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

First Draft

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Table of Contents

1. Introduction

In this document we attempt to provide a User's Guide to the Final Version of the Spousal Support Advisory Guidelines, released in July 2008. [*]

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

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

- highlights the main practice issues at the different stages of a Guidelines analysis:
- reminds you of common mistakes and things that are often missed:
- notes things that have been added or changed in the Final Version; and
- provides cross-references to leading case-law and to the relevant portions of the Final Version (FV) where an issue will be more fully discussed.

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

*This version of the User's Guide is still **very much a first draft.** It was prepared, on very short notice, to accompany the release of the Final Version of the Advisory Guidelines at the National Family Law Program on July 14, 2008. We hope to improve it over time, but wanted to make it available to you now in its current form in the hope that it will prove helpful.*

2. Entitlement (FV Chapter 4)

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

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

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

Two appellate level decisions provide good models of this preliminary analysis of entitlement: *Yemchuk v. Yemchuk*, [2005] B.C.J. No. 1748, 2005 B.C.C.A. and *Fisher v. Fisher*, [2008] O.J. No. 38, 2008 ONCA 11.

(a)   Entitlement as a threshold issue

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

- **Compensatory claims** are based either on the recipient's economic loss or disadvantage because of the marriage (typically a loss of earning capacity because of the roles assumed during the marriage) or on the recipient's conferral of an economic benefit on the payor without adequate compensation. Compensatory claims for lost earning capacity can be based not only on child-rearing during the marriage, but also on post-divorce child-rearing responsibilities. While compensatory claims in theory require an individualized assessment, in practice, in long marriages with children, the marital standard of living is used as a proxy measure of compensatory gains and losses.

- **Non-compensatory claims** involve claims based on need. Need can mean an inability to meet basic needs, but it has also generally been interpreted to cover, as an aspect of economic hardship, a significant decline in standard of living from the marital standard. Non-compensatory support reflects the economic interdependency that develops as a result of a shared life, including significant elements of reliance and expectation. See *Fisher v Fisher,* [2008] O.J. No. 38, 2008 ONCA 11 for a nice analysis of entitlement on non-compensatory grounds. Some lawyers and judges erroneously think that *any* long marriage gives rise to compensatory support, but *Fisher* makes clear that is incorrect.

- In many cases there may be **entitlement on both bases**. For example, in long marriages with children there are often significant elements of both compensatory and non-compensatory support.

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

- **As a general matter any *significant* income disparity generates an entitlement to some support.** Even if there is not a compensatory claim, a significant income disparity will give rise to a non-compensatory claim based on a loss of the marital standard of living. The Guidelines leave the issue of when an income becomes significant enough to generate entitlement, to the courts.

- Cases where there has been a finding of no entitlement **despite a significant income disparity** are relatively rare. Factors that have justified a finding of no entitlement include the following, which often overlap:

  - short marriage and limited period of financial interdependency: *Beese v. Beese*, [2006] B.C.J. No. 2903, 2006 BCSC 1662, *McKee v. Priestlay*, [2007] B.C.J. No. 1297, 2007 BCSC 85, *Rezel v. Rezel,* [2007] O.J. No. 1460 (S.C.J.) *S.C.J. v. T.S.S.*, [2006] A.J. No. 1319, 2006 ABQB

  - the parties have similar standards of living because of differences in their asset positions or their costs of living, or the recipient has not experienced any significant decline from the marital standard of living (see *Eastwood v. Eastwood*, 2006 CarswellNB 655, 2006 NBQB 413; *Elias v. Elias*, [2006] B.C.J. No. 146, 2006 BCSC; *Johnson v. Johnson*, [2006] B.C.J. No. 3308, 2006 BCSC 1932): *Lamothe v. Lamothe* (2006) 2006 CarswellOnt 8150 (Ont. S.C.J.)

