payne & Marilyn A Payne, *Canadian Family Law* (Toronto: Irwin Law, 7th Ed, 2017) at pp 389–390; and Julien D Payne & Marilyn A Payne, *Child Support Guidelines in Canada, 2017* (Toronto: Irwin Law, 2017) at p 7.

89 See D A Rollie Thompson, "Rules and Rulelessness in Family Law: Recent Developments, Judicial and Legislative" (2000) 18 Can Fam LQ 25 at 31.

90 See Simon Fodden, *Family Law* (Toronto: Irwin Law, 1999) at p 262.

91 See Julien D Payne & Marilyn A Payne, *Child Support Guidelines in Canada, 2017* (Toronto: Irwin Law, 2017) at p 9.

92 See D A Rollie Thompson, "Rules and Rulelessness in Family Law: Recent Developments, Judicial and Legislative" (2000) 18 Can Fam LQ 25 at 31.

93 See Simon Fodden, *Family Law* (Toronto: Irwin Law, 1999) at p 261.

94 See Carol Rogerson, "Canada: A Bold and Progressive Past but an Unclear Future" in *The Future of Child and Family Law: International Predictions* (Elaine E Sutherland ed) (Cambridge: Cambridge University Press, 2012) at para 3.35.

95 SOR/97-175.

- (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
- (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
- (d) to ensure consistent treatment of spouses and children who are in similar circumstances.

28 While objectivity and consistency are among the objectives of the Federal Child Support Guidelines, there are certain individual circumstances in which the guidelines provide judges with the discretion to deviate from the table amount to ensure some degree of fairness.⁹⁶ Some critics argue that the exceptions to the general rule are too excessive and complex such that the aims of objectivity and predictability are no longer met.⁹⁷ For instance, it has been pointed out that “[i]t is proving to be a vain hope that the introduction of the Federal Child Support Guidelines would make the task of setting child support easier and hence lead to settlements. If anything, fresh areas for dispute have arisen and certain aspects are at least as difficult and contentious as before.”⁹⁸

29 Be that as it may, it is undeniable that families of modest means have benefitted from the Federal Child Support Guidelines where the amount of child support is based on the table amount.⁹⁹ Put another way, “the inaccurate ‘fit’ of a rule in some cases is more tolerable when it works well for the bulk of ‘typical’ cases.”¹⁰⁰ In fact, Canada’s experience with the Federal Child Support Guidelines suggests that positive effects have been generated from the use of such guidelines.¹⁰¹ Five years after the Federal Child Support Guidelines were implemented, the then Minister of Justice and Attorney General of Canada, Martin Cauchon, observed that child support became more predictable, consistent and objective, with the end result of reducing conflict and tension between spouses.¹⁰² In the light of

96 See Lorne H Wolfson, “The Limits of Discretion under the Guidelines” in *Recent Developments in Spousal and Child Support: The Final Frontier* (Toronto: Edmond Montgomery Publications, 1998, looseleaf) at p 3-2.

97 See Simon Fodden, *Family Law* (Toronto: Irwin Law, 1999) at p 262.

98 See *Crick v Crick* (1997) 43 BCLR (3d) 251 at [11].

99 See Julien D Payne & Marilyn A Payne, *Child Support Guidelines in Canada, 2017* (Toronto: Irwin Law, 2017) at p 9.

100 See D A Rollie Thompson, “Rules and Rulelessness in Family Law: Recent Developments, Judicial and Legislative” (2000) 18 Can Fam LQ 25 at 27.

101 See Carol Rogerson, “Child Support, Spousal Support and the Turn to Guidelines” in *Routledge Handbook of Family Law and Policy* (John Eekelaar & Rob George eds) (Abingdon, Oxon: Routledge, 2014) at p 158.

102 See Department of Justice, Canada, *Children Come First: A Report to Parliament Reviewing the Provisions and Operation of the Federal Child Support Guidelines* vol 1 (Ottawa: Minister of Justice and Attorney General of Canada, 2002) at p iii. See also
(cont'd on the next page)

this, it can be concluded that the Federal Child Support Guidelines were a “solid success”.¹⁰³

IV. Design options for Singapore – lessons from Canada’s experience

A. Determining the table amount

30 The general consensus is that the legal community in Canada responded positively to the Federal Child Support Guidelines.¹⁰⁴ This is perhaps due, in part, to the fact that the formula used is relatively simple.¹⁰⁵ As mentioned above, the table amount of child support is calculated based only on the payor’s income and the number of children.¹⁰⁶ The benefit of such a “percentage of payor income” model is that it obviates the need for the courts to consider unrealistic claims and inflated budgets tendered by spouses under the old child support regime.¹⁰⁷

31 While the committee in Singapore has yet to release its report or recommendations, in a 2017 telephone interview with the media, one of the co-chairpersons of the committee revealed that the child support guidelines might be based on the income of both parents and the child’s age.¹⁰⁸ As can be seen, Singapore has a choice between the “percentage of

Carol Rogerson, “Shaping Substantive Law to Promote Access to Justice: Canada’s Use of Child and Spousal Support Guidelines” in *Delivering Family Justice in the 21st Century* (Mavis Maclean *et al* eds) (Oxford: Hart Publishing, 2015) at p 52.

103 See Department of Justice, Canada, *Children Come First: A Report to Parliament Reviewing the Provisions and Operation of the Federal Child Support Guidelines* vol 1 (Ottawa: Minister of Justice and Attorney General of Canada, 2002) at p v.

104 See Carol Rogerson, “Shaping Substantive Law to Promote Access to Justice: Canada’s Use of Child and Spousal Support Guidelines” in *Delivering Family Justice in the 21st Century* (Mavis Maclean *et al* eds) (Oxford: Hart Publishing, 2015) at p 60 and Carol Rogerson, “Child Support, Spousal Support and the Turn to Guidelines” in *Routledge Handbook of Family Law and Policy* (John Eekelaar & Rob George eds) (Abingdon, Oxon: Routledge, 2014) at p 158.

105 See Julien D Payne & Marilyn A Payne, *Child Support Guidelines in Canada, 2017* (Toronto: Irwin Law, 2017) at p 9 and Carol Rogerson, “Child Support, Spousal Support and the Turn to Guidelines” in *Routledge Handbook of Family Law and Policy* (John Eekelaar & Rob George eds) (Abingdon, Oxon: Routledge, 2014) at p 158.

106 See *Francis v Baker* [1999] 3 SCR 250 at [1]; Julien D Payne & Marilyn A Payne, *Canadian Family Law* (Toronto: Irwin Law, 7th Ed, 2017) at pp 389–390; and Julien D Payne & Marilyn A Payne, *Child Support Guidelines in Canada, 2017* (Toronto: Irwin Law, 2017) at p 7.

107 See Julien D Payne & Marilyn A Payne, *Child Support Guidelines in Canada, 2017* (Toronto: Irwin Law, 2017) at p 9.

108 See Priscilla Goy, “New Guidelines on Child Maintenance Expected Next Year” *The Straits Times* (16 January 2017).

payor income” model adopted by Canada and the “income shares” model proposed by the committee. The former considers only the income of the payor while the latter considers the incomes of both parents. In this regard, it can be said that the task of choosing an appropriate formula involves a tension between “simplicity and efficiency, on the one hand, and more finely-tuned justice on the other”.¹⁰⁹

32 It is suggested that Singapore would be better served in adopting the Canadian formula for the following reasons. First, it has been persuasively argued that basing the amount of child support on the incomes of both parents does not bring about clear advantages.¹¹⁰ Instead, doing so would result in child support amounts being more complicated and complex to calculate while not necessarily producing amounts that differ much from the Canadian approach of basing it on the income of the non-custodial parent only.¹¹¹ Second, Singapore’s proposal of varying the amount of child support based on age would be unnecessary if Singapore adopts the Canadian formula which is derived from the average costs of raising children.¹¹² In such a situation, adjustments need not be made for children of younger ages as opposed to older children because the average table amounts would “yield over child-rearing years appropriate amounts for the average child in the average family”.¹¹³

33 All things considered, given that Singapore is just starting out on its task of developing child support guidelines, it would be preferable to start with a simple formula such as the Canadian model, which is “defensible on the grounds of fairness and efficiency”.¹¹⁴ As England’s experience has shown, a complex and complicated child support formula may bring about disastrous consequences, such as unreasonably high amounts and no discretion to deviate from the formula.¹¹⁵ Having said

109 See Carol Rogerson, “Child Support, Spousal Support and the Turn to Guidelines” in *Routledge Handbook of Family Law and Policy* (John Eekelaar & Rob George eds) (Abingdon, Oxon: Routledge, 2014) at p 157.

