

# ALL GUIDELINES, ALL THE TIME: SPOUSAL SUPPORT IN ONTARIO 2009-10

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This paper risks becoming an annual affair, with each Family Law Summit. The first came at the 2<sup>nd</sup> Summit in June 2008, shortly after the Ontario Court of Appeal's landmark decision in *Fisher v. Fisher*,<sup>1</sup> when Carol Rogerson and I wrote "*Fisher and After: The Spousal Support Advisory Guidelines in Ontario*".<sup>2</sup> In 2009, I showed a distinct lack of originality in my title for the 3<sup>rd</sup> Summit: "Following *Fisher*: Ontario Spousal Support Trends 2008-09".<sup>3</sup> This year, I've changed the title, to reflect the progress of the Ontario case law in incorporating *Fisher* and the Spousal Support Advisory Guidelines into the everyday toolkit of an Ontario family law lawyer.

The most important spousal support decision in this past year is *Cassidy v. McNeil* from the Ontario Court of Appeal, a case involving the often-ignored *custodial payor* formula.<sup>4</sup> It will be discussed below in the Court of Appeal section of the paper, entitled "The Good, the Bad and the Ugly". *Cassidy* is "the Good", the others are explained below.

I will also review the 68 trial decisions reported in the twelve months since last May, 28 cases under the *without child support* formula and 40 under the *with child support* formula. Case summaries for all the appeal and trial decisions are found in Appendix A to this paper. Broadly speaking, the trends and errors identified in last year's paper have continued in the reported case law. We do see some issues emerging more strongly in this year's cases: more variations, post-separation income increase of the payor, repartnering, retirement, retroactive spousal support.

Before diving into the cases, I want to flag two new and useful resources on the Spousal Support Advisory Guidelines. Remember that the *Final Version* was released in July 2008 and that version is now the definitive version.<sup>5</sup>

First, Prof. Rogerson and I have revised and updated our 2008 "User's Guide" paper, now subtitled "A New and Improved User's Guide to the Final Version", to be

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<sup>1</sup> [2008] O.J. No. 38, 2008 ONCA 11, 47 R.F.L. (6<sup>th</sup>) 235, released in January 2008.

<sup>2</sup> Law Society of Upper Canada, *2<sup>nd</sup> Annual Family Law Summit* (Toronto, June 9-10, 2008), also posted at [www.utoronto.ca/faculty/rogerson/ssag.html](http://www.utoronto.ca/faculty/rogerson/ssag.html).

<sup>3</sup> Law Society of Upper Canada, *3<sup>rd</sup> Annual Family Law Summit* (Toronto, June 11-12, 2009), also posted at the Rogerson website and published without the case summaries at (2009), 28 Can.F.L.Q. 241 (all citations are to the published version).

<sup>4</sup> [2010] O.J. No. 1158, 2010 ONCA 218 (released March 23), appeal allowed in part from [2008] O.J. No. 112.

<sup>5</sup> Rogerson and Thompson, *Spousal Support Advisory Guidelines* (Department of Justice Canada, July 2008), referred to as the *Final Version*.

released at the National Family Law Program in July. We have added new cases and new material since 2008, reflecting good practices and avoidable errors in the use of the Guidelines..

Second, an entire issue of the *Canadian Family Law Quarterly* was devoted to the Advisory Guidelines, Volume 28, Issue 3, published in October 2009, pulling together material from a number of sources and authors in one place.<sup>6</sup>

## 1. Spousal Support on Appeal: The Good, the Bad and the Ugly

The last of Sergio Leone's spaghetti westerns featured Clint Eastwood as "the Good" member of the triumvirate, like *Cassidy v. McNeil*. Unfortunately, this past year the Court of Appeal also brought forth "the Bad" (think the character played by Lee van Cleef), in *Rioux v. Rioux*,<sup>7</sup> and then "the Ugly" (Eli Wallach) in *Catsoudas v. Catsoudas*.<sup>8</sup> There were also a few other odds and ends of spousal support appeals worth noting. If it helps, as you read, you can hum a few bars from Ennio Morricone's memorable theme song from the movie.

### (a) The Good: *Cassidy v. McNeil*

*Cassidy* is important for two reasons: first, its explanation and application of the *custodial payor* formula; and second, its premise of indefinite support in a compensatory case like this. Too often, the *custodial payor* formula is missed or mis-applied, but not in *Cassidy*. Further, *Cassidy* on duration provides a helpful bookend to *Fisher*, both judgments being written by Justice Lang, reminding us that different support rationales lead to different outcomes.

It was a long marriage in *Cassidy*, 23 years, with three children now age 26, 24 and 15. The three children resided with the husband, after the July 2003 separation. The husband was an engineering professor, earning \$137,000 per year, while the wife was a teacher at a private school, earning \$85,000 per year. After separation, no support was paid between spouses. Later, the husband claimed retroactive and prospective child support, including past section 7 contributions, while the wife claimed retroactive and prospective spousal support. In cryptic reasons, the trial judge dismissed all the retroactive claims, ordered ongoing child support by the wife of \$759 per month for the youngest child and time-limited spousal support of \$1,200 per month for five years. Everybody then appealed everything.

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<sup>6</sup> Included in this issue are: the *Report on Revisions* for the Final Version, the *Users' Guide*, my 2009 Ontario paper, Lonny Balbi's summary charts for each SSAG formula, and two other articles, Rogerson and Thompson, "Complex Issues Bring Us Back to Basics: the SSAG Year in Review in B.C." (2009), 28 Can.F.L.Q. 263 and Booth, "The Spousal Support Advisory Guidelines: Avoiding Errors and Unsophisticated Use" (2009), 28 Can.F.L.Q. 339.

<sup>7</sup> [2009] O.J. No. 2949, 2009 ONCA 569, 97 O.R. (3d) 102, 66 R.F.L. (6<sup>th</sup>) 256, appeal allowed in part from 2007 CarswellOnt 9916..

<sup>8</sup> [2009] O.J. No. 4102, 2009 ONCA, affirming [2008] O.J. No. 2171 (S.C.J.).

In the end, the Court of Appeal dismissed the husband's appeal and allowed the wife's cross-appeal in part, removing the time limit and reducing ongoing spousal support to \$950 per month. The husband had not provided detailed evidence to support his s. 7 claims, the wife had made direct payments to the children, the older boys had substantial summer earnings, and the wife through her employment had obtained school tuition reductions. The wife had also not claimed spousal support, part of what the appeal court described as a kind of "standstill" arrangement for the past 4 ½ years.

The enigmatic trial reasons had not much explained the spousal support outcome, referring only to "a need for spousal support at least during the period that Louise [the youngest child] has either completed her education or gone on her own". Lang J.A. properly pointed out that "need" is "only one factor relevant to entitlement".<sup>9</sup> While the long marriage would give rise to non-compensatory support, the more important basis for Ms. McNeil's entitlement was compensatory. The wife had subordinated her career to that of her husband. Early in the marriage the family moved three times to accommodate Cassidy's education and employment. The wife was restricted to part-time substitute teaching. She spent four years out of the paid workforce when the children were young. The wife taught at the lower-paid private school, because that meant reduced cost child care and tuition reductions for the children. She worked on year-to-year contracts, while the husband was a tenured professor.

Lang J.A. rejected the five-year time limit, in favour of "indefinite" support.<sup>10</sup> The trial judge had not explained why he did not order indefinite support, which would be the presumptive result. The Advisory Guidelines presumed "indefinite (duration not specified)" support, she noted, as this was a marriage exceeding 20 years and the facts also fell within the "rule of 65" (the wife was 48 at separation, after a 23-year marriage). Stated the court:

I observe that the SSAG presumptions regarding duration and age simply reflect case law awarding indefinite support in long-term marriages where dependency on lifestyle is established and recognize that a spouse's age at separation is relevant to the person's ability to become self-supporting.<sup>11</sup>

There was no basis to time limit support given the economic merger between the parties, the uncertainties surrounding the wife's employment and the husband's security of employment. That was true even if the trial limit was treated as 9 ½ years (i.e. 4 ½ years of "notional" pre-trial support plus 5 years).

On the question of amount, the Court also applied the Advisory Guidelines with care, using the *custodial payor* formula. As Justice Lang noted, this formula recognises

the obligations that fall on the custodial parent, the custodial parent's responsibility for post-separation childcare, and the priority to be given to child

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<sup>9</sup> Above, note 4 at para. 64.

<sup>10</sup> Ibid. at paras. 70-71.

<sup>11</sup> Ibid.

support, as well as the length of the marriage, the usually older age of the remaining dependent children, and a non-custodial parent's usual pre-separation contributions to the children's care.<sup>12</sup>

On these facts, had the trial judge considered the relevant factors, "he would not have awarded support at the high end of the range", "in light of the husband's obligations for the child and the wife's relatively high level of income".<sup>13</sup> The appeal court then ordered a lower amount, \$950/mo., an amount near the low end of the SSAG range.<sup>14</sup>

In *Cassidy v. McNeil*, the Ontario Court of Appeal demonstrates the same analytical approach to a spousal support appeal as was seen in *Fisher v. Fisher*, as both decisions were written by Justice Lang. Both decisions start from the basis for entitlement, the non-compensatory basis in *Fisher* and the mix of compensatory and non-compensatory bases in *Cassidy*. Both decisions work carefully through issues of duration and amount, using the Advisory Guidelines as part of a broader support analysis. As we shall see, this is not always the case in the Court of Appeal.

**(b) The Bad: Rioux v. Rioux**

*Rioux* is another example of cryptic trial reasons, also overturned, but this time in appeal reasons that are themselves less than clear and, ultimately, disappointing. This was a 21-year marriage, with one child, age 21, away at university. The wife sought equalization, plus retroactive and prospective child support, including s. 7 contributions, and retroactive and prospective spousal support, from a husband who had not shown much respect for court orders. In baffling reasons, the trial judge ordered ongoing child support of \$916 per month, plus a lump sum of \$100,000 for everything else.<sup>15</sup>

The trial decision made no mention of ongoing spousal support, but seemed to include it in the lump sum. This was surprising, as the husband earned \$105,000 per year, while the wife's income was approximately \$16,000 per year, after a long traditional marriage. Not surprisingly, the wife appealed. The Court of Appeal only reversed on ongoing spousal support, ordering \$1,500 per month for five years, with the possibility of a review at that time. Somehow, the appeal court was prepared to defer to the child support holdings.<sup>16</sup>

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<sup>12</sup> Ibid. at para. 72.

<sup>13</sup> Ibid. at para. 74. Lang J.A. did acknowledge that a higher amount of support and a shorter duration might reflect "restructuring" under the SSAG, but there were no reasons to explain such a decision: para. 74.

<sup>14</sup> The closest calculations the Court of Appeal had were for annual incomes of \$133,754 and \$86,416, rather than the "apparent incomes at trial" of \$137,000 and \$85,000. The *custodial payor* range was thus stated to be \$838 to \$1,117/mo., which would mean a mid-point of \$977/mo. There were sizeable s. 7 expenses for school tuition, etc., being paid by the wife, but the precise number was not stated anywhere in the reasons, although the s. 7 expenses are clearly incorporated in the calculated range. On the correct incomes, \$950 per month is just above the low end of the SSAG range.

<sup>15</sup> As Epstein J.A. notes, \$90,000 of this lump sum represented the equalization payment: above, note 7 at para. 34.

<sup>16</sup> Curious, as the trial judge ordered the full table amount despite the daughter attending university away from home. And the support arrears totalled \$22,648. And the retroactive s. 7 claim for tuition and books was sizeable.

Of interest here are the appeal reasons on spousal support. First, the wife only sought \$1,500 per month on appeal, for reasons that are not clear.<sup>17</sup> This amount was found by Epstein J.A. to be “reasonable” and “well within the spousal support guidelines”.<sup>18</sup> The latter statement is confusing, no matter what SSAG formula or incomes are employed. If we applied the basic *with child support* formula, for the current incomes of \$105,000 and \$15,621 stated in the appeal reasons, the range would have been about \$2,059-\$2,649/mo. If we used the correct *adult child* formula, with one child away at university, the range would be slightly lower, about \$1,895-\$2,526/mo.<sup>19</sup> These ranges would be lower, if the appeal court was using the wife’s trial income of \$26,208/yr.: \$1,620-\$2,282/mo. for the basic formula and \$1,654-\$2,205/mo. for the adult child formula.<sup>20</sup>

More problematic is the appeal holding on duration. This was a 21-year traditional marriage, with a big disparity in income and the wife was 48 years old at trial. If the SSAG were applied, whatever the formula, the duration would be “indefinite”, for the same reasons set out in *Cassidy*.<sup>21</sup> Inexplicably, the Court of Appeal ordered support for only five years, starting in April 2007 and ending in March 2012, when the wife would be 52 years old, subject to a possible review at that time. Three reasons were given: (i) the wife did remain in the work force and was “relatively young”; (ii) she would need some time to achieve self-sufficiency; and (iii) the support was described as “non-compensatory transitional support”, citing *Fisher*.<sup>22</sup>

After a long traditional marriage and a big income disparity, it seems unlikely that the wife will become “self-sufficient” in the relative sense in less than three years, at the age of 52. And the Court is just plain wrong in treating this support as the same as that in *Fisher*, where the support was purely non-compensatory after a 19-year marriage without children.

In their newsletter, Epstein and Madsen kindly describe *Rioux* as “a fact-driven case” that “will scarcely get noticed”.<sup>23</sup> They too have difficulty with the time limit, and were “astounded by the casual reference to a review in 2012”, given the holdings in

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<sup>17</sup> There were interim orders made in 2006 for \$1,517/mo. and in 2007 for \$1,950/mo.

<sup>18</sup> Above, note 7 at para. 39.

<sup>19</sup> As the daughter was soon to finish university, we should look at the cross-over to the *without child support* formula too, after child support ceases, showing a range at this income for the wife of \$2,346-\$3,128/mo.

<sup>20</sup> In calculating the *adult child* formula, I have used the table amount for the husband’s contribution and the wife’s notional table amount for her contribution, given the absence of clear information. The Court of Appeal treated the full table amount as including both basic needs and any s. 7 contribution from the husband. Again, the *without child support* formula would be higher, \$2,068-\$2,758/mo.

<sup>21</sup> The Court of Appeal deferred to “the trial judge’s decision that an indefinite spousal support order was not warranted”, at para. 43. There was, in fact, no “decision” on the subject at all, unless silence amounts to a decision. Nor was deference justified where no reasons were given for the time limit, if the appeal panel were to follow the approach of the panel in *Cassidy v. McNeil*.