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

  - property division has satisfied any compensatory or needs-based claims, either a very high property award (see *Chutter v. Chutter,* [2007] B.C.J. No. 1247, 2007 BCSC 814 and *Bell v. Bell,* 2008 CarswellBC 1084, 2008 BCSC 694) or in B.C. a reapportionment of assets to meet self-sufficiency concerns (see *W.J. M. v. L.A.M.*, [2007] B.C.J. No. 1283, 2007 BCSC 842)

  - the recipient abdicated financial responsibility during marriage or post-separation: *Lamothe v. Lamothe* (2006) 2006 CarswellOnt 8150; *S.C.J. v. T.S.S.*, [2006] A.J. No. 1319, 2006 ABQB 777

(b) Entitlement and the application of the Guidelines formulas

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

The Guidelines formulas reflect different bases of entitlement:

- the *without child support* formula is based on a mix of compensatory and non-compensatory entitlement:

- when applied to short and medium length marriages without children, it generates largely non-compensatory support, providing a time-limited transition from the marital standard of living;

- when applied to longer marriages in which there may or may not have been children, its ranges reflect a mix of compensatory and non-compensatory support

- the *with child support* formula is largely compensatory, responding to the economic consequences of both past and on-going child-rearing responsibility.

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

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

- to determine whether or not the case justifies a departure from the ranges as an **exception.** For example two exceptions are triggered by *compensatory* claims that may not be adequately satisfied by the formula ranges: the compensatory exception for short marriages without children and, in cases with children, the s. 15.3 exception for compensatory claims that must be deferred because of the priority of child support (see FV Ch. 12 for exceptions).

(c)   Entitlement issues on variation and review

Entitlement issues can also arise on review and variation.

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

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

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

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

3.   Agreements (FV 5.2)

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

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

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

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

- **It is important to determine whether or not the spousal support agreement is a** *final* **agreement.** If the agreement is not a final agreement, but one which provides for **review** or for **variation** upon a material change of circumstances, the Advisory Guidelines *may* be applicable to the determination of the amount and duration of spousal support on review or variation. (See FV Ch. 14 which deals with the application of the Guidelines on variation and review)

- Where the validity or enforceability an agreement is being challenged under existing law, courts *may* use the ranges under the Advisory Guidelines to assist in identifying unfair agreements, for example in **determining whether there is substantial compliance with the** *Divorce Act* **objectives under either stage 1 or 2 of a** *Miglin* **analysis**. However, the Guideline result must be balanced with respect for the parties' own assessment of a fair outcome as reflected in their agreement. See *R.S.M. v. M.S.M.*, [2006] B.C.J. No. 1756, 2006 BCCA 362, *W.(C.L.) v. R.(S.U.)*, 2007 CarswellBC 666, 2007 BCSC 453, *Vanderlans v. Vanderlans*, 2007 CarswellNfld 119, 2007 NLUFC 8; *Rapley v. Rapley*, [2006] B.C.J. No. 3213, 2006 BCSC 1854l *Barter v. Barter*, [2006] N.J. No. 237, 2006 NLUFC 39 and *Chepil v. Chepil*, [2006] B.C.J. No. 15, 2006 BCSC 15, *Leaman v. Leaman,* [2008] N. J. No. 96, 2009 CarswellNfld 87, 2008 NLTD 54.

- **If a spousal support agreement is set aside or overridden** on the basis of *Miglin* or other applicable legal doctrines, the Advisory Guidelines *may* be relied upon in determining the amount and duration of support. See *M. (K.A.) v. M. (P.K.)*, 2008 CarswellBC 135, 2008 BCSC 93 and *Gammon v. Gammon,* [2008] O.J. No. 603. However, as recognized in *Miglin*, the parties' intentions, as reflected in their agreement, may still continue to influence the appropriate spousal support outcome and lead the courts to an outcome different from that suggested by the Advisory Guidelines. See *Santoro v. Santoro*, [2006] B.C.J. No. 453, 2006 BCSC 331.

4.   Application to Interim Orders (FV 5.3)

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

In *D.R.M. v. R.B.M*., [2006] B.C.J. No. 3299, 2006 Carswell BC 3177 (S.C.), Justice Martinson set out in detail the rationale for the application of the Advisory Guidelines to interim spousal support orders. The usefulness of the Guidelines in the interim context when there is limited information was emphasized in *Langdon v. Langdon*, 2008 CarswellOnt 545

- The Guidelines do recognize that **the amount may need to be different—either higher or lower—during the interim period** while parties are sorting out their financial situation immediately after separation. To accommodate these short-term concerns, the Advisory Guidelines recognize an **exception for compelling financial circumstances in the interim period** (see FV, 12.1).

