SSAG FAQS 2022

YOUR FREQUENTLY (OR OCCASIONALLY) ASKED QUESTIONS ABOUT THE SSAG, AND SOME "ANSWERS"

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Over the past five or six years, since the publication of the *Revised User's Guide* (April 2016), I have fielded many questions about the Spousal Support Advisory Guidelines – from lawyers, judges, mediators, arbitrators, and unrepresented spouses. Some questions came via the folks at DivorceMate or ChildView, others by email or questions at conferences (in-person and virtual). Some questions are recurring, some are novel, some are simple, some are complicated. Many of the questions have forced Professor Carol Rogerson and me to think very carefully about what we intended or meant when we wrote a passage in the SSAG Final Version (July 2008) or the *Revised User's Guide* (RUG).

Like in real life, the questions come in no particular order. There are more than twenty questions in this version. The list kept getting longer and longer! I've tried to organise them loosely around some larger topics. I put the "answers" in quotes, because we all know that, in family law, there are some "wrong" answers, some "right" answers, and often more than one "right" answer. Some of the questions were initially raised in Ontario or are distinctive to Ontario, and the DivorceMate terms are used in the "answers". In my answers, for convenience, I have **bolded** references to the SSAG Final Version or the RUG. As of February 2022, the *Revised User's Guide* has been cited 229 times in judicial decisions.

Finally, my "answers" may lead to more questions, or you may think that I have left out your "question". The SSAG have led to an ongoing dialogue about spousal support and spousal support law amongst those of us who "toil in the vineyards of matrimonial discord", to quote our late, great friend Phil Epstein. More questions can be added in later instalments of these "SSAG FAQS".

PENSION CONTRIBUTIONS NOT DEDUCTED

1. Why aren't mandatory Registered Pension Plan contributions deducted in net income calculations under the *with child support* formula? If RPP contributions aren't deducted, why is the related tax break considered?

This has been a frequently-asked question over the years, and thus I begin with these tricky questions, for which the answers are not necessarily intuitive.

First, the Registered Pension Plan/Registered Retirement Savings Plan (RPP/RRSP) contribution issue has **no impact upon the *without child support* formula**, as it is a gross income formula. RPP/RRSP contributions are clearly NOT deducted in a gross income formula. The same holds true for the *custodial payor* and *adult child* formulas, both of which are also gross income formulas (they both deduct grossed-up child support and notional child support, to give priority to child support).

The RPP/RRSP issue does arise for most of **the *with child support* formulas**, including the basic formula (where the recipient spouse has primary care), the shared custody formula, the split custody formula and the step-parent formula.

We addressed the mandatory RPP deduction issue in the **SSAG Final Version (July 2008), at page 77.** This excerpt speaks only of mandatory RPP deductions in calculating INDI, as that was the most difficult part of this general topic. Its wording was not changed from the January 2005 Draft Proposal and reads, in these two paragraphs:

> More contentious are deductions for mandatory pension contributions. We concluded that there should not be an automatic deduction for such pension contributions, but the size of these mandatory deductions may sometimes be used as a factor to justify fixing an amount towards the lower end of the spousal support range.
>
> We reached this conclusion after considerable discussion. Like EI, CPP and other deductions, pension contributions are mandatory deductions, in that the employee has no control over, and no access to, that money. But, unlike other deductions, pension contributions are a form of forced saving that permit the pension member to accumulate an asset. Further, after separation, the spouse receiving support does not usually share in the further pension value being accumulated by post-separation contributions. Finally, there are serious problems of horizontal equity in allowing a deduction for mandatory pension contributions by employees. What about payors with non-contributory pension plans or RRSPs or those without any pension scheme at all? And what about the recipient spouse—would we have to allow a notional or actual deduction for the recipient too, to reflect her or his saving for retirement? In the end, we decided it was fairer and simpler not to allow an automatic deduction for pension contributions.

In calculating Individual Net Disposable Income (INDI) for the *with child support* formula, the RPP contribution is NOT deducted from the contributor's income, unlike taxes, EI, CPP, etc. That much is clear. The mandatory RPP deduction can be taken into account by **location in the range** in cases where there may be ability to pay issues (not unlike other factors that go to ability to pay, like high expenses for commuting to work).

But RPP contributions have **tax consequences** (as do RRSP contributions). Since most of the *with child support* formulas are net income formulas, it is important to reflect the reduced tax paid now, usually for the payor spouse who makes the pension contributions. That reduced income tax *must* be taken into account, given its impact upon

current ability to pay. We know that the RPP/RRSP tax deduction is a tax deferral, but the tax is deferred well into the future for most contributors and, even then, likely with a much-reduced tax rate in retirement. Thanks to the RPP/RRSP tax deduction, it is a very efficient means of saving to accumulate the retirement asset.

Almost all of the *with child support* formula cases involve strong compensatory claims by the recipients, so any tax break that allows a payor to pay off the compensatory loss earlier makes sense. Given the priority of child support obligations, the real limit on compensatory support in most cases is the payor's ability to pay. The *with child support* formula for amount fixes a range based upon a sophisticated formula estimating ability to pay. Lawyers and judges can still use location in the range for amount to adjust in individual cases. Mandatory pension deductions may mean the payor has less ability to pay and thus the outcome has to be lower in the SSAG range.

In some unusual cases, it may even be necessary to locate *below* the SSAG range, as I have explained in repeated presentations. Many pension plans have hiked their employee contributions in order to maintain the solvency of their plans, with contribution percentages rising from the typical 5-7 per cent when the SSAG were first designed, to something more like 8-12 per cent. At these higher levels, in some cases, given the bite the mandatory RPP contributions make, the payor's ability to pay may be seriously constrained and an amount *below* the formula range may be appropriate. Usually, however, the broad SSAG range for amount should be able to make a satisfactory adjustment within the range.

We have focussed on the payor so far, but the same INDI and tax treatment applies to *a recipient who is making RPP/RRSP contributions*. For a recipient, the same principles at work will keep their income up and thus *reduce* the SSAG range. In some of these cases, this will mean a location *higher* in the range for amount is appropriate.

Although the SSAG refer only to mandatory RPP contributions in the excerpt above, the same treatment applies for a payor or recipient making significant RRSP contributions. The RRSP contributions would *not* be deducted in the INDI calculation, but the RRSP tax deduction would apply for tax and net income purposes.

RRSP contributions can be mandatory under some employment pensions, but most are voluntary decisions by the contributor. In either instance, the contributions allow the acquisition of an asset and there is the same favourable tax treatment.

It is wrong to just ignore the tax deductions associated with RPP/RRSP contributions, as some lawyers do. The RPP/RRSP tax deduction can be significant, depending upon the size of the contributions and the income tax bracket. To ignore the tax deduction would underestimate -- sometimes quite seriously -- the current ability to pay of the payor.

It would also be misleading to "just leave out" the RPP/RRSP contribution and tax deduction, as some lawyers do, without some explanation in the accompanying brief or other documentation.

DivorceMate properly explains the INDI and tax calculations for RPP/RRSP contributions and deductions, consistent with the Spousal Support Advisory Guidelines. Further, there is a clear "cash flow adjustment" on the summary page, with the adjustment of each spouse's net disposable income, there for all to see in a transparent manner.

Since the SSAG are "advisory guidelines", not legislated, then parties are free to negotiate their own terms that might not comply strictly with the SSAG. Equally, a judge may adjust or alter a SSAG calculation or outcome on the facts of a particular case. I can only speak to what the SSAG intended and what the software implements around RPP/RRSP contributions.

TAX CALCULATIONS

2. Should I only input “standard” tax credits and deductions, or do I have to include all the relevant credits and deductions available to the spouse?

The deduction for RPP/RRSP contributions is only one of a number of spouse-specific tax credits and deductions that need to be considered in determining Individual Net Disposable Income (INDI) in net income calculations under the *with child support* formulas. Each spouse must take into account their actual or individual tax information under the SSAG formula.

SOCIAL ASSISTANCE

3. Why is the recipient’s social assistance income treated as zero for spousal support calculations, when the adult portion of social assistance is considered in determining child support, including notional child support?

Under Schedule III to the *Child Support Guidelines,* in determining Guidelines income for child support purposes, section 4 says: “Deduct any amount of social assistance income that is not attributable to the spouse.” The intent is to exclude any amount of assistance intended for a child in the care of the spouse. Only the assistance intended to support the adult should be considered. In most provinces, the adult’s assistance will be less than or slightly above the $12,000 “self-support reserve” for a payor, resulting in no payment or a very small table amount. Weird that a person on social assistance can be held to pay a table amount, but that’s the *Child Support Guidelines* table formula at work.

The reality is that the enriched federal Canada Child Benefit (CCB) now provides all or most of the financial assistance for children in this country. Some provinces top up the CCB for children. It should therefore be straightforward to determine the adult’s income under s. 4 in most provinces and territories.

In determining income under the SSAG, however, the recipient's social assistance income is treated as zero, as is explained in the SSAG Final Version (July 2008):

> **6.2 Social Assistance Is Not "Income"**
>
> Under s. 4 of Schedule III to the *Federal Child Support Guidelines*, social assistance is treated as income, but only "the amount attributable to the spouse". This adjustment is required as social assistance is included in line 150 income. For spousal support purposes, any social assistance received by the recipient spouse has traditionally not been viewed as income, so that a recipient relying entirely on social assistance would be treated as person with zero income.Turning to the payor spouse, a payor who receives social assistance is by definition unable to support himself or herself and thus has no ability to pay.
>
> For purposes of the Advisory Guidelines, section 4 of Schedule III does not apply. **No amount of social assistance should be treated as income, for either the recipient or the payor**. (emphasis in original)

This approach is consistent with the case law and the long-standing policy of private support being preferred to public assistance.