<sup>22</sup> Above, note 4 at para. 43.

<sup>23</sup> *This Week in Family Law*, 2009-34 (August 25, 2009).

*Leskun*, *Fisher* and the absence of any discussion in *Rioux* why a review order was appropriate.<sup>24</sup>

Unfortunately, as we all know, there is no Court of Appeal decision that gets “scarcely noticed”, especially one that imposes a time limit on spousal support. Payors will undoubtedly try to use *Rioux* to support unjustified time limits on spousal support after long marriages. In last year’s paper, I noted that trial judges were using time limits more carefully, applying *Fisher* correctly after some initial confusion.<sup>25</sup> Over the past year, this trend has continued. One can only hope that trial judges will follow *Cassidy* rather than *Rioux*.

**(c) The Ugly: *Catsoudas v. Catsoudas***

What’s with these cryptic, “no reasons” trial decisions that got appealed to the Court of Appeal last year? The trial judges all seem to talk like Clint Eastwood in these westerns, biting off their words, squinting wordlessly at the distant horizon, kicking the dirt.

*Catsoudas* is another one, where the trial judge gave no reasons at all, just a bald order for the proverbial \$1,000 per month in spousal support. The focus in *Catsoudas* was the husband’s January 2005 home-made separation agreement, which he then attacked six months later. The equalization and child support provisions were upheld, but the agreement was silent on spousal support and thus support had to be determined. Like *Rioux*, the trial decision reflected some old family law notion of “unspoken rough justice”. On appeal, unlike *Rioux*, not much more was “spoken” in *Catsoudas*, hence “the Ugly”.

It was a 22-year marriage, a traditional marriage, with two children aged 20 and 18 at trial. The husband earned \$110,000 per year working for Petro-Can as an operations technician and the wife had an income of \$42,000 from her recent employment at a grocery store. The husband appealed, arguing that the spousal support order was “overly generous” in light of the equalization and child support. The Court of Appeal upheld the spousal support, as not “outside the range of what would be appropriate, particularly taking account of the spousal support guidelines”.<sup>26</sup>

Once again, we are left to sort out the accuracy of this Delphic utterance. The amount of child support in the January 2005 agreement was for \$1,084 per month, the table amount for two children for an income of \$85,000 under the “old” pre-May-2006 tables, plus \$216 per month as a contribution to s. 7 expenses, for a total of \$1,300 per month. These terms were continued by the trial judge, along with a requirement that the husband contribute to the younger child’s post-secondary expenses. By the time of trial,

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<sup>24</sup> Of course, Epstein and Madsen are big fans of review orders and big critics of the apparently narrow approach to such orders in *Leskun* and *Fisher*.

<sup>25</sup> Above, note 3 at 251-3.

<sup>26</sup> Above, note 8 at para. 7.

the husband should have been paying the new table amount of \$1,526 for two children.<sup>27</sup> We can estimate SSAG ranges for various scenarios, and in all of them, \$1,000 per month falls below the low end of the range.<sup>28</sup> In a case like *Catsoudas*, a long traditional marriage, we would expect spousal support to land in the mid-to-high end of the range. It might have been helpful if the Court of Appeal pointed out to the husband how lucky he was. At least, there is no mention of time limits in *Catsoudas*, and the support appears to be indefinite.

#### (d) A Fistful of Other Appeals

There were a number of other spousal support appeals in the past year, most of them dismissed on standard of review grounds.<sup>29</sup> Two appeals warrant mention.

First is *Carr v. Parlee*, a solicitor's negligence case.<sup>30</sup> The defendant lawyer had settled spousal support for \$700 per month, after a 24-year traditional marriage, where the husband earned \$75,000 and the wife \$34,000 per year. The lawyer admitted his negligence and the trial judge awarded damages based upon the mid-point of the Spousal Support Advisory Guidelines range of \$1,500 per month, for the period 2004 to 2007. The Court of Appeal extended the period of retroactive support back another 6 months for a period when no support was paid, for an additional lump sum of \$6,210.

Second is *Bhupal v. Bhupal*, a variation case that centred upon whether the wife's remarriage was a "change in circumstances".<sup>31</sup> *Bhupal* takes us back into the underbrush of whether a change must be "foreseeable" or "foreseen" at the time of the original order. If a change is "foreseen", then its impact has already been objectively incorporated into the terms of the original order. The more subjective and speculative "foreseeable" test looks to what the parties foresaw at that time, as is explained in the trial reasons in

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<sup>27</sup> The older child had finished school, but was only working part-time and, under the terms of the home-made agreement, the husband agreed to pay child support until the children obtained full-time employment. I suppose this might be treated as a "special provision", to justify maintaining the terms of the agreement, at least until the older child obtained such employment. Then, child support could drop down to the table amount for the one remaining child, plus s. 7 expenses.

<sup>28</sup> If we use child support of \$1,300 per month, then the range would be \$1,140-\$1,823/mo. If we add a modest \$3,600/yr. for s. 7 expenses, the range would be \$1,124-\$1,804/mo. Assuming the oldest ceases to be a child of the marriage, the one child table amount would be \$955/mo., plus the same s. 7 expenses, and the SSAG range would be \$1,104-\$1,843/mo.

<sup>29</sup> *Fowler v. Fowler*, [2010] O.J. No. 1829, 2010 ONCA 328 (long marriage, child support ended in 2003, no change in circumstances, 1998 spousal support of \$3,200/mo. continued); *Pustai v. Pustai*, [2010] O.J. No. 1336, 2010 ONCA 251 (foreseeable that child would move in with husband, to join other two, split custody still, no change in spousal support); *Wright v. Wright*, [2010] O.J. No. 988, 2010 ONCA 102 (prospective spousal support upheld, holding of no retro support upheld); *Purcaru v. Purcaru*, [2010] O.J. No. 427, 2010 ONCA 92, 75 R.F.L. (6<sup>th</sup>) 33 (big retro child and spousal support, husband's pleadings struck, time-limited prospective support upheld).

<sup>30</sup> [2010] O.J. No. 1397, 2010 ONCA 254, 2010 CarswellOnt 2040 (April 9).

<sup>31</sup> [2009] O.J. No. 2655, 2009 ONCA 521, 97 O.R. (3d) 230, 69 R.F.L. (6<sup>th</sup>) 43, affirming [2008] O.J. No. 4051, 92 O.R. (3d) 211, 60 R.F.L. (6<sup>th</sup>) 68.

*Bhupal*.<sup>32</sup> At the time of the 2006 trial and settlement, the wife was spending most nights with her new partner, a dentist, and they were “headed towards marriage” “in the long term” by her own admission. By May 2007 they were living together and they were married in February 2008, which sparked the husband’s application to vary. Whatever test was applied on these facts, the motion judge held the wife had “laid her relationship on the table” at the time of the settlement and there was no “material change”. The dangerous uncertainty over this variation test will thus continue, especially in repartnering and remarriage cases.<sup>33</sup>

## 2. Fewer *With Child Support* Decisions, Fewer Mistakes, More Variations

Unlike the three appeal decisions discussed above, most Ontario trial decisions did cite and apply the Spousal Support Advisory Guidelines, with some care and with fewer mistakes than in previous years. There were fewer reported spousal support decisions generally, down from 80 in a ten-month period last year to 68 cases over 11 months in 2009-10. All of that drop in cases reflected fewer cases under the *with child support* formula this year. Does this suggest that more of the *with child support* cases are settling, or is it just a blip?

Some patterns have not changed. Most of the *without child support* cases continue to be long marriages, with 15 of 28 being marriages of 20 years or more and fully 23 of 28 lasting 15 years or more. There were no trial decisions for marriages less than 5 years and only *one* under 10 years. As usual, there is a wide range of cases by length of marriage under the *with child support* formula, but even here 13 of 40 were marriages of 20 years or more and 18 of 40 lasted 15 years or more.

Also, interim decisions continue to predominate, a pattern unique to Ontario and its slower court processes. About one-third of *with child support* cases involve interim decisions, 12 of 40, but there was a slight drop in the interim proportion for *without child support* cases, just 7 of 27. The result is that fewer court decisions in Ontario address the important and difficult issue of duration.

What is different this past year has been the increased number and proportion of variation cases under the *without child support* formula, 11 of 40, many of them retirement cases. Variation cases are only a small proportion of the *with child support* cases. Under this formula, initial decisions dominate, rather than interim or variations.

Perhaps the best news is that there are fewer and fewer avoidable mistakes in this year’s cases, reflecting more consistent and more sophisticated use of the SSAG, one of the effects of *Fisher*. I will touch on some of these errors later, but one should be noted

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<sup>32</sup> The mistaken “foreseeability” test has unfortunately been fed by the Supreme Court of Canada itself, notably *L.G. v. G.B.*, [1995] 3 S.C.R. 370, 15 R.F.L. (4<sup>th</sup>) 201 and *Miglin v. Miglin*, [2003] 1 S.C.R. 303, 34 R.F.L. (5<sup>th</sup>) 255.

<sup>33</sup> See the recent discussion of this issue, including *Bhupal* in Epstein and Madsen, *This Week in Family Law* 2010-14 (April 6, 2010).

here: **social assistance is *not* income for spousal support purposes**, even if bears the confusing title of Ontario Disability Support Program or Ontario Works. That is clearly stated in the *Final Version*,<sup>34</sup> but some courts still treat it as income and thus understate the SSAG range.<sup>35</sup>

### 3. Time Limits Still Being Used Carefully, Reviews Rare

In the first year after *Fisher*, time limits were often used indiscriminately, especially in compensatory cases where the facts did not resemble those of *Fisher*. In my paper last year, I found that “Ontario courts are now using time limits more carefully and mostly in suitable cases”.<sup>36</sup> That pattern has continued over the past year.

#### (a) Without Child Support Cases

The *without child support* cases demonstrate what you would expect: time limits were imposed in half the cases for marriages 10 to 19 years in length (5/10), but there was only one case of time-limited support for marriages of 20 years or more (1/10).<sup>37</sup> That one case was *Smith v. Smith*, where support was terminated 8 years after separation, on a set of facts that might justify that outcome: a 23-year marriage, no children, the wife was 48 (43 at separation), support was non-compensatory, both spouses had secure jobs, the wife’s annual income was \$53,000 and the husband’s \$86,500, and both had experienced significant income increases since separation.<sup>38</sup>

Of the five short-to-medium marriage cases with time limits, all but one were reasonably generous and consistent with the Advisory Guidelines range. Two were retirement/variation cases: *Roberts v. Cantu-Roberts* (support terminated, paid for 12 years, after 12 year marriage, “rule of 65” recognised);<sup>39</sup> and *Elicich v. Okecka* (support paid 12 years, after 14-year relationship, continued for 2 more years).<sup>40</sup> In two more variation cases, both spouses had repartnered: *Balazsy v. Balazsy* (married 18 years, support paid for 4 years, step-down order, terminating in 5 years);<sup>41</sup> and *Mechefske v. Mechefske* (married 19 years, support paid for 5 years, to continue for 5 more years). The odd case out in this group is *Klimm v. Klimm*, where the court ordered only six years of support after an 18-year marriage with no children, on a mechanical application of *Fisher*.<sup>42</sup>

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<sup>34</sup> Above, note 5, section 6.2.

<sup>35</sup> *Berry v. Edge*, [2010] O.J. No. 25, 2010 ONSC 171 and *Gauci v. Malone*, [2009] O.J. No. 2627 (no spousal support awarded, as range stated to be 0-\$244/mo., when the correct range was \$430-\$652/mo.). For two cases where social assistance was properly treated as not income, see *Bath v. Bath*, [2010] O.J. No. 1668, 2010 ONSC 1630 and *Fountain v. Fountain*, 2009 CarswellOnt 6342.

<sup>36</sup> Above, note 3 at 251-53.

<sup>37</sup> Cases of interim support have been removed.

<sup>38</sup> [2010] O.J. No. 768, 2010 ONSC 398.

<sup>39</sup> [2010] O.J. No. 1392, 2010 ONSC 1883, 2010 CarswellOnt 2030.

<sup>40</sup> 2010 CarswellOnt 175, 2010 ONSC 36.

<sup>41</sup> [2009] O.J. No. 4113.

<sup>42</sup> [2010] O.J. No. 968, 2010 ONSC 1479. The police officer husband earned \$114,000/yr. and the wife earned \$51,000/yr. as a health care aide. There was no restructuring, just a step-down order, from the top

Most striking of all: there was *not one review order* made in these 28 cases.

**(b) *With Child Support Cases***

The time limits under the *with child support* formula are generally “softer”, more flexible, with initial orders intended to be “indefinite (duration not specified)” and time limits usually appearing through the process of variation and review.

Not that there were many reviews: *just three reviews* out of 28 cases involving initial orders or variations (there were 12 interim cases). In *Rivard v. Rivard*, Gareau J. provided a careful review of the law on time limits, including *Cassidy v. McNeil*, and then ordered indefinite support, subject to review in 5 years, as there was uncertainty about the wife’s obtaining full-time employment and completing an education program with Athabaska University.<sup>43</sup> In *Berry v. Edge*, a review was ordered in two years’ time, as the wife was on social assistance and she was told to seek full-time employment.<sup>44</sup> In *Hong v. Silva*, the wife was working part-time at the minimum wage and training as a personal support worker, so that Hambly J. ordered a review in three years.<sup>45</sup>

That’s it, just *three* review cases, suggesting that Ontario judges and lawyers may have over-reacted to *Leskun* and *Fisher*. Unlike Ontario, British Columbia still uses review orders extensively.<sup>46</sup> Review orders are particularly valuable in addressing the issues of transition, disadvantage and self-sufficiency in cases involving children, so this is an unfortunate Ontario trend.

There were only five cases of time limits under this formula. Two of them can be justified, but the other three are more problematic. *Barton v. Sauve* is a custodial payor case, with the higher-income wife paying spousal support to the lower-income disabled husband, for 8 years after an 8 year relationship.<sup>47</sup> The other understandable one is *M.(A.A.) v. K.(R.P.)*, where two veterinarians were married for 9 years and the result was a lump sum order for four years of support, where both had repartnered, the husband earned \$190,000 and the wife earned \$100,000 per year.<sup>48</sup>

Of the three problematic cases, two were short marriage cases where Ricchetti J. held that each wife was “not disadvantaged” by the marriage, despite the presence of young children: *Attia v. Garanna* (4 year limit after a 6-year marriage, two children 8

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end of the SSAG range for 2 years to way below the low end for another 2 years (plus 2 years of interim support).

