



Spousal Support Advisory Guidelines: The Revised User's Guide

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Spousal Support Advisory Guidelines: The Revised User's Guide

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Presented to:

**Family, Children and Youth Section
Department of Justice Canada**

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1 Introduction

This *Revised User's Guide* (which we sometimes call the “RUG”) updates and replaces the two previous versions: the original User's Guide released in July 2008 with the Final Version of the *Spousal Support Advisory Guidelines* (SSAG); and the New and Improved User's Guide which we produced in March 2010. The previous versions of the User's Guide have frequently been cited by the courts in their decisions, and by lawyers in their arguments about the Advisory Guidelines. This version provides us with an opportunity to update the past five years of SSAG case law, as well as to address some practical issues which have emerged since 2010.

The SSAG have now been in use for more than ten years, starting with the Draft Proposal in January 2005 and then the Final Version of 2008. Since the SSAGs are well-known and consistently used across the country, judges and lawyers are more often digging deeper into difficult and unexplored issues. Further, there is much more cross-fertilization amongst provinces and territories today than there was in the early days of the SSAG.

The *Revised User's Guide* is not intended to provide a comprehensive survey of the case law. That would be impossible, since there are now over 230 appeal court decisions and over 2,900 trial decisions that cite the SSAG. We have focused on leading appellate and trial decisions in the *Guide*. We hope to provide a starting point for research, but the *Guide* is not a substitute for the more thorough research that needs to be done by lawyers and judges for individual cases.

Like the two previous versions, the *Revised User's Guide* is intended to provide practical assistance in the application and use of the SSAG: flagging common errors, offering suggestions for more effective use, noting useful decisions and recent trends, and identifying emerging issues. More and more often, the issues raised by lawyers and judges involve the interaction between the SSAG and the broader principles of the law of spousal support. As we revised the *User's Guide*, we found ourselves wrestling with some of the hardest questions in spousal support law. We hope this version of the *User's Guide* will assist others to work through individual cases, whether typical or atypical.

Ultimately, the source to which we must all return is the original document, the Final Version of the *Spousal Support Advisory Guidelines*, published in July 2008. We have cross-referenced sections of that document throughout this *Guide*, cited as the “SSAG”. The *Revised User's Guide* should be read together with the SSAG, which can be found online in two places:

<http://www.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/spag/index.html>

<http://library.law.utoronto.ca/spousal-support-advisory-guidelines>

Also to be found at the latter site is the collection of our various writings and reports on the Advisory Guidelines.

In conclusion, we would like to thank two former and two present members of the federal Department of Justice's Family Policy Unit. Both Wendy Bryans and Lise Lafrenière-Henrie were instrumental in bringing the Advisory Guidelines from a general idea to their actual

implementation across the country. In the preparation of this *Revised User's Guide*, we have been greatly assisted by their successors, Marie-Josée Poirier and Claire Farid. We would also like to acknowledge the financial support of the Government of Canada through the Supporting Families Fund of the Department of Justice Canada.

2 Common Errors to Avoid

After more than ten years, errors are still being made in the use of the SSAG, some major, some minor, and some with a disturbing frequency. In this edition of the *User's Guide*, we decided to gather these “common errors” in one place, at the beginning, as a handy checklist of “what not to do”. Many of these are discussed in more detail in the relevant sections of this *User's Guide*. Here we are just identifying and listing them, framed in positive, encouraging terms wherever possible.

(a) *Know your inputs and assumptions. Be transparent!* Too often lawyers have calculations done by others: by law clerks, assistants, articulated clerks or junior lawyers. Lawyers need to know the input data, and the assumptions used, to generate the SSAG ranges and other numbers, whether in negotiations, mediations, judicial settlement conferences or hearings and trials. Think of this as part of the family law lawyer's duty to colleagues and courts, to know the law and to be forthright about it.

(b) *Remember entitlement.* We can't say this too often: the SSAG only deal with amount and duration, *after* there has been a finding or agreement on entitlement to spousal support. It is wrong to “just run the numbers”.

(c) *Use the correct incomes.* In the course of negotiation or hearing, there may be a different conclusion on the incomes to be used than the assumptions that underpinned the original SSAG calculations. Be sure that the SSAG calculations are based on the correct incomes.

(d) *Social assistance should NOT be treated as income for spousal support purposes.* This error continues to appear in decided cases, especially in determining the income of the recipient. It is complicated by provinces like Ontario calling social assistance “ODSP” (Ontario Disability Support Program) or “Ontario Works” or Alberta calling it “AISH” (Assured Income for the Severely Handicapped). Including social assistance in the recipient's income will result in the underpayment of spousal support.

(e) *Be alert to non-taxable income issues.* Non-taxable incomes need to be grossed up under the *without child support* formula or the *custodial payor* formula. There is also an exception for spousal support paid by a payor whose income is mostly or all non-taxable.

(f) *Use the right formula.* The dividing line between the two main formulas is clear: either *with child support* or *without child support*. The *with child support* formula is actually a collection of formulas, depending upon the custodial and child support arrangements. Often missed is the *custodial payor* formula or *adult child* formula.

(g) *It is the length of cohabitation that must be used in determining amount or duration, not the length of marriage alone,* under the *without child support* formula and the formulas that are built around it—the *custodial payor* and *adult child* formulas.

(h) *Section 7 expenses must be taken into account under the with child support formula.* This continues to be the single most common and most significant mistake under the SSAG. The failure to consider s. 7 contributions will inevitably lead to the payor paying too much spousal support, possibly way too much if the s. 7 expenses are substantial.

(i) *The custodial payor formula must be adjusted if child support is not paid by the spousal support recipient to the custodial payor.* Quite often the higher-income payor of spousal support will not claim child support from the lower-income recipient of spousal support. You need to know whether the lower-income recipient of spousal support is or is not paying child support. If he or she is not, but no adjustment is made, the payor will be paying too much spousal support.

(j) *Don't just state the ranges, suggest a location on amount, and duration.* The SSAG ranges are fairly wide. It is the task of the lawyer (or a party) to justify a location for amount or duration. A straight positional approach is also an error, e.g. the claimant spouse argues for the high end on amount for the longest duration possible, without explanation, while the payor spouse just seeks the low end of the ranges.

(k) *Remember duration.* Too often the focus is only on the amount of support. In some cases, the SSAG will suggest “indefinite (duration not specified)”. But in many cases, either initially or on variation and review, duration will be in issue.

(l) *Lump sum spousal support must be discounted for tax.* A lump sum, whether as part of a final settlement or for retroactive spousal support, will not be tax deductible for the payor or tax payable for the recipient, and thus any lump sum amount determined using the SSAG ranges for periodic amounts must be discounted or reduced to reflect that tax fact.

(m) *Remember the exceptions.* The SSAG formulas were developed to deal with typical cases. There will be cases where the formula outcomes just don't seem right. We have identified 11 such exceptions in Chapter 12 of the SSAG. But these exceptions do not exhaust the circumstances in which departures from the formula ranges might take place. Unusual facts may justify going beyond the listed exceptions.

3 Entitlement (SSAG Chapter 4)

An analysis of entitlement is the crucial first step before any application of the Guidelines. In practice this step is often ignored, the assumption being that any income disparity that produces a positive range for amount under the SSAG formulas means there must be entitlement.

The Advisory Guidelines do not determine entitlement. They deal with the amount and duration of support *after* entitlement has been established. They do not provide an arithmetical basis for entitlement. Entitlement is a **threshold issue** that must be determined before the Guidelines will be applicable. The existing legal framework recognizes three bases for entitlement: compensatory, non-compensatory, or contractual. If there is a finding of no entitlement, the Guidelines are not applicable. The SSAG formulas may offer some clues, or checks, about entitlement, but nothing more. **Even if entitlement is established, the analysis of entitlement will inform many subsequent steps in a SSAG analysis.**

Three early appellate level decisions continue to provide good models of the preliminary analysis of entitlement: *Yemchuk v. Yemchuk*, 2005 BCCA 527; *Chutter v. Chutter*, 2008 BCCA 507 and *Fisher v. Fisher*, 2008 ONCA 11.

Ignoring or assuming entitlement leads to some common errors:

- **A mere disparity of income that produces a positive range for amount under the Advisory Guidelines formulas does not automatically lead to entitlement.** More analysis is required: *why* is there an income disparity and how does this relate to the compensatory or non-compensatory basis for entitlement?
- **A zero range for amount should not be confused with a lack of entitlement.** It may simply reflect a current inability to pay, especially under the *with child support* formula.
- Even if entitlement is established, determining the basis for entitlement is still important as this will **inform the subsequent steps of the spousal support analysis and the application of the Guidelines.**
- **Duration marks the end of entitlement.** Spousal support can end despite a continuing income disparity.
- **Variation and review will often raise issues of entitlement.** You cannot simply apply the formulas to current incomes, without thinking again about entitlement.

First a review of the basic principles of entitlement is in order.

(a) *The principles of entitlement*

- **Compensatory claims** are based either on the recipient's economic loss or disadvantage as a result of the roles adopted during the marriage or on the recipient's conferral of an economic benefit on the payor without adequate compensation.

Common markers of compensatory claims include: being home with children full-time or part-time, being a “secondary earner”, having primary care of children *after* separation, moving for the payor’s career, supporting the payor’s education or training; and working primarily in a family business.

Some lawyers and judges erroneously think that *any* long marriage gives rise to compensatory support, but the Ontario Court of Appeal decision in *Fisher*, above, makes clear that this is incorrect. Compensatory support is to be distinguished from non-compensatory support (see below), which is based upon economic interdependency and loss of the marital standard of living.

Our review of recent case law has shown some “backsliding” on compensatory support, with the analysis seriously underestimating compensatory claims. Common errors include:

- focussing on where the claimant was at the beginning of the relationship instead of on where the claimant *would have been* if they had continued in the labour market. Avoid the “once a secretary, always a secretary” error.
- finding no compensatory entitlement simply because the claimant worked throughout the marriage. There may still have been career loss.
- forgetting that compensatory claims for lost earning capacity can be based not only on child-rearing during the marriage, but also on child-rearing responsibilities *after* separation.
- assuming no career advantage to the payor from the fact that the other spouse stayed home and cared for children. Compensatory entitlement can be based on the economic advantage of an uninterrupted career enjoyed by one spouse as a result of the other spouse’s assumption of a disproportionate share of child care responsibilities.

For good analyses of compensatory claims see *Yemchuk*, above; *Chutter*, above; *Cassidy v. McNeil*, 2010 ONCA 218; *Hartshorne v. Hartshorne*, 2010 BCCA 327, *Abernethy v. Peacock*, 2013 ONSC 2045, *Gray v. Gray*, 2014 ONCA 659, *Schimelfenig v. Schimelfenig*, 2014 SKCA 77, *Elliston v. Elliston*, 2015 BCCA 274, *Morigeau v. Moorey*, 2015 BCCA 160; and *Zacharias v. Zacharias*, 2015 BCCA 376.

- **Non-compensatory claims** involve claims based on need. “Need” can mean an inability to meet basic needs, but it has also generally been interpreted to cover a significant decline in standard of living from the marital standard. Non-compensatory support reflects the economic interdependency that develops as a result of a shared life, including significant elements of reliance and expectation, summed up in the phrase “merger over time”.

Common markers of non-compensatory claims include: the length of the relationship, the drop in standard of living for the claimant after separation, and economic hardship experienced by the claimant.

For nice analyses of entitlement on non-compensatory grounds see *Fisher*, above: *McKenzie v. McKenzie* 2014 BCCA 381; and *R.L. v. L.A.B.*, 2013 PESC 24.

In a small subset of cases a **narrower view of non-compensatory support** has recently been articulated. Judicial understandings of the non-compensatory basis for entitlement reveal continuing uncertainty and tension, with some judges taking issue with the broad view of non-compensatory support that has become dominant since the 1999 *Bracklow* decision. These judges have expressed the view that non-compensatory support should primarily be confined to cases involving economic hardship (or true “need”) and have questioned entitlement based on income disparity and loss of standard of living alone. For the most extensive discussion of this, see *Lee v Lee*, 2014 BCCA 383. In cases where economic hardship is not involved, this view can lead either to findings of no entitlement to non-compensatory support (see below) or to very short “transitional” awards to cushion the drop in standard of living, even in long marriages: see *Lee*, above and *Kirton v. Mattie*, 2014 BCCA 513. It should be noted that *Lee* involved a male claimant, as do a number of these “narrower view” cases, which makes it hard to discern if this is really a theoretical shift in the analysis.

- Cases where **need arises post-separation** can raise issues of whether there is an entitlement to non-compensatory support; see *Tscherner v. Farrell*, 2014 ONSC 976; *Fyfe v. Jouppien*, 2011 ONSC 5462; *Soschin v. Tabatchnik*, 2013 ONSC 1707; and *M.E.K. v. M.K.K.*, 2014 BCCS 2037. (These cases are further discussed under “Changing Incomes” below).
- In many cases there may be **entitlement on both bases**. For example, in long marriages with children there are often significant elements of **both** compensatory and non-compensatory support. In the early years, the compensatory element may predominate, but later the non-compensatory claim may come to the fore.
- A **large property award** does not necessarily preclude entitlement on either compensatory or non-compensatory grounds: see *Chutter v. Chutter*, 2008 BCCA 50; *Bell v. Bell*, 2009 BCCA 280; and *Berta v. Berta*, 2014 ONSC 3919.
- If there is a significant income disparity, entitlement on either compensatory or non-compensatory grounds may be established despite the fact that the **recipient has a relatively high income** and could on some understandings of the term be seen as “self-sufficient”: see *Gillimand v. Gillimand*, [2009] O.J. No. 2782 (S.C.J.) (entitlement for wife earning \$93,000 as pilot); *Gonabady-Namadon v. Mohammadzadeh*, 2009 BCCA 448 (entitlement for wife earning \$150,000 as doctor); *Mehlsen v. Mehlsen*, 2009 SKQB 279 (entitlement for wife earning \$70,000); *Cassidy v. McNeil*, 2010 ONCA 218 (wife earning \$85,000); *Marzara v. Marzara*, 2011 BCSC 408 (wife’s income \$104,000); *McKenzie v. McKenzie* 2014 BCCA 381 (entitlement for wife earning \$200,000); *Berta*, above (entitlement for wife with income of \$458,000); and *B.L.B. v. G.D.M.*, 2015 PESC 1 (interim entitlement for wife earning \$185,000).
- *Bracklow* also articulates a **third basis for entitlement**, the **contractual basis**, which covers not only formal domestic contracts but also implied or informal agreements. For a

recent appellate level decision that has engaged this basis of entitlement see *Stergios v. Kim*, 2011 ONCA 836 (entitlement found on compensatory, non-compensatory and contractual grounds; wife and her family supported husband to achieve his career potential in Korea; husband had undertaken to do same for wife and support her education once he had sponsored her immigration to Canada). For two trial decisions, both involving immigration sponsorship agreements, see *Carty-Pusey v. Pusey*, 2015 ONCJ 382 (husband withdraws immigration sponsorship, entitlement found on non-compensatory and contractual basis) and *Niranchan v. Naddarajah*, 2015 ONCJ 149.

For a good review of entitlement see Rollie Thompson, “Ideas of Support Entitlement” (2014), 34 *Canadian Family Law Quarterly* 1.

(b) Entitlement as a threshold issue: income disparity alone does not mean entitlement

On its own, a mere disparity of income that would generate an amount under the SSAG formulas, does not automatically lead to entitlement. Entitlement must be proven (or agreed upon) on a **compensatory** or **non-compensatory** basis, *before* the formulas and the rest of the Guidelines are applied.

The Advisory Guidelines were drafted on the assumption that the current law of spousal support, post-*Bracklow*, offers a **very expansive basis for entitlement** to spousal support, leaving amount and duration as the main issues to be determined in spousal support cases.

Judicial statements of principle do emphasize, repeatedly, that income disparity alone does not automatically mean entitlement to spousal support; see *Lee*, above, and *R.L. v. L.A.B.*, above. However, in practice **entitlement will generally be found in cases where there is a significant income disparity** at the time of the initial application. Even if there is not a compensatory claim, a significant income disparity will often give rise to a non-compensatory claim based on a loss of the marital standard of living. The Guidelines leave to the courts the issue of when an income disparity becomes significant enough to generate entitlement. In some cases courts have denied entitlement on the grounds that the income gap does not suggest significant differences in standard of living.

Cases where there has been a finding of **no entitlement on an initial application despite a significant income disparity** are somewhat atypical and tend to be very fact-specific. Many are cases involving non-compensatory support. In many of these cases another judge may well have found entitlement. Factors that have justified a finding of no entitlement despite income disparity include the following, which often overlap:

- a short marriage and a limited period of financial interdependency: see *Beese v. Beese*, 2006 BCSC 1662; *McKee v. Priestlay*, 2007 BCSC 85; *Rezel v. Rezel*, [2007] O.J. No. 1460 (S.C.J.); *S.C.J. v. T.S.S.*, 2006 ABQB; *Serpa v. Yeuping*, 2007 BCSC 43; and *Merko v. Merko*, 2008 ONCJ 530.
- no financial interdependence during the marriage, rebutting the presumption of mutual support: see *Tomlinson v. Tomlinson*, 2012 ABQB 509 (wife wanted husband to work).

- despite the income disparity, the parties have similar standards of living because for example. This may be because of differences in the parties' asset positions (see *Elias v. Elias*, 2006 BCSC 124; *Johnson v. Johnson*, 2006 BCSC 1932; and *Kerr v. Erland*, 2014 ONSC 3555) or differences in their costs of living (see *Eastwood v. Eastwood*, 2006 NBQB 413), or because the income difference is not that significant (see *Vlachias v. Vlachias*, 2009 BCSC 843).
- the recipient's income may actually be higher than stated (*Yar v. Yar*, 2015 ONSC 151) or the recipient is capable of earning more income (*Lewicki v. Lewicki*, 2014 BCSC 1653; and *Tomlinson v. Tomlinson*, 2012 ABQB 509). (This concern should be dealt with by way of proper imputing of income, but in some cases it may be difficult to do so.)
- the payor's income, although above the "floor" of \$20,000, is limited and there is a finding of no ability to pay; see *Hurley v. Hurley* 2012 NSCA 32; *Peters v. Peters*, 2015 ONSC 4006; and *Sarmiento v. Villarico*, 2014 BCSC 455.
- *custodial payor* cases where the non-custodial parent's claim is non-compensatory and courts give priority to the needs of the custodial household. These cases typically involve male claimants: see *Kay v. Kay*, 2014 ONSC 5210; *Stephens v. Stephens*, 2013 ONSC 7082; *Tomlinson v. Tomlinson*, 2012 ABQB 509; and *Widney v. Widney*, 2014 BCSC 1694.
- the recipient has not experienced any significant economic hardship or decline in standard of living from the marriage: see *Lamothe v. Lamothe* 2006 CarswellOnt 8150, [2006] O.J. No. 5045 (S.C.J.); *J.J.G. v. K.M.A.*, 2009 BCSC 1086; *Lam v. Chui*, 2008 BCSC 1177; *Beaudry v. Beaudry*, 2010 ABQB 119; and *Heard v. Heard*, 2014 ONCA 196.
- the recipient failed to contribute to the relationship: *Lamothe*, above, (husband unemployed for much of marriage); *S.C.J. v. T.S.S.*, 2006 ABQB 777 (short common law relationship, wife unemployed, gambled extensively and problems with drugs and alcohol); and *G.G.F. v. R.F.*, 2009 BCPC 43 (wife drug addict).
- the income disparity is the result of post-separation events or choices, such as a job loss on the recipient's part or post-separation disability (see *Rezel v. Rezel*, [2007] O.J. No. 1460 (S.C.J.); *Barton v. Ophus*, 2009 BCSC 858; *Howe v. Howe*, 2012 ONSC 2736; and *Peters*, above) or a post-separation increase in the payor's income (see *Eastwood v. Eastwood*, 2006 NBQB 413; *Fisher v. Fisher*, 2009 ABQB 85; and *Regnier v. Regnier*, 2014 ONSC 5480).
- courts reject or ignore a non-compensatory claim based on loss of marital standard of living and, in the absence of either a compensatory claim or economic hardship, find no entitlement; see *Rajan v. Rajan*, 2014 ONSC 6690 and *Griffiths v. Griffiths*, 2011 ABCA 359.
- male claimants. A significant number of the cases where no entitlement is found on the basis of the various grounds listed involve male claimants. Gender bias and stereotypes are less prevalent, but not dead yet.

- property division has satisfied any compensatory or needs-based claims, most often in B.C. as a result of significant reapportionment on spousal support grounds under the old *Family Relations Act*. There will be fewer instances of this in future, in light of the new provisions in the British Columbia *Family Law Act* (see below under “Exceptions”).

(c) A zero range for amount should not be confused with a lack of entitlement; it may simply reflect current inability to pay

Under the *with child support* formula there can be an income disparity and yet nothing but zeros for the range: 0 to 0 to 0. It is a mistake to automatically assume that this means no entitlement. Zeros may mean no entitlement, if the income disparity at the end of the marriage is not large because both spouses have worked full-time in the paid labour market. However, zeros may just reflect the priority given to child support and the reality that there is “no ability to pay” left despite a significant compensatory entitlement: think of any middle-income family with three or four children, where one spouse works part-time. There is entitlement, just no money, and the claim might revive under s. 15.3 of the *Divorce Act*, once the children leave home or finish post-secondary education and ability to pay returns for the payor. See also the exception for inadequate compensation under the *with child support* formula (SSAG 12.11), discussed under “Exceptions” below.

(d) Entitlement and the subsequent steps in the application of the Guidelines

Even if entitlement is found, the basis of entitlement shapes the determination of the amount and duration of spousal support. It thus informs many of the subsequent steps in the application of the Advisory Guidelines.

The Guidelines formulas reflect different bases of entitlement:

- the *without child support* formula is based on a mix of compensatory and non-compensatory entitlement:
 - when applied to short and medium length marriages without children, it generates largely non-compensatory support, providing a time-limited transition from the marital standard of living;
 - when applied to longer marriages in which there may or may not have been children, its ranges reflect a mix of compensatory and non-compensatory support
- the *with child support* formula is largely compensatory, responding to the economic consequences of both past and on-going child-rearing responsibility, but there is also an element of non-compensatory support.

The delineation of the compensatory and/or non-compensatory basis for entitlement assists in the application of the formulas in several ways:

- to determine **location within the ranges**. For example, a strong compensatory claim may push toward the higher end of the range (see “Choosing Location in the Range” below).
- to determine whether or not the case justifies a departure from the ranges as an **exception**. For example two exceptions are triggered by *compensatory* claims that may not be adequately satisfied by the formula ranges: the compensatory exception for short marriages without children and, in cases with children, the s. 15.3 exception for compensatory claims that are deferred because of the priority of child support (see “Exceptions” below). The disability exception responds to a specific subset of non-compensatory claims.
- to determine whether there is entitlement to a payor’s **post-separation income increase**. A compensatory basis for entitlement may provide a stronger claim for sharing than a non-compensatory basis.
- to determine the impact of **remarriage and repartnering**. The effect of remarriage can differ depending on whether the initial award was compensatory or non-compensatory; see *Kelly v. Kelly*, 2007 BCSC 227 and *Zacharias v. Zacharias*, 2015 BCCA 376. (See also “Remarriage and Repartnering” below.)

(e) Duration as the end of entitlement

Duration is often forgotten in the SSAG analysis. The formulas generate ranges for amount *and* duration. Amount cannot be considered alone. **Duration is nothing more or less than the end of entitlement**. When support stops, there may still be – and usually is – an income disparity between the spouses.

The SSAG formulas generate time limits which delineate the end of entitlement:

- Under the *without child support* formula and the *custodial payor* formula, which is modelled on the *without child support* formula, time limits are generated for relationships of less than twenty years (or for those with an older recipient under the “rule of 65”).
- Under the *with child support* formula, there are also time limits, but softer and more flexible, only implemented through variation and review. Even here, it is possible, even likely, that support will end despite the presence of a continuing income disparity.

(f) Entitlement issues on variation and review

Even if initial entitlement has been established, new issues of entitlement may arise in the context of variation and review. Issues such as the payor’s post-separation increase and the impact of remarriage and repartnering take us back to the basis of entitlement, as do cases of the recipient’s post-separation reduction of income. Furthermore, applications to terminate spousal support on the basis that the recipient has become “self-sufficient” are really questions about whether the initial basis for entitlement continues to exist. Self-sufficiency can be interpreted differently depending on the initial basis of entitlement: see *Fisher v. Fisher*, 2008 ONCA 11,

4 Agreements (SSAG 5.2)

(a) *SSAG as a backdrop to negotiation*

The interaction between the Advisory Guidelines and spousal support agreements has two different dimensions. One is the **use of the SSAG in applications to override or set aside spousal support agreements**, which will be discussed below. The other is the important role of the SSAG as a **backdrop to settlement**; indeed one of the primary objectives of the SSAG is to provide more structure and certainty for the negotiation and mediation of spousal support issues.

These two dimensions are related: given the clarification of the norms of spousal support in the SSAG, we are now seeing fewer really “bad deals” and thus fewer *Miglin* challenges to agreements.

Over time more and more agreements explicitly incorporate the SSAG; see for example *Swallow v. De Lara*, 2009 BCSC 911 (agreement providing for an annual recalculation of spousal support at the SSAG midpoint).

(b) *Existing legal framework for overriding or setting aside agreements*

It is now fairly well understood that the SSAG, being advisory only, cannot be used to re-open spousal support agreements:

- with respect to “old”(i.e. pre-SSAG) agreements, the creation of the SSAG does not amount to a “material change”; and
- more importantly, the SSAG give no power to invalidate or override prior agreements

A *final* agreement—i.e. one waiving or time limiting spousal support or fixing a lump sum—will preclude the application of the Advisory Guidelines unless the agreement can be set aside or overridden under the existing legal framework found in: (i) contract law (including the doctrines of duress, unconscionability and undue influence), (ii) provincial legislation or (iii) the *Divorce Act*.

With respect to the applicable law under the *Divorce Act*:

- in the context of an **initial application under s. 15.2** in the face of a “final agreement”, the two-part *Miglin* test applies to determine the weight to be given to the agreement and whether a court may “override” (**not** “set aside”) the agreement.
- **agreements providing for variation or review are not “final agreements”** and hence *Miglin* is not applicable; in these cases a court is being asked to apply the agreement, not override it. (For use of the SSAG in these cases see “Variation and Review” below.)

- remember that as a result of the Supreme Court of Canada’s decision in *L.M.P. v. L.S.*, 2011 SCC 64, applications under s. 17 for variation of **consent orders**, including agreements incorporated into court orders, are now dealt with under the framework for variation, with a threshold test of “material change”, and not under the *Miglin* framework. (Consent orders and the SSAG are dealt with below under “Variation and Review”.)

However, a spousal support agreement does not make the SSAG entirely irrelevant, as some lawyers think. The Advisory Guidelines can be helpful in dealing with specific issues within the *Miglin* analysis, i.e. in the context of an initial application for support under the *Divorce Act* after a final spousal support agreement, and also in challenges to spousal support agreements under provincial legislation.

(c) Use of the SSAG in a “Miglin” analysis

The Advisory Guidelines can be helpful in three ways in a *Miglin* case:

(1) At the **first stage** of the *Miglin* analysis, the SSAG ranges can be used to assess whether the agreement was in “substantial compliance” with the objectives of the *Divorce Act* at the time of negotiation. The courts are clear that the fact an agreement provides for less than the SSAG is not in and of itself a reason to set aside the agreement and that the Advisory Guidelines result must be balanced with respect for the parties’ own assessment of a fair outcome as reflected in their agreement or the value they may have placed on reaching an agreement and not litigating: see *Turpin v. Clarke*, 2009 BCCA 530 (*Miglin* stage 1 test of substantial compliance does not mean departure from SSAG will be reason to override agreement); *Duncan v. Duncan*, 2012 ONSC 4331; and *Viric v. Blair*, 2012 ONSC 7104. For example, an agreement with time-limited spousal support that comes close to the low end of the SSAG ranges for amount and duration might substantially comply.

However, a *significant* departure from the SSAG may be useful in illuminating a failure to comply in a broad sense: see the recent decision of the B.C. Court of Appeal in *S.E. v. J.E.*, 2013 BCCA 540 in which a trial judge was found to have erred in applying *Miglin* to uphold a lump sum spousal support agreement because he failed to test the lump sum for substantial compliance. The Court of Appeal drew on the SSAG in reaching this conclusion, stating:

[42] ... I am not suggesting that when a court is assessing whether an agreement substantially complies with the objectives of the *Divorce Act*, the effect of the agreement must be explicitly compared to the results indicated under the SSAG. Parties can legitimately negotiate valid agreements that depart from the *Guidelines*, particularly when other issues are being resolved. But in this case, such a comparison does illuminate, in broad terms, the degree to which this agreement shows a significant variation from what the SSAG suggests as an appropriate award.

See also *Quelch v. Quelch*, 2012 BCSC 667 (agreement providing for support of limited duration and less than half the SSAG mid-range after a 28 year marriage, too significant a departure from SSAG with no justification) and *Jones v. Lamont*, 2014 BCSC 1456 (modest lump sum does not meet wife’s compensatory claim after 28-year marriage). The case law shows that **complete waivers** of spousal support are often fairly easily overridden or set aside, especially where there are children: see *Veneris v. Veneris*, 2015 ONCJ 49; *Dhillon v. Dhillon*, 2014 ONSC 5608; *Cuffe*

v. Desjardins, 2013 ONSC 4044; *G.G. v. M.A.*, 2014 BCSC 1023; and *S.L.C. v. C.J.R.C.*, 2014 BCSC 1814.

When doing an assessment of the agreement in light of the SSAG ranges at *Miglin* stage 1, **remember restructuring**: an agreement that seems to be inconsistent with the SSAG on amount may in fact be more consistent if duration and restructuring are taken into account: see *Van Erp v. Van Erp*, 2015 BCSC 203 and *Ball v. Ball*, 2012 BCSC 227.

(2) If you get to the **second stage** of *Miglin*, the SSAG ranges for the parties' *current* circumstances can offer some insight into whether there has been any "departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds with the objectives of the Act". A result that differs significantly from the SSAG, particularly one that leaves the support claimant in circumstances of economic hardship, might support a finding that such a result could not have been reasonably contemplated by the parties.

(3) If the court does decide to override the final agreement in a *Miglin* case, the SSAG ranges can assist in determining the amount and duration of spousal support; see *Veneris*, above (interim spousal support ordered in face of marriage contract with waiver; low end of range to take account of agreement); *Cuffe v. Desjardins*, above (lump sum based on high-end SSAG ordered after spousal support waivers under marriage contract and separation agreement overridden under *Miglin*); *Krpan v. Krpan*, 2013 BCSC 1020 (mid-range SSAG on interim); and *Oostenbrink v. Oostenbrink*, 2013 BCSC 514 (SSAG mid-range).

However, consistent with *Miglin*, the parties' intentions as reflected in the agreement may continue to influence the appropriate spousal support outcome. The prior agreement may affect location within the range (see *Soschin v. Tabatchnik*, 2013 ONSC 1707); or lead to an award below the SSAG ranges (see *G.G. v. M.A.*, above and *Jubinville v. Jubinville*, 2013 BCSC 2262).

(d) Use of SSAG in challenges to agreements under provincial legislation

We have focussed on the use of the SSAG in a *Miglin* analysis, but the SSAG may be similarly useful when applying the tests for setting aside spousal support agreements under provincial legislation and in determining the amount of spousal support if the agreement is set aside: see *Ashton v. Ashton*, 2015 BCSC 790 (mid-range SSAG awarded after separation agreement set aside under s. 164(5)(e) of the B.C. *Family Law Act*).

(e) Additional reference material

For a review of the *Miglin* case law up to 2011 see Carol Rogerson "Spousal Support Agreements and the Legacy of *Miglin*" (2012), 31 *Canadian Family Law Quarterly* 13.

For a discussion of the treatment of consent orders see Rollie Thompson, "To Vary, To Review, Perchance to Change: Changing Spousal Support" (2012), 31 *Canadian Family Law Quarterly* 355.

5 Application to Interim Orders (SSAG 5.3)

(a) *Use of the SSAG on interim applications*

The Advisory Guidelines **are intended to apply to interim orders** as well as final orders. The interim support setting is an ideal situation for the use of guidelines. There is a need for a quick, easily calculated amount, knowing that more precise adjustments can be made at trial. Traditionally, interim spousal support was based upon a needs-and-means analysis, assessed through budgets, current and proposed expenses, etc. All of that can be avoided with the SSAG formulas, apart from exceptional cases.

In *D.R.M. v. R.B.M.*, 2006 BCSC 1921, Justice Martinson set out in detail the rationale for the application of the Advisory Guidelines to interim spousal support orders, concluding:

[19] They are a useful tool to have when determining interim spousal support. By focusing on income differences they provide a helpful measure of needs and means. Their use is consistent with the purposes of interim orders: to bridge the gap between the start of the litigation and the time when a resolution is reached at trial or by agreement; to avoid lengthy and costly interim litigation; to move the litigation to a timely resolution; and to reduce conflict

The usefulness of the Guidelines in the interim context when there is limited information was emphasized in *Langdon v. Langdon*, 2008 CarswellOnt 545, [2008] O.J. No. 418 and in *Thompson v. Thompson*, 2010 SKQB 322. In *Drouillard v. Drouillard*, 2012 ONSC 4495, in the context of a 30 year marriage, Justice Broad reviewed the general principles applicable to interim support and stated that interim support should generally follow the SSAG and that interim support should be based upon income-sharing and not budgets. Although judicial statements of the principles that govern interim awards tend to emphasize the primacy of needs and means, entitlement may also be recognized on compensatory grounds: see *B.L.B. v. G.D.M.*, 2015 PESC 1 and *H.F. v. M.H.*, 2014 ONCJ 450. The SSAG formulas reflect both compensatory and non-compensatory bases of entitlement, and their extensive use in the interim context shows that interim awards may also address compensatory objectives. In general both compensatory and non-compensatory claims should be considered at the interim stage, despite some court's insistence otherwise.