In calculating any "notional table amount" of child support within the *with child support* formula, however, the SSAG will apply s. 4 of Schedule III and use the adult's share of social assistance income. Thus, a recipient with zero income for spousal support purposes might still show a notional table amount for child support! What may seem odd at first glance is not, when you understand the different purposes of the income definitions.

CPP DISABILITY

4. Is Canada Pension Plan Disability social assistance, or is it "income" for SSAG purposes?

It's NOT social assistance. It *is* income for SSAG purposes. CPP Disability is paid to those who contributed to the Canada Pension Plan, and who have become disabled. It is taxable income in the hands of the recipient, although most recipients have such low incomes that little or no tax will be paid. If a person receives CPP Disability, they usually will not receive social assistance. I have been asked this question over and over again, in multiple settings, so I thought it worth repeating here.

Under CPP Disability, a separate portion or benefit is paid for a child to the parent with "custody and control" of the child, on account of the disability of the child's parent. Often the disabled parent will be the parent paying spousal support, but the disabled parent can also be the parent receiving spousal support. This child benefit should be treated as income for SSAG purposes, for whichever parent receives the benefit: see **RUG, pp. 18-19**. The CCP Disability child benefit is NOT taxable income in the hands of the recipient of the child benefit.

OAS/GIS CLAWBACK

5. How do the clawbacks for Old Age Security (OAS) or the Guaranteed Income Supplement (GIS) affect the SSAG range?

Both the OAS and GIS have "clawbacks", direct reductions in the monthly amounts paid for OAS and GIS as the recipient's income rises. A recipient of spousal support will often see their income from these sources go down as support goes up.

The clawback starts at very low income levels for GIS, with the Supplement completely disappearing for a single person in early 2022 at $19,464 (net income on line 23600 of the tax return) and at higher amounts for couples. The OAS clawback for a single person in early 2022 starts at $79,054 of annual net income and the "maximum income recovery threshold" is $128,149 where OAS is completely clawed back.

Both OAS and GIS are reported as part of line 15000 income. But, note that OAS *is* taxable income, while the GIS is not taxable (hence its inclusion at line 14600).

DivorceMate has recently created an automatic adjustment of both OAS and GIS for this clawback. DivorceMate now assumes that OAS and GIS incomes should be clawed back first *before* applying the SSAG, despite the fact that the clawback of those amounts doesn't get factored in until after Line 150 (Line 15,000 now) on a tax return. Here is an example of the "help" now found in DivorceMate about OAS:

> If the party is 65 years of age or older and is in receipt of the Old Age Security pension ("OAS"), input the <u>maximum</u> annual amount of the OAS ($7,707 for 2022; see below for prior years), *and the software will automatically determine the party's <u>net</u> OAS* (ie. T1, Line 11300 (Line 113 before 2019) or T4A(OAS) slip, Box 18 or 19 less any pension recovery tax (herein referred to as "clawback" of OAS).
>
> OAS <u>may</u> get clawed back depending on the party's other sources of income. While the clawback of OAS (T1, Line 23500 (Line 235 before 2019)) occurs after Line 150 (now Line 15000) and is not technically an enumerated adjustment listed in Schedule III or ss. 17, 18 or 19 of the CSG, the most reasonable interpretation of Guidelines Income in keeping with the spirit of the CSG is to include OAS income <u>as adjusted by this clawback</u>.
>
> ***The software will automatically calculate any clawback*** *based on the party's other sources of income (including the receipt or payment of spousal support), and will reflect this clawback (and the party's change in taxes) in the party's NDI in the Support Scenarios and the party's INDI in the "With Child Support" calculation of spousal support. The software will additionally reduce the party's Guidelines Income for the purposes of child and/or spousal support.*
>
> **IMPORTANT: The clawback in the software is based on the assumption that the party is single (ie. no spouse), and qualifies for the maximum OAS payment. If this is not the case and/or you do not want the clawback to be**

> **automatically applied, input the net annual amount of the party's OAS received as "Other taxable income".** (underlining, italics and bolding in original)

A similar method is now also applied to the GIS: the maximum benefit is included, with an automatically-calculated adjustment for the clawback.

This new method offers a more precise assessment of the impact of spousal support upon the incomes of the spouses going forward. Given the higher income thresholds for the OAS clawback, this calculation will more often come into play in spousal cases.

DISABLED ADULT CHILD RECEIVING INCOME ASSISTANCE

6. Where a spouse receives income for an adult child living with the spouse, under ODSP or other similar provincial programs, how should that income be treated in SSAG calculations?

Where an adult disabled child receives funds from income assistance, like the Ontario Disability Support Program (ODSP), then s. 3(2)(b) of the *Child Support Guidelines* applies to the determination of child support: *Senos v Karcz,* 2014 ONCA 459. Because of that receipt of ODSP income, the table-plus-section-7 approach of s. 3(2)(a) is "inappropriate". As *Senos v Karcz* tells us, the sharing of responsibility by the parents and the state makes child support more complicated and more discretionary. There will have to be a budget prepared for the expenses of the adult child, with adjustment of the child support obligations of each parent after taking into account ODSP. In turn, the lower child support amounts will affect spousal support. As the question arose in Ontario, I will refer to ODSP in what follows, but the same principles would apply to any other non-earmarked income assistance intended for an adult child in other provinces and territories.

Once child support is determined under s. 3(2)(b), then the *adult child* version of the *with child support* formula applies, a SSAG formula ignored too often. Remember that the *adult child* formula is a hybrid formula. Each parent's child support obligation is grossed up and deducted from their respective gross Guidelines incomes, before using the same considerations as the *without child support* formula to calculate the range for spousal support – gross income difference and years of cohabitation.

The *adult child* formula only applies where child support for all or the remaining child is assessed under s. 3(2)(b), like one adult disabled child, or that child plus another child away attending university. If the parties or the court determine child support under the s. 3(2)(a) approach, for the adult disabled child alone or along with other children still living with either parent, then one of the other *with child support* formulas will apply, like the basic, split custody, shared custody or custodial payor versions.

For these formulas, does the ODSP for the adult child get treated as income to the recipient parent? The answer is "no", but with an important adjustment. I've considered the alternatives.

If we include in income the Canada Child Benefit, provincial child benefits and other benefits paid for children under these formulas, then it seems hard to distinguish ODSP paid for an adult child: see SSAG 6.3 and RUG 6(a). But there is an important distinction: the child is an "adult", with the potential to have income of their own.

Or, we could just ignore the ODSP income of the adult child completely. Justice Chappel adopted that view in in two cases, by wrongly collapsing ODSP for a spouse with ODSP for a child: *McBennett v Danis,* 2021 ONSC 3610 at para. 294 and *A.E. v A.E.,* 2021 ONSC 8189 at para. 245. To support her view, Chappel J. cites the Divisional Court decision in *Naegels v Robillard*, 2020 ONSC 3918. That appeal was correctly and carefully decided, but it only involved ODSP for a disabled recipient spouse, which raises a different set of policy issues, discussed under FAQ 3 above.

I would suggest a middle way between these two extremes. The ODSP received for the disabled adult child should be treated in DivorceMate as a "cash flow adjustment – increase NDI". Thus, the ODSP will not be treated as part of the parent's income for spousal support purposes, but *will affect their NDI*, their net disposable income position. The ODSP adjustment will show up in the dollar amounts and percentages for NDI.

It may be that the ODSP adjustment should be less than the full amount paid in some cases, where the ODSP is used to cover the cost of special activities or programs, paid to third parties. Further, if child support is less than the table amount in these cases, as it is often us, it is critical to *override* the table amount not only for child support purposes, but also for SSAG calculations.

Parents of disabled adult children will also often receive funds to cover specific activities or respite care or other added expenses for the adult child. These ear-marked funds should obviously NOT be treated as income to the parents in any spousal support calculation. For more on these issues, see the recent illuminating article by Dickson and Battaglia, "Child Support for Adult Children with a Disability: The Impact of ODSP, the Disability Tax Credit, RDSP and RESP" (2022), 40 Can.Fam.L.Q., No. 2 (forthcoming).

CHILD SUPPORT CLAWBACKS ENDING

7. Which provinces still deduct child support received from the income assistance income of the custodial parent?

When we wrote the *Revised User's Guide* in 2016, only one province – British Columbia – had decided to end deducting child support from the recipient parent's assistance income, as of September 1, 2015. The rest of the provinces and territories did "claw back" any child support received, as well as any spousal support received, deducting both forms of support dollar-for-dollar from any assistance received.

Since then, the majority of the provinces have moved to end the "clawback" of child support (as of March 2022): Ontario, January 1, 2017 (ODSP) and February 1, 2017 (Ontario Works); Nova Scotia, August 1, 2018; P.E.I., July 1, 2018; Newfoundland and

Labrador, June 1, 2019; New Brunswick, October 1, 2021. In these provinces, the receipt of child support will no longer affect the amount of income assistance received.

In Alberta, there is no clawback of child support for those parents receiving assistance under the AISH (Assured Income for the Severely Handicapped) program. But Alberta still claws back child support for those obtaining assistance under the general Income Support program.

Manitoba and Saskatchewan continue to claw back child support from the income assistance of the recipient as of early 2022.