110 See Ross Finnie, *Good Idea, Bad Execution: The Government’s Child Support Package* (Ottawa: The Caledon Institute of Social Policy, 1996) at p 4.

111 See Ross Finnie, *Good Idea, Bad Execution: The Government’s Child Support Package* (Ottawa: The Caledon Institute of Social Policy, 1996) at p 4.

112 See Philip M Epstein, “Child Support Guidelines Legislation: An Overview” in *Federal Child Support Guidelines: Reference Manual* (Ottawa: Department of Justice, Canada, 2nd Ed, 1998, looseleaf) at p 4.

113 See Philip M Epstein, “Child Support Guidelines Legislation: An Overview” in *Federal Child Support Guidelines: Reference Manual* (Ottawa: Department of Justice, Canada, 2nd Ed, 1998, looseleaf) at p 4.

114 See Ross Finnie, *Good Idea, Bad Execution: The Government’s Child Support Package* (Ottawa: The Caledon Institute of Social Policy, 1996) at p 4.

115 See J Thomas Oldham, “Lessons from the New English and Australian Child Support Systems” (1996) 29 Vand J Transnat’l L 691 at 722 and 733. It is noteworthy that the formula in England was ultimately simplified in the light of these problems:
(cont’d on the next page)

that, refinements to the formula may be made *in the future* in the light of recent criticisms of the “percentage of payor income” model.¹¹⁶

B. Calibrating the degree of discretion for individual circumstances

34 In the absence of exceptions provided under the Federal Child Support Guidelines, the presumptive rule in s 3(1) stipulates that the amount of child support is that set out in the applicable table.¹¹⁷ While the table amount should be used for standard cases, individualised justice that is made possible through a certain degree of discretion conferred upon judges is required for specific situations.¹¹⁸ Indeed, Singapore should not shy away from the focus on fairness that has taken place in other jurisdictions through the introduction of “special factors” in child support guidelines to cater to unique and complicated circumstances.¹¹⁹

35 Owing to limitations of space, it is impossible to cover every area in detail within the modest confines of this article. Instead, key lessons from the Canadian experience and issues that are worthy of attention will be highlighted to help Singapore structure the exceptions in a manner that strikes a good balance between rules and discretion. More specifically, this section will focus on the following circumstances under Canada’s Federal Child Support Guidelines which permit the court to deviate from the table amount: (a) undue hardship;¹²⁰ (b) step-parents;¹²¹ (c) split and

see Carol Rogerson, “Child Support, Spousal Support and the Turn to Guidelines” in *Routledge Handbook of Family Law and Policy* (John Eekelaar & Rob George eds) (Abingdon, Oxon: Routledge, 2014) at p 157.

116 It has been argued that the availability of computer software programs in recent years may allow the use of a more complicated formula which takes into account the income of the custodial parent as well. For instance, the child support guidelines in Québec are based on an “income shares” model: see Julien D Payne & Marilyn A Payne, *Child Support Guidelines in Canada, 2017* (Toronto: Irwin Law, 2017) at pp 9–10. Notably, the “income shares” model has gained popularity in countries such as Australia and New Zealand as symbolically representing the responsibility of both parents to maintain their child: see Carol Rogerson, “Child Support, Spousal Support and the Turn to Guidelines” in *Routledge Handbook of Family Law and Policy* (John Eekelaar & Rob George eds) (Abingdon, Oxon: Routledge, 2014) at p 157.

117 See Julien D Payne & Marilyn A Payne, *Child Support Guidelines in Canada, 2017* (Toronto: Irwin Law, 2017) at p 14.

118 See J Thomas Oldham, “Lessons from the New English and Australian Child Support Systems” (1996) 29 *Vand J Transnat’l L* 691 at 717.

119 See Belinda Fehlberg *et al*, “Parenting Issues after Separation: Developments in Common Law Countries” in *Routledge Handbook of Family Law and Policy* (John Eekelaar & Rob George eds) (Abingdon, Oxon: Routledge, 2014) at p 225.

120 See s 10 of the Federal Child Support Guidelines (SOR/97-175).

121 See s 5 of the Federal Child Support Guidelines (SOR/97-175).

shared custody;¹²² and (d) special and extraordinary expenses.¹²³ Given that each of these exceptions arguably make sense in their own right, it is likely that Singapore's child support guidelines will contain some, if not all, of these exceptions. However, the important and challenging question is to determine the point on the spectrum between rules and discretion that is most appropriate in each of these circumstances.¹²⁴

36 This part of the article will suggest an approach for Singapore which is consistent with its existing family law jurisprudence, bearing in mind the complex issues that arose in the Canadian context.¹²⁵ As will be shown, some of the problems with the Federal Child Support Guidelines resulted mainly from the courts' reluctance to introduce flexibility into the basic rules, even though some flexibility would be more in line with the objectives of the child support guidelines.¹²⁶ While the Canadian position is not directly applicable in the Singapore context, there are nevertheless useful lessons to be gleaned from the Canadian experience.

(1) *Undue hardship*

(a) An overview of Canada's approach

37 Section 10(1) of the Federal Child Support Guidelines confers upon the court a discretion to deviate from the table amount of child support in circumstances that may cause undue hardship. This involves a two-stage test.¹²⁷ First, the court must be satisfied that the evidence before it supports a finding of undue hardship under s 10(2),¹²⁸ which provides a non-exhaustive list of circumstances that may cause undue hardship:

- (a) the spouse has responsibility for an unusually high level of debts reasonably incurred to support the spouses and their children prior to the separation or to earn a living;
- (b) the spouse has unusually high expenses in relation to exercising access to a child;

122 See ss 8–9 of the Federal Child Support Guidelines (SOR/97-175).

123 See s 7 of the Federal Child Support Guidelines (SOR/97-175).

124 See Carol Rogerson, "Shaping Substantive Law to Promote Access to Justice: Canada's Use of Child and Spousal Support Guidelines" in *Delivering Family Justice in the 21st Century* (Mavis Maclean *et al* eds) (Oxford: Hart Publishing, 2015) at p 54.

125 See Carol Rogerson, "Shaping Substantive Law to Promote Access to Justice: Canada's Use of Child and Spousal Support Guidelines" in *Delivering Family Justice in the 21st Century* (Mavis Maclean *et al* eds) (Oxford: Hart Publishing, 2015) at p 52.

126 See D A Rollie Thompson, "Rules and Rulelessness in Family Law: Recent Developments, Judicial and Legislative" (2000) 18 *Can Fam LQ* 25 at 32.

127 See *Gaetz v Gaetz* (2001) 15 RFL (5th) 73 at [15].

128 See *Gaetz v Gaetz* (2001) 15 RFL (5th) 73 at [15].

- (c) the spouse has a legal duty under a judgment, order or written separation agreement to support any person;
- (d) the spouse has a legal duty to support a child, other than a child of the marriage, who is
 - (i) under the age of majority, or
 - (ii) the age of majority or over but is unable, by reason of illness, disability or other cause, to obtain the necessaries of life; and
- (e) the spouse has a legal duty to support any person who is unable to obtain the necessaries of life due to an illness or disability.

