

The Spousal Support Advisory Guidelines: Ontario Update*

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[Appendix: Ontario SSAG decisions, Case Summaries, July 10 –Nov. 18, 2008]

1. Release of the Final Version of the Advisory Guidelines

The Final Version of the Spousal Support Advisory Guidelines was finally released in July 2008. It is available on-line at the SSAG website:

<http://www.law.utoronto.ca/faculty/rogerson/ssag.html>

The revisions from the Draft Proposal are relatively modest and are set out in a separate document, the *Report on Revisions* (July 2008) released together with the Final Version. This has been included in your materials (**Tab B**) and is also available on-line on the SSAG website, above.

By way of summary, what has not been changed in the final version:

- the Guidelines remain “advisory”; they have not been legislated
- the two basic formulas – the *without child support* formula and the *with child support* formula – have not been changed, although there has been some minor tweaking
- there are still no formulas to deal with some of the hard issues on variation and review: remarriage or repartnering of the recipient, second family obligations of the payor, or post-separation income increases for the payor.

The significant revisions, to be noted, are with respect to the following issues:

- *definition of income*: social assistance to be excluded for spousal support purposes; Universal Child Care Benefit (UCCB) to be included

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- *without child support formula*: maximum end of range for amount to be capped at 50 per cent of net (rather than gross) income
- “*indefinite*” *support*: change of terminology to “indefinite (duration not specified)”
- *with child support formula*: addition of lower end of range for duration based on length of marriage and age of children (school age)
- *with child support formula, shared custody*: shared custody formula adjusted to always include a 50/50 split of net family income
- *step-children*: *with child support* applies
- *with child support formula, adult children*: a special, hybrid formula added for adult children who are receiving child support under s.3(2)(b) of the Child Support Guidelines
- *exceptions*: several new exceptions added:
 - reapportionment of property in B.C.
 - basic needs/hardship: inability to meet basic need in shorter marriages under the *without child support* and *custodial payor* formulas where the recipient has little or no income
 - special needs of child (*with child support* formula)
 - inadequate spousal support under *with child support* formula due to priority given to child support under s. 15.3 of the *Divorce Act*
 - non-taxable payor income

2. The User’s Guide

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. 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.

To respond to these concerns, a *User’s Guide* to the Guidelines is being developed, a document that will 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. A first draft of the *User’s Guide* was prepared to coincide with the release of Final Version: see Carol Rogerson and Rollie Thompson, *The Spousal Support Advisory Guidelines: A User’s Guide to the Final Version* (First Draft) (July 11, 2008), found at **Tab C** in your materials and also on the SSAG web site, *supra*. A revised version of the User’s Guide will be available in 2009.

The *User’s 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 is more fully discussed.

3. Case Law Updates

The last comprehensive update on the Advisory Guidelines is Carol Rogerson and Rollie Thompson, “The Spousal Support Advisory Guidelines Three and a Half Years Later” (June 16, 2008, revised Aug. 1, 2008), found at **Tab D** and also online at the SSAG web site, *supra*. In that paper you will find a review of all the appellate cases on the Advisory Guidelines since Sept. 2007, as well as case summaries for all the Ontario SSAG cases from Sept. 2007 to July 2008.

In the appendix to this paper you will find summaries of all the Ontario SSAG cases from July 10 to Nov. 18, 2008. There have been two new decisions of the Ontario Court of Appeal in this relatively short period and 32 new trial decisions: 10 under the *without child support* formula and 22 involving minor children and under the *with child support formula* and its variants. The most noteworthy cases are indicated by **.

4. Ontario Court of Appeal Decisions

Of the two appellate decisions from Ontario, the most significant from the perspective of the Guidelines is *Jessop v. Wright*, [2008] O.J. No. 3849, 2008 ONCA 673 (Lang, Rouleau and Watt JJ.A.) released on Sept. 29, 2008, which involved a variation application in which the wife sought increased child and spousal support on both a retroactive and prospective basis as a result of both the husband’s increased income and her recent loss of employment. On appeal, the motion judge’s spousal support order was modified in part. While the motions judge’s failure to rely upon the Advisory Guidelines in determining the amount of support was found not to constitute reviewable error as they were not argued before him, he was found to have erred by awarding the same amount of spousal support both for the period when the wife was employed and when she was unemployed. The Guidelines were, however, argued on appeal and the Court of Appeal did refer to them in determining the appropriate amount of spousal support. As well, the motions judge was criticized for providing no reasons to support his conclusion as to the appropriate amount of spousal support, reflecting a significant change in the culture of spousal support as a result of the introduction of the Guidelines.

The second appeal case, *Vynnk v. Baisa*, [2008] O.J. No. 3747, 2008 ONCA 657 (Ont. C.A.) (Laksin, Simmons and Sharpe JJ.A), decided Sept. 19, 2008, is simply a brief endorsement with no explicit reference to the Guidelines in which the Court of Appeal upheld an order for time-limited (5 year) periodic spousal support combined with a lump sum award. The case involved a 10 year marriage with 2 children in which the wife had a very strong compensatory claim because of extraordinary contributions to the husband’s educational and career success. The objective of the spousal support order was to enable

the wife to pursue her own educational goals. The trial decision pre-dated *Fisher* and made only passing reference to the Guidelines which were seen as not providing an adequate response to the facts of the case [i.e. too low]. However, a more sophisticated application of the Guidelines, of the sort one might now expect post-*Fisher*, would have shown that the combined amounts ordered by the trial judge by way of periodic and lump sum support were within the global maximum under the *with child support* formula. *Vynnk v. Baisa* can thus be viewed as a nice example of restructuring: front-end loading an award to promote the recipient's education and facilitate self-sufficiency.

