

## **Beyond the Formulas – Additional SSAG Considerations**

*Prepared by S. Christine Montgomery, B.A., LL.B., For DIVORCEmate Software Inc.*

When determining spousal support pursuant to the Spousal Support Advisory Guidelines (the “SSAG”), in addition to the formulas, you must consider:

- ✓ Entitlement;
- ✓ Location within the Ranges;
- ✓ Restructuring;
- ✓ Ceilings and Floors;
- ✓ Exceptions;
- ✓ Other Miscellaneous Issues in SSAG.

### **Entitlement:**

The SSAG do not deal with the threshold issue of entitlement to spousal support, just the amount and duration of spousal support *once entitlement has been found*. In other words, there must be a finding (or agreement) on entitlement *before* applying the SSAG formulas.

Thereafter, entitlement continues to be an issue in assessing/analyzing spousal support vis-à-vis location within the ranges, restructuring and exceptions.

Continuing entitlement also arises on variation and review, particularly in applications to terminate spousal support.

### **Location within the Ranges:**

The SSAG discuss many factors to be considered in determining the appropriate placement of support within the range generated by the formulas. We have highlighted *some* of these factors for you.

The following factors *may* favour a support award at the higher end of the range:

- a. The recipient has a strong compensatory claim (eg. recipient moved/gave up employment for payor’s benefit; recipient funded payor’s education/training; recipient sacrificed employment opportunities because of child care).
- b. The recipient has limited income.
- c. The recipient has limited earning capacity.
- d. The recipient has compelling needs and standard of living.
- e. The recipient is older.

- f. The recipient will be undertaking retraining or education in the immediate future which is aimed at promoting self-sufficiency.
- g. The recipient has primary care of very young children, several children and/or special needs children (ie. age, number and needs of the children can restrict the custodial parent's ability to work).
- h. The marriage is long term.
- i. The marriage is short with young children and a stay-at-home custodial parent.
- j. There is no property to be divided.
- k. The recipient is carrying significant family debts (but not severe enough to fall within debt payment exception).
- l. There are local or regional differences (eg. parts of Ontario, especially 416 and 905 area codes).

The following factors *may* support an award at the lower end of the range:

- a. The recipient has a weak compensatory claim.
- b. The payor has limited income.
- c. The payor has limited earning capacity/ability to pay.
- d. The recipient does not have significant needs (eg. recipient has solid employment/income; recipient has reduced living expenses (ie. subsidized housing; mortgage free matrimonial home; shared housing costs)).
- e. The recipient has remarried/repartnered.
- f. The payor has significant needs.
- g. The recipient is younger.
- h. There is an unequal division of property in favour of the recipient.
- i. The recipient holds sizeable exempt or excluded assets after division of property.
- j. The payor is carrying significant family debts (but not severe enough to fall within debt payment exception).
- k. In the case of a traditional marriage, the payor has costs associated with going to work, in contrast to the non-working recipient.
- l. An incentive for the recipient to make greater efforts towards self-sufficiency is needed (although imputing income can also address this factor).
- m. There are local and regional differences (eg. Atlantic provinces).
- n. The payor has significant direct access costs (especially important when the payor is at the lower end of the income spectrum).
- o. The payor makes mandatory deductions for pension contributions (especially important when the payor is at the lower end of the income spectrum).

## **Restructuring:**

The SSAG permit spousal support awards to be “restructured” if a straight application of the formulas does not generate appropriate awards. In other words, restructuring is an important aspect of a SSAG analysis *after* the formulas have been applied to generate ranges for amount and duration.

Restructuring is the trade-off of amount against duration to arrive at an award within the global amount generated by the formula when amount is multiplied by duration.

Awards may be restructured in three ways:

- front-end loading (increasing amount by shortening duration);
- extending duration (by decreasing amount);
- formulating lump sum payments (by combining amount and duration).

Restructuring applies primarily in three types of cases under the Without Child Support Formula:

- shorter marriages without children, where a clean break is wanted, or where a period of transition is needed to allow the recipient to adjust to a lower standard of living;
- long-term disability after a medium-length marriage, where more modest supplements to income over a longer period of time would be preferred. (It may be that restructuring in these cases is inadequate, requiring a departure from the global ranges altogether through the illness/disability exception.)
- longer marriages where the formula generates a time limit but current practice dictates indefinite (unspecified) support, and so amount may be reduced to allow for an extended duration.