<sup>43</sup> [2010] O.J. No. 2039, 2010 ONSC 2711. The wife was working 15-20 hours per week at the hospital, and trying to get on full-time.

<sup>44</sup> [2010] O.J. No. 25, 2010 ONSC 171.

<sup>45</sup> [2009] O.J. No. 5543.

<sup>46</sup> Rogerson and Thompson, “Back to Basics”, above, note 6 at 309-11. Of the 24 indefinite *with child support* orders there, 14 had review conditions attached.

<sup>47</sup> [2010] O.J. No. 1008, 2010 ONSC 1072. Blishen J. provides a careful analysis of the issues of amount and duration, after setting aside the spousal support provision in a cohabitation agreement.

<sup>48</sup> 2010 CarswellOnt 1139, 2010 ONSC 930. First, Pazaratz J. set aside the spousal support waiver in the home-made separation agreement. The wife’s income was rising as she developed her own veterinary practice.

and 6)<sup>49</sup> and *Abuzokkar v. Farang* (3 year limit after a 4 ½ year marriage, one child 5).<sup>50</sup> In both cases, the court seemed to focus on *past* disadvantage, rather than the much larger *future* consequences of child care for the wife. The most inexplicable of the three is *Tersigni v. Mousavi-Rizi*, a 14-year marriage with two children 13 and 10, where the court imposed a three-year time limit based upon the wife’s two-year graduate program.<sup>51</sup> In all three of these cases, a review order would have been more consistent with the law.

For the most part, however, the 2009-10 decisions have used time limits judiciously. What is surprising is that Ontario courts have failed to use review orders in appropriate cases.

### **3. Amounts: More Variety, Still Too Little Explanation for Location, Alternative Calculations**

In last year’s analysis, I found that “most amounts fall in the mid-to-high part of the range, with amounts in the low end reflecting more unusual facts”.<sup>52</sup> That pattern is weaker in this year’s cases, with outcomes more spread throughout the range.

In the long marriage cases under the *without child support* formula (marriages of 25 years or more), 2 of 10 were high, 3 mid-range and 5 low. Of the five lower-end cases, two were interim decisions in higher-income cases, one involved repartnering, another involved delay and the last was a “lifetime” support case. For marriages of less than 25 years, I found a similar broad spread: 1 above the range, 3 high, 6 mid-range, 1 low and 3 below the range. Of the three “below” cases, two involved repartnering and the other was a debt exception. The one “low” case also involved repartnering.

The amount outcomes for the *with child support* formula were similarly spread across the range. For the 12 marriages 20 years or more, 5 amounts were high, 3 mid-range and 4 low. Two of the “low” cases involved interim support, one was an *adult child* formula case and one attempted to reflect work incentives, considered below. Of the other 23 cases, of less than 20 years, there were 5 high, 10 mid-range, 7 low and one below the range (an above ceiling income case). The 7 “low” cases were a mixed bag: a short-marriage case, a split custody case, a low-claim case, a retroactive support case, a dubious debt case, and a self-sufficiency incentive case.

Once again, there was usually little explanation for the location of an amount within the range, especially where a mid-range number was used. There are some good cases where judges provided more detailed reasons for location within the range. Amongst the *without child support* cases, I would flag *Shorey v. Shorey*, a mid-range

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<sup>49</sup> 2010 CarswellOnt 1168, 2010 ONSC 1261. In this case, there might be an argument for reduced future disadvantage, as a result of an equal time-sharing arrangement.

<sup>50</sup> [2009] O.J. No. 2915.

<sup>51</sup> [2009] O.J. No. 3637.

<sup>52</sup> Above, note 3 at 253.

decision of Rowsell J.<sup>53</sup> On the *with child support* side, note three helpful cases: *Chapman v. Chapman*, where Justice Belch opted for the low end of the range where the husband's income had a large performance component;<sup>54</sup> *Willi v. Chapple*, where Lemon J. accepted the wife's shorter time limit, and thus went to the high end of the range for amount;<sup>55</sup> and *Guignard v. Guignard*, a shared custody case where Justice Shaw considered various factors in going to the lower end of the range.<sup>56</sup>

One recent development deserves comment here. In a number of recent cases, judges have done "alternative calculations" of the range for amount based upon different measures or assumptions about incomes, almost like a kind of sensitivity analysis. In interim cases, where there were competing positions on the payor's income, two judges looked at the ranges for each income, to see if there was any overlap between them, in *Boucher v. Boucher*<sup>57</sup> and *Muzaffar v. Mohsin*.<sup>58</sup> The latter case is a good example, where Lemon J. calculated the ranges for both incomes, \$48,000 (\$900-\$1,200/mo.) and \$67,000 (\$1,200-\$1,675/mo.) and then ordered interim spousal support of \$1,300/mo. Another good example is *Smith v. Smith*, where the incomes of both spouses had changed since separation.<sup>59</sup> Leroy J. considered the SSAG ranges for their most recent year's incomes and their three-year average incomes, to come up with a support amount at the low end of the current income range and the mid-point of the average income range.

Alternative calculations permit the court to test the sensitivity of the support ranges to different income scenarios, avoiding unnecessary disputes about income, whether that of the payor or that of the recipient. Similarly, arguments about how much income to impute to one or both spouses can often be averted. Just not worth it, "For a Few Dollars More".

#### **4. The *With Child Support* Decisions: Less Common Cases Lead to Errors**

Of the 40 *with child support* cases, 28 or 70 per cent involved the basic formula, where both child and spousal support are paid by the higher-income spouse to the lower-income spouse with primary care. Most of these cases involve multiple issues of equalization, child support, section 7 expenses and spousal support, and spousal support may not be the centre of the dispute. There are a few errors here and there, but these "typical" cases seem to cause little difficulty.

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<sup>53</sup> [2009] O.J. No. 5136, 2009 CarswellOnt 7514

<sup>54</sup> 2010 CarswellOnt 2343 and 2009 CarswellOnt 8915, [2009] O.J. No. 5994.

<sup>55</sup> [2009] O.J. No. 3752.

<sup>56</sup> [2009] O.J. No. 2267.

<sup>57</sup> 2010 CarswellOnt 2587, 2010 ONSC 2413. The husband was in the real estate business and claimed a reduced annual income of \$221,000, while the court also considered his 3-year average income of \$319,000. To complicate matters further, there were arguments whether the wife's income should be imputed at \$20,000 or \$30,000/yr.

<sup>58</sup> [2009] O.J. No. 4005.

<sup>59</sup> [2010] O.J. No. 768, 2010 ONSC 398.

It is the less common cases that cause lawyers and judges to fall into error, some of which are identified below:

- **Step-parent.** In *Atkins v. Burgess*, it was a two-year relationship with two children, one step-child and one biological child.<sup>60</sup> The wife received \$150/mo. in child support from the biological father, which was deducted from the two-child table amount for the husband's child support. Unfortunately, the lowered child support was used in calculating the SSAG range, which is incorrect, as the full table amount should be used, as was pointed out in the *Final Version*.<sup>61</sup> The result was that the court overstated the SSAG range and that affected the outcome.<sup>62</sup>
- **Custodial Payor.** The Court of Appeal decision in *Cassidy v. McNeil* will now become the leading decision on this formula. There are also two excellent trial examples this year: *Chapman v. Chapman*<sup>63</sup> and *Barton v. Sauve*.<sup>64</sup> A common error is demonstrated in another case, *Teoli v. Coley*, where the *custodial payor* range is not adjusted downwards for the recipient wife's non-payment of child support.<sup>65</sup>
- **Shared Custody.** There is only one "true" shared custody case in this batch, a helpful and clearly-written decision by Justice Shaw in *Guignard v. Guignard*.<sup>66</sup> The dearth of such cases in Ontario is surprising, given their prevalence in the B.C. case law.<sup>67</sup>
- **Split Custody.** There were four of these, a surprising number. Most were in the mid-to-high end of the range for amount, with the exception of one low-end case caused by wrongly treating the wife's social assistance as income.<sup>68</sup>

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<sup>60</sup> [2010] O.J. No. 275, 2010 ONSC 557.

<sup>61</sup> Above, note 5, section 8.8 at 92-94.

<sup>62</sup> The stated range was \$719-\$1,330/mo. and the court opted for the low end of \$719/mo. in this short relationship case (2 years plus). But the properly-adjusted range was lower, \$597-\$1,196/mo.

<sup>63</sup> 2010 CarswellOnt 2343 and 2009 CarswellOnt 8915, [2009] O.J. No. 5944. This case was a real work-out for the court, as the retroactive support claims meant use of the basic, split and custodial payor formulas, as the custodial arrangements for the children changed over four years. At the time of the trial, the last child was living with the husband, after a long traditional marriage.

<sup>64</sup> [2010] O.J. No. 1008, 2010 ONSC 1072. This complex case involved a cohabitation agreement, a support claim by a disabled husband and two young children (9 and 5) with the higher-income wife.

<sup>65</sup> 2010 CarswellOnt 15, 2010 ONSC 135. The custodial husband, as is frequently the case, did not claim child support or university expenses from the lower-income wife. The judge ordered interim support at what was thought to be the mid-point of \$5,500/mo., but the correct mid-point was \$4,829/mo.

<sup>66</sup> [2009] O.J. No. 2267. There was one other case, involving a week-about parenting schedule but sole custody to the husband, which resulted in a time limit of 4 years for mid-range support: *Attia v. Garanna*, 2010 CarswellOnt 1168, 2010 ONSC 1261.

<sup>67</sup> "Back to Basics", above, note 6 at 315-17.

<sup>68</sup> *Hill v. Hill*, [2010] O.J. No. 1865, 2010 ONSC 2630 (mid); *Berry v. Edge*, [2010] O.J. No. 25, 2010 ONSC 171 (\$800/mo. at low end when social assistance not treated as income, mid-range when it was); *Terry-Lancaster v. Terry*, 2009 CarswellOnt 6141 (high end); *Leon v. Leon*, [2009] O.J. No. 2789 (mid).

- **Adult Child.** This is another often-missed formula, applicable where the last child (or children) is away at university or otherwise have their child support determined under s. 3(2)(b) of the *Child Support Guidelines*.<sup>69</sup> Some lawyers and judges try to use the basic *with child support* formula in these cases, as occurred in *Krane v. Krane*,<sup>70</sup> but that formula will often produce spousal support amounts that are too low in these longer-marriage cases. In *Buchanan v. Goldberg*, the court used the correct *adult child* formula, but failed to gross up the child support amounts in computing this hybrid gross income formula and thus overstated the SSAG range.<sup>71</sup>
- **Children With Special Needs.** In the *Final Version*, we recognised an exception for spousal support in cases of children with special needs.<sup>72</sup> There were three cases this past year involving children with special needs, raising some issues in the application of the *with child support* formulas.

The trickiest issue arose in *Bionski v. Bionski*, where an 18-year-old developmentally-delayed child received ODSP (social assistance) of \$796/mo., of which \$525 was for living expenses.<sup>73</sup> The court deducted that amount from the child support payable by the husband, but then the reduced child support was used to calculate a higher SSAG range under the basic formula and interim spousal support was ordered at the upper end. It may be better to calculate the SSAG range on the full table amount, much like under the step-parent formula, to reflect a third-party source of income. On the other hand, in special needs cases, it could be argued that the disadvantage is greater and the recipient should get the benefit of the increased “room” and ability to pay spousal support flowing from the lower child support.

In *Misner v. Misner*, the court again went to the higher end of the formula range, where the wife could not work much, given the tremendous demands on her time of two teenage children with profound special needs.<sup>74</sup> A third case, *Dhanesar v. Dhanesar*, involved no ability to pay and hence a nominal order for spousal support, a case where the special needs exception may apply in future when the husband returns to employment.<sup>75</sup>

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<sup>69</sup> See *Final Version*, above, note 5, section 8.10 at 96-7.

<sup>70</sup> [2010] O.J. No. 1009, 2010 ONSC 1488. The court tried to apply the basic *with child support* formula, but Gordon J. was understandably frustrated by the difficulties in doing SSAG calculations for less than full table amounts. In the result, the court ordered the mid-point of a range that was way too low and well below the low end of the *adult child* formula.

<sup>71</sup> 2010 CarswellOnt 74, 2010 ONSC 268. Price J. ordered \$6,000/mo. in spousal support, intended to be near the lower end of the range, but this was closer to the mid-point of the correct range of \$5,494-\$6,409-\$7,325/mo.

<sup>72</sup> *Final Version*, above, note 5, section 12.10, at 133.

<sup>73</sup> [2010] O.J. No. 1781, 2010 ONSC 2552. In *Bionski*, the case was complicated by an older child away at university, to whom the husband paid \$350/mo. directly for support.

<sup>74</sup> 2010 CarswellOnt 2713, 2010 ONSC 2284.

<sup>75</sup> 2009 CarswellOnt 7173.

- **Section 7 Expenses.** A recurring error in *with child support* cases has been the failure to take into account section 7 contributions in calculating the SSAG ranges. There was only one such case in this year's batch, *Teoli v. Coley*,<sup>76</sup> balanced out by a careful s. 7 adjustment in *Willi v. Chapple*.<sup>77</sup>

## 5. Exceptions? What Exceptions?

One of the mysteries of the Advisory Guidelines continues to be the failure of lawyers and judges to recognise and apply the exceptions, found in Chapter 12 of the *Final Version*. I recently wrote a short article on the subject for *The Lawyers Weekly*, which I have appended as Appendix B to this paper, in the desperate hope that you will read it, even though it's at the very back.<sup>78</sup>

It is hard to find an Ontario case where a judge explicitly refers to an exception, even when one plainly applies.<sup>79</sup> This year, there were *none*. Herewith were the eligible candidates, some good, some bad and some ugly:

- **Prior Support.** In *Robertson v. Williams*, the proper formulaic adjustment was made by Justice Mulligan for the husband's spousal support paid to his first wife, even more impressive since he had to do the calculations for the self-represented parties.<sup>80</sup> By contrast, the prior child support of the husband, for *four* children, was plainly not considered by any judge in the unfortunate decision in *Thompson v. Kirk*.<sup>81</sup> In neither of these cases was there any reference to this exception.
- **Debt Payment.** The debt exception clearly applied in *Metlin v. Metlin*, as Matheson J. reduced spousal support well below the SSAG range, but again no reference to the exception.<sup>82</sup>
- **Disability and Illness.** These are the most frequent "exception" cases amongst reported decision, even if the exception is still not identified. The most common approach to these cases continues to be "go high and long", to order the maximum

<sup>76</sup> 2010 CarswellOnt 15, 2010 ONSC 135 (a custodial payor case, full university expenses paid by custodial husband).

