S E R V I N G   C A N A D I A N S

The Spousal Support Advisory Guidelines: A New and Improved User's Guide to the Final Version

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The Spousal Support Advisory Guidelines: A New and Improved User's Guide to the Final Version

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TABLE OF CONTENTS

1 Introduction 1

2 Entitlement (FV Chapter 4) 3

(a) Entitlement as a threshold issue 3

(b) Entitlement and the application of the Guidelines formulas 5

(c) Entitlement issues on variation and review 6

3 Agreements (FV 5.2) 7

4 Application to Interim Orders (FV 5.3) 9

5 Income (FV Chapter 6) 11

(a) Differences in "income" for spousal support 11

(b) Can a payor have "two incomes"? 11

(c) Using alternative incomes, to estimate ranges 13

(d) Other assorted income issues 13

6 Use the Right Formula 15

7 The *Without Child Support* Formula (FV Chapter 7) 17

(a) The problem of amount in short marriages without children (FV 7.4.2) 18

(b) Short marriages: immigration sponsorship cases 19

(c) Duration under the *without child support* formula (FV, 7.5) 19

(d) Duration and the "rule of 65" (FV 7.5.3) 21

(e) Medium length marriages with children: crossover cases after child support ends 21

(f) Retirement cases under the *without child support* formula 22

8 The *With Child Support* Formula (FV Chapter 8)........ 25

(a) The *shared custody* formula (FV 8.6)........ 26

(b) Split custody (FV 8.7)........ 27

(c) Mixed custody........ 27

(d) Step-children: applying the formulas (FV 8.8)........ 27

(e) The *custodial payor* formula (FV 8.9)........ 28

(f) The *adult child* formula (FV 8.10)........ 29

(g) Issues of duration (FV 8.5)........ 29

9 Choosing Location Within the Range........ 31

10 Restructuring (FV Chapter 10)........ 33

(a) Restructuring under the *without child support* formula........ 34

(b) Restructuring under the *with child support* formula........ 35

(c) Restructuring under the *custodial payor* formula........ 35

11 Ceilings and Floors........ 37

(a) The floor, payor incomes below $20,000/$30,000 (FV 11.2, 11.4)........ 37

(b) Payor income above the $350,000 ceiling (FV 1.1, 11.3)........ 38

12 Exceptions (FV Chapter 12)........ 41

(a) Compelling financial circumstances at the interim stage (FV 12.1)........ 41

(b) Debt payments (FV 12.2)........ 41

(c) Prior support obligations (FV 12.3)........ 42

(d) Illness and disability (FV 12.4)........ 43

(e) The compensatory exception in short marriages without children (FV 12.5)........ 44

(f) Property division: reapportionment (B.C.) (FV 12.6.1)........ 45

(g) Property division: Boston (FV 12.6.3)........ 45

(h) Property division: high property awards (FV 12.6.2)........ 45

(i) Basic needs/hardship (FV 12.7)........ 46

(j) Non-taxable payor income (FV 12.8)........ 46

(k) Non-primary parent to fulfil parenting role (FV 12.9)........ 47

(l) Special needs of child (FV 12.10)........ 47

(m) Section 15.3: inadequate compensation (FV 12.11) 47
(n) Other grounds for departures, "new exceptions" 48

13 Variation and Review (FV Chapter 14) 49
(a) Application of the SSAG on variation and review (FV 14.1, 14.2) 49
(b) Application to pre-SSAG orders 50
(c) Crossovers between formulas when child support ends (FV 14.5) 50
(d) Post-separation income increase of the payor (FV 14.3) 51
(e) The recipient's remarriage or repartnering (FV 14.7) 52
(f) Second families, or subsequent children (FV 14.8) 53
(g) Self-sufficiency and termination (FV 13, 13.1, 13.7, 13.8) 53

14 Retroactive Support and the SSAG 55

1 INTRODUCTION

In this document we provide a New and Improved User's Guide to the Final Version of the Spousal Support Advisory Guidelines. The Final Version was released in July 2008.

This is a revised, updated and improved version of the User's Guide which was originally released by the authors in July 2008. This new version includes new case law up to the end of March 2010. We have also added some additional material to address new practice issues which have emerged since July 2008.

The Advisory Guidelines have proven to be a very helpful tool in spousal support determinations, but they are complex and they do not resolve all of the difficult issues of spousal support. We know that the Final Version itself remains a lengthy, somewhat daunting document, even in its revised, more user-friendly form. One of the challenges of the Advisory Guidelines is the problem of unsophisticated use. For too many, using the Guidelines means just plugging the income figures into the software program, getting the range and choosing the mid-point. There is more to the Advisory Guidelines than this, and using them in this way can lead to inappropriate results.

In this document we offer a brief and handy step by step guide to the use of the Advisory Guidelines in the interests of promoting more informed and sophisticated use. This guide:

- highlights the main practice issues at the different stages of a Guidelines analysis;
- reminds you of common mistakes and points that are often missed;
- notes additions and changes in the Final Version; and
- provides cross-references to leading case-law and to the relevant portions of the Final Version (FV) where an issue is more fully discussed.

Full summaries of the cases referred to can be found in the various updates which we have prepared and which are available at: http://www.law.utoronto.ca/faculty/rogerson/ssag.html

In addition to this User's Guide, we would like to make you aware of some other resources that also provide helpful advice on applying the Advisory Guidelines:

- J. B. Boyd, "Obtaining Reliable and Repeatable SSAG Calculations" (November 28, 2009) available at: http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/calc/index.html
- Lonny L. Balbi, "Steps to Using the Spousal Support Advisory Guidelines" (October, 2009)
    - "Without Child Support Formula", available at: http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/dir/wo-sans.html
    - "With Child Support Formula", available at: http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/dir/with-avec.html

2 ENTITLEMENT (FV CHAPTER 4)

An analysis of entitlement is an important first step before the application of the Guidelines. In practice this step is often ignored.

- **The Advisory Guidelines do not determine entitlement**. They deal with the amount and duration of support *after* entitlement has been established. Entitlement is a threshold issue that must be determined before the Guidelines will be applicable. This is still the case in the Final Version.

- As well, **even if entitlement is established, a determination of the basis of entitlement will inform the appropriate application of the Guidelines**.

Three appellate level decisions provide good models of this preliminary analysis of entitlement *Yemchuk v. Yemchuk*, [2005] B.C.J. No. 1748, 2005 B.C.C.A.; *Chutter v. Chutter*, [2008] B.C.J. No. 2398, 2008 BCCA.; and *Fisher v. Fisher*, [2008] O.J. No. 38, 2008 ONCA 11. For a trial level decision see *Purdue v. Purdue*, [2009] N.B.J. No. 382, 2009 NBQB 303.

(a) Entitlement as a threshold issue

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

- **Compensatory claims** are based either on the recipient's economic loss or disadvantage because of the marriage (typically a loss of earning capacity because of the roles assumed during the marriage) or on the recipient's conferral of an economic benefit on the payor without adequate compensation. Compensatory claims for lost earning capacity can be based not only on child-rearing during the marriage, but also on post-divorce child-rearing responsibilities. While compensatory claims in theory require an individualized assessment, in practice, in long marriages with children, the marital standard of living is used as a proxy measure of compensatory gains and losses. For good analyses of compensatory claims see *Yemchuk v. Yemchuk*, *supra*; *Chutter v. Chutter*, *supra*; *Mann v. Mann*, [2009] B.C.J. No. 826, 2009 BCCA 181; *Cassidy v. McNeil*, 2010 ONCA 218; and *Beneteau v. Young*, [2009] O.J. No. 3244 (S.C.J.).

- **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, as an aspect of economic hardship, 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. See *Fisher v Fisher,* [2008] O.J. No. 38, 2008 ONCA 11 and *Arnold v. Arnold*, [2009] B.C.J. No. 1999, 2009 BCSC for nice analyses of entitlement on non-compensatory grounds. Some lawyers and judges erroneously think that *any* long marriage gives rise to compensatory support, but *Fisher* makes clear that this is incorrect.

- 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.

- A large property award does not necessarily preclude entitlement on either compensatory or non-compensatory grounds: see *Chutter v. Chutter*, [2008] B.C.J. No. 2398, 2008 BCCA and *Bell v. Bell*, [2009] B.C.J. No. 1201, 2009 BCCA.

- 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] B.C.J. No. 2061, 2009 BCCA 448 (entitlement for wife earning $150,000 as doctor); *Mehlsen v. Mehlsen*, [2009] S.J. No. 403, 2009 SKQB 279 (entitlement for wife earning $70,000).

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.

- **As a general matter a *significant* income disparity will generate an entitlement to some support**. Even if there is not a compensatory claim, a significant income disparity will 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 **despite a significant income disparity** are relatively rare. Factors that have justified a finding of no entitlement despite income disparity include the following, which often overlap:

    - short marriage and limited period of financial interdependency: see *Beese v. Beese*, [2006] B.C.J. No. 2903, 2006 BCSC 1662; *McKee v. Priestlay*, [2007] B.C.J. No. 1297, 2007 BCSC 85; *Rezel v. Rezel,* [2007] O.J. No. 1460 (S.C.J.); *S.C.J. v. T.S.S.*, [2006] A.J. No. 1319, 2006 ABQB; *Serpa v. Yeuping*, 2007 CarswellBC 1795, 2007 BCSC 43; *Merko v. Merko*, 2008 CarsellOnt 6361, 2008 ONCJ 530.

    - despite the income disparity, the parties have similar standards of living, for example, because there are differences in the parties' asset positions (see *Elias v. Elias*, [2006] B.C.J. No. 146, 2006 BCSC and *Johnson v. Johnson*, [2006] B.C.J. No. 3308, 2006 BCSC 1932)or differences in their costs of living (see *Eastwood v. Eastwood*, 2006 CarswellNB 655, 2006 NBQB 413), or because the income difference is not that significant (see *Vlachias v. Vlachias*, [2009] B.C.J. No. 1241, 2009 BCSC 843).

- the recipient has not experienced any significant economic hardship or decline in standard of living from the marriage: see *Lamothe v. Lamothe* (2006) 2006 CarswellOnt 8150 (Ont. S.C.J.); *J.J.G. v. K.M.A.*, [2009] B/C/J. No. 1568, 2009 BCSC 1086; *Lam v. Chui*, [2008] B.C.J. No. 1648, 2008 BCSC 1177; *Beaudry v. Beaudry*, [2010] A.J. No. 170, 2010 ABQB 119.

- the income disparity is the result of post-separation events or choices, such as a job loss on the recipient's part (see *Rezel v. Rezel,* [2007] O.J. No. 1460 (S.C.J.) and *Barton v. Ophus*, 2009 BCSC 858, 2009 BCSC 858) or a post-separation increase in the payor's income (see *Eastwood v. Eastwood*, 2006 CarswellNB 655, 2006 NBQB 413; and *Fisher v. Fisher,* [2009] A.J. No. 1003, 2009 ABQB 85).

- property division has satisfied any compensatory or needs-based claims, most often in B.C. as a result of reapportionment on spousal support grounds (see *W.J. M. v. L.A.M.*, [2007] B.C.J. No. 1283, 2007 BCSC 842 and *C.J.D. v. J.H.E.*, [2009] B.C.J. No. 1716, 2009 BCSC 1168).

- the recipient abdicated financial responsibility during marriage or post-separation: *Lamothe v. Lamothe* (2006) 2006 CarswellOnt 8150; *S.C.J. v. T.S.S.*, [2006] A.J. No. 1319, 2006 ABQB 777; and *G.G.F. v. R.F.*, [2009] B.C.J. No. 215, 2009 BCPC 43.

- In cases with minor children under the *with child support* formula there may be no ability to pay spousal support after the payment of child support, which has priority. These cases are often treated as no entitlement cases. This may be incorrect. Inability to pay should not be confused with lack of entitlement. If there is entitlement but no current ability to pay, s. 15.3 of the *Divorce Act* allows for deferred payment of spousal support after the termination of child support. (See also the exception for inadequate compensation under the *with child support* formula, FV 12.11).