To be clear, whatever the treatment of child support, all provinces do deduct or "claw back" any *spousal support* received by an income assistance recipient.

Since any income assistance received by the primary parent is treated as zero for spousal support purposes, whether or not child support is clawed back does not have an impact upon the SSAG range for amount. See the explanation above for FAQ 3.

What does change is the net disposable income or monthly cash flow of the recipient. If the recipient gets to keep their child support, i.e. no clawback, their net disposable income or monthly cash flow will be significantly higher. The recipient will be better off.

PART YEARS AND TAXES

8. If a couple separates part way through a calendar year, why does the *with child support* formula use annualized taxes and benefits to calculate the ranges, rather than the actual taxes and benefits experienced by the spouses in that year?

The Spousal Support Advisory Guidelines use annualized income and tax calculations to provide ranges for the amount of spousal support, after entitlement has first been determined. But what if spousal support is being calculated on a part-year basis, like when the spouses separate part way through a calendar year – should the ranges be calculated differently, to reflect the actual taxes, benefits and net incomes in the remaining part year? This question was raised by an Ontario practitioner, an unusual question, but one warranting a detailed answer.

The answer is, generally, "no", but a more detailed explanation is required.

First, this is not an issue under the *without child support* formula, which uses gross incomes, not net incomes. There are net income *consequences* for both payor and recipient of spousal support, but the formula range will not be affected (except for the "net income cap" in some long marriages).

The part-year issue thus only arises for most of the *with child support* formulas, which do use net incomes to calculate the range.

To begin, we need to be careful about the specific concern under this formula. If a couple separates part way through the calendar year, with spousal support commencing, say, in October for the remaining three months, then the software uses annualized information on income, taxes, benefits, etc. to calculate the SSAG range using net incomes. It assumes that the payor pays tax-deductible spousal support for 12 months, the recipient receives tax-payable spousal support for 12 months, and it assumes that any child benefits will be adjusted to reflect the residential parent's adjusted family net income for 12 months. Other inputs will affect the formula range too, as well as the net disposable incomes of the spouses. But, for payor and recipient, their actual tax position for the calendar year of separation will only reflect the support paid for three months (and their child benefits will not change until later too).

On this view, the SSAG ranges do not properly reflect the *actual* positions of the spouses in the year of separation, which is correct. But that is not how we usually determine the amount of spousal support.

It is worth remembering that periodic spousal support is *prospective* or forward-looking, as is child support. Spousal support orders are intended to be more stable or "stickier", and thus harder to vary than child support, as I have explained: "To Vary, To Review, Perchance to Change: Changing Spousal Support" (2012), 31 Can.Fam.L.Q. 355. Spousal support remains discretionary and much less precise than child support, which is now founded upon a very specific table formula, one capable of precise calculation and recalculation. The greater stability of spousal support is intended to discourage relitigation and repeated and possibly inconsistent exercises of discretion by different judges.

Thus, spousal support orders (and agreements) will typically be intended to remain in place for a period of time, usually beyond the immediate calendar year and often for many years. The determination of the amount of spousal support has never been about precise "math". The SSAG formula ranges offer considerable scope for the exercise of discretion, in the location of an amount within the ranges. On "location within the range", see **chapter 9 of the *SSAG Final Version* and chapter 9 of the *Revised User's Guide***. In a judicial decision, there are many reasons for a judge to fix an amount. The net disposable incomes of the spouses are only one factor in that decision.

Lastly, most of these part-year issues will be resolved in the determination of interim or temporary spousal support after separation. Many couples will continue with informal monetary arrangements for a period of time after separation, before consulting lawyers and formalizing support. Parties can agree to using more precise part-year calculations for support, whether interim or ongoing, as part of their negotiations or mediation. Further, the SSAG recognize an exception at the interim stage for "compelling financial circumstances" and, in some cases, the tax implications may have serious implications for ability to pay in the short run. In many instances, temporary support will be determined retroactively, dating an order back to the date of separation, thereby

avoiding much of the problem. Finally, the earlier in the calendar year the parties separate, the less of a "part year" problem there will be anyway.

If you want to get a picture of the actual calendar year taxes, NDI, etc., here's a way to do it: add a new spousal support scenario and input the average monthly spousal support amount based on the support actually paid for the part year. For example, if spousal support of $5,000 was paid for each of October, November, and December, you can take the total support paid, i.e. $15,000, and divide it by 12 to get an average monthly amount over the full year, i.e. $1,250 per month. By specifying this $1,250 monthly amount in a new support scenario, you can see the actual taxes, NDI, etc. for the calendar year.

LEGAL FEES AS "CARRYING CHARGES"

9. Should legal fees be treated as a deduction under "carrying charges"?

The correct answer is that *neither* party should be allowed to deduct legal fees to obtain or resist support under s. 8 of Schedule III of the *Child Support Guidelines*. The adjustments in Schedule III are intended to place those with different sources of income in the same position as a recipient of wage and salary income, the T4 earner which is the basis for the table formula's conversion from its net income underpinnings (it's a net income formula) to using gross Guidelines income for the tables used by the public.

Carrying charges typically involve the interest costs of borrowing to make investments or the costs of fee-based investment advice, permissible under the *Income Tax Act* as costs to earn income. Legal fees to acquire child or spousal support are different.

Legal fees to obtain child support are, inexplicably, still deductible, even though child support is no longer treated as taxable income. The original logic was, when both child and spousal support were taxable income to the recipient, that the legal fees were incurred to earn taxable income. That logic might still hold for spousal support, but doesn't any longer for child support, but the government responded to lobbying and pressure on this issue.

Legal fees for the payor of support have never been deductible for tax purposes, despite multiple efforts over the years by various fathers to argue otherwise. That also goes for a net payor of child support under s. 9 of the *Guidelines*. One of the leading cases on non-deductibility of legal fees by a support payor is *Grenon v. Canada*, 2014 TCC 265, where the Tax Court found no breach of s. 15 of the Charter.

There are a number of Ontario cases which have -- rightly, in my opinion -- rejected any deduction of legal fees for support under s. 8 of Schedule III. The best and most exhaustive would be *S.L.B. v. V.A.H*, 2019 ONCJ 694 at paras. 343-370 (Finlayson J.). Other cases taking this view would be *Nixon v. Lumsden*, 2020 ONSC 147 at para. 184 (Audet J.); *Fielding v. Fielding*, 2018 ONSC 5659 at paras. 135-137 (Monahan J.); and *A.A.G. v. J.L.G.,* 2022 ABQB 119 (Dilts J.) at paras. 188-195. Two older cases that reach

the same conclusion are *Gillespie v. Gillespie,* 2017 NBQB 149 (B. Robichaud J.) at para. 236 and *G.J.L. v. M.J.L.,* 2017 BCSC 688 (Schultes J.)

Recently, Justice Chappel has entered the debate, with a different approach, in *McBennett v. Danis,* 2021 ONSC 3610. Chappel J. ruled that the legal fees of the support recipient were permissible "carrying charges" under s. 8, but the court could then "impute" the same fee amounts back into income under s. 19(1) CSG "where the deduction from the party's *Guidelines* income would yield unjust and distorted results" (at para. 299). Problem is, the deduction yields "unjust and distorted results" in every case, so this roundabout approach is unnecessary. In *McBennett*, Chappel J. did impute income in the end, at least for spousal support purposes (at para. 377), but only after much backing-and-forthing. Justice Chappel repeated these views in *A.E. v. A.E.,* 2021 ONSC 8189 at paras. 249-252. So far, the only reported decision applying this approach is *T.C. v. A.J.,* 2021 BCSC 1696 (Morellato J.) at para. 84.

The simpler answer – and the correct answer – is found in Justice Finlayson's decision in *S.L.B. v. V.A.H.*: *legal fees are not "carrying charges" and thus are not deductible under s. 8 of Schedule III*. It is hard to improve upon his careful research and reasoning at paras. 343-372. Finlayson J. notes that legal fees were not to be claimed on line 221 for "carrying charges" (now line 22100) of the tax return in 1997 when the *Child Support Guidelines* were promulgated, a change in reporting that did not occur until 2012 (paras. 367-368).

In addition to the weird child support implications, if the recipient of spousal support could deduct legal fees from their income under s. 8 of Schedule III, that would increase the SSAG range for the payor. And the payor of spousal support cannot deduct family law legal fees from their net income. This obvious "unfairness" was noted by both Justices Chappel and Finlayson. A double whammy for the payor!

Whatever the interpretation of "carrying charges" for purposes of child support under s. 8 of Schedule III, it would be *wrong* to treat the spousal support recipient's family law legal fees as a deduction under "carrying charges" under the SSAG.

MAXIMUM RANGE OF THE WITHOUT CHILD SUPPORT FORMULA

10. For marriages longer than 25 years, why doesn't the low end of the range for amount keep rising under the *without child support* formula, even if the high end maxes out at 50 per cent?