38 It is crucial to emphasise that the court will proceed to the second stage of the test only if there are circumstances constituting undue hardship.¹²⁹ At the second stage, the court will conduct a comparison of the standard of living of the two households as mandated under s 10(3).¹³⁰ If the court is of the view that the household of the spouse who claims undue hardship would have a higher standard of living than the household of the other spouse, then the application for undue hardship will be denied.¹³¹

(b) Lessons for Singapore

39 Most importantly, Singapore should ensure that some measure of flexibility is injected into its undue hardship exception. As the Canadian experience has shown, claims of undue hardship rarely succeed.¹³² This is because the courts prefer to constrain their discretion in this area¹³³ by repeatedly emphasising that a high threshold has to be met.¹³⁴ In adopting a rule-based approach to undue hardship,¹³⁵ the Canadian courts seem to be prioritising the objectives of certainty and consistency over fairness

129 See *Gaetz v Gaetz* (2001) 15 RFL (5th) 73 at [15].

130 See *Gaetz v Gaetz* (2001) 15 RFL (5th) 73 at [15].

131 See s 10(3) of the Federal Child Support Guidelines (SOR/97-175).

132 See Carol Rogerson, "Child and Spousal Support in Canada: The Guidelines Approach Part 1" (2011) 14 Ir J Fam L 72 at 77.

133 See Carol Rogerson, "Shaping Substantive Law to Promote Access to Justice: Canada's Use of Child and Spousal Support Guidelines" in *Delivering Family Justice in the 21st Century* (Mavis Maclean *et al* eds) (Oxford: Hart Publishing, 2015) at p 61.

134 See Julien D Payne & Marilyn A Payne, *Child Support Guidelines in Canada, 2017* (Toronto: Irwin Law, 2017) at p 335. For instance, a judge explained that the hardship must be "exceptional, excessive and disproportionate": see *Harvey v Sturk* [2016] WDFL 4792 at [8].

135 See Carol Rogerson, "Child and Spousal Support in Canada: The Guidelines Approach Part 1" (2011) 14 Ir J Fam L 72 at 77.

and flexibility.¹³⁶ This may be due to the concern about opening the floodgates if undue hardship claims were readily allowed by the courts.¹³⁷ While such concerns about the potential for abuse on the part of spouses or their lawyers¹³⁸ might have been legitimate when the Federal Child Support Guidelines first came into force, the continued inflexibility of the courts towards undue hardship applications has, unfortunately, resulted in “serious individual injustice”¹³⁹ in deserving cases. To minimise any potential unfairness to spouses who are genuinely facing undue hardship, Singapore must ensure that the standard of undue hardship required of spouses will not be too difficult to meet.

40 In particular, one area is deserving of attention. To ensure fairness and flexibility, the child support guidelines in Singapore should make a deliberate attempt to balance first and second families by stipulating explicitly the effect of a second family on child support for the first family. This was, unfortunately, not dealt with by the Federal Child Support Guidelines.¹⁴⁰ As a result, the Canadian courts seemed to have prioritised first families, leading to undesirable outcomes for second families.¹⁴¹ Two cases illustrate this point.

41 The first is the decision of the Manitoba Court of Appeal in *Schenkeveld v Schenkeveld*.¹⁴² In this case, the husband had two children from his first marriage.¹⁴³ At the time of the hearing, the husband had remarried and had three children from his second marriage.¹⁴⁴ The husband claimed that having to pay the table amount of child support would be an undue hardship on him.¹⁴⁵ Whilst Monnin JA, who delivered the judgment of the court, conceded that the husband was in a difficult financial position, he was of the view that such difficulty was nevertheless not sufficient to constitute undue hardship.¹⁴⁶

136 See D A Rollie Thompson, “Case Comment: *Gaetz v Gaetz*” (2001) 15 RFL (5th) 82 at 82 and Carol Rogerson, “Child and Spousal Support in Canada: The Guidelines Approach Part 1” (2011) 14 Ir J Fam L 72 at 77.

137 See D A Rollie Thompson, “Case Comment: *Gaetz v Gaetz*” (2001) 15 RFL (5th) 82 at 84.

138 See Julien D Payne & Marilyn A Payne, *Child Support Guidelines in Canada*, 2017 (Toronto: Irwin Law, 2017) at p 336.

139 See D A Rollie Thompson, “Case Comment: *Gaetz v Gaetz*” (2001) 15 RFL (5th) 82 at 86.

140 See James G McLeod, “Annotation: *Schenkeveld v Schenkeveld*” (2002) 23 RFL (5th) 352 at 355.

141 See James G McLeod, “Annotation: *Schenkeveld v Schenkeveld*” (2002) 23 RFL (5th) 352 at 353.

142 (2002) 23 RFL (5th) 352.

143 See *Schenkeveld v Schenkeveld* (2002) 23 RFL (5th) 352 at [3].

144 See *Schenkeveld v Schenkeveld* (2002) 23 RFL (5th) 352 at [4].

145 See *Schenkeveld v Schenkeveld* (2002) 23 RFL (5th) 352 at [5].

146 See *Schenkeveld v Schenkeveld* (2002) 23 RFL (5th) 352 at [10].

42 In adopting an approach which favours the first family, Monnin JA seemed to be particularly concerned that the objectives of the Federal Child Support Guidelines would be defeated if the courts deviated too readily from the table amount.¹⁴⁷ However, as James G McLeod astutely pointed out, it was “disappointing”¹⁴⁸ that Monnin JA did not balance the needs of the husband’s first family with the second family, even though s 10(2)(d) expressly provides that having a legal duty to support a child (other than a child of the marriage) could constitute undue hardship.¹⁴⁹

The court apparently was satisfied that there was nothing wrong in law with continuing the Table amount of child support for first-family children where the effect was to force a payor’s children from his or her second family to exist at a significantly lower lifestyle than the children from his or her first family.

43 McLeod also noted that this outcome was not likely to be the drafters’ intention.¹⁵⁰ Instead, there should be an attempt to accommodate the needs of the payor’s second family, or more specifically, “to share the pain between the two families.”¹⁵¹ Viewed in this manner, it is suggested that a difficult financial position faced by a spouse should be sufficient to constitute undue hardship.

44 In a similar vein, the decision of the Nova Scotia Court of Appeal in *Gaetz v Gaetz*¹⁵² (“*Gaetz*”) also illustrates the courts’ extreme adherence to the table amount and the strictness of the undue hardship exception.¹⁵³ In rejecting the wife’s claim for undue hardship, Freeman JA, who delivered the judgment of the court, interpreted s 10(2) in the following restrictive manner:¹⁵⁴

If a parent whose circumstances do not reflect considerations set out in s 10(2)(a) to (e), who has relatively minor debts, and who enjoys an income of \$30,000–\$31,000 a year, can be relieved of most of her child support obligations on grounds of undue hardship, the whole purpose of the Guidelines would be undermined and their laudable objectives defeated.

147 See *Schenkeveld v Schenkeveld* (2002) 23 RFL (5th) 352 at [9].

148 See James G McLeod, “Annotation: *Schenkeveld v Schenkeveld*” (2002) 23 RFL (5th) 352 at 356.

149 See James G McLeod, “Annotation: *Schenkeveld v Schenkeveld*” (2002) 23 RFL (5th) 352 at 353.

150 See James G McLeod, “Annotation: *Schenkeveld v Schenkeveld*” (2002) 23 RFL (5th) 352 at 354.

151 See James G McLeod, “Annotation: *Schenkeveld v Schenkeveld*” (2002) 23 RFL (5th) 352 at 354.

152 (2001) 15 RFL (5th) 73.

153 See D A Rollie Thompson, “Case Comment: *Gaetz v Gaetz*” (2001) 15 RFL (5th) 82 at 82.

154 See *Gaetz v Gaetz* (2001) 15 RFL (5th) 73 at [17].

45 Once again, Freeman JA seems to be particularly concerned about ensuring that certainty and predictability are not undermined in the interpretation of s 10 of the Federal Child Support Guidelines.¹⁵⁵ Unsurprisingly, *Gaetz* was heavily criticised by commentators for not accomplishing the underlying objectives of the Federal Child Support Guidelines by adhering strictly to the table amount without having regard to fairness and flexibility.¹⁵⁶ The general lesson that Singapore should learn, therefore, is that some form of balance is necessary in the area of second families.¹⁵⁷

46 Fortunately, the Singapore courts have thus far demonstrated their ability to balance first and second families. A survey of the case law reveals that the courts are prepared to award a lower amount of child support if the payor is unable to pay the full amount due to new support obligations owed to a second family. To substantiate this point, reference is made to two decisions.