Because restructuring ideally requires a fixed duration to trade off against amount, restructuring will generally only be advisable in cases where the formula generates time limits, rather than indefinite (duration not specified) support. Restructuring will therefore have limited application under the With Child Support Formula, primarily in cases where the recipient wants spousal support above the upper end of the range for a shorter period (eg. to pursue a more expensive educational program, often in shorter marriage cases). To convert periodic payments to a lump sum, the payor must have assets or resources available to make the lump sum payment. For front-end loading to occur, the following cases would be prime candidates, given the payor’s additional ability to pay:

- only one child;
- shared custody;
- two children, no s. 7 expenses and higher incomes;
- higher incomes generally.

For a sophisticated restructuring calculation, use the Tools 2K software, which will take into account the time-value of money and the income tax consequences of spousal support.

## **Ceilings and Floors**

The SSAG provide that where the payor has a gross annual income of more than \$350,000, the formulas should no longer be automatically applied to divide income beyond that threshold. The \$350,000, however, is not a cap on spousal support, as spousal support can and often will increase for income above that ceiling. Nor does the ceiling bar the continued use of the formulas as one method of arriving at an amount in a particular case. Instead, the court will have to exercise discretion in fixing the amount of spousal support.

The SSAG further provide that where the payor has a gross annual income of \$20,000 or less, no spousal support should be payable. There is an exception, however, for support to be paid below the income floor in exceptional cases where the payor spouse has significantly reduced expenses (eg. living with parents or otherwise has significantly reduced living expenses; both spouses retired on low incomes).

Note that there is also the possibility of an exception to the formulas where the payor's income is more than \$20,000 but less than \$30,000, to eliminate a "cliff effect" of the floor of \$20,000. In these cases, it might be necessary to depart from the lower end of the range, depending on the payor's circumstances and his/her ability to pay.

### **Exceptions:**

The SSAG formulas are intended to generate appropriate results in a wide range of *typical* cases; exceptions are required for *unusual* cases. Exceptions are recognized categories of departures from the ranges under the formulas, and are a "last step" to be used only where location within the ranges and restructuring cannot accommodate the unusual facts of a specific case.

These factors and exceptions are not intended to be an exhaustive list. Also, some of the factors listed under "Location within the Ranges" may be so extreme as to push an award outside the formula ranges altogether.

The spouse claiming to fall within one of these exceptions bears the burden of proof.

The exceptions under the SSAG are as follows:

1. Compelling Financial Circumstances in the Interim Period:
  - Where there are compelling financial circumstances at an interim stage (eg. one spouse may have to carry large and often unmovable expenses, most likely for housing or debts, in the short run; one spouse may have short term transitional needs at the interim stage).

2. Debt Payment:
  - Family debts exceed assets, the payor is carrying a disproportionate share of those debts and debt payments are excessive or unusually high.
3. Prior Support Obligations:
  - The payor (or recipient) has prior spousal or child support obligations (either through an agreement or as a custodial parent), requiring that spouse's income to be adjusted prior to applying the formulas ("first family first" exception). This exception is handled by Tools 2K automatically.
4. Illness and Disability:
  - The recipient's illness or disability is not accommodated by the maximums in the ranges or by restructuring (eg. young recipient; short marriage; payor has low income). Best solution may be to lengthen duration beyond range, but maintain amount at lower end of range.
5. Compensatory Exception in Short Marriages Without Children:
  - The recipient has a large compensatory claim disproportionate to the length of the marriage, particularly in short to medium length marriages where there are no children (eg. recipient gives up or accepts lesser employment to accommodate payor's employment transfer(s); recipient moves across country to marry payor and gives up employment/business; recipient works to put payor through post-secondary or professional program, but separates before enjoying payor's enhanced earning capacity).
6. Property Division, Reapportionment of Property:
  - Because B.C.'s legislation empowers a court to reapportion property between spouses on grounds that overlap with spousal support considerations, spousal support (in B.C. only) may have to be reduced below the SSAG formula range where a sufficiently large reapportionment order has been made on support grounds. [Note: With B.C.'s new Family Law Act and division of property regime, this exception likely no longer applies.]
  - No other explicit exception for high property awards should generally be recognized given that property and support are governed by distinctive laws and serve different purposes. The SSAG can handle most high property awards through other avenues: imputing income; appropriately locating support amounts and duration within the ranges; individualizing support awards for incomes above the ceiling; in extreme cases, finding no entitlement to spousal support. However, the law in high property and high income cases is evolving and therefore *may* arguably qualify for exceptional treatment.
7. Basic Needs/Hardship: Without Child Support, Custodial Payor Formulas:
  - In short to medium marriages (eg. 1 – 10 years), where the recipient earns no or low income, and where the SSAG formula, even after restructuring, will not provide sufficient income for the recipient to meet his/her basic needs (particularly acute in big cities), spousal support may be awarded outside the SSAG ranges for a *short, transitional* period, provided the payor has the ability to pay.

