

# The Spousal Support Guidelines in B.C.: The Next Generation

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## I. INTRODUCTION

British Columbia has embraced the Spousal Support Advisory Guidelines. In August of 2005, the B.C. Court of Appeal decided the *Yemchuk* case, endorsing the Advisory Guidelines as a “useful tool” in determining spousal support. Since *Yemchuk*, the Court of Appeal has continued to endorse and apply the Guidelines, in another nine appeals.<sup>1</sup> In its 2006 *Redpath* decision, the Court of Appeal incorporated the Guidelines ranges into the standard of appellate review in support cases. The trial courts in B.C. now cite and use the Advisory Guidelines in virtually every spousal support case. The SSAG have become a routine part of family law practice in B.C.

This makes the B.C. experience with the SSAG especially interesting for us. The Guidelines have been applied in a wide range of fact situations, both with and without children, testing their flexibility and usefulness. We are now beginning to see more sophisticated use of the Guidelines by lawyers and judges in British Columbia—the “next generation” of argument and analysis.

In our paper “The Spousal Support Guidelines: 28 Months Later” we review the experience with the Guidelines across the country. This paper is intended as a supplement to that, focusing specifically on the use of the Guidelines in B.C.

We begin with a review of the B.C. SSAG decisions: Part II reviews the cases without dependent children under the *without child support* formula; Part III reviews the cases with dependent children under the *without child support* formula.

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<sup>1</sup> Just as we were going to print another Court of Appeal decision was released: *Dunnigan v. Park*, [2007] B.C.J. No. 1364, 2007 BCCA 329, upholding the trial decision of Maczko J. reported at [2006] B.C.J. No. 987, 2006 BCSC 688 in which he used the Advisory Guidelines in awarding spousal support after a long traditional marriage. Justice Prowse notes, at para 16 that “In determining the amount of spousal support the trial judge referred to the Spousal Support Advisory Guidelines, *as he is obligated to do.*” [emphasis added].

The remainder of the paper focuses on those aspects of the Advisory Guidelines that now need more attention. Here we go beyond the “first generation” use of the Guidelines—input the income figures into the formulas, get the range and choose the mid-point—to the “next generation” of more sophisticated use. Part IV examines the challenging issue of *entitlement* and the way it interacts with the Guidelines; Part V looks at *restructuring*, a frequently ignored component of the SSAG scheme; and Part VI provides an extensive discussion of *exceptions*, which are coming to play a significant role in B.C. now that the Guidelines are routinely being considered across a wide range of spousal support fact situations.

## II. B.C. CASES UNDER THE *WITHOUT CHILD SUPPORT* FORMULA

B.C. has generated the highest number of spousal support decisions on the Advisory Guidelines—122 out of the 302 decisions we have collected as of June 25, 2007. The B.C. cases are collected and summarized in Appendix III of the “28 Months Later” paper and in addition in the supplementary case law update dated June 25, 2007, both included in your materials. The collection includes 10 decisions of the B.C. Court of Appeal.<sup>2</sup> The Court of Appeal decisions are extensively discussed in the “28 Months Later” paper.

The B.C. SSAG cases are fairly evenly divided between the two formulas: 57 cases without dependent children under *the without child support* formula; and 65 involving dependent children under the various versions of the *with child support* formula.

Here we will provide a basic overview of the cases under the *without child support* formula. The cases under the *with child support* formula will be dealt with in Part III, which follows.

Slightly over half (52%) of the *without child support* cases fall within the formula ranges for amount.<sup>3</sup> Although this may not at first glance seem like a ringing endorsement of the usefulness of the SSAG, this is not a surprising result given (i) that litigated cases involve a high proportion of difficult, atypical cases and (ii) that the *without child support* formula, in contrast to the *with child support formula*, covers a diverse array of fact situations.<sup>4</sup> The vast majority of “deviations” from the *with child support* formula involve one of the following:

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<sup>2</sup> Now 11, see *ibid.*

<sup>3</sup> Included here are cases where the results fall within the global ranges under restructuring.

<sup>4</sup> As will be discussed in Part III, over 80% of the *with child support* cases fall within the formula ranges; if the cases under both formulas are combined, approximately 70% of the cases fall with the formula ranges consistent with results across the country.

- non-application of the Guidelines because of a lack of entitlement or a prior agreement; or
- facts clearly falling within an identified exception, such as disability, the compensatory exception, debts, or reapportionment

The cases as a whole do not reveal any serious problem of lack of fit between the *without child support* formula and spousal support outcomes in B.C. A somewhat higher percentage of the B.C. *without child support* cases fall within the identified exceptions than in the other provinces,<sup>5</sup> but this is in large part explained by the pervasive use of the Advisory Guidelines in B.C. They are considered in all spousal support cases, whereas in other provinces the clearly exceptional cases are often dealt with without any reference to the Guidelines. As well, the use of reapportionment in B.C. to meet spousal support objectives also contributes to a larger number of exceptions. An extensive discussion of exceptions, which play such a large role under this formula, is found in Part VI.

With respect to location within the ranges, there is no consistent pattern in B.C.<sup>6</sup> Results under the *without child support* formula span the spectrum from the low to the high end of the ranges.

The *without child support formula* covers a wide array of fact situations, but almost half of the reported cases under this formula (28 out of 57 cases) involve long marriages of over 20 years in length. Looking only at this subset of cases, 67% fall within the formula ranges. In terms of location within the range, there is no consistent pattern, even in the long marriage cases. Results are fairly evenly distributed between the low to mid and mid to high points of the range. The only clear patterns are the relative absence of awards at the very high end of the range and a number of awards at the low end of the range because of reapportionment. In contrast to Ontario, B.C. does not appear to have adopted the norm of equalization of income in long marriage.

The second largest category of cases under the *without child support* formula (19 out of 57 cases) is short marriages (under 10 years in length) and it is here that the results show the least conformity with the formula ranges: only 30% of the results fall within the formula ranges. While short marriages generally have few economic consequences, this is not true of the cases which go to litigation: strikingly, over half of the “deviations” from the formula ranges in the reported cases involve disability or significant compensatory losses because of relocation. Where the short marriage cases do fall within the formula ranges, restructuring must often be considered to reach this result. The fit is with the *global ranges* rather than the actual ranges for amount generated by the formula. As will be discussed in Part V, below, restructuring is often ignored and the courts treat these as cases where the Advisory Guidelines do not generate appropriate results: see *Toth v. Kuhn*, [2007] B.C.J. No. 244, BCCA 83 and *Wang v. Poon*, [2007] B.C.J. No. 271, 2007 BCSC 194 (Humphries J.).

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<sup>5</sup> In other provinces approximately 60% of the *without child support* cases are within the range.

<sup>6</sup> As will be discussed in Part III, the same is true of the *with child support* cases.

The smallest category (10 out of 57 cases) is medium length marriages (between 10 and 19 years in length). Some of these are marriages without children; others are “cross-over” cases—marriages where there were dependent children at the time of separation who are now grown, with the result that the *without child support* formula is now applicable. Here 60% of the cases fall within the formula ranges for amount.

We now turn to duration. The *without child support* formula generates durational limits for marriages under 20 years in length. In many parts of the country these durational limits are simply ignored and the formula is used only to determine amount. In B.C. however, the time limits do not appear to be as problematic.

In the short marriage cases (under 10 years) awards are consistently time-limited and fall within the durational ranges under the formula. Even in disability cases, for example, while the courts will go higher than the ranges on amount, the awards are typically time-limited and consistent with the durational ranges under the formula: see *Shellito v. Bensimhon*, [2007] B.C.J. No. 1081, 2007 BCSC 713 (Meyers J.) and *Wise v. Wise*, [2006] B.C.J. No. 1413, 2006 BCSC 945 (Mackenzie J.)

In the medium-duration marriages, the use of time-limits is admittedly more inconsistent. In several of the cases the awards were indefinite rather than time-limited. For an appellate level decision which explicitly over-ruled the trial judge’s imposition of a time-limit see *Tedham v. Tedham*, [2005] B.C.J. No. 2186, 2005 BCCA (18 year marriage, 2 children now grown, support indefinite slightly below low end of range). For trial level decisions see *Bramhill v. Dick*, [2007] B.C.J. No. 387, 2007 BCSC 262 (support indefinite after 14 year marriage with no children, but disability exception); *Munro v. Munro*, [2006] B.C.J. No. 3096, 2006 BCSC 1758 (Brine J.) (variation case, 18 year marriage with 2 children now adults, custody with father after separation; support continues indefinite but well below the range for amount), and *Gosling v. Gosling*, [2005] B.C.J. No. 2421, 2005 BCSC 1580 (Williams J.) (14 year marriage with 2 children now grown, with mother; support indefinite but low end of range).

However, the B.C. courts have also shown themselves willing to time-limit or terminate awards in medium length marriages, if not in the initial order, which may have been indefinite, but then on a subsequent review or variation: see *Reitsma v. Reitsma*, [2006] B.C.J. No. 1743, 2006 BCSC 1135 (Maczko J.) (18 year marriage with 2 grown children; spousal support ordered at middle of range for 13 years); *T.M. v. R.M.*, [2006] B.C.J. No. 868, 2006 BCPC 161 (Tweedale Prov. Ct. J.) (11 year relationship; husband adopts wife’s child; support low end of range for another 4 years, 8 years total); and *Kelly v. Kelly*, [2007] B.C.J. No. 324, 2007 BCSC 227 (Barrow J.) (17 year relationship, wife 2 children from prior marriage now grown; variation application 9 years after separation; support at this point non-compensatory only; step-down order for further 19 months, total duration over 10 years).

### III. THE *WITH CHILD SUPPORT* FORMULA

The summaries set out the specifics of the *with child support* formula decisions. All we intend to provide here is a quick statistical overview and a few highlights.

Over 80 per cent of the *with child support* trial decisions fall within the formula ranges. The ten cases that don't are all exceptions of various kinds, considered below. This high percentage of "within range" cases probably reflects a combination of "goodness-of-fit" with prior B.C. case law and the strong appellate guidance from the Court of Appeal. In most Canadian jurisdictions, this percentage is more like 70 per cent for the *with child support* formula.

As for where the location of amounts within the range, the cases split pretty evenly, recognising some minor problems of classification: 33 per cent low; 40 per cent mid; and 27 per cent high. British Columbia courts obviously use the full range offered by the Advisory Guidelines formula, unlike courts in other jurisdictions which tend to cluster at the low-to-mid or mid-to-high ends of the ranges. This suggests a more sophisticated and flexible use of the SSAG in B.C. and, accordingly, much more room for skilful advocacy by lawyers in negotiating and arguing spousal support.