5. Appeal Decisions from Other Provinces

Since the "Three and a Half Years Later" update, the Guidelines have also been dealt with in six appeal decisions from other provinces/territories. Not surprisingly, four are decisions of the B.C. Court of Appeal:

- *Chera v. Chera*, [2008] B.C.J. No. 1807, 2008 BCCA 374 (Sept. 25, 2008), affirming [2008] B.C.J. No. 657, 2008 BCSC 465 [upholding indefinite spousal support order in case of 6 year marriage with child based on mid point of Guidelines because of strong compensatory claim, but noting that Advisory Guidelines emphasize that "indefinite" does not mean permanent]
- *Jens v. Jens*, [2008] B.C.J. No. 2013, 2008 BCCA 392 (Oct. 7, 2008) overturning [2007] B.C.J. No. 1673, 2007 BCSC 1123 [further extension of duration of spousal support in medium length marriage with disability/illness; amounts still within Guidelines maximum global range]
- *Beese v. Beese*, [2008] B.C.J. No. 1894, 2008 BCCA 396 (Oct. 9, 2008), overturning [2006] B.C.J. No. 2903, 2006 BCSC 1662 [unusual facts; short relationship with no children; wife uses settlement funds from accident during marriage; trial judge order for lump sum compensatory order either by way of reapportionment or lump sum spousal overturned; modest spousal support awarded in accordance with Guidelines and converted into lump sum.]
- *Wang v. Poon*, [2008] B.C.J. No. 2113, 2008 BCCA 442 (Nov. 7, 2008), varying in part [2007] B.C.J. No. 271, BCSC 194 [short (7 yr) marriage involving immigration sponsorship; trial judge intended award to be higher than SSAG but actually awarded support at low end of global range; Court of Appeal extends support, but total award still within Guidelines global maximum; good use of restructuring]

There is an additional decision of the B.C. Court of Appeal acting as the Yukon Court of Appeal:

- *Holmes v. Matkovich*, [2008] Y.J. No 51, 2008 YCA 10 (July 15, 2008), upholding 2007 YKSC 15 [upholding trial award based on Guidelines; double-

dipping argument based on sharing income generated by business included in property division rejected]

The Alberta Court of Appeal, which has acknowledged the Guidelines in previous decisions without explicitly endorsing them, recently gave them a somewhat less than enthusiastic reception in *Sawatzky v. Sawatzky*, [2008] A.J. No. 1171, 2008 ABCA 355 (Oct. 28, 2008) overturning [2007] A.J. No. 182, 2007 ABQB. In *Sawatzky* the Court of Appeal overturned an interim order for spousal support on the basis that the motions judge had not considered the factors set out in s. 15.2. and appeared to have utilized the Guidelines simply as a formula. The case is a useful reminder that the Guidelines cannot simply be applied as an automatic mathematical formula and are only one part of a spousal support analysis, a point also made by the Ontario Court of Appeal in *Fisher* and referred to by the Alberta Court of Appeal. On the other hand, the Guidelines have proven to be an especially useful tool on interim applications where there is limited evidence. The Alberta Court of Appeal could at the least have saved the parties the cost of a rehearing on the interim support issue and determined the interim support issue on the material before it. Doing so might also have provided some helpful appellate reflection and guidance on the appropriateness of the numbers generated by the Guidelines.

6. Spousal Support in Ontario Post-*Fisher*: an Update

The first six months of Ontario spousal support decisions after the Ontario Court of Appeals endorsement of the Advisory Guidelines in its *Fisher* decision of January 2008 were analyzed in Carol Rogerson and Rollie Thompson, “*Fisher* and After: The Spousal Support Guidelines in Ontario” (May 28, 2008) available on line at <http://www.law.utoronto.ca/faculty/rogerson/ssag.html>

Many of the patterns and trends identified in that paper continue to be confirmed by the subsequent decisions of the past five months. A survey of the recent Ontario spousal support decisions reveals the following six notable features:

(i) Regular and More Sophisticated Use of the Advisory Guidelines

There is now widespread use of the Advisory Guidelines in spousal support determinations; counsel now commonly provide the Guidelines calculations and when they do not, it often prompts negative comment from the bench and a request that counsel provide them.

Many decisions are beginning to reflect more the sophisticated use of the Guidelines that comes with increased use and familiarity. For example, the recent reported decisions reveal fewer inaccurate calculations and a greater awareness of the income assumptions on which various Guidelines calculations submitted by the parties are based. Many judgments now provide reasons to justify the choice of an amount at either the upper or lower end of the range, including some analysis of the mix of compensatory and non-compensatory claims. In general, one finds an enhanced level of reasoning and analysis

in spousal support cases, with the Court of Appeal in effect endorsing this new norm in *Jessop v. Wright*.

However, there are aspects of the Guidelines that are still often being ignored, or at least not explicitly addressed:

- despite *Fisher*, there is infrequent reference to the global ranges and restructuring.
- there is often a failure to include prior support obligations in the calculation.
- there is often a failure to include s.7 expenses in the calculation under the *with child support formula*. In cases where the expenses are not specified in advance it is important nonetheless to take them into account in determining placement within the range.
- There is rarely explicit reference to any of the identified exceptions.

(ii) Income is Becoming the Main Contested Issue in Spousal Support

With increased reliance on the Advisory Guidelines to determine the amount of support, the main issue in dispute in the majority of spousal support cases, as in child support cases, is income. There are many disputes about income, but once those are resolved, the parties are often in agreement on the application of the Advisory Guidelines to determine amount.

Income is frequently imputed, not only to the payor, but also to the recipient, often to reflect a modest and realistic level of earnings.

There have been a couple of cases involving interesting income issues arising in the context of the payor's retirement; first, whether certain retirement incentives count as income in the year received and second, how to determine the amount of pension income to be used in the Guidelines calculation to avoid double-dipping when a portion of the pension has been shared through equalization. See *Hurst v. Hurst*, [2008] O.J. No. 3800 (S.C.J.) (Ducharme J.) and *Gammon v. Gammon*, 2008 CarswellOnt 6349 (S.C.J.) (Nolan J.)

(iii) Usefulness in the Interim Support Context

There is significant reliance on the Advisory Guidelines in the context of interim support determinations. (But note the use of the interim exception where payor carrying costs of the matrimonial home in *Clements v. Clements*, 2008 CarswellOnt 5692 (S.C.J.) (Heeney J.))

(iv) Usefulness in the Variation Context

Fisher repeated, in *obiter*, the common misunderstanding that the Advisory Guidelines are not applicable on variation. A more accurate statement of the application of the Guidelines in the variation context was articulated by the British Columbia Court of Appeal in *Beninger v. Beninger*, [2007] B.C.J. No. 2657, 2007 BCCA 619 (December 2007), i.e. that the Guidelines have a more limited application on the variation than on

initial applications and that their use should be approached with caution because they were not designed to address some of the more complex issues that can arise on variation, such as the impact of remarriage, second families and retirement. In addition, the B.C.C.A. noted that entitlement issues may also have arisen since the initial order.