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

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

    For cases involving this exception see *Agioritis v. Agioritis*, [2008] S.J. No. 270, 2008 SKQB and *Savage v. Savage*, [2007] B.C.J. No. 2764, 2007 BCSC

- **Any periods of interim support have to be included within the durational limits set by the Advisory Guidelines.** For an explicit application of this see *Fisher v. Fisher*, [2008] O.J. No. 38.

5. The *Without Child Support* Formula (FV Chapter 7)

In cases where there are no dependent children, the ***without child support* formula** applies. This formula covers a wide range of fact situations. As well, in some cases the initial determination of support will initially take place under the *with child support* formula, but once the children are independent, there will be a cross-over to this formula (FV, 14.5) for a determination of amount.

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

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

- In calculating the **length of the relationship,** be sure to include periods of **pre-marital cohabitation**. Also, the period ends with the date of **separation** (not divorce).

- It is important to **identify the basis of entitlement** when using this formula, whether it is non-compensatory, compensatory or a mix (see discussion above and FV Ch. 4). This is important for determining location within the range, and also for determining whether or not there is an exception that warrants an award outside the range.

- Although the formula works with gross income figures, it is always important, in determining a precise amount of support within the range to do a "reality check" by looking at **net disposable income positions** after payment of a given amount of spousal support, particularly in cases of long marriages.

- Note the addition of an **equalization of net income "cap"** to the formula for amount in the Final Version. (FV, 7.4.1). This "cap" applies to long marriages of 25 years or more, where the range is 37.5 to 50 per cent of the gross income difference. The "cap" implements the idea that the recipient should never receive an amount of spousal support that will leave him or her with more than 50 per cent of the spouses' net disposable income or monthly cash flow. The software programs can calculate this net income cap with precision and will present the cap as the upper limit of the range. For those without software, or without more precise net income calculations, the net income cap can be estimated crudely by hand, at 48 per cent of the gross income difference. This "48 per cent" method is a second-best, but adequate, alternative.

- If the ranges generated by the formula seems inappropriate, consider **restructuring** (below and FV, Ch. 10) and **exceptions** (below and FV, Ch. 12); they will have their primary application to cases under the *without child support* formula.

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

Under the *without child support* formula short marriages generate very limited awards, if there is entitlement at all, even in cases where there is a significant income disparity. Typically, the modest amounts generated by the formula are restructured into a lump sum or a very short transitional award. This result is consistent with current law and generally raises no problems; see *Conquergood v. Dalfort,* [2007] B.C.J. No. 2337, 2007 BCSC 1556. Identified exceptions will cover most of the short marriage cases where the formula result seems inappropriate.

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

- Remember the **compensatory exception** (FV, 12.5) which applies to short and short/medium length marriages without children where there are significant compensatory claims that are not adequately redressed by the modest amounts generated by the formula which are non-compensatory and transitional in nature.

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

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

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

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

- A **basic needs/hardship exception** has been added in the Final Version (FV 12.7) to recognize the specific problem with shorter marriages (1-10 years) where the recipient has little or no income and the formula is seen as generating too little support for the recipient to meet his or her basic needs for any transitional period that extends beyond the interim exception. *Simpson v. Grignon*, [2007] O.J. No. 1915, 2007 CarswellOnt 3095

(Ont.S.C.J.) offers an example of this exception. One area where this exception can apply is immigration sponsorship cases. See *Gidey v. Abay*, [2007] O.J. No. 3693 (Ont.S.C.J.) and *T.M. v. M.A.G.*, [2006] B.C.J. No. 3479, 2006 BCPC 604 (B.C.P.C.)