#### A. Length of Marriages Under this Formula

Under the *with child support* formula, there are relatively few short marriages, as just 11 per cent of the cases are under 10 years in length. The other 90 per cent divide up evenly: roughly one-third 10 to 14 years, one-third 15 to 19 years, and one-third 20 years or more.<sup>7</sup> Here we do not see the prominence of long marriages in litigated cases, as we do under the *without child support* formula. Under this formula, given the requirement of a minor child, even the long marriage cases cluster right around the threshold of 20 or 21 years.

#### B. The Basic Formula

We will do a separate analysis of two categories of cases: shared custody cases and custodial payor formula cases. But first we can look at the bulk of the cases that are governed by the basic formula and any reasons given for the location of an amount within the range. These are very tentative conclusions and the cases often do not reveal discernible patterns.

One pattern is clear: when the middle of the range is chosen, there does not appear to be much felt need for explanation. Most of these thirteen mid-range trial cases seem to involve 2 or 3 children. A couple of cases even involve minor reapportionment,

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<sup>7</sup> To be more precise, the numbers are: under 10, 7 or 11 per cent; 10-14 years, 18 or 30 per cent; 15-19 years, 27 per cent; 20 or more years, 19 or 32 per cent.

but support is still fixed in the mid-range.<sup>8</sup> In the Court of Appeal, *Redpath*, *Stein* and *Kopelow* are all mid-range cases.<sup>9</sup>

What about the high end of the range? Four of these nine cases have three children,<sup>10</sup> but the rest are evenly divided between one and two kids. Almost half are interim cases,<sup>11</sup> a couple have high incomes,<sup>12</sup> two have incomes imputed to husbands,<sup>13</sup> one has a time limit and looks like restructuring.<sup>14</sup> No clear pattern, but these are a few of the factors that can be discerned.

The eleven low end cases are not much clearer. Numbers of children range from 1 to 4, with two 4-child cases.<sup>15</sup> A couple of debt cases.<sup>16</sup> Big section 7 expenses.<sup>17</sup> Shortish marriages.<sup>18</sup> Longish marriages with teenagers.<sup>19</sup> One reapportionment case.<sup>20</sup> One wife cohabiting with a doctor.<sup>21</sup>

### C. The Shared Custody Cases

All seven shared custody cases fell within the ranges. Four had two children and three one child, typical of most shared custody cases. What is atypical about the reported cases were the high payor incomes, large income disparities and lower recipient incomes.

<sup>8</sup> The mid-range trial cases would be: *E.(Y.J.) v. R.(Y.N.)*, 2007 CarswellBC 782, 2007 BCSC 509; *P.H.D. v. M.L.D.*, [2007] B.C.J. No. 1302, 2007 BCSC 863; *Toews v. Toews*, [2007] B.C.J. No. 1146, 2007 BCSC 746; *Gagne v. Gagne*, 2007 CarswellBC 671, 2007 BCSC 438; *Silliphant v. Drever*, [2007] B.C.J. No. 186, 2007 BCSC 153; *Fisher v. Fisher*, [2007] B.C.J. No. 52, 2007 BCSC 39; *MacCarthy v. MacCarthy*, [2006] B.C.J. No. 3082, 2006 BCSC 1765; *L.D.D. v. G.C.D.*, [2006] B.C.J. No. 2636, 2006 BCSC 1499; *S.R. v. N.R.*, [2006] B.C.J. No. 627, 2006 BCSC 412; *R.L.G. v. R.G.G.*, [2006] B.C.J. No. 466, 2006 BCSC 348; *Phillips v. Phillips*, [2005] B.C.J. No. 2495, 2005 BCSC 1614; *Wegner v. Wegner*, [2005] B.C.J. No. 2290, 2005 CarswellBC 2488, 2005 BCSC 1497 and [2005] B.C.J. No. 2020, 2005 CarswellBC 2195, 2005 BCSC 1294; *J.S.G. v. A.G.G.*, [2005] B.C.J. No. 2228, 2005 BCSC 1457.

<sup>9</sup> *Redpath v. Redpath*, [2006] B.C.J. No. 1550, 2006 BCCA 338 (range \$4,542-\$5,510, order \$5,000/mo., indefinite, review in 5 years); *Stein v. Stein*, [2006] B.C.J. No. 2020, 2006 BCCA 391 (range \$3,920-\$4,883, order \$4,200/mo., review in 3 ½ years before termination); *Kopelow v. Warkentin*, [2005] B.C.J. No. 2412, 2005 BCCA 551 (range \$3,037-\$4,015, order \$3,500/mo., indefinite).

<sup>10</sup> *Francios v. Franciosi*, [2007] B.C.J. No. 544, 2007 BCSC 368; *D.R.M. v. R.B.M.*, [2006] B.C.J. No. 3299, 2006 CarswellBC 3177; *J.W.J.McC. v. T.E.R.*, [2007] B.C.J. No. 3581, 2007 BCSC 252; *DeCamillis v. DeCamillis*, [2006] B.C.J. No. 2959, 2005 BCSC 1826 (Master)..

<sup>11</sup> *Ferchert v. Ferchert*, [2007] B.C.J. No. 1315, 2007 BCSC 873 (Master); *D.R.M. v. R.B.M.*, above; *McGuckin v. McGuckin*, [2006] B.C.J. No. 859, 2006 BCSC 582 (Master); *DeCamillis*, above.

<sup>12</sup> *J.W.J.McC. v. T.E.R.*, above; *D.R.M. v. R.B.M.*, above; *W. v. W.*, [2005] B.C.J. No. 1447, 2005 BCSC 1010.

<sup>13</sup> *Ferchert*, above; *Purewal v. Purewal*, [2006] B.C.J. No. 1899, 2006 BCSC 1259.

<sup>14</sup> *J.W.L.S. v. J.L.S.*, [2007] B.C.J. No. 247, 2007 BCSC 174.

<sup>15</sup> *Parker v. Vik*, [2006] B.C.J. No. 1794, 2006 BCSC 1193; *Gibb v. Gibb*, [2005] B.C.J. No. 2730, 2005 BCSC 1738.

<sup>16</sup> *M.P. v. S.F.*, [2006] B.C.J. No. 1434, 2006 BCPC 289; *Gibb*, above.

<sup>17</sup> *Kim v. Kim*, [2006] B.C.J. No. 2663, 2006 BCSC 1330.

<sup>18</sup> *Wong v. Smith*, [2007] B.C.J. No. 1055, 2007 CarswellBC 1091, 2007 BCSC 701; *Salmond v. Salmond*, [2007] B.C.J. No. 388, 2007 BCSC 264.

<sup>19</sup> *G.(L.D.B.) v. G.(K.L.)*, 2007 CarswellBC 1028, 2007 BCPC 134; *A.T. v. C.T.*, [2006] B.C.J. No. 309, 2006 BCSC 240.

<sup>20</sup> *Landrigan v. Bloomer*, [2007] B.C.J. No. 367, 2007 BCSC 254.

<sup>21</sup> *Wettlaufer v. Wettlaufer*, [2007] B.C.J. No. 168, 2007 BCSC 137 (Master).

Most shared custody parents display relatively small income disparities, usually because they have both worked and shared parenting during the marriage as well as after separation.

In general, the shared custody cases at the low end of the range reflected large income disparities, plus other characteristics: like a new partner for the wife,<sup>22</sup> or an above-ceiling income, big s. 7 expenses and a step-down order that started high and ended below the range,<sup>23</sup> or a husband receiving support from a much-higher income wife.<sup>24</sup> Length of marriage did not seem to make any real difference to the location within the shared custody range.

For the mid-to-high end shared custody cases, the income disparities were a bit smaller, with the high end case displaying the smallest disparity.<sup>25</sup> Three of these four cases had time limits on support, which suggests some element of “restructuring” might be at work.<sup>26</sup> The other was the interim decision in *Swallow v. De Lara*, where Master McCallum equalised the net disposable incomes of the spouses to maintain similar household standards of living, an increasingly common response in shared custody cases after *Contino*.<sup>27</sup> Some quick calculations for the other cases did not reveal any consistent pattern of 50/50 NDI splits, but a number were quite close to that approach.<sup>28</sup>

#### D. The Custodial Payor Formula

Four of the five custodial payor cases reflect the “typical” pattern of such cases: longer marriages, children in their teens living with dad.<sup>29</sup> These facts will generate sizeable amounts of support usually for an indefinite duration. Three of these four fall within the ranges. The fourth fell below the range, to take account of debt payments at the interim stage in *Christensen*.

The most recent case also involved a longer marriage and teenage children, but this time the husband was seeking spousal support from the higher-income wife and he

<sup>22</sup> *Marr v. Marr*, [2006] B.C.J. No. 339, 2006 BCSC 254 (and the wife had no income).

<sup>23</sup> *J.K.S. v. H.G.S.*, [2006] B.C.J. No. 2051, 2006 BCSC 1356 (and the husband earned \$477,206 annually).

<sup>24</sup> *Ladd v. Ladd*, above (she earned \$182,000 and he earned \$42,000).

<sup>25</sup> *Thorimbert v. Thorimbert*, [2007] B.C.J. No. 851, 2007 BCSC 94 (husband earns \$66,000, wife no income, 1 child, support time limited to 6 years after a 14-year marriage).

<sup>26</sup> *Thorimbert*, above; *Vargas v. Berryman*, [2007] B.C.J. No. 694, 2007 BCSC 470 (married 11 years, husband \$102,000, wife \$20,800, 2 children, spouses in their thirties, support for 10 years); *Galloway v. Galloway*, 2006 CarswellBC 2758, 2006 BCSC 1677 (married 21 years, husband \$235,000, wife \$96,000, 2 older children, 6 years of supporting ending when husband retires at 65).

<sup>27</sup> *Swallow v. De Lara*, [2006] B.C.J. No. 2060, 2006 BCSC 1366 (Master) (married 11 years, 1 child, husband \$97,000, wife \$5,000).

<sup>28</sup> *Vargas v. Berryman*, above; *Ladd v. Ladd*, above.