There are now many reported decisions using the SSAG in the interim context.

(b) *Income determination at the interim stage*

There may be inadequate evidence to ascertain precise income figures at the interim stage. One solution may be to estimate different ranges for amount, based upon alternative income hypotheses. Usually there will be some overlap in the ranges, which can help in choosing a specific amount. For examples of this see *Stork v. Stork*, 2015 ONSC 312; *Saunders v. Saunders*, 2014 ONSC 2459; and *Muzaffar v. Mohsin*, [2009] O.J. No. 4005 (S.C.J.). (This issue is further discussed under "Income" below.)

Interim support can be adjusted retroactively later at trial if the income figures chosen were incorrect; see *Frank v. Linn* 2014 SKCA 87 and *Stork*, above.

(c) Remember the interim exception

The Advisory Guidelines provide an **exception for compelling financial circumstances in the interim period** (see SSAG, 12.1). As Justice Martinson recognized in *D.R.M.*, above, this exception is based on the recognition that the amount may need to be different—either higher or lower—during the interim period while parties are sorting out their financial situation immediately after separation. In many cases the exception is still not explicitly relied upon, although the circumstances warranting an award different from the SSAG range are taken into account.

- The SSAG amount may be **too high** during the interim period in cases where the payor has high debt payments or is making mortgage payments or where the recipient has remained in a mortgage-free matrimonial home and thus has significantly lower housing costs than the payor. These concerns about the SSAG amounts being too high are particularly applicable under the *with child support* formula where the spouses are more often at the limits of their ability to pay after separation.

For examples see: *Oster v. Oster*, 2014 ONSC 7183 (shared custody, wife in home); *Harrison v. Harrison*, 2015 ONSC 505 (husband paying mortgage); *Leclerc v. Roberts*, 2014 ONSC 4201 (mortgage payment); *Acevedo-Gregory v. Gregory*, 2012 ONSC 6722 (interim order for exclusive possession); *Haraphongse v. Haraphongse*, 2011 ABCA 343 (wife in home); and *Carrier v. Poon*, 2013 NBQB 146 (debts)

- The SSAG amount may be **too low** during the interim period, particularly in shorter marriages under the *without child support* formula or the *custodial payor* formula, where the amounts generated by the formula are relatively low. The interim exception may also cover cases involving hardship/inability to meet basic needs in the transitional period in the immediate aftermath of separation. There may thus be some overlap with the basic needs/hardship exception (SSAG, 12.7) and even the disability exception (SSAG, 12.4), but it is **preferable to use the interim exception for short term, transitional needs**.

For examples see: *Tasman v. Henderson*, 2013 ONSC 4377 (explicit reference to interim exception and basic needs/hardship exception); *Singh v. Singh*, 2013 ONSC 6476 (short marriage, immigration sponsorship, explicit discussion of interim exception); *Osanlo v. Onghaei*, 2012 ONSC 2158 (custodial payor, need for recipient who had been primary caregiver to establish accommodation); *Bhandal v. Mann*, 2012 BCSC 1098 (no discussion of exceptions but interim exception and compensatory exception in short marriages would be applicable.); and *S.A. v. E.A.*, 2010 NBQB 61 (disability exception mentioned, but interim circumstances the applicable exception).

(d) Include periods of interim support in duration

Any periods of interim support have to be included within the durational limits set by the Advisory Guidelines. For an explicit application of this see *Fisher v. Fisher*, 2008 ONCA 11. Further, most separated couples will go through a period, shorter or longer, of voluntary support

arrangements and disentangling their household finances; these periods of informal support should also be taken into account in determining duration.

6 Income (SSAG Chapter 6)

The starting point for the determination of income under the Spousal Support Advisory Guidelines is the definition of “income” under the *Federal Child Support Guidelines*. For the most part, the income issues are the same as those for child support purposes, i.e. interpreting the provisions of sections 15 to 20 of the *Child Support Guidelines* and Schedule III.

(a) Differences in “income” for spousal support

There are some notable differences in “income” for spousal support purposes under the Advisory Guidelines, as compared to the income of a spouse determined for child support purposes.

- **Social assistance is *not* income for spousal support purposes**, whatever its name, even if it’s called Ontario Works or Ontario Disability Support Program (ODSP) or Alberta’s Assured Income for the Severely Handicapped (AISH) or some other confusing name (SSAG 6.2). ODSP still appears to fool some lawyers and judges, who erroneously treat it as income for the recipient and thus understate the spousal support range. For examples of correct treatment of ODSP and social assistance, see *Fountain v. Fountain*, 2009 CarswellOnt 6342 (S.C.J.); *Quattrociocchi v. Quattrociocchi*, [2008] O.J. No. 5341, 2008 CarswellOnt 7977 (S.C.J.); and *Stano v. Stano*, 2014 BCSC 1677.
- Under the *with child support* formula, the Child Tax Benefit, the Universal Child Care Benefit (UCCB), the child portion of the GST credit and any other child benefits for the children of the marriage are treated as income for spousal support purposes, unlike for child support (SSAG 6.3, 6.4). The software automatically computes these benefits and thus these benefits should NOT be calculated manually and included as income, as that will lead to double-counting.
- **Update:** There will soon be a significant change in child benefits, as the new federal government intends to roll the UCCB, the Child Tax Benefit and the National Child Benefit Supplement into a single, increased **Canada Child Benefit**, effective July 1, 2016. This new benefit will also have a different phase-out or claw-back rate as the recipient’s income rises. This change will have an impact upon the *with child support* formula.
- One child benefit issue has arisen recently, namely whether **the Canada Pension Plan Disability child benefit** should be included in a spouse’s income for spousal support purposes. CPP pays a separate child portion/benefit to the custodial parent, on account of the disability of the child’s parent. In our view, the answer should generally be “yes”, consistent with the SSAG treatment of other child-related benefits for the children of the marriage/relationship. In many cases, it will be the lower-income primary parent who will be reporting this income and its inclusion will reduce spousal support payable. In some custodial payor cases, the CPP child benefit will be paid to the higher-income custodial parent. In one such case, *Janzen v. Janzen*, 2014 BCSC 1374, the court chose to exclude the benefits of \$5,400/year for the two children from the payor’s income, after a careful

analysis of the issues. In our view, the better approach would have been to *include* the CPP Disability child benefit in the payor's income (with a parallel adjustment for his payment of s. 7 expenses).

(b) Timing of income

In the SSAG (6.7), we state: "The Advisory Guidelines start from the practical position that the relevant time for determining the incomes of the spouses is the date of the hearing or the date of the agreement, at both interim and initial stages." Incomes can and do change in the period between separation and the date at which support is initially being set, but usually only in minor ways. A long delay in the support claim or significant changes in incomes before the initial order/agreement (such as a significant increase in the payor's income or a significant reduction in the recipient's income) may complicate the analysis in some cases (see below under "Changing Incomes").

The issue of what incomes to use in situations of variation and review is dealt with below under "Variation and Review" and "Changing Incomes".

(c) Imputing income

Everyone wants to impute a higher income to the other spouse, either to increase or decrease spousal support. Once we use income-based advisory guidelines, it is obvious that a higher income for the payor will move the range upwards, or a higher income for the recipient will move the range downwards. Attempts to impute income have now become common, often with little evidentiary foundation.

Section 19 of the *Child Support Guidelines* is often the basis for these imputing claims. It is worth remembering that s. 19 is a mixture of two kinds of "imputing": a number of clauses that can be described more accurately as "attributing" income to the payor, income that the payor actually receives in some form, as contrasted to s. 19(1)(a), for example, where a court can truly "impute" income to the payor, even if he or she is unemployed or underemployed. Most of s. 19(1) focusses upon attributing income to a spouse, in an effort to treat various types of income and situations so as to put the spouse on an equal footing with a wage or salary earning employee, i.e. s. 19(1)(b) to (e) and (g) to (i). True imputing takes place under s. 19(1)(a) (and possibly under s. 19(1)(f)), where a court must determine the hypothetical income a spouse might earn.

There must be an evidentiary basis to attribute or impute income under s. 19(1). Where a spouse is not employed, but should be working part-time or full-time under s. 19(1)(a), it is straightforward to impute a minimum wage income, as a court can take judicial notice of the minimum wage in the jurisdiction. To prove that a spouse could earn more than the minimum, evidence will be needed. The case law under s. 19(1)(a) will be helpful, e.g. *Drygala v. Pauli* (2002), 61 O.R. (3d) 711 (Ont.C.A.).

In many cases, it will be difficult to prove how much a spouse ought to be able to earn. It may be easier to just argue location within the range for amount, to go lower in the range if the recipient's income is in issue or to go higher in the range if it is the payor's income.

In many cases where not much imputed income is involved, imputing additional income will not move the range much, which means considerable overlap between the range for actual income and the range for the desired imputed income, as is discussed in the next section. Or, where the payor has a high income, imputing a part-time or full-time minimum wage income to the recipient will not move the range much. In these instances, it might be better to concede the time-consuming proof of income, and then argue location in the range.

(d) Using alternative incomes, to estimate ranges

In some circumstances, it may be difficult to ascertain the precise income of a payor or a recipient. There may be uncertainty about income, or difficult judgments in imputing income, or inadequate evidence at the interim stage. One way to solve this common problem is to estimate different ranges for amount, based upon alternative income hypotheses. Usually there will be some overlap in the ranges, which can help in choosing a specific amount.

The B.C. Court of Appeal accepted this approach in upholding the variation decision in *Beninger v. Beninger*, 2009 BCCA 458. In a case above the ceiling, the trial judge had considered ranges for incomes of \$366,400 and \$416,400, thanks to an uncertain bonus for the payor, and then opted for an amount at the low end of the higher-income range, which fell in the middle of the lower-income range.

For an excellent example of this approach, in a high-income interim support case, see *Saunders v. Saunders*, 2014 ONSC 2459. For other interim examples, see *Kozek v. Kozek*, 2009 BCSC 1745 (Master), affirmed on appeal 2009 BCSC 1663 (dividend income); *Muzaffar v. Mohsin*, [2009] O.J. No. 4005 (S.C.J.) (husband self-employed) and *Stork v. Stork*, 2015 ONSC 312

One other example would be those cases where a court debates whether to impute income to a support recipient, or how much, in a “self-sufficiency” case. In the same fashion as for the payor, alternative incomes will usually generate overlapping ranges. Where the income disparity is great, there will be considerable overlap, often simplifying the outcome, as was the case in *Teja v. Dhanda*, 2009 BCCA 198 (trial judge considered ranges for wife’s incomes of \$25,000 and zero). See also *P.D.E. v. A.J.E.*, 2009 BCSC 1712 (wife underemployed, ranges determined for incomes of \$20,000, \$40,000 and \$50,000, terminating step-down order made).

(e) Grossing-up non-taxable income

Under the *without child support* formula, which uses gross incomes, any non-taxable income will generally have to be “grossed up”, either by correctly inputting the income data with the software or by manual calculations (if software is not being used). If the inputs are done correctly, the software will do the grossing up calculations. The same is true for non-taxable income under the *custodial payor* or *adult child* formulas. Income can be legitimately non-taxable, such as workers’ compensation or income earned on reserve or long-term disability payments, or it can be income that is improperly not reported for tax purposes, such as tips or cash payments for work. Both forms of non-taxable income must be grossed up to do the *without child support* formula calculations, in order to treat earners of gross income and earners of non-taxable income on an equal footing.

The rest of the *with child support* formulas use net income rather than gross income to calculate spousal support, but you still have to input the income data correctly in the software. Any non-taxable income will be directly inserted into the net income calculations for spousal support by the software for these formulas. But remember that any non-taxable income will have to be grossed up by the software to determine the correct amount of child support.

Where a substantial portion of the payor's income derives from legitimately non-taxable sources, you may have to use the "non-taxable income" exception, discussed below under "Exceptions".

(f) Quick tips and alerts in determining income

Apart from these major issues in income determination, there are some minor ones that should be noted, both manually and in the use of software.

- **Most common simple error?** Failing to deduct union dues from Guidelines income, as is permitted under s. 1(g) of Schedule III of the *Child Support Guidelines*.
- Remember to check the other "adjustments to income" of Schedule III.
- Too often lawyers and others input all forms of income into the default "employment income" category, without much thought. One example would be the non-taxable income discussed in the section above. Under the *without child support* formula, there are fewer other sources of error, as this formula uses gross income. But there is still room for error from Line 150 income: for example, you need to use actual amounts of capital gains and dividends from taxable Canadian corporations, as directed by ss. 5 and 6 of Schedule III.
- Under the *with child support* formula, there is much more room for error in inputting income, as the formula is a *net income* formula and thus is sensitive to each form of income, as different taxes, deductions, credits, CPP and employment insurance contributions will attach to different kinds of gross income. For example, a person receiving CPP or any other form of pension income will not pay CPP or EI contributions (which are deducted from employment income).

(g) Can a payor have "two incomes"?

Another set of difficult "income" issues can be succinctly characterized as "two incomes", one for child support and another, different income for spousal support. The question is not, "can a payor have two incomes?", but really "in what circumstances should a payor have two incomes?" These issues are difficult because they are not just about "income", but about more fundamental principles of support.

Here are some examples of circumstances where the payor can have one income for child support and a different one for spousal support:

- Where the payor experiences a **post-separation income increase**, there is no question that the child should share fully in any increased income under the *Child Support Guidelines*. The same cannot be said for spousal support, as there is a threshold

entitlement question to be considered, namely whether the recipient spouse should share none, some or all of the payor's increase in income (discussed at SSAG 14.3 and below under the heading "Changing Incomes"). A court can find that child support should increase, but not spousal support under the Advisory Guidelines. For good examples of these issues, see *Sarophim v. Sarophim*, 2010 BCSC 216 (income for spousal support excluding income from increased teaching post-separation) and *Judd v. Judd*, 2010 BCSC 153 (full income increase included after careful discussion).

- Section 14 of the *Child Support Guidelines* fixes a very low threshold for **an application to vary** child support, on the view that child support should readily adjust up and down with the payor's income, at least for table amounts, often on an annual basis. By contrast, the threshold for variation is more demanding for spousal support and some judges will thus attempt to determine more of a "steady-state" income, smoothing out fluctuations or predicting anticipated increases: e.g. *K.D. v. N.D.*, 2009 BCSC 995 (fluctuating income).
- Where the payor's income exceeds the "**ceiling**" of **\$350,000 per year**, a court will usually order the formulaic table amount of child support for payor incomes up to \$1 million per year, but a lower income can be used for purposes of the Spousal Support Advisory Guidelines (SSAG 11.3). For an example, see *Dickson v. Dickson*, 2009 MBQB 274 (child support income for 2005-07 \$520,872, but \$350,000 used for spousal support, one small error in using higher amount of actual child support in calculating spousal support range at \$350,000, rather than child support amount for \$350,000).
- There are often strong policy reasons to **impute income** to a payor for child support purposes, for the child to obtain the full benefit of the earning capacity of the payor, while the rationale is much weaker for spousal support. For an example of this, see *Martin v. Orris*, 2009 MBQB 290 (various corporate payments to family members and expenses treated as not reasonable to deduct from child support income, but reasonable to recognize such long-standing payments in determining income for interim spousal support). Similarly, a court may be prepared to attribute pre-tax income from the payor's corporation as income for child support purposes under s. 18 of the *Child Support Guidelines*, but less so for the determination of spousal support.
- Finally, there may be situations where the inter-relationship between **property division** and spousal support for spouses may mean a different, and lower, payor income is used for spousal support. See *Klefenz v. Klefenz*, 2015 NSSC 196 (payment on account of capital in share transaction included for child support, but not for spousal support). For example, if stock options are valued and divided as part of the property divisions, the same stock options may not be treated as income for spousal support purposes, even in cases where the stock options might be considered as income for child support purposes. On such benefits as stock options and bonuses, see Kenneth Cole, "The Dual Character of Employment Benefits" (2009), 28 *Canadian Family Law Quarterly* 95.

(h) Other assorted income issues

Not covered here are a variety of “income” issues, issues which receive specific treatment under a number of other headings in this User’s Guide (with the relevant sections of the SSAG also referenced below). These issues will just be flagged here:

- Ceilings and floors: incomes above the “ceiling” and below the “floor”, dealt with below under “Ceilings and Floors” (SSAG 11).
- Non-taxable payor income: there is an exception where the payor derives all or most of his or her income from legitimately non-taxable sources, dealt with below under “Exceptions” (SSAG 6.6 and 12.8).
- Post-separation income increase of the payor: this important and difficult issue is dealt with below under “Changing Incomes” (SSAG 14.3).
- Post-separation income reduction of the recipient: below under “Changing Incomes”.
- Delayed claims: also dealt with below under “Changing Incomes”.
- Imputing income for self-sufficiency: dealt with below under “Self-sufficiency” (SSAG 13.2).
- Prior support obligations: an adjustment to income is required under this exception, often done automatically by software once the data is inputted, dealt with below under “Exceptions”.
- *Boston* and double-dipping: where a pension has already been divided as part of the property settlement, there may have to be an exception made and income adjusted, considered below under “Retirement”.

7 The Without *Child Support* Formula (SSAG Chapter 7)

In cases where there are no dependent children, the *without child support formula* applies. This formula covers a wide range of fact situations: marriages of every length—short, medium and long—in which there were no children; and long marriages where the children are now adults. As well, in cases involving medium length marriages with children the initial determination of support will take place under the *with child support* formula, but once the children are independent, there may be a **crossover** to this formula (SSAG, 14.5, and below).

This formula relies heavily upon **length of the relationship** to determine both the amount and duration of support. Both amount and duration increase with the length of the relationship. This formula is constructed around the concept of **merger over time** which offers a useful tool for implementing the mix of compensatory and non-compensatory support objectives in cases where there are no dependent children.

In short and medium length marriages without children the primary basis for entitlement will be non-compensatory and the formula generates transitional awards, with the length of the transition period proportionate to the length of the relationship. In longer marriages the basis for entitlement will vary depending upon the facts; it may be primarily non-compensatory (marriages without children), or a mix of compensatory and non-compensatory (marriages with grown children and crossover cases).

Some of the more difficult issues under this formula will be discussed in more detail below, but here we first offer some reminders about the application of this formula:

- In calculating the **length of the relationship**, be sure to include periods of **pre-marital cohabitation**. Also, the period **ends with** the date of **separation** (not divorce). Thus the length of the relationship runs from the start of cohabitation to the date of separation.
- If there is any **period of separation during the relationship**, followed by a reconciliation and continued cohabitation, then the **cumulative total of the periods of cohabitation** will most often be the appropriate way of calculating the length of the relationship, not just the last period of cohabitation; see *Broadbear v. Prothero*, 2011 ONSC 3636 and *R.L. v N.L.*, 2012 NBQB 160. However unusual circumstances, such as an extremely lengthy period of separation, may require a different approach.
- It is important to **identify the basis of entitlement** when using this formula, whether it is non-compensatory, compensatory or a mix (see SSAG Ch. 4 and “Entitlement” above). This is important for determining location within the range, and also for determining whether or not there is an exception that warrants an award outside the range.
- Determining **location in the range** is an important issue, given the diverse array of fact situations this formula covers. The mid-range should **not** be the default. (See SSAG Ch. 9 and “Choosing Location in the Range” below).

- Although the formula works with gross income figures, it is always important, in determining a precise amount of support within the range, to do a “reality check” by looking at **net disposable income positions** after payment of a given amount of spousal support, particularly in cases of long marriages.
- Note that an **equalization of net income “cap”** is part of the formula for amount (SSAG, 7.4.1). This “cap” applies to long marriages of 25 years or more, where the range for amount is 37.5 to 50 per cent of the gross income difference. The “cap” implements the idea that the recipient should never receive an amount of spousal support that will leave him or her with more than 50 per cent of the spouses’ net disposable income or monthly cash flow. The software programs can calculate this net income cap with precision and will present the cap as the upper limit of the range. (For those without software, or without more precise net income calculations, the net income cap can be estimated crudely by hand, at 48 per cent of the gross income difference. This “48 per cent” method is a second-best, but adequate, alternative.)
- If the ranges generated by the formula seem inappropriate, consider **restructuring** (SSAG Ch. 10 and “Restructuring” below) and **exceptions** (SSAG Ch. 12 and “Exceptions” below); they will have their primary application to cases under the *without child support* formula.
- In cases involving **longer marriages**, many of the difficult issues will arise in subsequent applications for **variation and review** to address things like changing incomes over time, the self-sufficiency of the recipient, retirement and repartnering, all addressed below in separate sections of this *User’s Guide*.

(a) The problem of limited awards in short marriages without children (SSAG 7.4.2)

Under the *without child support* formula short marriages generate very limited awards, if there is entitlement at all, even in cases where there is a significant income disparity. In many cases the modest amounts generated by the formula will be restructured into a lump sum or a very short transitional award. This result is consistent with current law and generally raises no problems; see *Newcombe v. Newcombe*, 2014 ONSC 1094. Identified exceptions will cover most of the short marriage cases where the formula range seems inappropriate. These exceptions are discussed in detail below and will simply be flagged here:

- Remember the **compensatory exception** (SSAG 12.5 and “Exceptions” below) which applies to short and short/medium length marriages without children where there are significant compensatory claims that are not adequately redressed by the modest amounts generated by the formula which are intended to satisfy claims that are non-compensatory and transitional in nature. These compensatory claims may involve :
 - an **economic loss**, for example moving and/or leaving a job to marry or to facilitate the other spouse’s employment; or alternatively
 - **restitutionary claims**, based on contributions to the other spouse’s education or professional training, followed by separation before the supporting spouse has a chance to enjoy any benefits of the enhanced earning capacity.

These compensatory claims need to be assessed on an individualized basis.

- The **interim exception for compelling financial circumstances** (SSAG 12.1 and “Application to Interim Orders” above) may also be applicable in short marriage cases where the amounts generated by the formula do not provide realistic amounts to deal with the immediate transitional needs resulting from the marriage breakdown.
- The **basic needs/hardship exception** (SSAG 12.7 and “Exceptions” below) recognizes the specific problem with shorter marriages (1-10 years) where the recipient has little or no income and the formula is seen as generating too little support for the recipient to meet his or her basic needs for any transitional period that extends beyond the interim exception. One area where this exception can apply is immigration sponsorship cases (see immediately below).
- The **disability exception** (see SSAG 12.4 and “Exceptions” below) may also be applicable in short marriages where the recipient has a longer-term illness or disability.

(b) Short marriages: immigration sponsorship cases

One category of short marriages, those involving immigration sponsorship agreements, raise some unique issues under the *without child support* formula. These are cases where a marriage breaks down while a sponsorship agreement is in place. Most spousal sponsorship agreements now run for a period of 3 years, but in the past the duration was as long as 10 years. In some cases involving very short marriages, courts have used the duration of the sponsorship agreement as the appropriate measure for the duration of spousal support, thus extending duration beyond the durational ranges generated by the Advisory Guidelines. As well, in such cases, some courts have also ordered support in an amount beyond the high end of the range to generate an amount of support that will meet the recipient’s basic needs and preclude resort to social assistance. See *Gidey v. Abay*, [2007] O.J. No. 3693 (S.C.J.); *T.M. v. M.A.G.*, 2006 BCPC 604; *Singh v. Singh*, 2013 ONSC 6476; and *Carty-Pusey v. Pusey*, 2015 ONCJ 382.

Some of the identified exceptions may be relevant in these cases to justify a departure from the formula ranges and have certainly been relied upon by judges:

- the exception for compelling financial circumstances in the interim
- the compensatory exception in short marriages
- the basic needs/hardship exception

However, although the case law on this issue is not settled, it does appear that the sponsorship agreement may be an independent factor in short marriages, leading to either an amount or duration outside the formula ranges

Note that in some immigration sponsorship cases entitlement may be an issue. Despite the sponsorship agreement there may be a finding of no entitlement: see *Mazloumisadat v. Zarandi*, [2010] O.J. No. 252 (S.C.J.) (1 year marriage, no entitlement because husband told wife not to come) and *Merko v. Merko*, 2008 ONCJ 530 (very short marriage; economic lives never intertwined, each party no income).

(c) Time limits under the without child support formula (SSAG, 7.5)

Do not ignore duration. We have found that the *without child support* formula is widely used to determine amount, but that duration is often ignored. This is a misapplication of the formula. Amount and duration are interrelated parts of the formula: see *Domirti v. Domirti*, 2010 BCCA 472. Using one part of the formula without the other undermines its integrity and coherence. Extending duration beyond the formula ranges, for example, may require a corresponding adjustment of amount by means of **restructuring** (see SSAG Ch. 10 and “Restructuring” below), or a finding that the facts of the case require an **exception** (see SSAG Ch. 12 and “Exceptions” below).

This formula generates **time limits** when the relationship is under 20 years in length and the rule of 65 is not applicable. There is increasing acceptance of the **appropriateness of time limits, particularly when the basis of entitlement is largely non-compensatory** and the purpose of the award is to provide a transition to a lower standard of living: see *Fisher v Fisher*, 2008 ONCA 11 (7 years of support after 19-year marriage with no children; within global range after restructuring). One of the achievements of the SSAG has been to bring greater structure to the issue of duration in medium-length marriages, under both this formula and the *with child support* formula.

- Remember that **time-limited orders are subject to variation** if there has been a material change in circumstances: see *Fisher v Fisher*, 2008 ONCA 11; *Fewer v. Fewer*, 2005 NLTD 163; *Bastarache v. Bastarache*, 2012 NBQB 75; and *R.L. v N.L.*, 2012 NBQB 160.
- The durational limits need **do not necessarily require time-limited initial orders**, but can be used in a “softer” way to structure the on-going process of variation and review (see immediately below).

Implementing the durational limits under the *without child support* formula. Time limits under this formula can be implemented in different ways. While shorter durations (under 10 years) are more easily implemented through time limits set out in initial orders, the longer durational ranges may seem less amenable to initial time limits. However, **time limits under this formula may be used in a “softer” way**, similar to the use of the durational ranges under the *with child support* formula, **to structure the on-going process of review and variation**. While the initial order is indefinite, perhaps subject to a review, a time limit or termination may be imposed on a subsequent review or variation.

- For cases where **time limits have been set in initial orders**, see *Fisher*, above, (7 years of support after 19-year marriage with no children, within global range after restructuring); *Zimmaro v. Smee*, 2013 BCSC 381 (18-year relationship, no children, 4 years further support after almost 5 years of interim); *R.L. v. L.A.B.*, 2013 PESC 24 (15-year marriage, no children, 3 years further support after 8 years interim, 11 years total); *Tamaki v. Dahlie*, 2012 BCSC 1917 (18-year marriage, no children, 4.5 years support plus 4.5 years interim, 9 years total); *Soschin v Tabatchnik*, 2013 ONSC 1707 (11-year relationship, no children, lump sum based on mid-range amount and duration); *Friedl v. Freidl*, 2012 ONSC 6337 (time-limited order for 7 years after 25-year marriage; 10 years total with interim; no compensatory claim, only non-

compensatory); and *Bastarache v. Bastarache*, 2012 NBQB 75 (18 year duration fixed after 18-year marriage, 13 years lump sum retro plus further 5 years time-limited, subject to variation). As noted above, the potential risks associated with a longer-term fixed duration can be ameliorated by the possibility of a variation application if there has been a material change in circumstances.

- For cases **where the durational limits have been applied in the context of subsequent variation or review**, see *Kerman v Kerman*, 2008 BCSC 500; *Hanssens v. Hanssens*, 2008 BCSC 359; *Kelly v. Kelly*, 2007 BCSC 227; *Gammon v. Gammon*, 2008 CarswellOnt 6349 (S.C.J.) (10 year total duration after 15-year relationship with no children; termination date set 4 years after separation on variation application after husband retires); *Bourque v. Bourque*, 2008 NBQB 398 (16 year total duration set after 17-year marriage; termination date set on review application 9 years after separation); *Maber v. Maber*, 2012 NBQB 337 (crossover, variation; 2 more years support; 18 years total after 18-year marriage); *Domirti v. Domirti*, 2010 BCCA 472 (crossover, review, support terminated 16 years after 16-year relationship). Other good examples under the *custodial payor* formula are *Puddifant v. Puddifant*, 2005 NSSC 340; and *R.L. v N.L.*, 2012 NBQB 160 (16-year relationship; review 8 years after separation; support for further 8 years, subject to variation.)
- In general, awards in highly **compensatory cases** (eg. crossovers) tend to be at the **longer** end of the duration range and those in **many non-compensatory cases** (eg. where the purpose of the award is to provide a transition from the higher, marital standard of living) at the **shorter** end of the duration range. But in cases of **illness and disability**, extreme need may push awards to the **longer** end of the duration range or even beyond.
- The **disability exception** (see SSAG 12.4 and “Exceptions” below) may result in an extension of support beyond the durational ranges under the *without child support* formula as may the **s. 15.3 exception** in crossover cases (see “Crossovers Between Formulas When Child Support Ends” below).

SSAG durational ranges too long? In some cases courts have ordered spousal support for periods of time below the low end of the SSAG ranges. Some of these cases are simply examples of restructuring where the award is still within the global ranges, see *Fisher*, above, (7 years of support after 19-year marriage with no children; within global range after restructuring); *Mercel v. Bouillon*, 2012 ONSC 6557 (support after 14-year common law relationship should be indefinite because of “rule of 65” but above SSAG amount paid for many years; support terminated after 17 years). However, the B.C. Court of Appeal, in two recent decisions, has suggested that non-compensatory claims based solely upon drop in standard of living warrant only limited “transitional” awards, even in long marriages, and that the SSAG ranges may be too long: see *Lee v Lee*, 2014 BCCA 383 and *Kirton v. Mattie*, 2014 BCCA 513. It is not clear at this point whether these decisions just reflect fact-specific rulings or suggest more significant shifts in thinking about entitlement that will influence the duration of awards.

(d) Long marriages and indefinite support

- **The meaning of “indefinite” support.** Duration under this formula is “indefinite” when the relationship is 20 years or longer or when the “rule of 65” applies (see immediately below). Many misinterpret this term. **Indefinite support does not necessarily mean permanent support. It only means that no time limit can be set at the time of the order or agreement.** And it certainly does not mean that support will continue indefinitely at the level set by the formula, as such orders are open to variation and review as circumstances change over time. The SSAG use the term “**indefinite (duration not specified)**” to convey that indefinite orders are **subject to variation and review**. Variation and review may subsequently result in **time limits or even termination** as a result of changing incomes, retirement, repartnering, or self-sufficiency considerations, all of which we discuss below in separate sections of this *User’s Guide*. For a good discussion of the meaning of “indefinite” support see *Banziger v. Banziger*, 2010 BCSC 179.
- When a support award is “indefinite”, recipients are under an obligation to make **reasonable efforts toward their own self-sufficiency**, even if they cannot attain full-self-sufficiency, and a failure to make reasonable efforts may result in imputing income and a reduction of support on a subsequent review or variation. (See SSAG Ch.13 and “Self-sufficiency” below.)

(e) Duration and the “rule of 65” (SSAG 7.5.3)

When determining duration under the *without child support* formula, even if the relationship is under 20 years in length, indefinite support may be appropriate under the “rule of 65” which applies if the length of the relationship in years plus the recipient’s age at the date of separation equals or exceeds 65. For two recent appellate level decisions applying the “rule of 65” see *Djekic v. Zai*, 2015 ONCA 25 (8-year cohabitation, both over 60, husband \$90,000, wife \$24,000, trial judge ordered support for 6 years, Court of Appeal finds error, “rule of 65”, no time limit) and *Frank v. Linn*, 2014 SKCA 87 (together 16 years, wife 52 at separation; trial judge orders indefinite, no error, “rule of 65”).

- **Not applicable to short marriages.** Note that the “rule of 65” for indefinite (duration not specified) support is not applicable in short marriages under 5 years in length.
- **Age at the date of separation.** Remember that the calculation under the “rule of 65” requires the recipient’s **age at the date of separation**, not his or her age at the date of trial or application. See *Domirti v. Domirti*, 2010 BCCA 472 where the B.C. Court of Appeal found that the lower court, on a review application, had incorrectly applied the “rule of 65”. The lower court’s order for indefinite support was replaced by an order applying the SSAG durational range and terminating spousal support.

(f) *Medium-length marriages with children: crossover cases after child support ends*

One group of cases that is beginning to appear under the *without child support* formula is medium-length marriages with children. In these cases there would have been dependent children at the time of separation and hence spousal support would have initially been determined under the *with child support* formula. After child support has been terminated, these cases may be brought under the *without child support* formula on an application for review or variation and the time limits under *the without child support* formula will be applied. It is important to be aware of this particular subset of cases under the *without child support* formula. We have created a separate section on crossovers (see “Crossovers Between Formulas When Child Support Ends” below) to flag the specific issues raised in these cases.

8 The *With Child Support* Formula (SSAG Chapter 8)

The *with child support* formula is actually a family of formulas, built around the custodial and child support arrangements for the children. Child support takes priority over spousal support, as is directed by s. 15.3 of the *Divorce Act* and the equivalent provincial law provisions. The child support priority is reflected in the income calculations for these formulas. After addressing some general issues, we will work our way through the different *with child support* formulas.

