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COMPLEX ISSUES BRING US BACK TO BASICS: THE SSAG YEAR IN REVIEW IN B.C.

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**Appendix I: SSAG Case Summaries: B.C.C.A., June 2007 – June 2009
Appendix II: SSAG Case Summaries: B.C. Trial Decisions, July 2008 – June 2009
Appendix III: Review of B.C. SSAG Cases by Issue, June 2007 – June 2009**

I. INTRODUCTION

In July of 2008, the *Final Version* of the Spousal Support Advisory Guidelines was released by the federal Department of Justice, after three years of intensive feedback from spouses, lawyers, mediators and judges across the country.¹ Since British Columbia was an “early adopter” of the Advisory Guidelines, especially with the Court of Appeal decision in *Yemchuk*,² much of the most useful and sophisticated advice about revisions to the *Draft Proposal* came from the family law community in this province. Accompanying the *Final Version* was a short *Report on Revisions*, detailing the specific changes made.³

Where are we now in British Columbia, one year after the release of the *Final Version*? The year in review reveals the courts struggling with some complex issues of spousal support law: the use of the SSAG on variation and review, the impact of high property awards upon spousal support, competing theories of entitlement, spousal support in shared custody cases, cases involving payor incomes over \$350,000, post-separation income increases for payors, the effect of remarriage or repartnering by the recipient, self-sufficiency, time limits. All of these issues require sophisticated support analysis and we will delve into most of them in this paper.

¹ Carol Rogerson and Rollie Thompson, *Spousal Support Advisory Guidelines* (Department of Justice Canada, July 2008), which we call the *Final Version*.

² *Yemchuk v. Yemchuk*, [2005] B.C.J. No. 1748, 2005 BCCA 406, 16 R.F.L. (6th) 430.

³ Carol Rogerson and Rollie Thompson, *Report on Revisions* (Department of Justice Canada, July 2008).

Unfortunately, the past year also reveals some backsliding, some rote use of the Advisory Guidelines, even some carelessness: errors in income determination, basic problems in calculations, defaulting to mid-points, no awareness of exceptions. The Advisory Guidelines have become just another part of the family law landscape in British Columbia, just “ordinary” and that may lead to some unthinking use of the SSAG. It never hurts to go back over “the basics” of the Advisory Guidelines, to ensure that mistakes do not get made in typical cases. We will flag some of those errors and offer some tips as we review the cases.

A few words about the materials and the three appendices to this paper:

- Appendix I sets out summaries of the SSAG decisions from the Court of Appeal since the last CLEBC Family Law Conference, from June 2007 to June 2009
- Appendix II provides SSAG summaries for B.C. trial decisions for the past year, from July 2008 to June 2009, organized by the two main formulas, the *without child support* cases and the *with child support* cases
- Appendix III provides an issue-by-issue breakdown of cases, for easy reference.

Also included in the materials is our July 2008 *User’s Guide to the Final Version*, a paper which has been widely distributed and contains many practical tips on the use of the Advisory Guidelines.⁴

In the next part of the paper, we will review the major spousal support decisions of the B.C. Court of Appeal in the past two years, focussing primarily upon four of the 17 decisions: *Beninger*, *Chutter*, *Mann*, and *Shellito v. Bensimhon*.⁵ In the next two sections, we will analyze in detail the trial decision cases from the past year, first those under the *without child support* formula and then those under the *with child support* formula. Over this period, there have been 95 trial decisions dealing with the Spousal Support Advisory Guidelines, 31 cases without dependent children under the *without child support* formula and 64 cases involving dependent children under the *with child support* formula. This is a change from our 2007 Family Law Conference paper, when the cases were more evenly divided between the two formulas in the early days of the

⁴ Carol Rogerson and Rollie Thompson, “The Spousal Support Advisory Guidelines: A User’s Guide to the Final Verion” (July 11, 2008) in *National Family Law Program 2008* (Deerhurst, Ontario, July 13-17, 2008) and available, along with all our other papers, at: www.law.utoronto.ca/faculty/rogerson/ssag.html

⁵ We have focused entirely on B.C. Court of Appeal decisions. In the past two years, the single most important appellate decision outside of British Columbia would be the Ontario Court of Appeal decision in *Fisher v. Fisher*, [2008] O.J. No. 38, 2008 ONCA 11, 47 R.F.L. (6th) 235, which endorsed the use of the SSAG in Ontario and covered a wide range of spousal support issues in a *without child support* case, including time limits. We discussed *Fisher* at length in “*Fisher* and After: The Spousal Support Advisory Guidelines in Ontario” in Law Society of Upper Canada, 2nd *Annual Family Law Summit* (Toronto, June 9-10, 2008) and posted on the Rogerson site.

Advisory Guidelines.⁶ The current pattern of “with child” cases outnumbering “without child” cases by about 2-to-1 is now well-established across the country.⁷

We should explain one noticeable absence. We have not discussed “income issues” at any length, even though the determination of income is a critical step in the use of income-based guidelines like the SSAG. Income issues come up for comment here and there in the paper, and in the case summaries. We do offer some comments about high-income cases, those over \$350,000 per year. Anything more on income determination would require another whole paper, and there are other papers on the topic.

In our concluding section, we will offer some gratuitous advice, our own “top ten” list, on what to do, and not to do, in using the Advisory Guidelines in British Columbia in the future.

II. THE APPEAL CASES: COMPLEX ISSUES

In the past two years, there have been 16 decision of the B.C. Court of Appeal dealing with the Advisory Guidelines, plus one decision as the Yukon Court of Appeal. Twelve of the 17 cases have been decided in the past year. The cases are summarized in Appendix I, in reverse chronological order. Also included in the summaries are three other non-SSAG spousal support decisions that address important issues: the nature of reviews (*Scott*),⁸ entitlement (*Hinds*)⁹ and the effect of remarriage (*Redpath*).¹⁰

We don’t have the time or space to discuss every appeal decision in the past two years, so we have decided to focus upon the four cases that raise complex issues and one specific topic that recurs in the cases:

- *Beninger v. Beninger*: do the SSAG apply on variation?
- *Chutter v. Chutter*: how does a high property award affect spousal support?
- *Mann v. Mann*: how should spousal support be determined in shared custody cases?
- *Shellito v. Bensimhon*: how should a recipient’s disability affect spousal support?
- *Incomes Above \$350,000*: how should spousal support be determined in high-income cases?

⁶ For the period from January 2005 to June 2007, there were 57 *without child support* cases and 63 *with child support* cases: Carol Rogerson and Rollie Thompson, “The Spousal Support Guidelines in B.C.: The Next Generation” (June 27, 2009), in CLEBC *Family Law Conference 2007*.

⁷ The last ten months of Ontario cases show that 2-to1 relationship: Rollie Thompson, “Following *Fisher*: Ontario Spousal Support Trends 2008-09” in Law Society of Upper Canada, *3rd Annual Family Law Summit* (Toronto, June 11-12, 2009).

⁸ *Scott v. Scott*, [2008] B.C.J. No. 2189, 2008 BCCA 457.

⁹ *Hinds v. Hinds*, [2008] B.C.J. No. 2540, 2008 BCCA 547.

¹⁰ *Redpath v. Redpath*, [2009] B.C.J. No. 813, 2009 BCCA 168. The Court upheld the refusal of a further extension of time for the wife to file her factum, primarily on the basis that the appeal was without merit. Her spousal support had been terminated on the grounds of her remarriage to a very wealthy man.

Clearly the two most important appellate decisions from past two years are the *Beninger* decision from December, 2007, which provides a careful analysis of the use of the SSAG on variation, and *Chutter*, released in December of 2008, an important decision on entitlement. While *Chutter* deals specifically with the impact of high property awards on entitlement to spousal support, the decision also provides a broad overview of the compensatory and non-compensatory bases for entitlement, with the result that the case has become the common starting point for any discussion of entitlement to spousal support in B.C.

(1) *Beninger v. Beninger: The Application of the Guidelines on Variation*

In *Beninger* the British Columbia Court of Appeal provided a careful analysis of the application of the Guidelines on a variation application.¹¹ Dispelling the common misunderstanding that the Advisory Guidelines have no application on variation, *Beninger* offers a more accurate reading of the Advisory Guidelines. The decision recognizes that the Advisory Guidelines *may* be applicable on variation, but not in all cases, and that their use in the variation context must be approached with some degree of caution and an awareness of their possible limitations.

The case involved a long (25 year) traditional marriage with four children in which the husband had been a successful tax lawyer, ran into financial difficulties and ended up declaring bankruptcy shortly after the separation in 2000. He was unemployed for a period of time after the separation, then eventually began to work as a consultant.

A 2003 order had anticipated the husband returning to an income of \$312,000 per year and set spousal support at \$6,500 per month, in addition to child support for the one child who remained with the wife. A subsequent 2004 order, based upon an income of \$120,000, reduced spousal support to \$2,000 per month..

In 2006, the husband returned to work as a tax lawyer on a contract basis with a gross annual income of \$364,500. He applied for a variation of child and spousal support. The wife had tried to retrain and find employment but suffered from health problems and was essentially unemployed. After deducting business expenses, the trial judge set the husband's income at \$318,900 and ordered spousal support of \$4,000 per month.

In a decision written by Justice Prowse, with Chief Justice Finch and Justice Huddart concurring, the Court of Appeal allowed the wife's appeal and, guided by the Advisory Guidelines, increased spousal support to \$9,000 per month. One of the main issues addressed by the Court of Appeal, apart from the determination of the parties' incomes, was the application of the Guidelines in the context of a variation application under s. 17 of the *Divorce Act*.

Drawing from the *Draft Proposal*, Justice Prowse noted [at para 52] that the Guidelines are to be used with caution on variation applications because they were not designed to address some of the more complex issues that can arise on variation, including the impact of remarriage, second families and retirement. She noted that entitlement issues may also

¹¹ [2007] B.C.J. No. 2657, 2007 BCCA 619.

have arisen since the initial order. However, in an important ruling, Justice Prowse recognized that these complications do not preclude the use of the Guidelines as a tool in a variation application to assist in the determination of amount and duration; but they do require that any such use be undertaken with care and with sensitivity to the specific factual context:

The decision whether to use the SSAG as a guide on variation applications will have to be made cautiously and on a fact specific basis. [para 55]

On the particular facts of the case, Justice Prowse found that it was appropriate to use the Advisory Guidelines as a guide to determining the appropriate amount and duration of support. No issues of entitlement arose. Given the parties' long traditional marriage and the adverse economic circumstances Mrs. Beninger continued to experience as a result of the marriage breakdown, she was found to have a strong continuing entitlement to substantial support on both compensatory and non-compensatory grounds. As for Mr. Beninger's increased income post-separation, which was the basis for the variation application, there was no issue of Mrs. Beninger's entitlement to share in it. The post-separation income increase was found to be directly related first to education pursued during the marriage and second to the skills developed in his years of working during the marriage which were facilitated by Mrs. Beninger's efforts as a full-time homemaker. While Justice Prowse did not explicitly state this, it was also clearly relevant that at the time of the 2003 order the husband had gone bankrupt and was on disability but was now employed as a working lawyer again. The case could be seen as involving not so much a post-separation increase as a re-stabilization of the husband's pre-separation income.

The Guidelines range under the *with child support* formula, based upon a finding that the husband's income was \$330,000 and a refusal to impute income to the wife, was found to be \$8,500 to \$10,000 for an indefinite duration. The \$9,000 a month awarded by the Court of Appeal came close to equalizing the net disposable incomes of the parties after taking into account child support.¹²

Beninger should put an end to arguments that the SSAG have no application on variation, or by extension on review.¹³ As our analysis of the B.C. trial decisions will show, the SSAG are often very useful on variation and review. While *Beninger* has been frequently cited in subsequent decisions at both the trial and appellate level, the careful analysis in *Beninger* is often over-looked. The decision is typically cited for the general, vague proposition that the SSAG have a limited application on variation with little serious analysis of when the SSAG may appropriately be used on variation and review and when

¹² Mrs. Beninger has since brought a successful variation to increase child and spousal support to reflect the increase in Mr. Beninger's income since 2006: see *Beninger v. Beninger* [2008] B.C.J. No. 2612, 2008 BCSC 1806.

¹³ See *J.M. v. L.D.M.*, [2008] B.C.J. No. 1746, 2008 BCSC 1235.

not.¹⁴ For one of the rare examples of a thoughtful application of *Beninger* at the trial level see *Lepp v. Lepp*.¹⁵

(2) *Chutter v. Chutter*: High Assets and Entitlement to Support

In *Chutter* the Court of Appeal addressed an issue on which there has been much uncertainty and debate: the impact of high property awards on spousal support.¹⁶ This has been a long-simmering issue in the law of spousal support, but the SSAG have sharpened the focus on this issue, raising the question of whether a high property award can justify a departure from the formula ranges. In light of the uncertainty and flux in the law, the Advisory Guidelines did not recognize high assets as an explicit exception and left this as an open issue to be dealt with through the developing law.¹⁷

Chutter has provided a partial answer to that question, ruling that a high property award does not necessarily preclude entitlement to spousal support nor render the Advisory Guidelines inapplicable. In the course of resolving this issue, the Court of Appeal produced a handy primer on entitlement, reviewing both the compensatory and non-compensatory bases for spousal support.

Chutter involved a 28 year marriage with a separation in 2003. The parties had one child who was no longer dependent. During the early years of the marriage the parties worked together in developing a water-slide business. After their child was born the wife stayed home and then returned to work as a dental hygienist after child started school. At the time of the trial she was earning \$49,000. The husband continued to work in the business from which he drew an income of \$156,000. The husband paid interim spousal support of \$3,250 a month.

After the division of assets each spouse was left with approximately \$4 million in assets. The wife's total income, after the property settlement, was found to be \$133,000 (employment, rent and \$50,000 interest on her RRSPs worth \$1 million) and the husband's \$214,000 (employment plus rent). The trial judge found that there was no entitlement to spousal support in light of property settlement which satisfied the wife's needs and would enable her to maintain the marital standard of living.

The Court of Appeal, in a decision written by Rowles J.A. (Newbury and Hall JJ.A. concurring), reversed the trial judge, finding that the wife was entitled to support on both compensatory and non-compensatory grounds. In the course of reaching this conclusion the Court of Appeal took the opportunity to engage in a comprehensive review of the compensatory and non-compensatory bases for entitlement, drawing together ideas from

¹⁴ See *James v. James*, [2009] B.C.J. No. 1151, 2009 BCCA 261. In *Jens v. Jens*, [2008] B.C.J. No. 1886, 2008 BCCA 392, the Court stated that none of the factors noted in *Beninger* as qualifying the use of the SSAG on variation were present in the case, but the Court too easily glossed over the issue of including the husband's post-separation income increase in the support calculations.

¹⁵ [2008] B.C.J. No. 640, 2008 CarswellBC 717, 2008 BCSC 448

¹⁶ [2008] B.C.J. No. 2398, 2008 BCCA 507, leave to appeal to S.C.C. denied May 28, 2009, [2009] S.C.C.A. No. 41.

¹⁷ *Final Version*, section 12.6.2.

Moge, Bracklow and numerous trial and appellate decisions from B.C. and other provinces. This part of the decision is a “must read” for all family lawyers in B.C. There is nothing particularly surprising or new in what the Court has said, but it has provided a concise formulation of the basic principles, a formulation that has already become the starting point for all discussions of entitlement.

With respect to compensatory support, the Court found that the wife’s prospects for future financial success had been limited by the role she played in marriage. As well, she had contributed to the business which was the source of the husband’s income. The fact that she earned a reasonable income after separation was found not to preclude entitlement to compensatory support, nor was the fact that she had received substantial assets, for after all the husband had received roughly the same value in assets and also continued to enjoy the income generated by the business.

With respect to non-compensatory support which, in the Court’s words “aims to narrow the gap between the needs and means of the spouses upon marital breakdown”[para. 54] the trial judge was found to have interpreted need too narrowly. The Court of Appeal emphasized that need is a relative concept related to both the marital standard of living and the other spouse’s post-separation standard of living. In an important passage, the Court stated that if the wife was required to encroach on capital to sustain the marital standard of living, then she was arguably suffering an economic hardship from the breakdown of marriage and the loss of the marital standard of living [para 90].

Having found entitlement, the Court then turned to the Advisory Guidelines. As with the law of entitlement, the Court of Appeal provides a helpful overview of the Guidelines, reviewing the changes introduced in the *Final Version* drawing together a handy checklist of exceptions and other situations in which the Guidelines might not be applicable. Another “must read” for B.C. family lawyers.

On the specific issue of high assets, the Court noted the rejection of an explicit exception for high property cases, then went on to rule that high assets do not make the Guidelines irrelevant. Having found that the trial judge erred in including interest on RRSP’s in the wife’s income, the Court determined the SSAG range using an income of \$83,000 for the wife and \$214,000 for the husband. The result: a range of \$4,093 to \$5,458, indefinite.

In the end the Court of Appeal chose an amount of support below the range -- \$2,800 a month. Two reasons were given for the lower award, both related to the property award that the wife received, but much more specific than a generic “high property” exception. First, the wife’s RRSPs were increasing in value (and sheltered from tax), while the husband had to save for retirement. And second, the matrimonial home exceeded the wife’s housing needs; if she chose to keep the assets in a non-income producing form she should bear the economic costs of that choice.¹⁸ If the wife were to downsize to a \$1 million house, equivalent to the husband’s, and invest the other \$1 million, earning

¹⁸ On this issue see also *J.M. v. L.D.M.*, [2008] B.C.J. No. 1746, 2008 BCSC 1235 where \$40,000 of additional income was imputed to the wife to represent the income she could have earned if she had sold the home, purchased a smaller home that would adequately meet her needs, and invest the remainder of the proceeds.

investment income of \$40,000 per year, the SSAG range would be \$2,844-\$3,792/mo. This second reason amounts to imputing income to the wife, and it would have been better if the Court had been more explicit about it and fixed support at the low end of the range, rather than calling it “lower than the suggested range”.

On the specific issue of high assets and spousal support, the impact of the ruling in *Chutter* has been obvious. In a subsequent appeal, *Bell v. Bell*, the Court of Appeal reversed another trial judgment in which entitlement to spousal support had been denied because of a large property award.¹⁹ In finding entitlement on a non-compensatory basis, the Court reiterated its ruling in *Chutter* that the wife should not be required to encroach on her capital to sustain the marital standard of living.

More broadly, *Chutter* signals that the Court of Appeal takes entitlement seriously and expects a careful analysis of entitlement from trial judges and lawyers. In *Jens v. Jens*, decided a few months before *Chutter*, (10 year marriage with no children; wife serious health problems at end of relationship) the Court engaged in a careful delineation of wife’s continued entitlement to support on both compensatory grounds (she had sold her house and business as a result of the marriage) and non-compensatory grounds (her continuing health problems) for entitlement.²⁰ And in *Hinds v. Hinds*, decided shortly after *Chutter*, the Court of Appeal reversed a trial judge’s finding of no-entitlement because of the wife’s repartnering and sent the matter back for a rehearing.²¹ Entitlement to compensatory support was established because the wife had stayed home with the parties’ child during their 16 year relationship while the husband built up his business. Entitlement to non-compensatory support was established because the wife had serious health problems and was in receipt of CPP disability. Finally, in the appeal case we consider in the next section, *Mann v. Mann*, once again the Court demonstrated a nuanced appreciation of the compensatory basis for spousal support in a shared custody case.

Our review of trial judgments will show that there are continuing problems with the way that entitlement is being dealt with at the trial level. As is shown by cases like *Chutter*, *Hinds* and *Mann*, the B.C. Court of Appeal does an excellent job of identifying strong compensatory claims to spousal support. However, at the trial level we see an increasing tendency to analyze support claims as non-compensatory, even those in cases where there are dependent children. Some of the broad language in *Chutter* describing non-compensatory support as related to standard of living, when taken out of context, may unfortunately reinforce this trend. As well, the full implications of non-compensatory support, and the question of whether entitlement is triggered by disparity in income alone, remain live issues at the trial level, resulting in much close parsing of the language used in *Chutter* to describe this basis of entitlement.

(3) *Mann v. Mann*: Shared Custody and Formulaic Traps

¹⁹ [[2009] B.C.J. No. 1201, 2009 BCCA 280.

²⁰ [2008] B.C.J. No. 1886, 2008 BCCA 392.

²¹ [2008] B.C.J. No. 2540, 2008 BCCA 547.