<sup>29</sup> *Christensen v. Christensen*, [2006] B.C.J. No. 930, 2005 BCSC 647 (Master) (married 25 years, 1 child 19 with father, debt exception); *Lawrence v. Lawrence*, [2006] B.C.J. No. 210, 2006 BCSC 167 (married 19 years, 4 children 19, 19, 17 and 15 with father); *M.R.M. v. I.M.M.*, [2006] B.C.J. No. 1034, 2006 BCSC 568 (married 28 years, 1 child 16 with father); *Reggelsen v. Reggelsen*, [2007] B.C.J. No. 332, 2007 BCSC 219 (married 16 years, 3 children 17, 14 and 13 with father).

appeared to get less in *P.G.A. v. B.M.A.*,<sup>30</sup> although it's hard to tell because of some confusion in the case around the formula ranges.

### E. Cases Outside the Range for Amount

There were a total of ten cases that fell outside the *with child support* formula range, nine below and one above. The lonely “high” case was *Hewko v. Hewko*.<sup>31</sup> *Hewko* might best be treated as an unusual “prior order” case, as the prior order was also above the range, even before the husband’s income was nearly cut in half, from \$108,000 to \$58,000.

Of the “below” cases, three involved no entitlement<sup>32</sup> or no ability to pay.<sup>33</sup> Another involved the low-income “floor” exception, where the husband only earned \$24,000.<sup>34</sup> One was a “prior order” case, where the prior pre-Guidelines order was already low as part of a step-down order and spousal support was extended at that low level for another two years.<sup>35</sup> Another was a *Miglin* case, where a prior agreement constrained the amount of support, but the court recognised that the duration of support might need to be extended in four years’ time.<sup>36</sup> Two were debt cases.<sup>37</sup> Then there was the *Frouws* case, a custodial payor case that incorporated way too many exceptional factors: a split/shared custody arrangement, no child support paid by the wife, the wife had cohabited for seven years, her claim was thus delayed, the husband had paid the family debts, and all three children in the father’s care had had problems, one with continuing psychiatric problems.<sup>38</sup> And one was just a very early case where the judge did not use the Guidelines and produced a low monthly amount in a higher income case.<sup>39</sup>

### F. Duration

Duration has proven to be a much more difficult issue under the *with child support* formula. Most orders are indefinite, but time limits do appear in a minority of

<sup>30</sup> [2006] B.C.J. No. 3386, 2006 BCSC 1964 (married 17 years, husband on CPP disability plus some work, \$19,229, wife earns \$49,000, 2 children 20 and 17, low end of range intended).

<sup>31</sup> [2005] B.C.J. No. 1416, 2005 BCSC 904.

<sup>32</sup> *R.E. v. D.E.*, [2007] B.C.J. No. 226, 2007 BCSC 168 (husband earns \$61,500, wife imputed full-time income of \$46,000 rather than part-time, range zero to zero, no entitlement).

<sup>33</sup> *D.L.T. v. D.T.B.*, [2007] B.C.J. No. 303, 2007 BCSC 210 (both made \$50,000, wife on one-year contract, range zero to zero, dismissal with liberty to reapply in change); *C.E.A.P. v. P.E.P.*, [2006] B.C.J. No. 3295, 2006 BCSC 1913 (husband earns \$56,927, wife on disability pension of \$9,479, range zero to zero, dismissal with liberty to reapply if change).

<sup>34</sup> *Snowden v. Snowden*, [2006] B.C.J. No. 1187 (S.C.).

<sup>35</sup> *Upton v. Fasoli*, 2007 CarswellBC 765, 2007 BCSC 414.

<sup>36</sup> *Rapley v. Rapley*, [2006] B.C.J. No. 3213, 2006 BCSC 1854.

<sup>37</sup> *M.P. v. S.F.*, [2006] B.C.J. No. 1434, 2006 BCPC 289 (spousal support suspended while bankrupt husband making payments for 6 months to bankruptcy trustee, support below low end of range); *Christensen v. Christensen*, unreported decision of Leask J., dated June 15, 2006, reversing [2006] B.C.J. No. 930, 2006 BCSC 647 (Master)(interim support of \$700/mo., because husband paying line of credit of 250/mo.).

<sup>38</sup> *Frouws v. Frouws*, [2007] B.C.J. No. 282, 2007 BCSC 195.

<sup>39</sup> *M.S. v. W.S.*, [2005] B.C.J. No. 1447, 2005 BCSC 939.

cases. Outside time limits, or the notion that support will end at some future point, work away in the background shadows of these cases, sometimes mentioned, often not.

A bunch of these are interim decisions and another handful are cases of no entitlement or no ability to pay, decision that can avoid these hard duration questions.<sup>40</sup> Time limits were imposed in 12 of the remaining 43 cases. Orders were “indefinite” in the other 31 cases, 18 without any review and 13 with reviews. Length of the marriage did not have any influence upon the attachment of review conditions.

There are a few noticeable patterns in the dozen time-limited support orders. Eight of these cases involve marriages of 11 to 15 years: in fact, 6 of them are marriages of 11 years in length. Some of the “time limits” were quite long, especially when you take into account prior periods of support: 11 years in *Vargas v. Berryman*, 15 years in *Franciosi*, 7 more years for a total of 14 years in *J.K.S. v. H.G.S.*, 6 more years for a total of 11 years in *Thorimbert*, 4 more years for a total of 10 years in *Rapley* (an agreement case) and 2 more years for a total of more than 8 years in *Upton v. Fasoli*. Only two cases were short, both involving strong facts: *J.W.L.S. v. J.L.S.* (a 2-year marriage and a wife with skills and recent employment, 11 more months for a total of 18 months) and *S.R. v. N.R.* (wife completing Ph.D. within a year, 2 years interim paid, 18 more months). The rest of the time limits hovered around 5 or 6 years: *Foster v. Foster*, *Gagne v. Gagne*, *Galloway v. Galloway*, *L.D.D. v. G.C.D.* Although some time limits were linked to the length of the marriage and some to the age of the children, no clear pattern emerged. In *L.D.D. v. G.C.D.*, the 3-year time limit (after 3 years of interim support) looked short after a 14-year marriage and three children aged 7, 7 and 6 in the wife’s care, but there was a serious lack of employment effort by the wife and a step-down order.

The review cases deserve a closing comment. *Leskun* appears to have had little impact upon the use of review orders in British Columbia. About 40 per cent of the “indefinite” cases with children have review conditions attached. All but one of the 13 review orders appear to fall comfortably within the confines of *Leskun*: mostly wives seeking retraining or employment, a few cases of uncertain incomes, a case of temporary disability, a few cases where both spouses had financial uncertainties.<sup>41</sup> The one odd case was *J.W.J.McC. v. T.E.R.*, where the review was to take place 14 years later when the wife reached 60, with the support likely to be terminated then, something that looks more like a long time limit. The timing of the reviews wind up in three clusters: 6 months (2 cases), 1 to 2 years (5 cases) or 4 to 7 years (5 cases). One of those 6-month reviews was in a shorter-marriage-young-children case, where the child would be starting Grade 1: *Salmond v. Salmond*.

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<sup>40</sup> Interim cases were 11 in number and 5 cases found no entitlement or no ability to pay.

<sup>41</sup> The twelve cases are: *Redpath*, *Stein*, *Toews*, *Salmond*, *Landrigan v. Bloomer*, *Kim*, *M.P. v. S.F.*, *A.T. v. C.T.*, *Lawrence*, *Stieda-Everitt v. Everitt*, *Hewko*, *G.F.W. v. J.L.W.*

## IV. ENTITLEMENT

In Chapter 4 of the *Draft Proposal* (at pages 24 to 25) we make clear that the Advisory Guidelines do not deal with entitlement, only the amount and duration of spousal support after a finding of entitlement:

The proposed advisory guidelines do **not** deal with entitlement. The informal status of the proposed guidelines means that they must remain subject to the entitlement provisions of the *Divorce Act*, notably ss. 15.2(4) and (6) as interpreted by the courts. Entitlement therefore remains a threshold issue to be determined before the guidelines will be applicable. **On its own, a mere disparity of income that would generate an amount under the advisory guidelines, does not automatically lead to entitlement.**

However, as we have noted both in the “Issues Paper” and in our most recent update, “The Spousal Support Advisory Guidelines 28 Months Later”, the threshold issue of entitlement is often ignored in practice, with entitlement simply being assumed because there is a difference in spousal incomes that generates an amount of support under the formulas. **This is incorrect. There must be a finding (or agreement) on entitlement before the formulas and the rest of the Guidelines are applied.**

Furthermore, entitlement is not just a threshold issue. Even where entitlement is found, the basis for entitlement in a particular case, e.g. compensatory or non-compensatory, informs the whole subsequent Guidelines analysis, including the discretionary judgments that need to be made on location within range, restructuring and exceptions. As well, issues of continuing entitlement arise on variation and review, most obviously in the context of applications to terminate spousal support.

As we have noted above, B.C. judges and lawyers are becoming increasingly sophisticated in their use of the Advisory Guidelines. B.C. case law provides a number of decisions in which the courts have engaged in a serious analysis of entitlement in conjunction with the application of the Advisory Guidelines—and we in fact use these cases as examples in other parts of the country. However, in daily practice—even in B.C.—entitlement is still often forgotten.

### A. Entitlement as a Threshold Issue: The “No Entitlement” Cases

In some cases the entitlement analysis will determine that there is no entitlement to spousal support and hence that the SSAG are not even applicable. Admittedly, current spousal support law, post-*Bracklow*, provides a broad basis for entitlement. Even if it is not possible for a lower-income spouse to claim spousal support based on economic disadvantage from the marriage or the conferral of an economic advantage upon the other spouse, there is still the possibility of a non-compensatory claim based on need or hardship created by the loss of the marital standard of living. Typically a significant disparity in income will create an entitlement to some support—at the very least to some time-limited, transitional support.

The SSAG do not pre-determine when an income disparity will be large enough to create entitlement, leaving that issue to the courts, nor do they preclude the possibility that courts may find no entitlement on particular facts despite a fairly significant income disparity. In some cases courts may find that the income disparity reflects neither economic disadvantage flowing from the marriage nor economic need and hence that there is no entitlement to support. In other cases they may find that any compensatory or needs-based claims have been met through property division, including an unequal division through reapportionment, thus eliminating entitlement to spousal support. Lawyers using the SSAG need to remain aware of these possibilities.