Chapter 8 of the SSAG contains a detailed explanation of the formulas for amount and duration, and their construction. The rationale for spousal support in these cases is primarily *compensatory*. The interaction of child and spousal support can often raise tricky legal issues: for more, see Rollie Thompson, “The Chemistry of Support: The Interaction of Child and Spousal Support” (2006), 25 *Canadian Family Law Quarterly* 251. Government benefits and credits for children also affect these formulas, as public support for children and their caregivers serves to reduce the demand for spousal support for lower income parents.

Our review of the case law suggests that 90 per cent of *with child support* cases are resolved within the formula ranges for amount, with the remainder falling outside the ranges for good reasons like exceptions or unusual facts. This is not surprising, given the homogeneity of the fact situations that underlie most of the *with child* cases (except for those under the *custodial payor* or *adult child* formulas). These are primarily compensatory claims, most of them quite strong, but compensation is limited by the priority given to child support and the resulting limits on ability to pay. Apart from high incomes or one child cases, the payor’s ability to pay will be the practical limit on spousal support in most of these cases, as was recognized in *Moge*.

(a) **Government child benefits and credits**

There are a collection of public benefits and credits intended to provide support to children and their caregivers. The *with child support* formulas include them as income, as is explained in section 6.3 of the SSAG. The computer software automatically calculates these amounts, so they should not be input manually. The amounts are adjusted annually or at intervals by governments, and those changes are picked up by the software.

Most prominent amongst these benefits are the Canadian Child Tax Benefit, the National Child Benefit Supplement, the Universal Child Care Benefit, the child portion of the GST/HST credit, the Child Disability Benefit, and the various provincial and territorial benefit and credit schemes. The federal government has proposed to roll three of these (the Child Tax Benefit, the U.C.C.B. and the National Child Benefit Supplement) into a single new **Canada Child Benefit**, effective July 1, 2016. Based on our current information, it does not appear that any change to the *with child support* formulas will be required.

In Quebec, the *with child support* formulas are adjusted for Quebec's different child support guidelines, as well as recognizing the more generous child benefits in the province: SSAG, Chapter 15.

Just a reminder: social assistance is NOT treated as "income", whether for parents or children: SSAG 6.2. Canada Pension Plan payments are NOT social assistance and thus are income, including CPP disability payments, whether for the parent or the separate benefit paid for the children: see "Income" above.

(b) Section 7 expense contributions

The various formulas deduct from income both the table amount of child support (actual or notional) for each spouse AND the s. 7 expense contributions of each spouse. By definition, any payment of s. 7 expenses will reduce the range for amounts of spousal support. Further, the correct actual parental contributions must be input, and there is a wide range of sharing arrangements. The software assumes the "guiding principle" of s. 7(2) of the *Child Support Guidelines*, i.e. a sharing of s. 7 expense contributions based upon incomes *after* the transfer of spousal support. If the spouses agree to a different sharing arrangement, an adjustment must be made, to state the SSAG range correctly.

Lawyers and courts still fail to consider s. 7 expenses in calculating the SSAG range. We hesitate to offer examples of this recurring error. Where the s. 7 expenses are large, this error can be quite serious for the payor. In some instances, where the expenses are small or where the expenses are reduced by tax deductions and credits, the impact of the error may be relatively small. In some cases, parties agree to cost-sharing proportions going forward, without itemizing the specific s. 7 expenses. The parties should make some estimate of the future expenses in preparing SSAG calculations. If the expenses are not too large, some practical adjustment can be made by going lower in the SSAG range.

However accomplished, the s. 7 expenses must be recognized and factored into the SSAG analysis. They cannot just be ignored.

(c) No ability to pay vs no entitlement

There is an important difference between "no entitlement" and "no ability to pay" under these formulas, because of the statutory priority given to child support. A SSAG range of zeroes across the board under this formula usually does NOT mean "no entitlement", as such a range is most likely with a larger number of children (3, 4 or more children) or large s. 7 expenses or both. In these cases, there is usually a large compensatory claim, by reason of those substantial child care obligations, but no ability to pay spousal support while the children are still around.

Once the child support obligations diminish, then s. 15.3(3) of the *Divorce Act* (and the provincial equivalents) will resuscitate or increase the amount of the spousal support payment and also lengthen the duration: note the exception for s. 15.3 and inadequate compensation under "Exceptions" below.

(d) A family of formulas: choose the right one

There are **six formulas** listed in Chapter 8 of the SSAG:

- the *basic* formula;
- the *shared custody* formula;
- the *split custody* formula;
- the *step-child* formula;
- the *custodial payor* formula; and
- the *adult child* formula.

There is no separate *hybrid custody* or “mixed custody” formula, as that arrangement always includes at least one child in shared custody and thus the *shared custody* formula is applied. Hybrid cases are given their own heading below, as these cases often have different dynamics than the “simpler” shared custody cases.

Choosing the right one amongst these formulas has become much better over time. Cases where custodial arrangements are fluid may mean a consideration of two of the formulas, as occurred in *Philippe v. Bertrand*, 2015 ONSC 235, where the 14-year-old son had been in equal shared custody, but then moved in most of the time with his father, with the distinct possibility of reverting back to shared custody. Two ranges were calculated by Justice Kane and alternative amounts fixed for the two possible situations. Multiple formulas are also used for retroactive spousal support claims, where the custody arrangements have varied over time.

(e) The basic formula (SSAG 8.3)

Over time, we see fewer of the *basic* formula cases in reported decisions, even though we know that this is by far the most common custodial arrangement: a higher-income payor pays child and spousal support to a lower-income parent with custody or primary care of the children. Most of these cases appear to settle, with the “complex” custody cases turning up more and more often in the reported decisions. In almost all of these cases, at least at the initial stage, duration will not be a big issue: orders will be “indefinite (duration not specified)”. The real issue, at both interim and initial stages, will be the location of an amount for spousal support within the SSAG range.

Most of these *basic* formula cases default to the mid-point, with little explanation. Only where a court goes higher or lower is there much explanation for location in the range. It appears that something like 60 per cent of all reported *with child support* cases order the mid-point. But the mid-point is NOT some kind of “norm”, with the rest of the range only to be used in unusual circumstances: see “Choosing Location Within the Range” below.

If anything, **in the *basic* formula cases for low to middle-income spouses, there should be a tendency for spousal support to push up into the mid-to-high end of the SSAG range**, given the significant compensatory claims with children, the needs in the home of the primary care parent and the constraints of ability to pay upon the range. A simple default to the mid-point likely leaves many of these recipients under-compensated. There may be good reasons to locate in the mid-to-lower end of the SSAG in some of these cases, notably the specifics of ability to pay for lower income payors in individual cases, but these need to be articulated. The dynamics

of location with the range will be different where there is only one child or spouses with higher incomes.

(f) The shared custody formula (SSAG 8.6)

In shared custody cases, there *is* a clear default location for amount in the range: **the amount of spousal support which would leave the children in each household with roughly similar standards of living**. See Rollie Thompson, “The TLC of Shared Custody: Time, Language and Cash” (2013), 32 *Canadian Family Law Quarterly* 315. This outcome is consistent with the strong statements about similar living standards in *Contino v. Leonelli-Contino*, 2005 SCC 63.

Where neither spouse has repartnered and there are no new children in either household, the starting point should be an amount of spousal support that leaves each household with **equal net disposable income**. The SSAG range in shared custody cases always includes this 50/50 NDI split, to recognize the importance of this principle. This default outcome can be adjusted, depending upon housing costs and other factors. Sometimes the equal NDI point is in the mid-range, but it is just as often lower or higher in the SSAG range.

- In **Ontario**, there is now a strong trend to equalize net incomes in these cases: *Kochar v. Kochar*, 2014 ONSC 5211; *Neilipovitz v. Neilipovitz*, 2014 ONSC 3008; *Lafazanidis v. Lafazanidis*, 2014 ONSC 3287; *Rankin v. Rankin*, 2014 ONSC 235; *Martins v. Martins*, 2014 ONSC 113; *Dupuis v. Desrosiers*, 2013 ONCJ 720; *C.L.Y. v. D.G.Y.*, 2013 ONSC 6550; *Mayer v. Mayer*, 2013 ONSC 7099; *Cuffe v. Desjardins*, 2013 ONSC 4044; *Price v. Burgess*, 2013 ONSC1142; *MacDonald v. MacDonald*, 2012 ONSC 6657; and *Hurrell v. Hurrell*, 2012 ONSC 4824.
- The same strong trend is not observable in **British Columbia**, where trial judges seem to default to the mid-point, even in shared custody cases. In B.C., there are a large proportion of shared custody cases in the mix, much larger than in Ontario, yet the equal net income issue has not been clearly addressed. In *R.D.L.J. v. B.S.J.*, 2014 BCSC 1566, the court suggested that an equal NDI outcome, while not out of the question, would be “a significant change in the practice and the law in British Columbia”. Yet there are also a few B.C. shared custody cases where the courts explicitly equalized net incomes: *A.M.D. v. K.R.J.*, 2015 BCSC 1539 and *Paisley v. Paisley*, 2014 BCSC 1752. It is worth repeating here that there is no inherent reason in the SSAG to default to the mid-point on amount: see “Choosing Location Within the Range” below.
- Where spouses have repartnered or new children have appeared, similar household standards of living can be calculated by using an adjusted version of Schedule II to the *Child Support Guidelines*. Two adjustments are required. First, Schedule II ignores s. 7 contributions. Second, Schedule II does not include child benefits and credits. Both of these can be adjusted with the software: Thompson, above, at 344.
- Where spousal support is paid, 80 per cent of shared custody cases resolve child support at the straight set-off amount, leaving spousal support to make the adjustment in living standards: Thompson, above, at 336.

In the *reported* shared custody cases involving spousal support, it is common to see large income disparities between the spouses, which are unusual for most shared custody parents. Most shared custody cases only involve child support, and not spousal support, as the parental incomes are not that far apart.

Some lawyers and courts have been surprised by SSAG ranges for amount that start at or near 50 per cent NDI for the recipient and then go up from there, typically cases with two or three children. The argument is that spousal support should *never* leave the recipient with more than 50 per cent of the family's net disposable income in shared custody cases. That view is incorrect, as the cases with big income disparities often reflect strong compensatory claims based upon past disadvantage that justify going above 50 per cent. The same is true for some of the cases where the recipient has a low income.

Duration may become a more important consideration in shared custody cases. All initial orders under the formula will be “indefinite (duration not specified)”. Where there is true shared custody after separation, the effect is to limit the continued accumulation of loss or disadvantage from child care in most (but not all) cases. The compensatory claim will primarily reflect past loss or disadvantage, which may then be met over a shorter period of time compared to the *basic* formula (where the recipient continues to fulfil the bulk of child care responsibilities). In shared custody cases, a time limit upon continued spousal support may thus emerge sooner, as the lower income spouse may be able to move more quickly to self-sufficiency, e.g. *Shih v. Shih*, 2015 BCSC 2108.

(g) Split custody (SSAG 8.7)

These are cases in which each parent has primary care of at least one child. Section 8 of the *Child Support Guidelines* requires a strict set-off of table amounts to determine child support, with no room for discretion. Spousal support provides a means to create financial discretion in these cases and to adjust between households. For a careful discussion, see *Maber v. Maber*, 2012 NBQB 337.

Unlike the *shared custody* formula, under the *split custody* formula, a 50/50 NDI split is NOT automatically included in the SSAG range, even if there is an even number of children. This is not the “default” for every split custody case: *Greig v. Young-Greig*, 2014 ONSC 58, where such a default position was rejected for parents who each had one child. If one parent has more children than the other in split custody, then equal net incomes makes no sense. Where there is much movement of the children between the two homes in a split custody situation, there might be a good argument for bringing household living standards closer together via spousal support.

In some split custody cases, the higher-income spouse will not claim any child support from the lower-income spouse. In these cases, an adjustment must be made, to avoid stating too high a range for spousal support (which assumes that the recipient of spousal support is in fact paying an amount for child support). For two older cases that failed to make this adjustment, see *Paheerding v. Palihati*, 2009 BCSC 557 and *Santos v. Santos*, [2008] O.J. No. 5110, 2008 CarswellOnt 7607 (S.C.J.).

(h) Hybrid or mixed custody

These are cases in which at least one child is in shared custody plus the split, sole or primary residence of the others. These are complex cases, but the software by and large solves the problems of calculation of child support and notional child support.

Because at least one of the children is in shared custody, the discretion of s.9 of the *Child Support Guidelines* is available in assessing child support. For a leading case on the calculation of child support in hybrid cases, see *Sadkowski v. Harrison-Sadkowski*, 2008 ONCJ 115. In turn, as with shared custody, that child support discretion can complicate the SSAG calculations. Any complications can be resolved by simply using the set-off to determine child support and then using spousal support to adjust, e.g. *T.L. v J.L.*, 2014 ONSC 91.

As with split custody, there is no automatic extension of the range in the formula to include a 50/50 split of NDI, especially as there may be an odd number of children involved. If there is much movement between the homes, not just for the shared custody child, there may be a good argument in favour of equal living standards, e.g. *Ryder v. Walker*, 2015 ONSC 2332 (1 child primarily with mother, 2 shared, living standards should be “not too dissimilar”).

(i) Step-children: applying the formulas (SSAG 8.8)

In cases involving step-children the appropriate formula is a variant of the *with child support* formula. For a good example of the application of the *step-parent* formula see *Depatie v. Squires*, 2011 ONSC 1758, affirmed by 2012 ONSC 1399 (Div.Ct.) (together and married 12.5 years, wife’s child 18, husband in place of parent, wife’s income \$26,399, husband’s \$78,371, child support \$207/mo for 4 years (\$707-\$500 by biological father), spousal support \$1,082/mo for 9 years, explicit reference to discussion of step-parent support in SSAG).

This version of the *with child support* formula adjusts for any child-support obligation imposed on a step-parent. The step-parent child support may limit the parent’s ability to pay spousal support. There is a trade-off between spousal support and child support, as was noted in *Stadig v. Stadig*, 2013 ONSC 7334.

Occasionally, in these cases, we still see the wrong formula used, e.g. *Swan v. Leslie*, 2011 ONSC 6879 (used *without child support* instead of step-parent version of *with child support*; amount stated as above SSAG range, but in range if correct step-parent formula used, review at 4.5 years (together 4.5 years)).

Some of the cases will involve hybrid custody situations, with sole custody of the step-child but shared custody of the common child/children.

Concerns about the *with child support* formula generating spousal support awards that are too substantial, for example in cases of short marriages where a low threshold for a finding of step-parent status has been applied, can be met by using the length of marriage test for **duration**.

- See *Swan*, above; *Shen v. Tong*, 2013 BCCA 519 (3 years together, 1 step-child, mid-SSAG for 3 years); *Decker v. Fedorsen*, 2011 ONCJ 850 (7 years together, 1 step-child

with wife, mid-SSAG, 2 more years (total 5)); *Cameron v. Cameron*, 2015 ONSC 196 (7 year marriage, 1 step-child, 1 child of own, both shared, duration 3.5 years); and *Karkulowski v. Karkulowski*, 2015 ONSC 1057 (2 years together, 2 step-children, lump sum of \$5,000, low end of ranges).

Under s. 5 of the *Child Support Guidelines*, it is possible for a step-parent to pay less than the table amount of child support, if appropriate. Where the amount of child support is reduced under s. 5, the *with child support* formula should still be calculated **using the full table amount rather than the reduced amount**. If this adjustment is not made, the result is an inappropriately higher spousal support range. In *Stadig*, above, the court incorrectly considered the range on the reduced child support amount. For an example of the correct and careful application of this *step-parent* formula, see *Collins v. Collins*, 2008 NLUFC 31. For two other examples, where the math is not set out, see *Shen v. Tong*, 2013 BCCA 519 and *Durden v. Durden*, 2014 ONSC 3242.

(j) The custodial payor formula (SSAG 8.9)

These are cases where the higher-income payor of spousal support is also the primary or custodial parent of the children. Spousal and child support may now flow in opposite directions. This category of cases is becoming much more common, amounting to 20 per cent of all the reported decisions in most provinces, and even higher in Ontario.

For some reason, many lawyers seem to have forgotten the leading appellate case in Canada on this formula, the Ontario Court of Appeal decision in *Cassidy v. McNeil*, 2010 ONCA 218. In *Cassidy*, the wife had a compensatory claim after a 23-year marriage, and Lang J.A. removed a time limit, making the support order lower and indefinite on appeal.

As these cases multiply, it turns out that custodial payor cases are a real mixed bag. Not just fathers with teenage children paying support to their wives, but also men making claims against higher-income primary care wives with younger children or disabled spouses claiming support and a range of other situations. Many claims are non-compensatory, but there are also a substantial number of compensatory claims.

Unlike the other *with child support* formulas, this is a more diverse group of cases, which is reflected in the variety of outcomes. We see less defaulting to the mid-point on amount and more complex issues of duration, more like the *without child support* formula cases. In short, a *custodial payor* case requires more careful analysis.

- Examples of strong **compensatory** claims, all by wives, would be: *Cassidy v. McNeil*, above; *Toscano v. Toscano*, 2015 ONSC 487; and *Fisher v. Fisher*, 2014 ONSC 4941. In some cases, husbands had good compensatory claims, as well as non-compensatory claims: *Cowell v. Cowell*, 2014 ONSC 1898 and *Bennett v. Reeves*, 2014 ONCJ 145.
- Other claims are **non-compensatory**: *Tscherner v. Farrell*, 2014 ONSC 976; *Papasodaro v. Papasodaro*, below; *Brooks v. Brooks*, 2014 NBCA 29; and *Carson v. Carson*, 2013 NBQB 275.

The *custodial payor* formula is built around the spine of the *without child support* formula, driven by the gross income disparity and the length of cohabitation/marriage. Consistent with the priority to child support, before calculating spousal support, each spouse will have deducted the grossed-up amount of table child support plus the grossed-up value of their s. 7 contributions. The range for amount generated by this formula thus already adjusts for the costs of child care for the custodial parent, a point missed by the court in *Kay v. Kay*, 2014 ONSC 6274. To adjust further through going lower in the range (or even below the low end of the range) will amount to double-counting, apart from unusual cases.

One reservation should be noted. **Where the custodial payor has a very high income**, the grossed-up notional amount of child support deducted will be very large, perhaps too large compared to the actual cost of caring for children. As the custodial payor's income rises, towards the "ceiling" and above it, it becomes possible, and even advisable, to go higher in the range for amount. For examples of high-income custodial payors, see *T.N. v. J.C.N.*, 2015 BCSC (\$982,626) and *T.T. v. J.M.H.*, 2014 BCSC 451 (\$597,000). This specific point is discussed in *T.T. v. J.M.H.*

In every *custodial payor* case, one of the first questions to ask is **whether the lower-income spousal support recipient is or is not paying child support** to the higher-income custodial parent. In many of these cases, the higher-income parent does not claim child support from the lower-income parent. **If no child support is paid** by a spouse otherwise liable to pay child support, there must be an adjustment, so that there is no grossed-up deduction of child support on that spouse's side of the formula. Absent this adjustment, the SSAG range will be too high.

The formula deducts a grossed-up amount of child support from the recipient, which adjusts for the different tax treatment of child and spousal support.

- **If no child support is paid**, it is incorrect to calculate spousal support, and then to simply deduct the unpaid child support amount from the spousal support, as was done in an otherwise careful judgment in *Philippe v. Bertrand*, 2015 ONSC 235. There the after-tax amount of child support that should have been paid was just deducted from the before-tax amount of spousal support to be paid.
- If there is a child support order made, the different tax treatment also means a court should **NOT order a set-off** of child support against spousal support in these *custodial payor* cases, as that may risk losing deductibility for that portion of spousal support.

The deduction of grossed-up amounts for notional child support obligations for the custodial spouse not only reduces the amount of support payable, but it also tends to generate a fairly narrow range of amounts for most short-to-medium-length marriages, compared to the other *with child support* formulas. And that group of relationships are the most common situations where this formula operates, given the presence of minor children.

Another notable effect of this formula: the recipient is often left with less than 30 per cent of the net disposable income. There are some in Ontario who believe that the recipient should never be left with less than 40 per cent NDI after spousal support, for reasons that are unclear.

- One example of a case where these issues were raised is *Papasodaro v. Papasodaro*, 2014 ONSC 30. This formula was criticized as “harsh” by Justice McGee, for leaving the recipient husband with less than 29% of the NDI. But the facts explain why the formula generated that range: a 17-year marriage, 3 children with the payor wife (producing sizeable grossed-up notional child support), the wife earned \$101,535/year at the bank, while the husband earned \$48,300/year as a school custodian, and his claim was non-compensatory. The spousal support paid to him was fixed at \$1,000/mo., above the \$831/mo upper end of the SSAG range. If there had only been two children in *Papasodaro*, the recipient husband would have ended up with 31-33 per cent NDI, and if there had only been one child, that percentage would have risen to 35-37 per cent NDI. Or, if they had been together longer than 17 years, his post-support NDI percentage would have been higher too.
- A better case for departure from the *custodial parent* range might be *Toscano v. Toscano*, 2015 ONSC 487, where the husband had custody of the two children after an 18-year marriage, his income was \$493,335/year, income of \$40,000 was imputed to the wife (child support of \$579/mo) and the husband paid all the university and private school expenses of the children totalling \$43,700/year. Not surprisingly, given the husband’s table and s. 7 child support, the wife would be left with 21-27 per cent NDI on the SSAG range (high end was \$6,716/mo). Blishen J. ordered spousal support of \$11,300/mo, giving the wife 37.5 per cent of the NDI. At his much higher income level than *Papasodaro*, Mr. Toscano could afford to pay more on his wife’s strong compensatory claim (she had been home for 13 years). Further, one can ask, above \$350,000, whether the grossed-up notional child support table amount might be too generous in a case like this.

Exceptions may provide a response to these concerns in some cases. If the recipient spouse, the non-primary parent, continues to play an important role in the children’s care and upbringing after the separation, there is an **exception for the non-primary parent to fulfil parenting role**. In a short marriage with a young child, the *custodial payor* formula will not generate large enough spousal support for the active non-primary parent, e.g. *Mumford v. Mumford*, 2008 NSSC 82. More spousal support may be necessary for the parent to provide adequate housing for the children, e.g. *Osanlo v. Onghaei*, 2012 ONSC 2158. This exception is dealt with in more detail, below, under “Exceptions”.

In some *custodial payor* cases, **disability issues** may explain the non-primary spouse’s inability to assume primary care of the children. In many situations, disability can be accommodated by the location in the range for amount or duration under this formula. In more extreme cases, resort to the illness or disability exception may be necessary to provide adequate support, especially in shorter marriages. For an example, see *S.D. v. J.D.*, 2012 NBQB 237.

The *custodial payor* formula does generate **time limits** for initial orders, the same as those under the *without child support* formula.

- If the marriage lasts longer than 20 years or the “rule of 65” applies, then support will be indefinite, as it was in *Cassidy v. McNeil*, above.
- **Indefinite orders** are often made for longer marriages less than 20 years where the non-custodial wife has a compensatory claim, e.g. *Toscano v. Toscano*, 2015 ONSC 487 (married 18 years); *T.T. v. J.M.H.*, 2014 BCSC 451 (17 years); and *Papasodero v. Papasodero*, 2014 ONSC 30 (17 years).
- Where **time limits** are imposed under this formula, they fall within the range, typically towards the upper end of the range, e.g. *B.M.P.v. S.L.B.*, 2015 BCSC 448 (together 7 years, low SSAG for 7 years); *Philippe v. Bertrand*, 2015 ONSC 235 (together 18 years, time limit of 12 years); *Bennett v. Reeves*, 2014 ONCJ 145 (together 16 years, time limit of 9 years); *Polak v. Polak*, 2013 ONSC 4670 (married 8 years, time limit of 7 years); *C.A.K. v. D.E.D.L.*, 2013 ONSC 2777 (together 7 years, time limit of 6 years); *J.D.P. v. R.M.P.*, 2010 BCSC 1873 (married 17 years, time limit of 13 years).

(k) The adult child formula (SSAG 8.10)

The *adult child* formula is another hybrid formula, similar to the *custodial payor* formula in that it too is built around the spine of the *without child support* formula. **The adult child formula applies only where the last child or children of the marriage have their child support fixed under s. 3(2)(b) of the *Child Support Guidelines*.**

If the adult child or children are living with one of their parents and attending university, then child support is determined under s. 3(2)(a), i.e. table amount plus s. 7 expenses. In these cases, other versions of the *with child support* formula will apply, e.g. the *basic with child support* formula, or the *split or shared custody* formula, or the *custodial payor* formula (many of the reported cases involving adult children fall into this last category).

The most common circumstances where s. 3(2)(b) applies are for adult children where the “table-amount-plus- s. 7-expenses” approach is not appropriate :

- a child lives away from home for college, university or other post-secondary education
- a child has other sources of income or resources to cover all or most of their higher education, e.g. a good job, grandparents, scholarships, RESPs, etc.
- a child pursues advanced degrees and is expected to contribute a larger proportion of their education costs
- an adult child is disabled and receives his or her own social assistance or other independent disability funding

In these cases under s. 3(2)(b), child support is usually determined by constructing a monthly budget for the child, assessing the child’s contribution first and then dividing the balance between the parents based upon their respective incomes.

This *adult child* formula only applies where the child support for all the remaining children of the marriage, one or more, is determined under s. 3(2)(b). If there is another child in the mix whose child support is determined under s. 3(2)(a), i.e. table amount plus s. 7 expenses, then

the *adult child* formula *does not* apply. So, if one parent has the primary care of two children, one in high school and another away at university, then the *basic* formula will apply, but with some adjustment required if the adult child's support is assessed under s. 3(2)(b), as was done in *Robitaille v. Trzcinski*, 2015 ONSC 4621 and *McConnell v. McConnell*, 2015 ONSC 2243. Mixed cases like these are relatively common in the case law, although it is not always clear that counsel or the court have made the necessary adjustments for the adult child support.

The *adult child* formula can accommodate a wide range of arrangements for the payment of a child's education. For each parent, deducted from their Guidelines income will be a grossed-up amount for each parent's contribution to child support, after which the formula ranges are calculated using the *without child support* formula math. If the higher-income spouse pays the full costs of university education, then that amount, grossed up, will be deducted on his or her side, while no amount will be deducted from the Guidelines income of the lower-income spouse. If the spouses decide to share the university costs equally, despite different incomes, the grossed-up deduction of equal child support contributions will adjust for that arrangement.

The *adult child* formula seems to be the "forgotten formula" amongst the many variants of the *with child support* formula. Admittedly, this formula likely applies to the smallest number of cases, compared to the other versions. But we would have expected to see this formula crop up in the case law more often than it has.

Much more seriously, **a review of the case law reveals that lawyers and judges dealing with spousal support frequently just ignore child support entirely in cases of adult children under s. 3(2)(b) CSG. This is a serious mistake**, as post-secondary child support obligations will usually be quite large. For many couples, whether together or apart, there are financial sacrifices involved during these post-secondary years. Practically, for separated couples, this translates into a trade-off between child support and spousal support: *T.T.B. v. P.H.D.*, 2014 NBQB 164 (wife accepted reduction in spousal support in return for husband assuming all university costs for two children).

There are some cases where parties agree to calculate spousal support first, using the *without child support* formula and, once spousal support has been determined, then the post-support gross incomes are used to allocate the university costs of the adult child: *Cork v. Cork*, 2014 ONSC 2488 and *Overell v. Overell*, 2012 ONSC 6615 (no agreement, just acquiescence of the wife where the children resided with the husband and he paid the expenses). It is not clear that a court can resolve the issues in this sequence, given the statutory priority given to child support in s. 15.3 of the *Divorce Act*. In a few cases, courts have simply calculated spousal support under the *without child support* formula, and then used the child support obligations of the higher income spouse to justify a lower location in the range, e.g. *Wang v. Song*, 2013 ONSC 32 (adult child likely to go to medical school, higher-income wife likely to assist her). This makeshift solution is probably unwise, as it is likely that there will be an over- or under-adjustment for the child support obligations in determining spousal support.

What complicates the determination of spousal support in these adult child cases are the wildly-varying arrangements made for funding their education. This is true whatever version of the *with child support* formula is used, and not just those relatively few cases to which the "*adult child*"

formula was intended to apply. Once s. 3(2)(b) is used to determine child support for just one of the children subject to the order, adjustments will have to be made in doing the SSAG calculations under the *basic, shared, split, step-child* or *custodial payor* formulas. Many of these will involve manual adjustments and judgment calls, and lawyers must be transparent about them in negotiations and advocacy.

In the cases involving adult children, whether s. 3(2)(a) or s. 3(2)(b) is used for child support, it is often not clear what formula is being used, how child support is accounted for or what adjustments have been made. The failure to cite and apply the *adult child* formula is just one of the many problems in determining spousal support where there are adult children. These are complex and difficult cases, with many moving parts and much potential for errors along the way. One of those errors has been the failure to keep the *adult child* formula in mind as an option.

A sub-set of the s. 3(2)(b) cases involve adult children with disabilities, who continue to reside with one of the spouses, but receive independent incomes from social assistance or other funding bodies. There has always been a question how to mesh the child support regime with these adult funding arrangements: see John McGarrity, “The Child Support Obligations of Separated Parents of Disabled Adult Children in the Province of Ontario” (2012), 30 *Canadian Family Law Quarterly* 321. The issue reached the Ontario Court of Appeal in 2014: *Senos v. Karcz*, 2014 ONCA 459. The appeal court ruled that s. 3(2)(a) of the CSG was inappropriate where the child received his or her own ODSP (Ontario Disability Support Program). Using s. 3(2)(b) meant that a budget for the child’s expenses would need to be prepared and then the child’s ODSP deducted from the total, before the *pro rata* calculation of the spouses’ child support obligations on the balance. A similar approach has been followed in British Columbia, e.g. *T.A.P. v. J.T.P.*, 2014 BCSC 2265 (spousal support was increased by \$400/mo, to \$2,104/mo, SSAG used for initial amount, but not variation).

One last point: an advantage in using the *adult child* formula is that it allows a fairly seamless “crossover” to the *without child support* formula once the adult child finishes his or her studies: see “Crossovers Between Formulas When Child Support Ends” above.

(I) When a child lives with a third party: what formula?

There are a very small number of cases where a child lives with neither parent, but instead with a third party, like a grandparent or some other family or community member. There is a child support obligation upon the parents, which leads us to some version of the *with child support* formula, but the child support is paid to the third party by one or both of them. What happens when there is also a spousal support obligation between the spouses? What formula should be used?

In our view, the *adult child* formula offers the proper template for these cases. Quite often these are informal care arrangements, with child support paid to the third party in amounts less than those fixed by the tables or paid by covering s. 7 and other specific expenses. The *adult child* formula offers a flexibility to accommodate these idiosyncratic arrangements, with each spouse’s income reduced by grossed-up amounts of child support paid to the third party. The *adult child* formula can also address the simpler case where both parents pay the table amount to

the third party, by grossing up those table amounts. The ranges for amount and duration in these rare cases will thus reflect the underlying premises of the *without child support* formula, as do the *custodial payor* and *adult child* formulas.

The reasons for the child's third-party placement will inevitably be varied and unusual. Some will be young children, others teenagers, and yet others might be post-secondary students. The basis for spousal support entitlement can be compensatory or non-compensatory. There may well be disability issues for the recipient in these cases, thus explaining the child's placement.

(m) Issues of duration (SSAG 8.5)

Apart from the short marriage cases described below, most courts have consistently and carefully applied the *with child support* formula ranges for duration. Most initial orders are "indefinite (duration not specified)". Where time limits are set, they tend to be generous, as they should be in light of the strongly compensatory claims. As discussed above, the *custodial payor* formula does provide for initial time limits.

Time limits do emerge over time through variation and review. There are **two tests for duration** under these formulas: the length-of-marriage test and the age-of-children test. The longer of the two tests applies to determine duration at both the lower and upper ends of the range. **At times, the age-of-children test has been overlooked**, even apart from the short marriage cases, e.g. *Osborne v. Wilfong*, 2009 SKQB 83. Whenever a court imposes a time limit or the parties negotiate a time limit, there should be careful consideration of the ages of the children, especially that of the youngest child, at the point where support would end.

We repeat here, as we did in previous User's Guides, the *with child support* formulas are fundamentally compensatory, which means that most time limits should fall towards the higher end of the range, not the lower end. For an excellent analysis of duration under this formula, see *Dabrowska v. Bragagnolo*, 2008 ONCJ 360.

There is one point of significant divergence across provinces that has emerged since the Supreme Court's decision in *Leskun v. Leskun*, 2006 SCC 25: the use of review orders. Review orders have fallen into disuse in Ontario and New Brunswick, while reviews remain the norm for *with child support* orders in British Columbia and Alberta. There are understandable concerns for the cost and relitigation involved in reviews, but review orders do provide a valuable means of addressing issues of self-sufficiency and duration in *with child support* cases.

(n) Short marriages, young children (SSAG 8.5.5)

This has now emerged as one of the major problems under the *with child support* formula. Lawyers argue for, and courts grant, a short time limit at the initial stage where the marriage is short and there are young children. The time limit on spousal support is typically fixed at the number of years of marriage or cohabitation, e.g. 4 years of support after a 4-year marriage, even though the recipient has the primary care of children aged 1 and 3.

Such short time limits will only rarely be the right outcome at the initial hearing. The vast majority of these orders should be “indefinite (duration not specified)”. Often a review will be required in these indefinite orders.