(b) Entitlement and the application of the Guidelines formulas

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 two ways:

  - to determine **location within the ranges**. For example, a strong compensatory claim may push toward the higher end of the range (see FV Ch. 9 for using the ranges)

  - 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 must be deferred because of the priority of child support (see FV Ch. 12 for exceptions).

(c) Entitlement issues on variation and review

Entitlement issues can also arise on review and variation.

- **Applications to terminate spousal suppor**t based upon the recipient's remarriage or employment or simply by the passage of time will often require an analysis of whether the initial basis for entitlement continues to exist. Although the issue on termination is often framed in terms of whether the recipient has become "self-sufficient", the issue can also be seen as one of whether there is a continuing entitlement to support.

  - self-sufficiency can be interpreted differently depending on the initial basis of entitlement. See *Rezansoff v. Rezansoff*, [2007] S.J. No. 37, 2007 SKQB 32 for an excellent discussion of this in the context of a case involving non-compensatory support.

  - the effect of remarriage can differ depending on whether the initial award was compensatory or non-compensatory. See *J.W.J.McC. v. T.E.R.*, [2007] B.C.J. No. 358, 2007 BCSC 252 and *Kelly v. Kelly*, [2007] B.C.J. No. 324, 2007 BCSC 227.

- **Requests for an increase in spousal support**, either because of a **decrease in the recipient's income** or **a post-separation increase in the payor's income** can also indirectly raise entitlement issues. In these cases you cannot simply apply the formulas to the new incomes (see FV Ch. 14, "Variation and Review".). There must be a threshold determination of whether the change in income is relevant to the support obligation and if so, to what extent. The analysis requires going back to the compensatory and non-compensatory bases for spousal support.

3 AGREEMENTS (FV 5.2)

The Advisory Guidelines, as informal, non-legislated guidelines, confer **no power to re-open or override *final* spousal support agreements**.

- A *final* agreement—i.e. one waiving or terminating spousal support or setting a fixed amount with no provision for review or variation—will preclude the application of the Advisory Guidelines unless the agreement can be it set aside or overridden under existing law.

- The **law** to be applied in setting aside or overriding an existing agreement includes the common law doctrine of **unconscionability**, the evolving law under the ***Miglin*** decision of the Supreme Court of Canada which deals with the weight to be given to a spousal support agreement under the *Divorce Act* and, where applicable on the facts, **provincial statutory provisions** with respect to domestic contracts and their effect on spousal support.

Two cases where a binding agreement was found to preclude the application of the Advisory Guidelines are *Woodall v. Woodall*, [2005] O.J. No. 3826, 2005 ONCJ 253 and *Carberry v. Stringer*, [2008][N.J. No. 6, 2008 NLUFC 1 (wife's attempt to set aside agreement unsuccessful).

The Advisory Guidelines **may** be helpful in three ways in cases involving agreements:

- **To determine spousal support where the agreement provides for a review or variation. It is important to determine whether or not the spousal support agreement is a *final* agreement**. If the agreement is not a final agreement, but one which provides for **review** or for **variation** upon a material change of circumstances, the Advisory Guidelines *may* be applicable to the determination of the amount and duration of spousal support on review or variation, see for example *Hurst v. Hurst*, [2008] O.J. No. 3800 (S.C.J.). (See FV Ch. 14 which deals with the application of the Guidelines on variation and review). For an interesting example of an agreement explicitly structured to provide for an annual recalculation of spousal support at the SSAG midpoint see *Swallow v. De Lara*, [2009] B.C.J. No. 1339; 2009 BCSC 911.

- **To provide a standard for assessing the fairness of an agreement**. Where the validity or enforceability an agreement is being challenged under existing law, courts *may* use the ranges under the Advisory Guidelines to assist in identifying unfair agreements, for example in **determining whether there is substantial compliance with the *Divorce Act* objectives under either stage 1 or 2 of a *Miglin* analysis**; see *Chepil v. Chepil*, [2006] B.C.J. No. 15, 2006 BCSC 15; *W.(C.L.) v. R.(S.U.)*, 2007 CarswellBC 666, 2007 BCSC 453; *Leaman v. Leaman,* [2008] N.J. No. 96, 2009 CarswellNfld 87, 2008 NLTD 54; *Poitras v. Garner*, [2009] B.C.J. No. 206, 2009 BCSC; and *Covriga v. Covriga,* [2009] O.J. No. 3359. However, the Guideline result must be balanced with respect for the parties' own assessment of a fair outcome as reflected in their agreement: see *Turpin v. Clarke*, [2009] B.C.J. No. 2328, 2009

BCCA 530 (*Miglin* stage 1 test of substantial compliance does not mean departure from SSAG will be reason to override agreement); *Vanderlans v. Vanderlans*, 2007 CarswellNfld 119, 2007 NLUFC 8; *Rapley v. Rapley*, [2006] B.C.J. No. 3213, 2006 BCSC 1854; and *Dobie v. Rautenberg*, [2008] B.C.J. No. 1199, 2008 BCSC 826.

- **To determine the amount or duration of support if a final agreement is set aside or overridden**. **If a spousal support agreement is set aside or overridden** on the basis of *Miglin* or other applicable legal doctrines, the Advisory Guidelines *may* be relied upon in determining the amount and duration of support. See *R.S.M. v. M.S.M.*, [2006] B.C.J. No. 1756, 2006 BCCA 362; *M. (K.A.) v. M. (P.K.)*, 2008 CarswellBC 135, 2008 BCSC 93 , *Gammon v. Gammon,* [2008] O.J. No. 603 (S.C.J.) and *Jenkins v. Jenkins*, [2009] M.J. No. 271, 2009 MBQB 189. However, consistent with *Miglin*, the parties' intentions, as reflected in their agreement, may still continue to influence the appropriate spousal support outcome and lead the courts to an outcome different from that suggested by the Advisory Guidelines. See *Santoro v. Santoro*, [2006] B.C.J. No. 453, 2006 BCSC 331 and *Turpin v. Clarke*, [2009] B.C.J. No. 2328, 2009 BCCA 530 (agreement set aside on *Miglin* stage 2; appropriate to adjust duration but not amount which was below SSAG).

4 APPLICATION TO INTERIM ORDERS (FV 5.3)

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 has been based upon a needs-and-means analysis, assessed through budgets, current and proposed expenses, etc. All of that can be avoided with guidelines formulas, apart from exceptional cases.

In *D.R.M. v. R.B.M.*, [2006] B.C.J. No. 3299, 2006 Carswell BC 3177 (S.C.), Justice Martinson set out in detail the rationale for the application of the Advisory Guidelines to interim spousal support orders. That view has been strongly restated on an appeal from a Master's order in *Kozek v. Kozek*, [2009] B.C.J. No. 2412, 2009 BCSC 1663. The usefulness of the Guidelines in the interim context when there is limited information was emphasized in *Langdon v. Langdon*, 2008 CarswellOnt 545 and in *Thompson v. Thompson*, [2010] S.J. No. 41, 2010 SKQB 322. How to deal with the problem of not being able to ascertain precise income figures at the interim stage is discussed below under "Income" ("using alternative incomes to estimate ranges").

- The Guidelines do recognize 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. To accommodate these short-term concerns, the Advisory Guidelines recognize an **exception for compelling financial circumstances in the interim period** (see FV, 12.1).

    - Most often this will involve mortgage or debt expenses, particularly under the *with child support* formula where the spouses are more often at the limits of their ability to pay after separation.

    - In some cases, particularly shorter marriages under the *without child support* formula where the amounts generated by the formula are relatively low, this 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 (FV, 12.7) and even the disability exception (FV, 12.4), but it is preferable to use the interim exception for short term, transitional needs.

- For a rare case where the Court explicitly discussed the interim exception, even though Melnick J. found the exception not applicable on the facts, see *Garritsen v. Garritsen*, [2009] B.C.J. No. 691, 2009 BCSC 124.

- To date, few courts have explicitly recognized this important exception, with most just departing from the formula amounts: *Van de Wint v. McArthur*, [2009] B.C.J. No. 1870, 2009 BCSC 1283 (S.C.); *Dort v. Dort*, [2009] N.S.J. No. 591, 2009 NSSC 372 (S.C.); *Thompson v. Kirk*, [2009] O.J. No. 3222 (S.C.J.); *Tenhoeve v. Tenhoeve*, [2009] O.J. No. 1423, 2009 CarswellOnt 1882 (S.C.J.); *Agioritis v. Agioritis*, [2008] S.J. No. 270, 2008 SKQB and *Savage v. Savage*, [2007] B.C.J. No. 2764, 2007 BCSC 1566 (unable to determine income at interim stage). See also *S.A. v. E.A.*, [2010] N.B.J. No. 46, 2010 NBQB 61 (disability exception mentioned, but interim circumstances the applicable exception).

- **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] O.J. No. 38, 2008 ONCA 11.

5 INCOME (FV 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 distinctive income issues that do arise under the Advisory Guidelines.

- 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 some other confusing name (FV 6.2). ODSP appears to fool lawyers and judges, who erroneously treat it as income for the recipient and thus understate the spousal support range: *Macropoulos v. Macropoulos*, [2008] O.J. No. 4534, 2008 CarswellOnt 6743 (S.C.J.). For examples of the correct treatment of ODSP, see *Fountain v. Fountain*, 2009 CarswellOnt 6342 (S.C.J.) or *Quattrochiocchi v. Quattrociocchi*, [2008] O.J. No. 5341, 2008 CarswellOnt 7977 (S.C.J.).

  The same mistake is made in some B.C. cases, where social assistance has wrongly been treated as income: *Xu v. Luo*, [2010] B.C.J. No. 282, 2010 BCSC 196; *Paheerding v. Palihati*, [2009] B.C.J. No. 830, 2009 BCSC 557; and *E.A.C. v. L.A.C.*, [2009] B.C.J. No. 283, 2009 BCPC 49.

- In the *with child support* formula, the Child Tax Benefit, the Universal Child Care Benefit, 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 (FV 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, as occurred in *Bigelow v. Downie*, [2009] B.C.J. No. 293, 2009 BCSC 205 and *Lane v. Creighton*, [2008] B.C.J. No. 2389, 2008 BCSC 1689.

- For spousal support payors, like child support payors, there are frequent claims from recipients for income to be "imputed" pursuant to s. 19 of the *Child Support Guidelines*, to raise the income of the payor. What is different about spousal support are the claims by payors for income to be "imputed" to the recipient, who has failed to make sufficient efforts to achieve self-sufficiency. These issues are considered below, in the discussion of "self-sufficiency" under "Variation and Review".

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

There are another set of difficult "income" issues, which 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 in FV 14.3 and below under "Variation and Review"). 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] B.C.J. No. 284, 2010 BCSC 216 (income for spousal support excluding income from increased teaching post-separation); and *Judd v. Judd*, [2010] B.C.J. No. 177, 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] B.C.J. No. 1482, 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 (FV 11.3). For an example, see *Dickson v. Dickson*, [2009] M.J. No. 374, 2009 CarswellMan 515, 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] M.J. No. 383, 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. 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 Cole, "The Dual Character of Employment Benefits" (2009), 28 Can.F.L.Q. 95.

(c) 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] B.C.J. No. 2197, 2009 CarswellBC 2963, 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 examples of this at the interim stage, see *Kozek v. Kozek*, [2009] B.C.J. No. 2544, 2009 BCSC 1745 (Master), affirmed on appeal [2009] B.C.J. No. 2412, 2009 BCSC 1663 (dividend income); and *Muzaffar v. Mohsin*, [2009] O.J. No. 4005 (S.C.J.) (husband self-employed).

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] B.C.J. No. 928, 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] B.C.J. No. 2497, 2009 BCSC 1712 (wife underemployed, ranges determined for incomes of $20,000, $40,000 and $50,000, terminating step-down order made).

(d) 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 Final Version 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" (FV 11).

- Non-taxable payor income: an exception was created in the Final Version where the payor derives all or most of his or her income from legitimately non-taxable sources, and the issue is covered here under "Exceptions" (FV 6.6 and 12.8).