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

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

- **The "problem" of time-limits.** This formula generates **time limits** when the relationship is under 20 years in length and the rule of 65 is not applicable. In some cases these time limits may appear to be inconsistent with current law which disfavours the use of time limits except in short marriages. In dealing with time-limits under this formula, in particular as they apply to medium-length marriages, consider the following (FV,7.5.6):

    - **The law on time-limits is in flux**. There is growing recognition of the **appropriateness of time limits, particularly when the basis of entitlement is largely non-compensatory** and the purpose of the award is to provide a transition to a lower standard of living: see *Fisher v Fisher,* [2008] O.J. No. 38, 2008 ONCA 11, *Malesh v. Malesh,* [2008] O.J. No. 2207, *Johnson v. Angeline*, [2008] O.J. No. 2327, 2008 CarswellOnt 3467, *Hance v. Carbone*, 2006 CarswellOnt 7063 (Ont.S.C.J.) and *Bishop v. Bishop*, [2005] N.S.J. No. 324, 2005 NSSC 220 (N.S.S.C.).

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

    - Time limits under this formula can be **used in a "softer" way,** similar to the use of the durational ranges under the *with child support* formula, to structure the on-going process of review and variation. While the initial order is indefinite (duration not specified), a time limit may be imposed on a subsequent review or variation. See *Kerman v Kerman*, [2008] B.C.J No. 710, 2008 CarswellBC 793, 2008 BCSC 500, *Hanssens v. Hanssens*, [2008] B.C.J. No. 526, 2008 CarswellBC 591, 2008 BCSC 359, and *Kelly v. Kelly*, [2007] B.C.J. No. 324, 2007 BCSC 227 Another good example under the *custodial payor* formula is *Puddifant v. Puddifant*, [2005] N.S.J. No. 558, 2005 NSSC 340 (S.C.F.D.).

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

- **The meaning of "indefinite" support.** Duration under this formula is **"**indefinite" when the relationship is 20 years or longer or when the "rule of 65" applies. Many have misinterpreted this term. **Indefinite support does not necessarily mean permanent support.** And it certainly does not mean that support will continue indefinitely at the level set by the formula, as such orders are open to variation as circumstances change over time. In the Final Version we have developed a new term—"**indefinite (duration not specified)**"—to convey that such orders or agreements are subject to variation and review and, through that process, even to time limits and termination. (FV, 7.5.2).

- When a support award is "indefinite", recipients are under an obligation to make **reasonable efforts toward self-sufficiency**, even if they cannot attain full-self-sufficiency, and a failure to make reasonable efforts may result in imputing income and a reduction of support on a subsequent review or variation. (See FV Ch.13 for a discussion of self-sufficiency.

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

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

- Make sure that you are using **the right formula**, among the five listed in Chapter 8: the *basic* formula (recipient has primary care and received both child and spousal support); the *shared custody* formula; the *split custody* formula; the *custodial payor* formula; or the *adult child* formula. In *Grinyer v. Grinyer*, 2008 CarswellOnt 366 (Ont.S.C.J.), for example, the Court used the basic formula, instead of the correct custodial payor formula.

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

- **Section 7 expenses** and the respective parental contributions have a critical impact upon the spousal support range generated by the formulas. By definition, any payment of s. 7 expenses will reduce the range, even for those expenses like child care that offer some tax break. Further, the correct parental contributions must also be input, especially if the contributions are fixed without respect to the payment of spousal support or fixed on some basis other than incomes after spousal support. For some cases where s. 7 expenses were not considered, see *Boulton v. Beirne*, [2008] B.C.J. No. 832, 2008 BCSC 577; *Wu v. Dipopolu*, 2008 CarswellBC 164, 2008 BCSC 112; *Meliambro v. Meliambro*, 2007 CarswellOnt 7699 (Ont.S.C.J.).

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

(a) The shared custody formula (FV 8.6)

At the time the *Draft Proposal* was released, we were still waiting for the Supreme Court's decision in *Contino v. Leonelli-Contino*, [2005] 3 S.C.R. 217, 19 R.F.L. (6th) 272. Further, in 2005, the Canada Revenue Agency quietly changed its policy on the payment of child-related

benefits in shared custody cases. Finally, we did some tweaking to the formula ranges based upon feedback from lawyers dealing with shared custody cases.

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

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

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

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

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

- Under s. 5 of the *Child Support Guidelines*, it is possible for a step-parent to pay less than the table amount of child support, if appropriate. Where the amount of child support is reduced under s. 5, the *with child support* formula should be calculated using the full table amount rather than the reduced amount.