Under the *without child support* formula, where the couple has cohabited for 25 years of more, the maximum range for spousal support is 37.5 to 50 per cent of the gross income difference between the spouses. At the top end of this range, the parties would end up with equal gross incomes after the payment of support. The top end is subject to a "net income cap", to ensure that the payor keeps at least 50 per cent of his or her net after-tax income. The 50/50 split at the top end of this range is a *permissible* outcome under the formula, but not mandated. Remember what *Moge* said: "As marriage should

be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution." [1992] 3 S.C.R. 813, [1992] S.C.J. No. 107 at para. 84. If the range is 37.5 to 50%, then the mid-point of this range, in percentage terms, falls at 43.75%, half way between the two ends. On these issues, see **SSAG 7.4 and 7.4.1 and RUG ch. 7 intro.**

Every now and then, some lawyer suggests that, for marriages longer than 25 years, even though the top end (50%) stays fixed under this formula, the low end should continue to rise, and thus so too should the mid-point be higher. To put it in concrete terms, if the spouses were married for 27 years, this argument goes, then the low end of the SSAG range should be 40.5% of the gross income difference, rather than 37.5%. The mid point would then move up to 45.25%.

That's NOT what the Advisory Guidelines say. *The percentage range remains fixed, whether the parties cohabited for 25 years or 27 years or 30 years or 40 years or 50 years!* The low end does NOT climb up. If the low end did climb up as suggested, then by 34 or 35 years, there would be no "range" at all and a 50% equalization would be mandated in every case under the formula. That would plainly be wrong and inconsistent with everything said in the SSAG.

THE "RULE OF 65"

11. When does the "rule of 65" apply, for "indefinite" support?

The rationale and operation of the "rule of 65" is explained in **SSAG 7.5.3 and RUG 7(e).** The "rule of 65" applies when the years of cohabitation and the recipient's age at separation total 65 or more. Remember it is the recipient's **age at separation** that gets counted. Further, if cohabitation is less **than five years**, the "rule" does not apply. The "rule" – perhaps an awkward term – reflects the dominant pre-SSAG pattern in the case law where courts showed great tenderness on duration towards older recipients of spousal support, being less willing to impose time limits on support in these cases.

In a recent Ontario Court of Appeal decision, *Climans v Latner,* 2020 ONCA 554, at paras. 63-78, the "rule of 65" was subjected to close analysis. The trial judge found the "rule" applied and ordered indefinite support, but the appeal court reversed, on the basis that the trial judge had palpably erred in fixing the starting date for cohabitation on an unusual set of facts. That left Climans just short of "65" after 14 years together and a time limit was imposed on appeal (almost 14 years in total). While it might be understandable that the "rule" was read strictly on the unusual facts of this case, the "rule of 65" should really be seen as more of a "principle" than a strict "rule".

Remember that the "rule of 65" is a less common ground for orders of "indefinite (duration not specified)" duration. It was meant to be a limited exception to time limits for relationships of 5 to 19 years. The most common reason for indefinite support is still that the couple has cohabited for 20 years or more.

Somehow, in much recent case law, lawyers and judges have forgotten this primary basis for indefinite support. The most egregious is the Ontario Court of Appeal decision in *Politis v Politis*, 2021 ONCA 541 where the "rule of 65" is discussed at length at paras. 40-45, unnecessarily, since the parties had been married for *25* years. The trial judge had imposed a time limit, where the recipient had repartnered, a time limit upheld on appeal. This reflects an unnerving pattern of lawyers and judges using the "rule of 65" when the real basis for indefinite support was their cohabitation for 20 years or more: *Boudreau v Jakobsen,* 2021 ONCA 511 at para. 18 (cohabited 21 years); *Outaleb v Waithe,* 2021 ONSC 4330 at para. 86 (22 years); *Smyth v Smyth,* 2021 ABQB 13 at para. 33 (married 34 years!); *Gromer v Gromer,* 2021 BCSC 2206 at para. 44 (26 years).

If the spouses have cohabited for 20 years or more, there is NO need to even consider the "rule of 65"! Maybe we should have called it the *"rule of 20 years",* to give it more prominence! There will still be issues whether spousal support should continue to be "indefinite", or whether support should be time limited or even terminated, especially on variation or review.

GOOD AND BAD NDI ARGUMENTS

12. Are there "target" percentages of NDI (net disposable income) in the SSAGs? What are "good" or "bad" ways to take NDI into account?

The focus on NDI, on Net Disposable Income, is very much an Ontario "thing". We find much less reference to NDI outside of Ontario, or its equivalent of "Monthly Cash Flow" in ChildView (MCF). So I will mostly use the language of DivorceMade in this answer. I originally addressed these issues when I was asked to do a presentation on the topic for "The Six-Minute Family Law Lawyer" in Toronto on December 1, 2020.

Remember to distinguish "NDI" as used in DivorceMate from "INDI", or Individual Net Disposable Income, as used in the *with child support* formula in the SSAG. The NDI you see on the first page in DivorceMate might more accurately be described as "family NDI", i.e. the net disposable income of each spouse after the transfer of child support and spousal support. By contrast, "INDI" in the SSAG formula refers to the individual net income available to each spouse *after* child support obligations have been deducted from each. This question refers only to "NDI" or "family NDI".

There are only *two* situations where the SSAG explicitly use NDI in determining the range for amount:

(1) Long marriage cases under the *without child support* formula
(2) Shared custody cases under the *with child support* formula

Long marriage cases

For very long marriages, of 25 years or more, or long marriages with big income disparities, there is a net income "cap" that comes into play. Remember, this is generally a formula that divides the *gross* income difference between the spouses. After 25 years or more of marriage or cohabitation, the range is 37.5 to 50 per cent of that gross income difference. We added a tweak, in the 2008 Final Version of the SSAG: the support

recipient should never end up with more than 50% of NDI, hence the net income "cap" which recognises the different tax positions of the payor and recipient. This reflects *Moge*, where the Supreme Court of Canada said that, after a long marriage, by way of property division and support, both spouses should end up with similar standards of living. NDI offers a good measure of relative living standards.

Shared Custody Cases

Here's another situation where the SSAG use NDI explicitly. I'm using the old language here, now described in the "new" language as "substantially equal shared parenting". The SSAG range for the *with child support* formula for shared custody cases will always include the amount of spousal support that will generate a 50/50 NDI split, even if that means extending the range upward or downward to capture the 50/50 NDI point. Where there are no new partners and no new children, equal NDI should be the default, or more accurately**, the starting point,** to determine the amount of spousal support in shared custody cases under the SSAG.

Equal NDI will be the result of the transfer of both child support and spousal support from the higher-income shared custody parent to the lower-income parent. This reflects the policy behind the holding in *Contino*: in shared custody cases, a "similar standard of living in the two households concerned" should be secured: *Contino v. Leonelli-Contino,* 2005 SCC 63, [2005] 3 S.C.R. 217, at para. 85. "Children may prefer one household to the other, but that cannot be made to depend on the respective means or resources of their parents."

NDI in DivorceMate (or Monthly Cash Flow in ChildView) is an excellent measure of standard of living in shared parenting cases, where there are no new partners and no new children. To date, Ontario judges have been fairly consistent in using the 50/50 NDI default. Sadly, B.C. judges continue to default to the mid-point of the SSAG range, even in shared custody cases, even where the SSAG say not to do so.

One small technical matter: the 50/50 NDI point moves around the range. For one child, it usually pulls the range UP, but for two children, 50% usually falls somewhere between the mid-range and high end and, for three children, 50/50 will be closer to the mid-range. Where there is a big income disparity between the parents, the 50/50 point is likely to pull the range DOWN.

Apart from shared custody cases, there is no NDI "target" in *with child support* formula cases, but NDI (or Monthly Cash Flow) is an important factor for location in the range. What matters in these cases is not just NDI percentages, but the actual net disposable income *dollars* in each household. Keep in mind, ability to pay is the real limit on spousal support in most *with child support* cases, given the statutory priority to child support.

How Do Courts Use NDI, Plus Some Bad NDI Arguments

There are many ways we see NDI or MCF used in decided cases. Sometimes the court just states the SSAG ranges, reciting NDI percentages as part of that. That's just descriptive, "here's what the printout shows". Sometimes a court states the NDI split that results from its decision about location of amount in the SSAG range. Sometimes a court

will explicitly consider the NDI amount or percentage to determine the precise location in the range, a tendency more noticeable in Ontario. Very rarely, and I would say unwisely, a court will treat NDI as a percentage "target" to determine the amount of support within the range. I say "unwisely", as NDI percentages just aren't that meaningful in most cases.

We also see some **bad NDI arguments**. Somes examples, and my responses:

"I know they were only together for 17 years, but my client wants a 50/50 split of NDI."

A: No, that's not what the SSAG say and that's not what spousal support law says.

Another favourite, and it's a uniquely Ontario argument:

"You can't ever leave a recipient with less than 40% NDI. No matter how briefly they were together!"

A: Why, you might ask? Just "because" or "because that's what we do in Ontario". I don't know where this argument comes from, but there's no principled basis for it, not in the SSAG and not in spousal support law.

Another recurring bad NDI argument, this one in **custodial payor cases:**

"The custodial payor formula is harsh, if it leaves the recipient with only 29% NDI."

A: "Harsh", that's what Justice McGee said in *Papasodaro v. Papasodaro,* 2014 ONSC 30, [2013] O.J. No. 240, referring to the NDI outcome where a husband was claiming spousal support after a 17-year marriage. This is some variant of the previous 40% argument, I think. But much depends upon the length of cohabitation under this formula. Most of these custodial payor cases are non-compensatory claims for support, like Papasodaro's. Remember: under this formula, the higher-income payor of spousal support has custody of the children and often is receiving little or no child support for the children. For more on this issue, see pages 37-40 of the *Revised User's Guide.*

One last bad old NDI argument:

"The recipient with the children can't get more than 50%, or 60%, of NDI."