- Post-separation income increase of the payor: this important and difficult issue is dealt with under "Variation and Review" (FV 14.3).

- Imputing income for self-sufficiency: dealt with below under "Variation and Review" (FV 13.2).

6 USE THE RIGHT FORMULA

The dividing line between the two formulas is the presence of a child support obligation, blindingly obvious you might think, as the formulas are entitled *without child support* and *with child support*. But in some cases a lawyer argues the wrong formula, usually in step-parent or custodial payor cases. In others, there is no child support paid. In still others, there may be an older child away at school. Over time, we would expect these "wrong formula" cases to disappear.

- Where the wrong formula is argued, one would hope that the opposing lawyer or the judge would pick up the error, but not always. In step-parent cases, the payor may argue for the *without child support* formula, to reduce spousal support, rather than face the correct and more generous step-parent version of the *with child support* formula: *Parsons v. Watt*, [2008] M.J. No. 444, 2008 MBQB 328 (4 year cohabitation, range rejected by judge); *Hofman v. Hofman*, [2008] O.J. No. 5335, 2008 CarswellOnt 8079 (husband argued *without child support* formula, again in step-parent case, wife argued correct *with child support* formula, but Court split the difference).

- The same thing can happen in *custodial payor* cases, but now the recipient spouse argues the wrong formula, the *without child support* formula, to increase support: *Cunningham v. Montgomery*, [2009] O.J. No. 1310, 2009 CarswellOnt 1733 (S.C.J.)(and top end of wrong range used, to make matters worse); *Gardner v. Gardner*, [2009] O.J. No. 340, 2009 CarswellOnt 387 (S.C.J.)(crude adjustment attempted for child support that wife should have paid).

- Where there is a child support liability, but none is actually paid, notably in *custodial payor* cases, sometimes the *without child support* formula is applied, incorrectly, as it fails to deduct notional child support for the custodial spouse and thus overstates the spousal support payable.

- In some cases, there are older children, attending university away from home, yet lawyers and courts apply the *without child support* formula, often without regard to the child support obligations still maintained by one or both parents: *Sarophim v. Sarophim*, [2010] B.C.J. No. 284, 2010 BCSC 216 (no amount stated, low end of range to adjust for university expenses, stated Court, but adult child formula range much lower).

The *with child support* formula is actually a family of different formulas, driven by custodial and child support arrangements. Within this "formula", there is further potential for using the "wrong" formula, discussed below.

7 THE *WITHOUT CHILD SUPPORT* FORMULA (FV 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. As well, in some cases the initial determination of support will initially take place under the *with child support* formula, but once the children are independent, there will be a cross-over to this formula (FV, 14.5) for a determination of amount.

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 long 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).

- 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).

- It is important to **identify the basis of entitlement** when using this formula, whether it is non-compensatory, compensatory or a mix (see discussion above and FV Ch. 4). 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.

- 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 the addition of an **equalization of net income "cap"** to the formula for amount in the Final Version. (FV, 7.4.1). This "cap" applies to long marriages of 25 years or more, where the range 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** (below and FV Ch. 10) and **exceptions** (below and FV Ch. 12); they will have their primary application to cases under the *without child support* formula.

(a) The problem of amount in short marriages without children (FV 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. Typically, the modest amounts generated by the formula are restructured into a lump sum or a very short transitional award. This result is consistent with current law and generally raises no problems; see *Conquergood v. Dalfort,* [2007] B.C.J. No. 2337, 2007 BCSC 1556. Identified exceptions will cover most of the short marriage cases where the formula result seems inappropriate.

- In some parts of the country (i.e. parts of Ontario) one does find more generous transitional awards, providing the marital standard of living for a significant period even after a short marriage. For a recent example see *Refcio v. Refcio*, [2009] O.J No. 1539 (Ont. Div. Ct.). This is a limited, regional pattern that is difficult to justify under the current principles that govern spousal support. See *Duggan v. Elsom*, [2007] O.J. No. 2168 for an Ontario case reflecting a shift in Ontario law to the result generated by the Guidelines.

- Remember the **compensatory exception** (FV 12.5) 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 non-compensatory and transitional in nature.

    - These compensatory claims may relate to an **economic loss**, for example moving and/or leaving a job to marry or to facilitate the other spouse's employment; see *Campbell v. Campbell,* [2008] O.J. No. 2168, *Ahn v. Ahn*, [2007] B.C.J. No. 1702, 2007 BCSC 1148 (B.C.S.C.); *Fuller v. Matthews*, [2007] B.C.J. No. 656, 2007 BCSC 444 (B.C.S.C.); *Beardsall v. Dubois,* [2009] O.J. No. 416 (S.C.J.).

    - Alternatively, they may involve a **restitutionary claim** (contribution to the other spouse's education or professional training and separation before the supporting spouse has a chance to enjoy any benefits of the enhanced earning capacity); see *Muchekeni v. Muchekeni*, [2008] N.W.T.J. No. 19, 2008 NWTSC 23.

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

- The **interim exception for compelling financial circumstances** (above and FV 12.1) may also be applicable in short marriage cases where the amounts generated by formula do not provide realistic amounts to deal with the immediate transitional needs resulting from the marriage breakdown.

- A **basic needs/hardship exception** has been added in the Final Version (FV 12.7) to recognize 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. *Simpson v. Grignon*, [2007] O.J. No. 1915, 2007 CarswellOnt 3095 (Ont.S.C.J.) offers an example of this exception. One area where this exception can apply is immigration sponsorship cases (see section (b) below).

(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 recipients' basic needs and preclude resort to social assistance. See *Gidey v. Abay*, [2007] O.J. No. 3693 (Ont.S.C.J.); and *T.M. v. M.A.G.*, [2006] B.C.J. No. 3479, 2006 BCPC 604 (B.C.P.C.).

Some of the identified exceptions may be relevant in these cases to justify a departure from the formula ranges:

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

However, it does appear that the sponsorship agreement may be an independent factor in short marriages, leading to either an amount or a duration outside the formula ranges.]

- 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); *Merko v. Merko*, 2008 CarswellOnt 6361, 2008 ONCJ 530 (very short marriage; economic lives never intertwined, each party no income).

- If the recipient spouse is not on social assistance, the sponsorship agreement may not be a relevant factor in determining whether there should be an exception to the formula's ranges; see *Tailor v. Tailor*, [2008] O.J. No. 3900 (S.C.J.) (but compensatory exception still operating to justify award higher than SSAG).

(c) Duration under the *without child support* formula (FV, 7.5)

- **Do not ignore duration**. We have found that the formula is widely used to determine amount, but duration is often ignored. This is a misapplication of the formula. Amount and duration are interrelated parts of the formula. Using one part of the formula without the other undermines its integrity and coherence. Extending duration beyond the formula ranges, for example, requires a corresponding adjustment of amount by means of **restructuring** (see below and FV Ch. 10)

- **The "problem" of time-limits**. This formula generates **time limits** when the relationship is under 20 years in length and the rule of 65 is not applicable. In some cases these time limits

may appear to be inconsistent with current law which disfavours the use of time limits except in short marriages. In dealing with time-limits under this formula, in particular as they apply to medium-length marriages, consider the following (FV,7.5.6):

- **The law on time-limits is in flux**. There is growing recognition 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] O.J. No. 38, 2008 ONCA 11 (7 years of support after 19 year marriage with no children; within global range after restructuring), *Malesh v. Malesh,* [2008] O.J. No. 2207, *Johnson v. Angeline*, [2008] O.J. No. 2327, 2008 CarswellOnt 3467, *Hance v. Carbone*, 2006 CarswellOnt 7063 (Ont.S.C.J.) and *Bishop v. Bishop*, [2005] N.S.J. No. 324, 2005 NSSC 220 (N.S.S.C.).

- If the concern is "crystal-ball gazing", remember that **time-limited orders are subject to variation** if there has been a material change in circumstances, see *Fisher v Fisher,* [2008] O.J. No. 38, 2008 ONCA 11 and *Fewer v. Fewer*, [2005] N.J. No. 303, 2005 NLTD 163 (N.L.S.C.)

- Time limits under this formula can 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 (duration not specified), a time limit may be imposed on a subsequent review or variation. See *Kerman v Kerman*, [2008] B.C.J No. 710, 2008 CarswellBC 793, 2008 BCSC 500; *Hanssens v. Hanssens*, [2008] B.C.J. No. 526, 2008 CarswellBC 591, 2008 BCSC 359; *Kelly v. Kelly*, [2007] B.C.J. No. 324, 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); and *Bourque v. Bourque*, [2008] N.B.J. No. 469, 2008 NBQB (16 year total duration set after 17 year marriage; termination date set on review application 9 years after separation.) Another good example under the *custodial payor* formula is *Puddifant v. Puddifant*, [2005] N.S.J. No. 558, 2005 NSSC 340 (S.C.F.D.).

- If it is contemplated that support will be on-going for an extended period in cases where the formula generates a time limit, it is necessary to use **restructuring** to adjust the amount downward (see below and FV Ch. 10).

- **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. Many have misinterpreted this term. **Indefinite support does not necessarily mean permanent support**. 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 as circumstances change over time. In the Final Version we have developed a new term—"**indefinite (duration not specified)**"—to convey that such orders or agreements are subject to variation and review and, through that process, even to time limits and termination. (FV 7.5.2). For a good discussion of the meaning of "indefinite" support see *Banziger v. Banziger*, [2010] B.C.J. No. 253, 2010 BCSC 179.

- When a support award is "indefinite", recipients are under an obligation to make **reasonable efforts toward 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 FV Ch.13 for a discussion of self-sufficiency.

(d) Duration and the "rule of 65" (FV 7.5.3)

When determining duration, even if the relationship is under 20 years in length, indefinite support may be appropriate under the "rule of 65". Duration under the *without child support* formula will be indefinite (duration not specified) even if the relationship is shorter than 20 years, if the length of the relationship in years plus the recipient's age at the date of separation equals or exceeds 65.

There is often no explicit reference to the "rule of 65 even when indefinite support is ordered (see *Busse v. Gadd*, [2009] S.J. No. 438, 2009 SKQB 99; *Robertson v. Williams*, [2009] O.J. No. 5451 (S.C.J.)). And in some cases a time limit is imposed when the "rule of 65" would have suggested indefinite support: see *Hayes v. Hanrieder*, [2009] O.J No. 421 (S.C.J.).

- **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).

- **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 (for cases that made this error see *Domirti v. Domirti*, 2009 BCSC 749 and *Smith v. Smith*, [2008] B.C.J. No. 530, 2008 BCSC 363).

(e) 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; for example see *Bockhold v. Bockhold*, [2010] B.C.J. No. 283, 2010 BCSC 214. It is important to be aware of this particular subset of cases.

- If the conditions for review or variation are satisfied, crossover cases may require a redetermination of amount; they may also involve a determination of duration, including payor requests for termination. **The *without child support* formula will be used to redetermine the amount of spousal support**. As for duration, given that the class of cases to which crossover applies will be medium to long marriages, duration will be driven by length of marriage and so will be the same under both formulas. (For a fuller discussion of review and variation cases involving crossovers see FV 14.5 and below under "Variation and Review".).

- These are cases with **strong compensatory claims**, as compared to medium-length 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 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 FV s. 12.11 and the discussion of cases below under "Exceptions".

(f) Retirement cases under the *without child support* formula

In one subset of cases under the *without child support* formula one or both parties may be retired. In some cases retirement has occurred prior to separation, while in other cases it will occur post-separation and may be the basis for an application for variation or review.

Spousal support cases involving retirement may raise complex issues of entitlement and income determination. As well, the circumstances of illness and low income that are often experienced by the elderly may require consideration of exceptions to the SSAG. For an excellent overview see Marie Gordon, "Back to Boston: Spousal Support After Retirement" (2009) 28 *C.F.L.Q.* 125.