In practice, and despite the comments in *Fisher* which are often cited, recent decisions show that the Advisory Guidelines are frequently being used in the variation context in Ontario to deal with the recalculation of support, both on a retroactive and prospective basis, when the variation is a relatively straightforward one based on the changing incomes of the parties. See for example *Parker v. Parker*, 2008 CarswellOnt 6381 (S.C.J.) (Bishop J.), *Lalonde v. Lalonde*, 2008 CarswellOnt 6710 (S.C.J.) (Gordon J.), and *Mann v. Mann*, [2008] O.J. No. 2942 (Ont. C.J.) (Sherr J.).

With respect to variation cases where there has been a post-separation increase in the payor's income, most of the post-*Fisher* cases, in contrast to *Fisher* itself, engage in no analysis of the recipients' entitlement to share in the post-separation increase. Once the increased income is established, spousal support is recalculated using the Guidelines. Most of these cases, unlike *Fisher*, have involved strong compensatory claims and entitlement can be fairly easily established. However, this issue of entitlement is one to which that counsel and judges should remain alert. The same is true of entitlement to increased support where there has been a post-separation decreases in the recipient's income.

For an interesting case where the Guidelines were not applied on a variation application because of a specific clause in the consent order providing a formula for adjusting the amount of support if incomes increased see *Kretzschmar v. Séguin*, [2008] O.J. No.2384 (S.C.J.) (Power J.)

(v) Use to Shape Duration: Time Limits

Prior to the Guidelines and *Fisher* Ontario spousal support law, structured as it was around concepts of need and comparable standards of living, revealed a great deal of uncertainty around duration. Time limits were rare; with indefinite orders the norm. Duration under such orders was at best uncertain, and at worst forever if there was significant income disparity. See Carol Rogerson, "Spousal Support in Ontario a Brief Update" (Sept. 20, 2007) available on line at <http://www.law.utoronto.ca/faculty/rogerson/ssag.html>

The Guidelines have introduced the concept of durational limits for marriages under 20 years in length. (As a result of the revisions made in the Final Version of the Guidelines, discussed above, there are now durational ranges under both formulas.) These durational limits can be implemented, depending on the circumstances, either through initial time limits or in a "softer" way by means of orders that are initially indefinite in form but which will be brought to a subsequent termination through the process of review and variation. In *Fisher*, on the facts, the Court of Appeal relied upon these durational limits and imposed an initial time limit in the context of a 19 year marriage without children in

which the spousal support claim was largely non-compensatory in nature. Certainly since *Fisher* time-limited orders have become more common in Ontario.

On the whole, the introduction of more structure with respect to duration as a result of the Guidelines should be taken as a positive development in Ontario law. However, in the initial period after *Fisher*, there appeared to be a rush towards time-limited orders, with such orders being made in cases quite different from *Fisher*, some involving very strong compensatory claims where strict time limits were clearly inappropriate. See Rogerson and Thompson, “*Fisher and After*”, *supra*. This was a troubling development.

The more recent decisions show some shift away from this early post-*Fisher* development. On the whole, more recent decisions show courts taking a more moderate approach to time-limits, engaging in a more careful analysis of the appropriateness of a time limit on the particular facts of the case. It is clear, however, that the durational ranges under the Guidelines are being relied upon to bring more focus and structure to the issues of duration and termination of the spousal support obligation, even in cases with minor children under the *with child support* formula.

Ontario courts are using time-limits more frequently than in the past; in some cases imposing them in initial orders (typically in short marriages without children or where there has been a lengthy period of interim support since separation); more commonly on a subsequent review or variation where the recipient’s prospects for achieving self-sufficiency can be more realistically addressed with the passage of time. In other cases the Guidelines’ durational limits are the basis for a finding of no further entitlement and the termination of spousal support. Indirectly or directly, issues of self-sufficiency are thus receiving more attention. In *Jessop v. Wright*, while noting that the motion judge’s order for prospective support did fall within the range for amount in one of the Guidelines calculations presented to the court, the Court of Appeal commented on the failure of his order to address “the important factor of the duration of support” [at para 11]. This comment may be seen as reflective of new, emerging norms and expectations with respect to the analysis of duration. As suggested above, this new focus on duration should, on the whole, be seen as a positive development.

For two cases relying on the durational limits under the *without child support* formula to either time-limit or terminate support and which, like *Fisher*, involve largely non-compensatory support claims see:

- *Wallace v. Prince Cox*, 2008 CarswellOnt 6434 (S.C.J.) (Tulloch J.) (8 -9 year common law relationship; support calculated at midpoint of global range using duration of 6 years; husband found to have paid more than that amount in interim, no further entitlement to spousal support)
- *Gammon v. Gammon* (15 year relationship with no children; variation application 4 years after separation when husband retires; SSAG durational range of 7.5 to 15 years noted; termination date appropriate, 10 year duration appropriate, support to terminate in 2014).

Cases under the *with child support* formula dealing with duration in the context of compensatory support claims include:

- *Nikolaou v. Nikalaou*, 2008 CarswellOnt 6640 (S.C.J.) (Sheppard J.) (6 year marriage, separation 2005, 1 child now 9 with w; spousal support for a further 3 years to terminate in 2011 (i.e. 6 years after separation) based on evidence that w has educational training that will allow her to be self-sufficient)
- *Jiwaji v. Jiwaji*, 2008 CarswellOnt 6537 (S.C.J.) (Wood J.) (7 year marriage with 2 children now 9 and 12, separation 2002; interim support for 6 years until 2008; support ordered for a further 4 years, for 10 years total)
- *Renton v. Renton*, 2008 CarswellOnt 6150 (S.C.J.) (Arell J.) (*custodial payor* formula, 12 year marriage; separation in 1995, 2 children with father, high school and college, spousal support paid since 2000; wife employed and income steadily increasing, husband remarried, applies to terminate, 9 year duration appropriate; support to end in 2009).
- *Dabrowska v. Bragagnolo*, [2008] O.J. No. 3155, 2008 ONCJ 360 (Ont. C.J.) (Sherr J.) (7 year relationship, separation 2006, 1 child age 5 with wife; court notes revised approach to duration under with child support formula in Final Version, but also notes that in cases with minor children duration should not be set in initial order but rather on subsequent variation or review; here order made indefinite, subject to variation, wife's income likely to increase, affecting both amount and duration of support)
- *Vanasse v. Seguin*, [2008] O.J. No. 2832 (S.C.J.) (Blisshen J.) (12 year relationship, separation 2005, 2 children now 10 and 8, shared parenting, interim support since 2006; wife had good employment in past; on the facts, appropriate case for time limit; appropriate duration 10 years from separation, so further 7 years when children 17 and 15)/
- *Durakovic v. Durakovic*, [2008] O.J. No. 3537 (S.C.J.) (Scott J.) (very unusual facts; 7 year marriage; separation 2004, 2 children now 10 and 5; husband older and partially retired; engaged in many religious and philanthropic activities, wife unemployed but access to family trust; appropriate duration under SSAG 6 years from date of separation (wife had wanted 8½) based on length of marriage and date youngest child in school; to terminate in 2010)