A: Once upon a time, in a galaxy far, far away, many lawyers for payors argued, often successfully, that the custodial parent and children couldn't get more than 50% of the family's NDI. Even though the recipient might have one or two or three children in their household. The Ontario Court of Appeal buried that view some time ago in *Andrews v Andrews* (1999), 45 O.R. (3d) 577 (3 children, one with a learning disability) and *Adams v Adams* (2001), 15 R.F.L. (5th) 1 (4 children), both cases where the custodial parent received 60% of the family's NDI.

Occasionally, I still hear an argument for a 60% barrier. But there is no such **upper limit** on NDI in the SSAG *with child support* formula. It all depends, as *Andrews* taught us years ago, on the number of children, their needs, the parenting arrangements, and the incomes of the spouses.

FUTURE SECTION 7 EXPENSES

13. How can you take section 7 expenses into account in calculating spousal support if you don't know what they will be in future?

One of the most common errors by those applying the *with child support* formula has been the failure to adjust for section 7 contributions: see **"Common Errors to Avoid", chapter 2, *Revised User's Guide*.** A failure to take into account s. 7 contributions will result in a SSAG range that is too high. But what if you don't know the precise amounts of the future section 7 expenses? There are two alternatives, plus one special one for shared custody cases.

First, it is possible to *estimate* s. 7 expenses, based upon past experience and future expectations. This is the most transparent approach, as then both parties will know what the assumptions are. If the expenses are not too large, then the SSAG range will be a decent estimate. Where child care expenses are involved, thanks to the tax break, in many cases the impact upon the SSAG range will not be that large. Where s. 7 expenses are large, for private school or extensive extracurriculars, estimates become more difficult.

Second, it is possible just to *locate* the spousal support amount *lower in the SSAG range*, to reflect the uncertain s. 7 expenses. While less precise, this approach does honour the statutory priority to child support. Some crude estimates of possible s. 7 expenses can help the parties to estimate how much lower in the range might be necessary.

Third, there is a special s. 7 solution available in *shared custody* cases. The default location for spousal support in such cases is the amount which would leave both parties with equal net disposable incomes after the payment of child and spousal support: see ***SSAG*, section 8.6.3 and *Revised User's Guide*, section 8(f).** This means that each spouse will contribute 50% of the s. 7 expenses going forward and, whatever the amount of s. 7 expenses, the spouses will still each be left with 50% of the family's net disposable income. Only if the spouses agree to this 50/50 split of NDI or if a court orders it, will this be an alternative available to deal with uncertain future s. 7 expenses.

SHARED CUSTODY/PARENTING FORMULA

MORE THAN 50% NDI/MCF?

14. Why is it possible for a shared custody recipient of spousal support to receive more than 50% of the family's NDI/MCF?

We made it clear, in the *SSAG Final Version*, that the default amount of spousal support in typical shared custody cases should be an amount that leaves both spouses with 50 per cent of the family's net disposable income. When I say "typical", I mean cases where there are no new partners and no new children in either shared custody household. But we also responded to those who suggested that no recipient should *ever* receive

more than 50% NDI. Where there are two or more children, most of the SSAG range will leave the recipient with more than 50% NDI, we said in **SSAG, p. 91**:

> In these latter cases, where there are two or more children subject to shared custody and the recipient has little or no income, the formula will produce a range with a lower end that leaves the lower-income recipient with 50 per cent of the family's net disposable income and the rest of the range will obviously go higher. During the feedback process, some criticized this range of outcomes, suggesting that a shared custody recipient should never receive spousal support that would give her or him more than 50 per cent of the family's net disposable income. After all, they suggested, under this arrangement, both parents face the same ongoing obligations of child care going into the future, with neither parent experiencing more disadvantage.
>
> The answer to these criticisms is that the past *is* relevant in these cases, as there is a reason the recipient has little or no income, usually explained by that parent's past shouldering of the bulk of child care responsibilities. In most shared custody cases, both parents have shared parenting during the relationship, so that there is less disadvantage and less disparity in their incomes at the end of the marriage. Where the recipient has little or no income, she or he will have a greater need for increased support in the short run. But the shared custody arrangement will reduce the impact of ongoing child care upon the recipient's employment prospects, such that progress towards self-sufficiency should occur more quickly. In these cases, spousal support will likely be reduced in the near future on review or variation, and the duration of support may be shorter.

The answer is right there in the Final Version of the SSAG, but the question still gets asked regularly.

NOTIONAL CHILD SUPPORT IN SHARED CUSTODY CASES

15. Why does a high-income payor get so little credit for "notional child support" for the child in his or her shared care when calculating spousal support?

A British Columbia lawyer raised this issue. Where a higher-income payor shares custody, then the payor's child support will reflect two parts in the calculation of INDI, even though just the payor's table amount will show up in the math. First, the higher-income payor will actually pay the set-off amount to the lower-income spouse. Second, the remaining amount will be "notional child support", i.e. a proxy for the amount that the parent spends directly on the child in their care. In a set-off situation, that "notional" allowance will be determined, not by the income of the payor, but by the income of the lower-income recipient of child support.

Here's the problem. We have no good data on how child costs are shared in shared custody cases. We have anecdotal experiences as lawyers or parents, but shared custody arrangements and spending run the gamut. Some are true "dual residence/equal

parent" cases, where both spend directly and equally upon the children. Others look a lot more like "extended access", with a non-primary parent spending much less than the primary parent for the children.

Complicating matters further are the flaws in the federal child support formula underpinning the table amounts, as well as the logic of the straight set-off under s. 9 CSG. Remember that the table formula makes a number of dubious simplifying assumptions, one of which is that the payor of child support and the recipient have *the same income*: see *Formula for the Table of Amounts Contained in the Federal Child Support Guidelines: A Technical Report* (Child Support Team, Research Report, Department of Justice Canada, CSR-1997-1E, December 1997).

To understand this problem, it helps to take a specific high income shared custody fact situation, even if it is an unusual one. Three children aged 10, 8 and 6. The norm for shared custody is one or two children. High income payor husband in B.C. at $400,000. Big income disparity, $400,000 vs. $35,000 for the wife. More typically, for shared custody parents, there is less disparity in their incomes.

So in setting the husband's table amount, it assumes he is married to a spouse who also makes $400,000/year. For the wife's table amount, it assumes she is married to a spouse who also makes $35,000/year. (Remember, spousal support paid between spouses is NOT considered income for child support purposes.) Hence, the set-off is quite misleading as to how much is actually spent on the children by the husband in this case. More accurately, for two parents earning $400,000 each, the figure would be 2 x $6,702 = $13,404/month, a number that is too high, as in real life higher income earners spend a smaller proportion of their income on their children. But that's why you get that paltry number of $748/month as a notional amount of his direct spending on the children. If the wife and her husband both earned $35,000/year, i.e. $70,000/year, then the table amounts would suggest they each spend $748/month on the child, or $8,976/year each or a total of $17,852/year on their child. For low-income primary care parents, the equal income assumption works to their disadvantage, as the child support amount assumes the recipient parent can ante up a similar amount as the payor. In the shared custody setting, though, it has a boomerang effect, leaving the higher income parent with a very modest credit for direct spending on the children, if the other spouse has a low income.

It is important for the husband's lawyer here to drive home just how much the higher-income husband will in fact be spending directly on the children, in contrast to the small amount attributed by the table formula and the set-off. That greater spending then can be used to argue location in the range, to that lower level where 50/50 NDI obtains.

A 50/50 split of NDI would permit and acknowledge equal spending upon the children in each household (leaving aside asset/liability positions). In shared custody cases, there are usually both compensatory and non-compensatory grounds for spousal support. One of the non-compensatory aspects would be to maintain similar household

standards of living for the children in shared custody: see Thompson, “The TLC of Shared Custody: Time, Language and Cash” (2013), 32 Can.Fam.L.Q. 315.

Defaulting to the non-50/50 mid-point then has unintended effects, especially noticeable in the British Columbia courts where that trend is too strong. A default to the formula mid-point in this fact situation would leave the recipient with 58% of the family’s NDI, a percentage that is hard to justify in most shared custody cases. That might be rationalised in a strongly compensatory case, as explained in the previous answer, as a payor with the ability to pay more spousal support now might get an earlier termination date for support later. When we were constructing the shared custody SSAG formula, we wanted to ensure that payors weren’t given large spousal support incentives to seek shared custody, given that relatively small child support differences sometimes did so already. But for these high-income facts, if the mid-point is chosen, then there is a significant *disincentive* to shared custody for the payor who is bearing one-half of the child costs (and an even bigger disincentive if he’s paying more than half the costs).

The federal government is unlikely to redesign the table formula or to adopt an income shares formula or to radically alter its approach to shared custody child support. So, in this less common situation, lawyers are left to make sophisticated arguments about spousal support, where there is more flexibility and an ability to “fix” some of the problems with the child support formula.

. By the way, in this fact situation with three children, the 50/50 NDI point is driven way down below the typical SSAG range. At the low end of the range, the recipient’s Individual Net Disposable Income (INDI) percentage is a mere 30.7% (compared to 40% under the usual formula). If there is only one child, even at these incomes, 50/50 NDI falls very close to the “normal” SSAG mid-point. If there are two children, the low end of the range still has to be extended to get the 50/50 split, but not so dramatically (low end INDI is 37%). At $300,000 a year payor income, with two children, the “normal” low end is very close to the 50/50 number.

If the income disparity is less, then the problem goes away too, even for three children. If the payor makes $400,000, but the recipient earns $150,000, then the low end of the SSAG range will be close to 50/50. If the recipient earns $35,000, but the payor “only” makes $130,000, then the 50/50 split doesn’t change the range either.