Remember that there are **two tests for duration** under the *with child support* formula. Not just the length-of-marriage test, but also the age-of-children test. The second test is more important for shorter marriages, with a range from the time the youngest child commences full-time school to the upper end of the last child finishing high school.

These are usually cases with strong compensatory claims. The compensatory claim derives less from the *past* disadvantage during the marriage and much more from the *future* disadvantage for the parent with ongoing primary care of the children, as identified in s. 15.2(6)(b) of the *Divorce Act*.

- Many recent cases do make indefinite orders: *Gartman v. Hancheroff*, 2015 BCSC 160; *Zivic v. Zivic*, 2014 ONSC 7262; *Jirh v. Jirh*, 2014 BCSC 1973; *Walker v. Maxwell*, 2014 BCSC 2357, upheld 2015 BCCA 282; *H.F. v. M.H.*, 2014 ONCJ 450; and *Dupuis v. Desrosiers*, 2013 ONCJ 720.
- But there remain too many cases that fix short initial time limits: *Fias v. Souto*, 2015 ONSC 880; *Ramsay v. Ramsay*, 2015 ONSC 196; *D.D.P. v. C.S.W.*, 2014 ABCA 162; *Okafor v. Bowyer-Okafor*, 2014 ONSC 120; *Chase v. Chase*, 2013 ONSC 5335; *Balayo v. Meadows*, 2013 ONSC 5321; and *P.M.D. v. D.M.C.*, 2013 ONSC 5220.

One consequence of this case law is that the recipient may only request a short period of support, as in *McKenzie v. Perestrelo*, 2014 BCCA 161 (only 19 months of support, including retroactive support, wife claimed 23 months, after a 2-year marriage and a 2-year-old child, appeal by husband) and *Yang v. Ren*, 2012 BCCA 164 (2-year marriage, shared custody, low-end SSAG, 2-year time-limit, wife only requested 3 years, appeal by husband). See also *Javed v. Khan*, 2013 ABCA 351 (6-year marriage, child 4, wife seeks 3 years’ support, trial judge grants 18 months, on appeal increased to 28 months).

The imposition of short time limits in these cases reflects a failure of compensatory analysis. A more careful approach is needed. The most obvious area for such analysis would be the *basic* formula cases, where the recipient continues with a disproportionate share of child care going forward. In the more complex custody cases, like shared, split, hybrid or step-child cases, there may be circumstances that warrant shorter time limits, especially the step-child cases. A short time limit would normally mean a quick “bounce back” by the support recipient, someone with pre-existing skills who can find good employment reasonably quickly and become truly “self-sufficient.”

9 Choosing Location Within the Range (SSAG Chapter 9)

Determining the ranges for amount and duration under the SSAG formulas is only the beginning of the real analysis by lawyers, mediators and judges. The ranges are quite broad, under both formulas, especially where the disparity in incomes is large or the marriage is long. Too often, the lawyer for the recipient asks for the high end of the range, the lawyer for the payor offers the low end, and then the court opts for the mid-range, all with little in the way of analysis or explanation.

There has been a distinct tendency in the case law to “default” to the mid-range for amount, an approach which should be avoided, in our view. On duration, we see much less of a tendency to default to the middle of the range, and more explanation for the outcome.

The mid-point of the SSAG ranges for amount should NOT be treated as the default outcome. It is not the “norm”, with the upper and lower ends of the range reserved for exceptional cases. Too often judges treat the mid-point as such, especially under the *with child support* formula. Our review of SSAG cases has revealed that in 60 per cent of all the reported *with child support* cases spousal support is ordered at the mid-point. A mid-point outcome is typically treated as if it does not require any explanation, with outcomes above or below being more likely to result in reasons. For a few decisions that carefully explain a mid-range outcome, see *Reid v. Carnduff*, 2014 ONSC 605 and *Monahan-Joudrey v. Joudrey*, 2012 ONSC 5984;

If anything, the *with child support* cases should more often resolve in the upper half of the range, as the formula already adjusts for “average” ability to pay. Most of these cases are strongly compensatory and there is great “need” in the home of the primary carer for the children, which should push amounts higher in the range. In shared custody cases, by contrast, the default outcome in bi-nuclear cases (no new partners, no new children) should be the spousal support which generates a 50/50 split of net disposable income (NDI), explained in more detail above under “The *With Child Support* Formula”.

We see less of a pattern of “default to the mid” under the *without child support* formula. This formula is simpler, less driven by ability to pay, with more diverse fact situations. And budgets may be more important in these cases.

Chapter 9 of the SSAG provides considerable guidance on location within the range, setting out a non-exclusive list of factors to assist in determining location within the range for both amount and duration:

- strength of any compensatory claim
- recipient’s needs
- age, number, needs and standard of living of children (if any)
- needs and ability to pay of payor

- work incentives for payor
- property division and debts
- self-sufficiency incentives

Lawyers need to think about fashioning arguments based on these factors, and others, to support their position on amount or duration. Courts need to explain why they located an amount within the range, generating a body of case law that will provide guidance in negotiations. Some judges are very clear why they chose a particular location, offering a model for others.

There are some good examples in the cases of careful explanation for location within the range. One of the best appeal court examples is still *Cassidy v. McNeil*, 2010 ONCA 218 (low end appropriate where payor husband continues as custodial parent, wife's income relatively high, no time limit). *Cassidy* recognized the **inter-relationship of duration and amount**. A high-range amount can be linked to a shorter duration or, vice versa, a lower amount for a longer duration. See also *Willi v. Chapple*, [2009] O.J. No. 3752 (S.C.J.) (shorter duration, low income estimate for payor, upper end of range for amount).

Location often reflects the **income determinations** that were used to establish the range for amount. A low estimate of the payor's income may result in a court going to the high end of the range, as in *Saunders v. Saunders*, 2015 ONSC 2459 (interim, high-income) and *Willi v. Chapple*, above. Conversely, where it is difficult to impute income to a recipient, but a court believes she or he could earn more, the judge may go lower in the range: *Shorey v. Shorey*, [2009] O.J. No. 5136, 2009 CarswellOnt 7514 (S.C.J.) (wife working 3 days/week, could make more, some overtime attributed to husband, he less able to increase income, mid-range).

The **strength of the compensatory claim** is often mentioned as a factor, whether strong or weak: *Brown v. Brown*, 2013 NBQB 369 (non-compensatory claim only, low end of range); *Monahan-Joudrey v. Joudrey*, 2012 ONSC 5984 (strong compensatory claim, sole caregiver); *Ross v. Ross*, 2010 BCSC 52 (wife maintained qualifications during marriage, able to find full-time work, weaker compensatory claim); and *Barry v. Barry*, 2009 NLUFC 13 (weaker compensatory claim, stronger non-compensatory claim, below mid-range).

The **depth of need** can be a strong non-compensatory factor pushing amount higher in the range: *Bastarache v. Bastarache*, 2012 NBQB 75 (disparity in living standards, need of wife, between mid and high range). **Lower housing costs** for the recipient can reduce "need" and pull a court lower in the range, where the recipient is living in a mortgage-free home or pays reduced rent: *Guignard v. Guignard*, 2011 ONSC 7078 (wife living in rent-g geared-to-income housing).

The recipient may also require **training or education** to improve their earning capacity, a factor which will push the amount higher in the range for a period of time, e.g. *Jones v. Hugo*, 2012 ONCJ 211.

The payor's **ability to pay** can be affected by debt payments: *Guignard v. Guignard*, above; *S.D. v. J.D.*, 2012 NBQB 237. The payor's cash flow may be seriously affected by **mandatory pension contributions**, which should be taken into account in most instances by location in the range: *Hari v. Hari*, 2013 ONSC 5562; and *Macey v. Macey*, 2013 ONSC 462.

Work incentives for the payor are frequently mentioned in the cases: *Reid v. Carnduff*, 2014 ONSC 605 (mid-range, transportation costs for commute to work); *Chapman v. Chapman*, [2010] O.J. No. (S.C.J.) (husband's income dependent on how hard he works, low end of range for work incentives); *Savoie v. Savoie*, 2009 NBQB 134 (lower than mid-range); and *Lalonde v. Lalonde*, [2008] O.J. No. 4507, 2008 CarswellOnt 6710 (S.C.J.) (significant overtime included in payor's income, low end).

Property division can influence location, mostly at the extremes. A large property settlement gives the spouses security and capital to fall back upon, likely leading to an amount lower in the range: *Cochrane v. Cochrane*, 2013 BCSC 2114 (strong compensatory claim, but large property, low end). Or, conversely, if there is little property to be divided, support can be higher in the range.

Some specific factors have emerged, that are not explicitly listed amongst those in Chapter 9 of the SSAG, but that can be important in determining location in the range:

- **High access costs:** *H.F. v. M.H.*, 2014 ONCJ 450 (husband returned to Bermuda); *Jardine v. Jardine*, 2013 NSSC 30 (high transportation costs for access, split custody); *S.D. v. J.D.*, 2012 NBQB 237 (custodial payor, husband pays all costs of supervised access by wife); *Gibson v. Gibson*, [2009] O.J. No. 4172 (high access costs after wife's move from Thunder Bay to Elliot Lake, husband making payments on line of credit, lower end of range); *Graham v. Wilson*, [2009] O.J. No. 1432, 2009 CarswellOnt 1866 (S.C.J.) (travel for extensive weekend access, low end); *Novlesky v. Novlesky*, 2009 BCSC 1328 (wife moves back to Brazil, high travel costs, low end); *Spikula v. Spikula*, [2008] O.J. No. 3931 (S.C.J.) (costs of shared custody, low end).
- **High medical costs:** *S.J.M. v. J.L.M.*, 2010 BCSC 154 (wife's extra medical, drug and dental costs after divorce, upper end of range).

There are other factors that can affect location in the range. Where the recipient remarries or repartners, the amount may be moved lower in the range than would otherwise be the case, or even below the range, as is explained in "The Recipient's Remarriage or Repartnering" below. Where the payor has a second family, or subsequent children, again there may be an adjustment in some cases by way of location in the range for amount: see "Second Families, or Subsequent Children" below.

Along with the exceptions, this is an area of the SSAG analysis that is **too often ignored** or downplayed. It is odd to ignore location in the range for amount, given how much energy and analysis is devoted to the determination of spousal incomes. Given the breadth of the ranges for amount, it is just as easy to get to a desired amount through a careful analysis of these location factors, as it is through arguments about incomes. And, similarly, all the attention tends to get concentrated on the amount of support, when location in the range for duration may be every bit as important. There are many moving parts to a good SSAG analysis, and it is an error to focus on just one part.

The formula ranges for both amount and duration are quite broad, providing lots of room for the exercise of judgment and discretion to respond to the facts of individual cases. If you wish to go

higher or lower than the formula ranges, remember to first consider “Restructuring”, discussed below. If neither location in the range nor restructuring seem to produce the desired outcome, then take a look at “Exceptions” below.

10 Restructuring (SSAG Chapter 10)

Restructuring is an important part of the Advisory Guidelines structure that is often ignored in practice. The result is the loss of an important element of flexibility that allows awards to be adjusted to meet the circumstances of individual cases while maintaining the benefits of structure and certainty offered by the Guidelines.

Although the formulas generate separate figures for amount and duration, the Advisory Guidelines explicitly recognize that these awards can be restructured by **trading off amount against duration** so long as the award remains within the **global ranges** generated by the formula (when amount is multiplied by duration). Restructuring asks you to think of the formulas as generating global amounts or values which can be restructured or configured in many different ways—a very useful tool in settlement negotiations.

Restructuring can be used in three ways:

- to **front-end load** awards by increasing the amount beyond the formulas' ranges and shortening duration (either to the lower end of the range or below it)
- to **extend duration** beyond the formulas' ranges and lower the monthly amount (either to the lower end of the range or below it; and
- to formulate a **lump sum** payment by combining amount and duration.

Examples of each of these methods of restructuring will be found below.

Apart from lump sums, which are used somewhat more frequently and are given separate treatment below, **restructuring remains largely ignored** and there are few references to the global ranges when periodic awards are being made. In cases where courts go outside the ranges for amount and duration they often state that they are “not following the SSAG”, whereas the outcomes may well fall within the global ranges and thus be consistent with the SSAG.

Consideration of restructuring a periodic award should be a standard part of an Advisory Guidelines analysis. For two excellent examples of the use of restructuring see *Fisher v Fisher*, 2008 ONCA 11 (explicit use of global ranges to front-end load a periodic award) and *Bennett v. Reeves*, 2014 ONCJ 145 (restructuring integrated into analysis of appropriate periodic award, although not used on the facts).

The primary use of restructuring will be under the *without child support* formula. To trade off amount against duration ideally requires a **fixed duration** for the award. As a result, restructuring will generally only be advisable in cases where the formula generates time limits rather than “indefinite (duration not specified)” support. This usually means short and medium length marriages where spousal support is being determined under either the *without child support formula* or the *custodial payor* formula (which is built around the *without child support* formula). But restructuring has sometimes been used in cases where the SSAG suggest an

indefinite award. The use of the restructuring under the *with child support* formula raises special issues which will be dealt with in a separate section below.

Restructuring and thinking about periodic awards in terms of global amounts may be helpful not only in the context of initial applications, but also in the context of **review and variation** (see examples provided below). As well restructuring should also be kept in mind when **assessing the fairness of spousal support agreements** that seem to depart from the SSAG ranges in the context of a *Miglin* analysis (as discussed above under “Agreements”); see for example *Van Erp v. Van Erp*, 2015 BCSC 203 (recognizing that agreement front-end loaded support with amounts significantly higher than SSAG range but global amount still lower than SSAG when duration taken into account; agreement upheld).

The calculations involved in restructuring can be done with varying degrees of sophistication. Computer software programs may assist in some of the calculations required by restructuring. However, even with software programs, there will be a certain amount of judgement involved in restructuring. But this is familiar territory for family law lawyers who even before the advent of the Advisory Guidelines frequently made trade-offs between amount and duration in settlement negotiations and spousal support agreements.

(a) Front-end loading

Front-end loading will often be appropriate in short and short/medium length marriages under the *without child support* formula where the ranges for amount generated by the formula may be seen as too low if the objective of the award is to provide a transitional period of support that bears some relationship to the marital standard of living. Here restructuring can be used to front-end load the award, increasing the amount and shortening duration. For good examples see *Fisher v Fisher*, 2008 ONCA 11; *R.L. v. L.A.B.*, 2013 PESC 24; *Broadbear v. Prothero*, 2011 ONSC 3636; and *McCulloch v. Bawtinheimer*, 2006 ABQB 232. Of course, in very short marriages it may be more appropriate to simply collapse the periodic order into a lump sum: see *Arnold v. Arnold*, 2009 BCSC 1384.

In the context of review or variation, where the original order was higher than the SSAG, courts have recognized this as an instance of front-end loading and have adjusted the amount and duration of on-going support downward: see *Mercel v. Bouillon*, 2012 ONSC 6557; *Ball v. Ball*, 2013 BCSC 227; and *Maber v. Maber*, 2012 NBQB 337.

(b) Lowering amount; extending duration

One situation in which this form of restructuring might be appropriate is a medium-length marriage where the recipient has a long-term disability. Here restructuring can be used to reduce the award to a more modest supplement that will extend over a longer duration; see *Bockhold v. Bockhold*, 2010 BCSC 214 (duration extended to indefinite rather than termination after 17 years because of disability plus wife’s inability to become self-sufficient, amount below low end of SSAG range, but also income over the ceiling.)

Another is in the case of medium/long marriages (eg. marriages between 15 and 20 years in length) where the formula generates a time limit but support for a longer duration is considered

appropriate. These may include cases initially involving dependent children which have “crossed over” to the *without child support* formula after the children have become independent. Here restructuring can be used to extend duration by choosing an amount of support in the lower end of the range or even below the low end of the range; see *Bockhold*, above and *Bosanac v Bosanac*, 2014 ONSC 7467.

In the context of review or variation, where the original order was lower than the SSAG, this form of restructuring may be used to extend duration beyond the SSAG range: see *Bhandhal v. Bhandhal*, 2015 ONSC 1152.

(c) Lump sums

One form of restructuring contemplated by the SSAG is the collapse of a periodic order into a lump sum. However, in some provinces, including Ontario, existing case law was often read as precluding lump sum support except in very unusual circumstances. In Ontario that is no longer the case as a result of the Ontario Court of Appeal’s sweeping ruling in *Davis v. Crawford*, 2011 ONCA 294 which restated and expanded the scope of a court’s ability to order lump sum spousal support. *Davis* has become the leading and often-cited decision on lump sum awards. The decision provides a mini-guide to the advantages, disadvantages and proper uses of lump sum support awards, laid out in paragraphs 66 to 76 of the judgement. The Court rejects the idea that that lump sum spousal support awards must, as a matter of principle, be limited to “very unusual circumstances”. Judges are recognized as having a broad discretion to make lump sum orders, after weighing their advantages and disadvantages, even if periodic orders will be the norm for practical reasons. The Court also stated (at para 76) that the Advisory Guidelines should generally be used in calculating the lump sum. In *Robinson v. Robinson*, 2012 BCCA 497 the British Columbia Court of Appeal subsequently endorsed the principles in *Davis v. Crawford*.

For good examples of a periodic award being converted into a lump sum see *Robinson* (BCCA, above); *Stannett v. Green*, [2014] O.J. 47 (S.C.J.); *Soschin v. Tabatchnik*, 2013 ONSC 1707, *G.G. v. M.A.*, 2014 BCSC 1023; and *Vanos v. Vanos*, [2009] O.J. No. 4217 (S.C.J.). Lump sums serve multiple purposes, however, and in many cases calculations are not provided. In *Davis v. Crawford* the Ontario Court of Appeal upheld the trial decision, despite the absence of a detailed explanation of the calculations, on the basis of the deferential standard of appellate review; see also *Racco v. Racco*, 2014 ONCA 330 and *Ludmer v. Ludmer*, 2014 ONCA 827.

Some things to keep in mind when considering restructuring by way of a lump sum:

- To convert periodic payments to a lump sum there will have to be **assets or resources available** to the payor to make the lump sum payment.
- Lump sums based on the SSAG need **time limits for duration** so they will most often be used in short and medium length marriages under the *without child support* formula. However, lump sums are sometimes found to be appropriate even in cases of long marriages where the SSAG duration is indefinite—for example, because of concerns about non-payment of periodic support. In such cases, a fixed duration may be chosen to calculate the lump sum; see *Marsh v. Marsh*, 2012 BCSC 1597 (lump sum after 24-year

marriage, based on duration of 15 years until husband turns 65, no discount for wife's life expectancy) and *Raymond v. Raymond*, 2008 O.J. No. 5294 (27-year marriage, lump sum based on duration of 10 years when husband would be close to 65). Alternatively, the calculation can be based on an indefinite award discounted for life expectancy; see *Blatherwick v. Blatherwick*, 2015 ONSC 2606 and *Yorke v. Yorke*, 2010 NBQB 230.

- **When converting periodic support to a lump sum remember to discount for tax!** The lump sum award is neither taxable for the recipient nor deductible for the payor, unlike periodic support payments. The SSAG ranges are based upon the premise that periodic support is deductible by the payor and taxable in the hands of the recipient. When the SSAG ranges for amount and duration are used to calculate the lump sum amount, the global amount must then be reduced to reflect the different tax status of a lump sum award: see *Samoilova v. Mahnic*, 2014 ABCA 65. Although this point would seem obvious, it is missed often enough to be worth mentioning. The five cases cited above as good examples of converting a periodic award into a lump sum (*Robinson*, *Stannett v. Green*, *Soschin v. Tabatchnik*, *G.G. v. M.A.*, and *Vanos*) all include the discount for tax. Similar issues can arise with respect to lump sum retroactive awards (see "Retroactive Spousal Support" below).
- The next question is **what tax rate to use in discounting or adjusting** the SSAG global amount. The same issue arises with respect to lump sum retroactive awards and much of the case law has arisen in that context. In cases where no evidence is led, some courts will fix, somewhat arbitrarily, a notional discount rate, for example 30%; see *Bastarache v. Bastarache*, 2012 NBQB 75 and *Chalifoux v. Chalifoux* 2008 ABCA 70. However, in *P. (B.) v. T. (A.)*, 2014 NBCA 51 the New Brunswick Court of Appeal rejected this practice and required that the tax discount be based on evidence. In cases where there is evidence, and the payor and recipient have different tax rates, there is an issue of what rate to use. Computer software programs may assist in this calculation. DivorceMate, for example, offers a lump sum calculator in its software that provides discounted values for recipient and payor tax rates. A balance between the respective tax positions of the payor and recipient is necessary, most often the mid-point between the two positions (which is the common approach if software calculations are used). In some cases, it may be appropriate to edge more towards the tax position of one or the other spouse, e.g. toward the recipient where little or no tax would be payable on a periodic award or toward the payor where the periodic amounts press up against the limits of ability to pay. For a review of cases dealing with this issue see *Robinson* (BCCA, above).
- **Lump sum calculations may also take into account the time-value of money (i.e. by discounting for present value).** Software may assist with some of these calculations. For example, the DivorceMate lump sum calculator, noted above, offers various net present value calculations in addition to discounted values for tax rates. This is generally a justifiable adjustment, but may not be appropriate when the duration is short; see *Arnold v. Arnold*, 2009 BCSC 1384. For examples of lump sum calculations that include discounts for present value see *Vanos v. Vanos*, [2009] O.J. No. 4217 (S.C.J.) (court averages DivorceMate lump sum present values for husband and wife); *Raymond v. Raymond*, [2008] O.J. No. 5294 (S.C.J.) (lump sum based on 10 year periodic order, 6% discount for present value); and *Durakovic v. Durakovic*, [2008] O.J. No. 3537

(S.C.J.)(lump sum based on 6 year periodic order; 30% discount for tax, 3% for present value).

- Discounting lump sums for **future contingencies** is more controversial. This appears to be a practice imported by judges from personal injury actions, but it is not obvious why such contingencies should be used in converting a stream of periodic spousal support payments into a lump sum. Further, contingencies are often left unexplained, which makes them even more dubious. For one case where no adjustment was made for contingencies, see *Blatherwick*, above.
- If there is to be any adjustment for contingencies, those contingencies should be clearly stated and estimated. There is no basis for any “standard” 20% discount for contingencies, as has been proposed by counsel or determined by courts in a few cases: *Colafranceschi v. Colafranceschi*, 2001 CarswellOnt 646, [2001] O.J. No. 771 (S.C.J.); *Walker v. Brown*, 2013 BCSC 204; and *Marsh*, above (although an alternative calculation there did not discount for contingencies). In some cases, there is no explanation at all for some steep contingency discounts: *Raymond*, above (50% reduction for contingencies, not explained) or *Durakovic*, above (25% reduction for contingencies, where the lump sum only reflected two years of support remaining). For a contrasting example of a case providing a clear statement of the rationale for the adjustment for contingencies see *Robinson*, above, (20% contingency for lump sum based on 9.5 years of periodic support to age 65, where payor had health and heart problems, including quadruple bypass surgery, and thus a real possibility that he would not work until age 65).

(d) Restructuring under the with child support formula

For the most part, restructuring has less relevance for marriages with dependent children. The payor’s ability to pay spousal support will be limited in most cases, thus often precluding any possibility of front-end loading or lump sum. The indefinite nature of awards under the basic *with child support* formula and the absence of firm time limits make restructuring a more uncertain enterprise. However, the durational ranges under this formula, albeit involving “softer” time limits, do create some room for negotiation over duration, which creates the conditions amenable to restructuring in certain kinds of cases.

- The most likely circumstances for the use of front-end loading or a lump sum under the basic *with child support* formula will be cases where the recipient wants **spousal support above the upper end of the range** for a shorter period, e.g. to pursue a more expensive educational program, or desires a lump sum to provide for accommodation; see *Card v. Card*, 2009 BCSC 865 and *Karisik v. Chow*, 2010 BCCA 548 (7-year marriage, 1 child, lump sum based on 5 years periodic support, allows wife to keep matrimonial home).
- In some cases **a lump sum** may be desired because of concerns about non-payment of periodic spousal support; see *Wielgus v. Adewole*, 2014 ONSC 3841; *Werner v. Werner*, 2013 NSCA 6; *Chen v. Tan*, 2014 BCSC 2176 (17-year marriage, 1 child, husband not likely to pay, lump sum based on low end of range for amount and mid-range for duration); *Stace-Smith v. Lecompte*, 2011 BCCA 129 (4-year cohabitation, 1 child, lump sum based on 3 year duration); *Venco v. Lie*, 2009 BCSC 831 (modest monthly amount

of support combined with history of non-payment); *Durakovic v. Durakovic*, [2008] O.J. No. 3537 (S.C.J.)(7-year marriage, lump sum based on 6 year periodic order). Or to bring about a clean break in a high conflict case; see *G.G. v. M.A.*, 2014 BCSC 1023 (high conflict, 7-year marriage, 2 children, lump sum based on mid-range amount and 6 year duration).

- For front-end loading , the following cases would be the more likely candidates, as there will be some additional ability to pay available:
 - only one child;
 - shared custody
 - two children, no s. 7 expenses and higher incomes
 - higher incomes generally
 - modest monthly amount of spousal support and short marriage
- The use of lump sum awards in cases of short marriages with children raises some concerns. These cases are often based upon a very short fixed duration of spousal support reflecting only the length of the marriage, an error identified above under “The *With Child Support Formula*”. under

(e) Restructuring under the custodial payor formula

The *custodial payor* formula, applicable in cases where there are dependent children but the recipient spouse is not the custodial parent, is a modified version of the *without child formula*. Its adoption of the *without child support* formula’s durational ranges means that restructuring may be used the same way under this formula as under the *without child support formula*, although ability to pay may restrict the use of front-end loading and lump sums; see *Martin v. Martin*, [2007] O.J. No. 467 (S.C.J.) (modest periodic order collapsed into lump sum) and *Bennett v. Reeves*, 2014 ONCJ 145 (nice discussion of restructuring in a custodial payor case, although not used on the facts).

11 Ceilings and Floors (SSAG Chapter 11)

The “ceiling” and the “floor” define the upper and lower boundaries of the “typical” cases where the formulas can be used. Above the ceiling and below the floor, the formulas alone cannot be used, as individual adjustments are required, much like for the “exceptions”. Not surprisingly, there is much more case law and discussion for incomes above \$350,000, so we will address cases below the floor first, and then the many cases above the ceiling.

(a) **The floor: payor incomes below \$20,000/\$30,000**

Chapter 11 of the SSAG explains the “floor” of \$20,000, i.e. the annual gross payor income below which spousal support is not generally payable. There may be exceptional cases below \$20,000 where support is sometimes payable. Just above that floor, for payor incomes between \$20,000 and \$30,000, ability to pay and work incentive concerns may justify going below the formula ranges, in what amounts to an “exception”. Most of these cases involve long marriages, older and retired spouses, and often disability issues for both spouses. They are few in number.

- Generally, support is not ordered **below the floor**: *Heywood v. Heywood*, 2013 ONSC 58 (36-year marriage, separated 2009, husband paying \$1,200/mo based on income of \$39,000, but his employment terminated, now retired, income \$17,600, below SSAG floor, no ability to pay, despite wife no income, lengthy discussion of the floor); *Whittick v. Whittick*, 2014 BCSC 1597 (26-year marriage, husband \$17,366, now retired, wife \$14,201/yr, no support); *Arbou v. Robichaud*, 2012 NBQB 16 (retired, incomes of CPP/OAS now equalised, both below floor, support terminated); *A.M.R. v. B.E.R.*, 2005 PESCTD 62 (11 years together, wife \$18,557, disabled husband even less at \$13,525, no support).
- In some of the early cases, courts did not make reference to the SSAG floor, but still denied support: *Moore v. Moore*, 2009 NLUFC 39 (both spouses disabled, payor husband receives \$14,700, no ability to pay); *Scheiris v. Scheiris*, [2009] O.J. No. 3795 (S.C.J.)(payor’s pension income \$10,000, wife’s \$3,600, no support); *Bains v. Bains*, 2008 ABQB 271 (taxi driver earning \$17,918/yr, child support paid, no spousal).
- In some cases of very long marriages, under the *without child support* formula, courts will find **an exception below the floor**, especially where the recipient has no income: *Pratt v. Pratt*, 2008 NBQB 94 (wife on social assistance, husband \$14,116/yr, support only \$300/mo); *M.(W.M.) v. M.(H.S.)*, 2007 BCSC 1629 (wife’s income zero, husband \$17,800/yr, support of \$600/mo, low SSAG).
- On some **unusual facts**, courts have been prepared to order spousal support despite the floor: *Wells v. Campbell*, 2015 BCSC 3 (22 years married, husband \$13,265, but \$27,629 including VA pension, wife \$11,079, lump sum of \$10,972 payable upon sale of property, equivalent to \$70/mo mid-SSAG); *N.B. (A.G.) v. Flanagan*, 2012 NBQB 849 (married 28 years, retroactive support, husband lost job as teacher for misconduct, failed to pay pension share to wife).

- In cases where the payor makes **between \$20,000 and \$30,000**, courts have generally awarded support amounts below the low end of the formula range, after explicitly considering this “exception”: *Matthews v. Gallant*, 2015 PESC 12 (husband \$22,867, wife \$16,497, husband paying family debts \$315/mo, husband little tax deductibility for support, no support); *Norrish v. Norrish*, 2015 ABQB 370 (husband \$23,357, wife in long-term care, \$10,452, low-end SSAG); *Slano v. Slano*, 2014 BCSC 1677 (married 39 years, husband \$31,157/yr, fluctuating income, wife \$8,760/yr, low end SSAG of \$700/mo ordered); *Gustafson v. Gustafson*, 2010 MBQB 10; *Kajorinne v. Kajorinne*, [2008] O.J. No. 2789, 2008 CarswellOnt 4229 (S.C.J.); *Serpa v. Yueping*, 2007 BCSC 1181 (no entitlement); *Maitland v. Maitland*, [2005] O.J. No. 2252 (Ont.S.C.J.); *Snowden v. Snowden*, 2006 BCSC 825.
- In two *with child support* cases involving low incomes, payors were ordered to pay **small amounts** of spousal support despite a zero formula range: *H.P. v. D.P.*, [2006] N.S.J. No. 511, 2006 CarswellNS 560 (Fam.Ct.) (\$175/mo spousal support until house sold rather than s. 7 contributions); *Skirten v. Lengyel*, [2007] O.J. No. 679 (Ont.S.C.J.) (husband should “pay something”, \$50/mo). But these are “freak cases”.

One last note: in retirement cases, where a pension has been divided and that divided portion is deducted from the payor’s SSAG income, leaving the payor with a low income, this should not be treated as a “floor” case when his full income in reality exceeds that level, as the B.C. Court of Appeal noted in *Brisson v. Brisson*, 2012 BCCA 396. More complex issues are raised in these *Boston* cases, discussed below under “Retirement”.

(b) Payor income above the \$350,000 ceiling

In absolute numbers, there aren’t that many of these cases, but they are over-represented in the decided cases, partly because of the high stakes involved and partly because they test the outer limits of our thinking about spousal support. A number of these cases have made their way to the B.C. Court of Appeal: see Carol Rogerson and Rollie Thompson, “Complex Issues Bring Us Back to Basics: The SSAG Year in Review in B.C.” (2009), 28 *Canadian Family Law Quarterly* 263 at 283-86. B.C. cases still dominate the reported decisions, as many of these high-income cases in Ontario are resolved by arbitration or mediation-arbitration.

There are some clear principles enunciated in the case law, even if the actual outcomes are discretionary and sometimes conflicting. In *J.E.H. v. P.L.H.*, 2014 BCCA 310, leave to appeal to SCC refused [2014] S.C.C.A. No. 412, there is a careful review of the law for cases above the ceiling, where some of these principles are stated.

- The formulas for amount are **no longer presumptive** once the payor’s income exceeds the “ceiling”.
- The ceiling is **not an absolute or hard “cap”**, as spousal support can and usually does increase for payor incomes above \$350,000.

- **The formulas are not to be applied automatically** above the ceiling, although the formulas may provide an appropriate method of determining spousal support in an individual case, depending on the facts.
- Above the ceiling, spousal support cases require **an individualized, fact-specific analysis**. It is not an error, however, to fix an amount in the SSAG range, as was done in *J.E.H. v. P.L.H.*, above. Evidence and argument are required.
- Where the payor’s income is **not too far above the ceiling**, the formula ranges will often be used to determine the amount of spousal support, with outcomes falling in the low-to-mid range for amount. How far is “not too far above” is still not clear. Somewhere between \$500,000 and \$700,000, it seems.
- Once the payor’s income is **“far” above the ceiling**, then the amount of support ordered will usually be below the low end of the SSAG range, but SSAG ranges are still calculated and sometimes the outcome will fall within the SSAG range.

In light of these principles, it is critical that counsel do SSAG calculations even in high income cases. It is wise to calculate the ranges for **alternative income levels**: for the \$350,000 ceiling (as a minimum) and for the full income (as a maximum), as well as for a range of intermediate incomes (to assist the court in triangulating an outcome). For a good example of such alternative calculations, see *Saunders v. Saunders*, 2014 ONSC 2459.

A number of the reported high income decisions involve **interim or temporary** support awards. Interim outcomes are more likely to fall within the formula range, as the goal in the interim period is to maintain the financial status quo: *Cork v. Cork*, 2013 ONSC 2788. In some of these cases, the estimate of the payor’s income will be low, pushing the amount higher in the range to adjust: *Saunders v. Saunders*, above; *Loesch v. Walji*, 2008 BCCA 214.