47 In *ANH v ANI*,¹⁵⁸ the husband argued that he should pay a lower amount of child support to his first family, given that he had two young children from his second marriage.¹⁵⁹ In allowing the husband's application, Choo Han Teck J¹⁶⁰ demonstrated the court's ability to perform a balancing exercise between the husband's first family and second family in the following way:¹⁶¹

Either party in a divorce is free to remarry ... It is therefore not right to deride the father here for his remarriage as if it were a problem of his own making ... The court has no business commenting, let alone pontificating, upon whether a divorcee should marry or not. What it has to do is compare the needs of the ex-spouse and the new family with the income that the [child support] provider has, and make a fair and reasonable attempt to balance the budget for them.

155 See *Gaetz v Gaetz* (2001) 15 RFL (5th) 73 at [17].

156 See generally, James G McLeod, "Annotation: *Schenkeveld v Schenkeveld*" (2002) 23 RFL (5th) 352 and D A Rollie Thompson, "Case Comment: *Gaetz v Gaetz*" (2001) 15 RFL (5th) 82.

157 See Ricki D Harris, "Undue Hardship: Section 10, Child Support Guidelines" in *Child Support Guidelines: New and Important Caselaw* (Toronto: Department of Continuing Legal Education, The Law Society of Upper Canada, 1998, looseleaf) at p 5-29.

158 [2019] SGHC 170.

159 See *ANH v ANI* [2019] SGHC 170 at [2].

160 In another decision by Choo Han Teck J, the father was allowed to pay a lower amount of child support as he had remarried with two young children and was financially stretched to his limit: see *Peh Soh Kiat v Teo Wee Eng* [2003] SGHC 94 at [8].

161 See *ANH v ANI* [2019] SGHC 170 at [5]-[6].

48 An earlier decision of the Singapore High Court in *THG v LGH*¹⁶² also illustrates the court's emphasis on balancing the needs of both households. In this case, the husband had remarried and had two young children from his second marriage.¹⁶³ In ordering the husband to pay \$375 per month as child support instead of \$700 as requested by the wife,¹⁶⁴ MPH Rubin J held as follows:¹⁶⁵

Considering the fact that the husband has since remarried and has two young children from the second marriage, and taking into account his income and current responsibilities, I was of the view that to burden him with [\$700] per month would cause him and his present household much hardship. Having regard to all the relevant circumstances, I came to conclude that in overall fairness to the parties, ... \$375 per month would be equitable ...

49 In the light of the above, the balancing exercise which has been performed by the Singapore courts thus far should be incorporated into the child support guidelines to ensure that second families are not unfairly disadvantaged. As the Canadian experience has shown, Singapore should bear in mind that fairness and flexibility are extremely important in order for the undue hardship exception to serve its purpose.¹⁶⁶ Conversely, extreme adherence to the table amount is simply undesirable.¹⁶⁷ As one commentator aptly put it, “[i]t is no longer enough for the [c]ourts to simply say, ‘You assumed new obligations knowing that you had responsibilities for a first family’”.¹⁶⁸

(2) *Step-parents*

(a) An overview of Canada's approach

50 In Canada, the child support obligation of step-parents is dealt with under s 5 of the Federal Child Support Guidelines, which provides as follows:

Where the spouse against whom a child support order is sought stands in the place of a parent for a child, the amount of a child support order is, in respect of

162 [1996] 1 SLR(R) 767.

163 See *THG v LGH* [1996] 1 SLR(R) 767 at [9].

164 See *THG v LGH* [1996] 1 SLR(R) 767 at [9].

165 See *THG v LGH* [1996] 1 SLR(R) 767 at [9].

166 See D A Rollie Thompson, “Case Comment: *Gaetz v Gaetz*” (2001) 15 RFL (5th) 82 at 87.

167 See D A Rollie Thompson, “Case Comment: *Gaetz v Gaetz*” (2001) 15 RFL (5th) 82 at 82.

168 See Ricki D Harris, “Undue Hardship: Section 10, Child Support Guidelines” in *Child Support Guidelines: New and Important Caselaw* (Toronto: Department of Continuing Legal Education, The Law Society of Upper Canada, 1998, looseleaf) at p 5-29.

that spouse, such amount as the court considers appropriate, having regard to these Guidelines and any other parent's legal duty to support the child.

51 As can be seen, s 5 permits the court to deviate from the table amount if child support is requested from a step-parent. At this juncture, it should be clarified that the focus of this section is on the issue of determining the amount of child support rather than the threshold question of whether a spouse qualifies as a step-parent for the purposes of the Federal Child Support Guidelines.¹⁶⁹ More specifically, the issue is how the child support obligation should be shared between natural parents and step-parents.¹⁷⁰ The decision of the British Columbia Court of Appeal in *H(UV) v H(MW)*¹⁷¹ ("*H v H*") provides useful guidance. In this case, Newbury JA, who delivered the judgment of the court, explained how the respective child support obligations of the natural father and the step-father should be determined.

52 First, Newbury JA held there should be no "balancing" or "apportionment" of the table amount payable by the natural parent due to the step-parent's concurrent liability.¹⁷² He then proceeded to emphasise that the court must first determine the amount of child support to be paid by the natural parent.¹⁷³ After determining this amount, the court will then ascertain the step-parent's obligation in light of that amount.¹⁷⁴ The following portion of Newbury JA's judgment is instructive:¹⁷⁵

Where for example the stepparent provided a standard to the children during the period of cohabitation that was materially higher than that which the natural parents can provide by means of their Guidelines amounts, a court might find it appropriate to make an order against the stepparent that is designed to provide the higher standard, or something approximating it, 'on top of' the other parents' support. However, where the 'piling' of Guidelines amounts would result in a standard beyond one that is reasonable in the context of the standard the children have previously enjoyed, such a 'windfall' or 'wealth transfer' ... is unlikely to be 'appropriate'.

53 On the facts, Newbury JA concluded that the trial judge had erred in his approach to the determination of the step-father's obligation under s 5 of the Federal Child Support Guidelines without considering

169 For the legal principles relating to when a person stands in the place of a parent for a child in the Canadian context, see *Chartier v Chartier* [1999] 1 SCR 242.

170 See Carol Rogerson, "The Child Support Obligation of Step-Parents" (2001) 18 Can J Fam L 9 at 50.

171 (2009) 59 RFL (6th) 25.

172 See *H(UV) v H(MW)* (2009) 59 RFL (6th) 25 at [38].

173 See *H(UV) v H(MW)* (2009) 59 RFL (6th) 25 at [39].

174 See *H(UV) v H(MW)* (2009) 59 RFL (6th) 25 at [40].

175 See *H(UV) v H(MW)* (2009) 59 RFL (6th) 25 at [41].

the natural father's non-discretionary obligation to pay the table amount of child support as mandated under s 3.¹⁷⁶ What this means is that the natural parent's obligation to pay child support should not be viewed as a secondary one.¹⁷⁷ In the circumstances, Newbury JA allowed the appeal and ordered the natural father to pay the full table amount of child support.¹⁷⁸

(b) Lessons for Singapore

54 The child support guidelines in Singapore should expressly prescribe how the child support obligations ought to be balanced between natural parents and step-parents.¹⁷⁹ As the Canadian experience has shown, a failure to stipulate how child support obligations should be apportioned between multiple parents will result in uncertainty, unpredictability and conflicting interpretations by different courts.¹⁸⁰ The end result would be a huge number of cases litigated in court.¹⁸¹ Therefore, Singapore would benefit from clear starting points and explicit guidance in crafting the exception for step-parents.¹⁸²

55 In that regard, Newbury JA's decision in *H v H*, being consistent with the existing Singapore jurisprudence on this issue, merits careful consideration. As a starting point, the phrasing of the exception for step-parents in Singapore should not be too discretionary.¹⁸³ Instead, the primacy of the natural parent's obligation should be included in the child support guidelines.¹⁸⁴ For instance, the child support guidelines

176 See *H(UV) v H(MW)* (2009) 59 RFL (6th) 25 at [43].

177 See *H(UV) v H(MW)* (2009) 59 RFL (6th) 25 at [42].

178 See *H(UV) v H(MW)* (2009) 59 RFL (6th) 25 at [43].

179 *Contra* Department of Justice, Canada, *Children Come First: A Report to Parliament Reviewing the Provisions and Operation of the Federal Child Support Guidelines* vol 1 (Ottawa: Minister of Justice and Attorney General of Canada, 2002) at p 26 (where some critics are of the view that apportioning child support obligations between natural parents and step-parents is such a complicated task that the use of a rigid formula would lead to unfairness).