In *Mann v. Mann*, the Court of Appeal decided to build its own formula for the shared custody case on appeal, with unfortunate consequences.²² *Mann* provides an object lesson in the dangers of using outdated material and the dangers of the *ad hoc* construction of “formulas”. This is unfortunate, as there is otherwise much excellent analysis in *Mann*, especially on the compensatory consequences of child care. Spousal support in shared custody cases is an important and complex topic, one of increasing importance given the number of such cases.

Still, the formula constructed in *Mann* should *never* be used in another shared custody case, as it is seriously flawed and it is no longer necessary in light of the revisions in the *Final Version*.

The facts in *Mann* are complicated, with the spousal support claim not being made by the wife until 2006, long after the separation in 1999 and the wife’s final departure from the home in 2001. Before we get into those facts, let’s look at the spousal support outcome. Threshold entitlement was not in issue, just the amount and duration of support, including a retroactive claim. The trial judge ordered a \$25,000 lump sum, representing roughly \$700 per month for three years, had the wife applied for support “in a timely way”. For reasons not made clear, Halfyard J. considered the circumstances “unusual” and did “not find much assistance on the issue of amount” from the SSAG. The Court of Appeal, through Huddart J.A., found the lump sum insufficient, in light of the compensatory basis of the claim, and substituted an order for periodic support of \$900 per month, commencing July 1, 2007 and continuing for eight years.

The Manns had been together for 15 years, married 14. The couple separated in October 1999, when the wife moved across the street. At that point, their two daughters were 12 and 9. The wife returned to the home each morning to prepare the girls for school. In July 2000 she moved back into the home and the Manns lived separate and apart under the same roof until the husband asked the wife to move out in October 2001. She moved out to a nearby residence after they made an oral agreement. The husband would pay the wife \$1,000 per month in child support. He would refinance the house, pay off the existing mortgage and all of the other family debts, and then pay the wife \$16,000, and the wife would have the family car. No spousal support was paid.

The custodial arrangements and child support had a complex history. The children spent “considerable time” with the wife, sufficient to amount to shared custody. At the end of 2003, the older daughter moved into her mother’s, while the younger one continued to go back and forth right up to the trial. In July 2005, at the age of almost 18, the older daughter moved out with a friend, but returned to her mother’s home in 2007. The daughters were 19 and 16 at the 2007 trial. In August 2005 the father had reduced his child support to \$500 per month, as he considered they had agreed he would only pay support until each child reached 18. The trial judge found that the father had shared custody of both daughters from November 2001 to December 2003 and of the younger daughter to the date of trial.

²² *Mann v. Mann*, [2009] B.C.J. No. 829, 2009 BCCA 181, reversing in part [2007] B.C.J. No. 1487, 2007 BCSC 980.

For 2001-02, Mr. Mann had paid \$1,000 per month child support, plus \$150/mo. for gas for the wife plus \$100/mo. for extras for the girls, but the gas arrangement ended, so that he paid \$1,100/mo. after that, until the reduction in 2005. As the Court of Appeal demonstrated, the husband paid amounts of support that ultimately proved to be mostly above the set-off amount under s. 9 and closer to the full table amount for two children.²³ Further, the trial judge made an order for retroactive support for another year for the older daughter (at \$500 per month), and ordered the full table amount for one child of \$835 a month, increased to \$1,002 per month in May 2006. In effect, the husband was treated as having paid the full table amount of child support throughout the period from 2001 to 2007. These child support results were upheld by the Court of Appeal and were important to the spousal support outcome.²⁴

A few quick words about property division. The 2001 oral agreement was found to be “final” with respect to the assets in question, notably the family home (except for a small undervaluation of the home, which was adjusted). The rest of the family assets were divided by the trial judge as of a triggering date in 2006. The Court of Appeal modified the outcome, describing it as a “minor reapportionment” in favour of the wife, not requiring her to pay half the value of the family car (\$1,250) and awarding her half of the husband’s 2000 and 2001 defined contribution pension and RRSP (about \$7,000), plus interest on the balance owing from the family home. The reapportionment, said Justice Huddart, “goes little distance to meet the objectives of a compensatory order in the circumstances of this case”.²⁵

In the reapportionment part of the judgment, there is a careful analysis of the compensatory consequences of this marriage for the wife, critically important to the spousal support outcome. As Huddart J.A. noted, by the 1999 separation, the wife had been “primarily a homemaker and child care giver for more than nine years, returning to the work force only as needed”.²⁶ The wife worked part-time after separation,²⁷ made \$16,000 in 2002, obtained a full-time job, got laid off, found a lower-paying full-time job and, by the 2007 trial, was working full-time as a claims advisor on a contract basis for an insurance company, earning \$37,000. The husband worked from 1988 on for a linen company, rising to a supervisory position and then general manager: he earned \$55,000 in 1999, \$93,000 in 2002 and \$111,500 by 2007.

The spouses may have shared custody after separation, but before separation the wife was the primary caregiver, a pattern that recurs in the trial decisions on shared custody,

²³ The table for 2001-2005 is found at para. 27, *ibid.*, of the Court of Appeal judgment.

²⁴ Given the income disparity in the *Mann* case and the tax positions of the spouses, it is baffling why the trial judge would order the full table amount of child support, rather than the set-off, and then reduce spousal support. Lower child support and higher spousal support would increase the resources of the two household. Even more baffling is why any court would order lump sum spousal support and obliterate any tax advantage at all.

²⁵ *Ibid.* at para. 77.

²⁶ *Ibid.* at para. 51.

²⁷ The wife made \$2,436 in 1999 and \$8,570 in 2000, before her income rose to \$15,951 in 2001, where it hovered until 2004, when it jumped to \$37,614.

discussed below. In this sense, the facts in *Mann* are not “unusual”, but typical of the kind of shared custody case that leads to a spousal support claim. This was not a case of two parents who had shared the demands of child-rearing during the marriage and then continued to share parenting after separation, with post-separation incomes that reflected those choices. Justice Huddart was acutely aware of the economic disadvantages faced by the wife after separation, beyond “the strict needs-based approach” of the trial judge. The duration should certainly have been longer and the amount higher, once the principles of compensatory support were applied.

The Court of Appeal then looked at the budgets of the spouses and their income histories. The trial judge had found the wife to be “self-sufficient” at an income of \$37,000 in 2007, by comparing it to the husband’s \$55,000 in 1999 and the family’s standard of living at that time. Huddart J.A. was prepared to take the husband’s full post-separation income increase into account. The “base” for his increases had been “laid during the marriage”, his income was over \$90,000 already in 2001 and the wife’s earlier failure to claim spousal support had permitted the husband to accumulate more assets.²⁸

At this point, unfortunately, the Court of Appeal decided to use an alternative formula to calculate a range for spousal support. Why? Here’s what they said:

The *Spousal Support Guidelines* cannot be applied in the circumstances of this case, without adjustment for the deferred application for spousal support, consideration of the respondent’s significant post-separation income increase, his underpayment for the family assets in 2001, as well as the amounts he actually paid under the parties’ shared custody arrangement. But, they are helpful in establishing a range of appropriate support and their consideration in this case provides a better range than the needs-based approach the trial judge took...

As commentators have noted, the application of the “with child” formula is problematic in shared custody situations, particularly where a payor spouse is paying the full table amount of child support. A useful alternative may be to apply a modified version of the “without child” formula (Lisa J. Hamilton, Anne Demeulemeester and Scott L. Booth, “The Spousal Support Guidelines: Buyer Beware! Read the Entire Manual and Apply with Care”).... I would adopt that approach to determine a range of appropriate support in this shared custody situation.²⁹

Justice Huddart then computed the following “alternative” formula, using the 2002 incomes:

Husband’s gross income: \$93,000
Less “adjusted child support paid” (grossed-up?): \$20,000

²⁸ We might add that a shared custody case is one where there is a strong argument to take the increase into account, as spousal support may be critical to maintaining similar standards of living between the two households, a central concern of the Supreme Court of Canada in *Contino*.

²⁹ At paras. 82, 83.

(it's not clear whether this is \$1,250/mo., or \$1,100/mo.)

For an adjusted gross income: \$73,000

Wife's gross income: \$16,000

Adding back child support paid (again, not clear): \$12,000

(the cited paper would have *deducted* the grossed-up child support)

Adding back an amount for the child tax benefits: \$1,000

For an adjusted gross income: \$29,000

Adjusted gross income difference: \$46,000

Multiplied by 22.5 to 30 per cent (15 years times 1.5 to 2 per cent per year)

For spousal support of \$10,350 to \$13,800/year, or \$862 to \$1,150/month

The same formula is used for the 2007 incomes and the range is almost the same (\$872 to \$1,163/month). The court considers a minimum lump sum would be \$70,000, beyond the ability of the husband, and then opts for 8 years of support at \$900 per month,

taking into account the appellant's delay in pursuing spousal support, the additional commitments that delay permitted the respondent to make, and the fact that the appellant's primary contribution was to the advancement of the respondent's career, as opposed to the acquisition of property, his post-separation income increase, and the child support he paid....

We have taken the time to set out the "alternative formula", before offering our criticisms.

First, the Court of Appeal relied upon an out-of-date paper, presented in March 2006, after the *Draft Proposal* was released, but long before the *Final Version* was released in July 2008. *Mann* was argued in March 2009 and decided on April 28, 2009. The 2008 *Final Version* contains a lengthy section, describing in detail the revisions to the *shared custody* formula, as a result of the feedback and the Supreme Court's decision in *Contino*.³⁰ The *shared custody* formula can be easily adjusted for the payment of an amount of child support that departs from the set-off amount.³¹ It is important that family law lawyers, and judges, use the *Final Version* and the updated software.

For the record, the *shared custody* formula ranges can be computed on the basis that the husband paid the full table amount of child support, rather than the set-off, in 2002 and

³⁰ *Final Version*, section 8.6, including 8.6.1 (Adjusting for rotating child benefits), 8.6.2 (Adjusting the ranges for child support that departs from the set-off) and 8.6.3 (Adjusting the limits of the range).

³¹ DIVORCEmate made all the necessary adjustment to its software in its mid-2008 release after the *Final Version*.

2007, as the Court of Appeal wished to do.³² For 2002, with two children, then aged 14 and 11, incomes of \$93,000 and \$16,000, and the wife receiving the child benefits, the range would be about \$848-\$1,195-\$1,555/mo. Of interest here is that the Court of Appeal's \$900 per month in this setting would leave the wife's household with just under 50 per cent of the family's total net disposable income, not far off a result often adopted in these cases and discussed in the *Final Version*.

The 2007 shared custody range reveals the danger of using a "homemade" formula. At this point, there is only one child aged 16 subject to shared custody, incomes are \$111,500 and \$37,000 and the wife is assumed to be receiving the child benefits. The husband is paying \$1,002 per month child support, which is the full table amount, and the spousal support range would be \$998-\$1,348-\$1,936/mo. At the \$900 per month spousal support and \$1,002 child support ordered by the Court of Appeal, the wife's household would receive only 46.5 per cent of the family's total net disposable income. For that proportion to go up to 50 per cent, spousal support would have to be \$1,400/mo. in 2007.

Second, even the "alternative" formula created by the Court of Appeal seriously misstates the suggested version put forward by Hamilton, Demeulemeester and Booth. Had that suggested version been applied, the court should have *deducted* the grossed-up "notional table amount" of child support for the *wife* (using her income) from her gross income, and *not added* to the wife's income the child support *paid by the husband*.³³ The court also added back incorrect amounts for child tax benefits for the wife in both 2002 and 2007, using the amount of \$1,000 per year in both situations.³⁴ Had the court even applied the correct version of its "alternative" formula, the 2002 range would have been \$1,084-\$1,264-\$1,445/mo. and the 2007 range \$1,123-\$1,310-\$1,498/mo., with these low-end-of-range amounts well above the court's \$900 per month.

Third, although the numbers didn't work out too badly in *Mann*, at least for the 2002 calculation, less so for the 2007 version, this was blind luck. The *without child support* formula is driven by length of marriage and income disparity, and not by custodial arrangements, child support, income taxes, child benefits, child standards of living and spousal sacrifice like the *with child support* formula. In short-to-medium childless marriages, the *without child support* formula primarily reflects non-compensatory considerations. After all the emphasis upon the compensatory nature of the wife's claim

³² There are some circumstances where no adjustment should be made, despite a child support amount higher than the set-off, e.g. where the lower-income spouse pays for more of the children's expenses. In *Mann*, there was no particular reason for the full table amount being paid, apart from general standard of living.

³³ The paper's suggested version was modelled upon the *custodial payor* and *adult child* Guidelines formulas that follow this approach, deducting from each spouse's income their respective contributions to child support.

³⁴ The problems in including the child benefits in a formula like this are numerous. First, the child tax benefit is not taxable, which would require a gross-up under this gross income formula. Second, the child tax benefit is reduced as the recipient's income rises by the payment of spousal support, which makes it a moving target. In the 2007 setting, with one child, the non-taxable benefits would be about \$2,200 per year with no support, but would drop down to \$1,200 per year with the payment of \$900/mo. of spousal support. Finally, in 2002, the benefits would be much larger than \$1,000 for two children, given the wife's low income, likely somewhere between \$5,000 and \$6,000 per year before any gross up.

in *Mann*, the Court of Appeal’s use of this “alternative” formula seriously understates the effect of that disadvantage upon the wife. Had it been a ten-year marriage, the “alternative” formula range would have been a ridiculously low \$575-\$670-\$766/mo., not far off the trial judge’s \$700 per month which the Court of Appeal criticized. A five-year marriage with two very young children would have produced a range that was in turn *half* of those numbers.³⁵

Fourth, in its reasons, the Court of Appeal notes that child support for the younger daughter had “recently” terminated when she went to live on her own. Once that happens, the spouses can cross over to the *without child support* formula. The appeal court eventually made an eight-year order, commencing in 2007 and ending in 2015. For the 2002 incomes, the *without child support* formula would produce a range of \$1,444-\$1,684-\$1,925/mo. and, for the 2007 incomes, a range of \$1,397-\$1,630-\$1,863/mo. Again, the low ends of these ranges are well above the \$900/mo. ordered by the court.

Fifth, when we crafted the *custodial payor* and *adult child* formulas around the backbone of the *without child support* formula, with adjustments for grossed-up child support, there were good reasons for doing so. The *adult child* formula only applies for a few years as the couple transitions from the basic, shared custody or split custody formulas to the *without child support* formula after the last child ceases to be a “child of the marriage”.³⁶ The *custodial payor* formula involves support paid by the higher-income custodial spouse to a single, non-custodial spouse for a mixture of non-compensatory and compensatory reasons, depending upon the length of the marriage and the past allocation of child care, as is explained in greater detail in the *Final Version*.³⁷ Shared custody cases are always different, as the rationale for spousal support will be compensatory, depending upon the past and future allocations of child-rearing responsibilities.

In general, in shared custody cases where there is a large enough income disparity to found any claim for spousal support, there will usually be a past history of primary caregiving by one parent – as was true in *Mann*, and as is found in almost all of the trial decisions on shared custody that we discuss later.³⁸ Going forward, a shared custody arrangement may equalize the relative *future* disadvantage from child care,³⁹ but the past disadvantage is still operating and will justify compensatory spousal support. What

³⁵ Lorne MacLean makes another important point about this “alternative formula”: “*Mann* creates the potential for a dramatic disparity between households in a very short marriage to even medium length marriages with children.” See Lorne MacLean, “Oh *Mann*! Modified support formula may lead to trouble”, *The Lawyers Weekly*, Vol. 29, No. 9 (July 3, 2009). MacLean’s criticism about the Court of Appeal’s inclusion of the husband’s post-separation income increase, however, does not correctly characterize the operation of the SSAG in these cases.

³⁶ *Final Version*, section 8.10.

³⁷ Section 8.9.

³⁸ The focus here is upon disadvantage caused by parenting roles, but there can also be other reasons for compensatory loss, e.g. moves to facilitate the other spouse’s career or support for the other spouse’s education and training.

³⁹ It must be noted that some “shared custody” arrangements may cause or maintain economic disadvantage going forward, depending upon the time proportions, the schedule and the respective parental responsibilities. We should not be quick to just assume no future disadvantage by reason of an arrangement labelled “shared custody”.

shared custody can permit in this situation is a shorter duration for spousal support, as the support recipient has fewer obstacles for a return to the full-time paid labour market and self-sufficiency. Only in the ideal example of parents who truly share parenting while together and who continue to do so after separation can one suggest a weak compensatory claim. But those will be the cases where parental incomes are not that far apart.⁴⁰

Mann demonstrates that counsel and courts should be very careful before suggesting whole new “alternative” formulas, formulas that might produce the “right” or the “desired” number on a particular set of facts, formulas that have not been tested across a wide range of incomes, numbers of children, etc. as was done for each of the formulas found in the Spousal Support Advisory Guidelines. That was the painstaking part of the process of formula development that may not be obvious to those reading the document or using the software. As long as the “alternative formula” in *Mann* is not used again, and the proper shared custody formula from the *Final Version* is used, the discussion of compensatory principles in shared custody cases found in *Mann* will continue to be helpful.

(4) *Shellito v. Bensimhon*: the Disability Exception

Disability cases, particularly those involving shorter marriages, raise difficult issues of spousal support on which the law is uncertain and unresolved. These issues inevitably spill over into the Advisory Guidelines. The *Final Version* of the Advisory Guidelines recognizes a possible exception to the formula outcomes for cases of disability.⁴¹ The February 2008 decision in *Shellito v. Bensimhon* was the first appellate decision on the Guidelines to deal explicitly with the issue and to recognize that disability may justify a departure from the Guideline ranges.⁴²

The case involved a short relationship with no children, a relationship between 5 and 6 years. Both parties were in their late twenties when their relationship began and both had full-time employment. However, since childhood, the wife had suffered from serious migraines which resulted in her having to cease employment during the marriage. The wife, who was qualified as a teacher, was unemployed at the time of separation in April 2006 and had received interim spousal support of \$750 for 12 months. The husband’s annual income as a corporal in the R.C.M.P. was taken to be \$88,000, with overtime.

At trial in 2007 the trial judge ordered equal sharing of four properties owned by the husband, two of which he brought into the relationship, properties that had increased significantly in value during the course of the marriage because of rising real estate values. The husband’s claim for reapportionment was rejected, with the court balancing the wife’s ongoing need because of her disability against the short marriage and the premarital property. The wife thus received over \$350,000 as a result of the equal property division.

⁴⁰ If there was an income disparity in this “ideal” case, in a marriage of any length there would still be a non-compensatory claim for spousal support.

⁴¹ *Final Version*, section 12.4.

⁴² 2008 CarswellBC 469, 2008 BCCA 68.

With respect to spousal support, the trial judge found that the wife would be able to take on increasing levels of part-time employment beginning in September of 2007 and would likely be able to return to full-time employment by 2010, i.e. within a further three years. While recognizing that her part-time earnings would vary over this period, he imputed an average income to her of \$18,000. In determining the amount of spousal support, the trial judge found that the maximum amount under the Guidelines *without child support* formula, \$700 per month for 3 to 6 years was “too low” under the circumstances. Instead, support was set at \$1,800 per month for 4 months until September 2007, dropping to \$1,500 for the next 8 months, followed by \$1,200 per month for the final 18 months. As a result spousal support was to be paid for a total duration of 4 years and 4 months.

The Court of Appeal upheld the trial judge’s decision on both property division and spousal support. Most of the reasons were devoted to the property issue. With respect to spousal support, the Court simply stated that the Guidelines were advisory and not “definitive: and that “the trial judge made no error in principle in departing from the SSAG to reflect the factor of Ms. Shellito’s disability.” [para 24]. The trial judge was found to have explicitly taken into account the asset division in reaching this result, thus there was no “double-counting” of the disability factor.

Shellito thus offers appellate level recognition that disability may be a factor justifying a departure from the formula ranges under the Guidelines. However, given the importance of the issue and the frequency with which it comes before the courts, one might have wished for a more extensive discussion of the issue. Neither the trial judge nor the Court of Appeal referred to the explicit recognition of disability as a possible exception in the Guidelines or to the suggestions in the Guidelines with respect to the structuring of such an exception. Neither compared the outcome under the Guidelines with that reached by the trial judge. That analysis would have shown that the trial judge’s order had a total value of \$64,800 as compared to the maximum global award under the *without child support* formula (\$700 per month for 6 years) of \$50,400—a departure but not an extreme departure. The award did fall within the time limits suggested by the formula, and in fact it fell short of the maximum duration, suggesting an element of “restructuring”. It was only the amount that was increased beyond the formula ranges (even after taking restructuring into account). To what extent this result was driven by the somewhat unusual nature of the facts in this disability case—*i.e.*, that the wife was expected to make a gradual recovery from her occupational disability or the significant property award—remains unclear.