The 50/50 point moves around the range, sometimes pulling the low end down (as in the posited fact situation) and sometimes pulling the high end up (if there is one child and low-to-middle incomes for the spouses). Where the SSAG range has been extended to include 50/50, I think the greater breadth of the range and that asterisk (in DivorceMate) should be enough to alert lawyers to the impact of the 50/50 point.

CUSTODIAL PAYOR FORMULA

LESS THAN 40% NDI/MCF FOR RECIPIENT

16. Why does the custodial payor formula leave the spousal support recipient with less than 40% of the family's net disposable income or monthly cash flow?

The *custodial payor* formula is a hybrid formula, built around the spine of the *without child support* formula, but adjusting this gross income formula for the child support obligations of the spouses: **SSAG 8.9, RUG 8(j).** The deduction of grossed-up child support amounts reduces the spousal-support-paying income of the custodial payor. This reflects the statutory priority to child support. Further, the spousal range will be driven by the length of cohabitation.

In a 10-to-15-year cohabitation, for example, the sharing percentages will be 15-20% to 22.5-30% of the remaining gross income difference. The result? Only rarely will the family net disposable income or monthly case flow of the spousal support recipient be over 40%. Where there are still minor children, it will be the rare case where the spouses have been married for 20 years or more. For more on this, see FAQ 9 above.

NO CHILD SUPPORT PAID

17. What if the custodial payor is not receiving or seeking any child support?

In every *custodial payor* case, the recipient of spousal support has a lower income than the payor, usually much lower. If the income of the recipient exceeds $12,000/year, then there will be a table amount of child support to be paid. In most cases, the higher-income payor of spousal support does not claim child support. If no child support is claimed, then there needs to be an adjustment in calculating the formula range: there will be *no deduction* of any amount for grossed-up child support for the recipient of spousal support. This means a higher remaining income for the recipient and a lower SSAG range for the amount of spousal support: see **RUG, p. 38**.

Even if child support is paid by the recipient of spousal support, it is often very little. That leaves the custodial payor to bear more of the children's costs than the amount of "notional" child support deducted. Notional child support for the custodial parent is measured by the table amount under the *Child Support Guidelines.* In these cases, there can be some adjustment of location in the range for the amount of spousal support. This is particularly true for low-to-middle-income custodial payors.

HIGH INCOME PAYORS AND NOTIONAL CHILD SUPPORT

18. What if the custodial payor has a high income and thus notional child support is very high?

This is the flip side of the latter part of the previous answer. Where the custodial payor has a very high income, then the grossed-up notional child support will be very large, perhaps too large compared to the actual cost of caring for the children: **RUG, p.**

38. The usual tenderness shown towards custodial payors with the care of children may be misplaced.

How high is “very high”? Certainly, incomes above the SSAG ceiling of $350,000 per year. And remember that the *Child Support Guidelines* introduce discretion under s. 4 for child support on incomes above $150,000. An outcome higher in the SSAG range for amount offers a way to adjust for this concern.

ADULT CHILD FORMULA

19. What, there’s an adult child formula for spousal support? How does the adult child formula adjust for the varied child support arrangements in these cases?

Too often forgotten is the *adult child* formula, one of the *with child support* formulas and, like the *custodial payor* formula, a hybrid formula: see **SSAG 8.10, RUG 8(k).** It applies when child support for the last or remaining adult children is determined under s. 3(2)(b) of the *Child Support Guidelines,* a provision that offers considerable discretion in assessing child support. The *adult child* formula can accommodate a wide range of arrangements for the payment of a child’s education, the most common situation where this formula applies.

Remember that s. 3(2)(b) applies for adult children where the “table-amount-plus-section-7-expenses” approach is “inappropriate”, i.e.

- a child lives away from home for college, university or other post-secondary education
- a child has other sources of income or resources to cover all or most of their higher education, e.g. a good job, grandparents, scholarships, RESPs.
- a child pursues advanced degrees and is expected to contribute a large proportion of their education costs
- an adult child is disabled and receives his or her own social assistance or other independent disability funding

Like the *custodial payor* formula, the *adult child* formula first deducts each parent’s grossed-up child support obligation from their respective gross Guidelines incomes. For most adult child cases, this will require the creation of a child expense budget, followed by a determination of what amount should be contributed by the child and then a prorating of the balance based upon the respective parental incomes. Then, like the *without child support* formula, the SSAG range will be driven by the remaining gross income difference and the years of spousal cohabitation. The relevant section of the ***Revised User’s Guide*****, 8(k)**, offers more tips on how to use this formula.

There is one further adjustment that should be considered. What if the adult child goes away from home for post-secondary education, but returns home to live with one or both parents over the summer months? The post-secondary budget under s. 3(2)(b) is usually constructed for the 8-month school year. If the child is at home with a parent for

the 4 summer months, then some lawyers and judges will provide for the table amount to be paid for those months to the parent with whom the adult child resides. In computing the *adult child* formula, that amount of child support should also be deducted and grossed up.

INTERIM/TEMPORARY SUPPORT

20. How do the SSAG apply in determining interim support?

In some parts of Canada, ancient authorities are still cited and applied, suggesting that interim support is just a matter of need and ability to pay, of "needs-and-means". Most of these decisions predate the Spousal Support Advisory Guidelines, some by many years. A classic example would be the Manitoba Court of Appeal decision in *Vauclair v Vauclair* (1998), 39 R.F.L. (4th) 124, which even suggests that matters of economic disadvantage and compensatory support ought not be considered at the interim stage! A commonly-cited interim decision in Alberta is *Bennett v Bennett,* 2005 ABQB 984, to similar effect, which in turn calls in support a number of decisions from the 1990's.

The application of the SSAG at the interim stage is discussed in **SSAG 5.3** and in much more detail in **RUG, ch. 5**. The SSAG *do* apply at the interim stage, of that there is no question. For an early and frequently-cited decision explaining the rationale, see *D.R.M. v R.B.M.,* 2006 BCSC 1921 (Martinson J.). Subject to the important exception for "compelling financial circumstances in the interim period", the SSAG formulas offer a quick, easily calculated method of obtaining an amount, knowing that more precise adjustments can be made at trial. The "interim exception" is discussed in **SSAG 12.1 and RUG 5(c) and 12(a).**

For a nuanced summary of the modern, post-SSAG principles that apply to interim or temporary spousal support, look to *Politis v Politis*, 2015 ONSC 5997, a decision of Justice Harvison Young, who in turn relies upon the leading B.C. case of *Robles v Kuhn*, 2009 BCSC 1163 (Master Keighley). At para. 14, Harvison Young J. sets out 8 principles:

1. On applications for interim support the applicant's needs and the respondent's ability to pay assume greater significance;
2. An interim support order should be sufficient to allow the applicant to continue living at the same standard of living enjoyed prior to separation if the payor's ability to pay warrants it;
3. On interim support applications the court does not embark on an in-depth analysis of the parties' circumstances which is better left to trial. The court achieves rough justice at best;
4. The courts should not unduly emphasize any one of the statutory considerations above others;
5. On interim applications the need to achieve economic self-sufficiency is often of less significance;

6. Interim support should be ordered within the range suggested by the *Spousal Support Advisory Guidelines* unless exceptional circumstances indicate otherwise;

7. Interim support should only be ordered where it can be said a *prima facie* case for entitlement has been made out;

8. Where there is a need to resolve contested issues of fact, especially those connected with a threshold issue, such as entitlement, it becomes less advisable to order interim support.

In Alberta, a recent Court of Appeal decision suggests a more expansive approach to interim support than the *Bennett* case, an approach closer to that found in Ontario and B.C.: *Furry v. Goodwin,* 2020 ABCA 127. What is unusual in Alberta is the use of time limits on interim orders, something rarely if ever seen outside of that province. Interim time limits are intended, it appears, to encourage recipients to move their case on to trial. The traditional interim order, which continues in effect until trial, without a specific time limit, places the onus of moving the case forward upon the payor, which probably is the better place to put the burden. Such interim time limits also reflect the tendency of the Bar to treat interim orders as "final" orders or, at least, as a prediction of ongoing support at trial. Yet these same practices occur outside of Alberta, without actual time limits on interim orders. What is clear is that the SSAG are now used regularly in Alberta in determining the amount of interim spousal support.

One last point of significance, not just in Alberta, but across the country. The amount of interim spousal support may *not* be a good guide to the amount of support after a trial. As *Bracklow* told us and as the SSAG show, there is an interaction between *amount* and *duration* in spousal support. As duration comes into play at trial, the amount may go up or down, especially where there is *restructuring* involved. And we all know that incomes may prove to be different, asset and debt positions change after property division, new partners appear, etc.

DELAYED CLAIMS FOR SPOUSAL SUPPORT

21. How do the SSAG deal with delayed claims for spousal support?

This is a sub-set of cases with which lawyers and judges struggle, where the recipient brings an initial claim for spousal support long after separation. A delayed claimant will likely seek retroactive support as well as prospective support. Here we are considering delayed prospective claims. Retroactive spousal support is dealt with below in FAQ 20. These delayed claim issues are not discussed in the SSAG, but are analyzed in **RUG 15(g).** This section of the RUG has been quoted in full in two recent decisions: *Kraft v Kraft,* 2018 BCSC 496 at para. 101; and *Droit de la famille – 211883,* 2021 QCCS 4139 at para. 29. We may see more delayed claims after COVID.