We provide here a brief review of the recent case law on entitlement. The focus is on B.C. decisions, but a few examples from other provinces have also been included.<sup>42</sup> We found that there are relatively few reported cases where entitlement has not been found. This could be read as confirming the broad basis for entitlement under the current law; alternatively, it could suggest that entitlement issues, even if raised on the facts of particular cases, are often not worth litigating and are settled. Below we identify some of the main factors, often overlapping, present in cases in which no entitlement has been found:

- ***Short marriage***

*Beese v. Beese*, [2006] B.C.J. No. 2903, 2006 BCSC 1662 (Goepel J.) (parties together 7 years (3 married), no children, husband earns \$52,495 as truck driver, wife earns \$35,000 as clerk; compensation order of \$175,000 for wife's use of personal injury settlement to pay off husband's business loans; SSAG range \$175-\$233 for 3 to 7 years, but any support claims fully addressed by compensation order, no periodic support)

*McKee v. Priestlay*, [2007] B.C.J. No. 1297, 2007 BCSC 85 (Ehrke J.) (second marriage for both; marriage under 3 years; parties incomes fairly similar; wife benefited economically from marriage, including property award)

*Rezel v. Rezel*, [2007] O.J. No. 1460 (S.C.J.) (Harvison-Young J.) (short second marriage; both parties computer analysts at point of separation, but wife subsequently lost job and sought spousal support; court found no entitlement based on the short length of the marriage, the absence of any merger of economic lives and fact that wife not serious about return to work; note also issue of entitlement, not directly addressed, re. recipient's post-separation income reduction)

*S.C.J. v. T.S.S.*, [2006] A.J. No. 1319, 2006 ABQB 777 (Lee J.) (together 5 years total, multiple separations, 2 children with husband; wife earned \$20,958 from employment/EI previously, has gambling addictions, residential treatment program just completed; income imputed at \$20,958; husband earns \$65,000; husband paid off wife's debts, no child support paid; SSAG range under custodial payor formula if no child support paid, \$176 - \$235; no entitlement to spousal support)

- ***Support objectives satisfied by property award***

*Chutter v. Chutter*, [2007] B.C.J. No. 1247, 2007 BCSC 814 (E.R.A. Edwards J.) (28 year marriage, 1 grown child; husband businessman, income \$156,000; wife returned to work as dental hygienist after child started school, earns \$49,000; interim spousal support of \$3250/mo;-each spouse left with 4 million in assets; wife's total income, including interest and rent, \$133,000 and husband's \$214,000;-

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<sup>42</sup> The B.C. cases were drawn from the B.C. SSAG cases found in our case law summaries, supplemented by a search of all spousal support decisions in B.C. over the course of the past year.

no entitlement to spousal support in light of property settlement which satisfies need and marital standard of living)

*W.J. M. v. L.A.M.*, [2007] B.C.J. No. 1283, 2007 BCSC 842 (Halfyard J.) (21 year marriage, 3 children now grown; wife moved out and 2 younger children remained with husband; -usband logger, earns \$67,596; wife homemaker but husband wanted her to work full-time after children all in school; wife works as house-cleaner after separation; cohabiting with new partner; court finds insufficient efforts; imputes income of \$25,000; voluntary interim support of \$500/mo for 24 months after separation; wife paid no child support; home (value of \$249,000) reapportioned 75/25 in wife's favour; no spousal support awarded; any claim for spousal support satisfied by reapportionment; wife did not lose any opportunities to earn income during marriage that were no longer available to her at point of separation; wife had means to earn reasonable income after separation and made choice not to)

*Lloyd v. Lloyd*, [2007] B.C.J. No. 493, 2007 BCSC 349 (Groppe J.) (12 year relationship; each 2 children from previous marriage; husband lawyer earning \$89,040; wife legal assistant, then MLA assistant, now provincial political job, earning \$56,815; assets divided equally, including husband's law practice; wife argues loss of political job would return her to lower salary; no entitlement; no economic disadvantage from marriage; no hardship after division of law practice)

*Beese v. Beese*, *supra*

- ***Similar standards of living despite income disparity (because of assets, differential cost of living, etc.)***

*Godin v. Godin*, [2007] B.C.J. No. 909, 2007 BCSC 566 (Shabbits J.) (19 year marriage; one remaining child with husband; wife earns \$34,000, husband \$64,000; wife in arrears of child support; no entitlement to spousal support; similar lifestyle to that during marriage)

*Johnson v. Johnson*, [2006] B.C.J. No. 3308, 2006 BCSC 1932 (Brooke J.) (14 year marriage; second marriage for both; wife 69, husband 77; wife's monthly income \$1391, husband's \$2630, but wife has greater assets; no entitlement to spousal support; both parties had sufficient assets and income to be self-sufficient)

*Elias v. Elias*, [2006] B.C.J. No. 146, 2006 BCSC (Bennett J.) (24 year marriage; husband earns \$50,000 in construction; wife earns \$87,000 as lab tech, but blip in overtime, \$60,000 without overtime; no entitlement to spousal support; similar standards of living—husband lower housing costs because will build own home; no requirement of income equalization)

*Eastwood v. Eastwood*, 2006 CarswellNB 655, 2006 NBQB 413 (Clendening J.) (25 year marriage with no children; parties had similar incomes during the marriage but husband moves to Toronto after separation and income increases; no entitlement to support; similar standards of living; note also issue of entitlement to post-separation increase in payor's income)

- ***Support claimant is non-custodial parent not paying child support***

*Godin v. Godin*, *supra*

*Frouws v. Frouws*, [2007] B.C.J. No. 282, 2007 BCSC 195 (Preston J.) (18 year marriage; 3 children initially with father, now 1 shared custody; husband pharmacy manager earning \$117,000; wife part-time, residential care centre, earns \$18,000, income imputed \$30,000; wife repartnered; seeks spousal support after 7 years separation; no child support paid by wife, home split 50/50; husband paid debts of \$15,000, no spousal support)

*S.C.J. v. T.S.S.*, *supra*

*Lamothe v. Lamothe* (2006) 2006 CarswellOnt 8150 (Ont. S.C.J.) (22 year marriage; husband claiming spousal support; husband quit working early in marriage because of injury and did not return to full-time employment until after separation; shared custody of youngest child; husband's income \$36,124 and cohabiting with woman who contributed \$300 per month to household expenses; wife a teacher earning \$90,000 who had paid all children's expenses since separation; interim support of \$1000/mo)

for 2 years; support terminated; no entitlement; husband had no compensatory claim as no issue of reduced earning capacity related to marriage and moreover husband had failed to contribute financially to the relationship for several years when able to do so; no significant change in the husband's standard of living from the marriage)

Some of these “no-entitlement” decisions are contentious, particularly those in which courts have made findings of minimal economic disadvantage experienced by women who have been primary care-givers of children in relatively long marriages (see *Frouws v. Frouws* and *W.J. M. v. L.A.M.*). Gender clearly makes a difference when it comes to entitlement: findings of no entitlement are more likely when the lower-income, claimant spouse is the husband rather than the wife (see *Elias v. Elias* and *Lamothe v. Lamothe*). As well, women who are non-custodial parents, particularly those who are not paying child support, risk dismissal of their claims for spousal support, suggesting, as with male claimants, that factors of conduct and non-conformity with stereotypical gender roles may influence decisions on entitlement. Second marriages, whether short or long, may more readily give rise to findings of no entitlement than first marriages, presumably because they may attract assumptions of a greater degree of financial independence.

Mention should also be made of a couple of significant B.C. cases where arguments of no entitlement were raised but ultimately dismissed by the courts. First is the B.C. Court of Appeal's ground-breaking judgment in *Yemchuk*. The significance of the decision in terms of its endorsement of the SSAG tends to over-shadow the court's ruling on entitlement. Recall that the support claim in *Yemchuk* was brought by the husband who had retired early to facilitate the wife's relocation because of her employment. The trial judge, confirming the pattern discussed above, had found no entitlement on the husband's part. The Court of Appeal overturned that decision, engaging in an extensive analysis of the husband's entitlement on compensatory grounds, before turning to the Advisory Guidelines as a useful tool in determining the appropriate amount of support.

A second important ruling on entitlement is Justice Martinson's decision in *R.S.R. v. S.M.R.*, [2006] B.C.J. No. 2109, 2006 BCSC 1404. The case involved a 23 year traditional marriage with 2 grown children. The wife, who worked as a part-time retail clerk during marriage earned \$21,400 per year while the husband earned \$67,074. In divorce proceedings the husband sought order dismissing the wife's claim for spousal support on basis of no entitlement. The wife, who had re-partnered, was not currently requesting spousal support because her new partner had a high income, but nonetheless wanted to preserve her entitlement to apply for support in the future if her new relationship ended. Justice Martinson dismissed the husband's claim, finding that the wife was entitled to support on both compensatory and non-compensatory grounds and that her entitlement was not lost because of the new relationship. Although recognizing that the SSAG do not deal with entitlement, Justice Martinson considered them of some assistance in determining the entitlement issue, noting that in the absence of the new relationship the wife would have had a substantial claim to spousal support (\$1,583.33 per month at the mid-point of range).

## **B. Entitlement at Other Stages of the Guidelines Analysis**

Cases where no entitlement is found despite a significant income disparity are infrequent. However, an analysis of entitlement is not only relevant at the threshold stage of determining whether any spousal support at all is to be paid. Even in cases where entitlement is found and spousal support is awarded, an analysis of the basis of entitlement is a necessary underpinning to the determination of the amount and duration of support. The compensatory and non-compensatory bases for spousal support need to be delineated as they generate different support outcomes.

The SSAG reflect these different bases. For example, the *without child support* formula reflects non-compensatory support considerations in its application to cases of short and medium length marriages with no children while the *with child support formula* is largely compensatory. In cases of long marriages under the *without child support* formula the awards reflect a mix of compensatory and non-compensatory claims. Effective use of the SSAG requires this delineation both to determine location within the ranges and to determine whether or not the case justifies a departure from the ranges (i.e. an exception).

In terms of determining location within the range, for example, in long marriages under the *without child support* formula, a strong compensatory claim may suggest an award at the high end of the range whereas a non-compensatory claim based only upon loss of the marital standard of living may suggest an award at the lower end of the range. As well, compensatory claims can be more or less extensive, depending upon the degree of economic disadvantage experienced because of labour force withdrawal.

The effective use of the exceptions will be dealt with in more detail below. With respect to the importance of delineating the basis of entitlement in applying the exceptions, we simply note here that 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.