In its more recent decision in *Jens v. Jens*, the Court of Appeal again dealt with a case involving disability, extending the duration of spousal support for a wife who had continued to experienced serious health problems after the termination of a 10 year marriage with no children for a further 5 years. The extension resulted in a total duration of 8 years and did not involve the Court to going outside the Guidelines ranges.⁴³

⁴³ [2008] B.C.J. No. 1886, 2008 BCCA 392.

Looking at the Guidelines case law as whole, three approaches to disability cases can be identified. A first group of courts will opt to resolve disability cases within the formula ranges, for both amount and duration, especially in short-to-medium marriages where the recipient spouse is relatively young. In effect, these courts do not recognize any disability exception. The B.C. Court of Appeal decision in *Shellito*, while recognizing disability as an exception, came fairly close to the upper end of the formula ranges and imposed a time limit on support and its decision in *Jens* falls clearly within this pattern. For a trial level decision reflecting this approach see *Rayvals v. Rayvals*.⁴⁴ A second group of courts will apply an exception, but only on duration, opting for an amount of support in the lower end of the range, on an indefinite basis. Yet a third group of courts will make disability an exception on both fronts by ordering an amount higher than the range and for a duration that is indefinite, as was the case in *Lepp v. Lepp*.⁴⁵

These divergent approaches explain why the *Final Version* continues to reflect a possible exception for illness or disability, until the courts can settle upon one particular approach.

(5) Incomes Above \$350,000: Not Much Guidance

In British Columbia, both trial and appeal courts have been prepared to apply the Guidelines formulas right up to the “ceiling” of \$350,000 per year of gross payor income, and usually to incomes that are not much above that level. It is not surprising that high income cases make their way to the Court of Appeal with some frequency – the stakes are large, the income issues are often difficult, and spousal support issues are tacked on to property division and reapportionment arguments. In the past two years alone, there have been five “above ceiling” cases.

The short answer is that there has not been much guidance from the Court of Appeal to assist in the resolution of these cases. There has been a tendency to mention that the Advisory Guidelines are not of much assistance and then to pick a big number without much explanation. Rarely does the Court of Appeal even mention the SSAG ranges, even where it is clear that the ranges have had some effect upon the outcome.

The most recent two appeal cases demonstrate that approach, both variation cases, both twenty year relationships, one where the payor’s income fell and another where it rose. In *Bell*, the husband was a retired diplomat, whose income from corporate and other sources had been \$1.5 million at the time of the 2006 agreement and order (which also divided \$12 million in assets).⁴⁶ The trial judge found his income fell to \$335,000 in 2007, but the Court of Appeal held the trial judge had incorrectly excluded certain remuneration received as a corporate director and fixed the husband’s income at \$650,000. The husband was supporting the youngest son directly and completely for his university studies in Ontario. The 2006 agreement had provided for spousal support of \$10,000 per month and the trial judge terminated support, after fixing the wife’s income at \$210,000 (\$180,000 investment income plus an imputed \$30,000 for employment income). On

⁴⁴ *Rayvals v. Rayvals*, [2008] B.C.J. No. 233, 2008 BCSC 176.

⁴⁵ *Lepp v. Lepp*, [2008] B.C.J. No.640, 2008 BCSC 448.

⁴⁶ *Bell v. Bell*, [2009] B.C.J. No. 1201, 2009 BCCA 280.

appeal, the Court found continuing entitlement, noting the large income disparity and citing *Chutter*, and then ordered \$5,000 per month. The Advisory Guidelines were “not... useful in the circumstances here”.

Still, it is always interesting to run some SSAG numbers in these cases, to frame the outcome. Assuming the wife’s income is \$210,000 and his income is \$650,000, the range would be \$11,000 to \$14,667/mo. If we calculate the range for the “ceiling” of \$350,000, the range would be \$3,500-\$4,667/mo. In the end, since Mr. Bell’s income had been cut in half, said Justice Hall, so too was his spousal support, what we might call “the rule of proportionality” in variation cases, one of those vaguely arbitrary but simple family law rules.

In the other appeal, *James v. James*, we can see this “rule of proportionality” making support go up, this time from \$5,750 in 2004 to \$9,000 per month.⁴⁷ Mr. James’ income went up from \$498,000 in 2004 to something above \$900,000 per year, but the trial judge had left spousal support at \$5,750/mo. It’s hard to be precise about his income, as no one at trial or on appeal ever made a clear finding of income.⁴⁸ Hall J.A. did state that not all funds should be stripped from the husband’s corporation as the food distribution corporation was “exposed to the winds of economic fortune or misfortune”, implying some reduction of the income figure attributed to the husband. The Court explicitly rejected the husband’s argument that, in light of the spouses’ capital positions, the “ceiling” of \$350,000 should be used for spousal support calculation. Also rejected was the husband’s argument that his income was still around \$500,000, and the appeal court increased spousal support. Hall J.A. noted that “some discretion can be considered concerning treatment of the SSAG”.

Again, some ranges might have helped to frame the appeal court’s analysis. If the ceiling of \$350,000 were used and zero income for the wife, the range would be \$8,750-\$11,666/mo. (compared to the \$9,000/mo. ordered). At \$500,000, the range would be \$12,500-\$16,667/mo. If we adjust the same \$500,000 income using the *adult child* formula for the husband’s expenditure of \$22,676/yr. for the university-age daughter, the range comes down to \$11,493-\$14,323/mo.

The amount of spousal support was not really in issue in *Teja v. Dhanda*, although almost everything else was.⁴⁹ The husband was a medical specialist, with a professional corporation, whose income was found on appeal to be \$630,000 per year, and not the lower amount of \$425,000 found at trial. Hall J.A. provided a careful analysis of section 18 of the *Child Support Guidelines* and concluded that all the income of the professional corporation should be attributed to the husband, a holding with wider implications. Child support was increased on the wife’s appeal, but she had not appealed to increase the

⁴⁷ [2009] B.C.J. No. 1151, 2009 BCCA 261. Again, Mr. James was directly supporting the younger child’s full university expenses.

⁴⁸ The corporation paid out significant sums as bonus or dividend, and it was returned to the corporation as shareholder loans. Various numbers were bandied about for income: “in the range of \$1 million” (\$1,049,368 in 2006), a suggested child support table amount that would mean an income of \$986,700. The only clear finding was that, contrary to the husband’s assertions, his income showed “a very significant increase” above \$500,000 per year.

⁴⁹ [2009] B.C.J. No. 928, 2009 BCCA 198.

spousal support from the \$10,500 per month ordered at trial. The husband did seek on appeal to reduce and time limit the spousal support, but those issues got booted to the review, moved up to May 2010 (from August 2011).

In the earlier *Smith* appeal, the orthodontist husband earned \$477,206 per year.⁵⁰ The 16-year-old child lived with the wife, who was “capable of earning about \$35,000 a year”. The husband was 62 years old at trial, the wife was 51, the marriage had lasted ten years, and the husband had continued to pay all the wife’s expenses for the next seven years after separation in the hope of reconciliation. The trial judge ordered child support of \$3,528/mo., plus \$3,000/mo. in s. 7 expenses, upheld on appeal. Not upheld on appeal was the trial judge’s spousal support award, which she described as “more money for a lesser period of time”: \$13,750/mo. for three years from July 2006, then \$11,000/mo. for two years and then \$8,000/mo. for two years. At trial, the wife’s lawyer had described the SSAG range for an income of \$450,000 to \$500,000 as \$11,000 to \$15,000 per month, using the *with child support* formula. On appeal, Newbury J.A. reduced the monthly amounts, but removed the time limit: \$8,000/mo. for four years, then \$6,500/mo., indefinite. The lower amount was intended to restrain the wife’s spending or to encourage her to seek employment. The step-down was intended to recognize the husband’s need to scale down his work week. While removing the time limit, the Court also acknowledged a likely variation application upon the husband’s retirement.

Again, the Court of Appeal made no reference to the possible SSAG ranges. The *without child support* range, without any s. 7 expenses, would be \$11,368-\$13,802/mo., as was suggested by the wife’s lawyer at trial. Once the s. 7 expenses are considered, however, the correct range would be \$9,237-\$11,351/mo. If one were to calculate the spousal support payable at the \$350,000 ceiling, with no allowance for s. 7 expenses, the range would be \$7,601-\$9,470/mo., a range that is an important one to work out in any *with child support* case above the ceiling. Even more telling is the *without child support* formula range for this ten-year marriage, \$5,528-\$7,370/mo., with a mid-point of \$6,449/mo.⁵¹

The most remarkable of this set of high income cases is *Loesch v. Walji*.⁵² Admittedly, this is an interim support appeal, so the standard of review is very forgiving and the dismissal is hardly surprising. But the Court says more about high income cases in this one decision than in all the others put together. Mr. Nazerali (also known as Walji) admitted receiving income, tax-free, of \$900,000 per year, grossed up by the chambers judge to \$1.6 million, with much evidence that there was much more available. The chambers judge ordered interim child support of \$30,000/mo. for four children and interim spousal support of \$50,000/mo., all upheld by the Court of Appeal. There is a helpful discussion of the “ceiling”, noting the two approaches of “minimum plus” and “pure discretion” found in the *Draft Proposal*. The SSAG were stated to be “really of no

⁵⁰ [2008] B.C.J. N. 1068, 2008 BCCA 245.

⁵¹ These numbers are only illustrative, as this is not a case that would ever reach that “cross over” stage, to the *without child support* formula, as the marriage was only ten years in length and the “rule of 65” would not apply (the wife was only 44 years old at separation).

⁵² [2008] B.C.J. No. 897, 2008 BCCA 214.

assistance in this case” and the chambers judge had gone the route of “pure discretion”, based upon evidence of the family’s needs and the husband’s ability to pay (he had been paying \$45,000 to \$55,000 per month on a voluntary basis, roughly equivalent to what was ordered in taxable form).

What is significant about *Loesch v. Walji* is that in this case, the case with the highest income of all five, Kirkpatrick J.A. actually looked at SSAG ranges. The wife’s lawyer had correctly stated the *with child support* formula range for \$1.6 million to be approximately \$30,000 to \$35,000 per month. The formula range for the \$350,000 ceiling, with no income for the wife, would be \$5,835-\$7,123/mo., correctly described by the Court as “the suggested minimum range of support (using a calculation of child support at that ceiling)”. Further, the Court of Appeal gently stated: “It would have been preferable if the chambers judge explained the discrepancy between the Spousal Support Advisory Guidelines amount of support and the amount ultimately awarded.” The more careful Guidelines approach of *Loesch* seems to have been forgotten in the more recent appeal decisions.

III. The *Without Child Support* Cases

Of the 95 trial decisions from the past year found in Appendix II,⁵³ only 31 were cases without dependent children that used the *without child support* formula.⁵⁴ Of these 31, three did not involve determinations of spousal support: two were estates cases involving applications under the *Wills Variation Act* where the SSAG were considered as part of the analysis but not ultimately relied upon,⁵⁵ and one involved supplementary reasons clarifying the tax implications of an earlier order for lump sum retroactive support.⁵⁶ Thus for purposes of analysis, there are 28 cases under the *without child support* formula, admittedly a relatively small sample. In recognition of this, we have at points dipped into the cases from the prior year, 2007/2008 and used them used to supplement the analysis where appropriate.⁵⁷

⁵³ Included in Appendix II are two earlier *without child support* decisions not included in previous summaries: *J.M. v. L.D.M.*, [2008] B.C.J. No. 1746, 2008 BCSC 1235, from April 11, 2008, and supplementary reasons in another decision from April 2008 released on June 30, 2008: *Kerman v. Kerman*, [2008] B.C.J. No. 710, 2008 CarswellBC 793, 2008 BCSC (April 24, 2008), supplementary reasons at [2008] B.C.J. No. 1244, 2008 BCSC 852 (June 30, 2008).

⁵⁴ Two cases did involve dependent adult children, but the *without child support* formula was used nonetheless, without taking child support into account: see *Sarton v. Sarton*, [2008] B.C.J. No. 2619, 2008 BCSC 1760 (child support to be dealt with after spousal determined under *without child support* formula) and, *J.M. v. L.D.M.*, *supra*, (husband’s payment of expenses for adult children attending university not taken into account in determining spousal under *without child support* formula).

⁵⁵ *Lamoureaux v. Kalyk*, [2009] B.C.J. No. 878, 2009 BCSC and *Viberg v. Viberg Estate*, [2009] B.C.J. No. 38, 2009 BCSC 27.

⁵⁶ *Kerman v. Kerman*, *supra*.

⁵⁷ For summaries of the B.C. trial decisions between Sept. 2007 and June 2008 see Appendix III of our paper “The Spousal Support Advisory Guidelines Three and a Half Years Later” (June 16, 2008, revised August 1, 2008). For the period June to September 2007 see Appendix III of our paper “The Spousal Support Advisory Guidelines 31 Months Later” (Sept. 12, 2007). Both papers are available at <http://www.law.utoronto.ca/faculty/rogerson/ssag.html>.

This overview will show relatively few surprises in the *without child support* cases. There is a high degree of consistency with the Guidelines ranges, both on amount *and duration*, and the departures from the formula ranges for the most part fall within easily identifiable categories of exceptions. B.C. seems to have little difficulty with the time limits set on spousal support in short and medium length marriages. In many cases the main issue is the determination of income. Apart from this, the live issue in many of these cases, as in the Court of Appeal decisions, is entitlement – sometimes on initial applications and sometimes on review and variation. In particular, some of the cases raise interesting issues about when there is entitlement to non-compensatory support.

While some cases demonstrate an increasingly sophisticated understanding of the Advisory Guidelines, others reveal a fairly rote application. There are many instances of defaulting to the middle of the range with little analysis of issues such as location within the range and no reference to or apparent awareness of exceptions. Although this approach does not necessarily lead to inappropriate results, in some cases potentially important issues are being missed. And obvious mistakes are still being made: careless income determinations and mistaken calculations.

(1) Long Marriages and Crossovers

Over half of the *without child support* cases (15 of 28) involved long marriages⁵⁸ (20 years and over); of the remainder, 9 were medium length marriages (10 to 19 years) and 4 were short marriages (under 10 years).⁵⁹

In all but two of the long marriage cases there had been children;⁶⁰ thus the majority of the long marriage cases involved strong compensatory claims.

Somewhat surprisingly, 4 of the 9 medium length marriage cases were also relationships where there had been children: 3 were what in SSAG terminology would be referred to as “crossover” cases—cases where the initial order had been made when there were dependent children and the current proceedings were either reviews or variations brought after the children were no longer dependent.⁶¹ A fourth case involved a situation where

⁵⁸ The term “marriage” is used for convenience, rather than “relationship”, and includes non-marital relationships as well as periods of cohabitation prior to marriage. There were 4 cases involving unmarried couples, 3 short and 1 medium length: *McEwan v. Fisher*, [2009] B.C.J. No. 831, 2009 BCSC 559 (Cole J.) (April 27, 2009) (9 yrs); *Roach v. Dutra*, [2009] B.C.J. No. 353, 2009 BCSC 229 (Pearlman J.) (Feb 27, 2009) (6 yrs); *Reavie v. Heaps*, [2008] B.C.J. No. 1461, 2008 BCSC 1038 (Arnold-Bailey J.) (July 31, 2008) (2 yrs); and *Waters v. Conrod*, [2008] B.C.J. No. 1256, 2008 BCSC 869 (Johnston J.) (July 2, 2008) (10 yrs).

⁵⁹ In one case the length of the relationship was unknown.

⁶⁰ The two long marriage cases without children are *Lam v. Chiu*, [2008] B.C.J. No. 1648, 2008 BCSC 1177 (Pearlman J.) (Aug 28, 2008) and *Trewern v. Trewern*, [2009] B.C.J. No. 343, 2009 BCSC 236 (Metzger J.) (Feb 26).

⁶¹ *Domirti v. Domirti*, 2009 BCSC 749 (16 year marriage, separation 1994, 3 children); *S.J.A. v. S.A.*, [2009] B.C.J. No. 725, 2009 BCSC 486 (17 year marriage; separation 2005, 1 child); and *Gosling v. Gosling*, [2008] B.C.J. No. 1870, 2008 BCSC 1323 (14 year marriage with children; separation 1992).

there had been children from a prior relationship brought into the marriage.⁶² Two short marriage cases also involved children from a prior relationship in circumstances where no child support was claimed for the step-children.⁶³

It is important to be aware of these medium length (and even short) marriage cases with children under the *without child support* formula. These cases will often raise strong compensatory claims where one would typically expect awards to be pushing the higher end of the ranges for both amount and duration. As we will discuss below, the compensatory element in these cases is often missed in the analysis

(2) Lots of Reviews and Variations

Review and variation applications are common among the *without child support* cases. While the majority of cases involved initial determinations of spousal support, 9 of the 28 cases (approximately one-third) were applications for review or variation. We thus see a pattern of increasing use of the Advisory Guidelines in more complex contexts involving issues such as material change in circumstances, post-separation income increases, the promotion of self-sufficiency, remarriage and repartnering, and retirement.

One striking feature of the *without child support* cases was the absence of cases involving applications for interim spousal support: only 2 cases. Interim applications were somewhat more common under the *with child support* formula.

Three cases involved claims for retroactive support.

(3) Relatively Few Departures from the Formula Ranges and Mainly Predictable

One of the *without child support* cases involved a prior binding agreement and the SSAG were simply used to determine the fairness of the agreement.⁶⁴ That leaves 27 *without child support* cases where there was a determination of spousal support. Of these, only 7 involved awards that fell outside the Guidelines ranges taking both amount *and duration* into account. 74 per cent of the cases thus fell within the ranges for both amount and duration. This is a very high percentage given the wide array of factual situations covered by this formula and the context of litigated cases which contain a relatively high percentage of atypical cases. In 2007, for example, only 52 per cent of the *without child support* cases fell within the range for amount.

⁶² *Burton v. Gillies*, [2009] B.C.J. No. 1, 2009 BCSC 1 (Smith J.) (Jan 2, 2009) (14 year relationship, no children, w children from prior marriage now grown)

⁶³ *Roach v. Dutra*, [2009] B.C.J. No. 353, 2009 BCSC 229 (6 year relationship) and *Reavie v. Heaps*, *supra*. (2 year relationship, wife has 12 year old child).

⁶⁴ *Poitras v. Garner*, [2009] B.C.J. No. 206, 2009 BCSC 144 (Goepel J.) Under the agreement the wife received almost all of the property but waived spousal support. SSAG calculations were used to assign a value to the waived spousal support claim, which was shown to exceed the value the wife received by way of the unequal division of property.

Most of the cases where the outcomes were not within the formula ranges are not surprising. They fall within easily predictable categories and the deviations from the formulas are easily justifiable on the particular facts.

One was a case involving a prior **agreement**:

- In *S.K. v. L.K.*, [2009] B.C.J. No. 105, 2009 BCSC 69 an agreement was found to be unfair, but the amount of interim support ordered was lower than the SSAG range because of the agreement and the delay in seeking a variation.

Two were cases involving **variation/review** and complicated facts, including high assets in one:

- In *Waters v. Conrod*, [2008] B.C.J. No. 1256, 2008 BCSC 869 the court refused to decrease the amount of spousal support on a variation/review despite a significant decrease in the husband's income, in part because of the husband's very large asset base (over \$4 million). The court found that the SSAG were not helpful in a case such as this where the payor's ability to pay was so heavily influenced by his asset or capital base and where he had the ability, as the major shareholder in a corporation, to control the amount of income he received. There was also a strong compensatory claim for spousal support and limited sharing of assets because the parties were not married.
- In *Rakose v. Rakose*, [2008] B.C.J. No. 1632, 2008 BCSC 1165 the court found that the material change threshold had not been met and refused to vary an order that was below the SSAG range on current incomes. The case was complicated by issues of repartnering and whether the wife had been making sufficient efforts toward self-sufficiency. As well, the variation application had been brought by the husband to terminate spousal support and the SSAG ranges were introduced by the wife to maintain the current order.

One case involved **retroactive support** and unusual facts:

- In *Labbe v. Labbe*, 2009 BCSC 835 which involved a long traditional marriage, the husband lost his job post-separation. Thus despite a finding of a strong entitlement on both compensatory and non-compensatory grounds, the result was only a nominal \$1 order for spousal support. The wife tried to use the SSAG to claim significant retroactive support to top up the interim support that had been paid in the period before the husband lost his job, but the court found that an order for retroactive support was not appropriate on the facts.