(vi) Short Marriages Without Children

Ontario spousal support decisions prior to the Guidelines were often out of step with decisions in other parts of the county in cases of short or short/medium length marriages without children. Ontario case law tended toward higher levels of support for longer periods of time in cases where there was significant income disparity. Several recent modest global amounts generated by the *without child support* formula and reflective of

typical outcomes in other parts of the country. See *Wallace v. Prince Cox*, 2008 CarswellOnt 6434 (S.C.J.) (Tulloch J.), *Wells v. Wells*, [2008] O.J. No. 3961 (S.C.J.) (Richetti J.), *Taylor v. Taylor*, [2008] O.J. No. 3900 (S.C.J.) (Richetti J.) (amount slightly higher than SSAG but circumstances warranting compensatory exception).

Appendix

SPOUSAL SUPPORT ADVISORY GUIDELINES, ONTARIO DECISIONS [July 10* – Nov. 18, 2008]

For cases decided prior to July 10, 2008 see the previous update papers at
<http://www.law.utoronto.ca/faculty/rogerson/ssag.html>

[** most noteworthy cases]

A. Appeal Cases

- ***Jessop v. Wright*, [2008] O.J. No. 3849, 2008 ONCA 673 (Ont. C.A.) (Lang, Rouleau and Watt JJ.A.) (Sept. 29/08), varying 2008 CarswellOnt 6486 (S.C.J.) (McKinnon J.) (Feb. 21/08)
15 year marriage, 2 children 18 and 15, with wife; date of separation not stated; before 2000
Husband loses job after separation; nominal child and spousal support 2001-2005; finds new employment April 2005; wife then seeks child and spousal support
Husband's income: \$135,000 (2005), \$145,500 (2006), \$131,425 (2007)
Wife's income: \$28,938 (2005), \$35,707 (2006), \$37,870 (2007, income plus severance); lost job in 2007, unemployed at time of motion
Motions judge: child support \$1772; spousal support \$2000/mo retroactive to May 2005
Appeal court criticizes motions judge for failing to explain how he arrived at the amount of support or specifying incomes on which award based.
No error to not apply Guidelines, as ranges not provided
Error to award same amount for years when wife working and earning \$25,000 - \$37,000 and years when unemployed; amount of spousal support should vary depending on recipient's income
Award reduced to \$1700 per month from May 2005 until Nov 2007 when wife's severance pay expired; amount said to fit one of Guidelines ranges provided by husband [SSAG range not provided, but calculated as \$1261- \$2030, midpoint \$1644, based on h \$131,425 and w \$35,000 as h argued; but using actual 2005 incomes range is \$1796-\$2575; actual 2006 incomes range is \$1654-\$2472, and actual 2007 incomes range is \$1261- \$2030]
Award of \$2000 per month from Dec. 2007 upheld; amount sought by wife; noted to be at low end of Guidelines range or even below given wife's unemployment [SSAG range not provided, calculated as \$2293-\$3125 if h \$131,425 and w zero income]
- ***Vynnk v. Baisa*, [2008] O.J. No. 3747, 2008 ONCA 657 (Ont. C.A.) (Laksin, Simmons and Sharpe JJ.A.) (Sept. 19, 2008) affirming [2007] O.J. No. 274 (S.C.J.)(Klowak J.)
Married 10 years, husband 39, wife 33, separation 2005, 1 child aged 3 at date of trial, with wife
Husband critical care nurse, paid through own company, earns \$87,000
Child support \$774
Wife earns \$39,000
Strong compensatory claim: wife sponsored husband from Ukraine, waitressed, two jobs, to put him through school,
Delayed her own education, now likely to return to school
Trial judge awarded periodic spousal support \$2,000/mo. for 5 years, 61% NDI
Higher quantum than if no time-limit; notes Guidelines range \$491-\$1151 but for up to 17 years [restructuring by front-end loading to facilitate education, but not noted as such]

* Included are a few cases decided before July 10, 2008, which were not included in the last update, "The Spousal Support Advisory Guidelines Three and Half Years Later" (June 16, 2008, revised Aug. 1, 2008) which provides case summaries for the period Sept. 17, 2007- July 10, 2008.

In addition, lump sum support of \$75,000 to recognize strong compensatory elements and support wife's education

Trial judge of view that the Guidelines would only generate periodic award and thus would not adequately address all the element of the case [but actually all within global range at Guidelines maximum]

Combined periodic and lump sum award upheld on appeal in brief reasons deferring to trial judge's finding of wife's extraordinary efforts in facilitating husband's educational and career success.

Award generous, but no error.

No reference to Guidelines in appeal judgement.

B. The Without Child Support Formula

Wallace v. Prince-Cox, 2008 CarswellOnt 6434 (Ont. S.C.J.) (Tulloch J.) (Oct. 31/08)

8 -9 year common law relationship

W has spotty work record; h loaned her \$22,000 during relationship, never repaid

H income \$76,000

H paid interim support of \$800/mo for 14 months plus \$4,500

W in new relationship and plans to move to Calgary; income uncertain; imputed at \$24,00

W seeks spousal support of \$1000/mo for 6 years

No further entitlement to spousal support

SSAG range \$520-\$693/mo for 4-8 years; midpoint \$606/mo for 6 years, or \$33,984 after tax.