## **C. Entitlement Issues on Review and Variation**

Entitlement issues can also arise on review and variation, most obviously in the context of applications to terminate spousal support. Such applications may be triggered by the recipient's remarriage or in other cases by the recipient's employment or simply the passage of time. In many cases duration under the Advisory Guidelines is indefinite, thus requiring a discretionary determination of whether termination is appropriate as the parties' circumstances evolve and change over time. Even in cases where the SSAG generate a range for duration, courts may sometimes prefer to make the initial order indefinite and deal with the issue of termination on a subsequent review or variation, particularly where the suggested time limits are fairly lengthy.

Determining whether termination is appropriate 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 should really be seen as one of whether there is a continuing entitlement to support. The determination of when a spouse has become self-sufficient is one of those “hard” issues that was there before the Advisory Guidelines. While the Guidelines take into account the obligation to make reasonable efforts towards self-sufficiency, they do not determine the hard issue of when self-sufficiency has been achieved and the law on this continues to evolve.

The result on a termination application, given the underlying significance of entitlement, may differ depending on whether the initial award was compensatory or non-compensatory in nature. For an excellent analysis of a compensatory support claim in the face of an application to terminate based on the wife’s remarriage see *J.W.J.McC. v. T.E.R.*, [2007] B.C.J. No. 358, 2007 BCSC 252. The case involved a 19 year traditional marriage with three children. The husband was a lawyer whose income was well over the \$350,000 ceiling. The wife had remarried a businessman and, six years after the separation, the husband brought an application to terminate spousal support. Sinclair-Prowse J. rejected the husband’s application after finding that the wife was still entitled to support on a compensatory basis both because of her child-care responsibilities and the fact that she had helped put the husband through law school. A review date was set for 2020 when the wife would turn 60, with the strong suggestion that support would terminate at that point (after 14 years of spousal support).

Two other decisions, one from B.C. and one from Saskatchewan offer good analyses of non-compensatory support and when it is appropriately terminated: *Kelly v. Kelly* [2007] B.C.J. No. 324, 2007 BCSC 227 (Barrow J.) (17 year relationship, no children; wife remarried but seeking increase in support based on significant increase in husband’s income; support to terminate in 19 month after 11 year total duration, support at this point no longer compensatory only non-compensatory) and *Rezansoff v. Rezansoff*, [2007] S.J. No. 37, 2007 SKQB 32 (Sandomirsky J.) (6 year second marriage with no children, support non-compensatory and to terminate in 6 months after 4 year total duration).

Thus far we have talked about how entitlement issues arise in the context of applications to reduce or terminate spousal support. Reviews or variations may also give rise to entitlement issues of somewhat different sort when the recipient applies for an increase in spousal support. Cases involving a post-separation increases in the payor’s income, for example, raise the issue of the recipient’s entitlement to share in that increase. For a B.C. case dealing with this issue see *Kelly, supra*. Cases from other parts of the country include *Eastwood, supra*, from New Brunswick and from Alberta, *D.B.C. v. R.M.W.*, [2006] A.J. No. 1629, 2006 ABQB 905 (Topolniski J.) (13 year marriage; two children with wife; husband worked in investment industry in Calgary; but stopped working for last 6 years of marriage as result of mutual decision to change lifestyle; after separation husband returned to Calgary investment work and income increases substantially; wife’s application for increased spousal support dismissed; no entitlement

to share of post-separation increase; no contribution by wife to increase; not long traditional marriage, husband out of work force for 6 years before separation).

## V. RESTRUCTURING

Restructuring—or to use more familiar language, the ability to trade off amount against duration—was a crucial component in the development of the Advisory Guidelines. It was the only way in which some of the results generated by the formulas could be rendered consistent with current practice. **Restructuring is thus an important aspect of a SSAG analysis *after* the formulas have been applied to generate ranges for amount and duration.** The best discussion of restructuring and its place within the overall scheme of the Advisory Guideline is found in an Alberta decision, *McCulloch v. Bawtinheimer*, [2006] A.J. No. 361 (Q.B.) (Sullivan J.).

**In practice, restructuring, like entitlement, is often ignored.** In many cases, particularly short marriages under the *without child support formula*, courts have found the amounts generated by the formula too low and have then simply concluded that the Advisory Guidelines do not yield an appropriate outcome and are of no further use; for an appellate example see the B.C. Court of Appeal decision in *Toth v. Kuhn*, [2007] B.C.J. No. 244, BCCA 83 discussed in our “28 Months Later” paper; for a trial level example see *Wang v. Poon*, [2007] B.C.J. No. 271, 2007 BCSC 194 (Humphries J.). The fairly pervasive failure to consider restructuring is unfortunate because it means that an important element of flexibility that allows the Advisory Guidelines to be effectively adapted to a wide range of circumstances is not being utilized. The structure and guidance provided by the SSAG are thus being lost in a number of cases where these benefits would otherwise be available.

Restructuring is discussed at several points in the Draft Proposal which bear re-reading. The concept is introduced in Chapter 4 at pages 32 to 33. Its use under the *without child support* formula is discussed extensively in Chapter 5 at pages 55 to 58; and its use under the *with child support* formula is discussed in Chapter 6 at pages 82 to 83.

### A. How Does Restructuring Work?

The SSAG formulas generate separate figures for amount and duration. Restructuring allows amount and duration to be traded off against each other, as long as the overall value of the restructured award remains within the global—or total—amounts generated by the formula when amount is multiplied by duration.

A certain degree of adjustment of amount against duration will occur when precise amounts and duration are being fixed within the ranges. However, in particular cases an appropriate award will require an adjustment beyond the limits of the formula’s ranges. Restructuring allows the formula to continue to act as a tool to guide such deviations from the ranges because the overall value of the award remains within the

global amounts set by the formula. In this way restructuring differs from exceptions, discussed below, which involve an actual departure from the outcomes suggested by the formula.

Restructuring can be used in three ways:

- to **front-end load** awards by increasing the amount beyond the formulas' ranges and shortening duration, see *McCulloch v. Bawtinheimer, supra*;
- to **extend duration** beyond the formulas' ranges by lowering the monthly amount; and
- to formulate a **lump sum payment** by combining amount and duration; see *Smith v. Smith*, [2006] B.C.J. No. 2920, 2006 BCSC 1655 (Pitfield J.) and *Martin v. Martin*, [2007] O.J. No. 467 (Linhares de Sousa J.).

In Chapter 5 of the *Draft Proposal* you can find examples of each of these uses of restructuring and the detailed, explicit calculations of the "global ranges" generated by the formulas. The calculations provided there are very simplified and do *not* take into account the time-value of money, the various future contingencies that could affect the value of awards over time, or tax consequences. In practice, more sophisticated calculations may take such factors into account. Computer software programs may assist in some of the calculations required by restructuring. See for example DIVORCEmate's new SUMmate Quantum v. Duration Analyzer.

Despite such software programs, however, there will also 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. Restructuring by means of a lump sum payment or an increase in amount above the formula amounts will also require a finding of ability to pay on the payor's part.

Two SSAG cases offer careful examples of restructuring to fix a lump sum. From B.C. see *Smith v. Smith, supra* (present value of monthly support if paid until payor 65, discounted for tax and adjusted for reapportionment, resulting in lump sum of \$25,0000). From Ontario see *Martin v. Martin, supra*, (9 year marriage with 2 children, husband the support claimant, lump sum support at the low end of the global range awarded under the custodial payor formula adjusted for tax).

## **B. When Should I Think About Restructuring?**

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

The primary use of restructuring is 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 possible in cases where the formula generates time limits rather than indefinite support. It will thus have limited application under the *with child support* formula where duration is often uncertain.

More specifically, restructuring should be kept in mind in two particular kinds of cases under the *without child support* formula where it may often be appropriate:

- **short marriages (under approx. 10 years) without children**

In some very short marriages cases where the support entitlement is limited and there is available property, a lump sum award that allows for a clean break may be appropriate. Restructuring allows for this.

In other short marriage cases without children the purpose of the award is to provide a period of transition to allow the recipient an opportunity to adjust to a lower standard of living. Such awards, under current practice, often provide fairly generous levels of support during this transitional period. The amounts generated under the formulas in cases of shorter marriages (for example a maximum of 20% of the income difference after a 10 year marriage) are often lower than current practice. Restructuring should be considered as a way to increase the amount of the award beyond the high end of the formula's range by reducing duration. See *McCulloch v. Bawtinheimer, supra*, where this was considered and *Toth v. Kuhn, supra*, where it was not.

- **Longer marriages where the formula generates a time limit but current practice dictates indefinite support**

Under the *without child support* formula, support becomes indefinite after 20 years of marriage. For marriages under that length, the formula generates time limits. Current practice, however, may preclude time limits in marriages shorter than 20 years, for example after 15 or 18 years. What often happens in practice is that the durational limits of the Advisory Guidelines are simply ignored and only the ranges for amount are considered. This is an incorrect use of the SSAG. Instead these cases should be analyzed in terms of restructuring—the extension of duration beyond the high end of the formula's range will require some trade-off of amount, at least a reduction to the low end of the range, if not below. For a case where this was done, although not explicitly, see *Munro v. Munro*, [2006] B.C.J. No. 3096, 2006 BCSC 1758 (Brine J.)

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

For the most part, restructuring has less relevance for marriages with dependent children. Under the basic *with child support* formula, many of the recipient spouses with older dependent children qualify for indefinite support. Further, the maximum duration under the second, shorter marriage, test for duration is much more uncertain, given the review process and the softer nature of the maximum duration. It is thus more difficult in these cases to establish the global or total amount of the formula outcome as is required for restructuring.

But there will be some medium-term marriages that will attract the length-of-marriage time limits under the first, longer-marriage test for duration. For these cases,

restructuring can have some meaning. In some cases, a recipient spouse may want an amount of support above the upper end of the range for a shorter period of time, e.g. to pursue a more expensive educational program. Or, in others, a recipient parent may want to receive support for a longer period, in an amount reduced below the lower end of the range, e.g. to bridge a period to the availability of pension and retirement income.

**(c) 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*, discussed above. The Ontario case of *Martin, supra*, is a good example of restructuring under the *custodial payor* formula, used to create a lump sum award at the low end of the global range for the husband after a nine year marriage.

## VI. EXCEPTIONS

Since the Guidelines are advisory only, judges and lawyers can always depart from the formula ranges when the outcomes don't seem "right". The formulas are intended to generate a range of appropriate outcomes in typical cases. In the *Draft Proposal*, we did expressly identify *five* specific "exceptions", categories of departures where neither the ranges nor restructuring could provide enough flexibility.