There are only three "outlier" cases that are noteworthy or contentious, all involving issues of entitlement. One was *G.G.F. v. R.F.*,⁶⁵ a short-marriage case where there was a finding of no entitlement. The other two cases, *Lam v Chui*,⁶⁶ which involved a 20 year marriage, and *Vlachias v. Vlachias*,⁶⁷ which involved a medium length marriage (10-11 years), are more surprising decisions. Both are cases in which the courts found a very limited basis for entitlement that resulted in an extremely modest spousal support award significantly below what the SSAG would suggest given a finding of entitlement. All three of these cases raise interesting issues about the non-compensatory basis for spousal support and will be discussed separately and in more detail below.

⁶⁵ *G.G.F. v. R.F.* [2009] B.C.J. No. 215, 2009 BCPC 43.

⁶⁶ *Lam v Chui*, [2008] B.C.J. No. 1648, 2008 BCSC 1177.

⁶⁷ *Vlachias v. Vlachias*, [2009] B.C.J. No. 1241, 2009 BCSC 843.

One case, *Garritsen v. Garritsen*,⁶⁸ offers an excellent discussion of the interim exception but found it not applicable on the facts. In *Garritsen* the master had relied upon the interim exception to award interim support above the SSAG range, responding to the fact that the husband was living in the matrimonial home rent-free while the wife was required to pay rent. On appeal, Melnick J. reduced the award to the top end of the range, finding that the interim exception was not applicable given that the husband was paying carrying costs on the matrimonial home equivalent to the wife's rent.⁶⁹

In *Trewern v. Trewern*⁷⁰ the husband, who had retired and started to receive his previously divided pension, tried to make a *Boston* double-dipping argument to exclude his pension income from the SSAG calculations. He was unsuccessful. The court ruled that this was not a *Boston*-type situation where the wife had received other assets in lieu of a share of his pension but rather one where the pension itself had been divided. The wife had actually started to receive her share of the husband's pension and this was included in her income. If the husband included his full pension income in the SSAG calculation, the amounts related to the previously divided portion of the pension cancel themselves out. The income difference generated by the SSAG calculation will thus represent only the pension income not previously considered in the property division, and hence there is no double-dipping.⁷¹

Somewhat surprisingly, there was no reference to the compensatory exception in any of the short marriage cases even though the facts in *Reavie v. Heaps*⁷² might have suggested its applicability: parties engaged, cohabited for two years but never married, wife sells her house and gives up her part-time employment during the relationship. As is also apparent from the Court of Appeal's decision in *Wang v. Poon*, this exception is often absent from the "radar screen" of lawyers and judges. Going back in the case law, a good example of the compensatory exception can be found in *Ahn v. Ahn*⁷³ from 2007.

(4) Entitlement a Live Issue: What is Non-compensatory Support?

As the *Final Version* of the Advisory Guidelines makes clear,⁷⁴ entitlement is an important issue that runs throughout the Advisory Guidelines. First, it is a threshold issue before the formulas are applicable. Second, if entitlement is found, the basis of entitlement will influence the application of the Guidelines to determine if there is a reason to depart from the formula ranges (*i.e.*, whether the case is an exception) or, more commonly, to determine location within the range. Third, the issue of continuing

⁶⁸ *Garritsen v. Garritsen*, [2009] B.C.J. No. 691, 2009 BCSC 124.

⁶⁹ The interim case was *S.K. v. L.K.*, [2009] B.C.J. No. 105, 2009 BCSC 69 which involved the setting aside of an unfair spousal support agreement. Because of the agreement, interim spousal support was set lower than the SSAG range.

⁷⁰ *Trewern v. Trewern*, [2009] B.C.J. No. 343, 2009 BCSC 236.

⁷¹ Double-dipping arguments have also been unsuccessful in B.C. with respect to income generated by previously divided assets other than pensions, such as businesses. See the B.C.C.A. decisions in *Holmes v. Matkovich*, [2008] Y.J. No. 51, 2008 YKCA 10 and *Jens v. Jens*, [2008] B.C.J. No. 1886, 2008 BCCA 392.

⁷² *Reavie v. Heaps*, [2008] B.C.J. No. 1461, 2008 BCSC 1038

⁷³ *Ahn v. Ahn*, [2007] B.C.J. No. 1702, 2007 BCSC 1148.

⁷⁴ *Final Version*, chapter 4.

entitlement can arise on review and variation in the context of changing incomes and economic circumstances, remarriage and repartnering, and assessing efforts at self-sufficiency. The *User's Guide* provides an excellent overview of these issues.⁷⁵

In general, B.C. courts engage in more extensive analysis of entitlement than those in other provinces, a pattern reinforced by appellate level decisions such as *Yemchuk* and, more recently, *Chutter* and *Hinds*.

The *without child support* formula tends to raise issues about the nature of non-compensatory support. Ever since *Bracklow* there has been confusion and debate about what non-compensatory support entails, raising issues about basic theories of entitlement. As we indicate in the *User's Guide*, non-compensatory support can be understood in different ways:

Non-compensatory claims involve claims based on need. Need can mean an inability to meet basic needs, but it has also generally been interpreted to cover, as an aspect of economic hardship, a significant decline in standard of living from the marital standard. Non-compensatory support reflects the economic interdependency that develops as a result of a shared life, including significant elements of reliance and expectation.⁷⁶

The B.C. Court of Appeal said very similar things about non-compensatory support in *Chutter*, relating it not just to inability to meet basic needs but also to hardship caused by a drop from the marital standard of living.

In the past year there have been three *without child support* cases that have raised some difficult issues about the basis of entitlement to non-compensatory support: *G.G.F. v. R.F.*, *Lam v Chui*, and *Vlachias v. Vlachias*. *G.G.F.* deals with the “basic social obligation” to meet the needs of a disabled spouse after separation, whereas *Lam v. Chui* and *Vlachias* deal with the significance of post-divorce income disparity in itself, apart from basic need, as a basis for entitlement to non-compensatory support.

*G.G.F. v. R.F.*⁷⁷ involved a clear finding of no entitlement after an 8 year marriage despite a significant income disparity and the fact that the wife was disabled and on social assistance. (The husband’s income was \$71,436 and the wife’s was zero—social assistance not included in income). The husband did, however, continue to cover the wife under his extended medical insurance. In addition to being a shorter marriage, where findings of no entitlement are more common, the facts in the case were very unusual and issues of “conduct” were engaged, another common theme in the “no entitlement” cases. Unknown to the husband at the time of the marriage, the wife was a drug addict; her subsequent disability was the result of her addiction and she had also been responsible for \$50,000 of damage to the matrimonial home while using it as a drug house post-separation. The court found that the marriage was not a joint endeavour and did not give rise to a “basic social obligation.”

⁷⁵ At pp. 3-5.

⁷⁶ At p. 3.

⁷⁷ [2009] B.C.J. No. 215, 2009 BCPC 43.

G.G.F. is an interesting case because it articulates the premise underlying the “basic social obligation” theory of non-compensatory spousal support. That premise is that the marriage was a “joint endeavour”—that there was an intertwining of the parties’ emotional and financial lives or, to use the language of *Bracklow*, that there was “interdependency” and not just dependency. In *Bracklow* the Supreme Court of Canada stated that there is a presumption of interdependency or joint endeavour in marriage, but that this presumption could be rebutted on the facts of a particular case. Challenging the presumption of joint endeavour on which entitlement to non-compensatory support is based clearly allows for some consideration of “conduct” to come in through the back door. However, one should not too quickly assume that *G.G.F.* opens the door wide to entitlement arguments in other cases that the parties’ relationship did not involve the requisite element of joint endeavour. Clearly lurking in the background of *G.G.F.* was a recognition that the wife would be worse off if she were to lose the benefits that came with being on social assistance and restricted to spousal support.

The other two entitlement cases—*Lam v Chui* and *Vlachias v. Vlachias*—are somewhat more surprising and contentious. Both were marriages without children – one long and one medium length. In both cases, despite a fairly significant income disparity, the courts awarded only very modest transitional support, well below what the SSAG would suggest. These are not strictly speaking “no entitlement” cases, but rather cases in which the courts found a very limited basis for entitlement that was then used to shape an award very different from that which the SSAG would suggest given a finding of entitlement.

*Lam v Chui*⁷⁸ involved a 20 year marriage without children. Both parties worked throughout the marriage, the wife in retail, earning \$35,000 a year and the husband as an associate architect, earning \$54,000 (but the inclusion of the grossed-up value of a leased vehicle bumped his income up to \$75,000). The wife had lost her job in Feb., 2007, post-separation, and interim support of \$500 per month had been paid on consent since then. She had not found new employment, in part because of stress and depression related to the marriage breakdown, and had no income other than spousal support. There was an equal division of the only significant asset—the proceeds of the matrimonial home—leaving each with assets of roughly \$300,000.

At trial, Pearlman J. found that this was a “modern marriage” in which both parties worked outside the home, pursued their own occupations and enjoyed a modest lifestyle from the pooling of their resources. Neither was found to have suffered economic hardship from the marriage or its breakdown. The equal division of assets left each party with funds to acquire and maintain separate households. The court found that the only basis for entitlement was the wife’s need created by her current unemployment. She was thus found entitled to limited transitional support to enable her to establish herself in full-time employment. The SSAG range relied upon by the court, calculated on an income of \$35,000 for the wife and \$75,000 for the husband, was \$1000 - \$1333, indefinite. Support of \$1,200 per month (midpoint) was ordered for 15 months, with the ability to apply for a review of the termination date.

⁷⁸ [2008] B.C.J. No. 1648, 2008 BCSC 1177.

Even if one accepts that there would have been no entitlement to spousal support if the wife had remained employed and earning \$35,000, the spousal support award in *Chui* is problematic. Given that the stated purpose of the support was to provide a short transition from the wife's current state of unemployment back to full-time employment, it was clearly inappropriate to impute income to her based upon her potential earning capacity of \$35,000.⁷⁹ Using an income of zero for the wife, the SSAG range would have been \$1875-\$2188-\$2500. As well, this range could have been used, as requested by the wife, to order a retroactive top-up adjustment to the interim support which was only \$500 a month.

But the more significant aspect of the *Chui* decision is the implicit premise that there would have been no entitlement to spousal support had the wife remained employed. Given a 20 year marriage and an income disparity of \$35,000/\$75,000,⁸⁰ other courts across the country might well have decided that issue differently⁸¹ and ordered at least transitional support for a 7 to 10 year period.⁸²

*Vlachias v. Vlachias*⁸³ raises similar issues, but with respect to a somewhat shorter relationship--this time 10 to 11 years in length, again with no children. The husband ran his own business; his income was somewhat uncertain but was set at \$95,000. The wife worked throughout the marriage as an office administrator and had an income of \$48,000. There was an equal division of the matrimonial home, RRSPs and pensions, but the business, although found to be a family asset, was reapportioned 80 per cent to the husband because of only minor contributions by the wife. The reasoning on entitlement is somewhat confusing. Justice Satanove makes an initial finding that there is no compensatory basis for entitlement and hence that the only basis on which the wife could claim support was non-compensatory, *i.e.*, the income disparity between the parties and the resulting loss of the marital standard of living. She then goes on to reduce the significance of the income difference of \$47,000 by taking into account the benefits the wife receives from her employment, such as pensions and paid holidays, that husband as a self-employed person does not have. She also reviews a series of cases where income disparity and the marital standard of living were important factors in establishing entitlement, all cases involving longer marriages with children. The reasoning appears to lead to the conclusion that there is no entitlement to support based on income disparity. In the end, however, a modest lump sum of \$12,000 is ordered as "compensatory" support.

⁷⁹ This is not an isolated example; as will be discussed below, we have found other cases of similar over-hasty imputing of income to unemployed recipients.

⁸⁰ If one takes the husband's income as \$55,000 rather than \$75,000 the case for entitlement is much weaker. One can question the appropriateness of the extremely large amount imputed to the husband's income because of the leased car which increased his income by 50 per cent.

⁸¹ See for example the somewhat comparable *Fisher* decision of the Ontario Court of Appeal: *Fisher v. Fisher*, [2008] O.J. No. 38, 2008 CarswellOnt 43, 2008 ONCA 11, 47 R.F.L. (6th) 235.

⁸² The husband had actually made a settlement offer to the wife that was much more generous than the award she ultimately received: 2 years at \$1000 a month and then \$500 a month for a further 3 years. The wife was seeking an order of \$2188 for an indefinite duration and also retroactive.

⁸³ [2009] B.C.J. No. 1241, 2009 BCSC.

It is not clear what the order is intended to compensate given the earlier finding of no entitlement on compensatory grounds. Another way of viewing the lump sum might be as a very modest transitional award of \$1000 a month for one year. On this view, the award provides much less generous transitional support than suggested by the SSAG. The SSAG ranges, which are not referred to in the judgment, would have suggested an award of \$588 to \$783 a month, for a duration of 5 to 10 years (the global range without discounting for tax or present value would be \$35,280 to \$93,960). Because there is no reference to the SSAG, and the focus is on entitlement, there is no explanation of why the lower end of the SSAG range was inappropriate: it would not have resulted in a permanent award based on the marital standard, but only a transitional award more in keeping with patterns in the current law.

It is not clear how to read *Lam v. Chui* and *Vlachias*. On one view they are simply decisions on their particular facts where courts have found that the gap between the parties' incomes is not very significant and that the lower income spouse will not experience any substantial drop in standard of living after marriage breakdown. Alternatively, they could be read as expressions of a more fundamental disagreement with the broad understanding of entitlement to non-compensatory support which has become dominant in the case law and on which the Advisory Guidelines build, captured by the concept of "merger over time."

Two other *without child support* cases that also raised interesting entitlement issues are: *Gosling v. Gosling*⁸⁴ (14 year marriage with children, no continuing entitlement to spousal support after wife receives inheritance, questionable finding that inheritance was relevant to entitlement because basis of entitlement was *non-compensatory*) and *Barton v. Ophus*⁸⁵ (20 year marriage, wife worked throughout marriage earning more or same as husband; gets lower paid job shortly before separation; wife repartners shortly after separation, similar standard of living to marriage, no entitlement).

(5) Reapportionment Not a Significant Factor

In contrast to the *with child support* cases, there were relatively few cases that involved reapportionment for purposes of self-sufficiency/promotion of economic independence. This use of reapportionment is clearly more common in cases involving dependent children. In long marriage cases where the children are already independent, equal division of family assets appears to be the norm. There were only three *without child support* cases in which there was a reapportionment and none of them led to an award lower than the SSAG ranges. The most that can be said is that the reapportionment *may* have influence location within the range, and even this is not clear.

In *Labbe*, where the husband had become unemployed after separation, with the result that no spousal support was awarded, the reapportionment had no impact on spousal

⁸⁴*Gosling v. Gosling*, [2008] B.C.J. No. 1870, 2008 BCSC 1323. *Barton v. Ophus*, 2009 BCSC 858

⁸⁵*Barton v. Ophus*, 2009 BCSC 858. This decision was released on June 30, after most of this paper was completed. It has not been included in the appendices or the analysis of the broad patterns in the *without child support* cases.

support and was possibly intended as compensate the wife for the absence of spousal support. In *Williams v. Williams*⁸⁶ the 60 per cent reappportionment in favour of the wife was an explicit factor in awarding support at the low end of the range. In *Burton v. Gillies*,⁸⁷ where the wife had stayed home during the 14 year relationship to care for her children from a previous relationship, it not clear that the reappportionment—leaving the wife with the entire \$50,000 equity in the home—had any impact on the spousal support which was set at the midpoint of the range.

(6) Clustering at the Midpoint, but Results Span the Entire Range

Twenty (of 27) of the *without child support* cases involved determinations of spousal support within the Guidelines ranges Unlike the patterns that have emerged in other provinces where awards tend to cluster at one end of the range or another, awards in B.C. tend to span the range. On amount, there is a clustering of results at the midpoint. In cases of medium and short marriages where time limits are applicable, the same clustering at the midpoint is true with respect to duration. But there are still decisions that that fall at the higher and lower ends of the ranges for amount and duration. This pattern of full use of the range with clustering at the midpoint is apparent across all categories of marriage: long, medium-length and short. The specific patterns in each of these categories will be examined in more detail below.

In the majority of cases there is a noticeable absence of any discussion of the factors that determine a particular choice of location within the range. The clustering of results at the mid-point suggests that it is being used as a “default”. While the midpoint may be an appropriate result in many cases, default reasoning may lead to a lack of attention to factors in a particular case which may call out for a different result.

(7) Long Marriage Cases: Straightforward, No Surprises

There were 12 long marriage cases (20 years and over) where there was a determination of spousal support that fell within the range for amount.⁸⁸ The amounts of support awarded in these cases clustered at the midpoint (5 cases) with 4 at the lower end and 3 at the higher end.

Of the low end cases, *Williams* involved a reappportionment; *Trewern* was a long marriage without children where there was no compensatory component to the award; in *Mocchi*⁸⁹ despite the length of the marriage (33 yrs), there were significant assets and the husband

⁸⁶ *Williams v. Williams*, [2008] B.C.J. No. 2267, 2008 BCSC 1603. *Burton v. Gillies*, [2009] B.C.J. No. 1, 2009 BCSC 1,

⁸⁷ *Burton v. Gillies*, [2009] B.C.J. No. 1, 2009 BCSC 1,.

⁸⁸ This eliminates *Lam v. Chiu*, where there was a finding of limited entitlement, *Labbe*, where the husband became unemployed after separation, resulting in a nominal order of \$1 despite a finding of significant entitlement to support on both compensatory and non-compensatory grounds, and *S.K. v. L.K.* where interim support was below the SSAG range because of a prior agreement and delay

⁸⁹ *Mocchi v. Mocchi*, [2009] B.C.J. No. 634, 2009 BCSC 435.

was going to have a relatively low income after the sale of his business(\$40,000 and imputed at that); and in *Enemark*⁹⁰ the low end award was simply the result of the continuation of a prior order (pre-SSAG) on review.

It is difficult to find any distinguishing features of higher end of the range cases, except perhaps length of marriage: *Brand* (30 year traditional marriage); *Mitchell* (26 year marriage, wife worked in the husband's business) and *Ralph* (26 year traditional marriage).

Most of the long marriage cases involved very straightforward applications of the SSAG after the determination of income. Only three cases are noteworthy. *Trewern*, discussed above, involved the impact of retirement and an unsuccessful attempt by the husband to make a *Boston* double-dipping argument with respect to his pension. In B.C. given the method of division of pensions under part 6 of the *FRA*, double-dipping will not typically be a concern as both spouses will have pension income from the divided part of the pension, which will be included in their incomes for purposes of the SSAG calculations, and the income difference in the SSAG calculation will reflect the undivided portion of the pension. *Enemark* involved an unsuccessful attempt by the husband to terminate spousal support because the wife was saving her spousal support rather than using it to sustain the marital standard of living and hence, the husband had argued, she had no "need". *Rakose v. Rakose*⁹¹ raised the issue of the impact of remarriage. The case involved a 20 year marriage with three children where spousal support had already been paid for 11 years and the wife was still earning a minimal, part-time income. On a review initiated by the husband to terminate spousal support because the wife was cohabiting, the court accepted the wife's argument that she was engaged but not cohabiting, and continued spousal support. However, the court suggested that the wife's need for support would likely change in the next two years in light of her engagement and likely remarriage—a reminder that "indefinite" does not necessarily mean permanent. *Rakose* provides a nice review of the case law on remarriage.

(8) Medium Length Marriages: Insufficient Attention to Crossovers; Adherence to the Durational Ranges

The category of medium length marriages (10 to 19 years) under the *without child support* formula includes the most diverse range of cases involving a mix of compensatory and non-compensatory claims. Some are marriages without children involving many forms of marital arrangements and degrees of dependency where spousal support claims are largely non-compensatory in nature. But then there are also those marriages where there were dependent children at the point of separation which have subsequently been brought under the *without child support* formula on a variation or review after the children have become financially independent. These cases involve a strong compensatory claims in addition to entitlement on non-compensatory grounds related to standard of living.

⁹⁰ *Enemark v. Enemark*, [2009] B.C.J. No. 148, 2009 BCSC 104.

⁹¹ *Rakose v. Rakose*, [2008] B.C.J. No. 1632, 2008 BCSC 1165.

In these cases, given the diversity of fact patterns, there is a need to be attuned to the possibility of exceptions. Here 2 of the 9 medium-length marriage cases did involve departures from the formulas (*Vlachias* and *Waters v. Conrod*.)

