CITATION: L.L. v. M.C., 2013 ONSC 1801
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SUPERIOR COURT OF JUSTICE – ONTARIO

RE: L.L., Applicant

AND:

M.C., Respondent

BEFORE: Czutrin J.

COUNSEL: Applicant, In Person

Respondent, In Person

HEARD: February 28, 2013

ENDORSEMENT

Introduction and Brief History

[1] On July 19, 2012, I released my judgment deciding the parenting issues between the parties, L. L. ("mother") and M. C. ("father"), concerning their now six-year-old son ("J"): (*L.L. v. M.C.*, 2012 ONSC 3311, [2012] O.J. No. 3347). For the full history of this separation and the decision at trial, that judgment should be read with the present endorsement.

[2] My decision did not calculate the actual time each parent would have with J. I expected the parents to look at the parenting time and consider whether the father's time reached the "40 per cent" threshold provided for under s. 9 of the *Federal Child Support Guidelines* ("*FCSG*"). I contemplated the parties to return, if necessary, to address support issues.

[3] They have returned on a few minor issues relating to the parenting schedule, but the major issue is whether the resulting parenting time has the father reaching the 40 per cent time referred to in s. 9 of the *FCSG*.

[4] According to s. 9 of the *FCSG*, the threshold for "shared custody" is reached when each parent has a minimum of 40 per cent access or custody time with the child. Section 9 states the following:

> 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.

[5] The parties married on October 1, 2005 and separated on July 14, 2008. On July 18, 2010, the Applicant (mother) commenced an application seeking a divorce, custody of the child, spousal and child support, and an equalization payment.

[6] The parties settled most of their financial issues by way of consent. This resulted in a final order dealing with financial issues, dated December 16, 2009.

[7] Though they had attempted to settle the parenting issues by way of consent as well, their detailed Consent-to-Parenting Agreement was not approved by the court. The proposed Consent-to-Parenting Agreement terminated the $917 per month child support that the father was paying and increased J's time with his father to 43 per cent.

[8] The parties' proposed Parenting Agreement came to me in June 2010 in the form of a Form 14(b) motion. I was not prepared to approve the order due to the absence of Rule 35.1 Affidavits, lack of explanation regarding the termination of child support, and the parents' choice to enter into a joint custody agreement in spite of the high-conflict nature of their relationship.

[9] Ultimately the parenting issues resulted in a seven-day trial that concluded on June 27, 2012.

[10] As a result of my decision, I granted the mother custody and primary residence and provided the following parenting order commencing at paragraph 139 of my judgment. I also have clarified certain issues now:

> With the exception of any necessary modification to this year's summer vacations (2012) planned and confirmed by the parties, which are to be adjusted for this year only, I make the following order that otherwise applies forthwith:
>
> 1. **The Respondent, L.L. ("Ms. L.") shall have primary residence and custody of JWC, born […], 2006.**
>
> **Residency Schedule**
>
> 2. The major period requiring predictability for J is the school period between September and June.
>
> a. The weekends for J with the mother shall coincide with the alternate week schedule with L's schedule, so that J and L can spend as much time together as possible. Mother provide this schedule to the father. The schedule is as follows:
>
> b. **The father shall have alternate weekends from Fridays at 5:30 PM until Tuesdays in the morning to either school, daycare or mother's home depending on where the child is scheduled to be (start of school, daycare or 8 AM at mother). This then also covers any holiday Mondays, except for any other specified days in this order. (For example, if the father's alternate weekends falls on Thanksgiving, then it his day, and so on).**
>
> c. The weekend of Mother's day will always be the mother's time and the weekend of Father's Day will always be father's time and the weekends will resume thereafter.
>
> **d. Mother is always to have the Easter Weekend including the Monday, as Easter is significant for the mother. (This includes Good Friday.)**
>
> e. The week following the father's non weekend, the father is to have **J after school on Monday or 3:00 PM if it is a Monday holiday, until the**