- For **incomes not too far above \$350,000**, courts frequently order an amount at the low end of the SSAG range for amount (payor’s income noted for each): *Ponkin v. Werden*, 2015 ONSC 7466 (\$498,828, then \$406,507); *Stober v. Stober*, 2015 BCSC 743 (\$600,000); *Piche v. Chiu*, 2015 BCSC 335 (\$465,000); *Droit de la famille – 151740*, 2015 QCCS 3284 (\$375,000); *Cork v. Cork*, 2014 ONSC 2488 (\$562,000, final); *C.E.A. v. B.E.A.*, 2014 BCSC 1500 (\$592,122); *Dymon v. Bains*, 2013 ONSC 915 (\$550,000); *D.L.D. v. R.C.C.*, 2013 BCSC 590 (\$652,000); *Perry v. Fujimoto*, 2011 ONSC 3334 (\$353,000); *Trombetta v. Trombetta*, 2011 ONSC 394 (\$660,000); and *Teja v. Dhandra*, 2007 BCSC 1247, appeal partly allowed on other issues, 2009 BCCA 198 (\$425,000).
- Not all of these cases end up at the low end: *J.E.H. v. P.L.H.*, 2015 BCSC 1485 (\$650,000, mid, variation); *T.T. v. J.M.H.*, 2014 BCSC 451 (\$597,000, mid-high); *J.R. v. N.R.F.*, 2013 BCSC 516 (\$471,814, mid-high); *Abelson v. Mitra*, 2008 BCSC 1197 (\$355,000, mid-SSAG); and *Y.J.E. v. Y.N.R.*, 2007 BCSC 509 (\$602,400, mid-SSAG). In some jurisdictions, below-SSAG amounts are ordered even for these incomes, e.g. *Babich v. Babich*, 2015 SKQB 22 (\$746,000, well below SSAG) and *Milton v. Milton*, 2008 NBCA 87 (\$500,000, below SSAG).

- For **incomes far above the ceiling**, the majority of outcomes wind up below the SSAG ranges, sometimes well below at the highest income levels: *Volcko v. Volcko*, 2015 NSCA 11, leave to SCC refused [2015] S.C.C.A. No. 141 (\$1,248,756); *J.L.A. v. M.J.G.G.*, 2014 BCSC 1391 (\$831,648); *S.R.M. v. N.G.T.M.*, 2014 BCSC 442 (\$900,000); *Frank v. Linn*, 2014 SKCA 87 (\$1,211,828); *Margie v. Margie*, [2013] O.J. No. 6193 (S.C.J.) (more than \$1 million); *Goriuk v. Turton*, 2011 BCSC 652 (\$9,740,000); *T.N. v. J.C.N.*, 2013 BCSC 1870 (\$1,163,648, custodial payor); *Breed v. Breed*, 2012 NSSC 83 (\$1,186,585); *Dobbin v. Dobbin*, 2009 NLUFC 11 (\$1.5 million); and *Dyck v. Dyck*, 2009 MBQB 112 (\$3,045,205).
- Even in cases far above the ceiling, however, some courts have fixed amounts within the SSAG range for high incomes: *Saunders v. Saunders*, above (\$1 million, high SSAG, income estimate low); *J.E.H. v. P.L.H.*, above (\$1 million, mid-SSAG); *B.L.B. v. G.D.M.*, 2015 PESC 1 (\$1,069,724, low SSAG); *Blatherwick v. Blatherwick*, 2015 ONSC 2606 (\$1.4 million, high SSAG); *T.N. v. J.C.N.*, 2015 BCSC 439 (\$982,626); *Williams v. Williams*, 2015 BCSC 112 (\$1.2 million, mid-SSAG); *K.R.M. v. F.B.M.*, 2013 BCSC 286 (\$895,898, high SSAG); *Elgner v. Elgner*, [2009] O.J. No. 5369 (S.C.J., leave to appeal denied, 2010 ONSC 1578 (Div.Ct.) (\$2.9 million, low SSAG); *Loesch v. Walji*, 2008 BCCA 214 (\$1.6 million, husband's income higher in past, spousal support \$50,000/mo, higher than high end SSAG of \$35,000/mo); and *S.O. v. C.S.O.*, 2008 BCSC 283 (\$909,569, low SSAG).
- In some high-income *with child support* formula cases, courts have calculated the table amount of child support on the full payor's income and then calculated the formula range for a gross payor income of \$350,000 for spousal support purposes: *J.W.J.McC. v. T.E.R.*, 2007 BCSC 252 and *J.E.B. v. G.B.*, 2008 BCSC 528 (Master). Remember that if you do this hypothetical calculation for the spousal support range, it is critical that you use the child support amounts appropriate for an income of \$350,000 too, and not the actual higher amount of child support (an error made in the otherwise careful analysis in *Dickson v. Dickson*, 2009 MBQB 274). See the discussion of two incomes under "Income" above.

Some commentators have expressed concern that there is too much defaulting to the formula range in high income cases, but no such pattern emerges from the mass of case law reviewed above. Individual high-income cases can attract considerable legal attention, but the wide discretion for these very high incomes will inevitably result in divergent and unpredictable outcomes. High income cases do not pose technical issues that can be solved by any set of guidelines, but raise fundamental theoretical questions about the rationale and purpose of spousal support.

12 Exceptions (SSAG Chapter 12)

If the formula ranges seem to produce intuitively “wrong” outcomes for amount or duration, you should think about exceptions and go to Chapter 12 of the SSAG. Eleven exceptions—recognized categories of departure from the formula outcomes—are listed there. Some of these exceptions are driven by an entitlement analysis that is not captured by the formulas; others are practical adjustments.

The exceptions are more likely to be needed under the *without child support* formula (and the *custodial payor* formula, which uses a hybrid version of the *without child support* formula) as its simpler formula does not respond as flexibly to the diverse fact situations in these cases.

Exceptions are the last step in a Guidelines analysis. First, **location within the ranges** can be used to adjust for some of the factors that underlie the exceptions. Second, **restructuring** provides another means to adjust amount or duration, above or below the ranges, while maintaining the consistency and predictability of the Advisory Guidelines. If neither of these steps can accommodate the facts of a particular case, then it may be necessary to resort to the exceptions.

There has been a steady increase in the use of the SSAG exceptions, better every year, and a growing body of case law applying them, including appellate level decisions (which will be reviewed below). But there are still too many cases where exceptions are missed. As a result, either no adjustment is made to the formula outcomes when one might be warranted, or if lawyers and judges don’t like the numbers generated by the formulas, they describe the Advisory Guidelines as being “of little assistance” and go back to budgets, or net incomes, or pure discretion, to come up with an outcome.

Finally, remember that **departures from the formula outcomes are not restricted to the 11 identified exceptions**. Family law is full of **unusual and odd fact situations**, no less so for spousal support cases. The SSAG formulas were devised for “typical” cases, to assist in their resolution. The Guidelines themselves are informal and advisory, which means that departures from the formulas can take place even if there is no listed “exception” in Chapter 12. When faced with unusual facts, some lawyers and judges try to jam them into the SSAG formulas anyway. Unusual facts demand a willingness to think “outside the formula ranges”, and even outside the listed exceptions. The kinds of factors that shape location in the range (see SSAG Ch. 9 and “Choosing Location in the Range”, above) may also, in some cases, push an award outside of the range.

As well, remember that the exceptions are not the only factors that can lead to a departure from the SSAG formula ranges. Departures may be justified when incomes are below the “floor” or above the “ceiling”, or if the recipient has remarried or repartnered, or if the payor has taken on second family obligations.

(a) Compelling financial circumstances at the interim stage (SSAG 12.1)

This exception was discussed above in “Application to Interim Orders”. It should be one of the most commonly-used exceptions, always on the radar screen on any interim support application.

(b) Debt payments (SSAG 12.2)

In most cases, marital debts are adequately taken into account in property division. It is only **where debts exceed assets** that the allocation of debt payments can have an impact on ability to pay. The debt payment exception is applicable only when debts exceed assets and, even then, only when debt payments are so large that they cannot be adjusted for by location in the range.

There is an overlap between this exception and the previous exception for compelling financial circumstances at the interim stage. At the interim stage one spouse’s assumption of greater responsibility for debt payment will likely be a more important factor—i.e. before property division has taken debts into account. One of the most common “compelling financial circumstances” under the interim exception is the payment of mortgages and other debts pending the trial or pending the sale of the house. The interim exception should be used in those cases, leaving the debt exception to apply at later stages.

Cases that openly discuss the debt payment exception include *Marche v. Marche*, 2009 NLTD 31; *Van Wieren v. Van Wieren*, 2008 BCSC 31; *Seed v. Desai*, 2014 ONSC 3329 (high debt load one factor leading to award below SSAG range); *Dunn v. Dunn*, 2011 ONSC 6899 (debt exception applied; husband’s income reduced by grossed-up amount of his debt payments, without much explanation or rationale, then low-end SSAG used on assumption that wife might not pay her share of joint debts, review in 5 years); *R.M.S. v. F.P.C.S.*, 2011 BCCA 53 (payor wife cannot claim debt exception because received assets to cover debts in property division); and *Goodine v. Goodine*, 2013 NSSC 98 (husband left with large debts after property division, no ability to pay spousal support, debt exception explicitly relied upon).

Typically, the debt payment exception is argued by the payor to reduce spousal support below the SSAG ranges. However in *H.M. H. v. J.R. H.*, 2015 BCPC 10, it was used to increase support payments above the SSAG range in a case where the recipient was responsible for debt repayment.

In some cases, courts will treat one spouse’s payment of an equalization payment over time, or the loan payments for such equalization, as a “debt”, and thus as a justification for a below-range amount of spousal support, but this is incorrect: see, e.g *Wright v. Wright*, [2008] O.J. No. 3118 (S.C.J.) (spousal support reduced well below range on account of equalization payments out of business income). In these cases, the spouse paying equalization by definition holds assets exceeding the equalization payment, and thus does **not** qualify under this exception.

(c) Prior support obligations (SSAG 12.3)

The exception for prior support obligations is often not mentioned, partly because this exception has a simple, mathematical adjustment in the software, an adjustment that just gets made with the simple input of the information. However, in some cases courts have done the adjustment manually: see *Ponkin v. Werden*, 2015 ONSC 791 (court discusses necessity of grossing up child support paid to prior children when doing the adjustment under the *without child support* formula). If the adjustment for prior support is not made, the spousal support will be well above the correct range.

Usually this will be an adjustment for a prior obligation for child support: *Lickfold v. Robichaud*, 2008 CarswellOnt 6138 (S.C.J.) (no ability to pay spousal support after adjustment made). But every now and then, it will be a prior spousal support obligation: *Robertson v. Williams*, [2009] O.J. No. 5451 (S.C.J.) and *Ponkin v. Werden*, 2015 ONSC 791 (prior child and spousal support taken into account).

In most cases, these prior support obligations will involve actual payments of prior child or spousal support by the payor spouse. But a payor spouse might also have a prior child in his or her care, a child who is not a “child of the marriage” in the current case. In these cases, there can be a notional child support amount determined, and used for the adjustment (SSAG 12.3.3); see *Ponkin v. Werden*, above. In *Newcombe v. Newcombe*, 2014 ONSC 1094, where the court did its own SSAG calculations and explained them, the payor, who had his two young children from his prior marriage in his physical care for significant amounts of time, was given credit not just for child support paid, but also for notional child support in respect of the time the children were in his care.

In some cases the amount of the adjustment for prior support obligations can be quite high. In *Ponkin v. Werden*, above, which involved a relatively short marriage under the *without child support* formula, the amounts of spousal support awarded after this adjustment were so low that the court relied upon the basic needs/hardship exception to award support above the SSAG range for part of the interim period.

Note that this adjustment to income to take account of prior support obligations applies only for the determination of spousal support under the SSAG. **The full payor income must be used to determine child support**, without any downward adjustment for prior support obligations. See *Stadig v. Stadig*, 2013 ONSC 7334 for a case where this error was made, although it did not, on the facts, affect the outcome.

Although it may be obvious, **what is NOT included in this exception is “second families” or “subsequent children”**. The “prior support” exception reflects the law’s general policy of “first family first”, especially where it is prior child support. There is no such consensus about support obligations towards subsequent spouses or subsequent children, and that is reflected in the discretionary approach in these cases, discussed below under “Second Families, or Subsequent Children”.

A couple of cases raise the possibility of departing from the formula range where the payor has been supporting his or her parents: *Wang v. Seow*, 2008 MBQB 218 and *Seed v. Desai*, 2014 ONSC 3329. As the categories of SSAG exceptions are not closed, on the particular facts of a case, there may be situations where support obligations towards other family members might be recognized.

(d) Illness and disability (SSAG 12.4)

Illness or disability is a frequent issue in the case law, and a common exception. Note that many disability issues can be resolved within the formulas. If it is a long marriage, then there will be a decent amount of support and an indefinite duration. If it is a marriage later in life, with an older recipient, the “rule of 65” may solve the duration issue, even if the amount isn’t so large. If the disabled individual has the primary care of the children, spousal support under the *with child support* formula will be indefinite (at least initially) and the amount will be generous.

The illness and disability “exception” will generally be relevant where the marriage is short-to-medium length and there are no children in the care of the recipient, but the disability is long-term. These will be cases that fall under the *without child support* formula or the *custodial payor* formula. The formulas produce ranges for amount and duration that may seem “too low” or “too short”, certainly to recipients. Payors will want to argue the formula ranges, primarily to time limit their spousal support in short-to-medium length marriages.

The law in these cases is particularly uncertain and confused, as the courts have not yet been able to work out a consistent approach. The Supreme Court of Canada addressed some of these issues in *Bracklow*, but we see the effects of its lack of guidance in these cases. Illness and disability is recognized as an exception in the SSAG, but the scope and operation of the exception is hard to nail down under the current law.

Cases involving permanent illness or disability in short and medium length marriages are “hard” cases and they are often litigated because they are difficult to settle. We thus have many reported decisions, but even with some appellate court rulings on the issue no clear approach has developed. There are still **three common lines of decisions** in the reported cases: (i) increase amount and extend duration; (ii) lower amount, extend duration; and (iii) no exception. The first and third are the most common. While factual differences may explain some of the differences in approach (for example, the length of the relationship or some element of compensatory entitlement in addition to non-compensatory), to a large degree the cases involve competing ideas about entitlement that are still being worked out in the courts.

- **Increase Amount, Extend Duration:** Many courts respond to the greater need in disability cases by increasing the amount *and* extending the duration of support. The highest level court to adopt this approach is the Ontario Divisional Court in *van Rythoven v. van Rythoven*, 2010 ONSC 5923 (13-year marriage, wife mental health issues, time-limited support under 1996 agreement; spousal support awarded at upper end of SSAG range, no time limit based on husband’s current income of \$95,000). Recent trial level decisions include: *Knapp v. Knapp*, 2014 ONSC 1631 (12-year marriage, initial order,

high end, indefinite, but review); and *Aujla v. Singh*, 2012 ONSC 5217 (5-year marriage, support higher than SSAG and indefinite).

For earlier cases see: *Rhynold v. Rhynold*, [2009] O.J. No. 4339 (S.C.J.); *Steele v. Steele*, [2009] O.J. No. 2062 (S.C.J.); *Shaw v. Shaw*, 2009 NSSC 353; *Smith v. Smith*, 2008 CarswellOnt 1921 (S.C.J.); *Lepp v. Lepp*, 2008 BCSC 448; *Mumford v. Mumford*, 2008 NSSC 82; *Pegler v. Avio*, 2008 BCSC 128; *Wilson v. Marchand*, 2007 ONCJ 408 (although time limited, still beyond range); *Peterson v. Peterson*, 2007 SKQB 316; *Bramhill v. Dick*, 2007 BCSC 262; and *Eng v. Eng*, 2006 BCSC 1353.

- **Lower Amount, Extend Duration:** Some courts will extend the duration of spousal support, even to be “indefinite”, while keeping the amount within the range, often at or near the low end. The Ontario Court of Appeal adopted this approach in *Gray v. Gray*, 2014 ONCA 659 (16-year marriage, spousal support not terminated after 16 years, low end, indefinite), but this was a “crossover” case that involved a strong compensatory claim and the court also relied upon the s. 15.3 exception. However, in *Hickey v. Princ*, 2015 ONSC 5596, reversing 2014 ONSC 5272, the Ontario Divisional Court adopted this approach in a purely non-compensatory case, where the trial judge on variation had reduced the amount of support because of the husband’s retirement and imposed a time-limited order that would have terminated support 17 years after a 17-year marriage without children. The Divisional Court allowed the appeal and removed the time limit, while leaving the amount the same, near the low end of the SSAG range.

For trial level decisions see: *Knapp*, above (12-year marriage; if indefinite support had been ordered with no review, amount would have been at low end of range); *M.E.K. v. M.K.K.*, 2014 BCCS 2037; *Tscherner v. Farrell*, 2014 ONSC 876 (17-year marriage, support indefinite but amount below SSAG range, unusual facts, custodial payor, recipient’s disability arising post-separation); *Campbell v. Campbell*, 2009 BCSC 1330; and *Munro v. Munro*, 2006 BCSC 1758.

- **No Exception:** On this approach, disability cases are to be resolved within the formula ranges, for both amount and duration. In effect, courts adopting this approach do not recognize any disability exception. Amount and duration may be at the higher end of the range, but we see spousal support being time-limited or terminated in accordance with the formula ranges even though the disability is permanent. This is the approach that was recommended in the SSAG and that was reflected in the *Bracklow* decision on re-trial.

At the appellate level, three decisions of the B.C. Court of Appeal offer examples of this approach: *Shellito v. Bensimhon*, 2008 BCCA 68 (5-year marriage, no children, time limit imposed; amount above SSAG range; global amount above the SSAG range, but not that far above the maximum; also recipient able to return to employment); *Shen v. Tong*, 2013 BCCA 519 (7-year marriage; wife car accident, spousal support terminated after 4 years); and *Powell v. Levesque*, 2014 BCCA 33 (8-year cohabitation; spousal support terminated after 12 years of generous support; longer than SSAG but still termination). All of these cases involved relatively short marriages. In *Depatie v. Squires*, 2012 ONSC 1399 the Ontario Divisional Court upheld a trial judge’s order imposing a time limit of 9 years after a 12-year relationship.

For recent trial decisions see: *Morneau v. Morneau* 2014 BCSC 2269 (termination 8 years after 8-year relationship); *Soschin v. Tabatchnik*, 2013 ONSC 1707 (11-year relationship, post-separation disability, lump sum based on mid-range for amount and duration); *R.L. v. L.A.B.*, 2013 PESC 24, (termination 11 years after 15-year relationship; husband will retire; amount above SSAG range); and *Este v. Blais*, 2014 ONSC 5446, (9-year cohabitation, wife disabled, CPP \$12,000, husband retires, spousal support to end after 6 years).

For rarer cases with a time limit and the low end of the range, see *B.M.P. v. S.L.B.*, 2015 BCSC 448 (7.5-year cohabitation, custodial payor, male claimant); *Patel v. Patel*, 2013 ONSC 2330 (custodial payor); and *Wilson v. Wilson*, 2009 BCSC 1021.

For earlier cases see: *Barton v. Sauve*, 2010 ONSC 1072; *Haggerty v. Haggerty*, 2010 NSSC 9; *T.J.M. v. C.R.M.*, 2009 BCSC 1122 (amount above range, but duration slightly below maximum); *McFadden v. Sprague*, [2009] O.J. No. 258, 2009 CarswellOnt 294 (S.C.J.); *Rayvals v. Rayvals*, 2008 BCSC 176; *Rezansoff v. Rezansoff*, 2007 SKQB 32; *Williston v. Williston*, 2006 BCSC 1869; *Wise v. Wise*, 2006 BCSC 945; and *Puddifant v. Puddifant*, 2005 NSSC 340.

Until appellate courts provide further guidance, these divergent approaches towards illness and disability will continue. As for us, we stated in the SSAG, “Our preference would be the ... ‘no exception’ approach, which seems more consistent with the modern limits of spousal support as a remedy.” We will have to await further developments in the law.

Other issues in disability cases:

- More complex issues of entitlement may arise when the disability occurs after separation; see *Tscherner v. Farrell*, above; *Soschin v. Tabatchnik*, above; and cases discussed below under “Changing Incomes”.
- In disability cases where the payor is a custodial parent, the needs of children need to be balanced against the needs of the disabled spouse: see *Tscherner v. Farrell*, above; *Patel*, above; and *Kuziora v. Fournier*, 2012 ONSC 1569. See also the discussion of the *custodial payor* formula, above under “The *With Child Support* Formula”.
- It is also important to note the **income issues** that can arise in disability cases. CPP disability payments are included in income but social assistance payments are not, even if labelled ODSP or AISH. Workers’ compensation benefits are included in income but are non-taxable, so will need to be grossed up. Most long-term disability insurance payments are also non-taxable, as it common for these insurance schemes to be employee-funded.

(e) *The compensatory exception in short marriages without children (SSAG 12.5)*

The *without child support* formula ranges are driven by the length of the relationship, as well as the gross income disparity. In shorter marriages, the formula assumes the sole basis for spousal support is non-compensatory, which then leads to a brief transitional award. Where there are compensatory claims in shorter marriages, an exception is required, to generate potentially larger and longer awards of spousal support.

There are typically, but not exhaustively, **three situations** where compensatory support can be claimed in shorter marriages without children.

- The **first**, and most common in the reported decisions, is where the **recipient spouse moves to marry the payor, giving up his or her job or career to do so**. Two appellate level decisions have explicitly recognized the application of the compensatory exception in such circumstances. One is the decision of the B.C. Court of Appeal in *R.M.S. v. F.P.C.S.*, 2011 BCCA 53. That case involved a three year marriage with two children. The husband, who had moved from Brazil, was awarded spousal support under the *custodial payor* formula in an amount higher than SSAG and for longer than three years. Two exceptions were relied upon: the compensatory exception in short marriages and the parenting exception (see below). The other is the decision of the Ontario Court of Appeal in *Stergios v. Kim*, 2011 ONCA 836 upholding the trial judge's application of the compensatory exception on an extremely compelling set of facts that combined multiple compensatory claims. The case involved a short marriage that lasted less than five years where the wife had given up her job and moved from South Korea. Because the husband had withdrawn his immigration sponsorship of her, she was unable to work in Canada. In addition, however, during the first years of the marriage, while the parties lived in Korea, the wife and her parents had financially contributed to the development of the husband's career potential. The husband had promised that he would do the same for the wife, by supporting her education after she moved to Canada. Five years of spousal support was awarded at an amount within the formula range for a 20-year marriage to allow the wife to go to university.

For trial level decisions that have awarded spousal support above the SSAG ranges in such circumstances, either with or without explicit reference to the compensatory exception, see: *Sidhu v. Sidhu*, 2014 ONSC 2965 (short marriage, husband withdraws immigration sponsorship; wife gave up job that she can't get back and has to travel back to India); *Singh v. Singh*, 2013 ONSC 6476 (short marriage, immigration sponsorship, explicit discussion of interim and hardship exceptions, could also be compensatory exception); *Bhandal v. Mann*, 2012 BCSC 1098 (no discussion of exceptions but interim exception and compensatory exception in short marriages would be applicable); *Ahn v. Ahn*, 2007 BCSC 1148; and *Fuller v. Matthews*, 2007 BCSC 444.

- The **second** is where the **recipient spouse has moved and given up or compromised his or her job or career, to facilitate the payor spouse's job or career**. An excellent analysis of such a case within this exception is *Beardsall v. Dubois*, [2009] O.J. No. 416, 2009 CarswellOnt 559 (S.C.J.) (wife left her employment to move to London where her husband had found employment).
- The **third** is where the **recipient spouse worked to put the other spouse through an education program**, but the couple separates before the recipient spouse has been able to enjoy any of the benefits of the payor spouse's enhanced earning capacity. The Ontario Court of Appeal decision in *Stergios v. Kim*, discussed above, also involved this situation.

(f) Property division: reapportionment (B.C.) (SSAG 12.6.1)

After the Draft Proposal, the British Columbia courts affirmed a spousal support exception in cases where a sufficiently large reapportionment order was made under the property provisions of the former *Family Relations Act*: *Tedham v. Tedham*, 2005 BCCA 502 and *Narayan v. Narayan*, 2006 BCCA 561. This exception applied only in B.C. because only in that province did the property statute permit reapportionment, or unequal division, on spousal support grounds.

In practice, there were very few B.C. cases that fell within this exception. Most often it was the equity in the matrimonial home that was reapportioned and the size of the reapportionment was not large enough to justify departing from the formula range. Typically the adjustment made for reapportionment was to fix an amount of spousal support at a lower point in the range than might otherwise have been the case, even the low end of the formula range, as was done in *MacEachern v. MacEachern*, 2006 BCCA 508. For a recent decision adopting this approach see *Marquez v. Zapiola*, 2013 BCCA 433.

With the proclamation of the B.C. *Family Law Act*, S.B.C. 2011, c. 25, in 2013, reapportionment on spousal support grounds has become “a more restricted discretion”, as the Court said in *C.M. v. M.S.*, 2015 BCSC 1031. Section 95(3) of the *Act* makes reapportionment of property on spousal support grounds a residual remedy, only available if the spousal support objectives cannot be met through spousal support:

95(3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 have not been met.

This changes the remedial sequence and likely removes any need for a B.C. reapportionment exception as part of spousal support law.

(g) Property division: “Boston” (SSAG 12.6.3)

The Advisory Guidelines on amount and duration do not change the law from *Boston v. Boston*, [2001] 2 S.C.R. 413, governing “double-dipping”, mostly from pensions. *Boston* expresses an entitlement principle, as to what portion of a payor’s income is available to pay spousal support. *Boston* is, however, subject to a sizeable exception in cases of hardship or need. An extensive discussion of the complexities of this exception and the cases where an adjustment has been made to prevent “double-dipping” can be found under “Retirement” below.

(h) Property division: high property awards (SSAG 12.6.2)

There is no explicit exception for **high property awards** in the SSAG. The Advisory Guidelines can already accommodate many of the “high property” concerns: by imputing income, by choosing location within the ranges for amount and duration, by individualizing support determinations for payors above the \$350,000 “ceiling”; and, in extreme cases, by finding no entitlement.

The law in this area remains unclear. The better view is that property and support are governed by distinctive laws and serve different purposes, so that a high property award should not in and of itself dictate no entitlement to spousal support. This view is reflected in the B.C. Court of Appeal decisions in *Chutter v. Chutter*, 2008 BCCA 507 (leave to appeal to the S.C.C. denied), and *Bell v. Bell*, 2009 BCCA 280.

But there is an inter-relationship between property and spousal support, which might in some cases warrant an outcome outside the SSAG ranges for amount and duration. In *Chutter*, where the Court of Appeal overturned the trial judge's finding of no entitlement in the case of a long marriage where each of the parties was left with \$4 million dollars in assets, the award of \$2,800 per month was below the low end of the SSAG range. (In going below the range, the Court of Appeal also took into account that the wife had the benefit of sizeable RRSPs and was overhoused in her non-income-earning \$1.9 million home, which muddied the outcome a bit.)

In *Mudronja v. Mudronja*, 2014 ONSC 6217 spousal support was ordered to terminate after the wife received an equalization payment of \$1.8 million on the grounds that she would then have investment income in addition to an additional \$1 million in assets. Spousal support had already been paid for 7 years since separation. Here we see income being imputed to the recipient from her receipt of an equalization payment and lump sum retroactive support.

(i) Basic needs/hardship (SSAG 12.7)

This exception recognizes the specific problem with shorter marriages (1-10 years) under the *without child support* formula (and the *custodial payor* formula which is built around the *without child support* formula) **where the recipient has little or no income** and the formula is seen as generating too little support for the recipient to meet his or her basic needs for any transitional period that extends beyond the interim exception. The exception allows for awards higher in amount than the SSAG ranges, enough to meet basic needs, but does not allow for an extension of duration.

This exception is intended to apply only where other exceptions—such as the interim exception, the illness and disability exception and the compensatory exception in short marriages—are not applicable and where restructuring does not provide an adequate solution. When this exception was recognized in the SSAG we contemplated a very narrow scope for its operation, and we thought it would arise mostly in bigger cities, where basic needs are most expensive.

To date this basic needs/hardship exception has not been used very often and the majority of the cases where it has been used it have involved interim support and combined reliance on this exception and the interim exception; see *Carty-Pusey v. Pusey*, 2015 ONCJ 382; *Ponkin v. Werden*, 2015 ONSC 791; and *Tasman v. Henderson*, 2013 ONSC 4377. For one example of its use outside of the interim context see *Simpson v. Grignon*, [2007] O.J. No. 1915, 2007 CarswellOnt 3095 (S.C.J.).

One area where we contemplated that this exception might apply is the immigration sponsorship cases; see *Carty-Pusey*, above (but interim exception also applicable).

(j) Non-taxable payor income (SSAG 12.8)

Both formulas produce a “gross” amount of spousal support, i.e. an amount that is deductible from taxable income for the payor and included in taxable income for the recipient. But **some payors have incomes based entirely or mostly on legitimately non-taxable sources** such as:

- workers’ compensation
- disability payments
- income earned by an aboriginal person on reserve
- some overseas employment arrangements.

In determining income, this non-taxable income will have been grossed-up (as discussed under “Income” above). However, in these cases where the payor’s income is based almost entirely on non-taxable income, the payor is unable to deduct the support paid, contrary to the assumption built into the formulas for amount. In most cases, the recipient of spousal support will still have to include the support as income and pay tax on it. Under this exception, it will be necessary to balance the tax positions and interests of the spouses.

For examples of the fact situations covered by this exception, see *Paul v. Paul*, 2008 NSSC 124 (both aboriginal, neither paying taxes, amount below low end of range) and *James v. Torrens*, 2007 SKQB 219 (aboriginal payor earning income on reserve).

There are also a number of self-adjusting mechanisms at work under both formulas that may limit the need to resort to this exception, described more fully in the SSAG itself. Note in particular that there will be no need to do any adjustment for non-taxable income in cases under the *with child support* formula because the calculations under that formula work with net incomes: see *Fiddler v. Fiddler*, 2014 ONSC 4068.

(j.1) Payor resides in country where no tax deductibility for support

Here we wish to identify a variant on the non-taxable payor income exception. Non-taxable income means a payor does not obtain the benefit of tax deductibility for spousal support payments. But a payor can lose out on tax deductibility in another way, by residing in a country where domestic law does not permit deductibility of spousal support. As with the non-taxable income exception, the Canadian recipient will still have to declare the support as income and pay taxes on that income.

Many countries do allow deductibility, like the U.S., France, Italy and Spain. But many others do NOT allow the payor to deduct spousal support, notably the United Kingdom, Australia, Mexico, Japan and Korea (Germany and Israel only allow a limited deduction).

This creates a similar problem to that seen above for payors with non-taxable income and warrants a similar exception and solution.

(k) Non-primary parent to fulfil parenting role (SSAG 12.9)

This exception arises under the *custodial payor* formula in shorter marriages on a specific set of facts, to justify increased spousal support for parenting purposes. There are **three requirements for this exception**:

- the recipient spouse and non-custodial parent must play an important role in the child's care and upbringing after separation
- the marriage is shorter and the child is younger
- the ranges for amount and duration are low enough and short enough under the formula that the non-custodial parent may not be able to continue to fulfil his or her parental role.

Some of these cases involve illness or disability, as that explains the non-custodial status of the recipient spouse. But in such cases, this exception should be considered first, before reaching the more common illness and disability exception.

This parenting exception has now been recognized in two appellate level decisions, both decisions of the B.C. Court of Appeal. *R.M.S. v. F.P.C.S.*, 2011 BCCA 53 involved a very short, three year marriage with two children. The father, who had moved from Brazil, exercised substantial access. Two exceptions were relied upon to justify an award of spousal support in an amount higher than the SSAG and for longer: the compensatory exception in short marriages and the parenting exception. At para 80 of her reasons, Justice Smith noted that the parenting exception is focussed on the recipient's parenting role, and is most often used to extend the duration of spousal support until the children are older and parenting functions are reduced. She added that it may also be used to augment the amount of support if the recipient does not have the financial resources to meet the demands of parenting. At para 83 she stated:

This exception is not aimed at compensating the recipient. Nor is the goal to ensure that both households have the same level of income. Rather, it works to ensure that the non-primary parent has the resources needed to fulfil their parenting duties. This might encompass ensuring the children have adequate housing or transportation between houses.

R.M.S. was followed in *Kelly v. Kelly*, 2011 BCCA 173, which involved a seven year marriage in which the children remained with the father. The mother was awarded spousal support higher than SSAG and for longer, with explicit reference to the parenting exception. On the facts the mother had a relatively low income and her difficulties in fulfilling her parenting role were exacerbated by high access costs. Both *R.M.S.* and *Kelly* referred to an earlier Ontario trial level decision, *Petit v. Petit*, [2008] O.J. No. 5437, 2008 CarswellOnt 8257 (mobility case, children moved with husband, support to wife increased above range to adjust for cost of travel for access in northern Ontario).

Other trial level decisions using this exception include *Osanlo v. Onghaei*, 2012 ONSC 2158 (exception not explicitly relied upon but non-custodial mother who had been primary caregiver awarded support higher than SSAG range, her need to provide accommodation suitable for children) and *Mumford v. Mumford*, 2008 NSSC 82 (married 16 years, 14-year-old with husband, wife with parenting time, mental health issues for wife, spousal support above range, duration set at maximum).