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

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

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

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

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

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

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

- This adult child formula *only* applies where the child support for ***all* the remaining children of the marriage**, one or more, is determined under s. 3(2)(b) of the *Child Support Guidelines*. If there is another child of the marriage whose support is determined using a table amount, then this formula *does not* apply.

7. Restructuring (FV Chapter 10)

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

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

Restructuring can be used in three ways:

- to **front-end load** awards by increasing the amount beyond the formulas' ranges and shortening duration; see *Fisher v Fisher,* [2008] O.J. No. 38, 2008 ONCA 11 and *McCulloch v. Bawtinheimer*, [2006] A.J. No. 361 (Q.B.).

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

- to formulate a lump sum payment by combining amount and duration. When formulating a lump sum it is important to take into account the different tax treatment of lump sum and periodic awards. Two cases offer careful examples of restructuring to fix a lump sum *Smith v. Smith*, [2006] B.C.J. No. 2920, 2006 BCSC 1655 and *Martin v. Martin*, [2007] O.J. No. 467.

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

- More sophisticated calculations may take into account the time-value of money or the various future contingencies that could affect the value of awards over time.

- If periodic payments are converted into a lump sum, the different tax consequences must be taken into account in arriving at a comparable lump sum.

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

When should you think about restructuring?

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

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

The primary use of restructuring will be under the *without child support* formula. To trade off amount against duration ideally requires a fixed duration for the award. As a result, restructuring will generally only be advisable in cases where the formula generates time limits rather than indefinite (duration not specified) support. More specifically, think about restructuring in the following cases:

- short and short/medium length marriages where the amount generated by the formula seems low in comparison to current awards, which typically attempt to provide a transitional period of support that bears some relationship to the marital standard of living. Here restructuring can be used to front-end load the award, increasing the amount by shortening duration. For good examples see *Fisher v Fisher,* [2008] O.J. No. 38, 2008 ONCA 11 and *McCulloch v. Bawtinheimer*, [2006] A.J. No. 361 (Q.B.).

- long-term disability after a medium-length marriage. Here restructuring can be used to reduce the award to a more modest supplement that will extend over a longer duration

- longer marriages where the formula generates a time limit but current practice dictates indefinite support, eg. marriages between 15 years and 20 years in length. These may include cases initially involving dependent children which have "crossed over" to this formula after the children have become independent. Here restructuring can be used to extend duration by choosing an amount of support in the lower end of the range or even below the low end of the range,

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

For the most part, restructuring has less relevance for marriages with dependent children, The indefinite nature of awards under this formula and the absence of firm time limits makes restructuring a more uncertain enterprise. As well, in cases of three or more children the payor's ability to pay will be limited, thus often precluding the possibility of front-end loading or a lump sum. However, the addition of a lower end to the durational range under this formula in the Final Version does create more room for negotiation over duration, which creates the conditions amenable to restructuring in certain kinds of cases.

- The most likely circumstances for the use of front-end loading or a lump sum under the basic *with child support* formula will be cases where the recipient wants spousal support above the upper end of the range for a shorter period, e.g. to pursue a more expensive educational program. Many of these will be shorter marriage cases.

- For front-end loading to occur, the following cases would be prime candidates, as there will be some additional ability to pay available:
    - only one child;
    - shared custody
    - two children, no s. 7 expenses and higher incomes
    - higher incomes generally.

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

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

The *custodial payor* formula, applicable in cases where there are dependent children but the recipient spouse is not the custodial parent, is a modified version of the *without child formula.* Its adoption of the *without child support* formula's durational ranges means that restructuring may be used the same way under this formula as under the *without child support formula*. See *Martin v. Martin*, [2007] O.J. No. 467.

7.   Exceptions (FV Chapter 12)

In the Draft Proposal, we set out "exceptions", categories of departures, from the formula ranges for amount and duration. Exceptions are the last step in a Guidelines analysis. First, location within the ranges can be used to adjust for some of the factors that underlie the exceptions. Second, restructuring provides another means to adjust amount or duration, above or below the ranges, while maintaining the consistency and predictability of the Advisory Guidelines. Only if *neither* of these steps can accommodate the facts of a particular case should it become necessary to resort to these exceptions.

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

Even now, 3 ½ years after the Draft Proposal, it is still surprising how often lawyers and judges fail to consider the exceptions.