<sup>77</sup> [2009] O.J. No. 3752.

<sup>78</sup> Thompson, "Forgotten? The SSAG Exceptions" *The Lawyers Weekly*, Vol. 29, No. 45 (April 9, 2010) at 14, 16, attached as Appendix B.

<sup>79</sup> Above, note 3 at 259-60. Last year there were actually three cases where Ontario judges cited and applied exceptions, so I'll mention them again: *Beardsall v. Dubois*, [2009] O.J. No. 416, 2009 CarswellOnt 559 (compensatory exception in short marriages and disability exceptions flagged by Vogelsang J.); *McFadden v. Sprague*, [2009] O.J. No. 258, 2009 CarswellOnt 294 (disability, by Power J.); and *Petit v. Petit*, [2008] O.J. No. 5437, 2008 CarswellOnt 8257 (non-primary parent to fulfil parenting role under the *custodial payor* formula, by Platana J.).

<sup>80</sup> [2009] O.J. No. 5451.

<sup>81</sup> [2009] O.J. No. 3222. The interim spousal support appeal from the Court of Justice was dismissed, on standard of review grounds, despite obvious problems with the SSAG calculations.

<sup>82</sup> [2009] O.J. No. 2211. For a case where the equalization payment was used, dubiously I would suggest, to fix spousal support at the lower end of the SSAG range, see *Sponagle v. Sponagle*, [2009] O.J. No. 3696.

amount on the SSAG range, without time limit, as we can see in three Ontario cases this past year: *Rhynold v. Rhynold*,<sup>83</sup> *van Rythoven v. van Rhythoven*,<sup>84</sup> and *Steele v. Steele*.<sup>85</sup> The second most common approach is that found in *Barton v. Sauve*, a custodial payor case, where the husband recipient received the mid-point amount for the maximum time limit of 8 years after an 8-year relationship.<sup>86</sup> More often, in these time-limited disability cases, the courts go to the upper end of the SSAG range. In effect, on this approach, judges don't make an exception, but resolve the disability issues within the range.

## 6. Complex Issues Continue to Cause Problems: Ceilings, Floors, Payor's Post-Separation Income Increase, Repartnering

There are a number of issues that arise around the edges of the "typical" cases to which the formulas apply. Lurking within these hard issues are often questions of entitlement, which complicate determinations of amount and duration.

### (a) Incomes Above the \$350,000 Ceiling

In the past year, there were four of these "above-ceiling" cases, two under each formula, and none of them are terribly helpful, partly because the incomes were so high. As we move further above a gross annual payor income of \$350,000, the formula ranges usually become less and less significant in any spousal support determination. In *Elgner v. Elgner*, the husband earned \$2.8 to \$3.9 million a year after a 33-year marriage and, amazingly, the court ordered the low end of the formula range for interim support, of \$100,000 per month.<sup>87</sup> More typical would be *Denofrio v. Denofrio*, where the husband earned \$4.1 million per year and interim support was set at \$15,000/mo. tax-free, a long way short of the wife's blue-sky request for \$150,000 per month using the *without child support* formula.<sup>88</sup>

The *with child support* cases involved less stratospheric incomes. In *Maskobi v. Maskobi*, the husband earned a modest \$1.1 million a year and McGee J. ordered temporary spousal support of \$12,500 per month, well below the formula range, to go with child support of \$13,274 per month.<sup>89</sup> Finally we come down to the \$500,000 per year earned by the husband in *Poirier v. Poirier*, where Price J. ordered interim spousal support at the low end of the formula range of \$10,000 per month.<sup>90</sup> As higher incomes

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<sup>83</sup> [2009] O.J. No. 4339 (11-year marriage, no children, wife on CPP Disability).

<sup>84</sup> [2009] O.J. No. 3648 (13-year marriage, adult children, wife on ODSP).

<sup>85</sup> [2009] O.J. No. 2062 (12-year marriage, split custody, 4 children, wife employed part-time).

<sup>86</sup> [2010] O.J. No. 1008, 2010 ONSC 1072.

<sup>87</sup> [2009] O.J. No. 5269, 2009 CarswellOnt 7702, leave to appeal to Divisional Court denied [2010] O.J. No. 1139, 2010 ONSC 1578. The formula range was \$118,347-\$158,347/mo.

<sup>88</sup> [2009] O.J. No. 3295, 2009 CarswellOnt 4601.

<sup>89</sup> 2010 CarswellOnt 2742, 2010 ONSC 2540 (the *with child support* formula range was \$18,500-\$24,193/mo., according to the wife).

<sup>90</sup> 2010 CarswellOnt 744, 2010 ONSC 920.

come closer to the ceiling, as in *Poirier*, there is a readiness to look more closely at the formula range, especially at the lower end.

**(b) Floor**

There were two cases at the other end of the income spectrum, below and near the “floor” of \$20,000 gross payor income, but that term was not used in either case.<sup>91</sup> In *Scheiris v. Scheiris*, the husband’s workers compensation income ended at retirement and he received only \$10,000 per year of CPP and OAS. Thus his support was terminated by Lemon J., even though the wife’s CPP income was a mere \$3,600/yr.<sup>92</sup>

The other low income case was also a retirement case, *McFarlane v. McFarlane*, where the husband’s RRSP/LIRA income was estimated as \$25,928 per year, an income that falls within that above-floor band of \$20,000 to \$30,000 where the Advisory Guidelines suggest that below-range amounts may be necessary on grounds of ability to pay.<sup>93</sup> Unfortunately, the court did not consider that exception or the SSAG, instead applying that old and arbitrary pre-Guidelines approach: his income had gone down 66 per cent, so that his spousal support was reduced 66 per cent, from \$2,846/mo. down to \$940/mo., way above even the SSAG range of \$404-\$538/mo.

**(c) Payor’s Post-Separation Income Increase**

This issue usually comes up at the stage of variation or review, although it can come up occasionally at the initial trial if there has been a long delay or a dramatic change in income since separation. Where the payor’s income increases after separation, there will always be a question of whether the recipient should share none, some or all of that income increase through the formulaic calculations of the SSAG. As we explained in the *Final Version*, the courts appear to apply “some rough notion of causation”, depending upon the length of the marriage, the roles adopted during the marriage, the time elapsed between the date of separation and the subsequent income increase, and the reason for the income increase.<sup>94</sup>

Both Ontario decisions this past year ordered a full sharing of the payor’s income increase, both under the *with child support* formula. A clear and brief analysis is found in Justice Belch’s reasons in *Chapman v. Chapman*.<sup>95</sup> In that case, the husband worked for one of the “Big 5” banks and shortly after separation took a new job with another of the big banks, with an increase in his income from \$103,000 in 2005 to \$163,400 by 2009. He argued that the wife had not contributed to this new position, but this strict view was rejected:

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<sup>91</sup> *Final Version*, above, note 5, section 11.2 at 111.

<sup>92</sup> [2009] O.J. No. 3795.

<sup>93</sup> [2009] O.J. No. 2947.

<sup>94</sup> *Final Version*, above, note 5, section 14.3 at 144-46.

<sup>95</sup> The analysis is found in the first of the two-part decision: [2009] O.J. No. 5994, 2009 CarswellOnt 8915, at paras. 23-25.

While the method of payment and the employer may have changed, he is still in the banking industry like he was in their 23 year relationship and the court infers the long term service with the first bank made him attractive to the second bank as an employee.

In *M.(A.A.) v. K.(R.P.)*, Justice Pazaratz also provided a thoughtful analysis of these issues.<sup>96</sup> In this case, the veterinarian husband's income rose from \$92,000 at the 2004 separation to \$189,900 by 2009. The court quoted Phil Epstein's annotation to *Fisher* and Justice Leask's close analysis of this issue in the latest *Hartshorne* decision.<sup>97</sup> In *M.(A.A.)*, both veterinarian spouses' incomes had increased since separation, with the wife's lagging behind the husband's. The court took the full increase of the husband's income into account, with this comment: "To simply ignore continuing income gains by the payor, while factoring in changes in the recipient's earnings, would almost inevitably preclude consideration of an important component of a compensatory claim."<sup>98</sup>

On this point, lawyers and judges will often cite a few of the leading Alberta cases on this topic, notably *Sawchuk*, *Coghill v. Michalko*, *Chalifoux* and *D.B.C. v. R.M.W.*<sup>99</sup> These Alberta cases have imposed a much more demanding test, looking for a truly "causal link" between the specific post-separation increase and the *contributions* of the recipient spouse during the marriage. By contrast, the Ontario and B.C. cases have taken a less demanding view, exemplified by *Chapman*, *M.(A.A.)*, *Hartshorne* and, most recently, the useful B.C. case of *Judd v. Judd*.<sup>100</sup> The Alberta cases should be "handled with care", to quote the Traveling Wilburys.

#### (d) Repartnering and Remarriage of the Recipient

There are a number of different methods of addressing this issue, seen in the most recent Ontario cases:

- **Low end of range for amount.** This was used at the interim stage in *Gibson v. Gibson*.<sup>101</sup>
- **Below range amount.** This approach is fairly common, seen in *Driscoll v. Driscoll*,<sup>102</sup> *Fountain v. Fountain*<sup>103</sup> and *Balazsy v. Balazsy*.<sup>104</sup>
- **Step-down order.** Another method, also used in *Balazsy*.

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<sup>96</sup> 2010 CarswellOnt 1139, 2010 ONSC 930 at paras. 202-207.

<sup>97</sup> [2009] B.C.J. No. 1050, 2009 BCSC 698, 70 R.F.L. (6<sup>th</sup>) 106.

<sup>98</sup> Above, note 93 at para. 207.

<sup>99</sup> *Sawchuk v. Sawchuk*, [2010] A.J. No. 18, 2010 ABQB 5; *Coghill v. Michalko*, [2010] A.J. No. 86, 2010 ABQB 59; *Chalifoux v. Chalifoux*, [2008] A.J. No. 174, 2008 ABQB 70; *D.B.C. v. R.M.W.*, [2006] A.J. No. 1629, 2006 ABQB 59.

<sup>100</sup> [2010] B.C.J. No. 177, 2010 BCSC 153.

<sup>101</sup> 2010 CarswellOnt 420.

<sup>102</sup> [2009] O.J. No. 5056.

<sup>103</sup> 2009 CarswellOnt 6342.

<sup>104</sup> [2009] O.J. No. 4113.

- **Imposition of a time limit or outright termination.** Although the repartnering of both spouses was described as “irrelevant” in *M.(A.A.) v. K.(R.P.)*, the court did impose a relatively short 4-year time limit in that *with child support* formula case.<sup>105</sup> The generous time limit of 10 years after a 19-year marriage in *Mechefske* did not seem to be affected by repartnering.<sup>106</sup>

Repartnering continues to be a significant issue, one upon which the Canadian law remains unpredictable and uncertain, making it impossible at the moment to find a formulaic solution.

## 7. Emerging Issues: “Two Incomes”, Retirement, Retroactive Spousal Support

There are a number of “emerging” issues in the use of the Advisory Guidelines, some of which are reflected in the most recent Ontario case law. Here I can do no more than flag those issues, to encourage further discussion.

### (a) Can a Payor Have “Two Incomes”?

No, by this I don’t mean the heartfelt wish of most spouses that their spouse made more money. The issue here is whether a payor can have one income for child support purposes, and then another, different income for spousal support purposes. The answer is clearly “yes”, but the situations where this can happen are still being explored, although not in the most recent batch of Ontario cases:

- Where the payor experiences a post-separation income increase, there is no question that the child should share fully in any increased income, but the same cannot be said automatically for spousal support, discussed above.
- The income change threshold for variation of child support is very low under s. 14 of the *Child Support Guidelines*, but is more demanding for spousal support.
- For an income above the ceiling, courts will usually order the full table amount of child support for incomes up to \$1 million per year, but a lower income will be used for SSAG calculations.
- There are often strong policy reasons to impute income to a payor for child support, for the child to obtain the full benefit of the earning capacity of the payor, while the rationale is much weaker for spousal support.
- There may be situations where the inter-relationship between property division and spousal support may mean a different, and lower, payor income is used for

<sup>105</sup> 2010 CarswellOnt 1139, 2010 ONSC 930.

<sup>106</sup> [2009] O.J. No. 2004.

spousal support rather than child support, e.g. where stock options have been divided.

**(b) Retirement**

Nine of the 28 *without child support* cases in the past year involved retirement issues, hardly surprising as the boomers get older. Five of the nine retirement cases were variations. *Boston*<sup>107</sup> issues were raised, and dismissed, in two cases, where the payor's full pension income was considered for support purposes: *Ellis v. Ellis*<sup>108</sup> and *Scott v. Scott*.<sup>109</sup> Spousal support was terminated after retirement in two cases: *Roberts v. Cantu-Roberts*<sup>110</sup> and the low-income case of *Scheiris v. Scheiris*.<sup>111</sup> In *Elicich v. Okecka*, a time limit was imposed, with support to terminate two years after retirement.<sup>112</sup> The other four retirement cases showed no particular pattern.<sup>113</sup>

**(c) Retroactive Spousal Support**

With the increased use of the Advisory Guidelines, it becomes easier to quantify retroactive spousal support claims, as is the case for retroactive child support under the *Child Support Guidelines*. Seven of the 2009-10 cases involved successful retroactive claims, 4 *without child support*<sup>114</sup> and 3 *with child support*.<sup>115</sup>

The threshold issues of retroactive spousal support will inevitably be influenced by the Supreme Court of Canada's ruling on retroactive child support in *D.B.S. v. S.R.G.*<sup>116</sup> Appeal courts have recently adapted the *D.B.S.* analysis to the spousal support context, British Columbia in *Reis v. Bucholtz*<sup>117</sup> and New Brunswick in *Brown v. Brown*.<sup>118</sup> Ontario's leading authority on retroactive spousal support predates *D.B.S.* and is thus less helpful.<sup>119</sup> I would suggest that modifications to *D.B.S.* are likely necessary for spousal support cases.

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<sup>107</sup> *Boston v. Boston*, [2001] 2 S.C.R. 413.

<sup>108</sup> [2010] O.J. No. 1250, 2010 ONSC 1880.

<sup>109</sup> [2009] O.J. No. 5279.

<sup>110</sup> [2010] O.J. No. 1392, 2010 ONSC 1883, 2010 CarswellOnt 2030.

<sup>111</sup> [2009] O.J. No. 3795.

<sup>112</sup> 2010 CarswellOnt 175, 2010 ONSC 36.