Where a claimant has seriously delayed seeking spousal support, the SSAG can be used to determine the amount and duration of support, if there is continuing

entitlement. Long delays do create a problem, the problem of what incomes to use in doing SSAG calculations. Ordinarily, on an interim or initial claim for support, we would use the current incomes of the spouses. Not so simple on a delayed claim.

An intervening consideration will be the effect of post-separation income changes. The payor's income may have increased considerably during the period of delay: see Thompson, "Post-Separation Increases in Payor Income and Spousal Support" (2020), 39 Can.Fam.L.Q. 185; and also **SSAG 14.3 and RUG 15(e).** Or, on the other end, the recipient's income may have decreased post-separation: **SSAG 14.4 and RUG 15(f).** In deciding what incomes to use on a delayed claim, guidance can be found in the law governing these post-separation changes, changes which usually arise through the process of variation and review.

For example, for most non-compensatory cases, on a delayed claim, a court will likely use the separation date income of the payor, rather than the payor's current higher income. Conversely, where the claim is strongly compensatory, a court will be more willing to use the payor's current income to calculate the SSAG range, despite any delay.

In these delayed claim cases, in arguing prospective spousal support, it is wise for lawyers to do at least *two* SSAG calculations, one for the separation date incomes and another for the current incomes. Often it will be helpful to do one or more intermediate calculations too, especially where the post-separation income changes are substantial, as partial sharing is a frequent outcome in these cases. Keep in mind that location in the range can also be used to adjust the outcome, like taking the high end of the separation date income range or the low end of the current income SSAG range.

A second dimension for delayed claims is **duration**. If there is also a retroactive claim, then any period of retroactivity will obviously count towards duration, limiting the period of prospective support. In some cases, retroactive claims are refused, due to the delay, with the delay period still having an impact upon prospective duration. Much depends upon the reason for the delay and the strength of the recipient's claim.

A 10-year delay in claiming spousal support by a husband after a 13-year marriage, on a weak set of facts, led to summary judgment dismissing his claim: *Karlovic v Karlovic,* 2018 ONSC 4233 (Kurz J.). Similarly, in *Droit de la famille – 211883,* cited above, a wife delayed 10 years in claiming support after a 10-year marriage with no children, resulting in a finding of no entitlement by Samson J. In *Badrinarayan v Badrinarayan,* 2017 ONSC 2934, after a 26-year marriage and 4 children, where the wife was employed throughout the marriage, Justice Trimble found a non-compensatory claim and the 3-year delay in making the claim was a factor in choosing the low end of the SSAG range for amount. In the case of a strong compensatory claim, where there was good reason for the 7-year delay in claiming spousal support after an 8-year relationship, with a 12-year old autistic child in the recipient's care, Justice Sullivan used their current incomes to determine spousal support for a 3-year duration: *Crew v Lobo,* 2016 ONCJ 632.

LIVING OFF CAPITAL

22. Where spouses are living off their capital, like when both are retired, how do you calculate spousal support using the SSAG?

The Spousal Support Advisory Guidelines offer income-based formulas for amount. Where both spouses are retired or otherwise living off their capital, the critical step is determining what incomes should be attributed or imputed to the spouses. In these cases, it will usually be the *without child support* formula that is being applied.

Entitlement issues can arise at this late stage. By retirement, many spouses will be approaching the end of duration, the end of entitlement. And, as income differences narrow in retirement, with or without the "double-dipping" concerns of *Boston*, then there will be questions about a spouse's continuing entitlement to spousal support.

The Supreme Court reminded us in *Leskun v Leskun,* 2006 SCC 25, that capital is part of "means" and can be the basis for paying periodic spousal support. In the ***Revised User's Guide*, 19(e)**, we only briefly addressed these issues.

First, if older spouses have roughly similar assets after the division of property, a court can terminate spousal support and leave each spouse to manage their own assets to meet their needs, as in *Puiu v Puiu*, 2011 BCCA 480 and *Salt v Salt,* 2019 ABQB 595. Each spouse can then decide what investments to make to maximize their income and what pace to apply in drawing down their capital.

Second, in most low income cases with no assets, the spouses will be left to each rely upon their CPP, OAS and GIS, plus any other small amounts of income. CPP credits are divisible upon separation and divorce, thus narrowing the gap in CPP income, or even equalizing them in long marriages. The technical term for this is "Division of Unadjusted Pensionable Earnings", a calculation done by the federal government on a year-by-year basis, with the unfortunate acronym of "DUPE". Remember also that the Guaranteed Income Supplement (GIS) has its own clawback and any payment of spousal support may have an impact upon the GIS of the recipient.

Third, in a contested case where the parties have significant capital and negligible pensions, then it will be necessary to determine the incomes of the spouses to calculate the SSAG range. Where spouses have made reasonable investment decisions to generate income over the period of their retirement, courts have been willing to give spouses some leeway. Where capital is poorly invested, imputing a reasonable income may be required under s. 19(1)(e) of the *Child Support Guidelines*. Where a spouse has dissipated their assets, a court may also use that provision to impute a reasonable income to the assets they should still be holding.

At some point during retirement, most of us will have to draw down our capital to fund our expenses. In effect, that is what we are doing with the payment of an employment pension (which is a mix of income and capital) or payments from a RRIF (Registered Retirement Income Fund) or an annity. If the parties mostly have capital left, if spousal

support is still paid, to calculate the SSAG formula range, “incomes” will need to be determined. This will require a different kind of “imputing”, to estimate how much capital each spouse should be drawing down as “income” to fund their expenses and, possibly, to pay spousal support. There will be obvious tax issues to take into account at this stage.

There are some non-retirement cases where the payor may have capital, but little income, like in *Leskun*. In these cases, the same sort of issues will arise in determining the payor’s “income” for spousal support purposes.

RETROACTIVE SPOUSAL SUPPORT

23. What are the implications of the Supreme Court of Canada decisions in *Michel v Graydon* and *Colucci* for retroactive spousal support claims and the SSAG?

We devoted the final chapter, **chapter 20, of the *Revised User’s Guide*** to retroactive support issues, including the tax issues. At that point, in 2016, the Supreme Court of Canada had applied the *D.B.S.* analysis to retroactive spousal support in *Kerr v Baranow,* 2011 SCC 10.

There is no question that the introduction of the SSAG has made the calculation of retroactive spousal support much easier, in the same way that the *Child Support Guidelines* have simplified retroactive child support. Retroactive spousal support claims have increased dramatically over the years. Often the parties will agree to use the mid-point of the SSAG range, subject to determination of the previous years’ incomes of the spouses by the court. In many adjudicated cases, courts will reflexively default to the mid-point in locating the proper retroactive amount, just as often happens with prospective spousal support. That should be avoided.

Lawyers should argue “location in the range” in retroactive cases, just as they should in prospective cases.

In the past two years, the Supreme Court has revised and reinterpreted the *D.B.S.* retroactive approach in child support cases: *Michel v Graydon,* 2020 SCC 24 and *Colucci v Colucci,* 2021 SCC 24. I have written two articles about these decisions: “The Supreme Court Begins to Rewrite D.B.S. in Michel v. Graydon” (2020), 39 Can.Fam.L.Q. 95; and “Retroactive Support After Colucci” (2021), 40 Can.Fam.L.Q. 61.

Recently, Justice Chappel has suggested that we should not apply *Colucci’s* reworked approach to *D.B.S.* in spousal support cases in *A.E. v A.E.*, 2021 ONSC 8189 at para. 479:

> The Supreme Court of Canada has not yet had the opportunity to decide whether the revisions that it made to the retroactive child support framework in *Colucci* extend to the spousal support context. In particular, it has not yet addressed whether the four *D.B.S*. factors should still be applied in the spousal support context to determine as a threshold matter whether a retroactive spousal may be advanced, or whether those factors should now only be considered in

> determining whether to depart from the presumptive commencement dates identified in *Colucci*. In my view, the framework set out in *Kerr* continues to apply unless and until the Court of Appeal or Supreme Court of Canada directs otherwise. Given the Supreme Court of Canada's emphasis in *Kerr* on the divergent foundational principles underlying child support and spousal support, and the highly discretionary nature of spousal support as compared to child support, there is no principled basis for simply transplanting the *Colucci* framework into the spousal support field.

This comment was cited and approved by Bale J. in *Nault v Nault,* 2022 ONSC 904 at para. 53. I don't think this interpretation is correct.

Actually, given that *Kerr* was founded upon *D.B.S*. and *D.B.S*. has now been revised in *Michel* and *Colucci,* I would think there is no "principled basis" *not* to apply them in the spousal setting. In *Legge v Legge,* 2021 BCCA 365, the B.C. Court of Appeal showed no compunction about applying the Supreme Court's *Michel* decision in a retroactive spousal support case. The recent Ontario Court of Appeal decision in *Hevey v Hevey*, 2021 ONCA 740 at para. 34, found the "same imperatives" from *Colucci* to apply to disclosure in retroactive spousal support cases.

In my longer article, "Retroactive Support After *Colucci"*, I explained how the Supreme Court's revised approach can, and should, be applied to retroactive spousal support, which I will quote at length here (with most footnotes removed). It is best to read the full article, as the first part of the article explains the impact of *Michel v Graydon* and *Colucci* upon the determination of retroactive child support, which may help understand some of the points made in this excerpt about retroactive spousal support.