180 See Carol Rogerson, "Child and Spousal Support in Canada: The Guidelines Approach Part 1" (2011) 14 Ir J Fam L 72 at 75 and Brian Burke & Stephanie Chipeur, "The More the Merrier? Multiple Parents and Child Support" (2010) 29 Can Fam LQ 185 at 186.

181 See Carol Rogerson, "The Child Support Obligation of Step-Parents" (2001) 18 Can J Fam L 9 at 10.

182 See Carol Rogerson, "Shaping Substantive Law to Promote Access to Justice: Canada's Use of Child and Spousal Support Guidelines" in *Delivering Family Justice in the 21st Century* (Mavis Maclean *et al* eds) (Oxford: Hart Publishing, 2015) at p 61.

183 See Carol Rogerson, "The Child Support Obligation of Step-Parents" (2001) 18 Can J Fam L 9 at 114.

184 See Carol Rogerson, "The Child Support Obligation of Step-Parents" (2001) 18 Can J Fam L 9 at 114.

could indicate that the court will approach the inquiry in a two-stage process.¹⁸⁵ The first stage consists of a strict and bright-line rule that the full table amount must be paid by the natural parent.¹⁸⁶ The second stage then allows the court some flexibility to determine the amount of top up (if necessary) to be paid by the step-parent.¹⁸⁷ This two-stage inquiry is consistent with the legal position in Singapore, where the duty of a step-parent to provide child support is secondary to the natural parent's duty in that the former only arises if the natural parent fails to provide child support.¹⁸⁸ This is made clear by s 70(1) of the Women's Charter, which provides as follows:

Where a person has accepted a child who is not his child as a member of his family, it shall be his duty to maintain that child while he remains a child, so far as the father or the mother of the child fails to do so, and the court may make such orders as may be necessary to ensure the welfare of the child.

56 As can be seen from s 70(1), one of the conditions that must be satisfied before a step-parent is required to provide child support is the failure of the child's natural parent to do so.¹⁸⁹ In other words, the step-parent's liability is secondary.¹⁹⁰ This primacy of the natural parent's liability to provide child support¹⁹¹ was helpfully explained in *AJE v AJF*¹⁹² by Kan Ting Chiu J:¹⁹³

Section 70(1) provides that a person who accepts a child as a member of his family has a duty to maintain the child so far as the parents fail to maintain the child. The words 'so far as' must be understood properly. They have the same meaning as 'to the extent that'. In other words, the duty only starts upon the parents' failure to maintain the child adequately. If the child is already adequately maintained by his or her parents, there is no duty on the non-parent to provide further [child support] for the child. However, if the child receives *some* [child support] from the parents, which is insufficient for his requirements, then the non-parent who has accepted the child as a member of his family has the duty to provide the child with such additional [child support] within his means as is reasonable for the child. [emphasis in original]

185 See Brian Burke & Stephanie Chipeur, "The More the Merrier? Multiple Parents and Child Support" (2010) 29 Can Fam LQ 185 at 198.

186 See Brian Burke & Stephanie Chipeur, "The More the Merrier? Multiple Parents and Child Support" (2010) 29 Can Fam LQ 185 at 198.

187 See Brian Burke & Stephanie Chipeur, "The More the Merrier? Multiple Parents and Child Support" (2010) 29 Can Fam LQ 185 at 198.

188 See Debbie Ong, "Family Law" (2011) 12 SAL Ann Rev 298 at 300, para 15.6.

189 See *TDT v TDS* [2016] 4 SLR 145 at [111].

190 See Leong Wai Kum, *Elements of Family Law in Singapore* (Singapore: LexisNexis, 3rd Ed, 2018) at para 12.082.

191 See *TDT v TDS* [2016] 4 SLR 145 at [111].

192 [2011] 3 SLR 1177.

193 See *AJE v AJF* [2011] 3 SLR 1177 at [12].

57 The Singapore courts have consistently applied this approach. For instance, in *AAE v AAF*,¹⁹⁴ Belinda Ang Saw Ean J held that the step-parent was not liable to pay child support as child support should be first sought from the child's natural parent.¹⁹⁵ In a similar vein, Woo Bih Li J emphasised in *EB v EC*¹⁹⁶ that the burden to provide child support should not be imposed on the step-parent if child support was not sought from the natural parent in the first place.¹⁹⁷ Leong concluded that "non-parental liability does not release parental liability",¹⁹⁸ given that a natural parent has a higher burden towards a child *vis-à-vis* a step-parent.¹⁹⁹

58 To summarise, Singapore must bear in mind the "conflicting policy pulls at play"²⁰⁰ in crafting this exception to the table amount. In order to avoid the situation in Canada where the case law developed in different directions,²⁰¹ the discretion conferred upon judges to apportion the child support obligations between natural parents and step-parents must be carefully structured.²⁰² As has been shown, this should not be a difficult task for Singapore, given that a consistent and sound approach already exists in its jurisprudence.

(3) *Split and shared custody*

(a) Overview of Canada's approach

59 Sections 8 and 9 of the Federal Child Support Guidelines, which deal with split custody and shared custody respectively, provide that the spouses' custody arrangements may affect the amount of child support that is being awarded by the court. Turning first to split custody, s 8 provides as follows:

Where each spouse has custody of one or more children, the amount of a child support order is the difference between the amount that each spouse would otherwise pay if a child support order were sought against each of the spouses.

194 [2009] 3 SLR(R) 827.

195 See *AAE v AAF* [2009] 3 SLR(R) 827 at [35].

196 [2006] 2 SLR(R) 475.

197 See *EB v EC* [2006] 2 SLR(R) 475 at [28].

198 See Leong Wai Kum, *Elements of Family Law in Singapore* (Singapore: LexisNexis, 3rd Ed, 2018) at para 12.060.

199 See Leong Wai Kum, *Elements of Family Law in Singapore* (Singapore: LexisNexis, 3rd Ed, 2018) at para 12.061.

200 See Carol Rogerson, "The Child Support Obligation of Step-Parents" (2001) 18 Can J Fam L 9 at 124.

201 See Carol Rogerson, "The Child Support Obligation of Step-Parents" (2001) 18 Can J Fam L 9 at 124.

202 See Carol Rogerson, "Child and Spousal Support in Canada: The Guidelines Approach Part 1" (2011) 14 Ir J Fam L 72 at 75.

60 As can be seen from s 8, there is no judicial discretion involved as it is based on a simple set-off of the table amount of child support. Given that split custody is generally considered to be uncontroversial,²⁰³ no more will be said about it.

61 Instead, complications start to arise²⁰⁴ when one turns to shared custody²⁰⁵ under s 9, which permits the court to reduce the amount of child support when the parent spends at least 40% of the time with the child:

Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account

- (a) the amounts set out in the applicable tables for each of the spouses;
- (b) the increased costs of shared custody arrangements; and
- (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

62 It is well established that the determination of child support under s 9 consists of two stages. First, the court must ascertain whether the 40% threshold has been met.²⁰⁶ Second, if the threshold is met, the court must then consider the factors listed under ss 9(a), 9(b) and 9(c) in order to determine the amount of child support.²⁰⁷

63 On the first issue of whether the 40% has been met, the decision of the Ontario Court of Appeal in *Froom v Froom*²⁰⁸ provides guidance. Catzman and Laskin JJA, who delivered the judgment of the majority of the court, held that there is no universally accepted method to calculate whether the 40% threshold has been met and cautioned that rigid calculations should not be performed.²⁰⁹

64 The second issue concerning the amount of child support to be paid once the 40% threshold has been met was comprehensively examined by the Supreme Court of Canada in *Contino v Leonelli-*

203 See Simon Fodden, *Family Law* (Toronto: Irwin Law, 1999) at p 272.

204 See Simon Fodden, *Family Law* (Toronto: Irwin Law, 1999) at p 272.

205 For the purposes of the Federal Child Support Guidelines, shared custody is defined in terms of the amount of time the child spends with the parent: see D A Rollie Thompson, “The TLC of Shared Parenting: Time, Language and Cash” (2013) 32 Can Fam LQ 315 at 319.