If there has been any surprise in the past two years with the Guidelines, it has been the failure of lawyers and judges to use these exceptions. The tendency has been to identify the "Guidelines" with the "formulas", and to just state that the "Guidelines" produce ranges that are too high or too low, too short or too long. No reference is made to the existence or use of "exceptions".

To some extent, these are still early days, and we had a similar experience with the Child Support Guidelines at the outset. More use and experience with the Advisory Guidelines may eventually lead to more use of the exceptions and we are seeing some of this now in British Columbia.

Here we will list off the five "exceptions" expressly identified under that heading, and then a number of the other situations where the formulas are not applied as identified in various parts of the *Draft Proposal*. Finally, we will list a few new exceptions, to be added as part of the revisions. In the revised version, we intend to create a new chapter, devoted entirely to the important topic of "exceptions". Many of these exceptions, as you will see, apply to a very small number of atypical cases. For each exception, we will identify the conditions for its applicability.

**The Five Listed "Exceptions":**

- (1) The Compensatory Exception in Short Marriages
- (2) Illness and Disability
- (3) Debt Payment
- (4) Prior Support Obligations
- (5) Compelling Financial Circumstances at the Interim Stage

**Other “Exceptions” in the Draft:**

- (6) Payor Income Above \$350,000
- (7) Payor Income Below \$30,000/\$20,000
- (8) Prior Agreement or Court Order
- (9) Non-Custodial Parent to Fulfil Parental Role in Custodial Payor Formula
- (10) Reapportionment of Property (British Columbia)
- (11) Post-Separation Income Increase of the Payor
- (12) Post-Separation Income Reduction of the Recipient
- (13) Remarriage/Repartnering of the Recipient
- (14) Subsequent Children of the Payor

**Exceptions to Be Added in Revisions:**

- (15) Special Needs Children
- (16) Shorter Marriage, Low Recipient Income under the Without Child Support Formula (Basic Needs)
- (17) Small Amounts, Inadequate Compensation under the With Child Support Formula (Section 15.3(3))

**A. The Five Listed “Exceptions”**

Of the five listed exceptions, the circumstance that appears to come up most frequently in the decided cases is the disability exception, although not always identified as such. Both debt payments and interim circumstances also come up frequently, while the compensatory exception is relatively rare and prior support obligations are almost never mentioned. Because the exceptions themselves are often not explicitly used, little real case law has developed to interpret their limits or use.

In the *Draft Proposal*, these exceptions are discussed at some length in Chapter 5 at pages 58-63 and again at pages 83-84. Interim circumstances are discussed in Chapter 8 at pages 91-92. These pages provide explanations and examples where the exceptions might apply. Here we will be briefer.

**(1) *The Compensatory Exception in Short Marriages (DP, pp. 59-60)***

The compensatory exception applies primarily under the *without child support* formula. In a shorter marriage without children, the formula generates limited support on a non-compensatory basis, to provide a short period of transition. But short and medium length marriages can involve large *compensatory* claims, disproportionate to the length of the marriage, even without any child care obligations:

- a large economic loss or restitutionary claim for an economic advantage conferred as a result of:
- the claimant spouse supported the other spouse while he or she completed a post-secondary or professional program
- the claimant spouse gave up his or her job or employment, or his or her prior spousal support, to marry the other spouse
- the claimant spouse became a secondary earner, in making a move or moves to further the other spouse's career.

There may be other examples, but the latter three capture most cases. In these cases, the claimant spouse would typically have the burden of proving the existence and the amount of the loss or advantage.

Short marriages don't appear that often in the *without child support* case law, and this exception turns up infrequently. Just three cases in B.C., all very short relationships (12, 14 or 30 months) and all involving moves and/or giving up jobs for marriage: *Boudreau v. Scaduto*, [2006] B.C.J. No. 2187, 2006 BCSC 1348; *Ahn v. Ahn*, [2005] B.C.J. No. 2742, 2005 BCSC 1745 (Master); *Fuller v. Matthews*, [2007] B.C.J. No. 656, 2007 BCSC 444.

## (2) *Illness and Disability (DP, pp. 60-61)*

Disability cases are disproportionately represented in the reported decisions, as the law remains highly uncertain after *Bracklow* and outcomes are difficult to predict. Disability is often a factor within the ranges under both formulas, but the length of the marriage or the presence of children can often resolve any issues about amount or duration: *Crawford v. Crawford*, [2006] B.C.J. No. 2921, 2006 BCSC 1664 (20-year marriage, indefinite support, low end of range); *Landrigan v. Bloomer*, [2007] B.C.J. No. 367, 2007 BCSC 254 (married 19 years, two children 7 and 12 with wife, disability possibly temporary, review in 8 months). Disability also comes up regularly under the custodial payor formula, as it explains why the mother is the non-custodial parent: *Lawrence v. Lawrence*, [2006] B.C.J. No. 210, 2006 BCSC 167.

The exception will usually arise in one of the following circumstances:

- a long-term or permanent disability after a short or medium length marriage, where there would otherwise be a time limit that would end support well before the ill or disabled recipient reaches age 65
- a shorter marriage where the same duration problem arises, but the formula also produces a support amount that is too low to support the basic needs of the ill or disabled recipient

Faced with a case of permanent disability, after *Bracklow*, most Canadian courts have responded with one of three approaches, in declining order of frequency:

- (1) *Lower Amount, Extend Duration*: much as we suggested in the *Draft Proposal*, most courts will extend the duration, even to be “indefinite”, while keeping the amount within the range, at or near the low end of the range.
- (2) *No Exception*: a smaller number of courts will use *Bracklow* to fix an amount in the range and use the maximum duration, even if that means that support terminates while need continues.
- (3) *Increase Amount, Extend Duration*: an even smaller group of courts will respond to the greater need in disability cases by increasing amount *and* extending duration.

All three of these can be found in the reported B.C. case law. An example of the first option would be *Munro v. Munro*, [2006] B.C.J. No. 3069, 2006 BCSC 1758, where the court went below the low end of the range due to reapportionment and the husband’s debt payments and the duration was indefinite (the rule of 65 would have applied anyway).

Under option (2) above, B.C. courts seem to combine the time limits with amounts at or above the upper end of the range in these shorter marriage cases: *Shellito v. Bensimhon*, [2007] B.C.J. No. 1105, 2007 BCSC 732 (together 5-6 years, support for 52 months, above upper end of range); *Williston v. Williston*, [2006] B.C.J. No. 3248, 2006 BCSC 1869 (together 7 years, upper end for 8 years); *Wise v. Wise*, [2006] B.C.J. No. 1143, 2006 BCSC 945 (together 7.5 years, higher than upper end, for 8 years). For an excellent example of disability analysis from outside B.C., in a custodial payor case, one that results in time limits too, see *Puddifant v. Puddifant*, [2005] N.S.J. No. 558, 2005 NSSC 340 (Gass J.).

Two examples of option (3) can be found: *Bramhill v. Dick*, [2007] B.C.J. No. 387, 2007 BCSC 262 (together 14 years, upper end of range, indefinite); *Eng v. Eng*, [2006] B.C.J. No. 2044, 2006 BCSC 1353 (together 4 years, husband earns \$165,000, well above upper end of range, \$3,000/mo., indefinite).

The inability of the courts to come up with any consistent approach towards these illness and disability cases means that the Advisory Guidelines can only give limited advice about the appropriate outcomes within this exception. This is an area where the law really does need to develop, and there have been no signs of such development in British Columbia – or anywhere else in Canada – over the past two years.

### (3) *Debt Payments (DP, pp. 61-2)*

In our recent discussions, we have refined the limits of this exception, so that the following requirements must be met:

- the total family debts must exceed the total family assets or the payor’s debts must exceed his or her assets (where the property legislation permits one spouse to have net assets and the other net debts)
- the qualifying debts must be “family” debts
- the debt payments have to be “excessive or unusually high”

Where assets exceed debts, then the debts will usually have been taken into account in the property division, as in *Lawrence v. Lawrence*, [2006] B.C.J. No. 210, 2006 BCSC 167 (home and substantial debts to custodial payor husband). Or, where the net debts are not excessive, there is sufficient flexibility within the range to adjust by going to the low end of the range.

In a few cases, B.C. courts went below the low end of the range on account of debts, but without explicitly invoking the debt exception: *Munro v. Munro*, [2006] B.C.J.No. 3069, 2006 BCSC 1758 (support of \$1,200 vs. low end \$2,826, due to debts , reapportionment and payor husband’s custodial responsibilities); *A.C. v. C.G.*, [2006] B.C.J. No. 1157 (Prov.Ct.)(support of \$1,200 vs. low end \$1,594, husband earning \$58,000 paying \$650/mo. on debts); *Frouws v. Frouws*, [2007] B.C.J. No. 282, 2007 BCSC 195 (husband paid \$15,000 debts, custodial parent, no child support, wife cohabiting, delayed application, no spousal support despite positive range); *M.P. v. S.F.*, [2006] B.C.J. No. 1434, 2006 BCPC 289 (husband paying \$400/mo. to bankruptcy trustee for family debts, spousal support suspended for those 6 months).

**(4) *Prior Support Obligations (DP, pp. 62-3, pp. 83-4)***

This exception just don’t seem to turn up in the decided cases. My guess is that the “first family first” rule and the software calculations mean that most lawyers just make the adjustment, without a lot of discussion. In two reported cases, prior support obligations were noted, but neither case seems to have taken those prior obligations into account: *Williston v. Williston*, [2006] B.C.J. No. 3248, 2006 BCSC 1869 (disability exception, husband pays \$300/mo. child support for two 17-year-olds from first marriage, no apparent adjustment of range); *Matthews v. Matthews*, [2005] B.C.J. No. 2666, 2005 BCSC 1692 (Master)(husband pays \$1,450 for previous child, not clear that taken into account).

**(5) *Compelling Financial Circumstances at the Interim Stage (DP, pp. 91-2)***

Spousal support guidelines were first developed in the United States for interim support applications, where a quick, easily-calculated amount was required. Some masters and judges in B.C. thought there was a conflict between the traditional “needs-and-means” interim analysis and the use of the Advisory Guidelines. That view was convincingly laid to rest by Justice Martinson in *D.R.M. v. R.B.M.*, [2006] B.C.J. No. 3299, 2006 CarswellBC 3177: the Advisory Guidelines do apply to the interim support determination.