<sup>113</sup> *Robertson v. Williams*, [2009] O.J. No. 5451 (mid-range, indefinite); *Courtney v. Courtney*, 2009 CarswellOnt 6465 (low end, indefinite); *Pengilley v. Pengilley*, [2009] O.J. No. 3227 (high end, interim support); *Lehtomaa v. Lehtomaa*, [2009] O.J. No. 2099 (mid-range, indefinite).

<sup>114</sup> *Ellis v. Ellis*, [2010] O.J. No. 1250, 2010 ONSC 1880 (2006-08 period); *Elgner v. Elgner*, [2009] O.J. No. 5269, 2009 CarswellOnt 7702 (2008-09); *Fountain v. Fountain*, 2009 CarswellOnt 6342 (2006-09); *Shorey v. Shorey*, [2009] O.J. No. 5136, 2009 CarswellOnt 7514 (2007-09).

<sup>115</sup> *Chapman v. Chapman*, 2010 CarswellOnt 2343 and 2009 CarswellOnt 8915, [2009] O.J. No. 5994 (2006-09); *Krane v. Krane*, [2010] O.J. No. 1009, 2010 ONSC 1488 (2003-2010); *Berry v. Edge*, [2010] O.J. No. 25, 2010 ONSC 171 (2006-10).

<sup>116</sup> [2006] 2 S.C.R. 231, 31 R.F.L. (6<sup>th</sup>) 1, 2006 SCC 37.

<sup>117</sup> [2010] B.C.J. No. 382, 2010 BCCA 115.

<sup>118</sup> [2010] N.B.J. No. 18, 2010 NBCA 5.

<sup>119</sup> *Bremer v. Bremer*, [2005] O.J. No. 608, 13 R.F.L. (6<sup>th</sup>) 89 (C.A.).

## **8. Conclusion: A Year of Consolidation, Hard Issues Come to the Fore**

The good news is that 2009-10 brought fewer spousal support cases, with fewer SSAG errors in those that were reported. Increasingly, as one would predict with increased use of the Advisory Guidelines, more “typical” cases settle and those that do go to court reflect hard issues: disputes over incomes, less common custodial and child support arrangements, above-ceiling and below-floor incomes, exceptions, variations, post-separation income increases, repartnering and remarriage, retirement, and retroactive spousal support. In effect, the Advisory Guidelines permit lawyers and judges to settle the “easy” cases and focus on the “hard” cases. I would expect that, in the near future, those “hard” cases will increasingly become the focus of spousal support law in Ontario.

May 25, 2010

## APPENDIX A

### SPOUSAL SUPPORT ADVISORY GUIDELINES, ONTARIO DECISIONS

[May 14, 2009 – May 3, 2010]

[\*\* most noteworthy cases]

#### A. Appeal Cases

*Carr v. Parlee*, [2010] O.J. No. 1397, 2010 ONCA 254, 2010 CarswellOnt 2040 (Ont.C.A.)  
(Gillese, Rouleau, Lang J.J.A.) (April 9)  
solicitor's negligence case, SSAG mid-range used to calculate likely amount of spousal support  
support for 2003-07, \$1,500/mo. vs. \$700/mo. agreed upon  
on appeal, 6 more mos. retro support to increase damages

\*\**Cassidy v. McNeil*, [2010] O.J. No. 1158, 2010 ONCA 218 (Ont.C.A.) (Feldman, Lang,  
MacFarland J.J.A.) (March 23)  
Married 23 years, separated July 2003, both 54, 3 children 26, 24 and daughter 15  
Husband engineering professor, earns \$137,000/yr.  
wife teacher at private school, tuition reductions, daughter there, earns \$85,000/yr.  
After separation, all 3 children with husband, 2 in university then  
No child support by wife, but tuition reduction for daughter and some direct money to older  
Trial judge: no retroactive child or spousal support, no support claims til later, upheld on appeal  
Husband's trial claim of \$55,750 for retro s. 7 contributions dismissed at trial, upheld  
Expense claims not well documented and wife made direct contributions  
Wife ordered at trial to pay child support of \$759/mo.  
Husband to share in wife's payment of tuition and other s. 7 expenses, amount unclear  
Spousal support: trial judge ordered \$1,200/mo. for 5 years, til daughter finishes schooling  
Reversed on appeal, basis not just need, also compensation  
Wife moved with husband for his career, was home and worked part-time  
Trial judge time-limited support to 5 years (plus 4.5 years pre-trial)  
Custodial payor formula supports "indefinite" support, no basis for time limit  
Closest SSAG calculations show range \$838-\$1,117/mo.  
High end not appropriate, given husband's obligations to daughter, wife's relatively high income  
Order for \$950/mo. [just below mid-point]

*Catsoudas v. Catsoudas*, [2009] O.J. No. 4102, 2009 ONCA 706 (Moldaver, Simmons, Juriansz  
J.J.A.) (October 8)  
Married 22 years, 2 children 19 and 21, separated Dec. 2004  
Husband \$110,000/yr., wife \$42,000  
Trial decision: husband signed over home in separation agreement  
Child support \$1,084/mo., plus \$216/mo. s. 7 expenses, under agreement, continued  
Agreement silent on spousal support, \$1,000/mo. ordered  
Spousal support "may be generous", but not "outside the range, particularly taking account of the  
spousal support guidelines"  
[if husband paying full table plus s. 7, range estimated \$866-\$1,499/mo.; if lower amount,  
\$1,142-\$1,820/mo.]

*Rioux v. Rioux*, [2009] O.J. No. 2949, 2009 ONCA 569, 97 O.R. (3d) 102, 66 R.F.L. (6<sup>th</sup>) 256 (Ont.C.A.)(Laskin, Juriansz, Epstein J.J.A.)(July 14)  
Married 21 years, both 45 at separation in 2005, 1 child 21 at university  
Husband earns \$105,000/yr., wife \$16,000/yr. part-time  
Trial judge: no spousal support, child support at table amount \$916  
Equalization, retro child and spousal support, future spousal, all in one lump sum \$100,000  
Wife appeals, seeks \$1,500/mo. in periodic spousal support  
Deference to child support decisions, i.e. table amount, no s. 7's, retro  
Spousal support: equalization alone was \$90,000  
Traditional marriage, wife home, then part-time work  
Order for \$1,500/mo., reasonable, "well within the spousal support guidelines"  
But agrees with trial judge that "indefinite" support not warranted, following *Fisher*  
Further "non-compensatory transitional support", review in 5 years  
Wife young, encourage self-sufficiency  
[basic *with child support* formula range, if wife \$15,621, estimated \$2,346-\$3,128/mo.]  
[if wife full-time income \$26,208, range estimated \$1,623-\$2,283/mo.]  
[if *adult child* formula, wife full-time income, range estimated \$1,564-\$2,086/mo.]

## **B. The Without Child Support Formula**

*Boucher v. Boucher*, 2010 CarswellOnt 2587, 2010 ONSC 2413 (Hennessy J.)  
Married 25 years, husband 60, wife 50, no children, separated Nov. 2008  
Interim interim "without prejudice" order \$2,000/mo. spousal support in July 2009  
Husband real estate business, income issues, 3-year average \$319,000/yr.  
2009 income \$221,000  
Wife's income could be imputed at \$20,000 or \$30,000/yr.  
Interim order not "made completely without regard to" SSAG, various calculations  
Wife seeks \$10-\$12,000/mo., interim order for \$5,000/mo.  
[SSAG range at \$221,000 and \$30,000 estimated \$5,969-\$7,958/mo.]

*Roberts v. Cantu-Roberts*, [2010] O.J. No. 1392, 2010 CarswellOnt 2030, 2010 ONSC 1883 (Haines J.)  
Married 12 years, 2 adult children, separated Jan. 1997, husband 67, wife 66  
1998 agreement: \$7,000/mo. spousal support  
Husband dentist, sold practice, now salaried at \$94,000/yr., remarried  
Wife health problems, worked in dental offices, \$9,000/yr. CPP/OAS  
SSAG range \$1,275-\$1,700/mo., for 6-12 years, but rule of 65  
Spousal support terminated, economic disadvantage redressed, husband's retirement

\*\**Ellis v. Ellis*, [2010] O.J. No. 1250, 2010 ONSC 1880 (van Rensburg J.)  
Married 22 years, separated 1994, both 64, traditional marriage  
1999 consent order: spousal support \$2,333/mo. (COLA), husband \$96,720, wife \$13,680/yr.  
Husband applies to vary, from \$2,728 to \$1,710/mo., wife seeks increase to \$2,973/mo.  
Husband's employment terminated 2006, severance payments to May 2008  
Now retired, pension, handyman business runs at loss, 2<sup>nd</sup> wife and her disabled daughter  
Wife 2 part-time jobs, minimum wage, \$12,000/yr., knee surgery, now \$6,000/yr.  
Husband's income, *Boston* but most of pension post-separation, total income \$69,429/yr.  
SSAG range \$1,824-\$2,128-\$2,431/mo., order for \$2,100/mo., indefinite  
Retroactive spousal support for 2006-08, husband's average income \$125,835/yr.  
SSAG used, mid-to-upper range, \$4,000/mo., \$2,000/mo. for 2009

*Klimm v. Klimm*, [2010] O.J. No. 968, 2010 ONSC 1479 (Mulligan J.)  
Married 18 years, husband 42, wife 43, separated Dec. 2003, no children  
Interim 2008 order: \$1,400/mo. spousal support  
Wife health care aide, \$51,000/yr.  
Husband police officer, undercover work, \$114,000/yr.  
Wife seeks \$2,150/mo., husband offers \$1,800/mo.  
Wife not made efforts to improve earnings, step-down order as result  
Order for \$1,800/mo. for 2 years, then \$900/mo. for 2 more years, then end (total 6 yrs)  
[SSAG range \$1,418-\$1,890/mo., 9 to 18 years]

*Gibson v. Gibson*, 2010 CarswellONt 420 (Turnbull J.)  
Married 24 years, wife 49, husband 52, 2 children 25 and 19  
Wife cohabiting since separation Sept. 2008, new partner earned \$70,000/yr., laid off, EI now  
Wife chemotherapy, looking for part-time job, no income  
Husband earns \$32,000  
SSAG range \$1,000-\$1,167-\$1,258/mo.  
Wife has need, interim support \$1,000/mo., to maintain marital standard of living

*Elicich v. Okecka*, 2010 CarswellOnt 175, 2010 ONSC 36 (Tucker J.)  
Together 14 years, separated 1997, husband 61, wife 49, one adult child  
Previous orders unpaid: 1998 for \$600/mo. combined support (“some amount” spousal)  
2002 \$600/mo. child support, \$400/mo. spousal support, then to \$500 and \$579/mo.  
Husband worked at GM, earned \$80-\$90,000/yr, retired at 60 in 2008, pension \$40,000/yr.  
Husband applies to terminate support  
Support compensatory as wife out of work force  
Wife now working as cook, \$27,000/yr.,  
Husband uses SSAG, duration 7.5 to 15 years [range for amount \$227-\$303/mo.]  
Order for \$579/mo. to continue, despite retirement, 2 more years (total 14 years)

*Smith v. Smith*, [2010] O.J. No. 768, 2010 ONSC 398 (Leroy J.)  
Married 23 years (plus 2), no children, wife 44, husband 45 at April 2006 separation  
Husband Union Gas in Belleville, wife Ontario public service in Ottawa  
Careful analysis of entitlement:  
No compensatory basis, as wife got retraining and better job despite move with husband  
Non-compensatory support, no claim til April 2008, claim for retro support to May 2007  
Incomes averaged over last 3 years: wife \$49,000, husband \$80,000/yr.  
Incomes at separation: wife \$40,700, husband \$63,500, now wife \$53,000, husband \$86,500  
Duration 8 years from separation, i.e. 52 more months to April 2014, retro lump sum \$22,913  
SSAG \$1,040/mo., low end of current incomes, mid-point of average incomes

*Robertson v. Williams*, [2009] O.J. No. 5451 (Mulligan J.)  
Together 16 years, both self-represented  
Husband over 65, income \$34,611/yr. of pension, OAS, CPP, pays \$800/mo. to first wife  
Wife 63, non-taxable WSIB payments, \$10,700/yr., should seek CPP  
Judge did calculations, mid-range \$334/mo., order for \$300/mo., indefinite  
[If wife’s income grossed up, range \$272-\$318-\$363/mo., adjustment made for prior support]

*Elgner v. Elgner*, [2009] O.J. No. 5269, 2009 CarswellOnt 7702 (Greer J.), leave to appeal to Div. Ct. denied [2010] O.J. No. 1139, 2010 ONSC 1578 (Sachs J.), no hearing unless \$2.1 million paid to comply with order [2010] O.J. No. 845, 2010 ONSC 1143 (McCombs J.), stay denied [2010] O.J. No. 562, 2010 ONSC 794 (Swinton J.)  
Married 33 years, separated June 2007, wife 61, husband 62, 3 children 31, 28 and 27  
Traditional marriage, substantial assets, husband advanced \$62 million to wife  
Husband says no “need” for spousal support, wife no income, expenses \$1 million/yr.  
Husband’s income \$2.8 to \$3.9 million/yr.  
Wife seeks SSAG range \$118,347-\$158,347/mo. plus retro to 2007  
Entitlement both compensatory and non-compensatory  
Wife not have to use capital for expenses  
Retro spousal support for 2008 and 2009 of \$140,000/mo., certain non-recurring expenses  
Ongoing support of \$110,000/mo. from Jan. 2010

*Scott v. Scott*, [2009] O.J. No. 5279 (R.J. Smith J.)  
Married 32 years, divorced 1999, traditional marriage  
1999 order: \$1,000/mo., husband then earning \$36,000/yr., lifetime support, binding on estate  
2005 increased to \$1,100/mo.  
Husband’s income rose to \$87,841 in 2007, then retired and income \$30,432/yr.  
Husband says double-dipping, but low amount of pension equalized, 10 years further service  
Support reduced to \$1,000/mo., indefinite  
[SSAG range \$950-\$1,266/mo.]

*Driscoll v. Driscoll*, [2009] O.J. No. 5056 (Lemon J.)  
Married 30 years, 3 adult children  
Joint business Driscoll Hardwood Flooring, owned 50/50, wife bookkeeper  
Issue re husband’s income from business, hard to determine for interim support  
Husband says \$25,000, wife says \$140,000/yr., court determines \$100,000  
Wife unemployed, out of business, new partner also unemployed, purchased new home  
SSAG range if wife no income \$3,125-\$4,042/mo., but repartnering, order for \$3,000/mo.