As well, it is important to be conscious of location within the range in order to deal appropriately with the diversity of fact situations and the different kinds of spousal support claims. In general, cases with strong compensatory claims based on child-rearing should lead to higher amounts and for longer periods of time. Here, of the 6 medium length marriage cases where there was a determination of support,⁹² 4 involved relationships where there had been children: *Domirti*⁹³ (16 year marriage, separation 1994, 3 children); *S.J.A. v. S.A.*⁹⁴ (17 year marriage; separation 2005, 1 child); *Gosling v. Gosling*⁹⁵ (14 year marriage with children; separation 1992); and *Burton v. Gillies*⁹⁶ (14 year relationship, separation 2007, step-children, now grown).

Five cases dealt with amount and awards spanned the range: one low end, 2 midpoint, and 2 high end. The two high end cases were actually cases without children: one was an interim order (*Garritsen*) and the other, *Liggins v. Sikorski*⁹⁷ was a case in which although both parties had full-time employment, the wife was found to have a significant compensatory claim (she had looked after the home and all personal matters which allowed the husband to develop the company from which he continued to draw his income). In the cases where there had been children, the awards were only at the midpoint (*Burton*, *Domirti*) or even more surprisingly, at the low end as in *S.J.A. v. S.A.* (wife who had moved for the husband's work was earning \$27,000 as a special needs teacher, husband was earning \$63,000). *S.J.A.* is one of the few cases in the choice of location in the range is explained, although the reasons given are somewhat questionable. The low award was justified by the fact that the wife was left with the matrimonial home, had secure employment and could increase her income, and that she would begin to share the husband's pension in 11 years when he retired.

Five of the cases dealt with duration. In two cases the "rule of 65" was applicable and so duration was indefinite, although there was no explicit acknowledgement that this was the reason that the SSAG indicated an "indefinite" duration (*Burton* and *Liggins*). In *Domirti* it was incorrectly assumed that the "rule of 65" was applicable as a result of a calculation error—using the wife's age at the date of trial rather than the date of separation.⁹⁸

In those cases where the "rule of 65" is not applicable, the B.C. courts appear to have little difficulty with the time limits that the formula generates for medium length marriages. Although time limits are not typically imposed in initial orders, the durational

⁹² One case involved a binding prior agreement.

⁹³ *Domirti v. Domirti*, 2009 BCSC 749.

⁹⁴ *S.J.A. v. S.A.*, [2009] B.C.J. No. 725, 2009 BCSC 486.

⁹⁵ *Gosling v. Gosling*, [2008] B.C.J. No. 1870, 2008 BCSC 1323.

⁹⁶ *Burton v. Gillies*, [2009] B.C.J. No. 1, 2009 BCSC 1.

⁹⁷ *Liggins v. Sikorski*, 2009 BCSC 818.

⁹⁸ For another case that makes the same mistake see *Smith v. Smith*, [2008] B.C.J. No. 530, 2008 BCSC 363.

limits under the *without child support* formula are applied in a subsequent variation or review to impose a termination date. This is consistent with the “softer” use of the time limits under this formula that is contemplated in the *Final Version* of the Advisory Guidelines.⁹⁹ See *S.J.A.* (17 year marriage, order to continue until husband’s retirement then review, but likely termination then, after 13 years of support); *Gosling* (14 year marriage, variation application, termination after 15 -16 years). Similar examples can be found in the 2007/8 cases.¹⁰⁰ The B.C.C.A. decisions also endorse the use of the SSAG time limits in medium-length marriages: see *Jens* where support was extended beyond the duration specified in the original order but with a termination date consistent with the SSAG ranges (10 year marriage without children, total duration of award 8 years).

The most interesting case on duration is *Domirti*, a review case involving a medium length marriage with children which raises the possibility of spousal support being extended beyond the maximum durational range. In *Domirti* the parties had separated in 1994 after a 16 year marriage. There were 3 young children at the time of separation. The husband had paid spousal support for 15 years, the children were adults, and the wife, despite her best efforts had not become self-sufficient. On a review application the husband sought to terminate spousal support. The trial judge found that there was a continuing entitlement to support: the wife was not self-sufficient and continued to suffer the economic disadvantages of the marriage. Operating on the mistaken assumption that the SSAG suggested indefinite support (as a result of the erroneous application of the “rule of 65”), the trial judge ordered spousal support of \$1250 per month (midpoint) without any time limit. The support was indefinite although it was acknowledged that the husband’s retirement in a year would raise a question about the continuation of spousal support post-retirement. How would this case have been dealt with had the court been aware of the SSAG durational range of 8 to 16 years? Would support have been terminated after 16 years despite the wife’s continuing disadvantage and the strong compensatory component to the support claim?

(9) Short Marriages: Lack of Attention to Compensatory Claims; Lump Sums and Restructuring

There were only 4 short marriage cases (under 10 years), and in one of those there was a finding of no entitlement (*G.G.F. v. R.F.*)¹⁰¹ This leaves three short marriages where there was a determination of spousal support, all involving unmarried couples: *McEwan*

⁹⁹ Section 7.5.6.

¹⁰⁰ See *Kerman v. Kerman*, [2008] B.C.J. No. 710, 2008 CarswellBC 793, 2008 BCSC 500 (18 year marriage; support for 6 for years to terminate after 18 years total) and *Hanssens v. Hanssens*, [2008] B.C.J. No. 526, 2008 CarswellBC 591, 2008 BCSC 359 (18 year relationship; long interim order; appropriate duration midpoint, 13 ½ yrs; support for a further 3 yrs. or “further order”). See also *McEwan v. Fisher*, [2009] B.C.J. No. 831, 2009 BCSC 559, discussed in the short marriage cases below (9 year relationship; on review support to terminate in 2 yrs for a total duration of 6 yrs, but award restructured (front-end loading--amounts higher than range)).

¹⁰¹ For short marriage cases from the earlier 2007/2008 cases see: *Freeman v. Freeman*, 2008 CarswellBC 1366, 2008 BCSC 857, *Zavari v. Zavari*, [2008] B.C.J.No. 453, 2008 CarswellBC 512, 2008 BCSC 317, *Mabin v. Mabin*, [2008] B.C.J. No. 17, 2008 BCSC23, *Conquergood v. Dalfort*, [2007] B.C.J. No. 2337, 2007 BCSC 1556 (good discussion of why low end of range chosen), *Ahn v. Ahn*, [2007] B.C.J. No. 1702, 2007 BCSC 1148 (compensatory exception).

*v. Fisher*¹⁰² (9 year relationship); *Roach v. Dutra*¹⁰³ (6 years); and *Reavie v. Heaps*¹⁰⁴ (2 years). Awards ranged from midpoint to high end of the range.¹⁰⁵ Arguably in two of the cases the presence of strong compensatory claims may not have been given sufficient.¹⁰⁶

In one case, *McEwan*, the award was clearly at the high end of the global range and appropriately so; there was a strong compensatory claim (wife quit work to accompany husband on business travel) as well as a strong non-compensatory claim (wife health issues). In *Roach*, the award was at the midpoint of the global range, with no explanation of the choice. Indeed, an award at the high end of the range would have seemed appropriate given the husband's relatively high income (imputed at \$108,000) and the wife's extremely low income (\$16,000): this was a case where the wife had shifted from full-time to part-time work during the relationship and even her part-time earnings were significantly reduced due to post-separation stress. In addition, there were children involved: the wife had two children from a prior relationship. Finally, in *Reavie v. Heaps* the award was intended to be at the high end of the range but was actually at the midpoint or low end of the range because of mistakes in calculation.¹⁰⁷ As well, *Reavie*, if not *Roach*, called out for some discussion of the potential applicability of the compensatory exception.¹⁰⁸

The short marriage cases are prime territory for restructuring in the form of either front-end loading or conversion to a lump sum using the global ranges under the SSAG. Both *Roach* and *Reavie* involved lump sum orders; in *Roach* the appropriate discount for the different tax implications of lump sum orders was made but not in *Reavie*.¹⁰⁹ In *McEwan* there was no explicit discussion of restructuring, or even of the SSAG ranges for amount—only duration—but the result in the case, where the monthly amounts of support ordered are well above the SSAG range can be seen as an example of front-end loading within the global range generated by the SSAG. The Users Guide provides a good overview of restructuring and lump sums.¹¹⁰

(10) Concluding Odds and Ends

¹⁰² *McEwan v. Fisher*, [2009] B.C.J. No. 831, 2009 BCSC 559. *Reavie v. Heaps*, [2008] B.C.J. No. 1461, 2008 BCSC 1038

¹⁰³ *Roach v. Dutra*, [2009] B.C.J. No. 353, 2009 BCSC 229.

¹⁰⁴ *Reavie v. Heaps*, [2008] B.C.J. No. 1461, 2008 BCSC 1038.

¹⁰⁵ *Conquergood*, *supra*, from 2007 involved an award at the low end of the range.

¹⁰⁶ See also *Mabin*, *supra* from 2008 where despite a strong compensatory claim the award was only at the midpoint of the global range.

¹⁰⁷ First a calculation error with respect to the durational range (.5 to 1 instead of 1-2 years) and second an improper imputing of income to the unemployed wife during the brief transitional period covered by the award, resulting in a range that was too low.

¹⁰⁸ See discussion of the compensatory exception above in the section of the analysis dealing with cases that depart from the ranges. In *Reavie* there may have been an assumption that the award for unjust enrichment satisfied any compensatory claims, but that award dealt with contributions to property and not the income loss that the wife continued to experience in the period after separation when she had not yet reattained her former income level.

¹⁰⁹ For another case where there was a failure to discount a lump sum for tax, in the context of a lump sum order for retroactive support see *Kerman v. Kerman*, [2008] B.C.J. No. 710, 2008 CarswellBC 793, 2008 BCSC, supplementary reasons at [2008] B.C.J. No. 1244, 2008 BCSC 852.

¹¹⁰ At pp. 16-18.

This last part will simply gather together, for easy reference, a few easily avoidable errors that have come up in the *without child support* cases. Most have already been noted in the preceding analysis of the cases, but it is important to highlight them here:

- Don't impute income based on future earning capacity to a recipient when the purpose of the award is to provide a period of transition to higher earnings. Use the recipient's actual income until a point when it is reasonable to assume the higher earnings (perhaps by means of a step-down order). See *Lam v. Chui* and *Reavie v. Heaps*.
- For the purposes of the "rule of 65" and determining if duration will be indefinite in marriages of under 20 years, it is the recipient's age at the date of separation that is relevant, not age at date of trial. For errors see *Domirti* and *Smith v. Smith*.¹¹¹
- Where the SSAG ranges are being used to calculate a lump sum, the amounts must be discounted to take into account the differential tax consequences; the SSAG ranges assume that the payor gets to deduct spousal support. In the absence of specific calculations, this factor should at least push the award lower down the range. For a failure to consider see *Kerman*.¹¹² For a good treatment with careful calculations see *Roach v. Dutra*.
- If there are adult children for whom one or both spouses are still paying educational expenses, this needs to be taken into account. Best would be to use the "adult children" formula, which seems to be ignored. But if not that, then some adjustment for these child-related expenses is required. See *Sarton* and *J.M. v. L.D.*

III. The *With Child Support* Cases

The *with child support* cases in the past year outnumber the *without child support* formula cases by a 2-to-1 margin, a pattern that remains fairly consistent across the country and over time.¹¹³ There were 64 *with child support* formula trial decisions. These cases reveal a wide range of marriage lengths: 13 involved marriages of 20 years or more; 14 were 15 to 19 years; 22 were 10 to 14 years; 11 were 5 to 9 years; and only 4 were under 5 years. There was thus a distinct "mode" or central clump in the 10 to 14 year range.

¹¹¹ *Smith v. Smith*, [2008] B.C.J. No. 530, 2008 BCSC 363.

¹¹² *Kerman v. Kerman*, [2008] B.C.J. No. 710, 2008 CarswellBC 793, 2008 BCSC), supplementary reasons at [2008] B.C.J. No. 1244, 2008 BCSC 852.

¹¹³ Ontario cases show the same pattern: Rollie Thompson, "Following *Fisher*: Ontario Spousal Support Trends 2008-09" in Law Society of Upper Canada, *3rd Annual Family Law Summit* (Toronto, June 11-12, 2009) at 2.

(1) Custodial Arrangements: Mostly the Basic Formula

The *with child support* formula is actually a family of formulas, all of which involve an ongoing child support obligation. To use the correct formula, it is critical to assess the custody and child support arrangements for the “children of the marriage”. In the vast majority of these cases, 67 per cent, the basic formula will apply, as both child and spousal support payments are being made by the higher-income spouse to the lower-income spouse with custody or primary care.¹¹⁴ All the other formulas can also be found in the cases: 13 shared custody, 4 split custody, 3 custodial payor and 1 step-parent. Of the basic formula cases, 4 could be characterised as “adult child” cases, even if the *adult child* formula was not applied. Shared custody cases made up 20 per cent of the total, a high percentage compared to other provinces. We will discuss these shared custody cases below.

(2) Mostly Initial and Interim Determinations

Most of these cases were initial determinations of spousal support, nearly 75 per cent of all cases (48 of 64). Another 9 cases, or 14 per cent, were interim support decisions. Only eight cases involved variation (3) or review (4), in contrast to the *without child support* cases. Four *with child support* cases involved prior agreements that raised *Miglin* issues, 2 on initial applications and 2 on variations.

(3) Almost All Amounts Within the Range, Mostly Mid-Range

Of the 64 cases, there was a finding of no entitlement or zero support (or no amount fixed) in 11 cases,¹¹⁵ leaving 53 cases where an amount of spousal support was determined. Of those 53 cases, 8 fell outside the formula ranges and 45 fell within the ranges. Fully 85 per cent of the *with child support* cases thus fell within the formula range, slightly higher than the 80 per cent in the range we noted in our 2007 paper.

Almost 50 per cent of all the *with child support* cases were resolved at or near the mid-point of the range (26 of the 53), while 24 per cent were in the upper end of the range (13 cases) and 11 per cent in the lower end (6 cases). Compared to our 2007 analysis, there is a noticeably greater proportion of outcomes at the mid-range, with fewer in the lower end of the range and about the same at the higher end.¹¹⁶

If we take out the longest and shortest marriages, confining ourselves to the cases for marriages of 5 to 19 years, i.e. those with school-age children, 77 per cent of the cases fell within the mid-to-upper part of the range for amount. The same pattern was revealed in the recent Ontario cases.¹¹⁷ The three of these cases in the lower end of the range are

¹¹⁴ In Ontario, these cases made up 70% of the total: *ibid.*

¹¹⁵ In one case, the court found entitlement, fixed a duration and then sent the lawyers out to work out the SSAG calculations before fixing an amount: *M.M.F. v. R.B.*, [2008] B.C.J. No. 1406, 2008 BCSC 984.

¹¹⁶ For 2009, of those 45 cases that fell within the range, 29% were at the upper end, 58% at the mid-range and 14% at the lower end. In 2007, those proportions were : 33% upper, 40% mid, 27% lower.

¹¹⁷ Above, note 1 at 10.

the unusual fact situations: *Lane v. Creighton* (split custody, self-sufficiency issues, close to mid-range);¹¹⁸ *V.E.T. v. C.E.T.* (shared custody, self-sufficiency issues, continued interim order in high-conflict custody case);¹¹⁹ and *Bassi v. Grewal* (5-year marriage, no appearance by husband, 85% reapportionment of home to wife).¹²⁰

The long-marriage cases (20 years or more) involving child support are a much more mixed bag of cases, as children are usually older, with varying child support demands and the courts often have one eye on support life after child support ends (even sometimes using the *without child support* formula). This explains the scatter of results: 3 cases at the high end, 4 in the middle, 2 at the low end (both variations) and 2 below the range (*Conner, Bozak*).

Of the 8 cases that fell outside the formula ranges, one-half were above the range and one-half below.¹²¹ Sometimes there was an explanation for the outcome, sometimes not. Of the below-range cases, two involved incomes above \$350,000: *Bockhold* and *Bozak* (and the latter was fairly close to the low end of the range).¹²² In *Schloegl v. McRoary*, the amount was set just below the low end of the range because the wife and child were living permanently with the wife's mother, thus reducing her expenses, a reasonable explanation.¹²³ In *Conner*, there was some vague language about the Guidelines being only a "guide" in a variation case, but the downward change in spousal support to an amount below the range was not explained (if anything, an amount higher in the range might have been warranted as the younger child had special needs).¹²⁴

Explanations weren't always forthcoming in the above-range cases either. Most striking would be *Decock*, where the wife had failed to make reasonable employment efforts and the court then ordered an amount well above the range (although the wife suggested she might start another program of study).¹²⁵ Two were lump sum cases: *Mohajeriko v. Gaudomi* and *Chen v. Liu*. In both cases the court had to impute income to payors who were less than forthcoming about their incomes, and maybe each court was implicitly using a higher income. In *Chen*, it was a lump-sum retroactive award, for the 15 months the wife was on disability and no explanation was given for the calculation.¹²⁶ In *Mohajeriko*, the court reapportioned the family assets 75/25 to the husband in a short-marriage case, then proceeded to give the wife another 25% of the assets by way of lump-sum spousal support, sort of redividing the reapportionment.¹²⁷ In the last above-range case, *McClaghry*, the interim exception would have applied, had anyone mentioned it,

¹¹⁸ [2008] B.C.J. No. 2389, 2008 BCSC 1689

¹¹⁹ [2009] B.C.J. No. 730, 2009 BCSC 444

¹²⁰ [2008] B.C.J. No. 2218, 2008 BCSC 1573

¹²¹ This contrasts sharply with the 2007 cases, where 9 of the 10 were below the range and only one was above the range. Three of the 9 below-range cases were "no support" cases and one was a very early case that didn't use the Guidelines, so the below-range cases in 2007 were more like 5 for this comparison.

¹²² *Bockhold v. Bockhold*, [2009] B.C.J. No. 188, 2009 BCSC 130; *Bozak v. Bozak*, [2008] B.C.J. No. 2080, 2008 BCSC 1458.

¹²³ [2008] B.C.J. No. 2443, 2008 BCSC 1722.

¹²⁴ *Conner v. Conner*, [2009] B.C.J. No. 616, 2009 BCSC 423.

¹²⁵ [2008] B.C.J. No. 1477, 2008 BCSC 1055.

¹²⁶ *Chen v. Liu*, [2008] B.C.J. No. 1354, 2008 BCSC 928.

¹²⁷ *Mohajeriko v. Gaudomi*, [2009] B.C.J. No. 576, 2009 BCSC 393.

since the husband was paying \$946 per month on the mortgage plus utilities as the equivalent of support, with no spousal support paid and child support reduced below the set-off amount in a shared custody case.¹²⁸

(4) The Impact of Reapportionment on Amount: Not Much

Early on in the life of the Advisory Guidelines, we acknowledged that reapportionment of property on spousal support grounds under the *Family Relations Act* could be an exception to the formula ranges and that exception is clearly stated in the *Final Version*.¹²⁹ Of the 64 *with child support* cases, 10 involved reapportionment to the support recipient. Of those ten cases, nine wound up within the formula range and only one case resulted in a support amount below the range. Of the nine, 2 were in the upper end (*Dong v. Liu, E.A.T v. M.S.T.*), 4 in the mid-range (*Stanger v. Dehel, Hosseini v. Kazemi, Busby, Roper*) and 3 in the lower end (*Godinez v. Gallant, Durrad, Bassi v. Grewal*).

Below range was the inexplicable *Conner* case, where there had been a 65/35 reapportionment of the house and RRSPs in the wife's favour in 2003, of a modest amount, but every other factor pointed to an outcome in the formula range, even high in the range had it not been for the low-ish initial order being varied.

More interesting are the other reapportionment cases. Most involve fairly modest reapportionment, in percentage or amount, usually involving the matrimonial home. To move the amount to the low end of the range, something more substantial is required, like the 85% in *Bassi v. Grewal*. Or a range for spousal support that was already zero (*Durrad*) or where the lower end of the range was zero (*Godinez v. Gallant*).¹³⁰ In the latter two cases, reapportionment was used to justify no order of spousal support. Two other cases involved a no-support-after-reapportionment result: *Busby* (the fairness of the 70/30 reapportionment assessed by way of a calculation of a 13-year periodic order converted into a lump sum) and *Dong v. Liu* (100% reapportionment compared to 75% reapportionment plus lump-sum spousal support).