Particular issues to watch out for in retirement cases include:

- **Material change:** If the payor's retirement and consequent drop in income is the basis for a variation application, there may be an issue of whether retirement constitutes a **material change in circumstances**. Thus **early retirement** may not count as a material change, unless for health reasons, and if it does, courts may impute additional income that can be earned; see *Francis v. Logan*, [2008] BCSC 1028 and *Gajdzik v. Gajdzik*, 2008 BCSC 160. As well, there may be issues of **whether the payor's retirement was "foreseen" or "foreseeable"** in the sense of having been taken into account when the initial/agreement was made; see *Templeton v. Templeton*, 2005 ABCA, 14 R.F.L. (6th) 161 and *Fishlock v. Fishlock* (2007), 46 R.F.L. (6th) 254 (Ont.S.C.J.).

- **Retirement incentives:** There may be an issue of whether any retirement incentive received in the year of retirement will be treated as income for that year. Typically the answer has been "no": see *Hurst v. Hurst*, [2008] O.J. No. 3800 (S.C.J.) and *Gammon v. Gammon*, 2008 CarswellOnt 6349 (S.C.J.).

- ***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" (FV 12.6.3), discussed below under "Exceptions".

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 *Cymbalisty v. Cymbalisty*, 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. Szcerbaniewicz*, [2010] B.C.J. No. 562, 2010 BCSC 421; and *Swales v. Swales*, [2010] A.J. No. 297, 2010 ABQB 187.

- **Drawing on capital**: After retirement, income alone may not be an accurate indicator of either recipients' or payors' economic circumstances and they may be required to draw on capital for support purposes. This may require some imputation of notional income to determine support under the Advisory Guidelines.
- **The "floor"**: Often incomes are low after retirement, so keep in mind that the SSAG floor is a payor income of $20,000, with the additional possibility of an exception to depart when the payor's income is between $20,000 - $30,000. See below under "Ceilings and Floors".
- **"Rule of 65"**: The "rule of 65" may be applicable to extend duration.
- **Disability exception**: The disability exception may be relevant in cases involving older spouses and shorter marriages. See below under "Exceptions".

8 THE *WITH CHILD SUPPORT* FORMULA (FV CHAPTER 8)

The *with child support* formula is actually a family of formulas, built around the custodial and child support arrangements for the children. The rationale for spousal support in these cases is primarily *compensatory*. The interaction of child and spousal support can often raise tricky legal issues: see Thompson, "The Chemistry of Support: The Interaction of Child and Spousal Support" (2006), 25 Can.F.L.Q. 251.

- Make sure that you are using **the right formula**, among the six listed in Chapter 8: the *basic* formula (recipient has primary care and received both child and spousal support); the *shared custody* formula; the *split custody* formula; *the step-parent* formula; the *custodial payor* formula; or the *adult child* formula.

  The "formula errors" centre upon the failure to use the *custodial payor* or the *adult child* formulas. Both of these are "hybrid" formulas, formulas that give priority to child support but are constructed upon the same concepts as the *without child support* formula. These two formulas emphasize length of marriage and "merger over time", and thus produce a different range of support outcomes than the other *with child support* formulas. For example, in *Grinyer v. Grinyer*, 2008 CarswellOnt 366 (Ont.S.C.J.), the Court used the basic formula, instead of the correct *custodial payor* formula.

- **Government benefits for children** are large and have a real impact upon the ranges for the amount of spousal support, as such benefits are treated as income for spousal support purposes. In all cases for younger children, under 6 years of age, identify whether the Universal Child Care Benefit (UCCB) is being claimed: see *Tremblay v. Tremblay*, [2008] O.J. No. 420 (Ont.S.C.J.); *P.G. v. N.L.*, [2008] O.J. No. 2045 (Ont.S.C.J.)(UCCB not included). In shared custody cases, identify whether the spouses are rotating the Child Tax Benefit, UCCB and child portion of GST Credit or whether just one spouse (usually the lower-income spouse) is receiving these benefits, as the courts did in *Samson v. Samson*, [2009] B.C.J. No. 952, 2009 BCSC 635 and *Bigelow v. Downie*, [2009] B.C.J. No. 293, 2009 BCSC 205.

- **Section 7 expenses** and the respective parental contributions have a critical impact upon the spousal support range generated by the formulas. By definition, any payment of s. 7 expenses will reduce the range, even for those expenses like child care that offer some tax break. Further, the correct parental contributions must also be input, especially if the contributions are fixed without respect to the payment of spousal support or fixed on some basis other than incomes after spousal support.

  Surprising, lawyers and courts often fail to take s. 7 expenses into account in calculating the spousal support range, with the payor incorrectly paying more spousal support as a result. For just a few cases where s. 7 expenses were not considered, (there are more), see *Morey v. Morey*, [2009] O.J. No. 1160, 2009 CarswellOnt 1502 (S.C.J.); *Boju v. Corr*, [2009] O.J. No. 443, 2009 CarswellOnt 563 (S.C.J.); *Southcott v. Southcott*, [2009] B.C.J. No. 1143, 2009 BCSC 760.

- Remember that permissible deductions for the calculation of individual net disposable income under the *with child support* formula do *not* include deductions for mandatory pension contributions, for the reasons explained (FV 8.3.1). The software does these net income calculations for you. That said, at lower income levels, the size of the mandatory pension contributions may be relevant to choosing the location of an amount within the range, to recognize limitations on the payor's ability to pay.

- As for **duration**, all initial orders or agreements under the basic, shared custody and split custody formulas will be **indefinite (duration not specified)**, with any time limits only imposed upon subsequent review or variation. The range for duration under these formulas will be determined by two tests: the length-of-marriage test and the age-of-children test, whichever is longer for the upper and lower ends of the range.

(a) The *shared custody* formula (FV 8.6)

At the time the *Draft Proposal* was released, we were still waiting for the Supreme Court's decision in *Contino v. Leonelli-Contino*, [2005] 3 S.C.R. 217, 19 R.F.L. (6th) 272. Further, in 2005, the Canada Revenue Agency quietly changed its policy on the payment of child-related benefits in shared custody cases. Finally, we did some tweaking to the formula ranges based upon feedback from lawyers dealing with shared custody cases.

- We said it on the last page, and we'll say it again: it is critical to determine which spouse is receiving which **child-related government benefits** in shared custody cases before calculating the range for spousal support. (FV 8.6.1)

- The premise underlying the shared custody range is that the spouses have adopted the straight set-off amount for child support, plus any section 7 expenses. As *Contino* makes clear, the straight set-off is not a default rule, but the starting point for the determination of child support in a s. 9 case. Child support can, and often will, end up above the set-off amount (and occasionally below it). In some of these non-set-off cases, the child support amount will have to be adjusted in determining spousal support (but not usually), depending upon the reason for the higher or lower than set-off child support. (FV 8.6.2)

- In the Final Version, the limits of the range for spousal support in shared custody cases has been adjusted, to ensure that a 50/50 split of the spouses' net disposable income or monthly cash flow is always included in the formula range. Many shared custody parents, and some judges, have used this equal net income split as a means of maintaining similar standards of living in each parent's household, an approach also consistent with *Contino*: see e.g. *Swallow v. De Lara*, [2006] B.C.J. No. 2060, 2006 BCSC 1366 (Master); *Fell v. Fell*, [2007] O.J. No. 1011 (Ont.S.C.J.); *Nordio v. Nordio*, [2007] B.C.J. No. 1710, 2007 BCSC 1164; *J.W. v. M.H.W.*, [2007] B.C.J. No. 1597, 2007 BCSC 1075. This outcome is usually within the shared custody formula range, but in some cases the formula range has to be extended at the upper or lower end to include it. The software does this automatically. (FV 8.6.3)

  These Final Version adjustments to the *shared custody* formula were unfortunately not considered by the B.C. Court of Appeal in *Mann v. Mann*, [2009] B.C.J. No. 829, 2009

BCCA 181. The Court of Appeal instead tried to construct its own "hybrid" formula for shared custody, a formula that contains serious flaws and should NOT be used. For a more detailed discussion of *Mann*, see Rogerson and Thompson, "Complex Issues Bring Us Back to Basics: The SSAG Year in Review in B.C." (2009), 28 Can.F.L.Q. 263 at 272-80. There are a surprising number of shared custody cases that involve large disparities in income after separation, discussed by Rogerson and Thompson in the same article, at 315-17.

(b) Split custody (FV 8.7)

For whatever reason, errors seem to occur with some frequency in split custody cases, cases where each parent has primary care of at least one child.

- 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 cases that failed to make this adjustment, see *Paheerding v. Palihati*, [2009] B.C.J. No. 830, 2009 BCSC 557 or *Santos v. Santos*, [2008] O.J. No. 5110, 2008 CarswellOnt 7607 (S.C.J.).

(c) Mixed custody

These are complex cases, with children in one family subject to a mix of custody regimes, e.g. one child in the primary care of one parent and another in shared custody, or split custody of two children with a third sharing time between homes. The software will solve any problems of "notional child support" in these mixed custody cases. Each of these "mixed custody" cases will include at least one child in shared custody, which permits discretion in child support determination, which can in turn complicate determining the range for spousal support, as described above for shared custody cases.

(d) Step-children: applying the formulas (FV 8.8)

There was no specific mention of step-children in the Draft Proposal, nor of the appropriate formula to apply in such cases. In the vast majority of cases, the *with child support* formula will apply with no difficulty. But some courts apply a very low threshold for step-parent status, especially in British Columbia. There were concerns that the basic formula might generate spousal support obligations that were too substantial in these shorter-marriage cases, especially on duration. The creation of a range for duration under this formula alleviated these concerns, as the lower end of the range can be used in appropriate short-marriage cases.

- As we noted above ("Use the Right Formula"), some lawyers and judges may incorrectly use the *without child support* formula in these cases. There is a specific version of the *with child support* formula that applies in step-parent cases.

- 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 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, as occurred in *Atkins v. Burgess*, [2010] O.J. No. 275, 2010 ONSC 557 (low end of range chosen for other reasons, so still in lower half of range); *Hansen v. Roy*, [2009] O.J. No. 282, 2009 CarswellOnt 302 (high end of range chosen). For an example of the correct application of this *step-parent* formula, see *Collins v. Collins*, [2008] N.J. No. 296, 2008 NLUFC 31.

- Where the marriage is a short one, a court will adjust under this formula, not by lowering the amount, but by imposing a time limit: *Collins v. Collins*, above.

(e) The *custodial payor* formula (FV 8.9)

Where the payor of spousal support also has primary care of the children, a different, hybrid formula is applied, first deducting grossed-up amounts of child support from each spouse's gross income and then applying the *without child support* formula. Most of these cases involve older children and longer marriages, where the husband is the higher-income payor and the parent with primary care. In many of these cases, there are disability issues facing the recipient wife. A small number involve shorter marriages, which raise some of the short marriage exceptions identified above under the *without child support* formula.

As noted above ("Use the Right Formula"), the *custodial payor* formula is often missed, with one or both parties incorrectly using the *without child support* formula.

In *Cassidy v. McNeil*, [2010] O.J. No. 1158, 2010 ONCA 218, Justice Lang provided an excellent analysis and application of the *custodial payor* formula, in reducing the amount of spousal support to the wife on appeal and also removing a time limit, substituting an indefinite order after a 23-year marriage. It is now the leading case on the *custodial payor* formula.

There are a number of practical issues to be flagged here:

- It is important to be clear whether the recipient of spousal support is or is not paying child support for the children in the higher-income payor's primary care. In a significant number of these cases, the parties agree that no child support will be paid, or the higher-income spouse does not make a claim for child support. **If no child support is paid**, then there should be an adjustment, with no grossed-up deduction of child support from the recipient's gross income. Absent this adjustment, the formula range for spousal support will be too high.