*Courtney v. Courtney*, 2009 CarswellOnt 6465 (Henderson J.)  
Married 32 years, 2 adult children, separated 1998, both spouses 67  
Husband asbestos worker, retired 2008, income \$38,400/yr. pension, CPP, OAS  
Wife gets share of pension, \$23,328/yr.  
Husband paid \$600/\$500/mo. 2005-08, stopped when retired, sporadic before that  
Delay, so low end of SSAG range \$475/mo. [range \$472-\$629/mo.]  
Retro support sought back to 2001, but first serious demand in June 2008  
Wife used up joint bonds worth \$40,000, order for \$950/mo. for 2008.

*Fountain v. Fountain*, 2009 CarswellOnt 6342 (Lemon J.)  
Married 24 years, wife 50, husband 51, 2 adult children, separated July 2003  
Wife not credible, cohabiting since 2003  
Wife on ODSP of \$864/mo., repartnered, new partner on EI  
Husband earns \$60,075/yr.  
Interim orders: 2005 \$1,100/mo., 2006 \$1,300/mo.  
SSAG range \$1,500-\$2,000/mo.  
Retro reduction from Aug. 2006 for repartnering, \$500/mo., pay back \$22,800  
No self-sufficiency efforts by wife, had worked at restaurant until injury  
If \$500/mo. until wife 65 (15 years), less tax, discounted, negative contingencies  
Lump sum of \$49,500 ordered

*Rhynold v. Rhynold*, [2009] O.J. No. 4339 (Mulligan J.)

Married 11 years, no children, separated Jan. 2004

2007 minutes: wife in house, equalization payment, support \$1,365/mo., review Feb. 2010

Husband then earning \$97,510/yr. as Chrysler autoworker

2008 income \$78,000, then laid off 2009, income with EI reduced to \$59,000

Husband new partner, she unemployed

Application to vary by husband, he argues SSAG

Wife on CPP Disability, mental health problems, \$8,400 plus rent, income \$16,000/yr.

2008 SSAG \$852-\$1,035, 2009 SSAG \$591-\$788/mo.

2008 no variation, as husband knew his income would fluctuate, wife's disability

2009 not strict SSAG as disability, varied to \$788/mo. [no time limit mentioned]

*Balazsy v. Balazsy*, [2009] O.J. No. 4113 (Turnbull J.)

Married 18 years, 3 children 25, 24 and 20, wife 46, separated 2000

2 boys with husband, girl with wife, all on own now

Husband travelling salesman, wife ran restaurant and cared for children

2005 consent order: \$750/mo. spousal support, husband \$78,800, wife \$16,300/yr.

But wife earned \$28,675 in 2005, living with partner since 2003, he earns \$66,000/yr.

Wife now on EI, \$25,000 in 2009

Husband now earns \$85,000/yr., new partner earns \$40,000 and her 2 teen daughters

SSAG range \$1,230-\$1,650 for 9-18 years

SSAG assistance now "somewhat limited" as both repartnered

Now similar household living standards, still some compensatory element

Wife now building hairdressing business, self-sufficiency issues

Step-down order: \$650/mo., 2009-10; \$550, 2010-11; \$450, 2011-12; \$350, 2012-13, \$250, 2013-14, end Sept. 2014, i.e. 9 years total

*Muzaffar v. Mohsin*, [2009] O.J. No. 4005 (Lemon J.)

Married 15 years, no children, separated 2008

Wife on social assistance, husband earns either \$48,000 or \$67,000/yr.

Husband says \$1,000/mo. interim support, wife claims \$1,300/mo.

Neither did SSAG calculations, judge did own

Range either \$900-\$1,200/mo. or \$1,200-\$1,675/mo., so \$1,300/mo. ordered

*King v. King*, [2009] O.J. No. 4029 (Lemon J.)

Married 32 years, no children now

2004 minutes: spousal support \$900/mo., when husband earned \$49,849/yr.

Husband now 60, new partner, 2009 income \$43,000, trucking company, applies to vary

Wife's income \$25,200 in 2008

Both self-reps, judge did own SSAG calculations, range \$554-\$689/mo.

Order varied to \$600/mo., indefinite

*Scheiris v. Scheiris*, [2009] O.J. No. 3795 (Lemon J.)

Married 42 years, husband 66

2004 order \$900/mo., husband on WCB payments \$35,000/yr.

Now terminated, husband on CPP/OAS \$10,000/yr., bankrupt

Wife \$3,600/yr, her share of CPP

SSAG range \$188-\$250/mo., husband no ability to pay

Spousal support terminated as of May 2008, when husband's CPP started [husband's income below "floor"]

*van Rythoven v. van Rythoven*, [2009] O.J. No. 3648 (Gray J.)  
Married 13 years, 2 children 28 and 24, separated 1993  
1996 final settlement agreement: spousal support \$700, then \$1,200/mo., ended 1997  
Wife says represented by duty counsel, 1998 variation by wife dismissed  
Her subsequent health problems: bipolar, back injury, asthma, etc., unable to work  
Wife on ODSP \$7,500/yr., no CPP disability as no contributions  
Husband supporting children's doctoral and B.A. studies  
Fails *Miglin* 2<sup>nd</sup> stage, if not 1<sup>st</sup> too: wife expected to return to labour force, but medical conditions worsened  
Wife says SSAG range \$1,463-\$1,700-\$1,950/mo.  
Wife entitled to non-compensatory support, disability  
SSAG "of little use", order for \$1,950/mo., indefinite

*Denofrio v. Denofrio*, [2009] O.J. No. 3295, 2009 CarswellOnt 4601 (Linhares de Sousa J.)  
Married 54 years, 4 children in their fifties, wife 70, husband 83  
Separation, reconciliation and marriage contract in 1989, not adhered to  
Husband Alzheimer's, in home, his parking business sold  
Wife's income \$19,000/yr.  
SSAG used by wife to claim \$150,000/mo. support, if husband's income \$4.1 million/yr.  
Not use SSAG above ceiling, interim spousal support \$15,000/mo. tax-free  
Husband says income \$268,500/yr., but some encroachment on capital okay

*Thompson v. Kirk*, [2009] O.J. No. 3222 (Roccamo J.)  
Together 9 years, wife 49, husband 46, wife's son (18) lives with husband  
Wife medical problems, CPP disability \$9,108/yr.  
Husband construction contractor, repartnered, income issues, income \$51,000/yr.  
Husband pays \$1,173/mo. child support for 4 children  
Ontario Court of Justice ordered \$1,000/mo. interim spousal support, appealed by husband  
SSAG argued, but not mentioned by trial judge, but must have "considered"  
Appeal dismissed on standard of review grounds  
[SSAG *without child support* range \$473-\$650/mo.; adjusted for prior support, \$229-\$306/mo.]  
[If *custodial payor* formula, range \$370-\$493/mo.; adjusted for prior support, \$138-\$184/mo.]

*Pengilley v. Pengilley*, [2009] O.J. No. 3227 (Murray J.)  
Married 16 years, wife 75, husband 80, separated 2005  
Husband's CPP/annuity income \$56,300/yr.  
Wife's income \$30,300 in 2007, says \$1,800/mo. will equalize incomes  
Husband says SSAG range \$551-\$734/mo.  
Interim interim support \$750/mo., slightly above upper end

*Greenglass v. Greenglass*, [2009] O.J. No. 3224 (Allen J.)  
Married 30 years, husband 66, wife 62, 2 adult daughters, separated 2001  
Wife teacher, home, taught ESL 12 years, then 4 years part-time, now retired  
Her income \$21,000/yr., pensions/ CPP/investments  
Husband accountant, fired in 1999, outstanding litigation, now repartnered  
Husband part-time at H & R Block, \$12,000/yr. plus investments, total \$55,000  
Indefinite order, upper end of SSAG range, 50%, \$1,417/mo.

*McFarlane v. McFarlane*, [2009] O.J. No. 2947 (Greer J.)

Married 31 years, separated 1997, husband 66, wife 65

1998 separation agreement: \$2,300/mo. spousal support, indexed, husband earned \$78,825/yr.

Husband remarried, new wife earns \$15,000/yr.

Husband retired by employer at 64 in 2007, RRSP/LIRA \$17,260/yr.

Husband paying \$2,846/mo., stopped in 2008

Wife former nurse, now CPP/OAS \$13,020/yr.

No *Boston*, need, husband's income could be \$25,928/yr, 66% income reduction

SSAG range \$539-\$674/mo. (?) [estimated to be \$404-\$538/mo.]

Support reduced 66%, to \$940/mo.

*Metlin v. Metlin*, [2009] O.J. No. 2211 (Matheson J.)

Together 17 years (married 13), wife 48, husband 42, separated Jan. 2008

Wife works part-time in store, \$15,000/yr., bankrupt after separation

Wife could work more, \$20,000/yr., left husband with joint debts of \$33,000

Husband works in construction, cash payments, earned \$47,796/yr.

Wife used \$80,000 for husband and \$15,000, to say SSAG range \$1,056-\$1,408/mo.

Spousal support set at \$500/mo., partly due to debts [exception?]

[at lower income for husband, range \$591-\$788, 8.5 to 17 years]

*Lehtomaa v. Lehtomaa*, [2009] O.J. No. 2099 (McCartney J.)

Married 40 years, husband 75, wife 75, separated 1999

Wife retired at separation, husband "retired" when he was 48

Wife's income \$21,780, husband \$33,948/yr.

SSAG range \$380-\$440-\$507/mo.

Order for \$440/mo., not equalize incomes

*Mechefske v. Mechefske*, [2009] O.J. No. 2004 (Gordon J.)

Married 19 years, wife 41, husband 44, separated Nov. 2004

2 children 23 and 20, both now independent, youngest with husband

Spousal support since 2004 of \$1,000/mo., then \$1,520/mo.

Wife seeks \$2,000/mo., husband says paid long enough

Husband Inco miner, bankrupt, new partner (unemployed), income \$80,000/yr.

Wife on contract with CRA, new partner (unemployed trucker), income \$37,000/yr.

Support to continue, 10 years to 2014, wife young and industrious

SSAG calculations for different incomes, "limited assistance" as wrong incomes

Order for \$1,200/mo. [range estimated as \$1,022-\$1,192-\$1,362/mo.]

\*\**Shorey v. Shorey*, [2009] O.J. No. 5136, 2009 CarswellOnt 7514 (Rowell J.)

Together 17 years (married 16), both 53, 2 adult children of wife

Husband RCMP officer, earns \$92,000 with some overtime

Wife dental hygienist, works 2 days/week, 3<sup>rd</sup> day imputed, income \$38,000/yr.

SSAG range \$1,148-\$1,339-\$1,530/mo., mid-point of \$1,339 ordered

Wife could work more, retro support to Sept. 2007, reduced to \$3,292 as no tax relief

### C. The With Child Support Formula

**\*\*Rivard v. Rivard**, [2010] O.J. No. 2039, 2010 ONSC 2711 (Gareau J.)

Together 10 years (married 6), wife 37, husband 40, separated Dec. 2005  
2 children 10 and 8, husband seeks shared custody, but wife's primary care continued  
Temporary order Dec. 2006: child support \$1,220/mo. plus \$280/mo. child care  
spousal support \$1,200/mo., husband earned \$85,000, wife \$10,000/yr.  
Husband pharmaceutical sales rep, earns \$99,656/yr., including bonuses  
Wife was operating day care in home, now secretary at hospital, part-time, \$19,000/yr.  
court imputes full-time minimum wage income \$22,000/yr.  
Child support \$1,400/mo., plus s. 7 expenses: \$260/mo. child care, \$214/mo. by husband  
each pays \$800/yr. for one child, wife for dance, husband for hockey  
Spousal support: no time limit, wife's disadvantage, SSAG, *Cassidy*  
Wife seeking full-time work at hospital, doing online university courses  
Husband paid support 3 ½ years, review in 5 years  
Order for \$1,400/mo., considering budgets and SSAG  
[Estimated range \$589-\$988-\$1,468/mo.]

**Hill v. Hill**, [2010] O.J. No. 1865, 2010 ONSC 2630 (Spies J.)

Together 23 years (married 15), wife 39, separated March 2005  
2 children: boy 17 with husband, girl 14 with wife, wife in matrimonial home  
Husband not filed answer, so no notice re temporary order, support stopped in Feb.  
Wife earns \$33,587/yr. as caretaker at retirement centre  
Husband earns \$79,956/yr. at TTC  
Child support: \$719 - \$311 = \$408/mo.  
Spousal support: SSAG mid-range \$664/mo.  
Wife primary caregiver, home most of marriage, 44.9% family NDI to wife  
[Range \$336-\$664-\$931/mo.]

**Kahn v. Kahn**, [2010] O.J. No. 1867, 2010 ONSC 2617 (Spies J.)

Married 13 years, separated Sept. 2008, 5 children aged 5 to 13, with wife  
Mortgage in arrears, wife and children in home  
Wife teacher, earns \$60,798/yr.  
Husband lawyer, in leasing business, for father's company, earning \$120,000/yr.  
Interim child support \$2,870/mo.  
Section 7: nanny \$1,560/mo., no longer affordable  
Wife seeks interim spousal support, but no ability to pay, zero on SSAG  
Wife has 67% of family NDI  
Wife will have to pay \$3,400/mo. on mortgage, hope to refinance and reduce payment  
[Range zero to zero]

**Bionski v. Bionski**, [2010] O.J. No. 1781, 2010 ONSC 2552 (Pazaratz J.)

Married 20 years, separated Oct. 2008  
2 children: 19-year-old away at university, husband pays \$350/mo. direct, sufficient  
18-year-old developmentally-delayed, high school, full-time care, ODSP \$796/mo.  
Wife special education assistant, earns \$33,760/yr.  
Husband shop teacher, earns \$74,151/yr.  
Child support \$673-\$525 (ODSP living expenses)=\$148/mo.  
Interim spousal support of \$1,100/mo., within range  
[SSAG range if full child support \$317-\$797/mo., if lower \$148/mo, then \$620-\$1,148/mo.]

*Maskobi v. Maskobi*, 2010 CarswellOnt 2742, 2010 ONSC 2540 (McGee J.)  
Together 8 years (married 7), wife 41, husband 39, 2 children 7 and 5, separated April 2009  
Wife home since 2003, worked at bank earning \$250,000/yr. before  
Husband seeks shared custody, interim parenting schedule ordered  
Father at bank earns \$1,122,625, full table interim child support \$13,274/mo.  
Wife seeks temporary spousal support \$18,500-\$24,193/mo. using SSAG  
Husband's income different for spousal support, \$955,406, to exclude bonus shared as property  
Wife's budget reasonable, income above SSAG ceiling  
Temporary spousal support \$12,500/mo.