206 See *Contino v Leonelli-Contino* [2005] 3 SCR 217 at [37].

207 See *Contino v Leonelli-Contino* [2005] 3 SCR 217 at [37].

208 (2005) 11 RFL (6th) 254.

209 See *Froom v Froom* (2005) 11 RFL (6th) 254 at [2].

*Contino*²¹⁰ (“*Contino*”). In this case, the majority of the nine-member court (comprising all but Fish J, who dissented) held that s 9 of the Federal Child Support Guidelines had to be interpreted with the objectives of fairness and flexibility in mind, even if to the detriment of consistency and predictability.²¹¹ While the three factors in s 9 structure the exercise of the court’s discretion, no single factor should prevail.²¹² In this regard, the court must calculate the set-off amount, look through the child expense budgets, and then assess each parent’s ability to bear the increased costs of shared custody and the standard of living for their children.²¹³ In particular, the majority expressly rejected the use of a strict formulaic approach, pro-rated set-offs and multipliers.²¹⁴ On the facts, it was unclear how the majority arrived at the child support amount of \$500 per month,²¹⁵ although it had been suggested that the mother’s reliance on the parties’ initial agreement heavily influenced the majority’s decision.²¹⁶ Accordingly, the end result is that the Canadian courts have a huge amount of discretion in applying s 9 of the Federal Child Support Guidelines.²¹⁷

(b) Lessons for Singapore

65 The preliminary question arises as to whether the shared custody exception is even necessary in the first place. For instance, a survey revealed that three of 50 states in the US do not confer upon the court a discretion to deviate from the table amount in cases of shared custody.²¹⁸ Nevertheless, it is suggested that there is a sound basis for Singapore to create an exception for shared custody in the child support guidelines as in the case of Canada. This is because the formula used in the child support guidelines fails to take into account the fact that a parent who

210 [2005] 3 SCR 217.

211 See *Contino v Leonelli-Contino* [2005] 3 SCR 217 at [33].

212 See *Contino v Leonelli-Contino* [2005] 3 SCR 217 at [27].

213 See D A Rollie Thompson, “The TLC of Shared Parenting: Time, Language and Cash” (2013) 32 Can Fam LQ 315 at 334.

214 See D A Rollie Thompson, “The TLC of Shared Parenting: Time, Language and Cash” (2013) 32 Can Fam LQ 315 at 333–334.

215 See *Contino v Leonelli-Contino* [2005] 3 SCR 217 at [83].

216 See Robert Leckey, “Particular Justice: Michel Bastarache and Family Law” in *At the Forefront of Duality: Essays in Honour of Michel Bastarache* (Nicolas C G Lambert ed) (Québec: Éditions Yvon Blais, 2011) at p 125.

217 See D A Rollie Thompson, “The TLC of Shared Parenting: Time, Language and Cash” (2013) 32 Can Fam LQ 315 at 335.

218 See Patricia R Brown & Tonya Brito, *Characteristics of Shared-Placement Child Support Formulas Used in the Fifty States* (Institute for Research on Poverty, University of Wisconsin-Madison, March 2007) at p 1.

spends more time with the child will presumably spend more money on the child.²¹⁹

66 Having dealt with the preliminary question, the issue then becomes one of how the exception for shared custody should be best structured in Singapore. With respect, the approach adopted by Canada does not seem to be desirable given that it has struggled with conflicting interpretations of s 9 since the introduction of the Federal Child Support Guidelines in 1997.²²⁰ As has been aptly observed, the area of shared custody is “complex, difficult to calculate, and even more difficult to predict”.²²¹ Unfortunately, in *Contino*, the Supreme Court of Canada failed to address these concerns by choosing to adopt a “broadly discretionary approach”.²²² To avoid going down the same path as Canada, Singapore could consider the following suggestions.

67 First, the method to calculate whether the 40% threshold (or whatever threshold Singapore deems appropriate) has been met should be stipulated in the child support guidelines. This reduces litigation and uncertainty²²³ given that spouses often litigate over whether the 40% threshold has been met.²²⁴ Indeed, a failure to stipulate the threshold will only lead to differing judicial opinions and methods of calculation.²²⁵

68 Second, Singapore should structure the court’s discretion more carefully once the 40% threshold has been met. Having said that, it must be recognised that the Canadian experience has shown that it will be a challenging task for Singapore to devise a shared custody exception that

219 See D A Rollie Thompson, “The TLC of Shared Parenting: Time, Language and Cash” (2013) 32 Can Fam LQ 315 at 323.

220 See D A Rollie Thompson, “The TLC of Shared Parenting: Time, Language and Cash” (2013) 32 Can Fam LQ 315 at 315 and Carol Rogerson, “Shaping Substantive Law to Promote Access to Justice: Canada’s Use of Child and Spousal Support Guidelines” in *Delivering Family Justice in the 21st Century* (Mavis Maclean *et al* eds) (Oxford: Hart Publishing, 2015) at p 61.

221 See Ruth E Mesbur, “Shared and Split Custody” in *Child Support Guidelines: A Fresh Look* (Toronto: Department of Continuing Legal Education, The Law Society of Upper Canada, 1997, looseleaf) at p 7-10.

222 See D A Rollie Thompson, “The TLC of Shared Parenting: Time, Language and Cash” (2013) 32 Can Fam LQ 315 at 315.

223 See D A Rollie Thompson, “The TLC of Shared Parenting: Time, Language and Cash” (2013) 32 Can Fam LQ 315 at 329.

224 See Carol Rogerson, “Child and Spousal Support in Canada: The Guidelines Approach Part 1” (2011) 14 Ir J Fam L 72 at 78.

225 See D A Rollie Thompson, “The TLC of Shared Parenting: Time, Language and Cash” (2013) 32 Can Fam LQ 315 at 322 and Julien D Payne & Marilyn A Payne, *Canadian Family Law* (Toronto: Irwin Law, 7th Ed, 2017) at p 427.

“both provides helpful guidance to sensible parents who want to settle and also offers clear answers in contested and conflicted cases”.²²⁶

69 Interestingly, the majority of the Supreme Court of Canada in *Contino* conceded that the application of the factors in s 9 of the Federal Child Support Guidelines had generated difficulties.²²⁷ One problem is that the courts require spouses to produce documents such as financial statements and child expense budgets to support their claims under ss 9(b) and 9(c).²²⁸ However, a survey of the case law reveals that spouses often do not lead evidence concerning the factors in ss 9(b) and 9(c).²²⁹ As a result, despite the fact that the courts are vested with a wide discretion after *Contino*, many judges simply use a simple set-off to deal with shared custody cases.²³⁰ This is clearly unsatisfactory because it mirrors the approach adopted in s 8 cases even though split custody and shared custody are completely different concepts.

70 In the light of the above, many commentators have persuasively argued that the area of shared custody would benefit from formulaic presumptions or clear starting points.²³¹ In this regard, Singapore could introduce a multiplier or a presumptive formula to replace the factors that are used in s 9 of the Federal Child Support Guidelines.²³² For instance, the Family Law Section of the Manitoba Bar Association recently proposed using a different multiplier based on the number of children.²³³ Alternatively, a committee that reviewed the Federal Child Support Guidelines five years after they were implemented recommended the introduction of a presumptive formula based on set-offs to increase

226 See D A Rollie Thompson, “The TLC of Shared Parenting: Time, Language and Cash” (2013) 32 Can Fam LQ 315 at 347.

227 See *Contino v Leonelli-Contino* [2005] 3 SCR 217 at [3].

228 See *Contino v Leonelli-Contino* [2005] 3 SCR 217 at [56] and [70].

229 See D A Rollie Thompson, “The TLC of Shared Parenting: Time, Language and Cash” (2013) 32 Can Fam LQ 315 at 336–337.

230 See D A Rollie Thompson, “The TLC of Shared Parenting: Time, Language and Cash” (2013) 32 Can Fam LQ 315 at 339.

231 See Carol Rogerson, “Shaping Substantive Law to Promote Access to Justice: Canada’s Use of Child and Spousal Support Guidelines” in *Delivering Family Justice in the 21st Century* (Mavis Maclean *et al* eds) (Oxford: Hart Publishing, 2015) at p 61.