Tuesday morning return to school, daycare or the mother's home as above. Father may attend at mother's home, make known his arrival and wait in the lobby in the presence of the security guard and leave after a safe exchange is made.

f. Parents **to alternate March breaks each year after school on the Friday at 5:30 PM until the Sunday at 5:00 PM the day before the return to school.** The schedule will resume thereafter. This March Break alternating years are also to coincide with L's schedule (her daughter) and mother to advise father.

g. The Christmas period of school holidays shall begin the last day of school and end the day before return to school. The mother shall always have all day Christmas Eve starting at 10:00 AM (if the previous day is with the father) and concluding at 4:00 PM on Christmas Day. The two-week period shall otherwise be divided equally with and also to the extent possible consistent with trying to have L and J (the mother's two children) be together as much as possible. Mother to advise father as to L's schedule forthwith but the father is to have equal time except for the period carved out for Christmas Eve and Day.

h. The summer period begins the last day of school and ends the day before the first day of school.

1. Each parent shall have two exclusive weeks of vacation for the summer and the mother's time will always be the last two weeks leading to the return of school after Labour Day. The two weeks shall commence on Friday and include the weekends without interruption.

2. The father's two weeks shall always be the first two weeks of July commencing on a Friday (until the Sunday) and include all the weekends in between.

3. Additionally, the weeks in between shall be a week-about arrangement with the exchanges taking place at 5:30 p.m. on Fridays.

3. J should spend the Chinese New Year with his mother, including one day before and one day after the event. Ms. L should provide Mr. C with confirmation of these dates in writing before November 30 of each year. On the day after the celebration, the regular access schedule should resume.

4. Halloween sharing will continue as currently ordered.

[11] While the parties are very focused on the number 40 per cent, I did not consider percentages when setting the custody and access schedule. I was guided by my findings and conclusions and attempted to structure a plan in the child's best interests.

[12] When I crafted the schedule and determined the parenting issues, I had no idea what the resulting time might be.

[13] Until the parties returned before me now to determine child support, I did not know what percentage of time resulted for each parent. In my judgment I directed the parties to exchange financial statements and income information and then attempt to mediate with the on- site mediation services. Regrettably, that did not occur. In addition, there was an issue of whether the father was entitled to some time on Christmas Day, which was resolved favourably for the father and, I might add, this is as I intended.

[14] There appears to be some confusion over the summer time. To clarify paragraph 139(2)(h), the two exclusive weeks to each parent for summer vacations includes three week-ends, ending on the Sunday for the father for his two weeks in July, and for the mother after Labour Day and return to school. The summer otherwise always has a Friday 5:30 p.m. transition, in a week-about arrangement. There are no additional week-ends attributed to either parent over the summer.

[15] When the parties initially appeared before me to address their parenting issues, I accepted the father's desire to have increased access with J as a sincere interest in spending the maximum time possible with his son. As the evidence progressed, it became apparent that the amount of child support that could be ordered under a given arrangement was a major consideration for the father. He insisted that the mother was similarly concerned with the support figures and that she sought to limit his access with J solely to maintain significant support entitlements at the full table amount.

[16] In making my order, I sought to maximize J's contact with each parent yet minimize conflict between the parties. The percentages would result from the schedule and the child support would follow.

[17] While the court cannot be motivated by a target percentage of access and custody time when making an order, the court is at times called upon to interpret the existing order to determine whether the parties' access falls above or below 40 per cent. This is one such case.

[18] The mother and father have both provided calendars that apply their respective interpretations of the access and custody schedule based on my July 2012 judgment. The father concludes that his access is over 40 per cent, whereas the mother concludes that it is below 40 per cent. Both parties are very aware that this 40 per cent threshold is significant.