(l) Special needs of child (SSAG 12.10)

A child with special needs can raise issues of both amount and duration of spousal support, issues that can often, but not always, be accommodated within the ranges. In some cases, the duration of spousal support may have to be extended and/or the amount may have to be increased above the upper end of the range.

The leading case on this exception is now the decision of the Manitoba Court of Appeal in *Remillard v. Remillard*, 2014 MBCA 304 where the court overturned a trial decision that both imputed income to the wife, who had custody of the parties' severely disabled child, and imposed a five year time-limit on support after an 11-year marriage. The wife had a new relationship and a new child and was not working outside the home. The Court of Appeal found that the trial judge's award failed to adequately reflect the wife's entitlement to compensatory support and over-emphasized self-sufficiency. Given the child's needs, it was unrealistic to expect the wife to work and become self-sufficient in five years. Relying explicitly on the special needs exception, the court awarded indefinite support, subject to review or variation. (The amount of the award was reduced \$1000 below the SSAG mid-range to take into account the wife's repartnering.)

For trial level decisions see *E.B.G. v. S.M.B.*, 2015 BCSC 541 (special needs child, time limit in consent order varied, indefinite, no explicit reference to special needs exception); *Krause v. Zadow*, 2014 ONCJ 475 (10-year marriage, 3 children, 2 special needs, separation agreement provides for amount higher than SSAG; husband's income decreases, wants reduction and time limit on spousal support; no basis for imputing income to wife given needs of children; no time limit; explicit reference to special needs exception); *Jans v. Jans*, 2013 ABPC 1999 (Down's Syndrome child, husband almost no access, spousal support higher than SSAG, no explicit reference to exception); *Yeates v. Yeates*, [2007] O.J. No. 1376, 2007 CarswellOnt 2107 (S.C.J.), affirmed on appeal 2008 ONCA 519 (wife with care of disabled children, spousal support well above range); and *Frouwes v. Frouwes*, 2007 BCSC 195 (wife no entitlement to spousal support, where wife delayed claim and custodial husband bears full costs of children with special needs).

(m) Section 15.3: inadequate compensation (SSAG 12.11)

The **full title for this exception** is "section 15.3: small amounts, inadequate compensation under the *with child support* formula". Section 15.3 of the *Divorce Act* requires that child support be given priority over spousal support, which can mean little or no spousal support, even in cases where there is a strong claim for compensatory support, especially where there are more children requiring care; see *C.E.A.P. v. P.E.P.*, 2006 BCSC 1913 (compensatory entitlement recognized, 4 children, but SSAG shows zero amount for spousal support; no spousal support ordered, no ability to pay). Section 15.3 goes on to recognize that as child support is reduced or terminated there will be increased ability to pay and thus an ability to satisfy unmet claims for spousal support which have been held in abeyance or only partially met while child support was being paid. For a nice example of the operation of s. 15.3, see *Beck v. Beckett*, 2011 ONCA 559 (at trial no spousal support while child support being paid, by time of appeal no more child support, on appeal child support order replaced with spousal support order for mid-range SSAG).

This exception recognizes that after child support ends there may still be unmet compensatory claims and that *duration* under the SSAG may need to be extended to provide adequate compensation to the recipient. This exception will usually arise in a variation context in longer marriages with children, when child support ends and there is a **crossover** from the *with child support formula* to the *without child support* formula (see SSAG 14.5 and below under “Crossovers Between Formulas When Child Support Ends”). In many cases the *without child support formula* will be able to respond adequately to the past priority given to child support and the recipient’s unmet compensatory claims. The amount of support may be increased under the *without child support* formula and for marriages of 20 years or longer, duration will be indefinite. However, where the marriage is under 20 years in length, the time limits under this formula will become applicable, with the maximum duration being the length of the marriage. For these cases, **the effect of the exception will be to extend the duration of spousal support beyond the upper limit of the length of the marriage.**

We now have an appellate level decision explicitly relying upon this exception, the decision of the Ontario Court of Appeal in *Gray v. Gray*, 2014 ONCA 659. This was a crossover case where child support had ended. Spousal support had already been paid for 16 years after a 16-year marriage with four children. The wife had not worked outside the home since shortly before the separation because of health problems. The husband’s application to terminate child support was combined with an application to either terminate spousal support or keep it at the existing very low level, while the wife sought continued spousal support in an increased amount. The wife was found to have continuing entitlement on both non-compensatory and compensatory grounds. The amount of support was increased to the low end of the SSAG range on an indefinite basis. In justifying this result the Court of Appeal recognized that the amount of the original order reflected the priority given to child support. In not imposing a time limit, the Court explicitly referred to both the disability exception and the s. 15.3 exception. The low end of the range was ordered to reflect this extension of duration, as well as the husband’s second family obligations.

In *Gray* the Court of Appeal drew upon an earlier decision in *Abernethy v. Peacock*, 2013 ONSC 2045, upholding 2012 ONCJ 145, a case where the wife had a very strong compensatory claim following a 16-year marriage and where the s. 15.3 exception had been explicitly relied upon to extend the duration of spousal support after child support ended.

(n) Other grounds for departures, “new exceptions”

The eleven “exceptions” listed in the SSAG represent recognized grounds or “categories” of departure from the formula ranges. But the Guidelines are informal and advisory, which means that departures from the formulas can take place even if there is no listed “exception” in Chapter 12. The listed “exceptions” do not exhaust the possible reasons for departing from the formula ranges.

The SSAG formulas were devised for “typical” cases, and the unusual facts of a particular case may require a departure from the formula ranges, e.g. the unusual mortgage arrangements made *after* separation in *S.S.V. v. G.J.V.*, 2009 NBQB 195 (husband jointly purchased home and co-signed mortgage); or the wife’s permanent arrangement to live with her mother, thereby lowering her expenses in *Schloegl v. McCroary*, 2008 BCSC 1722 (amount lower than low end of range).

One might also imagine exceptional cases involving usually high medical expenses for either the payor (limiting ability to pay) or the recipient (increasing need).

The kinds of factors that determine location in the range (SSAG Ch. 9) may also, in some cases, push an award outside of the range in extreme or unusual circumstances. Just think of the debt payments exception. For another example, employees have recently been called upon to pay much larger mandatory pension contributions in order to cover pension fund deficits, contributions that may be large enough that the payor lacks the ability to pay the spousal support amounts under the formulas and thus an outcome below the range may be warranted. (Remember that mandatory pension contributions are not treated as deductions for SSAG calculations.)

It is impossible to conjure up the many and various ways that spousal support cases can be unusual or atypical, and thus demand a departure from the SSAG ranges.

13 Variation and Review (SSAG Chapter 14)

(a) *The general framework of variation and review*

The SSAG do nothing to change the general structure of the law pertaining to variation and review.

Some important points to remember about the basic law of variation and review include:

- **the distinction between a review and a variation:**

A **variation** involves the threshold requirement of a material change in circumstances whereas a review is more like an initial application; courts often mistakenly confuse the tests. For recent decisions requiring appellate correction see *Marche v. Marche*, 2014 NLCA 2; *Morck v. Morck*, 2013 BCCA 186; and *Domirti v. Domirti*, 2010 BCCA 472.

A **review** is often described as a hearing *de novo*, but this is somewhat misleading because, following *Leskun v. Leskun*, 2006 SCC 25, the issues to be reviewed may, and indeed should be, delineated by the terms of the review: see *Westergard v. Buttress*, 2012 BCCA 38 (review only re self-sufficiency, not *de novo* assessment) and *MacCarthy v. MacCarthy*, 2015 BCCA 496 (order permitting review properly interpreted to apply only to quantum and not entitlement; not allowing for re-litigation of entitlement one year after trial).

- **the test for material change** -- “known or taken into account”, not “foreseeable”:

The test for a “material change”, as confirmed by the Supreme Court of Canada in *L.M.P. v. L.S.*, 2011 SCC 64, is a change that is substantial, continuing and that “if known at the time, would likely have resulted in a different order”. *L.M.P.* is now the leading case on the threshold test for variation. The test is not whether the change was or was not “foreseeable” by the parties at the time of the previous order. The language of “foreseeability” is mistakenly transposed by lawyers and judges from the case law dealing with spousal support agreements—first *Pelech* and now *Miglin*. Some prefer to restate the “material change” test as a change that was not “foreseen” in the initial order, but even this often leads to confusion. The better approach is to focus on what was “contemplated” or “taken into account” in the initial order.

There is a growing body of higher level court decisions providing clearer thinking on the test for “material change”. Before *L.M.P.*, Lambert J.A. provided an insightful explanation of the test in *Stones v. Stones*, 2004 BCCA 99:

[15] In my opinion, the question of what is a material change of circumstance may vary from one case to another. That is particularly so in relation to foreseeability. There are a group of cases which decide that retirement from employment, even at the retirement age set by the employer, or by collective agreement, can be a material change of circumstances, although clearly it would be foreseeable.

[16] I suppose that the question should really be asked in each case of whether the circumstance in question was *one which the parties must have had in contemplation and built into the framing of their agreement*. Perhaps it is a change that the parties were prepared to leave out of contemplation in the agreement because

of complexity or some other reason, so that when it occurs it is a material change of circumstances, even though the parties knew it must be going to happen at some time or another. [emphasis added]

More recently, good discussions of the proper application of the material change test can be found in the decision of Justice Kasirer in *Droit de la famille – 141364*, 2014 QCCA 1144, leave to SCC refused [2014] S.C.C.A. No. 459 and in *Dedes v. Dedes*, 2015 BCCA 194. In *Dedes*, the court stated, in the context of an application for variation of a custody order to permit the mother’s relocation:

[25] As articulated in *L.M.P.*, the test for material change is based not on what one party knew or reasonably foresaw, but rather on what the parties *actually* contemplated at the time the order was entered by agreement. A function of the material change threshold is to prevent parties from re-litigating issues that were already considered and rejected; in such cases an application to vary would amount to an appeal of the original order. [emphasis in original]

In *Goodkey v. Goodkey*, 2015 ABCA 394, the Alberta Court of Appeal very sensibly concluded that a chambers judge erred in refusing to find that the cessation of child support was a material change in circumstances. His ruling that the change must have been in the contemplation of the parties at the time of the prior consent order was quickly dealt with by the Court of Appeal: “while it could be said that it was reasonably anticipated by the parties that child support would terminate at some point, the specific timing of that termination remained unknown.”

However, even at the higher court levels, the test for “material change” continues to be misunderstood and conflated with concepts of foreseeability. In *Morigeau v Moorey*, 2015 BCCA 160, the wife’s repartnering was found not to be a material change because it was “foreseeable” at the time of the initial order that she might cohabit with her current partner, who she was seeing at the time, or if not with him, then with someone else. In *Hickey v. Princ*, 2015 ONSC 5596, the Ontario Divisional Court found that the husband’s early retirement was either “foreseeable” or “foreseen” because his pension was valued on that basis and therefore his retirement could not be a material change. The results in these two decisions—i.e. no variation—may well be defensible (in *Morigeau* the wife had a strong compensatory claim and in *Hickey* the wife was disabled). But the problematic analysis of “material change” complicates the resolution of variation cases for lawyers and judges.

- on a variation, the court must limit itself in its order to whatever variation is justified by the material change in circumstances:

As the S.C.C. made clear in *L.M.P.*, above, at para 47, a variation is neither an appeal nor a hearing *de novo*. Judges making variation orders under s. 17 are required to limit themselves to making the appropriate variation and should not weigh all the factors to make a fresh order unrelated to the existing one.

- **consent orders are now governed by the test for variation from *L.M.P.* rather than by *Miglin*:**

As a result of the SCC’s ruling in *L.M.P.*, above, the threshold test for variation of consent orders is the same as for orders that do not incorporate an agreement, that of a “material change” in circumstances since the making of the order. A spousal support agreement does not alter the statutory “material change” threshold of s. 17. The *Miglin* test is thus not applicable in the variation context. However, the more specific the terms of the agreement,

the greater the impact the agreement will have in “shaping” the “material change” analysis, as the terms will indicate the intentions of the parties and what they did or did not take into account in arriving at the spousal support agreement. Not all “finality” clauses will be given weight on the variation analysis. The majority distinguishes between “general” and “specific” finality clauses, with the former having less effect than the latter.

The other way to challenge a consent order is to seek rescission of the order because of the invalidity of the agreement on which the consent order is based; see comments by Bastarache and Arbour JJ. in *Miglin* (at para 16) cited in *L.M.P.* at para 47.

For an overview and analysis of the law of variation and review see Rollie Thompson, “To Vary, To Review, Perchance to Change: Changing Spousal Support” (2012), 31 *Canadian Family Law Quarterly* 355.

(b) Applicability of the SSAG on variation and review

We hope we are now at the stage where the once pervasive “myth” that the Advisory Guidelines “do not apply” on variation and review has finally been dispelled. **The SSAG do apply on variation and review**, but there may be added complexities and entitlement issues arising in some cases that limit the use of the Guidelines. In many variation and review cases, however, the Advisory Guidelines can be readily applied.

The British Columbia Court of Appeal began to sort through this issue in *Beninger v. Beninger*, 2007 BCCA 619, where Justice Prowse warned that “the SSAG should be approached with considerable caution on variation applications”, as more complex issues of entitlement can arise, but nonetheless recognized that “[i]n certain circumstances, the SSAG can be used on a variation application, albeit with care”. After that warning, the Court of Appeal proceeded to apply the SSAG to determine amount and duration in that case.

Some of the on-going confusion on this issue comes from Justice Lang’s unfortunate and often-repeated statement in her otherwise excellent general discussion of the Advisory Guidelines in *Fisher v. Fisher*, 2008 ONCA 11: “they [the SSAG] only apply to initial orders for support and not to variation orders” (para 96). In practice, however, Ontario courts have regularly applied the Advisory Guidelines in both variation and review decisions, and properly so, despite the comment in *Fisher*. In its recent decision in *Gray v. Gray*, 2014 ONCA 659, the Ontario Court of Appeal has explicitly distanced itself from the statement in *Fisher* (noting at para 43 that *Fisher* was not a variation case and that it was decided before the release of the Final Version of the SSAG) and confirmed that the SSAG do apply on variation, although in some cases there will be “complicating factors that must be considered before a court applies the SSAG wholesale” (para 45).

What variation situations require more “caution” because they raise “complicating factors”?

- variations of pre-SSAG orders or non-SSAG consent orders
- some post-separation income increases of the payor
- some post-separation income reductions of the recipient
- remarriage or repartnering of the recipient
- issues of maximum duration and the “end of entitlement”

- fact situations requiring the use of exceptions, in the previous order or at the time of variation
- post-retirement cases involving “double-dipping” and *Boston*

Most other situations do not pose a problem, e.g. where the payor’s income is reduced or the recipient’s income is increased or where child support is terminated.

Even more surprising has been the argument that the SSAG do not apply on a review hearing. A review hearing is much more like an initial application for support. Entitlement issues like those listed above come up much less frequently on review than on variation. Again, with some of the same cautionary language, the B.C. Court of Appeal has stated that **the SSAG do apply on review** in its 2010 *Domirti* decision, and rightly so: *Domirti v. Domirti*, 2010 BCCA 472 at paras 40-41 per Smith J.A.

(c) Variation of pre-SSAG orders or non-SSAG consent orders

Variation and review of orders or consent orders that were not based on the SSAG raise special issues. These issues arise predominantly with respect to older, pre-SSAG orders, but can also arise with SSAG-era agreements that depart from the SSAG and have been incorporated into consent orders. Payors may attempt to use the SSAG on a variation application to reduce the amount of support being paid or to terminate the obligation. Alternatively, recipients may attempt to use the SSAG to increase the amount of support being paid or to at least preclude a further reduction in support.

The mere fact that the SSAG would provide a different outcome based on current incomes and circumstances is not a basis for variation. A material change must be established. And even if there has been a change, the SSAG will not automatically be applied to determine the appropriate outcome. The court may be guided by the prior order/consent order rather than the SSAG. For example, in two cases involving pre-SSAG orders where the amounts under the existing order were below the SSAG ranges, payor requests for a downward variation based upon a reduction in their incomes were allowed—the SSAG were not applied and spousal support was adjusted in accordance with the percentage reduction in the payor’s income: see *Allaire v. Lavergne*, 2014 ONSC 3653 and *Thompson v. Thompson*, 2013 ONSC 7561.

And the same approach has been applied in cases where the existing support order is more generous than the SSAG; see *Krause v. Zadow*, 2014 ONCJ 475 (separation agreement with material change clause, amount higher than SSAG, SSAG not applied, spousal support adjusted in response to husband’s reduced income by applying same percentage distribution of NDI as in agreement to husband’s current income) and *Pustai v. Pustai*, 2014 ONCA 422 (trial judge erring in terminating support consistent with durational limits in SSAG and ignoring terms of consent order providing for variation in case of material change but no termination of spousal support).

However, in several cases, in contrast to the approach adopted in *Allaire* and *Thompson*, courts have used the SSAG to find that the spousal support under the existing order was low (at low end of the SSAG range or below), and have therefore refused to grant a payor’s application for a variation seeking a reduction or termination, often finding no material change; see *Bhandhal v. Bhandhal*, 2015 ONSC 1152; *Dunn v. Dunn*, 2014 ONSC 7277; *Rozen v. Rozen*, 2014 BCSC

3164; *Cossette v. Cossette*, 2015 ONSC 2678 (Div. Ct.); *Berger v. Brayley*, 2014 ONSC 1597; and *Gennoe v. Gennoe* 2014 ONSC 2256.

If a pre-SSAG order is understood to have been roughly consistent with the SSAG, the SSAG may be used to determine the new order on variation; see *Misztal v. Karpynczyk*, 2012 ONSC 6474 (23-year marriage; 2003 consent order; husband's income up, wife's down; material change, new order low end of SSAG range).

14 Crossovers Between Formulas When Child Support Ends (SSAG 14.5)

When child support ends, if there is a continuing entitlement to spousal support, it will be necessary to **cross over** from the *with child support* formula to the *without child support* formula. Crossovers will typically involve medium length and long marriages with children. In these cases there would have been dependent children at the time of separation and hence spousal support would have initially been determined under the *with child support* formula. After child support has been terminated, these cases may be brought under the *without child support* formula on an application for review or variation. In some cases the crossover, involving the application of two different formulas, may be relevant in the calculation of retroactive support.

We are now seeing increasing numbers of crossover cases—no surprise given the length of time the SSAG have been in use—and these cases will only become more common in future.

For good examples of cases where the crossover between formulas has been explicitly recognized and discussed see *Gray v. Gray*, 2014 ONCA 659; *Holman v. Holman*, 2015 ONCA 552; *Domingues v. Domingues*, 2013 ONSC 1639; *Abernethy v. Peacock*, 2012 ONCJ 145 affirmed on appeal [2013] O.J. No. 1768 (S.C.J.); *Purgavie v. Purgavie*, 2012 ONSC 2268, *Maber v. Maber*, 2012 NBQB 337; *Hamden v. Hamden*, 2012 NBQB 331; and *Beck v. Beck*, 2012 NLTD(F) 34.

Crossover cases may require a redetermination of amount, or a determination of duration, or both. The two formulas are driven by different underlying factors, even though they overlap considerably in longer marriages.

- In **shorter marriages**, apart from exceptions, there will not usually be any further duration left after child support ends and thus no room for crossover.
- In the **medium-length to long marriages** where there will be room for crossover, the **duration** of support will be driven by length of marriage and so will be the same under both formulas. For marriages under 20 years in length there will be time-limits which, while not applied in an initial application under the *with child support* formula, may now be imposed; see *Holman*, above; *Maber*, above; and *Handman*, above. For those over 20 years in length, support may remain “indefinite (duration not specified)”, or may be time-limited, if there are other material changes.
- **In a crossover situation, the amount of spousal support may go up or down or stay the same.** At the lower end of medium-length marriages, the *without child support* formula may lead to lower amounts. In marriages of 20 years or more, the range for amount will usually be higher after crossover to the *without child support* formula. In between, there will usually be considerable overlap of the ranges under the two different formulas, such that the amount of spousal support may not change, even if the duration might.

- These are mostly cases with **strong compensatory claims**, as compared to medium-length and long marriages where there were no children of the marriage. One would thus expect amount and duration to be near the **high end of the range**.
- In these cases **s. 15.3 of the *Divorce Act* and the Advisory Guidelines exception for inadequate compensation** under the *with child support* formula may also be relevant. If the amount of spousal support was inadequate in the past because of the statutory priority to child support, spousal support may have to continue beyond the maximum time limits generated by the formula in order to adequately satisfy the recipient's compensatory claims. See SSAG 12.11 and the discussion of this exception above under "Exceptions". The s. 15.3 exception for inadequate compensation was applied in both *Gray* and *Abernethy*, above.

15 Changing Incomes

Nothing ever stays the same in family law. Spousal incomes will change over time. Above, under “Income”, we discussed the determination of income at the interim and initial stages of spousal support, including the definition of “income”, the timing of income, imputing income, using alternative incomes to estimate ranges, grossing up non-taxable income and some tips and alerts in determining income. In this part, we focus on the impact of changes in income upon spousal support under the Advisory Guidelines. Most of these changes will occur after an initial agreement or order, which then raise issues under “Variation and Review” or “Agreements”.

A word about terminology: we use the generic term “post-separation” in reference to income changes here, as this language is commonly used. Most of these are actually changes in income after an initial order for support, addressed on a variation or a review. Or, changes in income after an agreement has been made, and then the parties renegotiate spousal support or one of them brings an application to court. And, finally, in some cases there can be significant changes in income between the date of separation and the date of an interim or initial application to court for support. In this chapter on “Changing Incomes”, we use the term “post-separation” in this broader, looser sense. When we refer to the earlier income, before the increase, we call it “the initial income”, intended to capture these different settings.

(a) Payor’s income reduced

The SSAG formulas can readily adjust in those cases where the payor spouse’s income is reduced after separation or after an initial order or agreement, as the range for amount can be adjusted downwards (see SSAG 14.2). There may be issues around material change, voluntary un/under-employment, etc. If the payor’s income is reduced significantly, ability to pay under the *with child support* formula may become an issue and the SSAG range even reduce to zeros across the board, due to the priority given to child support (which might later mean invoking the s. 15.3 exception, see “Exceptions” above).

Where the payor’s income is not reduced permanently, the court may attach additional terms for the payor about disclosure of future re-employment and income changes to the recipient. Or the court might even impose a review term, where the “genuine and material uncertainty” will be a possible restoration of income in the near future.

(b) Recipient’s income increased

Similarly, the SSAG formula ranges adjust easily to an increase in the recipient spouse’s income, as the recipient returns to the paid labour market, part-time or full-time, or receives promotions or wage hikes (SSAG 14.2). This can be an actual increase in income, or an *imputed* increase where the recipient fails to make reasonable efforts to become self-sufficient: see “Self-sufficiency” below.

Like a payor income reduction, a recipient income increase will move the SSAG ranges for amount downwards, with a likely reduction in the amount of support.

In some agreements and orders, there will be a clause allowing a recipient to earn up to a fixed, usually low-ish amount, without a reduction of spousal support, as an incentive to work towards self-sufficiency. In effect, such a clause forestalls a variation, review or initial support application (in the case of an agreement), impliedly “imputing” an income to the recipient.

(c) Both incomes increased

Over time, if both parties are already working, it is likely that both their incomes will rise, especially if they work on some sort of pay scale or get cost-of-living increases or are members of unions engaged in collective bargaining at intervals. If both incomes rise commensurately, then the SSAG range is unlikely to shift much, and that overlap of ranges will make it unlikely that support will change. Whether on a variation, review or initial application (in the case of an agreement), courts look to maintain greater stability for spousal support orders, and are thus prepared to accept some changes in incomes, sometimes significant, without modifying amounts.

Under the *without child support* formula, changes in spousal incomes that leave roughly the same *gross income difference* will not produce much difference in the SSAG ranges. Some insist that the initial income for the payor should continue to be used under this formula, such that the payor’s income remains fixed thereafter and thus *any* increase on the part of the recipient means a reduction in spousal support, but this is simplistic. There will be issues about sharing of the payor’s post-separation income increase, discussed in the following section, where the increase is significant. But small, steady increases should probably be taken into account on both ends of the formula when calculating SSAG ranges for at least a few years later, in the interests of stability, certainty, reliance, and reducing litigation.

Under the *with child support* formula, since it is so sensitive to small shifts in net income over and above child support, even commensurate changes in both incomes can lead to a noticeable increase in the SSAG range. This reflects the limits of ability to pay under this formula, as well as a tendency to go higher in the range for compensatory and need reasons. In these cases, as will be shown below, it is more likely that any post-separation income increase of the payor will be fully shared and an upward adjustment is more likely.

(d) Change from imputed income

The situations discussed above involved changes from previously declared and proved incomes. Where a court has previously imputed income, the analysis of changed income will become more complicated. Imputed incomes are becoming more common in SSAG cases, as income determination is a critical step when income-based guidelines are used.

In two recent cases, courts have undertaken a much more careful analysis where a payor alleges an income that has changed downward since the previously-imputed income, especially where there was non-participation or inadequate disclosure by the party on the prior occasion: *Trang v. Trang*, 2013 ONSC 1980 and *Power v. Power*, 2015 NSSC 234. Two more questions must be asked, stated Pazaratz J. in *Trang*:

1. *Why* did income have to be imputed in the first instance? Have those circumstances changed? Is it still appropriate or necessary to impute income to achieve a fair result?
2. *How* exactly did the court quantify the imputed income? What were the calculations, and are they still applicable?

It is not enough for the party to say, “here is my current declared income” at the next hearing. More evidence is needed, to quote Justice Pazaratz again, to show:

- a. It’s no longer necessary or appropriate to impute income and the payor’s representations as to income should now be accepted, even if they weren’t before; or
- b. Even if income should still be imputed, a different amount is more appropriate, given changed circumstances.

There are many reasons to impute income, as discussed above under “Income”. If income was imputed for non-disclosure, then full disclosure will be required at the next hearing, both as to the current income and the income on the previous occasion. In *Power*, income was imputed on grounds of non-disclosure, and also diverted income, unreasonable expenses and dividend income. Evidence was required from the payor on all four bases for imputing, which was not provided in sufficient detail on his variation application (for child support).

(e) *Post-separation income of payor increased*

Many spouses will see small, regular increases in their incomes over the years, thanks to wage and salary increases for inflation and increased seniority. If both spousal incomes rise like this, there will not be much change in the formula ranges for spousal support, as we noted above under “Both incomes increased”. These small, regular increases on the part of the payor would ordinarily be shared at intervals without too much controversy. Especially in non-compensatory cases involving long-term or indefinite support, these smaller increases effectively reflect the rise in the cost of living for the recipient: for a recent example of this thinking, see *R.L. v. L.A.B.*, 2013 PESC 24 (initial application, delayed claim, 15-year relationship with no children, entitlement only non-compensatory, husband’s income at separation used with upward adjustment for inflation, not full sharing of post-separation increase). In some jurisdictions, like Ontario, there was an attempt to recognize this kind of increase by means of indexing spousal support orders for the cost of living.

Under this heading, we are addressing larger increases in the payor’s income. Where the payor’s income increases significantly, a hard question arises: **should the payor share all, some or none of the income increase with the recipient in the calculation of spousal support?** The answer presents a mix of entitlement and quantum issues. It has now become a prominent issue in the case law, as the income-based formulas of the SSAG are used more consistently and more widely. It is also a sign of greater sophistication in the use of the SSAG.

This income increase issue usually comes up at the variation and review stages, after an initial order. At the interim and initial stages, current incomes are most often used, as explained above under “Income”. But, as we noted there, even at these early stages, the post-separation increase issue can sometimes arise, where there is a significant increase in income or where there is a long post-separation delay before the support claim is made.

In the SSAG (at 14.3), we stated in summary form, in a short section on the topic:

Some rough notion of causation is applied to post-separation income increases for the payor, in determining whether the income increase should be reflected in increased spousal support and, if it should, by how much. It all depends on the length of the marriage, the roles adopted during the marriage, the time elapsed between the date of separation and the subsequent income increase, and the reason for the income increase (new job vs. promotion with same employer, or career continuation vs. new venture).

That word “causation” has often been read without the preceding words “*some rough notion of causation*”. It would be better to describe it as a “**link**” or “**connection**”, between the marriage and the increase after separation. That has certainly been the approach of most courts, especially those in B.C. and Ontario.

In some early Alberta cases, notably *Sawchuk v. Sawchuk*, 2010 ABQB 5, the courts took a more demanding approach, looking for something like a “causal” connection between the post-separation income increase and the contributions during the marriage by the recipient spouse. More recently, with greater and more consistent use of the SSAG there, the Alberta cases have been less demanding, and have become more like decisions in the rest of Canada. The looser test of connection is more consistent with the evolution of spousal support law in Canada since *Moge*, i.e. the recognition of a broad range of spousal support objectives and the rejection of any narrow “causal connection” test for entitlement.

The basis of entitlement has a significant impact upon the degree of sharing of increases, with compensatory claims more likely to result in sharing than non-compensatory claims, but not exclusively so. There can be sharing—partial, or even full—in non-compensatory cases too, especially after long marriages.

A quick word about method, before delving into the case law: the SSAG formulas can be used to establish the outer boundaries of support amounts. In every case, at least two calculations should be done: one for the initial income of the payor, and the other for the more recent, increased income of the payor. Examples of this are provided in the SSAG. It would also be wise for the parties to do calculations for a few intermediate payor incomes, between those extremes, as partial sharing is quite common in these cases.

The case law on post-separation income increases has evolved since the early days of the SSAG. In *Fisher v. Fisher*, 2008 ONCA 11, the Ontario Court of Appeal provided some limited sharing of the post-separation income increase, by taking a four-year average income for both spouses, including the year of separation when the husband’s income started to increase significantly. This partial sharing was not explained further, but it would appear to have reflected the length of the marriage (19 years), the immediacy of the increase (the year of separation) and the non-compensatory basis for support (a less compelling argument for sharing).

The earlier B.C. and Ontario cases took a less demanding view of the links between the marriage and the post-separation increase, especially in longer marriages. For example, in *Hartshorne*, 2009 BCSC 698 (upheld 2010 BCCA 327), the Court found “a clear temporal link between their marriage and this increase with no intervening change in Mr. Hartshorne’s career, or any other event, that could explain the increase”. At para 111, the court reviewed the case law and

identified what might qualify as “intervening changes”. In *Chapman v. Chapman*, [2009] O.J. No. 5994 (S.C.J.), after separation, the banker husband had changed from one big bank employer to another, with more incentive-based remuneration, but his full increased income was considered after a 23-year marriage and the husband’s long history in the banking business.

By contrast, the older Alberta cases demanded much more, something like a “causal connection” between the specific post-separation increase and the *contributions* of the recipient spouse during the marriage. For example, *Sawchuk v. Sawchuk*, 2010 ABQB 5, held that the recipient spouse “must show that he or she has contributed to the acquisition of the other spouse’s skills or credentials, thus contributing to the ability to earn the increased income”. No such specific contribution by the wife was found. In *Sawchuk*, it was not enough that the marriage lasted 24 years, that the support was compensatory, that the husband acquired his skills during the marriage, or that he continued to work as an electrician. He had changed employers and he was working longer hours. Although the court stated that the increase was not to be shared, the SSAG were not used and, in the end, the amount ordered was higher than the SSAG range for the separation date incomes, an amount that shared about 25 per cent of the increase. Older Alberta cases should be read with caution, as they did not use the SSAG and, as in *Sawchuk*, rejected sharing post-separation increases, only to settle on an amount that did involve some sharing of the increase, e.g. *Chalifoux v. Chalifoux*, 2008 ABCA 70.

An older case like *Sawchuk* continues to turn up in the more recent cases, notably in the Ontario decision in *Thompson v. Thompson*, 2013 ONSC 5500. In that decision, Justice Chappel set out, at para 103, thirteen principles which are frequently quoted in subsequent cases. The tenth principle, in sub-paragraph (i), relies entirely upon the too-demanding test in *Sawchuk*, when it says: “Assuming primary responsibility for child care and household duties, without any evidence of having sacrificed personal educational or career plans, will likely not be sufficient to ground an entitlement to benefit from post-separation income increases.” This statement does not reflect the law generally, and not even Alberta law any more. For some Alberta cases to the contrary, see *O’Grady v. O’Grady*, 2010 ABCA 109; *S.D.Z. v. T.W.Z.*, 2011 ABQB 496; *Mulick v. Mulick*, 2012 ABQB 592; and *Bujak v. Bujak*, 2012 ABQB 458. It should be noted that *Thompson* itself was a custodial payor and then hybrid custody case, where the husband’s support claim was non-compensatory and the payor wife’s income had increased only modestly.

The fourth principle in *Thompson*, in sub-paragraph (d), should be read carefully, when it states: “The recipient spouse may be permitted to share in post-separation increases in earnings if they can demonstrate that they made contributions that can be directly linked to the payor’s post-separation success.” It is clear that a “contribution that can be directly linked” to success will result in sharing, and thus the “may” earlier in the sentence might be better read as “will usually be permitted to share”. Such a “direct link” will ordinarily satisfy the test for sharing.

Further, the second principle in sub-paragraph (b) of *Thompson* should be treated with caution, in its suggestion that sharing “does not typically arise in cases involving non-compensatory claims”. That is correct, but should not be overstated. There can be strong non-compensatory claims where significant sharing is warranted, notably in long interdependent marriages (even without children) or in disability cases. On this, we take a more expansive view than those expressed in *Thompson*, in *Black v. Black*, 2015 NBCA 63, and in an article on the subject, Brian

Burke and Joanna Hunt, “Post-Separation Increases in the Payor’s Income as They Bear upon Spousal Support” (2015), 35 *Canadian Family Law Quarterly* 63.