"Implications of Colucci (and Michel) for Retroactive Spousal Support

What do *Colucci* and *Michel* mean for retroactive spousal support claims, both up and down? The *Revised User's Guide* included a chapter, Chapter 20, on this topic, based upon the case law up to April 2016, including the Supreme Court's 2011 decision in *Kerr v. Baranow.* In my opinion, the two recent Supreme Court decisions should make spousal support easier to increase retroactively and harder to decrease, given the emphasis in both cases upon full and timely disclosure. There will always be more discretion in spousal support compared to child support, but some of the comments in *Kerr* will need to be reconsidered.

In *Kerr v. Baranow*, Justice Cromwell restored the order for "retroactive" spousal support made by Justice Romilly at trial and applied the *D.B.S.* factors to do so. I use quotation marks here, as the wife had not claimed interim support and only sought spousal support from the date of filing her court application. Was this really "retroactive" support? Cromwell J. would "not venture into the semantics of the word 'retroactive'". Any support prior to the order at trial was treated as "retroactive" in *Kerr*, a similar loose

interpretation as in *D.B.S.* Yet Justice Cromwell does mention the 2005 Ontario Court of Appeal decision in *MacKinnon v. MacKinnon* [75 O.R. (3d) 175] but misunderstands its import. In *MacKinnon*, Lang J.A. was clear that spousal support from the date of the application was not "retroactive" support, but "prospective" support. Thus, when the Ontario Court of Appeal describes the date of filing as the "usual commencement date", the Court means the commencement date for prospective support. No "retroactive" analysis was required. In *Kerr,* Cromwell J. insists that even in a *MacKinnon* situation, a *D.B.S.* analysis is required. Unfortunately, nothing in *Colucci* or *Michel* resolves these "semantics", which have important repercussions for those arguing about "retroactive" support.

Justice Cromwell emphasised the differences between child support and spousal support, in paragraph 208:

(1) The entitlement of a minor child is "automatic", while there is no "presumptive entitlement" to spousal support.

(2) Child support is the right of the child, and thus reduces concerns about notice and parental delay by the recipient parent. "Concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support."

(3) The basic amount of child support depends on the income of the payor, while spousal support requires "a highly discretionary balancing of means and need".

(4) While a parent has a fiduciary duty towards their child, "the spouse is in general not under any legal obligation to look out for the separated spouse's legal interests".

We must be careful not to overstate the differences. First, in Canada, we have a very broad basis of entitlement to spousal support and there are many cases of "presumptive entitlement" – just think of long traditional marriages. Second, it is true that a recipient parent can "give away" their own rights to support, but I will argue that *Colucci* and *Michel* have reduced the weight of these factors for spousal support. Third, the *Spousal Support Advisory Guidelines* have made the calculation of retroactive spousal support much more like that for child support, especially with the judicial tendency to default to the mid-point of the SSAG range in retroactive cases. Fourth, there are certainly fiduciary "elements" between spouses, with modern duties of disclosure and fair bargaining undercutting the sweeping statement by Justice Cromwell.

What *Kerr* did do was to import the *D.B.S.* analysis into spousal support law, without much practical guidance how it might differ in its application. Apart from more discretion and unpredictability in outcomes, most retroactive spousal support cases manipulate the same *D.B.S.* concepts – delay, blameworth conduct, hardship to the payor, effective notice, the "three-year rule", formal notice. The modification of those concepts in *Michel* and *Colucci* can and should have an impact.

First, delay and reasonable excuse for any delay. As Justice Martin says in *Michel,* "a delay, in itself, is not inherently unreasonable". There are many understandable reasons for delay set out in both sets of reasons in *Michel,* reflecting the disadvantaged social and economic position of the recipient parent. Most of those reasons are equally understandable for retroactive claims by recipients of spousal support. Second, the ills of non-disclosure by payors are every bit as blameworthy in spousal cases. The affirmative duty to disclose material changes in income seems to have been transposed into the spousal setting, but now applying to both spouses. Third, notice issues do seem to weigh more heavily in spousal cases, as the niceties of pleading and "fairness" to payors are considered more often.

The new *Colucci* framework for **"retro down"** applications applies comfortably in spousal cases. The five steps in paragraph 113 work like this:

(1) Material Change. The concept of "material change" is much more complicated in spousal support law, as I have explained elsewhere [(2012), 31 Can.Fam.L.Q. 355]. Spousal support is "stickier" compared to child support under the *Guidelines*. In simple terms, there must be a substantial, continuing change that was not taken into account in the previous order or agreement. It requires the analysis of both spouses' situations over time. That said, where the change is an alleged reduction in the payor's income, the analysis is not that complicated – mostly about whether the income reduction is substantial and continuing or, if so, whether income should be imputed. The onus is upon the payor, encouraging full disclosure.

(2) Effective Notice. The payor must provide notice *and* proper disclosure, just as with child support. Most payors will not satisfy this requirement. The "three-year rule" will thus rarely arise here either.

(3) Formal Notice. Where there is no effective notice, then the presumptive start date will be the date of formal notice, usually the date the payor files the application to vary. Most "retro down" cases will use this date.

(4) Departure. The four *D.B.S.* factors will be used to determine whether the presumptive start date should be moved further back or further forward. The conduct of the payor will be central to any departure, both conduct before filing and after filing, notably the payor's disclosure and payment record. If the payor continues to delay making disclosure after filing, a later date may be chosen. In the spousal setting, disclosure will cut both ways, with the recipient required to disclose too. As in *Colucci*, "hardship" is a two-way street: hardship for the payor, but also hardship for the recipient, especially where there might be a need for reimbursement or set-off of arrears.

(5) Quantification. Thanks to the SSAG, quantifying the amount of the reduction is much easier, a matter of doing the formula calculations and picking a location in the range. Trickier in spousal cases can be duration, of which more below.

Where the relevant material change is something other than the payor's reduced income, the retroactive analysis becomes more difficult. Did the recipient's income increase? Should income be imputed to the recipient due to insufficient efforts to become self-sufficient? Has the recipient repartnered or remarried? Has the payor retired, raising questions of "early" retirement or "double-dipping"? Has the recipient's entitlement to support ended, by reaching the end of duration or otherwise?

Where the *with child support* formula is being used under the SSAG, a small reduction in spousal support in a "retro down" case can lead to a large drop in the range, because of the statutory priority to child support. Where retroactive spousal support has been reduced, or even erased, for this reason, keep in mind the exception for "small amounts, inadequate compensation under the *with child support* formula" under s. 15.3 of the *Divorce Act* and its equivalents under provincial laws. Spousal support amounts can later be increased as child support is reduced or ended, and duration can also be extended under this SSAG exception.

As in the child support setting, **"retro up"** spousal applications are much more complicated and the *D.B.S./Colucci/Michel* analysis is much less successful. The added spousal support factors cause further complications, as issues of entitlement and duration come up more frequently in variation cases. I will use paragraph 114 and its five steps from *Colucci*.

(a) Material Change. Most "retro up" spousal cases will raise issues of entitlement, either to share the payor's post-separation income increase or to reflect the recipient's post-separation income reduction. Thus, in addition to the complexities of determining the payor's increased income, there will be an added question whether the recipient is entitled to share all, some or none of the increase. The onus will be upon the recipient. Quite often there will be competing applications to vary, with the payor moving to terminate or reduce support, to which the recipient responds with a claim for retroactive support.

(b) Effective Notice. A recipient will have to "broach" the issue of increased spousal support, in much the same way as for child support. There are the same problems of "information asymmetry" for spousal support upward claims. The "three-year rule" will come up more often, especially where the recipient brings a counter-application for increased support.

(c) Formal Notice. Where the recipient has not given effective notice, then the date of formal notice will be the presumptive start date for "retroactive" spousal support.

(d) Departures. This is where spousal support becomes more complicated. After *Colucci,* the *D.B.S.* factors are used to determine departures from the presumptive start date. Delay by the recipient will be read generously, with many good "excuses". Both spouses will have a duty of disclosure, so the "conduct" of both will be relevant. The payment record of the payor will be

considered. The circumstances of the recipient will be relevant, as they always are in spousal cases. Finally, hardship to the payor will be a factor, especially where there are also child support obligations. I predict that "departures" from the presumptive date will be more common in spousal cases.

(e) Quantification. The SSAG will assist, but there is much more discretion on amount in "retro up" cases, especially for post-separation increases in payor income. Further, there are more likely to be other changes on the recipient's end that will have an effect on the amount. And there will always be questions of duration.

A word or two about duration in retroactive spousal support cases. Any period of retroactive support counts towards total duration under the SSAG. In some cases, parties may wish to think about retroactive vs. prospective duration. For example, if a recipient can obtain support for ten years, it may be wiser to use a more recent start date using higher incomes, rather than going backwards in time. Or vice versa, depending upon the spousal incomes.

There is still very little post-*Colucci* case law on retroactive spousal support. A good example of "retro up" would be *Outaleb v. Waithe*, a decision of Justice Kraft involving both child and spousal support [2021 ONSC 4330]. The wife received substantial retroactive child and spousal support. The spousal support analysis was complicated by two further issues: the sharing of the husband's post-2012 income increases (full sharing); and the appropriate tax rate to discount the SSAG amounts to a lump sum. There haven't been many "retro down" spousal cases. Undoubtedly, post-*Covid*, we will see more downward variations."

My comments above reflect an early view of the impact of *Michel v Graydon* and *Colucci* upon retroactive spousal support claims. Retroactive spousal support cases continue to accumulate, as also do retroactive child support cases, so the law will undoubtedly develop further.

March 2022