- In some *custodial payor* cases, the recipient spouse and non-primary parent will continue to play an important role in the child's care and upbringing after the separation. In cases where the marriage is short and the child is younger, the *custodial payor* formula may not generate enough spousal support for the recipient to continue to perform that role: see *Mumford v. Mumford*, [2008] N.S.J. No. 138, 2008 NSSC 82. Under the **non-primary parent to fulfil parenting role exception** under this formula, it is possible to make an exception, for both duration and amount. Even if the parent suffers from some kind of disability, this exception is driven by the spouse's parental role and it should be considered **first**, before the illness or disability exception. (FV 12.9)

- In many of these cases, there will be **disability issues** for the recipient, as that will explain her or his inability to assume primary care of the children. Disability can obviously affect the income of the recipient and the recipient's ability to become self-sufficient. Disability can also affect location of an amount and duration within the ranges under the *custodial payor* formula: *Puddifant v. Puddifant*, [2005] N.S.J. No. 558, 2005 NSSC 340. Finally, there is the **illness or disability exception** under the Advisory Guidelines and it can occur under the *custodial payor* formula in shorter marriage cases. The disability exception will sometimes mean a longer duration than the upper end of the range under this formula, and in some cases even an amount above the upper end of the range.

(f) The *adult child* formula (FV 8.10)

The *adult child* formula is another hybrid formula, added subsequent to the Draft Proposal, to address the situation where the child support for an adult child is fixed under s. 3(2)(b) of the *Child Support Guidelines*. Usually, these are cases where the child has gone away to college or university, or makes a sizeable contribution to his or her own education or has other non-parental resources to defray education expenses. Child support will be determined on the budget method, and will invariably be lower than the table amount.

For some reason, the *adult child* formula seems to be the "forgotten formula" among the *with child support* formulas, often overlooked. Lawyers and courts will either apply the *without child support* formula or attempt to apply the basic *with child support* formula, neither of which responds adequately to the issues raised in these cases.

- 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) of the *Child Support Guidelines*. If there is another child of the marriage whose support is determined using a table amount, then this formula *does not* apply.

- When deducting child support in this hybrid formula, the child support amount must be *grossed up*, as this is a gross income formula. If child support is not grossed up, then the spousal support range will be too high, as was the case in *Buchanan v. Goldberg*, 2010 CarswellOnt 74, 2010 ONSC 268.

(g) Issues of duration (FV 8.5)

All initial orders under the *with child support* formula should be "indefinite (duration not specified)", given the strongly compensatory basis for spousal support in these cases. The only exception is the *custodial payor* formula, and even there a number of the cases involved longer marriages and non-custodial spouses who once did a disproportionate share of the child rearing. The durational limits under the *with child support* formula are described in the Final Version as "softer" or more flexible, and take effect largely through the process of variation and review.

Since the release of the Final Version, there has been a disconcerting pattern of *initial* time limits in *with child support* cases, and often very short time limits. There has been a tendency for courts to under-estimate the compensatory loss, i.e. the depth of the economic disadvantage, that flows

from one spouse assuming a disproportionate share of the child rearing during the marriage and after separation. In a review of British Columbia cases, we found a serious problem of inappropriate use of time limits under this formula for marriages of varying lengths: Rogerson and Thompson, "Complex Issues Bring Us Back to Basics: The SSAG Year in Review in B.C." (2009), 28 Can.F.L.Q. 263 at 311-15. The problems were most severe for medium-length marriages in the range of 5 to 14 years. Similar problems with too-short time limits have appeared in the Ontario case law: Thompson, "Following *Fisher*: Ontario Spousal Support Trends 2008-09" (2009), 28 Can.F.L.Q. 241 at 251-53. In Ontario, there was a tendency in shorter marriages to impose initial time limits around the length of the marriage, which gives too much emphasis to the length of the marriage and too little to the age of the children and the obligations of the custodial spouse.

One of our concerns in revising this formula in the Final Version to add a range for duration was that some lawyers and courts might too readily opt for the lower end of the range, without a sufficient recognition of the compensatory basis for support under the *with child support* formula. Four basic points about duration need reiteration:

- The initial order under this formula should be "indefinite (duration not specified)". Any time limits should only be applied through the process of variation and review.

- The *with child support* formula is fundamentally compensatory, which means that most time limits should fall towards the higher end of the range, not the lower end.

- In shorter marriages, the basis for compensation is not just the *past* disadvantage flowing from the spouse's disproportionate assumption of child-rearing responsibilities (relatively short), but primarily the continuing disadvantages that flow from the spouse's *ongoing and future* responsibilities for child-rearing.

- In shorter marriages with younger children, then, the length of the marriage is a very poor indicator of the depth of the recipient spouse's disadvantage.

For an excellent analysis of duration under the *with child support* formula, see *Dabrowska v. Bragagnolo*, [2008] O.J. No. 3155, 2008 CarswellOnt 4763, 2008 ONCJ 360.

9 CHOOSING LOCATION WITHIN THE RANGE

Determining the ranges for amount and duration under the Spousal Support Advisory Guidelines is the beginning of the real analysis by lawyers 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, 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 reasons.

Our latest reviews of Ontario and British Columbia trial decisions do suggest a tendency to "default" to the mid-range amount of spousal support, an approach which should be avoided. On duration, there is less of a tendency to default to the middle of the range, and more explanation for the outcome.

The Final Version details a series of factors that should be considered in determining location within the ranges, for both amount and duration, worth listing here:

- Strength of any compensatory claim
- Recipient's needs
- Age, number, needs and standard of living of children
- Needs and ability to pay or payor
- Work incentives for payor
- Property division and debts
- Self-sufficiency incentives

There are some good examples in the cases of careful explanation by the court for location within the range. One of the best appeal court examples would be the recent custodial payor case in the Ontario Court of Appeal: *Cassidy v. McNeil*, [2010] O.J. No. 1158, 2010 ONCA 218 (low end appropriate where payor husband continues as custodial parent, wife's income relatively high, no time limit). For two good trial court explanations: *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); or *Cecutti v. Cecutti*, [2009] O.J. No. 580 (S.C.J.)(many factors, lower end).

The basis for the entitlement is sometimes, although not often enough, considered explicitly as a factor affecting location: *Ross v. Ross*, [2010] B.C.J. No. 65, 2010 BCSC 52 (wife maintained qualifications during marriage, able to find full-time work, weaker compensatory claim); *Barry v. Barry*, [2009] N.J. No. 70, 2009 NLUFC 13 (weaker compensatory claim, stronger non-compensatory claim, below mid-range).

Some courts have properly acknowledged the inter-relationship of duration and amount: *Cassidy v. McNeil*, [2010] O.J. No. 1158, 2010 ONCA 218 (trial amount above range, no explanation, not restructuring, time limit not appropriate, low end for amount); *Willi v. Chapple*, [2009] O.J. No. 3752 (S.C.J.) (low duration, low income estimate for payor, upper end of range for amount).

In British Columbia, there is one factor under "property division" that is regularly considered in determining amount, namely whether reapportionment of property has occurred on the spousal

support grounds of s. 65(1)(e) and (f) in the *Family Relations Act*. This reapportionment usually has not proved large enough to warrant an exception (FV 12.6.1), but it has often been a factor justifying an amount lower in the range than would otherwise have been chosen.

In some cases, courts have pointed to a specific factor that influenced location within the range:

- High access costs: *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] B.C.J. No. 1956, 2009 BCSC 1328 (wifes 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).

- Work incentives: *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] N.B.J. No. 138, 2009 NBQB 134 (lower than mid-range); *Lalonde v. Lalonde*, [2008] O.J. No. 4507, 2008 CarswellOnt 6710 (S.C.J.)(significant overtime included in payor's income, low end).

- Low estimate for payor's income: *Willi v. Chapple*, [2009] O.J. No. 3752 (upper end of range for amount).

- High medical costs: *S.J.M. v. J.L.M.*, [2010] B.C.J. No. 178, 2010 BCSC 154 (wife's extra medical, drug and dental costs after divorce, upper end of range).

Along with the exceptions, this is an area of Advisory Guidelines analysis that has too often been ignored or downplayed up to this point. A more sophisticated approach to the Advisory Guidelines requires careful attention to choosing and justifying the location of an amount and duration within the ranges.

10 RESTRUCTURING (FV CHAPTER 10)

Restructuring is an important part of the 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 in terms of the formulas 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; see *Fisher v Fisher,* [2008] O.J. No. 38, 2008 ONCA 11 and *McCulloch v. Bawtinheimer*, [2006] A.J. No. 361 (Q.B.).

- to **extend duration** beyond the formulas' ranges by lowering the monthly amount; and

- to formulate a **lump sum** payment by combining amount and duration.

The **calculations** involved in restructuring can be done with varying degrees of sophistication:

- When formulating a lump sum it is important to take into account the different tax treatment of lump sum and periodic awards. This is often ignored. It is an error just to convert the periodic payments under the Advisory Guidelines into a lump sum. These periodic payments are assumed to be deductible. The total of periodic payments must be discounted to reflect the non-deductible, non-taxable nature of the lump sum. Cases that do offer careful examples of restructuring to calculate a lump sum include *Smith v. Smith*, [2006] B.C.J. No. 2920, 2006 BCSC 1655 ; *Martin v. Martin*, [2007] O.J. No. 467 (S.C.J.); *Roach v. Dutra,* [2009] B.C.J. No. 353, 2009 BCSC; *Fountain v. Fountain*, 2009 CarswellOnt 6342 (S.C.J.); and *Vanos v. Vanos*, [2009] O.J. No. 4217 (S.C.J.) (court averages lump sum present values for husband and wife).

- More sophisticated calculations may take into account the time-value of money or the various future contingencies that could affect the value of awards over time. For examples see *Raymond v. Raymond,* [2009] O.J. No. 5294 (S.C.J.) (although the amount of the discount seems a little steep) and *Durakovic v. Durakovic*, [2008] O.J. No. 3537. However, discounting for present value may not be necessary when the duration is short; see *Arnold v. Arnold,* [2009] B.C.J. No. 1999, 2009 BCSC 1384.

- Computer software programs may assist in some of the calculations required by restructuring. Even with software programs, there will be a certain amount of guess-work involved in restructuring. But this is already familiar to family law lawyers who frequently make trade-offs between amount and duration in settlement negotiations and spousal support agreements.

When should you think about restructuring?

In practice, restructuring has often been ignored. Here we try to flag the different kinds of fact situations, under each formula, where restructuring should be considered as an option.

(a) Restructuring under the *without child support* formula

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. More specifically, think about restructuring in the following cases:

- short and short/medium length marriages where the amount generated by the formula seems low in comparison to current awards, which typically attempt 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 by shortening duration. For good examples see *Fisher v Fisher,* [2008] O.J. No. 38, 2008 ONCA 11 and *McCulloch v. Bawtinheimer*, [2006] A.J. No. 361 (Q.B.). In short marriages, a lump sum may be appropriate to facilitate a clean break; see *Arnold v. Arnold,* [2009] B.C.J. No. 1999, 2009 BCSC 1384.

- long-term disability after a medium-length marriage. 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] B.C.J. No. 282, 2010 BCSC 214 (duration extended to indefinite rather than termination after 17 years, amount below low end of SSAG range but also income over the ceiling.)

- longer marriages where the formula generates a time limit but current practice dictates indefinite support, e.g. marriages between 15 years and 20 years in length. These may include cases initially involving dependent children which have "crossed over" to this 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; for examples see *Domirti v. Domirti*, 2009 BCSC 749 (although no explicit reference to restructuring) and *Bockhold v. Bockhold*, [2010] B.C.J. No. 282, 2010 BCSC 214 (disability as well as inability to become self-sufficient justifying extension of duration beyond 17 years.).

(b) Restructuring under the *with child support* formula

For the most part, restructuring has less relevance for marriages with dependent children. The indefinite nature of awards under this formula and the absence of firm time limits make restructuring a more uncertain enterprise. As well, in cases of three or more children the payor's ability to pay will be limited, thus often precluding the possibility of front-end loading or a lump sum. However, the addition of a lower end to the durational range under this formula in the Final Version does create more 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] B.C.J. No. 1283, 2009 BCSC 865). Many of these will be shorter marriage cases. In some cases a lump sum may be desired because of concerns about non-payment of spousal support; see *Venco v. Lie*, [2009] B.C.J. No. 1240, 2009 BCSC 831 (modest monthly amount of support combined with history of non-payment).