H already paid \$36,900 through interim support and \$22,000. W adequately compensated for relatively short relationship that resulted in no economic disadvantage to her

***Wells v. Wells*, [2008] O.J. No. 3961 (Ont. S.C.J.) (Richetti J.) (Oct. 9/08)

3 year relationship (married 1 plus 3 prior cohabitation; separation 2007)

W disabled; disability income of \$25,000 after gross up; child from prior relationship; child support from father excluded from her income; after separation sharing home purchased with ex-husband

H income \$70,000

W seeks \$1,200/mo interim spousal support, to give her 41% NDI; rejected; NDI approach not appropriate given short length of marriage

SSAG range: \$225-\$300/mo

Interim support of \$300/mo ordered; top end of range because of disability; by excluding child support received by wife from her income, range effectively increased; had this not been done, amount would have been increased by small amount beyond upper end of range to take account of disability

Taylor v. Taylor, [2008] O.J. No. 3900 (Ont. S.C.J.) (Richetti J.) (Oct. 7/08)

Immigration sponsorship; wife from India; married 2 years; cohabit only 10 months; separation 2006; h signs 3 year sponsorship until May 2008

Wife highly educated; employed now at \$14,000 but plans to seek certification of professional qualifications in Canada; h earns \$33,000 and supports parents

Wife seeks \$500 per month for 2 years (2006 to 2008) from separation to end of sponsorship agreement

Sponsorship agreement not a factor in decision because w did not seek social assistance

Court orders \$100/mo for 20 months for period from separation until Jan. 2008, or \$2000 lump sum plus pre-judgment interest.

Award said to be higher than SSAG, but reasonable given husband's actions in forcing execution of unconscionable separation agreement and leaving w stranded in India without return airfare post-separation [compensatory exception not referred to]

[SSAG range not stated, calculated as \$48-\$63 for 1-2 years, max. global value \$1515]

Parker v. Parker, 2008 CarswellOnt 6381 (Ont. S.C.J.) (Bishop J.) (Oct 6/08)

Variation of consent order

19 year relationship (17 marriage plus 2 cohabitation), separation 1999, wife 16 when married

2 children, now 20 and 18, one special needs, on social assistance but w also pays some expenses

Consent order in 2000 when h's income \$6,240: child support \$4/mo and spousal support \$1/mo; variation clause

H's income increases immediately after order; now \$95,800; w on social assistance (Ont. Disability), \$14,767; h did pay ws' car insurance of \$775/yr until July 2008
 W seeks retroactive child and spousal and on-going spousal
 Court uses SSAG to calculate arrears and on-going support [calculations not provided]
 On-going spousal support of \$2,655 per month
 Immaterial that Ont. Disability may recoup disability payments; primary responsibility for child and spousal support with h and not state

Merko v. Merko, 2008 CarswellOnt 6361, 2008 ONCJ 530 (Ont. C.J.) (Maresca J.) (Sept. 30/08)
 Immigration sponsorship; wife from Ukraine; married two years, cohabit only 12 months, separation 2006
 Each party no income and dependant on family and friends; both claim spousal support and make arguments using SSAG and imputed incomes
 No entitlement to support; very short marriage; economic lives never intertwined

Hurst v. Hurst, [2008] O.J. No. 3800 (Ont. S.C.J.) (Ducharme J.) (Sept. 24/08)
 36 year marriage; separation 2000; divorce 2003; 3 grown children
 2003 consent order : \$2000 per month spousal support until Aug. 2007 (h's expected retirement date); after retirement first \$2,261.70 of pension income not to be considered as income for spousal support purposes as divided through equalization payment
 H does not retire until Dec. 1, 2007; receives \$70,000 lump sum retirement transferred into RRSP
 W applies for variation and determination of support after Aug 2007
 Retirement incentive not to be included in h's 2007 income for spousal support purposes
 H 2007 income \$124,000; w's income imputed at \$23,000 (CPP, rental income; imputed income from hairdressing)
 Guidelines may be applicable if agreement provides for review or variation; guidelines taken into account to ensure that support ordered "falls within the appropriate parameters); \$3600 per month for 4 remaining months of 2007 [SSAG range not stated, calculated as \$3156-\$4143]
 Ongoing support for 2008 \$1200/mo: based on h income \$51,790 (including only unequalized portion of pension) and w income \$18,767 [SSAG range not stated, calculated as \$1032-\$1301]

***Gammon v. Gammon*, 2008 CarswellOnt 6349 (Ont. S.C.J.) (Nolan J.) ((Sept. 17/08)
 15 year relationship; 7 years marriage, plus 8 prior cohabitation; no children; separation 2004
 Separation agreement set aside; 2007 order for spousal support retroactive to separation (2004) based on parties' incomes (actual and imputed) and SSAG; \$1500 per month for 2007 based on w income (imputed) of \$25,956 and h's income (estimated) of \$90,000
 H retires Dec. 1, 2007; gross monthly pension \$3700; in property division, 22.6% of pension equalized (based on 7 years of marriage); 77.4% available for support
 H also receives retirement incentive of one-time payment of \$85,000, included in 2007 income but which could be sheltered all or in part in RRSP; also \$30,000 car voucher included in 2008 income
 Application by H to vary support and set termination date
 Neither severance package nor car voucher to be included in h's income (treated as post-separation income increase; w not entitled to share; basis of her support not compensatory; no significant contribution to h's career)
 Support for 2007 recalculated using h's actual income (\$117,880) and mid range of Guidelines
 Support for 2008 set at \$271/mo based on h income of \$34,365 (unequalized part of pension) and mid-range of Guidelines.
 Termination date appropriate; SSAG range 7.5 to 15 years; had spousal support provisions of separation agreement had been negotiated in accordance with Divorce Act objectives, termination at low end of range would have been appropriate; in circumstances and given how long it took w to get the periodic support to which she was entitled, 10 year duration is appropriate; support to terminate in 2014.