- If the formula ranges for amount and duration don't seem "right", then look at the **exceptions**. For recipients, the exceptions will sometimes justify support above the ranges for amount and duration. For payors, the exceptions will sometimes justify support below those ranges.

Usually one spouse will try to argue the formula ranges for amount and duration, often the payor in shorter marriage cases. It will then be the task of the responding lawyer to canvass the list of exceptions and to argue the applicable exceptions.

(a)   Debt payments (FV 12.2)

In most cases, marital debts are adequately taken into account in property division. It is only where debts exceed assets that the allocation of debt payments can have an impact upon ability to pay. Even then, most debt payments can be accommodated within the formula ranges. In the Final Version, the limits of this exception have been refined:

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

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

(b) *Property division: reapportionment (B.C.), high property awards, Boston (FV 12.6)*

After the Draft Proposal, the British Columbia courts affirmed a spousal support exception in cases where a sufficiently large reapportionment order is made under the property provisions of the *Family Relations Act*: *Tedham v. Tedham*, [2005] B.C.J. No. 2186, 2005 BCCA 502, 20 R.F.L. (6th) 217; *Narayan v. Narayan*, [2006] B.C.J. No. 3178, 2006 BCCA 561, 34 R.F.L. (6th) 272. "**Only in B.C.**, you say, pity…", to paraphrase the old Red Rose tea ad. That's because only in B.C. does the property statute permit reapportionment, or unequal division, on spousal support grounds. In the more common case, where the reapportionment is not so large, then a court can just fix an amount of spousal support at or near the low end of the formula range, as it did in *MacEachern v. MacEachern*, [2006] B.C.J. No. 2917, 2006 BCCA 508, 33 R.F.L. (6th) 315.

- The Advisory Guidelines on amount and duration do not change the law from *Boston v. Boston*, [2001] 2 S.C.R. 413, governing double-dipping, mostly from pensions. *Boston* expresses an entitlement principle, as to what portion of a payor's income is available to pay spousal support. *Boston* is subject to a sizeable exception in cases of need. For cases where an adjustment was made to the payor's income to prevent double-dipping see *Pettigrew v. Pettigrew*, [2006] N.S.J. No. 321, 2006 NSCA 98 (N.S.C.A.), affirming [2005] N.S.J. No. 616, 2005 NSSC 219 (N.S.S.C.); *Puddifant v. Puddifant*, [2005] N.S.J. No. 558, 2005 NSSC 340 (N.S.S.C.F.D.); and *Vanderlans v. Vanderlans*, [2007] N.J. No. 121, 2007 NLUFC 8 (N.L.U.F.C.)

We did not recognize high property awards as an explicit exception in the Draft Proposal. The Advisory Guidelines can already accommodate many of the "high property" concerns: by imputing income, by choosing an amount and duration within the ranges, by individualizing support determinations for payors above the $350,000 "ceiling"; and, in extreme cases, by finding no entitlement. For a "no entitlement" case, with high property ($4 million each, after a 28-year marriage) and high incomes (husband $214,000, wife $133,000), see *Chutter v. Chutter*, [2007] B.C.J. No. 1247, 2007 BCSC 814.

- There is still no explicit exception for **high property awards** in the Final Version. The law in this area remains unclear. The better view is that property and support are governed by distinctive laws and serve different purposes, so that a high property award should not in and of itself dictate a significant reduction of spousal support. But there is a minority view that does see these two remedies as substitutes one for the other, so that a high property award always justifies lower spousal support. We have left the law to develop further in this area, which means we leave it up to lawyers to argue for such an exception.

(c) *Illness and disability (FV 12.4)*

A disproportionate number of cases that come before the courts involve the illness or disability of the recipient spouse, as these are hard cases that don't settle. Especially difficult are the cases that involve permanent illness or disability after a short-to-medium marriage. The law in these cases is particularly uncertain and confused at the moment, as the courts can't seem to work out a

consistent approach. The Supreme Court of Canada addressed some of these issues in *Bracklow*, but we see the effects of its lack of guidance in these cases. Illness and disability was recognized as an exception in the Draft Proposal, but even the scope and operation of the exception is hard to nail down under the current law.