[19] It must be noted that "achieving the 40 per cent threshold does not necessarily mean that less child support will be paid, but only that the court can consider the issue under s. 9 of the *Federal Child Support Guidelines*" (*Gauthier v. Hart*, 2011 ONSC 815, [2011] O.J. No. 1169).

[20] In fact, it is not that the "court can", but rather, the court must proceed under s. 9 when the 40 per cent access threshold is achieved. It is clear from the wording of the legislation that s. 9 is imperative; therefore, when the court finds that a parent is exercising access or custody 40 per cent or more of the time, the court must fix child support in accordance with the three factors listed in s. 9 of the *FCSG*.

[21] Under s. 9 there is no presumption that the *Guideline* support amount is appropriate. Rather, support is determined by applying the three factors, informed by the evidence provided by the parties.

[22] The onus of proving that the 40 per cent access threshold is met falls on the spouse seeking to invoke s. 9 (*Meloche v. Kales*, 1997 CanLII 12292 (ONSC), [1997] O.J. No. 6335; *Huntley v. Huntley*, 2009 BCSC 1020, [2009] B.C.J. No. 1509). In this case that rests with the father.

Calculating Access Time

[23] The question of whether an access parent has met the 40 per cent threshold necessary to bring the child support assessment under s. 9 is one that has generated considerable litigation. This is largely because while the provision clearly sets out the threshold for a finding of shared custody, it is less clear about how that calculation is to be realized. According to the Ontario Court of Appeal, there is no universally accepted method for how to calculate access and custody time (*Froom v. Froom*, 2005 CanLII 3362 (ONCA), [2005] O.J. No. 507 (C.A.), at para. 2).

[24] Though the method of the calculation is not set out in the legislation, it is clear that 40 per cent is the minimum period of access time fixed by

Parliament as sufficient to trigger a child support calculation under s. 9 of the *Guidelines*. Courts cannot ignore this mandatory requirement in favour of rounding up in the case of access time that is close to 40 per cent (*Maultsaid v. Blair*, 2009 BCCA 102, [2009] B.C.J.467 (C.A.)). The court in *Maultsaid*, states the following at para. 30:

> I recognize this calculation brings the matter close to 40 per cent and appears arbitrary. However, in my view, it is not open to the court, faced with the express wording of s. 9, a court order particularizing "the right to access", and a measure of the time that falls short of the requisite 40 per cent, to ignore the words, the mandatory requirement, chosen by Parliament. In the words of the Alberta Court in *L.C. v. R.O.C.*, 2007 ABCA 158, "there is no place for 'deeming' parenting time to be what it is not".

[25] An example of the strictness of the 40 per cent mark is seen in *Gauthier v. Hart*, 2011 ONSC 815, [2011] O.J. No. 1169, where Mackinnon J. calculated access and custody in hours, based on conflicting evidence from the parties, and concluded that the father had the children 39.6 per cent of the year. As was pointed out in Epstein's "This Week in Family Law", the father in *Gauthier v. Hart* came up short by only 1 1/2 days over the course of the entire year. Nonetheless, s. 9 did not apply because his access was less than 40 per cent of the time.

[26] With the changes in support that can stem from proceeding under s. 9 and the strict setting of the 40 per cent threshold, this calculation can be extremely significant. At times, calculating in days versus hours makes just the difference that moves the access parent into a situation where they exercise 40 per cent access (*Froom*, at para. 1). For this reason, applying the appropriate method of calculation is crucial.

[27] The majority decision of Court of Appeal in *Froom* states that there is no universal method for calculating access time and they uphold the trial judge's analysis based on "days, not hours" (*Froom*, at paras. 1-2). The dissent, however, would have allowed the appeal and set aside the trial judge's decision because "the hours calculation produces an accurate figure in this case, and the days calculation produces an erroneous figure" (*Froom*, at para. 5).