***Wright v. Wright*, [2008] O.J. No. 3118 (Ont. S.C.J.) (Langdon J.) (Aug. 11/08)
 27 year marriage; separation 2003; 3 grown children
 H has gravel business; w worked in business during marriage

Property division dealt with in separation agreement: h to pay w \$213,475 for shares of company by means of monthly payments of \$2,647 for 8 years
 H's income from business \$105,000 (\$90,000 plus \$15,000 taxable benefits)
 W had worked part-time as book-keeper after separation, now enrolled in on-line course; future income speculative; living with new partner and enjoying higher standard of living than during marriage; annual income of \$35,000 imputed
 SSAG range calculated as \$1250 - \$1600
 \$800 per month ordered; lower than SSAG to take account of h's monthly obligation to pay wife for her shares out of income generated by business

Kretzschmar v. Séguin, [2008] O.J. No. 2834 (Ont. S.C.J.) (Power J.) (July 17/08)
 Variation application; agreement providing for variation upon change of circumstances
 SSAG generally not applicable on variation (*Fisher*); but more specifically this agreement has specific formula giving wife 35% of husband's base income (result higher than under SSAG)

Weatherhead v. Briant, [2008] O.J. No. 3390 (Ont. S.C.J.) (Hennessy J.) (June 30/08)
 10 year common law relationship; separation 2006; wife higher earner;
 Husband applying for spousal support; started 3 year college program Sept. 2007
 Wife's income from business \$30 - 35,000; husband zero for months in school
 SSAG range stated as \$375-\$500 (if w income \$30,000) or \$483-\$583 (if w income \$35,000)
 \$450 per month ordered from July 07 to April 08 (almost 3 yrs); low end of range because h capable of earning some income during summer

C. The With Child Support Formula

Dickinson v. Dickinson, 2008 CarswellOnt 6788 (Ont. S.C.J.) (Gauthier J.) (Nov 17/08)
 Variation
 11 year marriage, separation 2005, 3 children 12, 10 and 8 with w
 H support for prior child, \$300/mo
 2007 interim order based on h income \$107,000 and w \$29,000: \$1,935 child support and \$850 spousal
 H brings application to vary based on income decrease for 2008
 H income found to be \$84,000; w income now \$35,488, material change
 Child support for 3 children: reduced to \$1575
 Interim spousal support; SSAG range stated as 0 -\$464; \$500/mo ordered
 [If h prior child support obligation of \$300 taken into account and assumed to be non-deductible, SSAG range would be 0-\$171]

Lalonde v. Lalonde, 2008 CarswellOnt 6710 (Ont. S.C.J.) (Gordon J.) (Nov 12/08)
 Variation
 25 year marriage, 2 children, 1 adult, 1 university
 2005 consent order based on h income \$100,000 and w income \$32,000: child support \$773 and spousal \$1,130; increases in incomes to constitute material change
 Both incomes increase; w seeks retroactive and prospective increase in spousal and child support
 H income \$139,304; w. income \$44,447
 Child support: \$1,175.25 (no s. 7, post-secondary expenses covered by RESP and child's income)
 Spousal support: SSAG range stated as \$1813 - \$2,723; \$1825/mo ordered; lower end of range chosen because h income based on significant overtime; he should be rewarded for his efforts
 Retroactive spousal: h underpaid at least \$700/mo from what SSAG would suggest since 2005; total \$32,900, discounted for tax to \$17,750.

Nikolaou v. Nikalaou, 2008 CarswellOnt 6640 (Ont. S.C.J.) (Sheppard J.) (Nov 12/08)
 Duration, time-limits
 6 year marriage, separation 2005, 1 child now 9 with w
 H income found to be \$50,000 and w \$16,560
 Child support: \$462

Spousal support: \$460/mo, based on SSAG calculations provided by counsel; to terminate in 2011 (i.e. 6 years after separation) based on evidence that w has educational training that will allow her to be self-sufficient

[SSAG range not provided, calculated as \$171-\$496]

Jiwaji v. Jiwaji, 2008 CarswellOnt 6537 (Ont. S.C.J.) (Wood J.) (Nov 4/08)

Duration

7 year marriage, separation 2002, 2 children now 9 and 12 with w; 1 special needs

W from Kenya, no employment experience in Canada, plus health problems, now 50

2002 interim order based on h income \$43,000: child support \$609 and spousal \$800/mo

H's income \$62,100 (\$40,980 plus imputed benefits); w no effort to work, \$8000 imputed based on limited earning capacity

Child support: \$931

Spousal support: SSAG range \$450 - \$745, max 15 years [note duration based on Draft Proposal, revisions to durational range in final version of Guidelines not recognized]

Spousal support for further 4 years (10 years total): 2 years at \$597 per month (mid-range) and then 2 years at \$450, then review

Initial figure gives w 53.1% NDI, court acknowledges seems low, but 61.9% of actual dollars available

Lickfold v. Robichaud, 2008 CarswellOnt 6138 (Ont. S.C.J.) (Linhares de Sousa J.) (Oct 21/08)

Shared custody

5 year common law relationship; separation 2006, 1 child 6, shared custody (w not allowed to move child back to N.B.)

H income \$54,243; w \$18,000; h prior child, pays \$300/mo child support

Child support; h table amount \$500; w table amount \$156; h wants set-off; court finds w not able to pay any child support; h to pay \$500/mo; h to pay all s. 7 expenses

Spousal support: SSAG range presented as 0 - \$336; no spousal support ordered

Renton v. Renton, 2008 CarswellOnt 6150 (Ont. S.C.J.) (Arell J.) (Oct 21/08)

Custodial payor, duration

12 year marriage; separation 1997; 2 children, with father since 2000; older child in college since Sept. 2007

Informal support, then 2002 minutes of settlement and 2003 consent order: \$1000/mo spousal support

H remarried and 1 new child; w's income steadily increased

H applies to terminate spousal support

H income \$103,500 (2007) and \$93,300 (2008); W \$45,500 and \$46,500.

W now paying child support of \$688, plus share of s. 7 (college expenses)

SSAG range for duration 6 - 12 years; 9 years reasonable period in light of h's major responsibility for child support and wife's increased income; duration to commence in 2000

Spousal support reduced to \$750/mo as of Sept. 2007; then to \$500 per month as of Sept. 2008 to cease June 2009.