Under the Advisory Guidelines, most of these cases fall under the *without child support* formula or the *custodial payor* formula. The formulas produce ranges for amount and duration that seem "too low" or "too short", certainly to recipients. Payors will want to argue the formula ranges, primarily to time limit their spousal support in short-to-medium marriages.

Three approaches to disability cases can be identified:

- **Lower Amount, Extend Duration:** Many courts will extend the duration of spousal support, even to be "indefinite", while keeping the amount within the range, often at or near the low end, e.g. *Munro v. Munro*, [2006] B.C.J. No. 3069, 2006 BCSC 1758.

- **No Exception:** Disability cases should be resolved within the formula ranges, for both amount and duration, according to this slightly-smaller group of cases. In effect, these courts do not recognize any disability exception. An example would be the recent B.C. Court of Appeal decision in *Shellito v. Bensimhon*, 2008 CarswellBC 469, 2008 BCCA 68, which imposed a time limit and produced a global amount above the Guidelines range, but not that far above the maximum. See also trial decisions: *Rayvals v. Rayvals*, [2008] B.C.J. No. 233, 2008 BCSC 176; *Williston v. Williston*, [2006] B.C.J. No. 3248, 2006 BCSC 1869; *Wise v. Wise*, [2006] B.C.J. No. 1143, 2006 BCSC 945; *Puddifant v. Puddifant*, [2005] N.S.J. No. 558, 2005 NSSC 340.

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

(d) Four more exceptions (FV 12.7-12.8, 12.10-12.11)

The new **basic needs/hardship exception** has already been discussed above, under the *without child support* formula, to deal with the problem of need in cases of shorter marriages where the recipient has little or no income (FV 12.7).

Two new exceptions are relatively non-controversial and fairly well-entrenched in the pre-Guidelines case law: the **special needs of child exception** (FV 12.10) and the **small amounts, inadequate compensation, section 15.3 exception** under the *with child support* formula (FV 12.11).

One new exception in the Final Version will be the **non-taxable payor income exception** (FV 12.8). Both formulas produce a "gross" amount of spousal support, i.e. an amount that is deductible from taxable income for the payor and included in taxable income for the recipient. But some payors have incomes based entirely on legimately non-taxable sources, e.g. workers' compensation, disability payments, income earned by an aboriginal person on reserve, some overseas employment arrangements. In these cases the payor is unable to deduct the support paid, contrary to the assumption built into the formulas for amount. In most cases, the recipient of spousal support will still have to include the support as income and pay tax on it.

Under this new exception, it will be necessary to balance the tax positions and interests of the spouses. For examples of the fact situations, see *Paul v. Paul*, [2008] N.S.J. No. 157, 2008 CarswellNS 197, 2008 NSSC 124 (both aboriginal, neither paying taxes, amount below low end of range); *James v. Torrens*, [2007] S.J. No. 334, 2007 SKQB 219 (aboriginal payor earning income on reserve). There are also a number of self-adjusting mechanisms at work under both formulas that may limit the need to resort to this exception, described more fully in the Final Version.

8. Complex Issues Around the Edges of the Advisory Guidelines

In this section, we address a number of complex issues, issues where the formulas do not fully apply but can still help, issues which aren't really "exceptions" either. These are issues where entitlement, amount and duration tend to run together, amongst the hardest issues in spousal support law generally, Guidelines or no Guidelines. To make things a bit easier, we'll start with one of the easier issues, and then into the harder ones.

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

In the Final Version, the "floor" of $20,000 is maintained, i.e. the annual gross payor income below which spousal support is not generally payable. There may be exceptional cases below $20,000 where support is sometimes payable. For payor incomes between $20,000 and $30,000, there are ability to pay and work incentive concerns that may justify going below the formula ranges. There was general consensus since the Draft Proposal that these floor amounts were reasonable.

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

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

- In those cases where the payors made **between $20,000 and $30,000**, courts have generally awarded support amounts below the low end of the formula range: *Maitland v. Maitland*, [2005] O.J. No. 2252 (Ont.S.C.J.); *Snowden v. Snowden*, [2006] B.C.J. No. 1187 (B.C.S.C.).