Finally, the thirteenth principle in *Thompson*, in sub-paragraph (m), includes as a factor against sharing that “the recipient has not made reasonable steps towards achieving self-sufficiency”. The better way to deal with the self-sufficiency issue is to impute income to the recipient, in light of her or his skill, experience, etc. See “Self-sufficiency” below.

At a practical level, in what circumstances will a court order sharing, or not? These are complex cases, involving a mix of facts and legal factors, with a strong discretionary element to the final judgment. Below, we have tried to catalogue some of the facts or factors that push a court towards greater or lesser sharing, to offer some guidance. At the same time, it is important to recognize that these outcomes are rarely driven by just one factor.

When is full or substantial sharing more likely?

- ***With child support cases:*** in most of these cases, the full increase is likely to be shared given the strongly compensatory nature of the claims, subject to ability to pay. The child/children will of course share the full increase via child support, which has priority. These cases are so strong, or so obvious, that the issue is often not even identified. For examples where the issue was addressed, see *Hartshorne*, above; *Ludmer v. Ludmer*, 2013 ONSC 784 (upheld 2014 ONCA 827); *Remillard v. Remillard*, 2014 MBCA 101; *H.F. v. M.H.*, 2014 ONCJ 450; *Bujak v. Bujak*, 2012 ABQB 458; *A.A.M. v. R.P.K.*, 2010 ONSC 930; *S.D.Z. v. T.W.Z.*, 2012 ABQB 496; and *Judd v. Judd*, 2010 BCSC 1574 (same employment, promotion included).
- ***Without child support cases:*** full sharing is more likely when there is some combination of the following factors:
 - long traditional marriages, e.g. *Campbell v. Vaughan*, 2015 NBQB 110; *Anderson v. Sansalone*, 2015 BCSC 2; *Cork v. Cork*, 2014 ONSC 2488;
 - medium-length and longer marriages generally, e.g. *Farnum v. Farnum*, 2010 ONCJ 378 (17 years, both worked throughout, 2 adult children); and *Mulick v. Mulick*, 2012 ABQB 592.
 - strong compensatory claims based on the assumption of primary responsibility for child-rearing
 - strong non-compensatory claims, typically in longer marriages
 - where prior agreements countenance future increases with income, e.g. *O’Grady v. O’Grady*, 2010 ABCA 109.
 - support/cohabitation during education or training, e.g. *Pendleton v. Pendleton*, 2010 BCSC 1167 (10 years married, also two moves for his career, no kids).
 - payor continuing in same job or line of work after separation, e.g. *MacDonald v. Langley*, 2014 ONCJ 448.
 - claims that were previously constrained by limited ability to pay

- income increases shortly after separation, e.g. *H.F. v. M.H.*, 2014 ONCJ 450.

No sharing or limited sharing is more likely in these situations:

- ***Without child support* cases** involving:
 - solely non-compensatory claims based upon loss of the marital standard of living, e.g. *R.L. v. L.A.B.*, 2013 PESC 24 (payor’s income increased for inflation only)
 - short-to-medium marriages
 - significant changes in career/employment, e.g. *Reid v. Gillingham*, 2014 NBQB 79 (upheld 2015 NBCA 27)(although in this case we might have expected some limited sharing even on non-compensatory grounds after a long marriage); *Tscherner v. Farrell*, 2014 ONSC 976 (husband injured, retrained as radiation technologist, working long hours); *McDougall v. Alger*, 2013 BCSC 1925 (shift from accounting to business, only limited sharing, despite wife’s previous assistance with career); *Whitmore v. Whitmore*, 2012 BCSC 212; and *Patton-Casse v. Casse*, 2011 ONSC 4424 (upheld 2012 ONCA 709)(new venture)
 - more work or much harder work in foreign or remote locations, e.g. *Black v. Black*, 2015 NBCA 63 (8 year marriage, non-compensatory, construction business failed after separation, working in Nunavut); *L.A.H. v. B.D.H.*, 2014 BCPC 184; and *Coghill v. Michalko*, 2010 ABQB 59 (overtime, retention bonuses)
 - greater risk-taking, business acumen, e.g. *Frank v. Linn*, 2014 SKCA 87 (increase due to business reorganization, demanding test applied) and *Aelbers v Aelbers*, 2010 BCSC 1574
 - income increase long after separation.
- ***with child support* cases:**
 - custodial payor cases where the above factors are at work, e.g. *Thompson*, above (17 years, custodial payor for much of time, non-compensatory claim by husband, but same reasoning applied where shifted to hybrid custody).

(f) Post-separation income reduction of the recipient

This is an issue that has appeared in the case law more frequently, warranting a new section in this *Revised User’s Guide*. Should spousal support increase if the recipient experiences a decrease in income post-separation? Should the recipient’s current (reduced) income be used for the SSAG calculation or the higher income at separation or under the prior order? Most often the issue of a recipient’s decrease in income post-separation arises on variation or review, but it may also come up in an initial application.

This is the inverse issue to that of the payor’s increase in income in the preceding section, raising similar issues of entitlement. The test here is also a rough one of a “link” or “connection” to the marriage/relationship. Disability issues frequently complicate the analysis, as we shall see.

There are a number of cases where the recipient quits a job or becomes voluntarily under-employed after separation. In these cases, a court simply imputes the recipient's pre-separation income and then determines the SSAG range: *Wright v. Lavoie*, 2014 ONSC 6690 (wife loses job after separation due to her misconduct); *Hutchen v. Hutchen*, 2014 BCSC 729 (wife quits job, moves to U.S. for new partner, wife accepts imputing of previous income); and *McDougall v. Alger*, 2013 BCSC 1925 (wife quits job, unsuccessful business). Or a court can impute some intermediate amount, as in *Abernethy v. Peacock*, 2012 ONCJ 145 (upheld 2013 ONSC 2045)(wife's move to London ON a mistake, but within reason, minimum wage imputed, 13-year traditional marriage).

There is an archetypical fact situation where support can increase, or even be resurrected: where the recipient suffers a significant compensatory disadvantage from the roles adopted during the marriage, finds employment before or shortly after separation, and then loses her or his employment subsequently as a junior employee. The recipient's lack of seniority reflects her or his late arrival in the paid labour market. There are not many of these cases reported.

Where the recipient's post-separation job loss is involuntary, issues of the connection to the marriage can arise, requiring consideration of factors such as the basis of entitlement and the length of time that has passed since the separation; see *Rezel v. Rezel*, [2007] O.J. No. 1460 (S.C.J.) (initial application, 5 year marriage, no children, both spouses employed at time of separation, wife loses job 6 years after separation and applies for spousal support, no entitlement) and *Lawder v. Windsor*, 2013 ONSC 5948 (16-year marriage, no children, wife had become self-sufficient 16 years after separation and then lost job, no further entitlement, support terminated).

More often, the reason that the recipient suffers a big drop in income after separation is illness or disability. It is difficult to separate out the post-separation income decrease issue from the more dominant disability issues: see "Exceptions" above. One of the leading cases would be *Fyfe v. Jouppien*, 2011 ONSC 5462, a custodial payor case where the husband became ill after separation and was entitled to support, but the wife had no ability to pay. In that decision, Justice Chappel identified, at para 54, six helpful principles that can be applied to non-compensatory claims arising after separation. Central to this analysis are mutuality and interdependence during marriage and after separation, the interval of time to the post-separation disability or need, and the length of the relationship. Where a disability arises after separation, there will be arguments about entitlement and the balancing of these factors can lead to different outcomes: *M.E.K. v. M.K.K.*, 2014 BCSC 2037 (entitled); *Tscherner v. Farrell*, 2014 ONSC 976 (entitled, but court recognizes that some would disagree); or *Peters v. Peters*, 2015 ONSC 4006 (not entitled, but entitlement could well have been found on the facts).

The recipient's post-separation disability often leads to a finding of entitlement and an award of spousal support, but sometimes a lower amount than the SSAG formula range: *G.W.C. v. K.C.C.*, 2015 BCSC 1802 (19-year traditional marriage, wife working at separation, suffered accidents afterwards, non-compensatory support based on husband's income at separation 9 years earlier); *Tscherner v. Farrell*, 2014 ONSC 976 (19-year marriage, wife accident post-separation, amount below SSAG range, as her need unrelated to marriage); *Fuerst v. Fuerst*, 2014 ONSC 1506 (wife cancer surgery, income down from \$35,000 to \$22,256, low-end SSAG after 28-year cohabitation and marriage); and *Firth v. Firth*, 2012 BCSC 857 (wife's medical conditions,

“vestige of connection” remains, delayed claim, modest award, lump sum \$10,000). In *Soschin v. Tabatchnik*, 2013 ONSC 1707, after an 11-year relationship with no children, a lump sum of \$40,000 was ordered, despite a final settlement agreement, where the wife had experienced catastrophic mental illness after separation. In fixing the lump sum, Mackinnon J. considered various SSAG scenarios and calculations.

As with the post-separation income increase of the payor, you should prepare alternative SSAG calculations in this situation too. The outside boundaries of the debate will be determined by the initial income calculations on one end and the current incomes on the other.

(g) Delayed claims

Another sub-set of unusual cases has turned up recently, cases where the recipient makes an initial claim for spousal support long after separation. In some cases, the reason for the delayed claim is the recipient’s disability after separation, raising the difficult issues mentioned in the preceding section. In others, there are various reasons put forward for the delay, sometimes accepted, sometimes not. Claims for retroactive support after long delays are often rejected, at least in part, discussed further below under “Retroactive Spousal Support”. Here we deal with prospective support claims.

In an earlier case, *Van Rythoven v. Van Rythoven*, [2009] O.J. No. 3648 (upheld 2010 ONSC 5923 (Div.Ct.)), the court found the SSAG “of little use” in resolving a delayed claim, where the disabled wife was seeking support 13 years after her time-limited support had ended (in the end, the court did order support at the high end of the SSAG range using the spouses’ current incomes).

Delayed claims can raise issues of entitlement, especially if the delay is long enough: see *Howe v. Howe*, 2012 ONSC 2736 (24-year delay in claim after 13-year marriage, agreement for unequal division of property, other issues too, no entitlement).

If there is entitlement, the SSAG *are* of some use in delayed claims. But delayed claims do raise tricky income issues: what incomes should be used for the spouses after a long delay? Over time, incomes will change for both payor and recipient. If the delay is long and the claim is non-compensatory, then the separation date incomes may be appropriate. On the other hand, if the claim is compensatory, the current incomes may be a better guide. Again, both sets of calculations should be done, as well as some others to reflect spousal incomes as they changed over the period of the delay. Unfortunately, these income issues are often not addressed in the cases.

In *Quackenbush v. Quackenbush*, 2013 ONSC 7547, Justice Mackinnon did take the SSAG calculations into account, but ordered spousal support to the disabled wife of \$300 per month, about half the low end of the SSAG range. It was a 19-year marriage, but a 1990 separation and a 2001 filing. The extreme delay justified the modest amount, said the court. There was no information in the decision on the payor’s income at separation.

In another delay case involving a disabled recipient, *Dingle v. Dingle*, 2010 ONCJ 731, the court used the current incomes of the spouses, and fixed support at the high end of the SSAG range,

despite a 7 ½ year delay, where it had been a 9-year marriage and a lengthy ISO procedure. See also: *G.W.C. v. K.C.C.*, 2015 BCSC 1802 (9-year delay, separation date income used for payor, post-separation income reduction of recipient wife); and *Firth v. Firth*, 2012 BCSC 857.

Delayed claims may also raise difficult issues of future duration, depending upon the disposition of any retroactive support issues.

16 The Recipient's Remarriage or Repartnering (SSAG 14.7)

The remarriage or repartnering of the support recipient will most often arise as an issue in the context of a variation or review, but in some cases may also be an issue on an initial application.

If the recipient's remarriage or repartnering is the basis for an application for variation, the initial threshold of a **material change** in circumstances must be met. In some cases, it may be an issue whether the new relationship was "foreseen", i.e. considered or taken into account, in the previous order or agreement. However, as discussed above under "Variation and Review", some courts continue to misapply this test, as for example, in *Morigeau v. Moorey*, 2015 BCCA 160 where the Court found that the wife's repartnering was "foreseeable" and hence not a "material change" because she was "seeing" the new partner at the time of the previous order (but not cohabiting).

Under the current law the remarriage or repartnering of the support recipient does not mean the automatic termination of spousal support, but support is often reduced and sometimes even terminated. Much depends upon whether support is compensatory or non-compensatory, as well as the length of the first marriage, the age of the recipient, the duration and stability of the new relationship and the standard of living in the recipient's new household.

At the appellate level, several decisions of the B.C. Court of Appeal have dealt with this issue; see *Zacharias v. Zacharias*, 2015 BCCA 376 (29-year traditional marriage, continued entitlement on compensatory grounds, spousal support reduced by half but not terminated); *Morigeau v. Moorey*, above (order primarily compensatory so no material change), *Lee v. Lee*, 2014 BCCA 383 (20-year marriage, no children, husband claiming support, significant income disparity, husband repartnered with woman having income similar to that of wife, entitled only to short period of transitional support, one year). In *Zacharias* the Court of Appeal cautioned about the difficulties of clearly segregating the compensatory and non-compensatory elements of spousal support after a long marriage. The appeal court disapproved of the reasoning of the chambers judge who had determined that half of the original order was compensatory and the other half non-compensatory, with the result that he reduced the spousal support by half because of the wife's remarriage. The Court of Appeal nonetheless upheld the result but for different reasons—by testing the chambers judge's support order against the SSAG range if the wife's income were to include her new husband's income and finding that it was mid-range.

For recent trial level decisions that provide good discussions of the issue see *Rozen v. Rozen*, 2014 BCSC 3164 (23-year marriage; strong compensatory claim so re-partnering irrelevant, but old order and husband underpaid ss when compared to SSAG); *Hutchen v. Hutchen*, 2014 BCSC 729 (17-year marriage, compensatory claim not exhausted, wife's relationship very new, review in 2 years); *Landry v. Mallette*, 2014 ONSC 5111 (husband retires, *Boston* needs-based exception does not apply because wife's needs being met by income of new partner, new relationship more permanent at this point); *Cramer v. Cramer*, 2013 ONSC 4182 (husband

custody, waiver of spousal support in separation agreement set aside using *Miglin*, wife entitled to on-going spousal support on compensatory basis but reduced to \$2 because repartnered and no current need, wife's household higher standard of living than husband's, amount could be increased if new relationship ends); *Boland v. Boland*, 2012 ONCJ 102 (20-year marriage, down from high end to mid-range due to wife's cohabitation, strong compensatory claim, wife limited benefit from new relationship, careful decision, nice review of principles); and *Bockhold v. Bockhold*, 2010 BCSC 214 (continued entitlement to compensatory support despite wife's remarriage).

At the time of the drafting of the SSAG we concluded that the outcomes in these cases were not predictable enough to construct a formula. In *Colley v. Colley*, 2013 ONSC 5666, Quinn J. lamented this absence:

[74] However, it is unfortunate that the SSAGs do not contain any formula to reflect the remarriage or repartnering of the recipient spouse. (The cases on re-partnering are an unfulfilling read and are not of much assistance beyond the expression of general principles. I yearn for more specific guidance in this area and would gladly trade some flexibility for a measure of predictability.)

As case law in this area develops, it may be possible at some point in the future to revisit this issue of a post-repartnering formula.

In the meantime, even though the SSAG do not provide any formulaic adjustment for the recipient's remarriage or repartnering, this does not mean that the SSAG are irrelevant in such cases. In *Remillard v. Remillard*, 2014 MBCA 30, the Manitoba Court of Appeal ruled that the trial judge had erred in concluding that the SSAG were irrelevant because of the wife's remarriage. The Court stated at para 89 that "even where there is a re-partnering, the SSAG can still be a useful tool as a litmus test for the reasonableness of a support award". The B.C. Court of Appeal adopted a similar approach in *Zacharias*, above, stating:

[62] The spousal support guidelines are not directly applicable in this case, because it is a case of variation involving re-partnering. That said, they do provide some indication of amounts of support that are reasonable at particular income levels, and can be of indirect assistance in setting support amounts.

In cases where it is determined that the recipient's remarriage or repartnering requires some adjustment of spousal support, the SSAG ranges can still be a helpful starting point for the discretionary analysis.

- The most interesting of the older remarriage cases is *M.(K.A.) v. M.(P.K)*, 2008 BCSC 93, because Justice Barrow did try to construct a formula to guide a step-down of spousal support, by reducing support by 10 per cent a year until it ended 10 years later, this after a 21-year traditional marriage. A similar approach was recently adopted in *Bishop v. McKinney*, 2015 ONSC 5565 (provisional order, 20-year marriage, wife remarries 10 years after separation; spousal supported reduced by 20 per cent a year until it ends after 5 years).
- **Step-down orders** are one common solution in these cases, even if not formulaic: see *Colley*, above, (23-year marriage, wife new relationship 13 years after separation, step-down order going below SSAG but support not terminated); *Balazsy v. Balazsy*, [2009] O.J. No. 4113 (S.C.J.); and *C.L.M. v. R.A.M.*, 2008 BCSC 217.

- In some cases remarriage or repartnering may be dealt with by **location in the range** for amount, i.e. by moving the award down into lower part of the range; see *Boland*, above (down from high end to mid-range due to wife's cohabitation, strong compensatory claim, wife limited benefit from new relationship) and *Macey v. Macey*, 2013 ONSC 462 (16-year marriage, *wcs* formula, low end of range taking into account wife's repartnering, husband's mandatory pension contributions and s. 7 expenses).
- Another solution is to reduce spousal support **below the formula range** in these cases. This was the solution adopted by the Manitoba Court of Appeal in *Remillard*, above (11 year marriage, special needs child, amount reduced \$1000 below SSAG mid-range to take into account wife's remarriage). See also *Watkins v. Watkins*, 2013 BCSC 1983 (23 year traditional marriage, amount reduced by half, questionable finding that award largely non-compensatory); *Mayer v. Mayer*, 2013 ONSC 7099 (9-year relationship with children, *with child support* formula, shared custody, below low end of range and duration fixed at 4 years to take into account contributions of wife's new partner); *Driscoll v. Driscoll*, [2009] O.J. No. 5056 (S.C.J.); *Rakose v. Rakose*, 2008 BCSC 1165; and *Coolen v. Coolen*, 2005 NSSC 78.
- Yet another solution is to **take into account some part of the income of the new spouse or partner** as the recipient's income before the SSAG formulas are applied. This was the approach used by the B.C. Court of Appeal in *Zacharias*, above, to test the reasonableness of the chambers judge's reduction of spousal support by half—if the new husband's entire income were included the result was at the mid-range of the SSAG. See also *Politis v. Politis*, 2015 ONSC 5997 (interim, wife's need as established by her budget reduced by half of new partner's contribution to household, amount below low end of SSAG range).
- In some cases remarriage or repartnering will result in the **termination** of spousal support, either immediately or at some fixed point in the future; see *Lee*, above, *M.(K.A.) v. M.(P.K)*, above; *Bishop v. McKinney*, above; *Lalonde v. Lalonde*, 2014 ONSC 4925 (25-year marriage, termination after 10 years, wife's repartnering one factor); *A.M.F. v. D.F.*, 2013 BCPC 60 (discussion of impact of remarriage on duration under *with child support* formula); *Mayer*, above; and *Redpath v. Redpath*, 2008 BCSC 68, upheld on appeal 2009 BCCA 168 (new spouse higher income than payor).

17 Second Families, or Subsequent Children (SSAG 14.8)

A payor will often argue that a second or new family means that a downward adjustment should be made to spousal support. Whether any adjustment is warranted and, if so, in what circumstances, remains an unsettled issue in spousal support law. Given the state of the law, it is not surprising that no formulaic solution can be found in the Advisory Guidelines. We still have to wait for the law to develop further.

In the child support setting, issues of subsequent children are dealt with by way of undue hardship, a demanding and discretionary test found in s. 10 of the *Child Support Guidelines*, with no clear policy to resolve the conflict. The conflict becomes even more acute where the trade-off is between spousal support for a prior spouse and subsequent children. The policy of “first-family-first” remains powerful in the case law and is still the most common approach to the trade-off between families. The payor’s obligations to the children and spouse of the first marriage or relationship are seen to take priority over any subsequent obligations, but this is not an absolute principle

The most extensive appellate level discussion can be found in the Ontario Court of Appeal in *Fisher v. Fisher*, 2008 ONCA 11. On the facts Justice Lang adopted a “first-family-first” approach, but emphasized that these obligations “must be considered in context”. In *Fisher*, it was a bad context for the husband, perhaps the weakest possible second family claim imaginable: a speedy post-separation repartnering; two step-children rather than biological children; child support received from the father of those two children; a new wife who could requalify as a physiotherapist, but preferred to stay at home; and a large enough income that husband’s support obligation to his first wife would not impoverish his second family.

However, two interesting broader points were made by Justice Lang in *Fisher*: (i) despite the “first-family-first” principle, “inevitably new obligations to a second family may decrease a payor’s ability to pay support for a first family” (para 39); and (ii) where spouses separate, the payor remarries and produces another child, the context will be different and “the obligations to the second child will affect support for the first family because the payor has an equal obligation to both children” (para 40).

Two subsequent appellate level decisions, *B.V. v. P.V.*, 2012 ONCA 262 and *Shukalkin v. Shukalkin*, 2012 ABCA 274 have endorsed the “first-family-first” approach and upheld lower court decisions refusing to reduce spousal support because of new family obligations. As in *Fisher*, these were weak cases on the facts: both involved strong compensatory claims, payors with adequate means, and no evidence of a significant impact on the payor’s ability to support a new child. Many trial level decisions have also applied the “first-family-first” approach: see *Johal v. Johal*, 2014 ONSC 6; *Fiddler v. Fiddler*, 2014 ONSC 4068; *Bhandal v. Bhandal*, 2015 ONSC 1152; *Cotton v. Cotton*, 2015 ONSC 2703; *Kershaw v. Kershaw*, 2015 BCSC 925; and *Heath v. Heath*, 2012 SKQB 436.

At the trial level, *Kontogiannis v. Langridge*, 2009 BCSC 1545 offers one of the rare examples of a case where the broader considerations in *Fisher* came into play and where spousal support was reduced because of obligations to a new child (11-year common-law relationship, no compensatory claim, husband no longer required to support wife's 20-year-old child, husband repartnered, newborn child, spousal support reduced to \$600/mo, below low end of range \$1,034/mo, due to subsequent child). **The Advisory Guidelines can assist in assessing the amount of any downward departure in a “subsequent child” case, by adjusting the range for a notional amount of child support in the same fashion as one does for a “prior” child support obligation.** In *Kontogiannis*, this would have reduced the low end of the range to about \$770 per month, suggesting that the court may have intuitively “over-adjusted” for the subsequent child.

Although not warranting an explicit “reduction” in spousal support, **second family obligations may be a factor in choosing location in the range**, leading to an award at the lower end of the range: see *Gray v. Gray*, 2014 ONCA 659 (low end of range due to husband's second family and extension of duration beyond SSAG durational range on grounds of disability and inadequate compensation); and *Fiddler v. Fiddler*, 2014 ONSC 4068 (“first-family-first” but low end of range on interim). Second family obligations may also be a factor in determining duration and eventual termination of support: see *Beauchamp v. Beauchamp*, 2012 ONSC 344 (husband remarried and 5 new children, one factor justifying termination 29 years after 14-year marriage).

It should be kept in mind that **the repartnering of the payor may in some cases entail a financial benefit because of the sharing of expenses** and this may result in an increase in spousal support; see *Flieger v. Adams*, 2012 NBCA 39 (early retirement, *Boston* exception, also need to take into account economic impact of husband's new partner and sharing of expenses); and *Bell v. Bell*, 2013 BCSC 271 (court refuses to include income of husband's new spouse as part of his income, but does take into new spouse's income as contribution to joint household expenses and awards support well above SSAG range). Both cases involved long traditional marriages and older spouses, where the payor husband's income had been reduced by retirement or ill health.

18 Self-sufficiency and Termination

The issue of “self-sufficiency” comes up in almost every spousal support case, apart from cases where the recipient is disabled or aged. There is constant reference in the case law to s. 15.2(6)(d) of the *Divorce Act*, that fourth objective: “in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.”

Self-sufficiency is not “a SSAG issue”, strictly speaking. **Self-sufficiency requires an individualized determination** of the position and prospects of the recipient, an exercise not amenable to guidelines. It requires careful analysis of *this particular relationship, this payor and this recipient at this point in time*. The law of self-sufficiency is canvassed in Chapter 13 of the SSAG and there is little new to add here. We offer a few new cases, but only as examples, as the case law is substantial, with about 260 reported decisions a year mentioning self-sufficiency.

Self-sufficiency is only one of the four objectives stated in s. 15.2(6), said the Supreme Court of Canada in *Leskun v. Leskun*, 2006 SCC 25, and a qualified one at that. There is no absolute “duty” on a former spouse to become self-sufficient.

We should note here at the beginning that “self-sufficiency” can mean different things in different contexts. These **many different meanings of “self-sufficiency”** can confuse the analysis. Sometimes it is simply a conclusion about entitlement and outcome, i.e. spousal support should terminate and the recipient will have to be “self-sufficient”, relying only upon her or his own resources. Sometimes it is used as part of the compensatory analysis, i.e. the recipient has overcome her or his economic disadvantage and has returned to where the recipient would have been in the paid labour market. Sometimes it is used in a non-compensatory fashion, i.e. the recipient is now able to meet her or his own needs and achieve the appropriate standard of living. For an excellent review of self-sufficiency and its different meanings see *Fisher v. Fisher*, 2008 ONCA 11.

There are **two central issues within “self-sufficiency”** which we will examine in turn:

- first, whether the recipient has made or is making reasonable efforts to achieve self-sufficiency, and how to encourage such efforts; and
- second, whether the recipient has or has not achieved an income that makes her or him self-sufficient, such that spousal support can be terminated.

(a) Reasonable efforts to achieve self-sufficiency

Moge reminded us all of some important lessons about self-sufficiency: courts must be realistic about self-sufficiency; courts must not underestimate the labour market disadvantages faced by recipients returning to work; and courts should not be too quick to “deem” or “predict” that recipients will achieve self-sufficiency in future. Recent appellate decisions have demonstrated this flexible approach towards self-sufficiency: *Remillard v. Remillard*, 2014 MBCA 304 (trial judge setting 5 year time limit and imputing income after 11-year marriage with special needs child; overturned on appeal; trial judge over-emphasizing self-sufficiency, unrealistic to expect

wife to work or to achieve self-sufficiency in 5 years); *Reisman v. Reisman*, 2014 ONCA 109 (20-year marriage; insufficient efforts by wife, trial judge low end of range, income imputed, and 10 year time limit; time limit overturned on appeal, support indefinite, actually high end of range for first ten years, low end after); *Jendruck v. Jendruck*, 2014 BCCA 320 (34-year marriage, discussion of obligation to earn some income even if full self-sufficiency not attainable; half of minimum wage imputed to wife); and *K.D. v. N.D.*, 2011 BCCA 513 (impact of post-separation events on wife's self-sufficiency efforts).

In Chapter 13 of the SSAG, we canvassed the common methods of encouraging self-sufficiency. (And here we use the term “self-sufficiency” in the sense of the obligation on the recipient spouse to make reasonable efforts to contribute to his or her own support, either through earned income or use of assets.) The most common, and most flexible, method is imputing income to the recipient, with the other methods used less often, more tailored to specific situations.

- **Impute income to the recipient:** imputing income provides a fine-tuned response on self-sufficiency, with the minimum wage commonly imputed on a full-time or part-time basis to a recipient or a higher income if there is evidentiary basis. For an excellent early appeal case, see *MacEachern v. MacEachern*, 2006 BCCA 508 and, for recent decisions from the same court, see *MacCarthy v. MacCarthy*, 2015 BCCA 496 and *Jendruck v. Jendruck*, 2014 BCCA 320.
- **Order a higher amount in the range, or restructuring to go higher, for the recipient to obtain education or training:** this is the “short-term-pain-for-long-term-gain” theory, where the payor pays more now so that his or her spouse can become self-sufficient earlier and support may be reduced or end sooner. A recent example would be *Jones v. Hugo*, 2012 ONCJ 211.
- **Order a lower amount in the range:** a lower amount can provide an incentive to earn more, especially where a court has imputed a lower income to the recipient than might have been possible, as in *MacEachern* and *Reisman*, above.
- **Order a review, or another review:** self-sufficiency can be a “tightly circumscribed” issue suitable for review, as was explicitly noted in *Leskun v. Leskun*, above. Where there are serious questions about self-sufficiency efforts, a court can even make a “terminating review order”, fixing a time limit for spousal support subject to review and possible extension.
- **Reduce support by a step-down order:** some courts prefer step-down orders, with support reducing in increments at intervals over time, usually to reflect an expected ability of the recipient to increase her or his income in progress towards self-sufficiency, e.g. *Cipriano v. Hampton*, 2015 ONSC 349. However, where a recipient is actually earning a full-time minimum wage, for example, with no ability to earn more, a step-down order cannot create an “incentive” to earn more.
- **Fix an initial time limit under the *without child support* formula or the *custodial payor* formula:** time limits provide clear direction that support will end at a future date, which means the recipient must find other sources of income or face a lower standard of living.

There can be dangers in using multiple methods to encourage self-sufficiency, for example if you impute a substantial income and also go low in the range or order a step-down, both of which imply an ability to earn more income.

(b) Self-sufficiency and termination of support

Once the recipient has become “self-sufficient”, then spousal support can be terminated. Most often the issue of termination arises on variation or review. But in some cases under the *without child support* formula and the *custodial payor* formula initial orders can be time-limited, reflecting a judgement about self-sufficiency. The reported case law is full of applications to vary or review where the payor seeks the termination of spousal support on the basis that the recipient has become self-sufficient or would be self-sufficient if reasonable efforts had been made.

In some cases there may be an immediate termination; more often the court will decide “not yet”, but the amount of support may be reduced (as income is imputed to the recipient) or termination will be set at some future date by way of a time limit (perhaps combined with a step-down) to provide a defined period of time for the final transition to self-sufficiency. In some cases where spouses have made insufficient efforts towards self-sufficiency, support will be terminated on the basis that sufficient time has been allowed for self-sufficiency to be achieved: see *Aspe v. Aspe*, 2010 BCCA 508 and *Bosanac v. Bosanac*, 2014 ONSC 7467. Decisions about termination involve individualized, fact-based determinations of duration within the durational ranges set by the Advisory Guidelines, which do contemplate an eventual termination of support in many cases.

It is in the termination context that the many different meanings of self-sufficiency that we outlined above become most apparent. Conceptions of self-sufficiency are intertwined with ideas of entitlement. Termination means the end of entitlement. A finding of “self-sufficiency” often reflects a conclusion that there is no continuing entitlement—that disadvantage has been overcome and/or that there is no further “need”. The meanings of “self-sufficiency” can thus vary depending on whether the basis of entitlement is compensatory or non-compensatory. In some contexts “self-sufficiency” will be assessed against the marital standard of living; in other contexts the recipient will be found to be “self-sufficient” despite having a significantly lower income than the payor.

The most extensive discussion of these varying meanings of “self-sufficiency” can be found in the Ontario Court of Appeal’s decision in *Fisher v. Fisher*, 2008 ONCA 11 at paragraphs 52-55, which were recently summarized as follows in *Friesen-Stowe v. Stowe*, 2015 ONSC 554:

[25] Paraphrasing our Court of Appeal in *Fisher v. Fisher* (2008), 88 O.R. (3d) 241, self-sufficiency is a relative concept. It is not achieved simply because a former spouse can meet basic expenses. A determination of self-sufficiency requires consideration of the parties' present and potential income, their standard of living while married, the efficacy of any suggested steps to increase a party's means, the parties' likely post-separation circumstances including the impact of equalization and the duration of cohabitation. Self-sufficiency is often more attainable in short term marriages, particularly ones without children, where the lower income spouse has not become entrenched in a particular lifestyle, or compromised career aspirations. In such situations, the lower income spouse is expected to have the tools to become financially independent or to adjust his or her standard of living. In contrast, in most long term marriages, particularly in traditional long term ones, the parties' merger of economic lifestyles creates a joint standard of living that

the lower income spouse cannot hope to replicate, but upon which he or she has become dependent. In such circumstances, the spousal support analysis typically will not give priority to self-sufficiency because it is an objective that simply cannot be attained. (paras 52-55)

Given these multiple meanings of self-sufficiency, it is best to examine the case law on self-sufficiency and termination under the different formulas of the SSAG. Much of the material we address here is also covered in the separate sections of this *User's Guide* dealing with duration and time limits under each of the formulas and we refer you back there as well.

(i) *Time limits and termination under the “without child support” and “custodial payor” formulas*

The *without child support* formula generates time limits for marriages under 20 years in length, with the exception of those that fall under the “rule of 65”. Leaving aside “crossover” cases, which will be discussed below, the cases which engage the time limits will generally be short and medium-length marriages without children where the basis for entitlement is strictly non-compensatory, i.e. based on need and standard of living.

In some cases courts will impose a time limit in an initial order, most often in short marriages. In these cases the initial time limit sets a period of transition to self-sufficiency. “Self-sufficiency” in this context simply captures the idea that entitlement ends. At the end of a relatively short period of time the recipient is expected to be self-reliant and self-sufficient. The purpose of the period of transitional support is to allow the recipient to adjust to the loss of the marital standard of living; see *Fisher v. Fisher*, 2008 ONCA 11 (front-end loaded support for 7 years after 19-year marriage where basis of entitlement largely non-compensatory and wife had employment; transition to self-sufficiency in this context understood as period of time for wife to adjust her standard of living to her own income).