Inevitably, though, the Advisory Guidelines have to apply at the interim stage with some flexibility, due to three common circumstances:

- one spouse has to pay a large mortgage until the house is sold or otherwise dealt with
- one or both spouses have to pay large debts or other fixed expenses until their finances can be rearranged

- the recipient spouse may have no income and thus may need more substantial support for a brief period than would be provided by either formula, as a short-term transitional measure.

Relatively few interim decisions get reported. Those that are reported usually fall within the Guidelines ranges. A few examples of the exception can be found: *Ladd v. Ladd*, [2006] B.C.J. No. 1930, 2006 BCSC 1280 (interim support to underemployed husband fixed at low end of range, from which he pays mortgage); unreported decision of Leask J., dated June 15, 2006, in *Christensen v. Christensen*, allowing appeal from Master Keighley (reported at [2006] B.C.J. No. 930, 2006 BCSC 647) and fixing support at \$700/mo. below formula range on account of debt payments. For an early and useful case where Master McCallum applied the Advisory Guidelines, see *Matthews v. Matthews*, [2005] B.C.J. No. 2666, 2005 BCSC 1692 (amount of interim support should bear some relationship to final order, income issues).

## **B. Other “Exceptions” in the *Draft Proposal***

In the revised version of the Advisory Guidelines, we will bring together in one place all the “exceptions”, i.e. those circumstances where the formula ranges don’t apply or only partly apply. We thought this might encourage judges, mediators and lawyers to appreciate the existence of exceptions and to remember that the Guidelines go beyond the formula ranges.

Eight of the nine following exceptions are identified clearly in different chapters of the *Draft Proposal*, but not always as “exceptions”. For example, cases above the income ceiling or below the income floor are not technically “exceptions”, as they lie outside of the ranges to be covered by the formulas. The reapportionment exception is unique to British Columbia, but has been recognised in the B.C. case law from the start.

### **(6) *Payor Income Above \$350,000 (DP, pp. 85-86)***

Under either formula, when the payor’s gross annual income exceeds \$350,000, the formulas no longer apply and a case-by-case approach is necessary to determine the amount of spousal support. The \$350,000 “ceiling” does not create a hard “cap” on support for incomes above that level, i.e. the amount is not limited to the range for \$350,000. And it does not bar the continued use of the formula above \$350,000 as one method of arriving at an amount in the particular case. All of this is discussed carefully at pages 85 and 86 of the *Draft Proposal*, with examples.

Under the *with child support* formula, the child support amounts will continue to rise with incomes over \$350,000, as the courts will generally follow the table formula for incomes right up to \$1 million per year and even higher. At those income levels, the large amounts of child support can contain an element of spousal support, which then may affect the amount of spousal support awarded.

So far the B.C. Court of Appeal has been prepared to apply the formula ranges for some high incomes below the ceiling: *Tedham v. Tedham*, [2005] B.C.J. No. 2186, 2005 BCCA 502 (income \$343,000); *Redpath v. Redpath*, [2006] B.C.J. No. 1550, 2006 BCCA 338 (income \$260,000).

Trial courts have sometimes applied the formula for incomes above the ceiling: *E.(Y.J.) v. R.(Y.N.)*, 2007 CarswellBC 782, 2007 BCSC 509 (income \$602,400, table amount of child support, mid-point of Guidelines range ordered at \$15,128/mo., then to low end of range from January 2008 at \$14,148/mo.); *J.K.S. v. H.G.S.*, [2006] B.C.J. No. 2051, 2006 BCSC 1356 (husband's income \$477,206, wife's income imputed at \$35,000, shared custody set-off, step-down order from top end of range \$13,750 for 3 years to low end of range \$11,000 for 2 years to below range \$8,000 for 2 years and then end). Sometimes the courts have used the Guidelines to arrive at a number that is below the formulaic range for the above-ceiling income: *J.W.J.McC. v. T.E.R.*, [2007] B.C.J. No. 358, 2007 BCSC 252 (income \$400,000, ceiling of \$350,000 used to calculate spousal support range, *with child support* formula, high end chosen as husband earns more than ceiling). And sometimes a number is obtained by the use of needs and means: *D.R.M. v. R.B.M.*, [2006] B.C.J. No. 3299, 2006 CarswellBC 3177 (income \$750,000, interim support, table amount of \$12,028/mo. for 3 children, plus spousal support of \$8,500/mo., upheld on appeal). Note that all of these cases involve the *with child support* formula.

**(7) Payor Income Below \$30,000/\$20,000 (DP, pp. 87-89)**

In the *Draft Proposal*, we said that spousal support orders are exceedingly rare where the payor earns a gross annual income of \$20,000 or less. We also suggested that it may be necessary to go below the formula ranges for gross payor incomes of \$20,000 to \$30,000, given ability to pay concerns and a closer look at net incomes. Where there is child support to be paid, a payor will have to make more than \$30,000, more like \$40,000, for there to be any room left for spousal support.

“Floor” cases in B.C. have proven to be relatively rare. A payor income of \$24,000 was involved in *Snowden v. Snowden*, [2006] B.C.J. No. 1187, where Justice Scarth considered the payor's income and ability to pay to order spousal support of \$100 per month, below the formula range stated to be \$209 to \$349 (actually \$147 to \$284 after the May 2006 child support changes). No mention was made of the floor, or the exception for incomes between \$20,000 and \$30,000.

There are a couple of excellent “floor” decisions from outside of B.C.: *Maitland v. Maitland*, [2005] O.J. No. 2252 (Ont.S.C.J.)(husband truck driver earns \$28,439, wife can't work, no income, formula range \$889-\$1185, but \$700 ordered under exception for incomes \$20,000 to \$30,000); *A.M.R. v. B.E.R.*, [2005] P.E.I.J. No. 83, 2005 PESCTD 62 (P.E.I.S.C.)(wife earns \$18,557, husband receives workers compensation grossed up to \$13,525, range \$69 to \$92, no support payable as payor wife below \$20,000).

We should note here a couple of *with child support* cases where a court ordered a small amount of spousal support despite a zero formula range: *H.P. v. D.P.*, [2006]

N.S.J. No. 511, 2006 CarswellNS 560 (husband earns \$24,459, wife \$14,712 in retail, child support of \$362/mo., spousal support of \$175/mo. ordered until divorce and sale of home, tax advantage of spousal support over section 7 contributions); *Skirten v. Lengyel*, [2007] O.J. No. 679 (husband earns \$24,960, wife earns \$16,682, child support of \$224/mo., husband should pay something, \$50 per month).

**(8) *Prior Agreement or Court Order (DP, pp. 25, 97-98)***

The Advisory Guidelines do not deal with the effect of a prior agreement on spousal support, as that is an issue to be dealt with under the evolving law guided by the Supreme Court of Canada's decision in *Miglin v. Miglin*, [2003] 1 S.C.R. 303. As informal guidelines, they confer no power to override agreements. A prior agreement can thus be treated as an "exception" here.

The SSAG can play a limited role, in two ways: first, at stage one of the *Miglin* analysis, in assessing the "substantial compliance" of the agreement with the *Divorce Act* factors and objectives; and second, if the court does decide to override the agreement and order spousal support, the Advisory Guidelines can assist in determining amount and duration.

The Guidelines were used for the first, "substantial compliance" purpose in *W.(C.L.) v. R.(S.U.)*, 2007 CarswellBC 666, 2007 BCSC 453; and *Rapley v. Rapley*, [2006] B.C.J. No. 3213, 2006 BCSC 1854.

The Guidelines were used for the second purpose in the B.C. Court of Appeal decision in *R.S.M. v. M.S.M.*, [2006] B.C.J. No. 1756, 2006 BCCA 362 (within SSAG range). For a trial example, see *Silliphant v. Drever*, [2007] B.C.J. No. 186, 2007 BCSC 153 (spousal support insufficient at first stage, \$600/mo. ordered indefinite after long marriage). When a court decides to override the agreement, consistent with *Miglin*, the agreement may continue to exert an influence upon the outcome, thus reducing the effect of the Guidelines: *Santoro v. Santoro*, [2006] B.C.J. No. 453, 2006 BCSC 331 (lower amount than SSAG because of prior agreement); *Chepil v. Chepil*, [2006] B.C.J. No. 15, 2006 BCSC 15 (amount a low end of range, for only 3 years, not indefinite).

On an application to vary spousal support, the court starts from the premise that the prior order was correctly made at the time. The amount and duration of the pre-SSAG order, if not within the ranges, can thus force a different outcome at a subsequent variation, to remain consistent with the prior order. This is largely a transitional problem in British Columbia. Examples of this "prior order exception" would be: *Upton v. Fasoli*, 2007 CarswellBC 765, 2007 BCSC 414 (low order of \$500/mo. continued for 2 more years); *Banford v. Banford*, [2006] B.C.J. No. 721, 2006 BCSC 543 (prior order of \$1,375/mo., varied downward to below range amount of \$1,200 after wife obtained employment paying \$28,000/yr.).

**(9) *Non-Custodial Parent to Fulfil Parenting Role under the Custodial Payor Formula (DP, p. 82)***

This is quite a narrow exception, rarely raised, but worth noting. To come within 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 hybrid formula that the non-custodial parent may not be able to continue to fulfil their parental role

Under this parenting exception, the upper limits on both amount and duration can be exceeded. An example of these circumstances can be seen in the pre-Guidelines case of *Davey v. Davey* (2002), 205 N.S.R. (2d) 367 (N.S.S.C.), affirmed (2003), 36 R.F.L. (5<sup>th</sup>) 297 (N.S.C.A.).

**(10) *Reapportionment of Property (British Columbia)***

Unlike any other jurisdiction, the British Columbia *Family Relations Act* empowers a court to reapportion (or divide unequally) property between spouses on grounds that overlap with spousal support considerations. Section 65(1)(e) explicitly states one of the factors to consider to be: “the needs of each spouse to become or remain independent and self sufficient”. This ground is frequently used to adjust for the economic disadvantage of the lower-income spouse at the end of the marriage and there is a substantial case law on reapportionment on this ground.

The B.C. Court of Appeal has already acknowledged this exception, so that spousal support may have to be reduced below the formula range where a sufficiently large reapportionment order has been made: *Tedham v. Tedham*, [2005] B.C.J. No. 2186, 2005 BCCA 502 (spousal support fixed at \$6,000/mo., below range of \$6,260-\$8,347, payment by husband of \$95,850 to reapportion property); *Narayan v. Narayan*, [2006] B.C.J. No. 3178, 2006 BCCA 508 (home reapportioned 100% to wife, \$300,000, no spousal support). Sometimes, if the reapportionment is not so large, then a court can just opt for the low end of the range, as in *MacEachern v. MacEachern*, [2006] B.C.J. No. 2917, 2006 BCCA 508 (property reapportioned 56% to wife, spousal support at low end of range, \$3,100).