[28] In *Mehling v. Mehling*, 2008 MBCA 66, [2008] M.J. No. 172, at para. 42, the court states the following:

> [T]his court specifically rejected a "minute-by-minute" calculation method. While I would not categorically rule out an assessment on the basis of hours, it seems to me that an assessment of the time that a parent is with, or responsible for the children and their needs, on the basis of days or

> weeks, or portions thereof, will be a more realistic approach to the analysis than an hourly accounting. That being said, the approach to be used for the assessment of time is within the judge's discretion to determine.

[29] In *Mehling*, at paras. 42-44, Griffiths J.A. urges courts to take a flexible approach to calculating access and custody time, highlighting that while the time calculation will necessarily include a mathematical component, it should not be a strictly mathematical calculation. The court finds an evaluation of the days or weeks (or portions thereof) that a parent is responsible for the child to be a more realistic calculation than an hourly accounting. According to the court, this flexible approach allows the trial judge to take account of the varied circumstances of different families.

[30] In *Mehling*, at para. 45, the court asserts that the flexible approach is in line with the view expressed by Terry W. Hainsworth in his text, *Child Support Guidelines Service*, loose-leaf (Aurora: Canada Law Book, 2007) (at para. 3:10.03), which is as follows:

> Section 9 of the Guidelines requires the courts to consider more than a simple mathematical comparison of the number of hours in a year and the number of hours of physical access exercised by the parent asserting shared custody. If a given situation establishes an unusually extensive pattern of access by the support payor which is consistent with the concept of shared parenting or shared custody, the reality of the situation should be carefully reviewed. In determining the issue, the court may consider several factors, including:
>
> > (a) how the shared parenting situation evolved;
> >
> > (b) any specific contractual agreements relating to joint custody; and
> >
> > (c) the quality of the time the children spend with each parent (*i.e.*, whether the children are in daycare, whether there are associated costs such as meals and activities, whether there are clothing costs, etc.).
> >
> > ...
>
> If it is determined that a given situation is, in spirit and reality, one of shared custody, there is no governing method of calculation so long as the method used is reasonable. ...

[31] While there is debate over the best method for calculating access time, according to the late Professor McLeod in the Annual Review of Family Law, the issue is not as unclear as the majority in *Froom* asserted (McLeod and Mamo, *Annual Review*

of Family Law, 2010 (Toronto: Carswell, 2010) at 294)). In commenting on *Froom* the review states, "[w]ith respect, the overwhelming weight of authority in Ontario and the other provinces supports calculating the 40% threshold on an hourly basis." This approach is applied by the court in *Rockefeller v. Rockefeller*, 2005 CanLII 14325 (ONSC), [2005] O.J. No. 1736 (S.C.). Its appropriateness is also affirmed in *Gauthier v. Hart*, 2011 ONSC 815, [2011] O.J. No. 1169, although in that case the parties' evidence did not support an hourly calculation so it was not applied.

[32] While the notions of flexibility and robust consideration of the parties' circumstances are laudable, I do not see this as mutually exclusive from an hourly accounting of how the parties divide their child's time.

[33] The comments in *Mehling* make a great deal of sense and we should certainly urge consideration of the parties' circumstances beyond a simple minute-by-minute accounting. However, the court can be attuned to these important surrounding circumstances while still looking at an hourly breakdown of how the child's time is divided. Further, in *Mehling*, the court urges that the calculation should be in "days or weeks or **portions thereof**". This is acknowledgment, even in a decision that pushes for the utmost flexibility, that time will often need to be broken down into units smaller than days.

[34] As demonstrated in *Gauthier v. Hart* and *Maultsaid*, the courts do not have discretion to round up or down to reach (or avoid) a finding that a parent has access 40 per cent of the time. Forty per cent is fixed as a firm threshold. It is acknowledged that when parents are exercising that level of access, child support determinations need to be approached in a different manner given the reality of the costs incurred by parents in these types of access and custody arrangements.