What these *with child support* formula cases demonstrate is that reapportionment will usually not be large enough to require use of the exception, but will ordinarily be a factor affecting location within the range. An upper-end case will be pushed down to the mid-range, or a mid-range case down to the lower end. In some cases, the Advisory Guidelines have permitted courts to use the support ranges to test the fairness of any proposed reapportionment.

(5) Indefinite Orders and Reviews: The Norm

¹²⁸ *McClaghry v. McClaghry*, [2008] B.C.J. No. 1403, 2008 BCSC 982.

¹²⁹ *Final Version*, section 12.6.1.

¹³⁰ *Durrad v. Durrad*, [2009] B.C.J. No. 736, 2008 BCSC 492; *Godinez v. Gallant*, [2009] B.C.J. No. 840, 2009 BCSC 540.

The case outcomes on amount are relatively predictable and uniform, but not so the outcomes on duration. Admittedly, this is one of the most difficult areas of spousal support law. But B.C. courts use time limits more aggressively than other jurisdictions, sometimes more creatively, sometimes more dubiously.

To look at time limits vs. indefinite orders, it is necessary first to weed out all the no entitlement and interim cases, which reduces the number of relevant *with child support* cases from 64 to 46. The remaining cases were sorted by length of marriage, with these general results: marriages of 20 years or more, time limits in 4 of 10 cases, 6 indefinite; 15 to 19 years, limits in 3 of 8 cases, 5 indefinite; 10 to 14 years, limits in 8 of 15 cases, 7 indefinite; 5 to 9 years, limits in 6 of 11 cases, 5 indefinite; and marriages of 0 to 4 years, a time limit in 1 case of 2, the other indefinite.

The trend is predictably towards time limits more often as marriages become shorter, but not overwhelmingly so. Over all, however, slightly more than half the cases (24 of 46) were indefinite orders, as one would expect, since “indefinite (duration not specified)” is the norm under this formula. If anything, the proportion of indefinite orders appears a bit low, which we investigate below. Certainly, the proportion of indefinite orders is much lower than we found for the 2005-07 period, where over 70 per cent of *with child support* orders were indefinite and only 30 per cent were time limited.

Of the 24 indefinite orders, 14 had review conditions attached.¹³¹ Whatever restrictions on review some might read in to *Leskun*, there is no evidence of any less use of review terms in this batch of B.C. cases. Review has always been much more popular in British Columbia, than in Ontario or Alberta. Of the 10 decisions without review terms, three were step-down orders (*Samson*, *Singleton*, *Kjosness*), another approach to the same problem. In *Busby*, the court converted a 13-year “indefinite” periodic order (until the husband retired) into a lump-sum order. In two cases, there were older children involved, almost done their education, with little uncertainty thereafter: *Stanger v. Dehen*, *Paheerding v. Palihati*.¹³² Another involved the rejection of an application to vary: *Bishop*. In two cases, it was a bit baffling why review was *not* ordered on the facts: *Friedl* (wife retraining for two years, income issues for doctor husband, children 11 and 9); and *E.A.T. v. M.S.T.* (wife laid off, on EI, order for sale of house, children 13 and 7).¹³³

Every case where a review was ordered appeared to meet the test of “genuine and material uncertainty” from *Leskun*. In three cases, review was tied to an event, rather than a date: when the child support ceased for children aged 21 and 19 in *Bockhold*, when the 2-year-old child started school in *Schoegl v. McCroary*, and when the husband’s lawsuit

¹³¹ This 58% proportion with review conditions for indefinite orders is markedly higher than we found in our 2007 paper, where the proportion for 2005-07 was 40%.

¹³² *Stanger v. Dehen*, [2009] B.C.J. No. 1193, 2009 BCSC 778; *Paheerding v. Palihati*, [2009] B.C.J. No. 830, 2009 BCSC 557.

¹³³ *Friedl v. Friedl*, [2008] B.C.J. No. 1716, 2008 BCSC 1222; *E.A.T. v. M.S.T.*, [2008] B.C.J. No. 1456, 2008 BCSC 1029.

against his former employer was resolved or when the wife obtained employment in *Marino*. Most reviews were scheduled for 1, 2 or 3 years: one year where the children were very young in *E.G.P. v. S.L.P.* or *V.E.T. v. C.E.T.*; two years in *G.P. v. M.J.R.P.* (young children) and *Fleck* (12 year marriage, review when 10 years of support paid, in 2 years' time); and three years in *Birinyi v. Lindstrom* (oldest child then 18, wife in new business 4 years then) and *Lane v. Creighton* (husband in new career, wife might upgrade). Longer review periods were fixed in some other cases: four years in *Miolla* (wife finishes college) and *Bassi v. Grewal* (both young children in school); and five years in *Bigelow v. Downie* (harder to see, children 10 and 7, wife working part-time), *Roper* (retraining of wife) and *Decock* (wife little employment effort, but that would suggest a much *shorter* review period). In one interesting case, no spousal support was ordered for 18 months, with a review then scheduled, as the husband was paying off a sizeable debt to the Canada Revenue Agency by way of garnishment and child support for three children took priority over spousal support: *Andreychuk* (this would have been a debt exception case, had anyone called it that).

(6) Time Limits: Too Many Initial Limits, and Too Many Short Ones

The time limit decisions require a much more complicated analysis. In brief, too many of the time limits suggest courts underestimating the compensatory loss or the disadvantage to the lower-income-earning parent. In the *Final Version*, we introduced a range for duration under this formula, adding a lower end for the range, while emphasising that these are “softer” limits, more important as a means of structuring the process of variation and review. As the vast majority of these cases involve compensatory support, we suggested that most cases should eventually end up towards the upper end of any range.¹³⁴

The *Final Version* anticipated variation and review as the stage where these durational limits would come to bear in the *with child support* cases. Only 6 of the 46 duration decisions involved variation or review.¹³⁵ This means that most of the time limits were being imposed at the initial decision stage, somewhat of a surprise. The initial decision may often take place some time after the date of separation, especially when an interim order or agreement is in place or negotiations are complex. In some cases, entitlement factors may explain the end of support, e.g. the increased income of the recipient or employment after a period of education or retraining. Even allowing for that, these initial decision time limits occur with surprising frequency, and some of the time limits are disturbingly short, given the length of the marriages, the disparate incomes of the spouses, and the ages of the children.

Time limits were imposed in only four of ten cases of marriages 20 years or more. Apart from *Turpin v. Clark*, none of them are poster children for the wise use of time limits. In *Turpin*, a *Miglin* second-stage case, spousal support was increased above the step-down

¹³⁴ *Final Version*, section 8.5.

¹³⁵ Of the two variation cases, one was indefinite (*Beninger*) and one had a time limit (*Conner*). Of the four review decisions, only one was indefinite (*Bockhold*) and three had time limits (*Samson*, *Moniz*, *Hosseini v. Kazemi*).

levels provided in the agreement, but the 8 year time limit in the agreement was maintained for a 20-year marriage.¹³⁶ As for the other three, *Conner* has already been discussed: the court limited the below-range amount of support to a total period of seven years, this after a 25-year marriage, one child with special needs, and a wife's income of \$12,500 compared to the husband's \$82,000. In *Bozak*, spousal support was limited to 8 more years, when the youngest child graduated from high school, for a total of 10 years, after a 20-year marriage that left a huge income disparity, the husband's \$512,000 to the wife's \$80,000 (although this is confused by the trial judge using an income of \$150,000 for the wife to compute the set-off amount of child support for shared custody). The wife in *Schaefer* was back to work as a full-time nurse, earning \$65,000 per year, compared to her lawyer-husband's \$100,000 per year, so that she only got three years' support for 2006-08 and no ongoing support after a 20-year marriage, a dubious result in light of the wife's past child-rearing responsibilities and the husband's increased ability to pay after child support ceased in a few years (\$875-\$1,166/mo. under the *without child support* formula).¹³⁷

By contrast to the longest marriages, the time limits in marriages of 15 to 19 years were at least justifiable, in the 3 of 8 cases where time limits were used. The best example would be *Dong v. Liu*, where the court used the full 15-year maximum time limit (and an upper-range amount) to calculate a lump-sum spousal support order to set off against the husband's remaining assets when he was imprisoned in China for "gangsterism".¹³⁸ In *B.J.A. v. W.A.A.*, the five-year limit reflected an increasing income imputed to the wife, with support ending when the lower end of the formula range hit zero in 2013, this after a 16-year marriage.¹³⁹ Finally, in *Moniz*, in a review case, spousal support was to end six months after the wife graduated from her education program, providing her with 5 years of support (plus likely another 2 or 3 years of interim support), after a 19-year marriage and older children. This time limit is still on the short side, especially in light of the wife being home during the marriage and the continuing income disparity between the spouses.¹⁴⁰

The modal group of 10-14 year marriages offers 8 cases where support was time limited, slightly more than half of the 15 cases in this category.¹⁴¹ These fact situations lie at the heart of this formula: school age children, considerable past child care, child care obligations running into the future for some time yet, usually with some period of time before the recipient's position is entirely clear and sizeable continuing income disparities. One would expect time limits to be much less frequent, certainly much less than 50 per cent of the total.

There were some very short time limits, two years or less, that are really hard to justify. At least in *M.M.F. v. R.B.*, the two-year limit was openly stated to be extendible, after a

¹³⁶ *Turpin v. Clark*, [2008] B.C.J. No. 2013, 2008 BCSC 1425.

¹³⁷ *Schaefer v. Schaefer*, [2009] B.C.J. No. 590, 2009 BCSC 169.

¹³⁸ [2008] B.C.J. No. 2559, 2008 BCSC 1795.

¹³⁹ [2008] B.C.J. No. 1852, 2008 BCSC 1319.

¹⁴⁰ [2008] B.C.J. No. 1555, 2008 BCSC 1109, further reasons [2009] B.C.J. No. 589, 2009 BCSC 395.

¹⁴¹ In our 2007 paper, we also found an increased use of time limits in this group of cases, but the time limits were noticeably longer compared to the 2009 time limits.

13-year marriage and split custody.¹⁴² No such extension was mentioned for the 2-year limit in *M.G. v. D.G.*, where the wife had not worked outside the home during the 14-year marriage and she had been slow to seek employment, but there was a 9-year-old child in her care.¹⁴³

A good example of a short time limit would be *Chen v. Liu*, where the wife was only awarded 15 months of retroactive spousal support for a period when she was on disability leave and her income was lower, but no ongoing support as her employment income was higher and more stable once she returned to her full-time employment.¹⁴⁴

At the upper end of the durational range would be *Hartshorne*, where the wife was granted ten years of spousal support after a 12-year relationship, retroactively, in amounts at the high end of the range, with no continuing support in light of the wife's income of \$121,000 per year.¹⁴⁵ Again, we can see entitlement factors that explain the end of support here.

In the middle for this 10-14 year group are limits of 5 to 7 years, which raise more nuanced issues. For example, in *Abelson v. Mitra*, a 7-year limit is easier to understand where it was a 14-year marriage in which the wife achieved all her academic goals and was now studying for her Ph.D. (and the children were 16 and 13).¹⁴⁶ Or even the shortish 5-year limit after a 13-year marriage in the custodial payor case of *G.C.H. v. H.E.H.*, as time limits are built into the custodial payor formula on duration, the wife had not paid any child support for the 16-year-old and she had delayed her own application for spousal support for 3 years.¹⁴⁷ Harder to understand is the 4-year limit (plus 2 years interim) in *Southcott*, when the children were 12 and 10 in a shared custody arrangement.¹⁴⁸ Or the 5-year limit in *Hosseini v. Kazemi*, given the length of the marriage, children 11 and 4, and the huge continuing disparity in incomes (the husband was a medical specialist).¹⁴⁹

The time limits for marriages of 5 to 9 years are no more encouraging. Six of the 11 cases resulted in time limits. In two cases, short time limits were used to generate modest lump-sum awards in understandable circumstances: *Mohajeriko v. Gaudomi* (2 years, to offset the 75/25 split in family assets in favour of the husband after a 5-year marriage and a step-daughter now age 20);¹⁵⁰ or *Fearnside* (2 years, significant reapportionment, 8-year marriage, wife delayed seeking support and cohabited for 5 years, children 18 and 16).¹⁵¹ But a modest lump-sum award was made in *Dhaliwal*, for just 3 years of support after a 5-year marriage, with one child only 4 years of age and a wife on social assistance,

¹⁴² [2008] B.C.J. No. 1406, 2008 BCSC 984.

¹⁴³ [2009] B.C.J. No. 1225, 2009 BCSC 809.

¹⁴⁴ [2008] B.C.J. No. 1354, 2008 BCSC 928.

¹⁴⁵ [2009] B.C.J. No. 1050, 2009 BCSC 698.

¹⁴⁶ [2008] B.C.J. No. 1672, 2008 BCSC 1197.

¹⁴⁷ [2008] B.C.J. No. 1582, 2008 BCSC 1127.

¹⁴⁸ [2009] B.C.J. No. 1143, 2009 BCSC 760.

¹⁴⁹ [2009] B.C.J. No. 743, 2009 BCSC 502.

¹⁵⁰ [2009] B.C.J. No. 576, 2009 BCSC 393.

¹⁵¹ *Fearnside v. Fearnside*, [2008] B.C.J. No. 1525, 2008 BCSC 1072.

unquestionably inconsistent with any notion of duration under this formula and the case law upon which it is built.¹⁵²

The other three cases involved time limits of 5 to 7 years. In *T.(J.L.) v. T.(J.D.N.)*, the 7-year time limit could be justified under *Miglin* by the terms of an agreement, made after a 5 ½ year marriage, where the children were 12 and 10.¹⁵³ Baffling was the 5-year terminating review order in *E.A.C. v. L.A.C.*, where the wife was disabled and on social assistance after a 9-year marriage and the children were 8 and 6 (6 ½ years total duration).¹⁵⁴ Or the 3 more years (6 in total) in *M.E.C. v. D.E.J.*, where the children were 11 and 9, the wife had been home and there remained a sizeable income disparity after a 9-year marriage.¹⁵⁵

The inappropriate use of time limits, and short time limits, especially at the initial decision stage, is now a serious issue under the *with child support* formula.

(7) Shared Custody: Income Disparities and Continuing Disadvantage

There were a surprisingly large number of shared custody cases in the past year, 13 in all, 20 per cent of the total.¹⁵⁶ Typically, compared to other custodial arrangements, shared custody parents have incomes that are higher and closer together,¹⁵⁷ making spousal support less likely in such cases. The cases reported here all involved sizeable income disparities, so that spousal support was in issue, continuing a pattern we first observed in our 2007 paper.

Of the 13 cases, 4 involved one child, 6 involved two children and 3 involved three children. In 8 of the 13 cases, the straight set-off determined the child support amount, with two cases below the set-off and three above. In practice, despite the discretionary language of *Contino*, the set-off has become the presumptive result in shared custody cases, because neither parent is prepared to lead further evidence under s. 9(b) or (c) or because neither parent can convince the court of increased costs or other factors under those clauses.¹⁵⁸ Both the below-set-off cases were exceptions or aberrations.¹⁵⁹ The above-set-off cases are also unusual: a temporary full table amount in *V.E.T. v. C.E.T.*,¹⁶⁰

¹⁵² [2008] B.C.J. No. 1722, 2008 BCSC 1226.

¹⁵³ 2009 CarswellBC 1564, 2009 BCSC 780.

¹⁵⁴ [2009] B.C.J. No. 283, 2009 BCPC 49.

¹⁵⁵ [2009] B.C.J. No. 766, 2009 BCSC 519.

¹⁵⁶ Much larger than the 10 per cent in the 2005-07 period.

¹⁵⁷ See the statistics discussed in Thompson, "The Chemistry of Support: The Interaction of Child and Spousal Support" (2006), 25 C.F.L.Q. 251 at 270.

¹⁵⁸ See Thompson, "Annotation: *Stewart v. Stewart*" (2007), 40 R.F.L. (6th) 1.

¹⁵⁹ *McClaghry* is an interim exception, payor-pays-the-big-mortgage case. *Bozak* is just inexplicable, as the court used an income for the wife of \$150,000 in calculating the child support set-off despite finding the wife's income to be \$78,000/yr. for spousal support.

¹⁶⁰ [2009] B.C.J. No. 730, 2009 BCSC 444. This was a high-conflict custody case, where the court ordered a parallel parenting type of shared custody and continued the full table amount (the child had previously been in the primary care of the wife) until the parties could negotiate a resolution or bring the matter back before the court.

a weird non-set-off calculation in *Marino*,¹⁶¹ and a no “material change” case that left child support higher than the set-off in *Bishop*.¹⁶²

In 9 of the 13 cases, a spousal support amount was determined, and they reveal a pattern little different from other *with child support* cases: one high in the range (*Marino*), 6 in the mid-range¹⁶³ and 2 in the lower end (*V.E.T. v. C.E.T., Bozak*). There is no obvious inter-relationship between the child support amounts (above/below/set-off) and the location in the spousal support range.¹⁶⁴ As for duration, there is also little difference from the general run of *with child support* cases, with six cases of indefinite orders¹⁶⁵ and 3 time-limited orders.¹⁶⁶

There is one consistent pattern of note in these shared custody cases: almost all of them involved wives who were home with the children for most of the marriage, with shared custody only occurring after separation.¹⁶⁷ And most of these cases involved children 10 or older, so that the periods out of the labour force were significant. Not surprisingly, these cases also show large, continuing income disparities between the spouses. These are the same characteristics we saw in *Mann* in the Court of Appeal.

What lurks beneath these patterns is even more important. First, the wives emerge from these marriages with considerable past disadvantage flowing from the roles adopted during the marriage, a strong compensatory claim despite the post-separation roles. Second, anecdotal experience suggests that a parent who has been previously home will continue to play a more significant organizing and parenting role post-separation, despite any rough equality of time spent after separation. This in turn points to a continuing, but hidden, disadvantage flowing from the obligations of child care. In short, the fact pattern revealed in most of these shared custody cases suggests a very strong compensatory claim to spousal support.

¹⁶¹ [2008] B.C.J. No. 1996, 2008 BCSC 1402. This was a “mixed” custody case, where the oldest child (16) lived with the wife and the two youngest (14 and 10) were subject a shared custody regime. The proper calculation in this setting is to subtract the mother’s two-child amount from the father’s three-child amount. Instead, the court took the one-child amount and then added 75% of the difference between the three-child and one-child table amounts. The result was child support of \$2,000, rather than the \$1,884 set-off amount.

¹⁶² [2008] B.C.J. No. 1703, 2008 BCSC 1216. This was an unusual case on many fronts, starting with the fact that these were grandparents who had had their 11-year-old grandson living with them since his birth, then separated after being married for 30 years. In the 2006 consent order, the parties had fixed a set-off amount of \$458/mo., with the wife to pay all the Christian school and counselling fees (about \$597/mo.), a package deal that the court would not disturb, despite the husband’s income falling from \$72,000 to \$63,000 and the wife’s rising from \$22,500 to \$26,000 per year. The court also found no change for spousal support purposes.

¹⁶³ *Southcott, G.P. v. M.J.R.P., Samson, Bigelow v. Downie, Bishop, B.J.A. v. W.A.A.*

¹⁶⁴ The one exception would be *R.A.C. v. V.L.C.*, [2009] B.C.J. No. 1233, 2009 BCSC 825, where the wife earned \$900,000/yr., the husband earned \$84,000 and the straight set-off produced child support of \$12,758/mo. to the husband (\$153,096/yr.), so the husband was found not entitled to spousal support.

¹⁶⁵ *E.G.P. v. S.L.P., G.P. v. M.J.R.P., Samson, V.E.T. v. C.E.T., Bigelow v. Downie, Marino.*

¹⁶⁶ *Southcott* (6 years), *Bozak* (8 years), *B.J.A. v. W.A.A.* (5 years).

¹⁶⁷ The only clear exception would be *R.A.C. v. V.L.C.* In *B.J.A. v. W.A.A.*, the wife worked with the husband in the family company throughout the marriage and might be more accurately described as a secondary earner.

(8) Payor Income Above \$350,000: Formula Range Until Really High

In British Columbia, we see more reported cases involving higher incomes, unlike Ontario where many of these cases end up in arbitration. Earlier, we discussed the five high income cases that went to the Court of Appeal in the past two years. Amongst the *with child support* trial cases, we can find 7 cases where the payor earned more than \$350,000. Four involved incomes just above that “ceiling”: *Hosseini v. Kazemi* (\$351,000); *Bockhold* (\$360,000); *Turpin v. Clark* (\$382,700) and *Abelson v. Mitra* (\$355,000). In three of these four, the formula was used to establish the range and an amount was chosen in the low-to-mid range. Only in *Bockhold* were the SSAG not used and an amount determined well below the range.