232 See Department of Justice, Canada, *Children Come First: A Report to Parliament Reviewing the Provisions and Operation of the Federal Child Support Guidelines* vol 1 (Ottawa: Minister of Justice and Attorney General of Canada, 2002) at p 22.

233 The proposed multiplier ranges from 1.2 times the set-off for one child to no multiplier for three children or more: see D A Rollie Thompson, “The TLC of Shared Parenting: Time, Language and Cash” (2013) 32 Can Fam LQ 315 at 339, fn 111.

certainty and predictability in shared custody situations.²³⁴ In particular, it was suggested that:²³⁵

[T]he current factors used to determine the amount of support in shared custody situations [could] be replaced by the use of a presumptive formula. A judge would determine the support amount by applying a prescribed formula. The formula amount would be the difference between the table values for each parent given the total number of children in the shared custody arrangement.

71 Unfortunately, the Canadian government did not give effect to this recommendation.²³⁶ As a result, the situation in Canada has been described as one where “[o]bjectivity and predictability are absent, and the uncertainty alone will promote disagreement and litigation.”²³⁷ Conversely, the introduction of a multiplier or a presumptive formula in Singapore would ensure consistency and predictability in the amount of child support awarded.²³⁸

(4) *Special and extraordinary expenses*

(a) Overview of Canada’s approach

72 Section 7(1) of the Federal Child Support Guidelines allows the court to award an amount in addition to the table amount to cover special or extraordinary expenses such as:

- (a) child care expenses incurred as a result of the custodial parent’s employment, illness, disability or education or training for employment;
- (b) that portion of the medical and dental insurance premiums attributable to the child;
- (c) health-related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person,

234 See Department of Justice, Canada, *Children Come First: A Report to Parliament Reviewing the Provisions and Operation of the Federal Child Support Guidelines* vol 1 (Ottawa: Minister of Justice and Attorney General of Canada, 2002) at p 22.

235 See Department of Justice, Canada, *Children Come First: A Report to Parliament Reviewing the Provisions and Operation of the Federal Child Support Guidelines* vol 1 (Ottawa: Minister of Justice and Attorney General of Canada, 2002) at p 22.

236 See Carol Rogerson, “Child and Spousal Support in Canada: The Guidelines Approach Part 1” (2011) 14 Ir J Fam L 72 at 77.

237 See Simon Fodden, *Family Law* (Toronto: Irwin Law, 1999) at p 274.

238 See D A Rollie Thompson, “The TLC of Shared Parenting: Time, Language and Cash” (2013) 32 Can Fam LQ 315 at 339, fn 111 and Department of Justice, Canada, *Children Come First: A Report to Parliament Reviewing the Provisions and Operation of the Federal Child Support Guidelines* vol 1 (Ottawa: Minister of Justice and Attorney General of Canada, 2002) at p 22.

physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;

- (d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
- (e) expenses for post-secondary education; and
- (f) extraordinary expenses for extracurricular activities.

73 In addition, s 7(1) expressly provides that the court has the discretion to add such amounts after considering “the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation”. Lastly, s 7(2) emphasises that the guiding principle in this determination is that “the expense is shared by the spouses in proportion to their respective incomes”.

74 What is immediately notable is that the expenses for primary or secondary school education or for any other educational programs²³⁹ and extracurricular activities²⁴⁰ must be extraordinary. Unsurprisingly, questions concerning the interpretation of the term “extraordinary” arose due to “the lack of direction in the Guidelines themselves”.²⁴¹ As a result, two different approaches have been taken by the Canadian courts, namely, a subjective approach or an objective approach. The former approach, which can be associated with the decision of the Nova Scotia Court of Appeal in *Raftus v Raftus*²⁴² (“*Raftus*”), takes into consideration the expense of the education or activity in relation to the incomes of the parents in ascertaining whether the expense was extraordinary.²⁴³ The latter approach, however, does not take into account the incomes of the parents in making this determination.²⁴⁴

75 This controversy was partially resolved in the decision of the British Columbia Court of Appeal in *McLaughlin v McLaughlin*²⁴⁵ (“*McLaughlin*”), where Prowse JA, who delivered the judgment of the court, indicated a preference for the subjective approach.²⁴⁶ Endorsing the analysis in *Raftus*, Prowse JA was of the view that an objective approach would be unfair as it fails to take into account “the needs of a particular

239 Federal Child Support Guidelines (SOR/97-175) s 7(1)(d).

240 Federal Child Support Guidelines (SOR/97-175) s 7(1)(f).

241 See *McLaughlin v McLaughlin* (1998) 44 RFL (4th) 148 at [63].

242 (1998) 37 RFL (4th) 59.

243 See *Raftus v Raftus* (1998) 37 RFL (4th) 59 at [28].

244 See *Raftus v Raftus* (1998) 37 RFL (4th) 59 at [19].

245 (1998) 44 RFL (4th) 148.

246 See *McLaughlin v McLaughlin* (1998) 44 RFL (4th) 148 at [69].

family with particular expenses”²⁴⁷ Instead, a subjective approach to the meaning of “extraordinary” which considers the incomes of the parents would allow the establishment of a fair standard of support for children.²⁴⁸

76 In any event, a definition of “extraordinary expenses” was eventually added to the Federal Child Support Guidelines in 2006 to promote clarity and remedy the lack of judicial consistency:²⁴⁹

- (a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse’s income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or
- (b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account
 - (i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,
 - (ii) the nature and number of the educational programs and extracurricular activities,
 - (iii) any special needs and talents of the child or children,
 - (iv) the overall cost of the programs and activities, and
 - (v) any other similar factor that the court considers relevant.

77 As can be seen, s 7(1.1) of the Federal Child Support Guidelines seems to be adopting the subjective approach advocated by Prowse JA in *McLaughlin* by making reference to the spouse’s income.

(b) Lessons for Singapore

78 As a preliminary observation, Singapore should bear in mind that an exception permitting the award of extraordinary and special expenses would represent a deviation from the philosophy and rationale behind the “percentage of payor income” model, which seeks to award adequate levels of child support in a manner that is consistent and predictable.²⁵⁰

247 See *McLaughlin v McLaughlin* (1998) 44 RFL (4th) 148 at [70].

248 See *McLaughlin v McLaughlin* (1998) 44 RFL (4th) 148 at [46].

249 See Julien D Payne & Marilyn A Payne, *Canadian Family Law* (Toronto: Irwin Law, 7th Ed, 2017) at p 452 and Julien D Payne & Marilyn A Payne, *Child Support Guidelines in Canada, 2017* (Toronto: Irwin Law, 2017) at p 251.

250 See Simon Fodden, *Family Law* (Toronto: Irwin Law, 1999) at p 269.

Indeed, the Canadian experience has shown that the objectives of consistency and predictability would be undermined if there are regular disputes over the type of expenses that are extraordinary.²⁵¹ It is suggested that Singapore could deal with such concerns in the following manner.

79 First, the meaning of the term “extraordinary” should be included in the child support guidelines right from the outset to avoid unnecessary ambiguity. As the Canadian experience has shown, a failure to define key terms such as “extraordinary” will lead to differing interpretations by courts,²⁵² inconsistent outcomes²⁵³ and increased litigation between spouses.²⁵⁴ Moreover, the difficulties that arose in Canada may be due, in part, to the mystery behind the type of expenses that have already been included in the table amount at different economic levels.²⁵⁵ Therefore, it may be wise for Singapore to make this determination (if at all possible), and define key terms clearly.