[35] It is therefore desirable to be as precise as possible when determining the reality of the parents' access and custody situation. As the Alberta Court of Appeal stated in *C.(L.) v. C. (R.O.)*, 2007 ABCA 158, [2007] A.J. No. 513, "there is no place for 'deeming' parenting time to be what it is not". Arguably it is equally unfavourable to deem non-parenting time. If we are rounding up or down to larger portions of a day rather than using the most precise information available, "deeming parenting time" is inevitable.

[36] While it is important for the courts to not get lost in the numbers entirely, there will necessarily be an accounting of time and a question of whether the party exercising access does so in a manner that exceeds or falls short of 40 per cent.

[37] The two most common approaches to calculating access and custody time are in days, and in hours. If using days, to reach 40 per cent, the access parent must have the child in his or her care for 146 days per year (*Handy v.*

Handy, [1999] B.C.J. No. 6 (S.C.). When calculating in hours, the 40 per cent threshold lies at 3504 hours per year (*Claxton v. Jones*, [1999] B.C.J. No. 3086 (Prov. Ct.)).

[38] In his paper, "A Practitioner's Guide to the Economic Implications of Custody and Access under the *Divorce Act* and the *Federal Child Support Guidelines*", Julien D. Payne points out that no matter how the calculation is completed, the relevant period is the amount of time the child is in the care and control of the parent not the amount of time that the parent is physically present with the children ((2002) 32 R.G.D. 1-36, at 8). The calculation includes the time the child spends in swimming lessons, at day care, at school, or with a nanny, so long as the parent claiming this time is the parent who during that period is "responsible for their well-being" (*Sirdevan v. Sirdevan*, [2009] O.J. No. 3796).

[39] In line with this approach, a custodial parent will be credited with time that a child spends sleeping or at school, except for those hours when the non-custodial parent is actually exercising rights of access or the child is sleeping in the non-custodial parent's home (*Cusick v. Squire*, [1999] N.J. No. 206 (S.C.)). If there is a fixed drop-off time for the access parent to deliver the child to school or daycare and the child returns to the custodial parent at the end of that day, the time during school or daycare is typically credited to the custodial parent (*Maultsaid*, at para. 20; *Barnes v. Carmount*, 2011 ONSC 3925, [2011] O.J. No. 3717, at para. 43).

Applying this Approach to the Parties' Circumstances

[40] In this case, the custody and access schedule upon which the parties rely is set out in para. 139 of my July 19, 2012 judgment as outlined above and now clarified. The order is specific on times, setting out when the father has his access time and when and where the child is to be returned. It is intended, given the parties high conflict, to be precise and to facilitate counting of actual time without rounding up or down. This is not a case where the *Mehling* approach, if ever at all, has any application.

[41] The mother and father have both provided calendars that apply their interpretation of the access and custody order. The father, who calculates his time in days (overnights), concludes that his access time is over 40 per cent. The mother, who calculates in hours, concludes that the father's access falls well below 40 per cent. Both parties are very aware that this 40 per cent threshold is significant. I have now calculated based on their assertions and my conclusions and clarification.

[42] There are a number of reasons for the discrepancies between the mother's and father's determinations regarding the access schedules. Firstly, there are a number of holidays which pursuant to the order are always to be credited to the

mother. These include Chinese New Year, and the four day Easter long week-end. The father had erroneously included these in his access time.

[43] Further, the mother did her calculations in hours; whereas the father did his in days (he appears to have counted each access overnight as a day). To demonstrate the significance of these different approaches see the two week sample schedule inserted below. This schedule represents a normal two week period, with no holidays or days that require special treatment.