*Misner v. Misner*, 2010 CarswellOnt 2713, 2010 ONSC 2284 (Pazaratz J.)  
Married 20 years, wife 45, husband 52, separated Sept. 2008  
4 children, all with wife: 20 on athletic scholarship at Florida university, 17 and 15 (both with  
profound special needs) and 7  
Wife home since birth of 2<sup>nd</sup> child, no "time off", complex scheduling with demands of children  
Wife works 1 hour/day, 3 days/week at school, \$600 per year  
March 2009 temporary order: child support \$1,700/mo., spousal support \$1,300/mo.  
Husband's lack of financial disclosure re Dofasco income, \$94,000/yr.  
Also problems of disclosure of water purifying business income  
Court imputes \$100,000/yr. total income  
Child support for 20-year-old daughter: of \$10,000 expenses, \$5,000 paid by parents,  
husband to pay \$385/mo. as his share, home with wife in summer months  
Child support for 3 for 9 mos., \$1,875/mo., for 4 for 3 mos., \$2,172/mo., average \$1,940/mo.  
Spousal support of \$1,100/mo., at high end of SSAG range in summer, mid rest of year

*Bath v. Bath*, [2010] O.J. No. 1668, 2010 ONSC 1630 (Spies J.)  
Married 5 years, 2 children 5 and 3, with wife, husband 53, wife 39  
Husband from India in 1978, arranged marriage in India in 2003  
Husband taxi driver, rents licence, drives accessible vehicle, own numbered company  
Husband income issues, disclosure, fixed at \$26,858/yr.  
Child support \$401/mo., retro to separation date  
Wife provides beautification services for cash, on social assistance (not income)  
No disadvantage/loss, no efforts to self-sufficiency  
If wife no income, SSAG range \$76-\$237/mo., impute \$200-\$250/mo. income  
No spousal support

*Ali v. Ansar*, [2010] O.J. No. 1709, 2010 ONSC 2428 (Mesbur J.)  
Married 29 years, 3 children 27, 23 and 14, separated Aug. 2008  
Husband worked in bank in Bangladesh, Kuwait, now in foreign exchange  
Income imputed to husband of \$30,000/yr., child support \$270/mo.  
Long-term traditional marriage, wife's income \$5,000/yr.  
Spousal support of \$350/mo, indefinite, "considered SSAG"  
[SSAG range estimated \$209-\$298-\$390/mo.]

*Pandya v. Pandya*, [2010] O.J. No. 1695, 2010 ONSC 2026 (Hourigan J.)  
Retroactive variation, husband's income reduced, low end of SSAG range used

\*\**Chapman v. Chapman*, 2010 CarswellOnt 2343 and 2009 CarswellOnt 8915, [2009] O.J.  
No. 5994 (Belch J.)  
Together 23 years (married 22), wife 56, separated May 2004  
Children 24 and 17, with wife, then youngest to husband in March 2006

Wife health problems, unable to work, long traditional marriage  
Husband senior bank executive, changed banks and jobs after separation  
2005 minutes: child support \$1,032/mo., spousal support \$2,600/mo.  
Post-separation income increase: \$103,000 in 2005, by 2009 \$163,400  
Full sharing of increase, continuation of career in banking industry  
Husband repartnered at time of minutes, also in banking  
Lower end of range ordered, given husband's income incentives  
Custodial payor formula, \$4,000/mo. going forward  
Retro support: changes in numbers of children and custodial arrangements  
Some overpayment of child support 2006-09  
Use of different SSAG formulas (basic, split, custodial payor), low end of range  
\$34,100 in retro spousal support 2006-09  
[Custodial payor range estimated \$3,827-\$4,464-\$5,102/mo.]

*Oxley v. Oxley*, [2010] O.J. No. 1355, 2010 ONSC 1609 (Boswell J.)  
Interim interim order June 2009: child support \$1,414/mo., spousal \$4,200/mo.,  
husband's income \$171,595/yr., til valuation of husband's business  
Support not paid, husband's application to vary, in contempt, must pay \$28,070 in arrears  
Husband's income reduced in 2008 due to market conditions  
Husband stopped working Sept. 2009, medical reasons insufficient  
Income imputed to him of \$100,000/yr. from his company  
Child support \$877/mo., spousal support \$2,500/mo., mid-range SSAG, from Dec. 2009  
If arrears not paid, then husband's pleadings to be struck

*Krane v. Krane*, [2010] O.J. No. 1009, 2010 ONSC 1488 (Gordon J.)  
Married 21 years, 3 children 24, 23 and 20, separated Feb. 1997, wife 39 then  
Much litigation over support matters  
Spousal support paid for 13 years, issues of termination of child and spousal support  
Husband building inspector, earns \$84,853/yr., wife \$34,119/yr.  
Youngest now only "child", with wife, away at university  
Child support: \$758/mo. for 5 mos. when home with wife, \$345/mo. over full year  
Child has earnings, scholarship, Ontario student loan  
University expenses after child's contribution \$4,131, husband to pay \$2,520  
Retroactive child support ordered back to Jan. 2003, husband failed to disclose  
Husband paying \$550/mo. spousal support, based on husband's income \$65,000/yr. in 2001-02  
Retro spousal support calculated using SSAG \$9,300  
Court has difficulties in computing SSAG with less than full table child support  
Formula range stated to be \$685-\$1,020-\$1,350/mo. [basic formula used, full table?]  
Order for \$1,050/mo., indefinite  
[If *adult child* formula, range estimated \$1,159-\$1,352-\$1,545/mo.]

*Rivero v. Tan*, [2010] O.J. No. 1005, 2010 ONSC 1333 (Lemon J.)  
Married 9 years, separated May 2008, 2 children 10 and 4, with wife  
Husband's answer struck for non-disclosure  
Husband warehouse business, little income on tax return, bank statements and credit cards  
His income imputed at \$100,000/yr., child support \$1,404/mo.  
Wife from Cuba, little English, now pregnant, left bakery work on doctor's advice  
Her income zero, modest budget, SSAG range \$875-\$1,353/mo.  
Spousal support of \$1,000/mo., indefinite

\*\**Barton v. Sauve*, [2010] O.J. No. 1008, 2010 ONSC 1072 (Blisshen J.)

Together 8 years, 2 children 9 and 5 with wife, separated Nov. 2007

Husband claims spousal support

Wife's grandmother won lottery, gifted \$2 million to wife, she paid off debts

New home purchased, wife required cohabitation agreement, signed in 2007:

husband to get his \$70,000 contribution to home, waivers of spousal support

Husband injured in 2005, workers compensation, \$14,508/yr.

Wife's interest income \$54,064/yr., previously earned \$83,448/yr.

Cohabitation agreement upheld

Spousal support provision "unconscionable" under FLA s. 33(4)

At agreement husband expected to work, but fibromyalgia worsened, entitled

Husband not paying any child support

*Custodial payor* formula range \$396-\$527/mo., 4 to 8 years

Husband lived in matrimonial home for one year, so 7 years support

Mid-point of \$462/mo. ordered, or payable as lump sum after tax \$25,000

*Attia v. Garanna*, 2010 CarswellOnt 1168, 2010 ONSC 1261 (Ricchetti J.)

Married 6 years, 2 children 8 and 6, wife 34, separated Aug. 2006

Married in Egypt, wife sponsored and to Canada year later

After separation, wife abducted children to Egypt, returned in 2007

2007 interim order: child support \$944/mo., spousal support \$800/mo.

Sole custody to husband, but equal time sharing week-about schedule

Wife teacher in Egypt, got Ontario teachers degree, 1 course short of Master's

Teaching at private Islamic school, earning \$29,500/yr., disclosure issues

Husband works in IT at bank, earns \$68,000/yr.

Child support \$587/mo. on set-off [but \$1,105-\$437=\$578]

Spousal support: wife not disadvantaged by marriage

SSAG range 0-\$341/mo., duration 3 to 13 years [income of \$21,800 used for wife]

Support to end May 2011 (total 4 years), \$250/mo.

\*\**M.(A.A.) v. K.(R.P.)*, 2010 CarswellOnt 1139, 2010 ONSC 930 (Pazaratz J.)

Married 9 years, wife 40, husband 42, 2 children 11 and 7, with wife, separated Nov. 2004

Both veterinarians, husband bought interest in small animal practice in 1998

Wife's equine practice delayed by children, later

In 2004, husband earned \$92,000, wife \$11,000

Homemade separation agreement signed in Nov. 2005:

No legal advice, shared custody, child support \$500/mo., waivers of spousal support

Husband paid wife \$60,000 for equity in home

In 2007, wife primary care, child support varied to table amount, retro child support ordered

Property provisions of agreement upheld

Spousal support provisions fail at stage 1 of *Miglin*

No discussion, clause just inserted, no substantial compliance

Entitlement on compensatory and non-compensatory grounds

Wife now earns \$100,000 and husband \$189,900/yr.

Full sharing of post-separation income increase, as her loss and his gain

Both repartnered, but treated as irrelevant: husband's partner earns \$90,000/yr.,

wife cohabited since 2005, partner earns \$30,000/yr.

Counsel agree to SSAG ranges from 2004 to 2009

Spousal support awarded for 2006-09, 4 years (high, mid, then low-mid range for 2 years)

Total \$80,000, netted down for tax to \$44,000 lump sum

*Sfeir v. Sfeir*, 2010 CarswellOnt 922, 2010 ONSC 1163 (Tulloch J.)  
Married 19 years 2 teen children, separated Jan. 2007, wife 45  
Husband engineer, now on disability for depression, 2009 income \$230,000  
Wife runs electrolysis clinic, underemployed, \$60,000 income imputed for 2009  
Child and spousal support recalculated from Jan. 2007 to Feb. 2010  
Low range of SSAG used for 2007 (shared), 2008 (one sole, one shared), 2009  
Section 7 expenses including private school \$20,000/yr., shared proportionately

*Legge v. Funston-Legge*, [2010] O.J. No. 1021, 2010 CarswellOnt 1421, 2010 ONSC 1025  
(MacPherson J.)

Together 12 years (married 10), 3 children 13, 10 and 6, with wife, separated June 2008  
Husband not appear at trial, operated computer business, but no disclosure  
Income determined as \$95,000/yr., child support \$1,797/mo.

Wife home, now 2 part-time jobs, \$8,000/yr., paying debts of \$22,000-plus  
SSAG range \$520-\$736-\$957/mo, 6 to 14 years, wife seeks \$650/mo.

Judge would have ordered more spousal support, but \$650/mo. indefinite

*Poirier v. Poirier*, 2010 CarswellOnt 744, 2010 ONSC 920 (Price J.)

Married 27 years, husband 55, wife 52, separated Aug. 2008

6 children aged 17 to 31, 3 with wife now: 21 (not dependent), 19 (college), 17 (high school)

Husband engineer, high incomes as employee, now consulting, earned \$568,975 in 2008

Fluctuating income, disclosure problems, little income in 2009, underemployed

Income imputed at \$500,000/yr.

SSAG not fully addressed in argument, income above ceiling

Child support \$6,052/mo., plus s. 7 expenses of \$13,000-plus

Interim spousal support of \$10,000/mo. for 5 months

[SSAG range estimated \$10,911-\$13,074/mo.]

\*\**Atkins v. Burgess*, [2010] O.J. No. 275, 2010 ONSC 557 (Quinlan J.)

Together 2+ years, 2 children 7 and 3, separated Oct. 2007

Older child step-child, wife receives \$150/mo. child support from father

Husband in scrap metal recycling, income issues, husband says \$30,000/yr., non-disclosure

Income of \$90,000/yr. imputed, based on wife's evidence

Child support \$1,281 - \$150 = \$1,131/mo.

Wife can earn \$15,000/yr., previously home, her income an "estimate"

SSAG range \$719-\$1,330/mo., wife seeks \$1,100/mo.

Spousal support of \$719/mo., low end as wife's income an estimate, possibly higher

[if *step-parent* formula properly adjusted for table amount, range \$597-\$1,196/mo.]

*Berry v. Edge*, [2010] O.J. No. 25, 2010 ONSC 171 (Milanetti J.)

Together 10 years, wife 44, husband 52, separated Aug. 2006

2 children 15 and 10, wife one child of previous relationship now 20

Split custody, daughter 15 with wife, son 10 with husband

Wife home, now on social assistance, no income

Husband earns \$43,457, child support \$410/mo., retro support

SSAG calculations from wife, treats her social assistance as income, 2 children with her

Spousal support of \$800/mo., review in 2 years, wife must find employment

Retro spousal support to 2006 of \$18,500

[SSAG range, with wife's income zero \$792-\$1,041/mo.]

\*\**Buchanan v. Goldberg*, 2010 CarswellOnt 74, 2010 ONSC 268 (Price J.)

Together 28 years (married 23), husband 56, wife 54, separated 2007

2 children 26 and 19, 19 away at university, with husband in high school, wife now in summer  
Wife home, real estate, less than full-time, little income, income only from rent \$5,300/yr.  
Interim spousal support \$2,000/mo. for 1 ½ yrs, \$4,000/mo., since April 2009 \$5,000/mo.  
Husband pays \$1,000/mo. child support direct to child  
Income issues for husband: CEO of drug testing company  
Husband says income \$146,300 in 2010, \$172,000 in 2011, wife says \$274,142  
Average 2006-08 \$204,326/yr. used  
Bonus, retained earnings, etc.  
Child support: ½ table amount, 9 mos., \$828/mo., full table \$1,656/mo. for 3 mos.  
Also s. 7 expenses paid by husband, amounts vague  
*Adult child* formula applied, but no gross up of child support  
Spousal support of \$6,000/mo. ordered, indefinite  
[If child support grossed up, *adult child* formula range \$5,494-\$6,409-\$7,325/mo.]

*Teoli v. Coley*, 2010 CarswellOnt 15, 2010 ONSC 135 (Murray J.)  
Married 22 years, separated Oct. 2009, 2 children 17 (with husband) and 19 (away at university)  
Husband's income \$290,000/yr., 50% owner of own business  
Husband in home, paying house expenses \$9,600/mo. pending sale  
Wife teacher \$45,000/yr.  
Child support not claimed (\$680/mo.), full university expenses paid by husband  
SSAG used for interim spousal support, mid-point \$5,500/mo.  
[*Custodial payor* range, no child support, estimate re s. 7, \$4,139-\$4,829-\$5,518/mo.]  
[SSAG range probably not adjusted for husband's payment of university expenses]

*Zacconi v. Mahdavi*, [2009] O.J. No. 5752 (Linhares de Sousa J.)  
Married 14 years, wife 54, one child 14 with wife  
Husband area director of flyer company, disclosure problems, big gross income  
His income imputed as \$158,000/yr.  
Interim child support \$1,317/mo., interim spousal support \$4,000/mo.  
SSAG calculations provided and considered  
[range estimated as \$3,775-\$4,190-\$4,598/mo.]