For trial examples of similar results: *Beese v. Beese*, [2006] B.C.J. No. 2903, 2006 BCSC 1662 (compensation order \$175,000, no spousal support); *Vazzazz v. Vazzazz*, [2006] B.C.J. No. 625, 2006 BCSC 363 (reapportionment, low end of spousal support range). Not included here are a number of cases where there was reapportionment but spousal support was still fixed somewhere in the middle of the formula range.

In the *Draft Proposal*, we rejected any other exceptions based on property division, either for high assets or for unequal division, for the reasons given on page 62.

The current law is not clear that high assets alone justify a reduction of spousal support, and we have left that controversy to the courts. For a recent entry in this ongoing debate, see *Chutter v. Chutter*, [2007] B.C.J. No. 1247, 2007 BCSC 814 (28-year marriage, husband's income \$214,000, wife's \$133,000, each spouse receives \$4 million in assets, no entitlement). The current law of spousal support is probably predicated upon an equal division of the marital property, as that is the property norm. But there are many reasons for unequal division of property, most of which have nothing to do with the factors or rationales that underpin spousal support law. The parties are free to trade off property against support, as dollars for dollars, as part of a negotiated settlement, but Canadian courts generally do not have that power, other than in B.C.

**(11) *Post-Separation Income Increase of the Payor (DP, pp. 100-101)***

Where the payor's income increases after separation or initial order, there is no automatic assumption under our spousal support law that the increase must be shared by way of increased spousal support. The sharing of that increase is a threshold question: all, some or none of it might be shared. As we said in the *Draft Proposal*,

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 (e.g. new job vs. promotion within same employer, or career continuation vs. new venture).

The formulas can define the upper limits, if the full amount of the income increase were to be shared.

The law in this area remains unclear, with some rough notion of connection or causation at work between the post-separation income increase and the marriage itself. Most of the major cases are reviewed in a recent Alberta judgment that also considered the wife's Guidelines arguments: *D.B.C. v. R.M.W.*, [2006] A.J. No. 1629, 2006 ABQB 905 (no increase, cases reviewed at paras. 22-32 by Topolniski J.). For a B.C. Guidelines decision on this issue, see *Kelly v. Kelly*, [2007] B.C.J. No. 324, 2007 BCSC 227 (husband's income increased from \$70,000 in 2001, now \$182,152, complicated by both spouses remarrying too).

**(12) *Post-Separation Income Reduction of the Recipient (DP, pp. 101-102)***

This is the flip side of the previous exception, where the recipient spouse loses her or his job, or suffers an illness or disability, or otherwise suffers a reduction in income after the separation or initial order. Again, the formulas can calculate the upper limit of any increase in support if the recipient's full drop in income is to be considered, but that again is a threshold issue. See *Crawford v. Crawford*, [2006] B.C.J. No. 2921, 2006 BCSC 1664 (Garson J.) (20 year relationship; wife injured in car accident after separation; still entitled to support apart from accident; support awarded at low end of range.)

**(13) Remarriage/Repartnering of the Recipient (DP, p. 104)**

The remarriage or repartnering of the recipient can have an effect upon the amount and duration of spousal support. If an order is already in place, then remarriage or repartnering by the recipient will usually be treated as a material change in circumstances. As we said in the *Draft Proposal*:

Remarriage does not mean automatic termination of spousal support, but support is often reduced or suspended or sometimes even terminated. Compensatory support is often treated differently from non-compensatory support. Much depends upon the standard of living in the recipient's new household. The length of the first marriage seems to make a difference, consistent with concepts of merger over time. The age of the recipient spouse also influences outcomes.

As a result of this uncertainty in the law, we did not come up with any "formula" in the *Draft Proposal* to adjust spousal support within this exception.

In *Kelly v. Kelly*, [2007] B.C.J. No. 324, 2007 BCSC 227, Justice Barrow carefully analysed the remarriage of both spouses, noting that the support order was no longer compensatory nine years after separation, but only non-compensatory, so that the wife's remarriage led to a reduction and termination of support by way of a step-down order over the next 19 months.

For some helpful remarriage cases from outside B.C., see: *Coolen v. Coolen*, [2005] N.S.J. No. 155, 2005 NSSC 78 (support reduced below range as wife repartnered and purchased new home together); *Locke v. LeDrew*, [2006] A.J. No. 759, 2006 ABQB 452 (both spouses remarried, support adjusted down for remarriage); *Hesketh v. Hesketh*, [2005] O.J. No. 4053 (Ont.S.C.J.) (husband cohabiting, new partner makes \$56,000, so support to former wife just above the upper end of the range).

**(14) Subsequent Children of the Payor (DP, pp. 104-105)**

The payor's remarriage or repartnering is not grounds for a reduction in spousal support, but where the payor has a subsequent child by that relationship, a reduction may be possible, but the law is unclear on this point, with "first family first" in conflict with the child support priority of our family laws. Another exception is the result, although no case law so far on the issue.

**C. Possible Additions to the List of Exceptions**

These last three exceptions will be added to the conventional list of exceptions. These new exceptions have grown out of our continuing review of the case law, our feedback sessions with lawyers, mediators and judges across Canada, and the advice of the federal Advisory Working Group on Family Law.

**(15) *Special Needs of Child***

A child with special needs can raise issues of both amount and duration in spousal support law.

First, duration. A child with special needs can obviously affect the ability of the custodial parent to obtain employment, whether part-time or full-time. This may require that the duration of support be extended beyond the length of the marriage or the child finishing high school, the two possible outside time limits under the *with child support* formula.

Second, amount. Again, a special needs child will often mean that the custodial parent cannot work as much, perhaps not even part-time, and thus the amount of spousal support will be increased because of the recipient's lower income. But even then, there may be a need to go above the formula range, to leave an even larger percentage of the family's net disposable income in the hands of the custodial parent, above the typical maxima of 53 per cent (1 child) or 57 per cent (2 children) or even 61 per cent (3 children).

For a couple of reported cases where these issues arose, see *Yeates v. Yeates*, 2007 CarswellOnt 2107 (S.C.J.)(Greer J.)(child 17 with cerebral palsy, child 14 with autism, subsidies for special needs, mother's need for respite, higher spousal support) and *Frouws v. Frouws*, [2007] B.C.J. No. 282, 2007 BCSC 195 (Preston J.)(custodial payor, 15-year-old with psychiatric problems, mother now sharing custody, 2 other children with husband, husband pays child support to mother, no spousal support to wife).

**(16) *Shorter Marriage, Recipient Low Income, Without Child Support Formula (Basic Needs)***

The *without child support* formula works reasonably well across a wide range of cases from short to long marriages, with varying incomes. There is a specific problem for shorter marriages where the recipient has little or no income. In these shorter marriage cases, the formula will generate too little support for the low income recipient to meet her or his basic needs for a transitional period. Any restructuring will produce amounts that are too small or durations that are too short. To complicate matters further, the amount required to meet those "basic needs" will vary from big city to small city to town to rural area. Whether restructuring provides a satisfactory outcome, i.e. more support for less time, will depend upon where the recipient lives. Thus, the problem for these short-marriage-low-income cases is most acute in big cities.

We did not wish to change the structure of the *without child support* formula for this one sub-set of cases. We decided the best approach to these cases would be to create an exception for them, leaving the basic formula intact for the vast majority of cases where it delivers a reasonable range of outcomes. In some short marriages under this formula, the compensatory exception may apply, with more generous outcomes than under this exception, which is non-compensatory or needs-based.

To qualify for this “basic needs” exception under the *without child support* formula:

- the formula range, even after restructuring, will not provide sufficient income for the recipient to meet her or his basic needs
- the reason will be that the recipient’s base or non-support income is zero or too low
- the marriage will typically be short to medium in length, e.g. 1 to 10 years
- the payor spouse will have the ability to pay

One example of this fact setting can be found in the B.C. case law: *Wang v. Poon*, [2007] B.C.J. No. 271, 2007 BCSC 194 (husband earns \$50,000, married 7 years, wife from China earns \$8,000 as hairdresser, sponsorship agreement, range \$368-\$490 for 3.5 to 7 years, two lump sum interim payments of \$2,500 and \$4,000, plus \$850/mo. for 24 months and \$600/mo. for 20 months, at or just above maximum of global range).

**(17) *Small Amounts, Inadequate Compensation under the With Child Support Formula (Section 15.3(3))***

The *with child support* formula gives priority to child support, as required by the law. In cases where the spouses have three or four children, there may be little or no room left for spousal support, despite the substantial economic disadvantage to the custodial parent. The outside time limits would end spousal support after the last child finishes high school or after the length of the marriage, despite the potential inadequacy of the compensation in such cases. The requirements for this exception are those found in section 15.3(2) of the *Divorce Act*:

- as a result of giving priority to child support
- the court is unable to make a spousal support order or the court makes a spousal support order in an amount less than it otherwise would have been
- or the parties agree to those terms as part of an agreement.

For a B.C. example, see *C.E.A.P. v. P.E.P.*, [2006] B.C.J. No. 3295, 2006 BCSC 1913 (together 21 years, 12 married, 4 children aged 13, 10, 8 and 6 with wife, husband earns \$56,927, child support \$1,342/mo., wife on disability pension of \$9,479, Guidelines range zero to zero, entitlement but dismissal of spousal support, with liberty to reapply if change).

We propose that the exception recognise that the amount of spousal support may have to continue past that time limit in these cases, and even increase in some cases, as the formula can provide and as section 15.3 of the *Divorce Act* permits.

## VII. CONCLUSION

As we scramble to complete this paper, we have to remark on the richness of the British Columbia case law using the Advisory Guidelines. Lawyers and judges have tried to use the Guidelines to achieve sensible results in a wide range of cases. But the cases so far still reveal a lack of consistent reference to entitlement, restructuring, duration and exceptions as ways to maintain flexibility within the general scheme of the Advisory Guidelines.

Our purpose in this B.C. paper has been to encourage lawyers to go beyond the ranges for amounts, beyond the formulas, to boldly go where no lawyer has gone before. In this next generation of use, lawyers should make use of these four “useful tools” – entitlement, restructuring, duration, exceptions – to analyze hard cases and to make more sophisticated arguments under the Spousal Support Advisory Guidelines.