	Mother's Position		**Father's Position**	
Date	Mother's access (hrs)	Father's access (hrs)	Mother's access (days)	Father's access (days)
Monday, January 7, 2013		24		1
Tuesday, January 8, 2013	16	8	1	
Wednesday, January 9, 2013	24		1	
Thursday, January 10, 2013	24		1	
Friday, January 11, 2013	24		1	
Saturday, January 12, 2013	24		1	
Sunday, January 13, 2013	24		1	
Monday, January 14, 2013	15	9		1
Tuesday, January 15, 2013	16	8	1	
Wednesday, January 16, 2013	24		1	
Thursday, January 17, 2013	24		1	
Friday, January 18, 2013	17.5	6.5		1
Saturday, January 19, 2013		24		1
Sunday, January 20, 2013		24		1
Total time	**232.5/336 hrs**	**103.5/336 hrs**	**9/14 days**	**5/14 days**
Total %	**69.2 %**	**30.8%**	**64.3%**	**35.7%**

[44] The above represents a period during which the parties are in agreement as to who the child is with. The difference in their results stems solely from the fact that the mother calculates in hours whereas the father calculates in days. The impact that the calculation in hours versus days has on the father's access time is to reduce it by 16.5 hours every two weeks. Since the July 19, 2012 order sets firm start and end times for access, calculating in hours I find is reasonable and avoids inaccurately "deeming parenting time". The mother's approach to the calculations is the most accurate reflection of the parties' reality.

[45] In addition to the discrepancies that arise due to one parent calculating in hours and the other in days, over the course of the year there are a number of dates that the parties are in full disagreement about. Based on the July 19, 2012 order and the evidence of the parties, these dates are resolved in the following manner:

> February 11, 2013 is the mother's time because it is Chinese New Year.
>
> February 17, 2013 is the father's time as per the regular schedule.
>
> March 11, 15, 16, 17, 2013 are the mother's time. These days fall on March Break and as per the parties' order and subsequent email agreement, the mother has time over March Break in odd numbered years and the father for even years.
>
> March 29, 30, 31, 2013 and April 1, 2013 are the mother's time since this is Easter week-end.
>
> May 10, 11, 12 are the mother's time since this is Mother's Day week-end.
>
> June 14, 15, 16 are the father's time since this is Father's Day week-end.
>
> June 23 is the father's time per the regular schedule.

[46] Another period of disagreement is the summer vacation period. The order states that the father is to have vacation time for the first two weeks of July (inclusive of week-ends) and the mother is to have vacation time for the last two weeks of August (inclusive of week-ends). The remainder of the summer vacation period is to be divided between the parties on a week about basis with exchanges taking place on Fridays at 5:30 p.m. The parties disagree significantly on how this period is to be divided. To clarify the order, the father's vacation will begin on the first Friday in July and run for two full weeks (which includes three week-ends). At the end of the two

weeks' vacation the child will be returned to the mother at 5:30 p.m. on the Monday following vacation and the week about schedule will function until the mother's vacation time which starts on the middle Friday in August.

[47] In 2013, the vacation time is divided as follows:

> July 5 – 22 are the father's vacation days, with return at 5:30 p.m. on July 22.
>
> July 23 – 26 are the mother's days, with return at 5:30 p.m. on July 26.
>
> July 27 – August 2 are the father's days, with return at 5:30 p.m. on August 2.
>
> August 3 – 9 are the mother's days, with return at 5:30 p.m. on August 9.
>
> August 10 – 16 are the father's days, with return at 5:30 p.m. on August 16.
>
> August 17 – September 2 are the mother's vacation time, after which the regular schedule resumes.

[48] The parties disagree over the Christmas Holiday period as well. I find the mother's approach to be in line with the order, and have incorporated that into the calculation of how the parties divide J's time. From 10:00 a.m. Christmas Eve until 4:00 p.m. Christmas Day annually, J will be with his mother. He will then be with his father from 4:00 p.m. Christmas Day each year. The Christmas vacation time is otherwise divided evenly between the parties. The division proposed by the mother for 2013 follows this schedule and I have used it in my calculation. As noted above, the Christmas schedule is meant to divide the school holiday equally but the mother always has Christmas Eve from 10:00 a.m. and Christmas Day until 4:00 p.m., as outlined above. This ensures that J sees each parent on part of Christmas Day, every year. The mother gets to decide the days equally otherwise to try to maximize J and his sister being together as much as possible.