In cases involving medium-length marriages under the *without child support* formula, the initial or previous order is often “indefinite”, but as the recipient works toward self-sufficiency, time limits will be considered, e.g. see *Gammon v. Gammon*, [2008] O.J. No. 603 and [2008] O.J. No. 4252 (S.C.J.) (15-year relationship with no children, separation 2004, initial order no duration specified, variation application after husband retires, amount reduced using SSAG and termination date set 10 years after separation in 2014) and *Lawder v. Windsor*, 2013 ONSC 5948 (16-year relationship with no children, initial order indefinite, wife finds steady work and achieves self-sufficiency, termination after 16 years support). In these cases “self-sufficiency” carries a double meaning. Recipients are given time to improve their earning capacity and overcome disadvantage from the breakdown of the marriage and the loss of the marital standard of living. But the time limits reflect an understanding that at some point entitlement ends, and recipients will be found to be “self-sufficient” at the standard of living they can sustain on their own resources. As *Fisher* shows, entitlement to non-compensatory support does not involve a permanent guarantee of the marital standard of living in these medium-length marriage cases. See also *Rezansoff v. Rezansoff*, 2007 SKQB 32.

The *custodial payor* formula uses the same time limits as the *without child support* formula and similar approaches to self-sufficiency and termination apply: see *Aspe v. Aspe*, 2010 BCCA 508 (12-year marriage, 3 children, custodial payor, wife had received support for 16 years,

insufficient efforts toward self-sufficiency, 2 more years). However, some cases of short and medium length marriages under the *custodial payor* formula may involve compensatory claims as well as non-compensatory, which will shape the meaning of self-sufficiency and the duration of support.

(ii) *Time limits and termination under the “with child support” formula and in crossover cases*

Time limits under the *with child support* formula are “softer”, with initial orders “indefinite” and time limits coming later through variation or review, perhaps not until a “crossover” to the other formula. Under this formula concepts of “self-sufficiency” will be shaped by the strongly compensatory nature of many of the claims. For marriages shorter than 20 years, it is anticipated that at some point the economic disadvantages of the recipient will be fully compensated and, if there is no non-compensatory claim left, a time limit will be imposed and spousal support terminated. At that point the recipient will be seen as “self-sufficient” on the basis of his or her own income: see *Tadayon v. Mohtashami*, 2015 ONCA 777 (16-year marriage with two children, crossover, application to vary agreement, wife intentionally underemployed, 2 year time limit imposed, 16 years total; husband earning over \$350,000 and wife imputed at \$48,000).

As *Tadayon* shows, many cases under this formula or those that “cross-over” to the *without child support* formula involve significant compensatory claims and, as a result, duration ends up at the longer end of the durational ranges generated by this formula: see also *Bosanac v. Bosanac*, 2014 ONSC 7467 (14.5-year marriage, crossover, support had been paid for 17 years, wife making insufficient efforts, income imputed, two more years, step-down).

Many payor requests to time-limit or terminate support under this formula on the basis of self-sufficiency are denied because it is too soon: see *Bockhold v. Bockhold*, 2010 BCSC 214 (17-year marriage; review 10 years after separation, crossover, wife not making reasonable efforts, minimum wage imputed, support continued, unlikely wife would be self-sufficient in foreseeable future given 17 years out of labour force combined with disability) and *Remillard v. Remillard*, 2014 MBCA 304 (trial judge setting 5 year time limit and imputing income after 11-year marriage with special needs child; overturned on appeal; trial judge over-emphasizing self-sufficiency, unrealistic to expect wife to work and to achieve self-sufficiency in 5 years).

But in some cases, support has been terminated at a point well short of the longer end of the durational range because the wife was found to have become self-sufficient: see *Mills v. Elgin*, 2009 BCSC 1607 (15-year relationship with 3 children; spousal support terminated on variation application 6 years after separation when husband earning \$100,000 and wife earning \$46,000); *Price v. Price*, 2010 BCCA 452 (13-year marriage with 3 children, spousal support terminated on variation 8 years after separation, husband earning \$145,000 and wife earning \$54,000 as business manager); and *Holman v. Holman*, 2015 ONCA 552 (termination 11.5 years after 19-year marriage with three children; husband earning \$130,000 and wife \$60,000 plus her \$300,000 inheritance). In principle, these should be cases where recipients have suffered less disadvantage and leave the marriage with marketable skills and good employment prospects.

(iii) *Self-sufficiency and termination in long marriages or cases covered by the “rule of 65”*

For marriages of 20 years or longer or cases caught by the “rule of 65” the Advisory Guidelines provide that support will be “indefinite (duration not specified)”. But the Advisory Guidelines stress that even in these cases “indefinite” does not necessarily mean “permanent”. Support may not only be reduced to take into account the recipient’s efforts towards self-sufficiency, but also terminated if self-sufficiency is attained. On particular facts, entitlement may end, even in these cases: see *LeBlanc v Yeo* 2011 ONSC 2741 (termination 20 years after 20-year marriage where wife very young at separation and had made no efforts towards self-sufficiency); *Ludmer v. Ludmer* 2013 ONSC 784, upheld at 2014 ONCA 827 (10 to 11 years of support after 20-year marriage, wife worked at profession throughout marriage, earning \$84,000); *Friedl v. Friedl*, 2012 ONSC 6337 (10 years of support after 25-year marriage; wife worked as teacher throughout marriage, earning \$102,522, husband dentist earning \$277,000); and *Lalonde v. Lalonde*, 2014 ONSC 4925 (support terminated 10 years after 25-year marriage with 3 children, husband \$160,000, wife \$33,000 but repartnered).

However, following *Moge* and *Leskun*, courts recognize that in many of these long marriage cases (or cases involving older recipients) complete self-sufficiency will not be attainable. In the words of *Leskun*, there is no “duty” to become self-sufficient. The obligation on the recipient is to make reasonable efforts to contribute to his or her own support (or have income imputed), but then top-up support will often still be in order. In long marriage cases where there were children, support will be awarded on both compensatory and non-compensatory grounds. Often there will be significant economic disadvantage that will be difficult to overcome completely. As well, in these long marriage cases with a long history of interdependence, “need” (and hence self-sufficiency) will be measured against the marital standard of living (see *Fisher v. Fisher*, 2008 ONCA 11).

For a nice example of a long marriage case at the trial level where the court found that the wife was not yet self-sufficient, see *Brown v. Brown*, 2013 NBQB 369 (29-year marriage, variation application 11 years after separation, wife had found employment earning \$40,000, husband’s income \$80,000, support reduced but not terminated, extensive discussion of meaning of self-sufficiency). For cases at the appeal level, see *Reisman v. Reisman*, 2014 ONCA 109 (20-year marriage; insufficient efforts by wife, trial judge low end of range, income imputed, and ten year time limit; time limit overturned on appeal, support indefinite; actually high end of range for first ten years, low end after) and *Jendruck v. Jendruck*, 2014 BCCA 320 (34-year marriage, discussion of obligation to earn some income even if full self-sufficiency not attainable; half of minimum wage imputed to wife).

19 Retirement

Retirement cases are now more common, thanks to the “boomers” retiring. Retirement raises a host of tricky issues, usually at the stage of variation or review. In this edition of the User’s Guide, we decided to gather these retirement issues in one place, unlike previous editions. In the SSAG itself, retirement only merited a single paragraph under “Exceptions”. Obviously, this is a growth area for SSAG analysis.

First there are threshold issues. In a variation case, does retirement amount to a “material change” or not? Is retirement a ground of review? In most instances, retirement means a reduction in the payor’s income, but the “early retirement” cases ask whether income should be imputed to the retiring payor, either the former employment income or some other income post-retirement.

Once we get past those threshold issues, before applying the SSAG formulas, there may still be another issue, the “double-dipping” pension issue under *Boston v. Boston*, 2001 SCC 43. *Boston* is treated by the SSAG as a property-based “exception”, recognizing the interplay between the division of a pension as family property and the pension’s use as income for support purposes.

Finally, former spouses and partners will eventually have to draw down their capital for current needs, a challenge for income-based guidelines.

For an excellent earlier analysis of the retirement case law, see Marie Gordon, “Back to *Boston*: Spousal Support After Retirement” (2009), 28 *Canadian Family Law Quarterly* 125.

(a) Early retirement

When the payor retires “early” and seeks a reduction in spousal support, there will be close scrutiny of the decision to retire. When will a retirement be described as “early”? The courts are not always clear. For our purposes, an “early” retirement is either a retirement on a reduced pension or a retirement on a full or unreduced pension before 65 years of age, in the absence of health issues or other special circumstances. If the court sees the early retirement as “voluntary” and not necessary or reasonable, then it is likely that spousal support will not be changed. As Gordon notes, many of these cases involve longer marriages and significant compensatory claims: above at 151-166.

Where there is an application to vary, the court might take the view that the early retirement does not amount to a “material change” and leave spousal support unchanged: *Cossette v. Cossette*, 2015 ONSC 2678 (Div.Ct.); *Sangster v. Sangster*, 2014 NBCA 14; *Walts v. Walts*, 2013 ONSC 6787; *MacLanders v. MacLanders*, 2012 BCCA 482; *Jordan v. Jordan*, 2011 BCCA 518; *Marshall v. Marshall*, 2011 ONSC 5972; *Francis v. Logan*, 2008 BCSC 1028; *Gajdzik v. Gajdzik*, 2008 BCSC 160; *Moffatt v. Moffatt*, [2003] O.J. No. 3912 (S.C.J.) (income maintained for 5 years until normal retirement date). The Ontario Divisional Court also found no “material

change” in another early retirement case, but its authority is undermined by a number of errors in its reasons: *Hickey v. Princ*, 2015 ONSC 5596.

Early retirement will be accepted where justified by health issues: *LeMoine v. LeMoine*, [1997] N.B.J. No. 31 (C.A.). Or by economic uncertainty and lay-offs: *Beck v. Beckett*, 2011 ONCA 559. Retirement at a younger age from the Armed Forces has produced conflicting results: *Powell v. Levesque*, 2014 BCCA 33 (justified, support varied), but *Sangster v. Sangster*, 2014 NBCA 14 (not justified, no material change).

In other cases, the courts have found the retirement decision itself to be reasonable, but then a part-time employment income is imputed to the early retiree. In *Donovan v. Donovan*, 2000 MBCA 80, the imputed employment earnings plus his pension brought the retired police officer back to his pre-retirement income level. A similar result obtained in *Rothschild v. Sardelis*, 2015 ONSC 5572, where the payor’s employment income was imputed, but only for the one additional year he should have worked before retiring. When the early retiree’s income is imputed at or close to the pre-retirement level, the line between this “imputing” approach and the above “no material change” approach disappears in practical terms.

In *Stephen v. Stephen*, 2004 SKQB 386, a part-time income was imputed even where the RCMP officer retired early because of stress and various physical ailments, leaving the payor with an income in-between his pension and his former full-time income. To similar effect, see *LeBlanc v. LeBlanc*, 2013 NBCA 22 and *Beck v. Beckett*, 2011 ONCA 559. On imputing income in such cases, see Rollie Thompson, “Slackers, Shirkers and Career-Changers: Imputing Income for Under/Unemployment” (2006), 26 *Canadian Family Law Quarterly* 135, esp. 158-160.

(b) Does retirement constitute a basis for a change in spousal support?

Retirement may be included as an explicit ground of review in an order or agreement, especially where the retirement is likely to occur in the near future as a “genuine and material uncertainty”, to use the language of *Leskun*. In these cases, there is no need to prove a “material change”. Given the uncertain and confused treatment of “material change” by some courts, lawyers have frequently used a review clause to avoid that debate. For a court-ordered review at retirement, see *Vaughan v. Vaughan*, 2014 NBCA 6.

Alternatively, retirement may be explicitly included in the definition of material change in an order or agreement as is permitted by *L.M.P.*, e.g. *Slongo v. Slongo*, 2015 ONSC 2093.

If the order or agreement is silent on retirement, retirement is usually a “material change”, although some cases continue to apply the wrong test of “foreseeable” from *Miglin*, rather than the correct test, i.e. was retirement considered or taken into account in the previous order (see discussion above under “Variation and Review”). For a discussion of the appropriate test, see Rollie Thompson, “To Vary, To Review, Perchance to Change: Changing Spousal Support” (2012), 31 *Canadian Family Law Quarterly* 355. Some courts still confusingly find retirement is not a material change because it is “foreseeable”, e.g. *Hickey v. Princ*, 2015 ONSC 5596 (Div.Ct.).

(c) Previously-divided pensions: double-dipping, “Boston” and the SSAG

Years later, lawyers and judges still struggle with the practical implications of *Boston*. In the SSAG, *Boston* is recognized as an “exception”, where the use of the SSAG formulas must be modified in assessing the amount of spousal support.

Boston contained **three important “retirement” holdings**. First, where a pension has been divided as property and a court is addressing spousal support, “to avoid double recovery, the court should, where practicable, focus on that part of the payor’s income and assets that have not been part of the equalization or division of matrimonial assets, when the payee’s continuing need for support is shown” (para 64). Second, the recipient has an obligation to use her or his share of the divided property to generate income and to make a contribution to self-sufficiency and, if not, then income can be imputed to the recipient. The recipient in effect has to create her or his own “pension” (para 54). Third, the majority in *Boston* recognized that double recovery cannot always be avoided, noting that economic hardship and need may justify an exception to the general rule. For good reviews of *Boston*, see Gordon, above, as well as Carol Rogerson, “Developments in Family Law: The 2000-2001 Term” (2001), 15 *S.C.L.R.* (2d) 307 at 329-354.

Addressing *Boston* issues requires a step-by-step approach. The SSAG starting point in assessing spousal support is usually the full incomes of both parties. First, *Boston* creates an exception to this general approach. The payor thus bears the burden of convincing the court to use an income less than his or her Guidelines income under this exception. By way of actuarial or other evidence, the payor must prove to the court that some portion of his or her current pension income has already been divided as property. Second, if the payor does meet this initial burden of proving the “double-dipping” exception, then the burden shifts to the recipient to convince the court that the hardship or need exception applies under *Boston*.

Boston was decided in 2001, before the advent of the Spousal Support Advisory Guidelines. In *Boston* itself, the Supreme Court ultimately deferred, without much explanation, to the motions judge’s reduction of spousal support from \$3,433 to \$950 per month. The move towards income-based guidelines with the SSAG in 2005 led to courts trying to find a formulaic method to apply the “no double-dipping” approach from *Boston*.

Here’s what we had to say in the March 2010 User’s Guide about *Boston* and double-dipping:

The Advisory Guidelines do not change the law from *Boston v. Boston*, [2001] 2 S.C.R. 413, which governs “double-dipping” in respect of pension division and spousal support. That law can best be understood as relating to entitlement, entitlement to share in the already-divided portion of the payor’s pension income. Under the Advisory Guidelines, *Boston* is recognized as the basis of an “exception” (SSAG 12.6.3) ...

Boston articulates a general rule against “double-dipping”, i.e. that spousal support should not be paid out of pension income from a pension that has already been divided as part of the property division between the spouses. But *Boston* then goes on to recognize exceptions to the rule, exceptions which have been discussed at length in the appeal cases

of *Meiklejohn v. Meiklejohn*, [2001] O.J. No. 3911 (C.A.); *Chamberlain v. Chamberlain*, 2003 NBCA 34, 36 R.F.L. (5th) 241; and *Cymbalisky v. Cymbalisky*, 2003 MBCA 138, 44 R.F.L. (5th) 27. The most common exceptions to the rule against “double-dipping” are based upon hardship and need. *Boston* applies in cases where there has not been an *in specie* or statutory division of the pension, but instead the recipient spouse has received other assets or a lump sum in lieu of the pension. To apply the *Boston* rule against double-dipping, a court needs evidence of the prior valuation and division of the pension, to determine which portion of the payor’s current income has been divided. In some cases the divided portion will be quite small relative to the undivided portion of the payor’s pension income and *Boston* will not have any impact: *Leepart v Leepart*, 2009 CarswellSask 54, 2009 SKQB 47.

Where a pension is divided at source when it is paid out, as is the case under British Columbia or Nova Scotia legislation, then the problems of *Boston* can usually be avoided, e.g. *Trewern v. Trewern*, [2009] B.C.J. No. 343, 2009 BCSC 236. In these cases, both spouses simply include the pension payments in their income and the previously divided portions of the pension effectively cancel each other out.

The application of *Boston* within the context of the Advisory Guidelines raises complex issues. The *Boston* exception under the Advisory Guidelines recognizes that some adjustment may need to be made to the application of the SSAG to avoid “double-dipping”, but determining when and how that adjustment is to be made raises difficult issues, in part because of the “fuzziness” of *Boston* itself.

In two Ontario cases, courts have made a very formulaic adjustment to the Spousal Support Advisory Guidelines to avoid “double-dipping” that may not accurately reflect the *Boston* ruling. In each case, the court reduced the payor’s income by the amount of the divided pension and then calculated the *without child support* formula range on the reduced payor income: *Hurst v. Hurst*, [2008] O.J. No. 3800 (S.C.J.) and *Gammon v. Gammon*, [2008] O.J. No. 4252, 2008 CarswellOnt 6349 (S.C.J.). In both of these cases, the previously-divided pension was a small part of the payor’s total income, so the problems were not so obvious. As well, in *Hurst* this method of adjustment was dictated by the parties’ agreement. In other cases, however, this formulaic adjustment of income may be too mechanical and rigid, and may lead to inappropriate results. It not only risks by-passing the analysis of the exceptions that are built into *Boston*, but may also lead to arbitrary results under the Advisory Guidelines.

To take a simple example, assume the spouses have been married for 20 years and the wife has an income from non-pension sources of \$10,000 per year. The payor husband has retired with an annual income of \$50,000, of which \$30,000 represents the previously-divided pension. If the above *Boston* adjustment is used, then the SSAG range would be \$250-\$333/mo. Treating the payor as a person living on \$20,000 a year, which is the “floor” for spousal support, could lead to an award at the low end of the range, or even to the elimination of spousal support. This would ignore the payor’s base income of \$30,000 upon which he can live.

In some recent SSAG cases, courts have taken the full income of the payor into account in calculating the range, relying upon the hardship and need exceptions to the “double-dipping” rule: see *Scott v. Scott*, [2009] O.J. No. 5279 (S.C.J.) and *Jenkins v. Jenkins*, [2009] M.J. No. 271, 2009 MBQB 189.

Another aspect of the *Boston* “double-dipping” rule is the requirement that the recipient spouse convert into income the assets received and “traded off” against the payor’s pension in the property division.

In two recent cases, the payor spouse took early retirement and then argued that the recipient wife in her early ‘fifties should be required to access her share of the pension or have income imputed for SSAG purposes, but the courts rejected this “reverse *Boston*” argument: *Szczerbaniwicz v. Szczerbaniewicz*, [2010] B.C.J. No. 562, 2010 BCSC 421; and *Swales v. Swales*, [2010] A.J. No. 297, 2010 ABQB 187.

Despite these cautions about a simple formulaic attempt to apply *Boston*, the most common method for adjusting the SSAG formulas to reflect the rule against double-dipping continues to be to plug into the formula only the payor’s income generated by the undivided portion of the pension, plus any other non-pension income: *Elliston v. Elliston*, 2015 BCCA 274; *Murphy v. Murphy*, 2015 BCSC 408; *Pascall v. Mbolekwa*, 2015 ONSC 7444; *MacQuarrie v. MacQuarrie*, 2012 PECA 3; *Stephenson v. Stephenson*, 2012 ONSC 1867 (Div.Ct.); *Landry v. Mallette*, 2014 ONSC 5111. An amount is then determined within that lower SSAG range.

Here we have to go back to the basics of *Boston*, some of which are less than clear. We will try to disentangle the three main holdings in *Boston*, and relate them to the SSAG.

First, **the “no double dipping” approach.** In determining spousal support after a pension division, the focus should be upon the undivided portion of the pension received by the payor, said the Court. The complications mostly arise for defined benefit pensions. In most cases, the support recipient has received her or his share of the pension by way of a lump sum paid out of the pension plan and into a locked-in retirement investment, or in other offsetting non-pension assets or by an equalization payment. Eventually, the recipient will have to convert these funds into some form of recurring income for retirement, a “pension” of some kind in the words of *Boston*. It is a very difficult task to impute what the recipient’s income should be from the divided assets, or when that income should commence (as most recipients are younger than the payors). It is a simpler task, although not a “simple” task, to exclude the already-divided pension income from the payor’s income and then to determine spousal support using that reduced payor income and the actual recipient income. And, as the payor spouse has the necessary information available, the law places the burden upon the payor to prove what portion of the pension income has already been divided as property.

Second, **as a practical matter the recipient spouse will have to generate a “pension” from her or his assets eventually.** Remember that in *Boston* the wife had received the large matrimonial home and some other assets, and had increased her assets over time. There is much discussion of this issue in the Supreme Court majority’s reasons. But this can inadvertently lead to another kind of “double-counting”, revealed in *Boston* itself and discussed in Rogerson,

above. If the payor's income is reduced, taking out all the previously-divided portion of the pension, and then the recipient's income is *increased* to include investment income on any assets derived from the property division (or, even worse, to include some estimate of the annuity that could be generated from the assets), then there is **double-counting working against the recipient**. To be balanced as between the parties, you must take the divided pension income (or its equivalent in investment terms) *out of both sides or out of neither*. This point is not clearly stated in *Boston*.

Third, **the hardship or need exception within *Boston***. It is not always clear from *Boston* why this "exception" is limited to need, as has been the subsequent interpretation of the decision. There is much discussion in the case about "hardship" and "need", but little recognition of compensatory claims post-retirement. At first glance, a compensatory claim would seem to have as strong a claim, if not stronger, for an exception after retirement, especially after a long traditional marriage. Given the way that compensatory and non-compensatory factors are intertwined after a long marriage, it may not matter that the exception is treated as one for non-compensatory support. In the end, the Supreme Court did not apply the need exception on the facts of *Boston*. Further, the Court never defined its view of "need" in such cases.

The formulaic approach applied to avoid double-dipping often produces intuitively appealing outcomes on the facts. The ingredient common to all the cases cited above is that the bulk of the pension was NOT divided, leaving most of the pension income available as the payor's "income" for spousal support purposes. In these cases, the undivided pension income of the payor fell in the range of 62 per cent of the full pension income (*MacQuarrie, Stephenson*) to 76 per cent (*Pascall*) or 81 per cent (*Murphy*). In *Elliston*, the husband was still working while collecting his military pension, such that his income available for support was 74 to 81 per cent if his full pension income was considered (the husband's pre-cohabitation service portion seems to have been forgotten). The other common element in these cases is that all were lengthy relationships, ranging from 16 to 21 years, such that the *without child support* formula divided a substantial percentage of the remaining income by way of support to the recipient.

If the income from the undivided portion of the pension is below \$20,000, **it is important NOT to treat the payor as having an *actual* income below \$20,000 and NOT apply the SSAG provisions about the floor**: *Brisson v. Brisson*, 2012 BCCA 396. This important point was ignored in *Stephenson v. Stephenson*, 2012 ONSC 1867 (Div.Ct.) and *Rothschild v. Sardelis*, 2015 ONSC 5572.

Turning to the hardship/need exception, in the majority of post-*Boston* cases, **this "exception" has swallowed the "rule"**. For some recent cases, see: *Hickey v. Princ*, 2015 ONSC 5596 (Div. Ct.); *Senek v. Senek*, 2014 MBCA 67 (needs-based exception applied on appeal); and *Landry v. Mallette*, 2014 ONSC 5111 (needs-based exception does not apply because wife's needs being met by income of new partner). For two cases not quite as clear about the exception, see *Flieger v. Adams*, 2012 NBCA 39, affirming 2011 NBQB 237 and *Dishman v. Dishman*, 2010 ONSC 5239. To complicate matters further, many of the "*Boston* hardship/needs exception" cases involve disability or illness issues, as is true of *Hickey v. Princ* and *Landry v. Mallette*.

Where courts use the SSAG to apply this “exception” formulaically, the full pension income of the payor is usually used to calculate the SSAG range, without much explanation: e.g. *Smith v. Werstine*, 2014 ONSC 5319. The full pension income will generate a higher range, which moves the amount in the direction that is desired. Again, it is not obvious that this formulaic approach offers the appropriate outcome in every case, as was pointed out in *Slongo v. Slongo*, 2015 ONSC 2093. We would suggest that calculations be done for alternative incomes, as discussed under “Determining Income” above. First, do a calculation on the full pension income and, second, do another for only the undivided portion of the payor’s pension, before locating an amount under the “exception” within *Boston*. The hardship and need of the recipient will have an impact upon the location of that amount.

Further, it should be remembered that “need” in spousal support law should not be treated as bare or subsistence need, but as a relative concept, tied to the marital standard of living. The longer the marriage, with “merger over time”, the stronger the non-compensatory claim to the marital living standard. This view of need should inform the hardship/need exception under *Boston*.

In the end, under the SSAG, ***Boston* requires courts to exercise more flexibility**, both in applying the general “rule against double-dipping” and in applying the rather large need exception to that “rule”. The double-dipping “rule” of *Boston* is itself an exception from the ordinary calculation of spousal support. In many cases, the formulaic calculation (seen in cases like *Stephenson*) may produce a tolerable result, but only where the relationship is lengthy and the bulk of the pension is not divided (either because there has been a significant period of pension contribution post-separation or because of other sources of payor income). Similarly, the formulaic use of the payor’s full income under the hardship/need exception may generate reasonable outcomes over a range of cases, but not all.

(d) Termination of spousal support

Retirement is one of the reasons that spousal support ends. Retirement cases will usually involve the application of the *without child support* formula. In a long marriage, where one or both parties have pensions that are equalized, retirement may mean both have similar assets and incomes and thus no basis for continuing spousal support in most cases. If neither has an employment pension and both spouses look to their divided CPP/RRQ public pensions and OAS (Old Age Security) and sometimes GIS (Guaranteed Income Supplement), again their incomes will likely be similarly low, e.g. *Arbou v. Robichaud*, 2012 NBQB 16.

In between those two extremes, there will likely be continuing income disparities, although often reduced in size after retirement. In some of these cases, the payor’s actual post-retirement income will drop below the “floor” of \$20,000 gross per year: *Whittick v. Whittick*, 2014 BCSC 1597; *Heywood v. Heywood*, 2013 ONSC 58; and *A.M.R. v. B.E.R.*, 2005 PESCTD 62. These cases were discussed above under “Ceilings and Floors”. There are exceptions where support is continued after retirement and despite a payor income below the floor, but only in long marriages where the recipient has little or no income at all: *Pratt v. Pratt*, 2008 NBQB 94 (wife on social assistance, husband \$14,116/yr, support only \$300/mo.) and *M.(W.M.) v. M.(H.S.)*, 2007 BCSC 1629 (wife’s income zero, husband \$17,800/yr, support of \$600/mo, low SSAG).

In many cases, by the time the payor reaches retirement, the couple is nearing the end of the duration of spousal support anyway and the drop in payor income at retirement provides the ground for termination, e.g. *Powell v. Levesque*, 2014 BCCA 33 (8-year relationship, recipient disabled, payor retires on full pension from Armed Forces at 44 with health problems of her own, support paid 12 years, terminated). However, spousal support can continue past retirement, as *Boston* reminded us. For cases of long or late marriages (“rule of 65”), where support is indefinite, retirement and the payor’s drop in income will often create the grounds for termination or the imposition of a time limit.

(e) *Living off capital and income-based guidelines*

Eventually, as we get old enough, we all have to “live off our capital”, to drawn down our capital resources to pay for our current needs, especially those without pensions. RRSPs have to be converted into RRIFs (Registered Retirement Income Funds) or annuities. Businesses and farms have to be sold. Interest from investments becomes insufficient to fund daily needs. As *Leskun v. Leskun*, 2006 SCC 25 reminded us, capital is part of “means” and can be the basis for paying spousal support.

This poses a problem for income-based guidelines like the SSAG. In effect, there are two steps to the SSAG analysis at this advanced stage, assuming entitlement: first, what income should be imputed to the spouses as reasonable withdrawals from capital in addition to whatever current income the spouses may earn; and, second, the formula calculation for amount, under the *without child support* formula. Or, if older spouses have roughly similar assets after the division of property, a court can terminate spousal support and leave each spouse to manage their own capital to meet their needs, as occurred in *Puiiu v. Puiiu*, 2011 BCCA 480 (34-year traditional marriage, separated 2005, husband 66, wife 61, neither working).

20 Retroactive Spousal Support

(a) *General principles*

The law of retroactive spousal support was revised and restated in *Kerr v. Baranow*, 2011 SCC 10, after the release of the SSAG. The Supreme Court of Canada ruled that the retroactive child support analysis of *D.B.S. v. S.R.G.*, 2006 SCC 37, with some modifications, should be applied to the determination of retroactive spousal support. The *D.B.S.* factors are:

- (i) the reasonable excuse for any delay in seeking support by the recipient;
- (ii) the presence or absence of blameworthy conduct by the payor;
- (iii) the circumstances of the support recipient; and
- (iv) any hardship to the payor occasioned by a retroactive award.

As Cromwell J. said, “similar considerations” should apply to retroactive spousal support. Because spousal support is different, involving claims between adults, “concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support” (para 208). The date of effective notice plays an important role. The failure of the recipient to bring an interim application is not necessarily indicative of delay, ruled Justice Cromwell, provided the recipient commences proceedings promptly after separation and pursues those proceedings to trial with diligence (para 216). In *Kerr*, the wife’s spousal support was determined using the SSAG and the award was made retroactive by the trial judge to the commencement of the proceedings. That retroactive award had been reversed by the B.C. Court of Appeal, but the Supreme Court of Canada restored the trial judge’s decision.

Prior to *Kerr*, there had been an increase in retroactive spousal support claims, but they took a real jump after *Kerr*. The Spousal Support Advisory Guidelines also proved to be a factor in the increases, as the SSAG made it easier to quantify retroactive claims. It is now common for prospective support claims to be accompanied by retroactive claims. There are now more than one hundred retroactive spousal support decisions every year.

There has been some debate about the use of the word “retroactive” for these claims. The term itself is often used loosely, to mean simply any award of support for a period before the hearing or resolution of support issues, rather than its more technical meaning, i.e. an award of support for a period prior to the filing of an application or petition to the court. In this context, we will use the term here in its loose, colloquial sense.

There are two settings where “retroactive” spousal support is raised most frequently: (i) at the time of the initial order or agreement, where it may be necessary to revisit the amount and duration of interim spousal support; and (ii) on an application to vary spousal support, with a claim for retroactive support accompanying the claim for varied prospective support. Quite often, claims for retroactive spousal support are made at the same time as claims for retroactive child support, which further complicates the analysis.

(b) Use of the SSAG

In calculating retroactive spousal support, once retroactive entitlement has been found under the *Kerr* analysis, the SSAG are invaluable in working out the amount of support back to whatever commencement date is determined. Further, the retroactive calculation has the huge advantage of using actual, known incomes.

For some post-*Kerr* appellate decisions using the SSAG to calculate retroactive spousal support, see *Frank v. Linn*, 2014 SKCA 87; *Remillard v. Remillard*, 2014 MBCA 101; and *MacQuarrie v. MacQuarrie*, 2012 PECA 3.

(c) Tax issues

Retroactive spousal support is paid in the form of a lump sum. Ordinarily, lump sum spousal support is neither deductible to the payor, nor taxable in the hands of the recipient. This means that any calculation of periodic spousal support, or increased support, must be discounted or netted down to arrive at an after-tax amount.

For cases where this discounting is discussed, see *Hume v. Tomlinson*, 2015 ONSC 843; *Samoilova v Mahnic*, 2014 ABCA 65 (retroactive lump sum support 2004-08 calculated using mid-point SSAG, initially no adjustment for tax, subsequently discounted by 30%; appeal dismissed; the discount rate the judge chose was an average of the parties' respective marginal tax rates and was reasonable, based on the evidence); *Robinson v. Robinson*, 2012 BCCA 497; and *Patton-Casse v. Casse*, 2011 ONSC 6182 (supplementary reasons to 2011 ONSC 4424) (balance between respective tax positions of parties necessary). See also the discussion of discounting lump sums arrived at in restructuring prospective support under "Restructuring", above.

There is now an additional method of resolving these tax issues in the case of retroactive support. In 2013, the Tax Court ruled in *James v. Canada*, 2013 TCC 164, that a large lump sum retroactive top-up payment ordered by the B.C. Court of Appeal *could* be deducted by the husband. The Canada Revenue Agency has now accepted the policy underlying this decision, in its Income Tax Folio S1-F3-C3, which was updated effective March 5, 2015 (these Folios replace the older Interpretation Bulletins, in this case IT-530R). The payor is permitted to deduct the lump sum payment where it can be identified that:

- the lump sum payment represents amounts payable periodically that were due after the date of the order or written agreement that had fallen into arrears, or
- the lump sum amount is paid pursuant to a court order that establishes a clear obligation to pay retroactive periodic maintenance for a specified period prior to the date of the court order.

In these cases, the recipient who must pay tax can complete Form T1198 (Statement of Qualifying Retroactive Lump-Sum Payment) and CRA will adjust the recipient's relevant prior year taxes, to reduce the impact of the one-time payment. At the time of any settlement or order, it will be necessary to make an estimate of the tax implications for both parties, if this option is chosen. For a judicial reference to this tax method, see *Frank v. Linn*, 2014 SKCA 87.