In the continuing *Beninger* saga, on a variation application, the tax lawyer husband’s income had risen to \$416,400 per year from \$330,000 at the time of the previous order, another case of an income just above the ceiling.¹⁶⁸ The change in income led to an increase in child support for the one remaining child, to the new table amount of \$3,380/mo. Included in that income for child support purposes was a \$50,000 performance bonus. For spousal support purposes, two SSAG calculations were done, one for \$416,400 (\$10,885-\$12,875/mo.) and another for \$366,400 (\$9,261-\$11,049/mo.), with Fenlon J. interpolating (she called it “a compromise”) between the two, to produce a low-end amount of \$10,000 per month, increased from \$9,000/mo. The bonus was not part of his regular compensation and there was no guarantee that it would be paid or paid in the same amount in the next year. Spousal support was different from child support, suggested the court, as “some certainty” (meaning “stability”) was required for a spousal support order.¹⁶⁹ *Beninger* did use the SSAG, choosing the low end of the range.

The other two cases involved higher incomes: \$512,000 for the dentist husband in *Bozak*,¹⁷⁰ and a nice round \$900,000 for the investment adviser wife in *R.A.C. v. V.L.C.*¹⁷¹ The incomes used for the wife in *Bozak* confuse the analysis, as this was a shared custody case. The range stated by the court was \$6,448 to \$11,617 per month, which actually reflects two ranges, one for an income to the wife of \$78,000 (roughly \$8,500-\$11,596/mo.) and another for an income to the wife of \$150,000 (roughly \$6,520-\$9,221/mo.). The court ordered \$6,000 per month of spousal support, this after stating that it was using \$78,000 as the wife’s income for spousal support purposes. For child support purposes, with no explanation, the court used an income of \$150,000 for the wife, producing a set-off amount of \$4,400/mo. (compared to a set-off amount of \$5,317/mo. if the wife’s income were treated as \$78,000).

Since we are tossing around numbers here, it is worth considering another alternative for the court, discussed in the *Final Version*¹⁷² and mentioned in the *Loesch v. Walji* appeal:

¹⁶⁸ [2008] B.C.J. No. 2612, 2008 BCSC 1806.

¹⁶⁹ See the comments of Fenlon J. at para. 129.

¹⁷⁰ [2008] B.C.J. No. 2080, 2008 BCSC 1458.

¹⁷¹ [2009] B.C.J. No. 1233, 2009 BCSC 825.

¹⁷² At 112-113.

determine the child support using the parties' actual incomes and then compute the spousal support range as if the payor were only earning \$350,000 (rather than \$512,000) and the wife was making \$78,000.¹⁷³ That range in *Bozak* would have been \$5,164-\$7,001/mo. and the court's result falls in the middle of that range. Using the \$350,000 "ceiling" for spousal support purposes provides a useful "floor" range, to compare to the higher SSAG range generated by the higher incomes. For incomes not too ridiculously above \$350,000, this "minimum-plus" approach can be quite helpful. As the payor's income rises into the stratosphere, however, the huge child support amounts begin to deliver a chunk of spousal support, i.e. covering some of the indirect costs of child-rearing.

An interesting example of this comes in the *R.A.C. v. V.L.C.* case. The wife was an investment advisor, earning \$900,000 a year, while the husband earned \$84,000 managing a car dealership. They used nannies while they were together. The husband developed a serious cocaine addiction at the end of the relationship and into the initial separation. The court ordered week-about shared custody for the three children aged 10, 8 and 7. The husband sought child and spousal support and, paraphrasing Meat Loaf, "one out of two ain't bad": the husband was awarded set-off child support of \$12,758/mo. (\$153,096 per year, tax-free), but no spousal support. There was no compensatory basis, as his career was limited by his addiction, and little non-compensatory basis either, as the husband had a new partner earning \$60,000/yr. and the child support generated "an equivalent standard of living" for the children.¹⁷⁴ In effect, the child support award was large enough to satisfy any remaining spousal support claim. That would not have been so clear had the wife earned \$500,000, instead of \$900,000, although the husband would still have been a guy.

What is striking in these high income cases is the absence of such income-based arguments. Guidelines use incomes as proxies for many things: loss, advantage, need, standard of living. At lower income levels, incomes serve as excellent proxies for most of those things. As incomes rise, the correlations become less good and sometimes there is little correspondence between them. But in guidelines analysis, whether child support or spousal support, incomes aren't "just math" at these higher income levels, but policy discussions about how much is enough for "need" or "loss" or "standard of living". For cases over \$350,000 under the *with child support* formula, it is therefore important to explore the ranges for different incomes, for spousal support rather than child support. We see some intuitive sense of a "two-income" approach in some of the cases, but little real analysis.

¹⁷³ To be precise, what this means is that the software calculates spousal support for those incomes, after computing and deducting the child support appropriate for those incomes.

¹⁷⁴ The husband had received interim spousal support of \$1,500/mo. for 20 months from Nov. 2007 to June 2009.

(9) Hartshorne v. Hartshorne: Spousal Support Redetermined

One trial decision that deserves special consideration is the lengthy and carefully-written decision of Justice Leask in *Hartshorne v. Hartshorne*.¹⁷⁵ We all remember this case, the marriage contract that went all the way to the Supreme Court of Canada in 2004, with the wife eventually receiving, not the \$654,000 in assets she received at trial but just the \$280,000 under the contract.¹⁷⁶ At trial, in addition to child support, Beames J. had ordered spousal support of \$2,500/mo. from December 1, 1999, dropping down to \$1,500/mo. once the wife earned \$2,000 per month. That order was upheld on appeal, treated as “the functional equivalent of an interim order pending the property division and the respondent obtaining employment”. In 2002, on a review of spousal support, Melnick J. had ordered a termination of spousal support, effective December 21, 2002, subject to any appellate decisions on the property division.¹⁷⁷ In the Supreme Court of Canada, Bastarache J. said that the trial judge should have “first applied the Agreement, then determined the need for spousal support, which was preserved under the Agreement, and finally decided whether the result warranted a different apportionment of property”.¹⁷⁸ This meant a “reopening” of spousal support, acknowledged Justice Bastarache, and “a new application” for spousal support could be brought by Ms. Hartshorne.¹⁷⁹ She brought that application, along with applications for child support and various property determinations, all of which were decided on May 28, 2009.

On the spousal support issues, in brief, Justice Leask orders spousal support for the years 1999 to 2008 inclusive, in the form of a lump sum of \$350,000.¹⁸⁰ In his reasons and his technical appendix, Leask J. takes various different routes to fix upon this amount, the most prominent of which is the Spousal Support Advisory Guidelines.¹⁸¹ The court used the upper end of the range for amount, for the ten-year period from 2000 to 2009, this after a 12 ½ year relationship. At the beginning of the ten-year period, the two children were 12 and 10, which meant child support and section 7 expenses had to be considered. For the whole period in issue, the *with child support* formula applied.

By the time of the court’s 2009 decision, the 21-year-old son resided with the wife and remained a “child of the marriage”, in part due to his special needs. He had attended university in the spring term of 2008, had also worked and was returning to university in the fall of 2009. The court ordered a one-half table amount of child support for him until

¹⁷⁵ [2009] B.C.J. No. 1050, 2009 BCSC 698 (May 28, 2009).

¹⁷⁶ [2004] 1 S.C.R. 550, 47 R.F.L. (5th) 5, reversing [2002] B.C.J. No. 2416, 2002 BCCA 587, 31 R.F.L. (5th) 312 (C.A.), upholding [1999] B.C.J. No. 2861 and [2001] B.C.J. No. 409, 2001 BCSC 325 (S.C.).

¹⁷⁷ [2001] B.C.J. No. 2854, 2001 BCSC 1678 reports the adjournment of the review into 2002 by Melnick J., but the actual decision terminating support on December 31, 2002 is not reported.

¹⁷⁸ Above, note at para. 56.

¹⁷⁹ Above, note at para. 59.

¹⁸⁰ A lump sum which is applied first against the house payment owed by the wife to the husband of \$265,318 and then against any other property amount owing under the Supreme Court of Canada judgment.

¹⁸¹ In the appendix, the court sets out the calculations of Ms. Hartshorne and his own SSAG calculations using various assumptions, producing various lump sum amounts: \$354,000; \$341,000; \$347,500-\$443,500; and \$356,500.

he returned to university, \$1,316/mo. As for the daughter, Mr. Hartshorne was paying the bulk of her expenses out of RESP funds and his own funds.

At the start of the ten-year period, the husband's 1998 income was \$175,789, increasing to \$342,712 in 1999 and fluctuating up and down thereafter, ending in 2007-09 at \$320,550. The wife earned no income in 1999-2001, then her income climbed steadily from \$26,744 in 2001 to \$121,879 by 2007-09.

There were a series of legal arguments, only some of which bear repeating. The application was treated as a *de novo* application, and not a variation or review as argued by the husband. The husband conceded that the wife had a strong claim on both compensatory and non-compensatory grounds and the court clearly so found. Of lasting interest here is Justice Leask's careful analysis of the disadvantages faced by a lawyer and custodial parent returning to practice after a lengthy absence, an exercise in fact-finding with an "awareness of 'social reality'" as he described it.¹⁸²

The really interesting issue here was the husband's argument that his post-separation income increase should not be taken into account in determining spousal support. The couple separated in January 1998. After reviewing the relevant portions of the *Final Version* and the case law,¹⁸³ the court decided that the full amount of Mr. Hartshorne's post-separation income increase should be considered.

First, the family continued to function as a single economic unit until at least the end of November 1999, which captured the big jump in his income. Second, there was "a clear temporal link between their marriage and this increase with no intervening change in Mr. Hartshorne's career". Third, after the separation, the wife continued as the custodial parent of the two children, "shouldering the lion's share of child-rearing responsibilities, including the additional burden created by their son's special needs", restricting her income-earning ability. Fourth, the years from age 38 to 51, the years the parties lived together, are "crucial years in the professional development of most lawyers", no less so for Mr. Hartshorne.¹⁸⁴ Finally, the couple were "two legally trained people who decided to divide their family responsibilities in such a way as to make a joint investment in one career – Mr. Hartshorne's" and it would be "unfair for him alone to reap the benefits".

Unfortunately, there is no detailed explanation for the specific location of the amount and duration of support at the high end of the range, although the analysis of entitlement and post-separation income increase offers ample justification. The husband had argued for amounts in the mid-range, terminating at the end of 2004, just 5 years of support. Those

¹⁸² The same kind of evidence might not have resonated so strongly had Ms. Hartshorne been a long-distance truck driver or an orthopaedic surgeon or a hairdresser.

¹⁸³ Two of the cited cases deserve special mention: *Kelly v. Kelly*, [2007] B.C.J. No. 234, 2007 BCSC 227 and *D.B.C. v. R.M.W.*, 2006 ABQB 905.

¹⁸⁴ These points are canvassed at paras. 113-117 of the reasons. The 13-year period was further characterized as "when the best lawyers demonstrate their superiority over colleagues of average ability and build their reputations with fellow professionals and clients". Again, a bit of "social awareness", sometimes also described as "judicial notice".

who want to understand the calculations should read the judgment, as they are “technical”, but clearly set out.

We would quibble with three observations by Justice Leask about “applying SSAG with care”, at paragraphs 122 to 125. Here’s what he said, with our comments:

- “First, the authors of SSAG caution that the ranges are based on a strong presumption that the parties accumulated property during their marriage which has been divided equally. Here, though the parties’ marriage agreement may have operated ‘fairly’, it did not operate to create an equal division of property.”

A careful reading of section 12.6 of the *Final Version* reveals that the “strong presumption” of equal division referred to the property statutes themselves, not the underlying premise for any particular case under the SSAG. The Advisory Guidelines do not presume the existence or accumulation of any particular amount of family property. And while an equal division of any property will take place “in most cases”, an unequal division of property (apart from any income generated by that property) does not affect the formula ranges. An unequal division of property is may affect the location within the ranges for amount and duration, if at all.¹⁸⁵ In some cases, especially those involving lower incomes or older spouses, the property held by each spouse may have a significant effect upon their standard of living and hence the determination of an amount within the range.

- “Second, SSAG are typically a forward-looking tool. Here, the time period in question has almost entirely elapsed. As a consequence, I am mostly being asked to predict the past rather than the future. I have the benefit of knowing how need, self-sufficiency, and economic advantages and disadvantages have actually played out in the lives of the parties.”

Support itself, whether child support or spousal support, is usually a prospective exercise. But guidelines permit the ready calculation of retroactive support, as they do not require detailed inquiries into past budgets, spending, etc. Incomes alone are enough to generate amounts, along with some section 7 expenditures. And it is easier, not harder, to do all this *after* the events have transpired. Admittedly, other issues can arise in the typical retroactive case, e.g. delay, reasons for delay, reliance upon past orders or agreements, etc. On the unique facts of *Hartshorne*, however, none of these additional factors were at work, as both parties knew that the reopening of spousal support was a likely consequence of a different property outcome.

- “Third, SSAG does not automatically apply to payor incomes that exceed \$350,000. Due to the nature of Mr. Hartshorne’s business, his income has

¹⁸⁵ *Final Version*, section 9.6, discussing how property division and debts can affect location with the range.

fluctuated from year to year by as much as \$160,000. I am untroubled by including one year that is over \$350,000.”

This is largely correct, as long as we read the first sentence as “the formulas do not automatically apply to payor incomes that exceed \$350,000”. In the calculations, the court uses average incomes for various periods, all of which are less than the “ceiling”. The one year above the ceiling was 2006, when the husband earned \$401,929, not dramatically higher (and in 2004 his income fell to \$137,803).

Apart from these quibbles, the *Hartshorne* decision provides an excellent example of a careful and sensitive application of the Advisory Guidelines to determine spousal support in a complex fact situation, one made more complex by its unique procedural history.

(10) The “No Entitlement” Cases

Amongst these 64 trial decisions, there are ten cases where the court found “no entitlement” to spousal support. Under the *with child support* formula, “no entitlement” may just mean “no support” *now*, because of the statutory priority to child support and the incomes of the spouses. A finding of “no entitlement” may not have the same finality as under the *without child support* formula. Section 15.3 of the *Divorce Act* allows a subsequent increase or even resuscitation of spousal support, as child support reduces or terminates.¹⁸⁶

Of these ten cases, there are two where the wife claimed support, but her income was ultimately found to exceed the husband’s income, which makes “no entitlement” a no-brainer: *Rotaru, L.J.C. v. G.S.C.*¹⁸⁷

Next there are a number of cases where the formula range runs from zero to zero, supporting a conclusion of “no entitlement”: *Andreychuk, Durrad, Ginther, Hilton, D.C.O. v. J.S.O.*¹⁸⁸ A little bit different is a case where the low end of the range is zero, as the court has more room to exercise its discretion. The range of 0 to \$32 in *Gaita* led to a

¹⁸⁶ On these issues, see “The Chemistry of Support”, above, note at 279-284.

¹⁸⁷ *Rotaru v. Rotaru*, [2009] B.C.J. No. 280, 2009 BCSC 191 (wife earning \$63,645 claims self-employed maintenance man husband should be imputed an income of \$100,000, court finds \$15,881); *L.J.C. v. G.S.C.*, [2008] B.C.J. No. 2370, 2008 BCSC 1672 (wife earning \$46,263 claims cabinet-maker husband earns way more than \$45,000, court accepts that income for interim support).

¹⁸⁸ *Andreychuk v. Andreychuk*, [2009] B.C.J. No. 822, 2009 BCSC 549 (husband earns \$54,468, wife \$24,000, 3 children, zero range even before CRA garnishment); *Durrad v. Durrad*, [2009] B.C.J. No. 736, 2009 BCSC 492 (husband earns \$60,000, wife \$55,541, 2 children); *Ginther v. Ginther*, [2008] B.C.J. No. 2440, 2008 BCSC 1650 (husband earns 39,232, wife \$13,000, 2 children, s. 7 expenses); *Hilton v. Hilton*, [2008] B.C.J. No. 2150, 2008 BCSC 1536 (husband earns \$62,900, wife \$50,600, 2 children); *D.C.O. v. J.S.O.*, [2008] B.C.J. No. 1472, 2008 BCSC 1047 (husband earns \$50,000, wife \$26,000, 2 children, s. 7 expenses). Note that in *Chen v. Liu*, [2008] B.C.J. No. 1354, 2008 BCSC 928, the court ordered a \$2,000 retroactive lump sum even though the range was zero to zero even when the wife was on disability).

“no support” outcome there,¹⁸⁹ and courts have ended spousal support where that zero appears at the low end of the formula range.¹⁹⁰

That leaves two interesting “entitlement” cases, both with flaws. In *Godinez v. Gallant*, both husband and wife were servers, with undeclared tip income, and the trial judge incorrectly refused to gross up the tips as this was “tantamount to stolen money” or “a tax debt”.¹⁹¹ The result was a lower amount of child support for the three children and a spousal support range of 0-0-\$201, i.e. no order for spousal support. Had the husband’s tips been properly grossed up, the child support would have been \$1,668/mo., instead of \$1,365, and the spousal support range would have been 0-\$497-\$798.

Last of the entitlement cases is *R.A.C. v. V.L.C.*, where the husband earning \$84,000 per year and sharing custody of the three children was denied any spousal support from the wife earning \$900,000 per year.¹⁹² As pointed out earlier, the husband was receiving big child support, tax-free, amounting to \$153,096 per year. Would a wife in the same situation have been found to be “self-sufficient” and not entitled to spousal support after 13 years together? The nice thing about gender-blind formulas is that they make these questions more pointed.

(11) Concluding Odds and Ends

This last part will pick up a number of short issues, tips and traps, arising from the cases and the use of these formulas. Most of the following avoidable errors should be picked up by at least one lawyer in any given case.

- Social assistance is *not* income for spousal support purposes. In two cases, this small point was missed, thus generating a lower and incorrect range for spousal support: *Paheerding v. Palihati*¹⁹³ and *E.A.C. v. L.A.C.*¹⁹⁴
- It is critical to know which parent is receiving what child tax and other benefits. There was often no discussion of this important point in the shared custody cases, where the benefits can be rotated (6 months to each parent) or received by the lower income spouse.¹⁹⁵ In doing *with child support* calculations, however, the

¹⁸⁹ *Gaita v. Gaita*, [2008] B.C.J. No. 1558, 2008 BCSC 1111 (husband’s income imputed as \$80,000, wife was earning \$46,700, but \$74,000 now back to full time, 1 child), but note *Birinyi v. Lindstrom*, [2009] B.C.J. No. 143, 2009 BCSC 97 (husband imputed \$50,000, wife \$20,000, 2 children, range 0 to \$57, order for \$57/mo.).

¹⁹⁰ *Samson v. Samson*, [2009] B.C.J. No. 952, 2009 BCWSC 635 (nominal order after 2008); *Schaefer v. Schaefer*, [2009] B.C.J. No. 590, 2009 BCSC 169 (no support after Dec. 2008); *B.J.A. v. W.A.A.*, [2008] B.C.J. No. 1832, 2008 BCSC 1319 (no support after 2013).

¹⁹¹ [2009] B.C.J. No. 840, 2009 BCSC 540.

¹⁹² [2009] B.C.J. No. 1233, 2009 BCSC 825.

¹⁹³ [2009] B.C.J. No. 830, 2009 BCSC 557.

¹⁹⁴ [2009] B.C.J. No. 283, 2009 BCPC 49.

¹⁹⁵ The exceptions would be *Samson v. Samson*, [2009] B.C.J. No. 952, 2009 BCSC 636 at paras. 59, 65 and 87 and *Bigelow v. Downie*, [2009] B.C.J. No. 293, 2009 BCSC 205 at paras. 15, 46 and 56 (but the court incorrectly included the child tax benefit in the wife’s income to compute the set-off for retroactive support purposes, but not for prospective child support). In two cases, the formula ranges clearly indicated

child tax benefit should *not* be included in the spouse's income, as if it were employment or other income, as the software computes the benefits automatically and it adjusts them for the spousal support paid. To include the child benefits in the recipient's income manually then double counts the benefits, and generates a lower range for spousal support.¹⁹⁶

- Section 7 expenses must be considered in determining the spousal support range. Many cases correctly took these expenses into account, but some didn't.¹⁹⁷
- Where prior child support is paid, the range must usually be adjusted. This was missed in one or two cases.¹⁹⁸ There is also a small revision to this prior support exception in the *Final Version*, which also permits this adjustment to be made where a parent has the care of and supports a prior child in his or her own household.¹⁹⁹
- Adjustments should usually be made where one parent is not paying child support in cases under the *custodial payor*, *shared custody* or *split custody* formulas.²⁰⁰
- The *split custody* cases were complicated fact situations and contained more errors.²⁰¹
- There were only a few *custodial payor* cases, with no errors, except for the most recent *Stevenson* case.²⁰²

that the child benefits were being rotated, but this was never stated in the decision: *Southcott v. Southcott*, [2009] B.C.J. No. 1143, 2009 BCSC 760 and *G.P. v. M.J.R.P.*, [2009] B.C.J. No. 981, 2009 BCSC 659.

