

APPENDIX B

FORGOTTEN? THE SSAG EXCEPTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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