*Hong v. Silva*, [2009] O.J. No. 5543 (Hambly J.)  
Together 9 years, wife 35, husband 41, separated Sept. 2006, one child 9, with wife  
Husband forklift driver, then real estate agent, then forklift, then unemployed, new partner  
Income determined as \$40,000/yr.  
Wife worked in husband's real estate business, training as personal support worker  
Wife working part-time, minimum wage, \$8,650/yr.  
Child support \$367/mo.  
SSAG range \$196-\$441, order for mid-point \$319/mo., review in 3 years

*Dhanesar v. Dhanesar*, 2009 CarswellOnt 7173 (Kelly J.)  
Married 16 years, wife 46, husband 47  
2 children, 17 and 15 (autistic, full-time care by wife since 2005)  
Wife worked outside home, not since 2005  
Husband machine operator, earned \$33,500/yr., company bankrupt, now unemployed, EI  
Husband no ability to pay, support should be in accordance with SSAG, but \$1 nominal now  
Child support \$497/mo.  
Wife sought \$60,000 lump sum spousal support re his equity in home, dismissed

*Terry-Lancaster v. Terry*, 2009 CarswellOnt 6141 (Mulligan J.)  
Married 22 years, 6 children, split custody, 2 with husband, 4 with wife, wife 48  
Wife unemployed since Jan. 2009  
Husband's motion, child support varied to set-off \$2,129/mo.  
Husband's income increased from \$90,000 to \$100,000/yr.  
Nanny, husband paying 75%, wife unemployed so no longer appropriate  
Interim spousal support was \$1,000/mo.  
Husband says SSAG range mid \$281/mo., high \$438/mo.  
Concerns re SSAG where long-term marriage, wife has 4 children  
Interim spousal support reduced to \$438/mo.

*Gale v. Gale*, [2009] O.J. No. 4020 (Pazaratz J.)  
Married 20 years, 2 children 15 and 13, with wife, separated Dec. 2007  
Husband earns \$97,300/yr., child support \$1,371/mo.  
Wife earns \$33,400/yr.  
Both counsel present SSAG calculations, range \$428-\$869-\$1,242/mo.  
Wife says above mid-point for spousal support, as husband not exercising access  
Husband says continue interim order of \$750/mo., as debt load, even with house sold  
Debt and property issues left to trial, temporary spousal support \$1,000/mo.  
Retro child and spousal support to Oct. 2008, further back left to trial

\*\**Willi v. Chapple*, [2009] O.J. No. 3752 (Lemon J.)  
Together 16 years, 1 child 19, with wife and attending university  
Husband's income estimated conservatively at \$200,000/yr.  
Child support \$1,624/mo. plus \$10,000 for s. 7 expenses  
Wife accepts 6 years of spousal support, 2003-09  
SSAG range \$4,250-\$5,667/mo.  
Given low income estimate and low duration, high end of range \$5,500/mo.  
[Range correctly adjusted for s. 7 expenses]

*Tersigni v. Mousavi-Rizi*, [2009] O.J. No. 3637 (Allen J.)  
Married 14 years, 2 children 13 and 10 with wife, separated Jan. 2007  
Wife home, wants to do M.Psych., 2-year degree, \$10,800/yr. tuition and books  
No retro child or spousal support, as husband paid mortgage  
Husband runs restaurant business, says income \$78,000/yr., wife says \$350,000  
Income fixed at \$78,000/yr., based on restaurant sales and purchases  
Child support \$1,135/mo.  
Spousal support time limited to 3 years (!)  
Wife income of \$11,120/yr. from rent  
Order for \$600/mo., low end of SSAG range  
[Estimated range \$546-\$734-\$946/mo.]

*Sponagle v. Sponagle*, [2009] O.J. No. 3696 (Healey J.)  
Married 15 years, 2 children, separated May 2008, interim support  
Husband's income \$83,958/yr., wife's income \$33,672/yr.  
Child support \$1,208/mo.  
SSAG range \$203-\$893/mo.  
Wife gets equalization payment, to pay off mortgage and debts  
Also boards horse with husband (\$320/mo.)  
Compensatory issues left to trial, interim spousal support at lower end of range \$400/mo.  
Husband needs to finance equalization payment

*Wesselingh v. Wesselingh*, [2009] O.J. No. 5726 (Kershman J.)  
Married 16 years, 1 child 15  
Wife home, now part-time caregiver, earns \$10,600/yr.  
Husband works at Hewlett-Packard, earned \$163,026, now \$127,466/yr.  
Interim child support \$1,087/mo.  
Interim spousal support: wife needs to make greater self-sufficiency efforts  
Low end of SSAG range ordered, \$2,400/mo.  
[Range estimated as \$2,478-\$3,240/mo.]

*Leon v. Leon*, [2009] O.J. No. 2789 (Warkentin J.)  
Married 13 years, separated Feb. 2005, 2 children 16 and 14, split custody  
Wife \$15,800/yr.  
Husband mechanic, addiction to prescription drugs, \$30,000/yr. imputed  
Child support \$444 - \$311 = \$133/mo., and retro  
SSAG range 0-\$80-\$211/mo., modest support, given length and roles, \$100/mo.

*Gauci v. Malone*, [2009] O.J. No. 2627 (Baltman J.)  
Together 7 years, separated July 2007, wife 37, husband 46  
2 children 9 and 6, with wife, wife 2 children 13 and 11 from previous marriage  
Wife not worked outside home, on social assistance  
Husband earns \$44,000/yr., child support \$665/mo.  
SSAG range 0-\$244/mo., 4 to 14 years  
Wife's efforts insufficient, young, able-bodied  
Based on needs and means, no spousal support (!)  
[Social assistance wrongly treated as income; range if wife no income \$430-\$540-\$652/mo.]

*Abuzokkar v. Farang*, [2009] O.J. No. 2915 (Ricchetti J.)  
Together 4 ½ years (married 4), wife 37, separated April 2008  
1 child 5, plus wife's child of previous marriage age 10  
High conflict case, wife's evidence dubious  
Husband not stand in place of parent, even though sponsored wife and child to Canada  
Husband earns \$61,800/yr., child support for one \$573/mo.  
Wife earns \$30,000/yr., wife not disadvantaged, short marriage  
Spousal support time limited, not substantial  
SSAG range \$0-\$157-\$444/mo., for 2 to 12 years  
Spousal support \$200/mo. for 3 years [no explanation]  
Converted to lump sum \$7,200 [no discount for tax], set off vs. equalization by wife

*Albano v. Albano*, [2009] O.J. No. 2569 (Harris J.)  
2 children 10 and 5, with wife, 10-year-old has health problems  
Husband earns \$84,114/yr. at Toyota  
Wife earns \$27,000/yr., half-time  
Child support \$1,209/mo. plus \$368/mo. child care, also retro  
Spousal support \$600/mo, in upper SSAG range, plus retro to Jan. 2007  
[Range estimated as \$39-\$343-\$665/mo.]

\*\**Guignard v. Guignard*, [2009] O.J. No. 2267 (Shaw J.)  
Married 25 years, wife 45, husband 46, separated March 2009  
2 children 21 and 17, only younger "child", shared custody  
Incomes in issue  
Wife educational assistant/supply teacher/EI/lifeguard, earns \$32,256/yr.

Husband supervisor at mine, income \$106,212/yr.  
Interim child support \$925 - \$296 = \$629/mo.  
Interim spousal support: husband in navy, wife moved with him  
SSAG range \$1,142-\$1,512-\$1,874/mo.  
Various factors considered re location, \$1,200/mo.

*Contreiras v. Contreiras*, [2009] O.J. No. 2164 (van Rensburg J.)  
Married 20 years, 2 children, separated 2001  
Nominal spousal support since 2003  
Wife earns \$63,000/yr. in U.S. as teacher  
Husband earns \$209,509/yr.  
Premature to vary spousal support, as wife's U.S. visa expiring

*LeBlond v. LeBlond*, [2009] O.J. No. 5689 (Charbonneau J.)  
No details, 1 child 18 with husband, *custodial payor*  
SSAG range from husband \$1,800-\$2,400/mo., from wife \$2,160-\$2,880/mo.  
Interim order for \$2,100/mo.

*Steele v. Steele*, [2009] O.J. No. 2062 (Bielby J.)  
Married 12 years, separated July 2001, 4 children 18, 15, 13, 12  
2003 agreement: spousal support \$750/mo. for life  
Oldest child to husband in 2008, split custody now  
Husband terminated from employment, 1 year severance, til Oct. 2009  
Wife home, Crohn's disease, employment limited to 18 hrs/wk., \$10,275/mo.  
Spousal support duration 6-13 years  
Entitlement continues, given disability, upper end of range  
3 sets of SSAG calculations for different incomes for husband  
Husband's income set at \$113,591/yr.  
Child support \$2,039 - \$33 = \$2,006/mo., oldest child's tuition, etc. \$10,000/yr.  
Spousal support \$650/mo., probably high end  
[Range estimated as \$280-\$481-\$686/mo.]

*Unruh v. Rakowski*, [2009] O.J. No. 1706 (J. Wright J.)  
Missing information, 2 children with wife  
2002 order: child support \$537/mo., spousal support \$100/mo., husband \$37,400/yr.  
Application to vary by husband, now WSIB income \$43,700 grossed-up  
Child support \$661/mo.  
Spousal support range \$14-\$234/mo, order for \$234/mo. and arrears determined

## APPENDIX B

### FORGOTTEN? THE SSAG EXCEPTIONS

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So what is it? Is it that no one reads the Spousal Support Advisory Guidelines beyond Chapter 11? That Chapter 12 on exceptions somehow went missing from everyone's copy? How do we explain that, five years after the release of the original Draft Proposal and almost two years after the final version, lawyers and judges still ignore the SSAG exceptions?

It remains one of the great mysteries of the Advisory Guidelines so far. The two formulas for amount and duration apply to the wide range of "typical" spousal support cases. But, as we all know, there are lots of "atypical" or "unusual" cases in spousal support law and the SSAG "exceptions" are intended to recognize categories of cases where outcomes can or should depart from the formula ranges.

How can you tell when an exception might apply? First, when your family law intuition tells you that the formula outcomes just don't seem "right", e.g. the amount is too low or too high, or the duration too short. That gut feeling should send you quickly to Chapter 12, to root through the list of exceptions. Second, if you lack that "intuition", then your antennae should go up when the opposing lawyer really, really likes the formula outcomes.

In Chapter 12, you will find this summary list of "exceptions":

- (1) Compelling financial circumstances in the interim period;
- (2) Debt payment
- (3) Prior support obligations
- (4) Illness and disability
- (5) Compensatory exception in shorter marriages without children
- (6) Property division: reappportionment of property (B.C.), *Boston*, high property awards
- (7) Basic needs/hardship: without child support, custodial payor formulas
- (8) Non-taxable payor income
- (9) Non-primary parent to fulfil parenting role under the custodial payor formula
- (10) Special needs of child
- (11) Section 15.3: small amounts, inadequate compensation under the with child support formula

Not such a long list to remember. The most common exceptions would be the first four listed above, with "illness and disability" the most frequently considered in the cases.

Recently, Carol Rogerson and I have been reading the past year's spousal support cases, to update the "User's Guide". In only three cases do judges even make mention of the "exceptions": Justice Baird in *S.S.V. v. G.J.V.*, [2009] N.B.J. No. 220 (N.B.Q.B.)(exception made for unusual property arrangements after separation) and again in *S.A. v. E.A.*, [2010] N.B.J. No. 46 (disability exception mentioned, but applicable exceptions were debt payment/interim circumstances); and Justice Butler in *Marche v. Marche*, [2009] N.J. No. 54 (N.L.T.D.)(debt payment by husband).

In all the other exceptional cases, judges just explain that the formula ranges are not appropriate, and then move on to fashioning a different outcome, without any consideration of the "exceptions" listed above. For example, Harvey J. carefully explains why the custodial payor formula range is too low in *R.M.S. v. F.P.C.S.*, [2009] B.C.J. No. 1925 (B.C.S.C.), but there is no reference to the two exceptions that would clearly apply to this three-year marriage: the compensatory exception for short marriages (the claimant husband had given up his career to marry, move to Vancouver and then care for the children) and the non-primary parent to fulfil parenting role under the custodial payor formula (the husband had substantial access and played an important role in the lives of the two young children).

Similarly no reference to the interim exception in *Thompson v. Kirk*, [2009] O.J. No. 3222 (S.C.J.) or in *Dort v. Dort*, [2009] N.S.J. No. 591 (N.S.S.C.). No reference to the exception for prior support obligations in *Robertson v. Williams*, [2009] O.J. No. 5451 (S.C.J.)(husband paying spousal support to first wife).

Most surprising is the failure of courts to consider the illness and disability exception, despite its relative frequency in the reported cases. There were seven of these in this last batch of trial decisions, all involving short-to-medium-length marriages.

The decided cases do reveal the three approaches we identified in the final version in section 12.4. First, most judges "go high and long", ordering an amount at the SSAG maximum, but on an indefinite basis, the outcome in four of these cases: *Rhynold v. Rhynold*, [2009] O.J. No. 4339 (S.C.J.); *van Rythoven v. van Rythoven*, [2009] O.J. No. 3648 (S.C.J.); *Steele v. Steele*, [2009] O.J. No. 2062 (S.C.J.); *Shaw v. Shaw*, [2009] N.S.J. no. 559 (N.S.S.C.). Second, some judges go to the high end on amount, but then do impose a time limit, usually the maximum duration under the formula: *Haggerty v. Haggerty*, [2010] N.S.J. No. 5 (N.S.S.C.) or *T.J.M. v. C.R.M.*, [2009] B.C.J. No. 1642 (B.C.S.C.)(amount above range but duration slightly below maximum). Third, in only one case did a court "go low and long", to fix the amount at the low end of the range, but on an indefinite basis, in a case where both spouses were disabled: *Campbell v. Campbell*, [2009] B.C.J. No. 1944 (B.C.S.C.).

The SSAG exceptions in Chapter 12 should not be forgotten, as they are an integral part of the Advisory Guidelines.

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