¹⁹⁶ This double-counting was done in *Bigelow v. Downie* and the split custody case of *Lane v. Creighton*, [2008] B.C.J. No. 2389, 2008 BCSC 1689.

¹⁹⁷ E.g. *Southcott v. Southcott* (range stated as \$453-\$990, order for \$700, but sizeable section 7 expenses identified and no amount stated, range not adjusted, shared custody case); *Marino v. Marino*, [2008] B.C.J. No. 1996, 2008 BCSC 1402 (range stated as \$800-\$1,700, order made for \$1,300, but after s. 7 expenses range estimated as \$378-\$1,450/mo.); *Bishop v. Bishop*, [2008] B.C.J. No. 1703, 2008 BCSC 1216 (wife paying s. 7 expenses in shared custody case, husband states range as \$199-\$756, but range after s. 7 expenses actually \$756-\$1,195/mo., no "material change" anyway).

¹⁹⁸ *MacNutt v. MacNutt*, [2008] B.C.J. No. 1831, 2008 BCSC 1290 (range stated as \$4,525-\$5,516/mo., but actually lower \$3,277-\$4,057/mo.). In *Samson*, a shared custody case, the husband was paying voluntary and partial child support for a previous child, but no adjustment was made for spousal support purposes, perhaps more justifiably, although a partial adjustment could have been easily made. From the spousal support result, there may have been some adjustment through location within the range.

¹⁹⁹ *Final Version*, section 12.3.3.

²⁰⁰ For a split custody case, where no child support was ordered either way (husband had two children, wife had one), but no adjustment was made to the range, see *Paheerding v. Palihati*, [2009] B.C.J. No. 830, 2009 BCSC 557. In that case, the court ordered what it thought was the top end of the range, i.e. \$479/mo., in a very sympathetic case, as the wife had been disabled by the husband's abuse, but the top end of the range was more like \$538/mo. even at the wife's stated income of \$12,168/yr. In truth, it was even worse as the court treated the wife's likely social assistance as income and, had the wife been treated correctly as having no income, the top end of the range would have been \$856/mo. (if the husband paid child support for the one child in her care) or \$988/mo. (if no child support by the husband was ordered).

²⁰¹ *Stanger v. Dehen*, *Paheerding v. Palihati*, *Lane v. Creighton*, *M.M.F. v. R.B.*

²⁰² *Morrison, G.C.H. v. H.E.H.*, *Lemcke v. Lemcke*. But see the most recent case, not included in the Appendix, of *Stevenson v. Stevenson*, 2009 BCSC 857 (married 21 years, 2 remaining children with

- Despite B.C.’s relaxed approach to step-parent status, there was only one case where the *step-parent* version of the formula might have applied, but it was a no entitlement case.²⁰³ One of the split custody cases involved step-children, two with the husband and one with the wife, but that case had other problems mentioned above.²⁰⁴
- The *adult child* formula seems to have been ignored completely, despite its inclusion in the *Final Version*.²⁰⁵ There were a number of cases where that formula would appear to have applied, but it was not mentioned, even though it might have changed the outcome.²⁰⁶
- There were a few cases where self-sufficiency issues arose, with courts either imputing income to the recipient,²⁰⁷ fixing an amount at the low end of the range²⁰⁸ or scheduling a shorter review.²⁰⁹ Nothing new to be found in these cases on this important issue.
- There was no reference, none at all, to any of the exceptions in these 64 reported cases. Not even when an exception clearly applied: the interim exception in *McClaghry*; the prior support obligation exception in *MacNutt* or *Samson*; the debt payment exception in *Andreychuk*; or the disability exception in *Paheerding v. Palihati* or *Mohajeriko v. Gaudomi*.
- In the *Final Version*, we added a new exception, the *non-taxable payor income* exception.²¹⁰ The formulas assume that the payor can deduct spousal support for tax purposes. Where a payor derives his or her income largely from *legitimately* non-taxable sources, e.g. workers’ compensation, disability payments, income earned by an aboriginal person on reserve or some overseas employment arrangements, it may be necessary to use this exception to balance the interests of payor and recipient (as the recipient will usually be required to pay tax on the support income). After the release of the *Final Version*, we bumped into another example where this exception applies: where the payor resides and pays tax outside of Canada, in a country where it is not possible for the payor to deduct the spousal support for tax purposes.²¹¹

pipefitter husband, he earns \$78,741, wife had no income, spousal support reduced from \$3,000 to \$2,159/mo., wife to pay table child support based on spousal support income (!).

²⁰³ *L.J.C. v. G.S.C.*, [2008] B.C.J. No. 2370, 2008 BCSC 1672 (together 4 years, children 16 and 11, wife earned more than husband).

²⁰⁴ *Paheerding v. Palihati*.

²⁰⁵ *Final Version*, section 8.10.

²⁰⁶ *Rotaru, Bockhold, Fleck, Roper*

²⁰⁷ *Hosseini v. Kazemi, Bozak, Abelson v. Mitra, Decock, B.J.A. v. W.A.A.*

²⁰⁸ *Lane v. Creighton, Bockhold*.

²⁰⁹ *V.E.T. v. C.E.T.*

²¹⁰ *Final Version*, section 12.8.

²¹¹ This point was first made in a short article by Rollie Thompson, “Myths and tips about the spousal support guidelines” in *The Lawyers Weekly*, Vol. 28, No. 45 (April 10, 2009).

- It is possible for a payor to have “two incomes”, adverted to earlier in the section on incomes above \$350,000. In these high-income cases, it is possible to use the full payor income for child support purposes, but a lower income to do the calculations for spousal support under the *with child support* formula.²¹² In two other situations, “two incomes” are also possible: (a) where the payor experiences a post-separation income increase, as the full increase must be shared with the child through an increased table amount, but the same is not necessarily true for spousal support; and (b) where income is attributed or imputed under ss. 18 and 19 of the *Child Support Guidelines*, a higher income may be imputed for child support than for spousal support, e.g. where stock options have been divided as property, or where one spouse acquiesced in the other spouse working less than a full week.²¹³

IV. Looking to the Future in B.C.: Our “Top Ten”

This paper has been longer than we might like, but there have been a lot of SSAG cases in the past year and some important appeals over the past two years. Throughout our discussions of the appeal and trial decisions, we have noted income errors, dubious calculations, overlooked exceptions, but also careful use, thoughtful discussions of entitlement, etc. Here, in the last few pages of the paper, we wanted to offer tips and gratuitous advice for use of the Spousal Support Advisory Guidelines as we look toward the future. Our format is a familiar staple of academic analysis, the Letterman-style “Top Ten”, counting down in reverse order.

Before we start the countdown, there are some things that aren’t on the list. The most important is the need for careful determination of incomes, a topic that we have not discussed in detail in this paper. The determination of income is a whole topic of its own, one that is equally applicable to child and spousal support.

Also not on this list are some traditional “hard topics” in spousal support law, with which we are all familiar: post-separation increases in the payor’s income, remarriage and repartnering of the recipient, subsequent children and second families, illness and disability, high assets. Some of these we’ve already covered in this paper and some we’ve covered in detail in the *Final Version*.

(10) Read the *Final Version*, No “Home-made Formulas”

A number of the mistakes made in the reported cases could have been avoided if one counsel or the other or the judge had read the relevant portion of the Spousal Support Advisory Guidelines document. In July 2008, the *Final Version* was released. No one

²¹² *Beninger v. Beninger*, [2008] B.C.J. No. 2612, 2008 BCSC 1806 (full bonus included in income for child support, only part for spousal support).

²¹³ These points were made in the same short article on “Myths and Tips About the Spousal Support Guidelines”, above, note 211.

should now be using the *Draft Proposal*, which has been superseded by the revised and improved *Final Version*.

The *Final Version*, accompanied by the *User's Guide*, often provides helpful ideas and possible solutions to the day-to-day problems that come up in spousal support analysis. Even if you can't make time to read the whole *Final Version*, you should always go back to the relevant topic heading(s) when preparing your case. Don't just rely upon the software and whatever prompts come up on those screens.

The Advisory Guidelines are in the public domain. Inevitably lawyers, mediators and judges will use them in new and different ways, to further the interests of a client or to find a resolution in a particular case. We just want to offer a caution: there are real dangers in constructing whole new formulas, "home-made formulas", for a particular case. The *Mann* appeal should serve as an object lesson of those dangers.

The formulas found in the Advisory Guidelines have been through a rigorous process of construction based on existing case law, testing on a wide range of hypothetical fact situations, detailed probing by three software suppliers,²¹⁴ actual use across Canada in untold cases, three years of feedback from those users and a detailed process of revisions and adjustments. It is one thing to adjust or tweak around the edges of a formula, or to add another small exception, but it is unwise to build whole new "alternative formulas".

And, before you even adjust or tweak, read the *Final Version*.

(9) Be Issue-Specific in Assessing Use of the SSAG on Variation and Review

There has been a tendency in the cases for judges and lawyers to cite *Beninger* for the general proposition that the Advisory Guidelines "should be approached with considerable caution on variation applications". And that caution is repeated in review cases.

But too few have followed the subsequent careful analysis in *Beninger*, which pointed to some topics where that "caution" is warranted: (i) "some of the more complex issues which can arise on variation proceedings, including the impact of remarriage, second families and retirement"; and (ii) "entitlement may have become an issue since the initial order".²¹⁵ None of these "more significant complications" were a barrier to application of the SSAG on the facts of the *Beninger* variation, according to Justice Prowse.

There are many variations and reviews that do not raise "significant complications":

- applications to reduce spousal support where the payor's income goes down or the recipient's income goes up

²¹⁴ DIVORCEmate, ChildView and AliForm (in Quebec). There is nothing that forces you to be more methodical and careful than probing questions from skilled software creators and programmers, a debt that we should again acknowledge in public.

²¹⁵ *Beninger*, at para. 52. These comments immediately follow the quoted general proposition.

- applications to reduce support where the payor argues that the recipient should have an increased income imputed
- retirement cases that do not raise *Boston* complications, but just a reduction in the retiring payor's income, or the commencement of a new source of income for the recipient
- those cases where there is no dispute that the recipient should share in the payor's post-separation income increase
- applications that involve a "crossover" from the *with child support* to the *without child support* formula, where there are no issues of increasing or reviving spousal support under s. 15.3 of the *Divorce Act*

It is important to go beyond the general proposition in *Beninger*, to look at what specific issues arise on variation or review, to determine how the SSAG can be used.

(8) Remember the Methods for Dealing with Self-Sufficiency

There is a whole chapter in the *Final Version* devoted entirely to the hard topic of "self-sufficiency".²¹⁶ The chapter lists various methods for addressing self-sufficiency that should be noted again here:

- entitlement
- imputing income
- using the ranges, to go lower or higher
- restructuring, including front-end loading, step-down orders and lump sums
- time limits, which work differently under the two main formulas
- review

The *Final Version* makes the point, yet again, that "indefinite" support is not "permanent" support, just that duration is not specified. Indefinite support is subject to variation or review, which means its amount may be reduced, or its duration time limited, or even terminated, at a later date. For most low to middle income earners, the real incentive for self-sufficiency is not some method of support law, but the harsh economic reality faced by most separated or divorced spouses.

There remains some debate about the precise meaning of "self-sufficiency". Some aspects are clear. It is a relative concept, tied to the marital standard of living. It requires a highly-individualized analysis. It should not be "deemed" to occur in advance in compensatory cases, absent strong evidence that it will occur. Given its central importance in spousal support law, the concept of "self-sufficiency" requires more careful definition and development, perhaps by a B.C. court.

²¹⁶ *Final Version*, chapter 13.

(7) Compute Different Ranges for Incomes Above \$350,000

Once the payor's income is above \$350,000, the formula ranges for amount no longer automatically apply. This does not mean that the formula ranges no longer provide useful information, only that we are no longer in the realm of "typical cases" and hence there is no presumption that an amount should fall within the range. Where the payor's income is only slightly above the "ceiling", e.g. between \$350,000 and \$400,000, the formula range will provide more useful information than where the payor's income is well above the "ceiling".

In these high income cases, it is instructive to calculate spousal support for various levels of payor income. In almost every case, especially cases under the *with child support* formula, it is helpful to calculate what the spousal support range would be for an income of \$350,000, to give some sense of what the "suggested minimum" would be, as the Court of Appeal did in *Loesch v. Walji*.

This is what we mean when we say a payor can have "two incomes", one for child support and another for spousal support. A child gets the benefit of the full income of the payor, no matter whether it is an initial application, a review or a variation and no matter whether the payor has experienced a post-separation income increase. The child support case law supports use of the table amount formula right up to incomes of \$1 million.²¹⁷ The same cannot be said of the formulas under the Spousal Support Advisory Guidelines. Child support can thus be calculated on one income, and spousal support calculated for a lower income, even the "ceiling" of \$350,000, as is discussed in chapter 11 of the *Final Version*.²¹⁸

While some might say that high-income earners can afford the legal fees required by wide discretion, we can still debate whether that discretion ought to be narrowed somewhat by the Court of Appeal, to reduce the scope of argument in future cases.

(6) Distinguish When Support is Compensatory, Non-Compensatory or a Mix

In the *User's Guide* and again in this paper, we have emphasized the importance of being clear about the basis for entitlement, not just as a threshold issue, but also as a guide to the use of the formulas and on variation and review. There are *with child support* cases where courts have characterized support as "non-compensatory",²¹⁹ and there are *without child support* cases where courts have also missed the compensatory basis for support.²²⁰

The *with child support* formula is largely compensatory. Some cases may be stronger, e.g. a long period at home for one spouse or a child with special needs. Other cases may

²¹⁷ *Francis v. Baker*, [1999] 3 S.C.R. 250, 50 R.F.L. (4th) 228. Mr. Baker's income was \$945,538/yr. and the table formula was applied to produce child support of \$10,034 per month for the two children.

²¹⁸ Especially section 11.3.

²¹⁹ *G.P. v. M.J.R.P.*, [2009] B.C.J. No. 981, 2009 BCSC 659 (shared custody case, 2 children 6 and 5, wife home for 3 years); *Pfann v. Pfann*, [2008] B.C.J. No. 654, 2008 BCSC 452.

²²⁰ *Gosling v. Gosling*, [2008] B.C.J. No. 1870, 2008 BCSC 1323.

be weaker, e.g. shared custody after a shorter marriage, a brief period out of labour market. Apart from the *custodial payor* situation, it will be a rare or unusual *with child support* case that could be exclusively “non-compensatory”.

By contrast, the *without child support* formula cases can be compensatory or non-compensatory in nature, depending upon the facts. The presence of children will always be a marker of possible compensatory grounds, but so too can be other facts, e.g. moves to further one spouse’s career. Much more careful analysis of entitlement is therefore required for cases under this formula.

(5) Think About Location Within the Range for Amount and Duration

The cases reveal a strong tendency to “default” to the mid-range for amount, more strongly so in the *with child support* cases. Further, there are very few cases where the judge explains why a particular point in the range has been chosen, and in those cases the judge often just lists off a few factors. The only factor frequently mentioned is reapportionment. Nor is the reasoning process assisted by a recipient’s lawyer who just asks for the upper end of the range, to which the payor’s lawyer responds by offering the lower end (and then only *if* there is entitlement).

The *Final Version* devotes a separate chapter (chapter 9) to “using the ranges”, offering many ideas for arguments about location within the range.

The concept of “restructuring”, using the ranges to trade off amount against duration, remains underused, apart from lump sums. Chapter 10 of the *Final Version* and the *User’s Guide*²²¹ offer all kinds of helpful tips about when you should think of restructuring and how it works.

(4) Remember the Exceptions

The most recent B.C. trial cases reveal a serious failure to consider the exceptions, a continuing problem, but even a noticeable slide backwards from the previous year. The only exception that is consistently recognized would be the reapportionment of assets to the recipient on spousal support grounds, because it is so deeply embedded in lawyerly thinking in B.C. Second would be the exception for prior support obligations, for which the software adjustment is so easy that many don’t even think of it as an exception.

The exceptions also get their own whole chapter, chapter 12, in the *Final Version*.

Missed are exceptions that can arise with the same regularity, e.g. compelling financial circumstances in the interim period. Also missed are cases that scream “exception”, e.g. illness or disability or the compensatory exception in short marriages without children. In almost every case involving an exception, there is one lawyer in the room whose client has a huge interest in the use of the exception. That’s why the deafening silence on exceptions is so baffling, especially in a province of sophisticated users like B.C.

²²¹ At pp. 15-17.

(3) Be Careful in Using Time Limits under the *With Child Support* Formula, Especially on Initial Applications for Support

The addition of a lower end, to create a range for duration under the *with child support* formula, was done by us with some trepidation. These are “softer” time limits, implemented usually through variation and review over time, as children get older, spouses return to the full-time work force and economic disadvantage diminishes over time. Initial orders should usually be “indefinite (duration not specified)”, consistent with the law in *Moge*. The durational range was primarily intended to provide some structure and predictability to the process of variation and review.

We are concerned that B.C. courts have been so quick to put time limits on initial orders, and sometimes quite short limits, despite the presence of dependent children and despite continuing large income disparities. In some cases, courts even seem to forget that spouses would have claims to support for longer under the *without child support* formula. These are compensatory cases that should mostly end up in the upper end of the range for duration, apart from some weaker claims.

A critical consideration for duration in the *with child support* cases should be the ages and stages of the children. Too often lawyers and courts are not giving that factor enough weight. And time limits should be used with greater care in these cases.

(2) Don’t Underestimate the Disadvantage When Support is Compensatory

You may have noticed a pattern developing over points (6) to (3): a tendency on the part of the courts to underestimate the seriousness of the recipient spouse’s disadvantage at the end of the marriage in compensatory cases. Because of this underestimate, courts order amounts of support that are too low, or for a duration that is too short, or “deem” spouses self-sufficient and not entitled to support. That was one of the major problems identified in *Moge* by Justice L’Heureux-Dube back in 1992, but it never seems to go away.

We see the impact of this “underestimation” in B.C. trial decisions in certain categories: medium-length marriages under the *without child support* formula where children were once present; short time limits on initial orders under the *with child support* formula; shared custody cases; shorter marriages with very young children. This is just a tendency we’ve identified, as there are also some excellent trial decisions that avoid this problem, e.g. *Hartshorne*.

What’s interesting is that we do not see the same “underestimation” problem in the Court of Appeal decisions. The appeal court has consistently shown great sensitivity in its discussions of compensatory support in the past two years, e.g. *Mann, Hinds, Chutter, Beese, Jens, Beninger*, and even further back, notably *MacEachern, Redpath* and *Yemchuk*. We would have thought that this strong appellate jurisprudence would have had more of an impact upon trial decisions, and lawyers’ arguments to those judges.

One last point for the future: in some *with child support* cases, judges find no entitlement or no spousal support because the formula range is zero to zero, or the bottom end of the range is zero. It is worth remembering that s. 15.3 of the *Divorce Act* applies here, so that spousal support may be revived as child support is reduced or terminated, consistent with its compensatory rationale.

(1) Do the Calculations Carefully, Know Your Inputs and Make Full Disclosure

We know that this sounds like advice for the “dumb and dumberer”, but it is not. In this past year’s cases, we still see way too many errors in typical cases under both formulas, identified in the rest of the paper. To be clear, British Columbia is a province of sophisticated users, with fewer errors than most other provinces. Regular use generally makes for better use of the SSAG. But the Advisory Guidelines have become “routine” in B.C. and, at times, in this past year, we can see a certain sloppiness of practice appearing in ordinary cases.

Lawyers should read the *Final Version*, know their inputs, understand the software, and do their calculations carefully. There should be full disclosure of SSAG inputs and calculations, to other lawyers and to the courts, just as is required for any other research and briefing of the law.

And, with that last bit of gratuitous advice, we reach “The End” of our “Top Ten” and the paper.