8. Non-Taxable Payor Income:
  - Where payor has legitimate non-taxable income (ie. workers' compensation, disability payments or income earned by an aboriginal person on reserve) and is unable to deduct spousal support, payor's ability to pay may be affected. Tax positions of the spouses need to be balanced – payor's reduced ability to pay versus needs or loss of recipient who still has to pay taxes on support.
9. Non-Primary Parent to Fulfill Parenting Role under the Custodial Payor Formula:
  - Where the recipient is an involved non-custodial parent from a shorter marriage with a young child (or children), he/she may need support in excess of the "Without Child Support" formula to fulfil his/her parental role (the "parenting exception").
10. Special Needs of Child:
  - A child with special needs may affect the custodial parent's ability to work, requiring spousal support beyond the amount and duration ranges of the SSAG.
11. Section 15.3: Small Amounts, Inadequate Compensation under the With Child Support Formula:
  - Where priority is given to child support, resulting in spousal support (pursuant to an agreement or court order) in an amount less than the recipient would otherwise have been entitled, spousal support may have to continue past the SSAG duration limit and possibly even increase in amount, as permitted in s. 15.3 of the Divorce Act.

### **Other Miscellaneous Issues:**

1. Prior Agreement or Court Order:
  - The SSAG do not override prior agreements, and the caselaw as established by the SCC in *Miglin v. Miglin* applies. The SSAG can only be applied: at a stage one *Miglin* analysis of the "substantial compliance" of the prior agreement with the Divorce Act factors and objectives; if a review provision or a material change provision is triggered in a prior agreement; or if the court decides to override a prior agreement.
  - The SSAG do not override prior court orders. On a variation application, the court assumes that the prior order was correctly made, and any variation must remain consistent with that prior order. Accordingly, if the amount and duration of spousal support in the prior order were outside the SSAG ranges, the subsequent variation may well be outside the SSAG ranges to remain consistent.

2. Post-Separation Income Increase of the Payor:
  - Where the payor's post-separation income increases, the recipient *may* be entitled to share in the increase depending on the length of the marriage, the roles adopted during marriage, the time elapsed between the date of separation and the income increase, and the reason for the increase (eg. new job vs. promotion with same employer; career continuation vs. new venture). The SSAG formulas can define the upper limits of support if the full amount of the income increase were to be shared.
3. Post-Separation Income Reduction of the Recipient:
  - Where the recipient's post-separation income decreases (eg. loss of job, illness, disability), the recipient *may* be entitled to an increase in support, depending on the facts of the case. The SSAG formulas can define the upper limit of any increase in support if the recipient's drop in income is to be considered.
4. The Payor's Remarriage/Repartnering:
  - The payor's remarriage or repartnering is usually not grounds for a reduction in spousal support, apart from some exceptional cases. In fact, remarriage or repartnering may improve the payor's ability to pay as a result of sharing expenses with the new spouse or partner.
5. The Recipient's Remarriage/Repartnering:
  - Where the recipient remarries or repartners, there is no automatic reduction in spousal support, although the amount and duration of spousal support is *often* affected (reduced, suspended or sometimes even terminated), depending on the circumstances.
6. Second Families:
  - The effect of second families (ie. subsequent children) on spousal support is discretionary, depending on the particular facts of the case.