- For front-end loading to occur, the following cases would be prime 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 (see *Venco v. Lie*, *supra*, and *Abuzokkar v. Farag*, [2009] O.J. No. 2915 (S.C.J.))

- To convert periodic payments to a lump sum, obviously there will have to be assets or resources available to the payor to make the lump sum payment.

(c) 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*. See *Martin v. Martin*, [2007] O.J. No. 467.

11 CEILINGS AND FLOORS

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 (FV 11.2, 11.4)

In the Final Version, the "floor" of $20,000 is maintained, 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. For payor incomes between $20,000 and $30,000, there are ability to pay and work incentive concerns that may justify going below the formula ranges. There was general consensus since the Draft Proposal that these floor amounts were reasonable.

- In the leading case **below the floor**, the P.E.I. Supreme Court did not order spousal support where the payor wife made $18,557, even though the disabled husband made even less at $13,525: *A.M.R. v. B.E.R.*, [2005] P.E.I.J. No. 83, 2005 PESCTD 62. In most cases, however, courts have not made reference to the floor: *Moores v. Moores*, 2009 CarswellNfld 334, 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 CarswellAlta 628, 2008 ABQB 271 (taxi driver earning $17,918/yr., child support paid).

- In cases of very long marriages, under the *without child support* formula, courts will find **an exception below the floor** where the wife's income is zero, as in *M.(W.M.) v. M.(H.S.)*, 2007 CarswellBC 2667, 2007 BCSC 1629; and *Pratt v. Pratt*, [2008] N.B.J. No. 85, 2008 NBQB 94 (but the wife was on social assistance and support was only $300/mo.).

- In those cases where the payors made **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": *Gustafson v. Gustafson*, [2010] M.J. No. 12, 2010 MBQB 10; *Kajorinne v. Kajorinne*, [2008] O.J. No. 2789, 2008 CarswellOnt 4229 (S.C.J.); *Serpa v. Yueping*, [2007] B.C.J. No. 1733, 2007 CarswellBC 1795, 2007 BCSC 1181 (no entitlement); *Maitland v. Maitland*, [2005] O.J. No. 2252 (Ont.S.C.J.); *Snowden v. Snowden*, [2006] B.C.J. No. 1187 (B.C.S.C.).

- 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".

(b) Payor income above the $350,000 ceiling (FV 1.1, 11.3)

There aren't that many of these cases, but they are over-represented in the decided cases, partly because of the high stakes involved, 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 in recent years: Rogerson and Thompson, "Complex Issues Bring Us Back to Basics: The SSAG Year in Review in B.C." (2009), 28 Can.F.L.Q. 263 at 283-86.

- The ceiling is **not an absolute or hard "cap"**, as spousal support can and usually does increase for payor incomes above $350,000: *Smith v. Smith*, [2008] B.C.J. No. 1068, 2008 BCCA 245 and *Denofrio v. Denofrio*, [2009] O.J. No. 3295, 2009 CarswellOnt 4601 (S.C.J.).

- 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. For cases where the formulas appear to be used automatically, see *E.(Y.J.) v. R.(Y.N.)*, 2007 CarswellBC 782, 2007 BCSC 509; or *Teja v. Dhanda*, [2007] B.C.J. No. 1853, 2007 BCSC 1247. For a more individualized case-specific use of the formula, see *J.K.S. v. H.G.S.*, [2006] B.C.J. No. 2051, 2006 BCSC 1356. In its most careful high-income decision, the B.C. Court of Appeal considered the formula ranges and the different approaches to these "above-ceiling" cases: *Loesch v. Walji*, [2008] B.C.J. No. 897, 2008 BCCA 214. In four other decisions, the Court offered less guidance: *Bell v. Bell*, [2009] B.C.J. No. 1201, 2009 BCCA 280; *James v. James*, [2009] B.C.J. No. 1151, 2009 BCCA 261; *Teja v. Dhanda*, [2009] B.C.J. No. 928, 2009 BCCA 198; and *Smith v. Smith*, [2008] B.C.J. No. 1068, 2008 BCCA 245.

- Above the ceiling, spousal support cases require **an individualized, fact-specific analysis**. In most cases, the formula ranges are calculated, as part of the individualized decision-making process, e.g. *C.L.M. v. R.A.M.*, [2008] B.C.J. No. 608, 2008 BCSC 217; *O.(S.) v. O.(C.S.)*, 2008 CarswellBC 444, 2008 BCSC 283; or *Milton v. Milton*, [2008] N.B.J. No. 467, 2008 NBCA 87, affirming [2007] N.B.J. No. 414, 2007 NBQB 363, Where the husband's income was "far beyond" the ceiling ($1.6 million), an entirely discretionary approach was adopted by the B.C. Court of Appeal in *Loesch v. Walji*, [2008] B.C.J. No. 897, 2008 BCCA 214. See also *Dobbin v. Dobbin*, [2009] N.J. No. 52, 2009 NLUFC 11 ($1.5 million) and *Dyck v. Dyck*, [2009] M.J. No. 139, 2009 MBQB 112 ($3 million).

- Where the payor's income is close to the ceiling, the formula ranges will often be used to determine the amount of spousal support, e.g. *Hosseini v. Kazemi*, [2009] B.C.J. No. 743, 2009 BCSC 502 (income $351,649) or *Abelson v. Mitra*, [2008] B.C.J. No. 1672, 2008 BCSC 1197 (income $355,000). As the payor's income rises higher and higher above the ceiling, then courts begin to diverge from the formula ranges.

- Far too often, in these high-income cases, lawyers and judges fail to consider the SSAG formula ranges at all, in arriving at their conclusions. Formula ranges can be calculated for different hypothetical income levels, from $350,000 on up the scale, to assist in defining the much broader range of potential outcomes and to offer helpful insights in determining the appropriate large amount. For some examples of this approach, see Rogerson and Thompson, "Complex Issues in B.C.", above.

- In some high-income *with child support* formula cases, the 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] B.C.J. No. 358, 2007 BCSC 252; and *J.E.B. v. G.B.*, [2008] B.C.J. No. 758, 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] M.J. No. 374, 2009 CarswellMan 515, 2009 MBQB 274).

12 EXCEPTIONS (FV CHAPTER 12)

In the Draft Proposal, we set out "exceptions", categories of departures, from the formula ranges for amount and duration. 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. Only if *neither* of these steps can accommodate the facts of a particular case should it become necessary to resort to these exceptions.

Six exceptions were listed in the Draft Proposal and we added another five in the Final Version. We also made some refinements to the existing exceptions. Some of the new exceptions have already been mentioned above under the respective formulas.

Even now, more than five years after the release of the Draft Proposal and almost two years after the release of the Final Version, it is still surprising how often lawyers and judges fail to consider the exceptions. It remains one of the great mysteries of the Advisory Guidelines so far. Lawyers and judges just look at the standard formula ranges and then, if they don't like those numbers, they describe the Advisory Guidelines to be "of little assistance" and go back to budgets, or net incomes, or pure discretion, to come up with an outcome.

How can a lawyer, mediator or judge determine when one of the "exceptions" might be engaged?

- If the formula ranges for amount and duration just don't seem intuitively "right", then look at the **exceptions**. If the amounts seem too high or too low, or the duration seems too short, there will usually be an exception that applies. For recipients, the exceptions will sometimes justify support *above* the ranges for amount and duration. For payors, the exceptions will sometimes justify support *below* those ranges.

- If one party really, really likes the formula ranges, that would be another clue to the potential for an exception. For example, the payor in a short marriage case will like the limited support generated by the *without child support* formula, but it may be a case for the compensatory exception in shorter marriages or the illness and disability exception or the basic needs/hardship exception. It will be the task of the responding lawyer to canvass the list of exceptions and to argue the applicable exception.

(a) Compelling financial circumstances at the interim stage (FV 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 on any interim support application.

(b) Debt payments (FV 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 upon ability to

pay. Even then, most debt payments can be accommodated as a factor affecting location within the formula ranges. In the Final Version, the limits of this exception have been refined:

- The total family debts must exceed the total family assets, or the payor's debts must exceed his or her assets; the qualifying debts must be "family debts'; and the debt payments must be "excessive or unusually high".

There are relatively few reported cases involving the debt exception. Only two openly discuss this exception: *Marche v. Marche*, [2009] N.J. No. 54, 2009 NLTD 31 (S.C.T.D.) and *Van Wieren v. Van Wieren*, [2008] B.C.J. No. 26, 2008 BCSC 31. Others go below the range for amount, but without explicitly invoking the exception: *Munro v. Munro*, [2006] B.C.J. No. 3069, 2006 BCSC 1758; *A.C. v. C.G.*, [2006] B.C.J. No. 1157 (Prov.Ct.); *Frouws v. Frouws*, [2007] B.C.J. No. 282, 2007 BCSC 195; *M.P. v. S.F.*, [2006] B.C.J. No. 1344, 2006 BCPC 289.

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", as 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.

There is an overlap between this exception and the previous exception for compelling financial circumstances at the interim stage. The most common "compelling financial circumstance" 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.

(c) Prior support obligations (FV 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.

Usually this will be a prior obligation for child support: *Lickfold v. Robichaud*, 2008 CarswellOnt 6138 (S.C.J.)(no spousal support). But every now and then, it will be a prior spousal support obligation: *Robertson v. Williams*, [2009] O.J. No. 5451 (S.C.J.).

Sometimes the adjustment for prior support is not made, with spousal support ordered well above the correct range, e.g. *De Haney v. De Haney*, [2009] O.J. No. 1569 (S.C.J.); *Czupiel v. Czupiel*, 2008 CarswellOnt 6969 (S.C.J.); *Dickinson v. Dickinson*, 2008 CarswellOnt 6788 (S.C.J.); or *MacNutt v. MacNutt*, [2008] B.C.J. No. 1831, 2008 BCSC 1290.

In the Final Version, we added one further refinement to this exception, one that should be noted. In most cases, there will be a payment 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 these cases, there can be a notional child support amount determined, and used for the adjustment (FV 12.3.3).

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 "Variation and Review".

There is one recent case that raises the possibility of departing from the formula range where the payor had long been supporting his parents from his income, and they were providing child care: *Wang v. Seow*, [2008] M.J. No. 295, 2008 MBQB 218. The marriage was a short one, and one could argue that the husband had a "prior support obligation" to his parents. 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 (FV 12.4)

A disproportionate number of cases that come before the courts involve the illness or disability of the recipient spouse, as these are hard cases that don't settle. Especially difficult are the cases that involve permanent illness or disability after a short-to-medium marriage. The law in these cases is particularly uncertain and confused at the moment, as the courts can't seem 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 was recognized as an exception in the Draft Proposal, but even the scope and operation of the exception is hard to nail down under the current law.

Under the Advisory Guidelines, most of these cases fall under the *without child support* formula or the *custodial payor* formula. The formulas produce ranges for amount and duration that 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 marriages.

Three approaches to disability cases can be identified in the decided cases, with the first and second being the most common:

- **Increase Amount, Extend Duration:** Many courts respond to the greater need in disability cases by increasing the amount *and* extending the duration of support: *Rhynold v. Rhynold*, [2009] O.J. No. 4339 (S.C.J.); *van Rythoven v. van Rythoven*, [2009] O.J. No. 3648 (S.C.J.); *Steele v. Steele*, [2009] O.J. No. 2062 (S.C.J.); *Shaw v. Shaw*, [2009] N.S.J. No. 559, 2009 NSSC 353; *Smith v. Smith*, 2008 CarswellOnt 1921 (Ont.S.C.J.); *Lepp v. Lepp*, [2008] B.C.J. No. 640, 2008 CarswellBC 717, 2008 BCSC 448; *Mumford v. Mumford*, [2008] N.S.J. No. 138, 2008 NSSC 82; *Pegler v. Avio*, 2008 CarswellBC 169, 2008 BCSC 128; *Wilson v. Marchand*, [2007] O.J. No. 3738, 2007 ONCJ 408 (although time limited, still beyond range); *Peterson v. Peterson*, [2007] S.J. No. 474, 2007 SKQB 316; *Bramhill v. Dick*, [2007] B.C.J. No. 387, 2007 BCSC 262; *Eng v. Eng*, [2006] B.C.J. No. 2044, 2006 BCSC 1353.