[49] Finally, there is disagreement as to how the time that J spends in school should be calculated. Based on the parties' schedules, both are crediting the father with the time on the Monday following each of his access week-ends. This is correct. On that day the father is responsible for J's drop-off at school and pick-up after school and it is reasonable to conclude that he is responsible for the child over the course of that entire day.

[50] The rest of the week when J is in school, the time is credited to his mother as the custodial parent. As stated above, the custodial parent is credited with time that a child spends sleeping or at school, except for those hours when the non-custodial parent is actually exercising rights of access or the child is sleeping in the non-custodial parent's home (*Cusick v. Squire*, [1999] N.J. No. 206 (S.C.)). If there is a fixed drop-off time for the access parent to deliver the child to school or daycare and the child returns to the custodial parent at the end of that day, as is the case with J, the time during school or daycare is credited to the custodial parent (*Maultsaid*, at para. 20; *Barnes v. Carmount*, 2011 ONSC 3925, [2011] O.J. No. 3717, at para. 43).

[51] Based on this jurisprudence, it is clear that on the weeks that the father is exercising access solely from the period beginning Monday after school until Tuesday at 8:00 a.m., the Tuesday school day will be credited to the mother. There is a fixed drop-off point, at which time his access clearly ends.

[52] The Mondays following a non-access week-end, where J goes to school from his mother's home and then goes to his father's house Monday afternoon, are to be treated in the same manner. The father is not exercising access until J's time with him begins on Monday afternoon.

[53] That said, I have conducted a calculation to determine what impact those days would have on the father's final access time if they were credited to him. The Mondays in question are the days that fall in the parties' regular schedule after non-access week-ends. Removing from the equation the eight weeks of summer vacation, two weeks of Christmas vacation, and one week for March Break, this leaves at most 41 school days. For half of those weeks the father is already receiving credit for the Monday school day, as they follow his access week-ends. This leaves 20.5, at most, Monday school days that are not being credited to the father. If they were all to be credited to him this would increase his access time by a total of 143.5 hours (20.5 x 7 hrs). As is explained below, this does not make a significant difference and does not bring the father's access time to 40 per cent.

Conclusion on Access

[54] I am satisfied that when the July 19, 2012 order is properly implemented by the parties the result is that J is with his mother 5,904/8,760 hours, which is equal to 67.4 per cent of the time and with his father 2,856/8,760, which is equal to 32.6 per cent of the time in 2013.

[55] The monthly access totals are as follows:

2013	**Time with mother (hrs)**	**Time with father (hrs)**
January	481.5	262.5

February	482	190
March	601.5	142.5
April	513	207
May	606.5	137.5
June	443.5	276.5
July	192	552
August	534.5	209.5
September	521	199
October	520	224
November	505	215
December	503.5	240.5
Total annual time (hrs)	**5,904/8,760**	**2,856/8,760**
Total annual time (%)	**67.4 %**	**32.6 %**

[56] The father correctly points out that he will have increased access in 2014 given that J will be with him over March Break. He also asserts that there will be increased access due to various holidays and the summer vacation schedule.

[57] While the father's March Break assertion is true, the custody and access schedule for 2014 will be largely the same aside from that. The parties will split vacation time in the summer on a week about schedule, and each parent will have two weeks of vacation time with the child as set out in the order. Christmas vacation is split as well, with the exception of Christmas Eve 10:00 a.m. until Christmas Day 4:00 p.m. which are always with the mother. Chinese New Year and the Easter long week-end are also always with the mother. This is the case in both 2013 and 2014 so it does not result in a change to the father's access time between the years.