[SSAG calculations for amount under *custodial payor* formula not provided; calculated as \$585-\$780 based on 2007 incomes and no s. 7; \$468-\$624 based on 2008 incomes and no. s.7]

DeVos v. Devos, 2008 CarswellOnt 6145 (Ont. S.C.J.) (Turnbull J.) (Oct 20/08)

11 year marriage, plus 1-2 years prior cohabitation; separation 2005; 2 children 5 and 11

H income \$57,000

W only claims spousal support for 10 months, March – Dec. 2006; claims \$200 per month based on

CHEQUEmate calculations; \$2000 retroactive spousal support awarded

[SSAG calculations not provided; w's income unknown]

Santos v. Santos, [2008] O.J. No. 3899 (Ont. S.C.J.) (Sproat J.) (Oct 6/08)

Interim

20 year marriage; separation 2007; 3 children, 18 (in university, with h), 17 and 14 (with w in mat home)

Dispute about incomes; precise calculations not possible; \$100,000 imputed to h and \$25,000 to w

H to pay w child support of \$1404 (table for 2 children), plus 80/20 sharing of s. 7 expenses(private school, university tuition)
 Spousal support: parties to submit SUPPORTmate and CHEQUEmate calculations based upon income levels set my court

Sawula v. Sawula, [2008] O.J. No. 3672 (Ont. S.C.J.) (Matheson J.) (Sept 10/08)

Interim

22 year marriage, separation 2007; 5 children, 3 oldest in university, funded by RESP; 2 remaining with w in mat home

H surgeon, was earning \$600,000; heart attack post-separation, now \$456,000

W income of approx. \$36,000

Interim child support for 2 children at home: \$5,542

Spousal support; w seeks spousal support in accordance with Guidelines; court orders \$7518 as requested by wife

[SSAG range not provided, calculated as \$6491 - \$8170 based on h income at \$350,000 ceiling and child support for 2 children.]

Danby v. Danby, [2008] O.J. No. 3659 (Ont. S.C.J.) (Gordon J.) (Sept 9/08)

Variation

25 year traditional marriage; separation 1994; 5 children; only 2 dependent in 1999 when settlement agreement; since June 2005 only 1 dependent

H, now 59, took early retirement in 2005, pension income \$49,000

W now three jobs, \$42,000, anticipates reduction, court sets at \$34,000

H seeks termination of spousal support and termination of child support for 1 child; w seeks increase of spousal support

H income imputed at \$63,000 (early retirement unreasonable; can earn extra income; use income in year before retirement)

Child support for 1 remaining child: \$900 plus s. 7 university in future

Spousal support: SSAG range 0 - \$438; court orders \$300 as requested by w, but found to be low as prior award did not meet spousal support objectives because priority to child support

Clements v. Clements, 2008 CarswellOnt 5692 (Ont. S.C.J.) (Heeny J.) (Sept 4/08)

Interim support

11 year relationship (8 marriage plus 3 cohabitation); separation 2006; 2 children with mother still in matrimonial home

H \$70,621; w \$29,443

Interim child support \$1036

Spousal support: SSAG range zero to \$573; no interim spousal support payable, h paying mortgage on mat home, \$1,100/mo; court also looks at budgets

***Spikula v. Spikula*, [2008] O.J. No. 3931 (Ont. S.C.J.) (Shaw J.) (Aug 28/08)

16 ½ year relationship (13 marriage plus 4 cohabitation), separation 2007, 1 child 5 with mother;

Father relocates for work reasons to another city 200 km away after separation

Wife at home, then part-time employment; now \$28,544 (2 part-time jobs)

Child support \$719

Spousal support: parties agree on application of SSAG after determination of income; SSAG range \$738-\$1039

\$750 per month ordered; good discussion of why lower end of range chosen; h will have significant travel expenses to exercise access and significant child-care costs; w will get significant equalization payment which can generate income

***Dabrowska v. Bragagnolo*, [2008] O.J. No. 3155, 2008 ONCJ 360 (Ont. C.J.) (Sherr J.) (Aug 11/08)

7 year common law relationship; separation 2006, one child age 5 with mother

W university education in Poland, waitress and factory worker before child; stayed home with child; on social assistance after separation; modest earnings of \$10,780, trying to improve position, no imputation of income

H paid \$1,400/mo interim support for 1 year after separation, then reduced to \$635, then \$270 (child support only); h trucker and hours significantly reduced at end of 2007 because of new regulations
 H income set at \$35,000 for 2008 and \$40,000 from 2009, no 3 year averaging; no intentional under-employment, table amount of child support ordered
 Spousal support 2008: SAGG range \$1 - \$229 calculated by court, support set at \$229, guideline result reasonable, leaves w with 51.3% NDI
 Spousal support 2009: SSAG range \$99-\$356 calculated by court, support set at \$350, leaving w with 51.3% NDI
 Duration: good review of revisions in SSAG final version setting durational range under *with child support* formula; notes SSAG provides that duration should not be set in initial order and that limits to apply on subsequent variation or review; notes that here durational range 3 -16 years; order indefinite, subject to variation; w's income likely to increase, affecting both amount and duration of spousal support

Kemp v. Helfrich, [2008] O.J. No. 3729 (Ont. S.C.J.) (Plantana J.) (Aug 1/08)

Interim support

13 year relationship (4 marriage plus 9 cohabitation); separation 2005; 2 children 6 and 13, temporary sole custody to w

H moves to Alberta after separation; high access costs

H income in dispute re amount of overtime and time off work to exercise access; 2007 income \$76,073; income for 2008 set at \$85,850

W income \$33,879 (said to be net, but seems to be used in calculations as gross)

Interim child support: \$1229 (1 child Alta. Table) plus s. 7 (daycare)

SSAG calculations provided based on h income of \$76,073 (0-\$538) and \$93,300 (\$390-\$1075) [s. 7 not taken into account in calculations] [SSAG range for income of \$85,850 not before court but calculated as \$251-\$916, not taking into account s. 7]

Spousal support of \$400 per month ordered, based on SSAG and review of financial statements

Drago v. Catalfo, 2008 CarswellOnt 5250 (Ont. S.C.J.) (Karakatsanis J.) (July 24/08)

Interim support

10 year marriage; separation 2006, 2 children 6 and 4 with mother in mat home

H no payments since separation

H income \$192,300; w \$83,352 (teacher)

Interim child support \$2483 plus significant s. 7; interim spousal \$1000/mo

SSAG not explicitly relied upon but parties using calculations based upon different income assumptions [SSAG range based on incomes found by court not provided but calculated as \$1045-\$2308, not including s. 7 expenses]