- In two *with child support* cases involving low incomes, payors were ordered to pay small amounts of spousal support despite a zero formula range: *H.P. v. D.P.*, [2006] N.S.J. No. 511, 2006 CarswellNS 560 (Fam.Ct.) ($175/mo. spousal support until house sold rather than s. 7 contributions); *Skirten v. Lengyel*, [2007] O.J. No. 679 (Ont.S.C.J.) (husband should "pay something", $50/mo.). But these are "freak cases".

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

There aren't that many of these cases, but they are over-represented in the decided cases, partly because of the high stakes involved, partly because they test the outer limits of our thinking about spousal support.

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

- The formulas are **not to be applied automatically** above the ceiling, although the formulas may provide an appropriate method of determining spousal support in an individual case, depending on the facts. For cases where the formulas appear to be used automatically, see *E.(Y.J.) v. R.(Y.N.)*, 2007 CarswellBC 782, 2007 BCSC 509; or *Teja v. Dhanda*, [2007] B.C.J. No. 1853, 2007 BCSC 1247. For a more individualized case-specific use of the formula, see *J.K.S. v. H.G.S.*, [2006] B.C.J. No. 2051, 2006 BCSC 1356.

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

- In some high-income *with child support* formula cases, the courts have calculated the table amount of child support on the full payor's income and then calculated the formula range for a gross payor income of $350,000 for spousal support purposes: *J.W.J.McC. v. T.E.R.*, [2007] B.C.J. No. 358, 2007 BCSC 252; and *J.E.B. v. G.B.*, [2008] B.C.J. No. 758, 2008 BCSC 528 (Master).

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

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

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

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

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

- Most of the major cases on this issue are reviewed in *D.B.C. v. R.M.W.*, [2006] A.J. No. 1629, 2006 ABQB 905 at paras. 22-32 (no increase in support). Another helpful decision is *Kelly v. Kelly*, [2007] B.C.J. No. 324, 2007 BCSC 227. See also *Chalifoux v. Chalifoux*, [2008] A.J. No. 174, 2008 ABCA 70 (no sharing).

- In *Fisher v. Fisher*, the Ontario Court of Appeal provided some limited sharing of the post-separation income increase, by taking a four-year average income for both spouses, including the year of separation when the husband's income first increased. This partial sharing was not explained further, but it would appear to reflect the length of the marriage (19 years), the immediacy of the increase (the year of separation) and the non-compensatory basis for support (less compelling argument for sharing).

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

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

The remarriage or repartnering of the support recipient does not mean automatic termination of spousal support, but support is often reduced and sometimes even terminated. Much depends upon whether support is compensatory or non-compensatory, as well as the length of the first marriage, the age of the recipient and the standard of living in the recipient's new household. In many fact situations, the outcomes are predictable, but not predictable enough to construct a formula for these cases in the Final Version.

- The most interesting of the remarriage cases is *M.(K.A.) v. M.(P.K.)*, 2008 CarswellBC 135, 2008 BCSC 93, because Justice Barrow did try to construct a formula to guide a step-down of spousal support, by reducing support by 10 per cent a year until it ended 10 years later, this after a 21-year traditional marriage.

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

- Another solution is to reduce spousal support below the formula range in these cases: *Coolen v. Coolen*, [2005] N.S.J. No. 155, 2005 NSSC 78.

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

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

In the child support setting, issues of subsequent children are dealt with by way of section 10's undue hardship, a demanding and discretionary test, with no clear policy to resolve the conflict. The conflict becomes even more acute where the trade-off is between spousal support for a prior spouse and subsequent children. There is no formulaic solution to be found in the Final Version and we again have to wait for the law to develop.

The policy of "first-family-first" remains powerful in these cases and is still the most common approach to the trade-off between families. The payor's obligations to the children and spouse of the first marriage are seen to take priority over any subsequent obligations. This was the approach adopted in *Fisher v. Fisher*, but Lang J.A. emphasized that these obligations "must be considered in context". In *Fisher*, it was a bad context for the husband, perhaps the weakest possible second family claim imaginable (para. 41): a speedy post-separation repartnering; two step-children rather than biological children; child support received from the father of those two children; a new wife who could requalify as a physiotherapist, but preferred to stay at home; and a large enough income by the husband that his support obligation to his first wife would not impoverish his second family.

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