[58] Easter week-end 2014 does not fall on the father's access week-end so he does not gain or lose any days due to this. Father's Day falls on a non-access week-end in both 2013 and 2014, so this does not affect the number of access days the father will have in 2014 any more than it does in 2013. Similarly, Mother's Day 2013 and 2014 fall on the father's time and therefore have the same impact both years.

[59] The child will spend March Break with his father in 2014, so nine days should be added to the father's access schedule in consideration of that period. Nine days is equal to 216 hours. When that is added to the father's assess time as calculated for 2013, the new total is 3,072 of 8,760 hours per year, for total access time of 35.1 per cent.

[60] I have concluded that the school time is being attributed properly by the mother. The father is to be credited with only the Mondays following his access week-ends. However, even if the father was correct that he should also receive credit for the school time following his non-access week-ends, the 40 per cent threshold would not be met. The Monday school days that are not being credited to the father total a maximum of 20.5. If they were all credited to him this would increase his access time by a total of 143.5 hours (20.5 x 7). This would give the father total access hours in 2013 of 2,999.5 (34.2 per cent) and total access hours in 2014 of 3,215.5 (36.7 per cent).

Child Support

[61] Based on my determination regarding the parents' access time with J, this is not a shared custody situation. Support is therefore calculated based on s. 3 of the *Guidelines*, which states:

> 3. (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is
>
> (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
>
> (b) the amount, if any, determined under section 7.

[62] The parties agree that the father's income for 2013 is $105,075. This is in line with the father's income in each of the past few years as well. In 2010 he reports an income of $104,015; in 2011, $105,320; and in 2012, $105,075.

[63] The table amount child support under the *Federal Child Support Guidelines* is $919.00 per month. The father is to pay this amount,

[64] Child support is ordered, retroactive to September 1, 2012, when J started school.

[65] Both parties are prepared to share section seven expenses on a 50/50 basis; however, there have been issues concerning the father's timely payment of J's medical expenses. The parties are fortunate in that they each have coverage through work and that most of J's expenses will be covered 100 per cent between the two plans. Unfortunately there have been delays and non-cooperation. Since custody is with the mother, the father is to fully cooperate with the methodology that each insurer requires to coordinate and pay for J's benefit and any unrecovered expenses (dental, prescription, or other medical needs) are to be shared equally. Mother is to provide

proof of payment and the father is to reimburse the mother within 30 days of receipt and failing which, if mother needs to return to court and the father is ordered to make payment, costs will be considered.

[66] According to the mother the section seven expenses include daycare of $435 per month plus a onetime $10 administration fee and Taekwondo of $1,200 per year. Based on my disposition I find that daycare is a section seven expense. No other extracurricular activities at this time fall under section seven. However, in the future on proper evidence there may be additional section seven expenses. The parties are to look at the definition of section seven items, and if they return, to provide evidence to support their position. The mother I find will be the only one to get and be entitled tax relief for this child and the father will not be able to claim any tax relief (that is daycare and other allowable expenses are to be only claimed by the mother). Therefore, although the daycare is an allowable expense, when considering the situation net of tax the total support for the period commencing September 1, 2012 (inclusive of the section seven daycare expenses) is to be $919.00 per month.

[67] Support Deduction Order to issue.

[68] As provided by the *Child Support Guidelines*, commencing May 1, 2014 and annually for so long as there is a child support obligation, the parents are to exchange tax returns for the previous year (so in 2014, for 2013) to calculate child support. Additionally, if the mother wishes to revisit issues of section seven she is to provide proof of such expenses and receipts and the need for such expenses as contemplated by the definition of special expenses on an annual basis commencing May 1, 2014 for the previous year.

[69] Parties, if they need to return to fix child support in the future will need to first attend before the Dispute Resolution Officer with updated financial statements and proof of income as above.

[70] The parties may make five page written submissions regarding costs, to be submitted by the mother by May 1, 2013 and by the father by May 30, 2013. This is to be done through the trial coordinator to my attention.

Czutrin J.

Released: March 28, 2013