



The Spousal Support Advisory Guidelines

Part Three – Exceptions and More

Rosemarie Bell

To construct the best possible claim using the Spousal Support Advisory Guidelines (SSAGs), by now you have:

- confirmed you are entitled to spousal support;
- ensured you are using the right formula (With/Without Child Support);
- determined both parties' incomes;
- calculated the range of spousal support (high and low amounts and duration);
- determined the location in the range, using the factors in Section 9; and
- considered whether you want to restructure (trade off amount against duration).

What next? There are still four SSAG sections:

Section 11 – Ceilings and Floors

Should the SSAGs apply at all? At very high and low incomes, the formulas become unrealistic. The ceiling is \$350,000. It is not a *cap* – it is a point where judges usually move away from the formula and focus on other factors. The ceiling varies from place to place – for example, in rural areas, it is generally between \$150,000 and \$250,000. At the \$20,000 floor, spousal support might push the payor into poverty, and it is rarely ordered.

Section 12 – Exceptions

Is your case exceptional? When the formula calculations are unsatisfactory and restructuring does not resolve the issues, look at Section 12. It lets you rework the numbers in certain circumstances.

12.1 Compelling Financial Circumstances in the Interim Period

It may be impossible to adjust the household finances quickly. The payor may have to cover large fixed debts (e.g. a mortgage). It is one of the most common exceptions used in lower-income short marriages, or when property has not yet been divided. It is a short-term adjustment – once a house has been sold, a spouse has moved, or debts have been refinanced, the support can be re-adjusted to the formula amounts.

12.2 Debt Payment

These are not ordinary debts. This exemption applies only when:

- the total family debts exceed the total family assets, or the payor has a negative net worth;
- they are “family debts”; and
- the payments are “excessive or unusually high.”

This is also a short-term adjustment while the parties sort out their finances.

12.3 Prior Support Obligations

The law’s general policy is “first family first.” An obligation to pay support for prior children or a prior spouse will lower the support for a subsequent spouse.

12.4 Illness and Disability

Providing for an ill or disabled spouse is challenging, particularly when the condition is permanent. The recipient can argue for a larger sum, a longer time, or both.

12.5 The Compensatory Exception In Short Marriages Without Children

A spouse who gave up something for the marriage may need compensation for the economic loss. For example, the claimant:

- gave up a job and became a secondary earner to accommodate the other spouses’ job;
- gave up a job or business to move across the country to marry; OR
- worked to put the payor through a post-secondary or professional program.

The parties then separated before the working spouse was able to enjoy any of the benefits of the other’s enhanced earning capacity.

12.6 Property Division and Re-apportionment of Property

This exception applies only in British Columbia, where the law permits an unequal division of property to meet a support obligation.

12.7 Basic Needs/Hardship: "Without Child Support" and "Custodial Payor" Formulas

This exception applies in cases of need, after shorter marriages, where the recipient has little or no income.

Child support takes priority over spousal support. When there are three or four children or large section 7 expenses, there may be little left over for spousal support.

12.8 Non-Taxable Payor Income

Legitimate non-taxable income includes disability payments, workers' compensation, income of an aboriginal person on a reserve, and some overseas jobs. The payor cannot deduct the support, yet the recipient must still pay the income tax. The parties can adjust the amount to balance their needs.

12.9 Non-Primary Parent to Fulfil Parenting Role under the "Custodial Payor" Formula

This narrow exception applies when:

- the non-custodial parent also plays a significant role in the child's post-separation care and upbringing;
- the marriage is short and the child is young; and
- the payor might not be able to meet the demands of parenting if also required to pay full spousal support.

12.10 Special Needs of Child

The duration and/or the amount may have to be extended to ensure the primary parent can meet the child's special needs.

12.11 Section 15.3: Small Amounts, Inadequate Compensation under the "With Child Support" Formula

Child support takes priority over spousal support. When there are three or four children or large section 7 expenses, there may be little left over for spousal support. To compensate the recipient, the payments may have to extend past the usual time limits.

Section 13 Self-Sufficiency

Section 15.2(6)(d) of the *Divorce Act* says spousal support should, “**in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.**” Payors often argue that recipients must do more to make their own way in the world. The SSAGs encourage this, and Section 13 gives the payor the arguments and tools: Entitlement, Imputing Income, Using the Ranges, Restructuring, Time Limits, Review Orders, and Incentives. Section 13 recognises that a recipient's needs can change over time (for example, as children become older), creating opportunities for greater self-sufficiency.

Section 14 Variation, Review, Remarriage, Second Families, Quebec Law

Sometimes the SSAGs apply on review and variation applications. They do not apply where there is a post-separation increase in the payor's income, re-partnering / remarriage, or a second family. These are left to discretionary, case-by-case determinations.

Quebec courts apply the SSAGs according to their own rules.

Conclusion

If you have worked your way through all the sections, you will have a good idea what the SSAGs are all about. Final words of caution:

- The SSAGS are only advisory – judges accept them more in some provinces than others. Judges in the same court will also have different views on whether or how to apply them.
- Never rely just on the SSAGs – be sure to have ready all of your personal and financial information, whether you are at trial or in a pre-trial motion. Be prepared to argue the traditional way.

Nailing down spousal support has never been easy. Judges exercise discretion in every case. Before you head to court, check the reported cases to see how the SSAGs are developing in your province. The SSAGs are complex and do not resolve all of the issues. Hopefully, with continued judicial use and regular monitoring by the federal Department of Justice, they will improve and bring more certainty and predictability to the calculation of spousal support.

- 1 The Spousal Support Advisory Guidelines 2008 www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/g-ld/spag/pdf/SSAG_eng.pdf
- 2 The Spousal Support Advisory Guidelines: A New and Improved User's Guide to the Final Version www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/tool-util/topic-theme/ug_a1-gu_a1/index.html

Rosemarie Boll is Staff Counsel with the Family Law Office of Legal Aid Alberta, in Edmonton, Alberta.