80 Second, it has been suggested that special or extraordinary expenses should only be awarded in unusual circumstances.²⁵⁶ This suggestion merits careful consideration as it would reduce the instances of courts having to adjudicate between differing estimates put forth by spouses, which often involves detailed item-by-item analysis and excessive judicial time that could be better spent on other matters.²⁵⁷ For instance, in *APE v APF*,²⁵⁸ Tan Siong Thye J was faced with the difficulty of having to ascertain the reasonableness of the estimates submitted by the wife and the husband respectively, which included expenses for extracurricular activities.²⁵⁹

251 See Simon Fodden, *Family Law* (Toronto: Irwin Law, 1999) at p 269.

252 See Melanie Kraft & Philip M Epstein, “The ‘Extraordinary’ Interpretations of s.7 of the Guidelines Part II” in *Child Support Guidelines: New and Important Caselaw* (Toronto: Department of Continuing Legal Education, The Law Society of Upper Canada, 1998, looseleaf) at p 3-1.

253 See *McLaughlin v McLaughlin* (1998) 44 RFL (4th) 148 at [30].

254 See Melanie Kraft & Philip M Epstein, “The ‘Extraordinary’ Interpretations of s.7 of the Guidelines Part II” in *Child Support Guidelines: New and Important Caselaw* (Toronto: Department of Continuing Legal Education, The Law Society of Upper Canada, 1998, looseleaf) at p 3-1.

255 See Gerald P Sadvari, “The Treatment of Add-ons on the Guidelines” in *Recent Developments in Spousal and Child Support: The Final Frontier* (Toronto: Edmond Montgomery Publications, 1998, looseleaf) at p 2-1.

256 See Simon Fodden, *Family Law* (Toronto: Irwin Law, 1999) at p 270.

257 See Valerie Thean, “Access to Family Justice: Anchoring Deeper, Extending Wider”, speech delivered at the Family Justice Courts Workplan 2017 (20 February 2017) at para 13.

258 [2015] SGHC 17.

259 See *APE v APF* [2015] SGHC 17 at [44].

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Item	Wife's estimate	Husband's estimate
Food	\$500	\$300
School fees and CCA	\$50	\$150
Transport fees	\$65	\$65
Course fees for piano, Grown English, written expression lessons, Chinese classes, swimming, gymnastics and JEI Maths	\$1,200	\$600
School, assessment and story books	\$100	\$60
Stationery and school bag	\$50	\$10
Clothing/shoes, etc	\$100–\$200	\$50
Allowances and rewards	\$300	\$70
Handphone	\$30–\$80	\$10
Stemcord storage	\$24.50	\$22.30
Dental	\$33	\$0
Medical	\$20	\$0
Insurance premiums	\$207	\$0
Travel expenses	\$750	\$0
Subtotal	\$3,597.50	\$1,337.30

81 After careful consideration, Tan J observed thus:²⁶⁰

I was of the view that a sum of \$1,500 for the child's monthly expenses was a reasonable figure ... In arriving at my decision, I noted that the wife was indulging the child in many things which might be nice to have, but were not reasonably necessary for the child's needs ... The course fees for the child which amounted to \$1,200 per month appeared to be extravagant ... [W]hile there are many things in life which may be nice to have, they should not be deemed to be reasonably necessary for the child's needs. In arriving at the figure of \$1,500, it was my view that the wife's figure was overindulgent and the husband's figure was much closer to what would be reasonably necessary for the child.

82 A moment's reflection will reveal that Tan J's analysis seems to bring us back to the old child support regime where budgets are required in order for the court to make a discretionary judgment about the reasonableness of the estimates and the abilities of the parents to satisfy the child's needs.²⁶¹ As mentioned above, this approach raises a whole

260 See *APE v APF* [2015] SGHC 17 at [45]–[46].

261 See Simon Fodden, *Family Law* (Toronto: Irwin Law, 1999) at p 273.

host of problems.²⁶² Moreover, coupled with the fact that many parents in Singapore enrol their children in extracurricular activities such as tuition,²⁶³ reverting to the old approach in *Paras* does not seem to be in the best interests of Singapore's family justice system.

V. Conclusion

83 As this article has shown, Canada's positive experience with the Federal Child Support Guidelines offers useful lessons to Singapore on how child support guidelines could be crafted to allow for discretion and flexibility within the exceptions while retaining structure and guidance at the same time.²⁶⁴ It is crucial that the exceptions to the table amount do not result in too much complexity or prolonged litigation such that the objectives of certainty and predictability are no longer met.²⁶⁵ At the same time, regard must be had to fairness and flexibility in deserving circumstances.²⁶⁶ Where the appropriate balance ought to lie, however, remains a complicated question.²⁶⁷ Indeed, as Carl E Schneider aptly put it, it is impossible to state "a priori what mixture of rules and discretion will best serve in any particular situation."²⁶⁸ Instead, the choice must be made on a case-by-case basis,²⁶⁹ bearing in mind the unique circumstances of Singapore's family justice system.

84 Having said that, it is suggested that Singapore should structure its child support guidelines in a manner that is easy for litigants to apply in order to resolve disputes by themselves. While individualised fairness within the unique circumstances of a particular family is undoubtedly

262 See, eg, Federal/Provincial/Territorial Family Law Committee, Canada, *Child Support: Public Discussion Paper* (Ottawa: The Committee, June 1991) at p 1.

263 A recent survey conducted by the Department of Statistics revealed that Singapore households spent S\$1.4 billion on tuition yearly: see Kelvin Seah Kah Cheng, "Tuition Has Ballooned to a S\$1.4b Industry in Singapore. Should We Be Concerned?" *Today* (12 September 2019).

264 See Carol Rogerson, "Shaping Substantive Law to Promote Access to Justice: Canada's Use of Child and Spousal Support Guidelines" in *Delivering Family Justice in the 21st Century* (Mavis Maclean *et al* eds) (Oxford: Hart Publishing, 2015) at p 54.

265 See Simon Fodden, *Family Law* (Toronto: Irwin Law, 1999) at p 262.

266 See Carol Rogerson, "Child and Spousal Support in Canada: The Guidelines Approach Part 1" (2011) 14 *Ir J Fam L* 72 at 72.

267 See Carl E Schneider, "Discretion and Rules: A Lawyer's View" in *The Uses of Discretion* (Keith Hawkins ed) (Oxford: Clarendon Press, 1992) at p 47.

268 See Carl E Schneider, "Discretion and Rules: A Lawyer's View" in *The Uses of Discretion* (Keith Hawkins ed) (Oxford: Clarendon Press, 1992) at p 88.

269 See Carl E Schneider, "The Tension Between Rules and Discretion in Family Law: A Report and Reflection" (1993) 27 *Fam LQ* 229 at 232.

a desirable objective,²⁷⁰ ensuring that the child support guidelines are simple enough to be understood by laypersons also plays an important role in promoting access to justice.²⁷¹ With feedback from the legal community and the accretion of case law over time, regular refinement of the child support guidelines would also be necessary²⁷² to ensure that they continue to respond to the ever-changing landscape in Singapore's family justice system.²⁷³

270 See J Thomas Oldham, "Lessons from the New English and Australian Child Support Systems" (1996) 29 Vand J Transnat'l L 691 at 717.

271 See Carol Rogerson, "Shaping Substantive Law to Promote Access to Justice: Canada's Use of Child and Spousal Support Guidelines" in *Delivering Family Justice in the 21st Century* (Mavis Maclean *et al* eds) (Oxford: Hart Publishing, 2015) at p 68.

272 As the Canadian experience has shown, the fine-tuning of the appropriate balance between rules and discretion will continue to be an ongoing issue: see Carol Rogerson, "Child and Spousal Support in Canada: The Guidelines Approach Part 1" (2011) 14 Ir J Fam L 72 at 72. For instance, it was recommended that the table amounts be updated every five years: see Department of Justice, Canada, *Children Come First: A Report to Parliament Reviewing the Provisions and Operation of the Federal Child Support Guidelines* vol 1 (Ottawa: Minister of Justice and Attorney General of Canada, 2002) at p 10.

273 For some of the recent challenges faced by the Singapore family justice system: see generally, *Report of the Committee to Review and Enhance Reforms in the Family Justice System* (13 September 2019).