- **No Exception:** Disability cases should be resolved within the formula ranges, for both amount and duration, according to a slightly-smaller group of cases. In effect, these courts do not recognize any disability exception. The prime example would be the B.C. Court of Appeal decision in *Shellito v. Bensimhon*, 2008 CarswellBC 469, 2008 BCCA 68, which imposed a

time limit and produced a global amount above the Guidelines range, but not that far above the maximum. See also trial decisions: *Barton v. Sauve*, [2010] O.J. No. 1008, 2010 ONSC 1072; *Haggerty v. Haggerty*, [2010] N.S.J. No. 5, 2010 NSSC 9; *T.J.M. v. C.R.M.*, [2009] B.C.J. No. 1642, 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] B.C.J. No. 233, 2008 BCSC 176; *Williston v. Williston*, [2006] B.C.J. No. 3248, 2006 BCSC 1869; *Wise v. Wise*, [2006] B.C.J. No. 1143, 2006 BCSC 945; *Puddifant v. Puddifant*, [2005] N.S.J. No. 558, 2005 NSSC 340. For a rare case with a time limit and the low end of the range, see *Wilson v. Wilson*, [2009] B.C.J. No. 1584, 2009 BCSC 1021.

- **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: *Campbell v. Campbell*, [2009] B.C.J. No. 1944, 2009 BCSC 1330; *Munro v. Munro*, [2006] B.C.J. No. 3069, 2006 BCSC 1758.

Until appellate courts provide further guidance, these divergent approaches towards illness and disability will continue.

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

The *without child support* formula ranges are driven by the length of the marriage, 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 recipient spouse may have had to give up or compromise his or her job or career, to move with the payor spouse. 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 with her husband).

- The recipient spouse moves to marry, giving up his or her job or career to do so, as was the case in *Ahn v. Ahn*, [2007] B.C.J. No. 1702, 2007 BCSC 1148 or *Fuller v. Matthews*, [2007] B.C.J. No. 656, 2007 BCSC 444. There was no mention of this exception in a recent *custodial payor* case, where the husband had given up his career to marry and move to Vancouver: *R.M.S. v. F.P.C.S.*, [2009] B.C.J. No. 1925, 2009 BCSC 1323 (husband also provided significant care for the children, another compensatory ground for support).

- The recipient spouse may work 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.

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

After the Draft Proposal, the British Columbia courts affirmed a spousal support exception in cases where a sufficiently large reapportionment order is made under the property provisions of the *Family Relations Act*: *Tedham v. Tedham*, [2005] B.C.J. No. 2186, 2005 BCCA 502, 20 R.F.L. (6th) 217; *Narayan v. Narayan*, [2006] B.C.J. No. 3178, 2006 BCCA 561, 34 R.F.L. (6th) 272. "**Only in B.C.**, you say, pity…", to paraphrase the old Red Rose tea ad. That's because only in B.C. does the property statute permit reapportionment, or unequal division, on spousal support grounds.

In practice, there have been very few B.C. cases which fall within this exception. Most frequently reapportioned is the equity in the matrimonial home, and the size of the reapportionment is not large enough to justify departing from the formula range. In our most recent review of B.C. cases, we did not find any reapportionment cases that fell outside the ranges: Rogerson and Thompson, "Complex Issues Bring Us Back to Basics: The SSAG Year in Review in B.C." (2009), 28 Can.F.L.Q. 263 at 297-98 and 308-09 (13 cases, one weird outlier case below range). That pattern has continued to the present day.

In one recent B.C. appeal, reapportionment of the home sale proceeds was the only feasible remedy where the husband could not pay spousal support: *Young v. Young*, [2009] B.C.J. No. 2636, 2009 BCCA 518 (husband earned $65,000, *without child support* formula range mostly zero, crude *without child support* range calculations by Court to reject husband's argument that reapportionment disproportionate). In a trial case involving a short relationship, the Court found no entitlement to support after reapportionment in favour of the husband: *C.J.D. v. J.H.E.*, [2009] B.C.J. No. 1716, 2009 BCSC 1168.

In the more common case, where the reapportionment is not large, a court can just fix an amount of spousal support at a lower point in the range than might otherwise be the case, even the low end of the formula range, as it did in *MacEachern v. MacEachern*, [2006] B.C.J. No. 2917, 2006 BCCA 508, 33 R.F.L. (6th) 315.

(g) Property division: Boston (FV 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 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 above under "The *Without Child Support* Formula"("Retirement cases under the *without child support* formula").

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

We did not recognize high property awards as an explicit exception in the Draft Proposal. The Advisory Guidelines can already accommodate many of the "high property" concerns: by imputing income, by choosing an amount and duration within the ranges, by individualizing

support determinations for payors above the $350,000 "ceiling"; and, in extreme cases, by finding no entitlement.

There is still no explicit exception for **high property awards** in the Final Version. 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 a significant reduction of spousal support. This view is reflected in the B.C. Court of Appeal decisions in *Chutter v. Chutter*, [2008] B.C.J. No. 2398, 2008 BCCA 507 and *Bell v. Bell*, [2009] B.C.J. No. 1201, 2009 BCCA 280. But there is a minority view that does see these two remedies as substitutes one for the other, so that a high property award always justifies lower spousal support. We have left the law to develop further in this area, which means we leave it up to lawyers to argue for and against such an exception outside of British Columbia.

(i) Basic needs/hardship (FV 12.7)

The new **basic needs/hardship exception** has already been discussed above, under the *without child support* formula. It is intended to deal with the problem of need in cases of shorter marriages where the recipient has little or no income.

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

One new exception in the Final Version is the **non-taxable payor income exception** (FV 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:

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

In these cases 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 new exception, it will be necessary to balance the tax positions and interests of the spouses. For examples of the fact situations, see *Paul v. Paul*, [2008] N.S.J. No. 157, 2008 CarswellNS 197, 2008 NSSC 124 (both aboriginal, neither paying taxes, amount below low end of range); *James v. Torrens*, [2007] S.J. No. 334, 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 Final Version.

(k) Non-primary parent to fulfil parenting role (FV 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.

A good example of the use of this exception is *Mumford v. Mumford*, [2008] N.S.J. No. 138, 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).

This exception was recognized and applied in different circumstances in *Petit v. Petit*, [2008] O.J. No. 5437, 2008 CarswellOnt 8257 (mobility case, children moved with father, support to wife increased above range to adjust for cost of travel for access in northern Ontario).

The exception also clearly arose on the facts, and *Petit* was cited and applied in *R.M.S. v. F.P.C.S.*, [2009] B.C.J. No. 1925, 2009 BCSC 1323 (husband exercised substantial access for two young children).

(l) Special needs of child (FV 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, however, 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. See *Yeates v. Yeates*, [2007] O.J. No. 1376, 2007 CarswellOnt 2107 (S.C.J.), affirmed on appeal [2008] O.J. No. 2598, 2008 ONCA 519 (wife with care of disabled children, spousal support well above range) and *Frouwes v. Frouwes*, [2007] B.C.J. No. 282, 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 (FV 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 in cases where

there is a strong claim for compensatory support, especially where there are more children requiring care.

The *duration* of spousal support may therefore have to be extended, to provide adequate compensation to the recipient. And the amount of spousal support will sometimes have to increase as child support goes down. For examples, see *Hajir v. Farshidfar*, [2008] O.J. No. 4712, 2008 CarswellOnt 70047 (S.C.J.); *Danby v. Danby*, [2008] O.J. No. 3659, 2008 CarswellOnt 5512 (S.C.J.); and *C.E.A.P. v. P.E.P.*, [2006] B.C.J. No. 3295, 2006 BCSC 1913.

(n) Other grounds for departures, "new exceptions"

The eleven "exceptions" listed in the Final Version represent recognized grounds or "categories" of departure from the formula ranges. On a case-by-case basis, there may be others that arise on the unusual facts of a particular case, e.g. the unusual mortgage arrangements made *after* separation in *S.S.V. v. G.J.V.*, [2009] N.B.J. No. 220, 2009 NBQB 195 (husband jointly purchased home and cosigned mortgage); or the wife's permanent arrangement to live with her mother, thereby lowering her expenses in *Schloegl v. McCroary*, [2008] B.C.J. No. 2443, 2008 BCSC 1722 (amount lower than low end of range).

13 VARIATION AND REVIEW (FV CHAPTER 14)

(a) Application of the SSAG on variation and review (FV 14.1, 14.2)

There is a pervasive myth that the Advisory Guidelines "do not apply" on variation or review or if they do, only after much angst and soul-searching by lawyers and judges. That is not correct.

The Advisory Guidelines "do apply" on variation and review. *How* they apply, that depends on the issues raised on the particular application to vary or to review. There may be added complexities and entitlement issues arising in **some** cases that may limit the use of the Guidelines, as explained by the B.C. Court of Appeal in *Beninger and Beninger*, [2007] B.C.J. No. 2657, 2007 BCCA 619. For a review of the conflicting authorities on the application of the SSAG on variation see *Bockhold v. Bockhold*, [2010] B.C.J. No. 283, 2010 BCSC 214.

The Advisory Guidelines and the formulas can be—and frequently have been—easily applied to the most common issues on variation or review, assuming that any threshold conditions have been satisfied:

- a decrease in the payor's income (e.g., change of employment, retirement)
- an increase in the recipient's actual income
- imputing income to a recipient who has made insufficient efforts toward self-sufficiency
- a change in the custodial arrangements for children
- a change in child support amounts
- the end of child support (crossover between formulas)

Variation or review cases that can raise entitlement or other complicating issues are a shorter list:

- old orders made before the SSAG
- a post-separation income increase of the payor
- a post-separation income decrease of the recipient
- the remarriage or re-partnering of the recipient
- second families and subsequent children
- applications to terminate support on grounds of no continuing entitlement

In these cases, the Advisory Guidelines can still be applied, but more care is required, as is explained below and in the Final Version.

As a preliminary matter when dealing with a variation or review, you need to keep in mind that the Advisory Guidelines do not affect the basic legal framework of variation and review. The threshold conditions for a variation (material change in circumstances) or review must be satisfied before the Guidelines can be used to redetermine amount and/or duration. With respect to a consent order see *Hurst v. Hurst*, [2008] O.J. No. 3800 (S.C.J.) (consent order; Advisory Guidelines may be applicable if agreement provides for review or variation) (see FV 14.1).

(b) Application to pre-SSAG orders

The existing order which is being reviewed or varied may pre-date the SSAG and the amount of spousal support may be much lower than the range the SSAG would have generated on the incomes at the date of the original order. This may complicate the application of the SSAG on a variation or review:

- Some decisions speak of the SSAG serving as a "check on pre-Guidelines determinations of spousal support, and a tool in the analysis leading to a determination of quantum on review" (*Bryant v. Gordon*, 2007 BCSC 946, cited in *Bockhold v. Bockhold*, [2010] B.C.J. No. 283, 2010 BCSC 214).

- On applications to reduce or terminate spousal support, where the existing order is for an amount significantly lower than the SSAG, a court may refuse to grant the reduction or termination: see *Uberall v. Uberall,* [2010] B.C.J. No. 340, 2010 BCSC 251; *Sveinson v. Sveinson*, [2009] B.C.J. No. 1494, 2009 BCSC); *Fritsch v. Fritsch,* [2008] O.J. No. 5238, 2008 CarswellOnt 7838 (S.C.J.); and *Barodoy v. Baradoy*, [2009] A.J. No. 443, 2009 ABQB 249.

(c) Crossovers between formulas when child support ends (FV 14.5)

In cases where there were dependent children at the time of separation, spousal support would have initially been determined under the *with child support* formula. After child support has ceased, an application for review or variation will bring these cases under the *without child support* formula; for example see *Bockhold v. Bockhold*, [2010] B.C.J. No. 283, 2010 BCSC 214.