Kajorinne v. Kajorinne, [2008] O.J. No. 2789 (Ont. S.C.J.) (Pierce J.) (July 8/08)

20 year marriage; separation 2004, 2 children 12 and 14, with w

Interim sep. agreement 2005 based on h income \$77,851: child support \$1009 plus s. 7 and \$817/mo spousal

H subsequently unemployed, income \$22,000 from employment insurance

W now employed, income \$27,500

Child support reduced to \$335/mo, plus some s. 7

Spousal support terminated; SSAG calculations provided by h show no spousal support payable [also reference to exception for payor income between \$20,000 - \$30,000]

***Vanasse v. Seguin*, [2008] O.J. No. 2832 (Ont. S.C.J.) (Blisshen J.) (July 4/08)

12 year common law relationship; separation 2005; 2 children now 10 and 8

W employed in first part of marriage; no employed after birth of children and still unemployed

H acquired and sold business during marriage; living off investments

Interim agreement 2006, child support \$2186, spousal \$5000/mo

H income imputed as \$450,000 (using "conservative" 6% figure for return on investment)

W imputed income of \$85,000 as of July 2008 (investment interest on property award for unjust enrichment plus \$45,000 imputed employment income)

Child support \$5472/mo (table amount despite shared parenting arrangement)
 SSAG stated not to be applicable because income over \$350,000 ceiling; court uses Murray/Mackinnon study to show dominant pattern of 48.6 – 57.5% NDI in cases where child support in pay
 Spousal support of \$3,800 per month ordered, giving w 48% NDI
 [SSAG range not provided but calculated using \$350,000 income ceiling for h as \$4817-\$6687]
 Time limit appropriate given length of relationship, ages of children, shared parenting, regime, w's age, good health, and past employment record.
 Total duration of 10 years support from date of separation appropriate; so further 7 years, when children 17 and 15.
 W's request for lump sum spousal rejected

Billingsley v. Billingsley, [2008] O.J. No. 2617 (Ont. S.C.J.) (R.J. Smith J.) (June 30/08)

Interim support

7 year marriage; separation 2006; 2 children; wife 1 prior child; h convicted of sexual abuse of w's child
 H income imputed at \$125,000 (w had argued for \$200,000); w income \$32,700
 Child support for 3 children, \$1977 (\$2209 table minus \$232 from step-daughter's biological father)
 SSAG range, \$811 - \$1654, \$800/mo ordered

***Mann v. Mann*, [2008] O.J. No. 2942, 2008 ONCJ 231 (Ont. C.J.) (Sherr J.) (June 19/08)

Use of SSAG on variation application to recalculate spousal support because of changed incomes
 19 year marriage; w primarily at home with 2 children; 2 part-time jobs after separation
 2006 order based on h \$58,500 and w \$28,700: child support \$879 (table 2 children) and \$150 spousal
 Both parties' incomes drop; h now \$42,900, w. now \$23,693; oldest child ceases to be child of marriage
 Dec. 2007; court asked to recalculate support for 2007 and 2008
 For 2007, SSAG show no spousal support payable; although SSAG only advisory and not designed for variation motions (*Fisher*) provide a useful starting point when court being asked to recalculate spousal support back to time of final order; reasonableness of guideline award needs to be assessed against individual circumstances of case; here with no spousal has 57.5% NDI, reasonable result; no basis to depart from Guidelines
 For 2008, CS for 1 child only, \$395/mo, plus \$66/mo s. 7 (dental), total \$461; SSAG range stated as \$94-\$247; w wants \$815 to give her 61% of NDI; far too high; court orders \$350; leave w with 52.4% NDI (52.7% with s.7); reasonable result [incorrect SSAG calculations used; SSAG range zero to \$27 if no s. 7; no spousal support payable; if include s. 7 expenses; w left with 52.2% NDI before spousal]

***Durakovic v. Durakovic*, [2008] O.J. No. 3537 (Ont. S.C.J.) (Scott J.) (June 11/08)

7 year marriage; separation 2004; 2 children now 10 and 5; h 57 and w 20
 Children with w; h supervised access
 Interim support \$8,300/mo combined child and spousal; h in arrears; no payment
 H doctor, partially retired; engaged in many religious and philanthropic activities; some U.S. employment; many issues re assessing income; determined to be \$225,000
 W unemployed but some issues re family trust, income of \$14,400 imputed (min wage)
 Child support \$2862, plus \$500/mo s. 7 (mainly private school) subject to accounting at end of year based on actual expenditures
 W seeking spousal support for further 5 years (8 ½ yrs total)
 Parties did not submit SSAG calculations but court refers to SSAG to confirm its own analysis
 Appropriate duration 6 years from date of separation (ct. looks to length of marriage and date youngest child in full time school)
 Spousal support \$4,500/mo from May/04 to Jan/06; then \$3,500/mo until April 2010
 Result stated to be "not outside of an alternate calculation projected by use of SSAG" (implicit reference to restructuring?) [SSAG range not provided; calculated as \$4024-\$5097, taking into account s. 7 expenses]
 On-going support from Jan 2008 converted to lump sum [\$98,000 in periodic payments for 28 months converted to lump sum of \$49,907 after discount of 30% for tax, 3% for present value and 25% for negative contingencies]

Baker v. Baker, 2008 CarswellOnt (Ont. S.C.J.) (Turnbull J.) (June 4/08)

Interim interim support application

4 year marriage; separation 2008; 1 child, 3 yrs. old

H in mat home; w with parents

H income approx \$80,000

Interim interim shared custody

C.S. \$500/mo (lower than table of \$719 bcs shared custody)

SSAG range \$1589 - \$2008

\$1500 interim interim spousal support ordered, but noted no info at this stage re h's carrying costs on mat home

Arsenault v. Arsenault, [2008] O.J. No. 2782 (Ont. S.C.J.) (Plantana J.) (June 4/08)

17 year marriage; separation 2007; 2 children, 1 adult, younger child in grade 12

W home until youngest child in grade 9, now part-time, \$14,040

H \$99,550, now in B.C.

No child support paid after separation because h paying off debts; now paid off

Child support \$902 (B.C. table)

SSAG range \$1688-\$2329; spousal support of \$2000/mo ordered (amount w requested), indexed to cost of living