- If the conditions for review or variation are satisfied, crossover cases may require a redetermination of amount; they may also involve a determination of duration, including payor requests for termination. **The *without child support* formula will be used to redetermine the amount of spousal support**. (As for duration, given that the class of cases to which crossover applies will be medium to long marriages, duration will be driven by length of marriage and will be the same under both formulas.)

- These are cases with **strong compensatory claims**, as compared to medium-length 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 (FV 12.11) may also be relevant. If the amount of spousal support was inadequate in the past because of the 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. This exception is discussed below under "Exceptions".

(d) Post-separation income increase of the payor (FV 14.3)

Since the Draft Proposal, courts have continued to struggle with this hard question, which presents a mix of entitlement and quantum issues. While this question usually arises at the stage of variation or review, it can also come up at the time of the initial order, if there has been a lengthy period of time since separation or a sudden increase in income after separation, as was true in the *Fisher* case from Ontario.

- It is incorrect to say that the Advisory Guidelines always require that incomes at the time of separation must be used in calculating the formula ranges.

- It is equally incorrect to state that the spouse's current incomes are always the correct incomes for formula purposes.

- Under the current law, a post-separation income increase on the part of the payor raises another distinct issue for spousal support analysis, an entitlement issue, namely whether **all, some or none of the increase** should be taken into account in calculating the formula range.

- As we said in the Final Version: "Some rough notion of causation is applied to post-separation income increases for the payor, in determining both 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)."

- Most of the major cases on this issue are reviewed in *Judd v. Judd*, [2010] B.C.J. No. 177, 2010 BCSC 153; *Sawchuk v. Sawchuk*, [2010] A.J. No. 18, 2010 ABQB 5; and *D.B.C. v. R.M.W.*, [2006] A.J. No. 1629, 2006 ABQB 905. Other helpful decisions are *Chapman v. Chapman*, [2010] B.C.J. No. 284, 2010 BCSC 216; *Coghill v. Michalko*, [2010] A.J. No. 86, 2010 ABQB 59; *Hartshorne v. Hartshorne*, [2009] B.C.J. No. 1050, 2009 BCSC 698; *Kelly v. Kelly*, [2007] B.C.J. No. 324, 2007 BCSC 227. See also *Chalifoux v. Chalifoux*, [2008] A.J. No. 174, 2008 ABCA 70 (no sharing).

- In *Fisher v. Fisher*, [2008] O.J. No. 38, 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 first increased. This partial sharing was not explained further, but it would appear to reflect the length of the marriage (19 years), the immediacy of the increase (the year of separation) and the non-compensatory basis for support (less compelling argument for sharing).

- The B.C. and Ontario cases have taken a less demanding view of the links between the marriage and the post-separation increase, especially in longer marriages. For example, in *Hartshorne*, 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 paragraph 111, the court reviews the case law and identifies what might qualify as "intervening changes". In *Chapman*, 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 Alberta cases have demanded much more, something like a "causal link" between the specific post-separation increase and the *contributions* of the recipient spouse during the marriage. For example, *Sawchuk* 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 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, so that none of the increase was shared.

- In the past few years, the issue of the payor's post-separation income increase has been identified and argued more frequently, a sign of increasing sophistication in the use of the Advisory Guidelines. The law should become more consistent and more nuanced over time.

- The Guidelines formulas can be used to establish the outer boundaries of support amounts, in every case, by calculating the ranges for the separation date payor income and then for the increased current income of the payor. Examples of this are provided in the Final Version.

(e) The recipient's remarriage or repartnering (FV 14.7)

The remarriage or repartnering of the support recipient does not mean 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 and the standard of living in the recipient's new household: *Hinds v Hinds*, [2008] B.C.J. No. 2540, 2008 BCCA 547; *Bockhold v. Bockhold*, [2010] B.C.J. No. 283, 2010 BCSC 214. In many fact situations, the outcomes are predictable, but not predictable enough to construct a formula for these cases in the Final Version.

- The most interesting of the remarriage cases is *M.(K.A.) v. M.(P.K.)*, 2008 CarswellBC 135, 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.

- **Step-down orders** are one common solution in these cases, even if not formulaic: *Balazsy v. Balazsy*, [2009] O.J. No. 4113 (S.C.J.); *C.L.M. v. R.A.M.*, [2008] B.C.J. No. 608, 2008 BCSC 217.

- Another solution is to reduce spousal support below the formula range in these cases: *Driscoll v. Driscoll*, [2009] O.J. No. 5056 (S.C.J.); *Rakose v. Rakose*, [2008] B.C.J. No. 1632, 2008 BCSC 1165; *Coolen v. Coolen*, [2005] N.S.J. No. 155, 2005 NSSC 78.

- Support can be terminated, especially if the new husband makes more money than the old one: *Redpath v. Redpath*, [2008] B.C.J. No. 68, 2008 BCSC 68, upheld on appeal [2009] B.C.J. No. 813, 2009 BCCA 168.

(f) Second families, or subsequent children (FV 14.8)

In the child support setting, issues of subsequent children are dealt with by way of section 10's undue hardship, a demanding and discretionary test, 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. There is no formulaic solution to be found in the Final Version and we again have to wait for the law to develop.

The policy of "first-family-first" remains powerful in these cases 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 are seen to take priority over any subsequent obligations. This was the approach adopted by the Ontario Court of Appeal in *Fisher v. Fisher*, [2008] O.J. No. 38, 2008 ONCA 11, but Lang J.A. 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 (para. 41): 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 by the husband that his support obligation to his first wife would not impoverish his second family.

Two interesting broader points 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).

For an example of the latter point, see *Kontogiannis v. Langridge*, [2009] B.C.J. No. 2257, 2009 BCSC 1545 (11 year common-law relationship, 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.

(g) Self-sufficiency and termination (FV 13, 13.1, 13.7, 13.8)

Some of the circumstances that trigger a variation or review—the recipient finding employment, the recipient's remarriage or repartnering, the payor's retirement or loss of income, etc.—may raise issues of continuing entitlement. Entitlement is always a pre-condition to the application of

the Guidelines. Support may therefore be terminated entirely on a variation or review if entitlement has ceased.

It is often on a variation or review application that the durational limits generated under the SSAG formulas are implemented under either formula. Even in longer marriage cases where the SSAG formulas indicate that the duration of spousal support will be indefinite (duration not specified), the support obligation may be terminated if entitlement has ceased. For an example of the termination of support on variation see *Gammon v. Gammon*, 2008 CarswellOnt 6349 (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.)

The recipient's attainment of self-sufficiency is one of the common arguments for "no entitlement". Case law establishes that self-sufficiency is not an absolute standard and must be understood in the context of the parties' standard of living. The meaning of self-sufficiency may also vary depending on whether the support claim is compensatory or non-compensatory. The determination of self-sufficiency requires a highly individualized analysis that is not amenable to guidelines.

For a nice example of a review case where the court found that the wife was not yet self-sufficient see *Bockhold v. Bockhold*, [2010] B.C.J. No. 283, 2010 BCSC 214 (17 year marriage; review 10 years after separation and wife remarried). For an example where support was terminated at a point far short of the high end of the durational range because the wife was found to have become self-sufficient see *Mills v. Elgin*, [2009] B.C.J. No. 2310, 2009 BCSC 1607 (15 year relationship with 3 children; spousal support terminated on variation application six years after separation when husband earning $100,000 and wife earning $46,000).

14 RETROACTIVE SUPPORT AND THE SSAG

The Spousal Support Advisory Guidelines can be helpful in resolving an issue of increasing frequency, that of "retroactive support". The term itself is often used loosely, to mean simply any award of support for a period before the hearing 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 trial, where the court is asked 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.

The threshold issues in the law of retroactive spousal support will inevitably be influenced by the Supreme Court of Canada's recent decision on retroactive child support in *D.B.S. v. S.R.G.*, [2006] 2 S.C.R. 231, 31 R.F.L. (6th) 1, 2006 SCC 37. Appeal courts in British Columbia and New Brunswick have adapted the *D.B.S.* analysis to the spousal support context, e.g. *Reis v. Bucholtz*, [2010] B.C.J. No. 382, 2010 BCCA 115 and *Brown v. Brown*, [2010] N.B.J. No. 18, 2010 NBCA 5. In other jurisdictions, like Ontario and Nova Scotia, the leading appellate authorities predate *D.B.S.*, e.g. *Bremer v. Bremer*, [2005] O.J. No. 608, 13 R.F.L. (6th) 89 (C.A.) and *Lu v. Sun*, [2005] N.S.J. No. 314, 2005 NSCA 112. There is not yet consensus on how the *D.B.S.* analysis might be applied differently to retroactive spousal support.

These cases focus upon the threshold issues of entitlement to retroactive support and the court's discretion in granting such support. Here we are interested in how the Advisory Guidelines can be used to work out the amount and duration of retroactive spousal support.

- The Advisory Guidelines can be—and often are—used to calculate the appropriate *amount* of spousal support, once historical spousal incomes have been determined. The *duration* of retroactive support is usually determined as part of the threshold analysis of entitlement and discretion.

- For examples of retroactive spousal support for the interim period being calculated with the SSAG, see *Reis v. Bucholtz*, [2010] B.C.J. No. 382, 2010 BCCA 115; *Fisher v. Fisher*, [2008] O.J. No. 38, 2008 ONCA 11; *Teja v. Dhanda*, [2009] B.C.J. No. 928, 2009 BCCA 198, appeal allowed in part from [2008] B.C.J. No. 1052, 2008 BCSC 733 and [2007] B.C.J. No. 1853, 2007 BCSC 124; *Purdue v. Purdue*, [2009] N.B.J. No. 382, 2009 NBQB 303; *Dickson v. Dickson*, [2009] M.J. No. 374, 2009 CarswellMan 515, 2009 MBQB 274.

- For examples of calculations of retroactive spousal support on variation applications, see *Chapman v. Chapman*, [2010] O.J. No. (S.C.J.); *Ellis v. Ellis*, [2010] O.J. No. 1250, 2010 ONSC 1880; *Krane v. Krane*, [2010] O.J. No. 1009, 2010 ONSC 1488; and *Mann v. Mann*, [2008] O.J. No. 2942, 2008 ONCJ 231. For a review case, see *Kerman v. Kerman*, [2008] B.C.J. No. 710, 2008 CarswellBC 793, 2008 BCSC 500.

- In one case, retroactive support was calculated once an agreement was set aside: *Leaman v. Leaman*, [2009] N.J. No. 359, 2009 NLTD 199 (no future support, retroactive support calculated, lump sum ordered).

- For the use of the Advisory Guidelines in an unusual "retroactive" support case, see *Hartshorne v. Hartshorne*, [2009] B.C.J. No. 1050, 2009 BCSC 698, where the court had to determine spousal support over a past ten-year period as a result of the Supreme Court of Canada's decision on the property and marriage contract issues.

- Tax issues can complicate any retroactive spousal support order. If the retroactive support is calculated using the Advisory Guidelines and converted into a lump sum payment, then the lump sum should be discounted for income tax, as the lump sum will usually not be deductible. On the other hand, if the intention is to make the retroactive support deductible and to reassess and adjust prior years' taxes, then that should be made clear and the proper forms filed with the Canada Revenue Agency, e.g. Form T1198 (Statement of Qualifying Retroactive Lump-Sum Payment).

  This area of the law remains less than clear. Neither the parties nor the courts can "direct" the Canada Revenue Agency what to do, but must structure their arrangements so as to attract the desired tax treatment. For an example of a court acknowledging and providing for this uncertainty in its order, see *Chapman v. Chapman*, [2010] O.J. No. (tax treatment treated as grounds for review of court order). For another trial judge struggling with tax treatment of a retroactive order in a review situation, see *Kerman v. Kerman*, [2008] B.C.J. No. 710, 2008 CarswellBC 793, 2008 BCSC 500, supplementary reasons on tax issues [2008] B.C.J. No. 1244, 2008 BCSC 852.