



## SPOUSAL SUPPORT ADVISORY GUIDELINES:

# New help for lawyers

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Spousal support cases are amongst the hardest we deal with in family law, right up there with parental mobility cases. The law of spousal support is confused, inconsistent and unpredictable. Both the *Divorce Act* and the leading Supreme Court cases like *Moge* and *Bracklow* speak only to broad principles, with little direction about the hard questions of amount and duration. Appeal courts have only provided limited guidance on these issues, in those few cases where a trial judge has gone beyond the outer limits of appellate review of discretionary decisions. Since the *Bracklow* decision in 1999, the law has become even more unpredictable.

So lawyers are left to prepare statements of income and expenses and budget deficits in individual cases, supplemented by DIVORCEmate calculations for differing levels of proposed spousal support. But what's a reasonable claim? A reasonable offer? You can start at zero from the payor's perspective or, from the recipient's

perspective, 50 per cent of the payor's income. Whether you are constructing a position for negotiations or you're preparing an argument for court, you are left pretty much to your "gut feel" in formulating an amount or duration for spousal support. In turn, this makes it hard to explain the law to clients, and even harder to advise clients on reasonable positions and outcomes.

Help on these issues can now be found in the spousal support advisory guidelines, released on January 27, 2005, in the form of a Draft Proposal. The formulas in the advisory guidelines generate ranges for the amount and duration of spousal support in a wide range of typical cases. These ranges reflect the dominant ranges of support now found in Canadian case law, as well as emerging trends in some specific areas. The guidelines are not a reform project, but an attempt to bring more consistency and predictability to the existing law.

Work on the advisory guidelines began back in late 2001, funded by the federal Department of Justice. Professor Carol Rogerson of the University of Toronto and I are the co-authors of the Draft Proposal. In our work, we drew on our own research and also on the invaluable advice and assistance of the federal Advisory Working Group on Family Law, which consists of 13 specialised judges, lawyers and mediators from across the country. The Executive Summary and complete Draft Proposal are available online from the federal Justice Web site [www.justice.gc.ca/en/dept/pub/spousal/project/index.html](http://www.justice.gc.ca/en/dept/pub/spousal/project/index.html).

The guidelines are called “advisory guidelines,” to distinguish them from the federal *Child Support Guidelines*, which are really “child support rules.” These spousal support guidelines are not legislated, but are voluntary and advisory. Spousal support is much more complicated than child support, demanding greater flexibility in the form of these “true guidelines.” The current Draft Proposal has been released, for lawyers, judges and mediators to use now. In 2006, we expect that we will make revisions and improvements, based upon the feedback we receive, a process that has already begun.

## Formulas require before and after work

The basics of the advisory guidelines are set out in the executive summary. Most lawyers will immediately hone in on the two formulas, the *without child support* formula and the *with child support* formula. These are the formulas that generate the numbers for amount and duration. But it is important to note that there are critical steps before and after the formulas.

*Before* you get to the formulas, you must first address these preliminary issues:

- (1) do the guidelines apply;
- (2) is there an entitlement to support; and
- (3) what are the incomes of the spouses.

It is important to emphasize the issue of entitlement: Only *after* entitlement has been found, can these guidelines be used to determine amount and duration. The formulas can generate “numbers” for even small income disparities, but the law is clear that a disparity in incomes at separation does not of itself generate entitlement.

*After* the formulaic ranges have been calculated come another series of steps:

- (1) does the payor’s gross income exceed the “ceiling” of \$350,000 or fall below the income “floor”;
- (2) what factors should be considered in locating an amount or duration within the range;
- (3) can the amount and duration of support be “restructured”;
- and
- (4) does the case fall within one of the “exceptions.”

In short, the advisory guidelines still require the exercise of skill and judgment by lawyers, both before and after the formula

calculations. **It’s not just a matter of plugging in some numbers and out come “the answers.”** What the guidelines do is narrow the range of outcomes, based upon formulas that incorporate the dominant ranges and trends in the law. The precise result will be the product of negotiation, mediation or adjudication on the facts of the particular case.

The first formula – the *without child support* formula – uses gross incomes and length of marriage, in a straightforward formula that can be calculated on the back of an envelope. This formula generates limited support obligations for short, childless marriages, but produces substantial sharing of income in long marriages of 20 years or more.

The second formula – the *with child support* formula – requires computer software to make the calculations, as it employs individual net incomes, after the deduction of each spouse’s child support obligations, and incorporates the necessary tax and benefit considerations. This second formula *is not* arithmetic, but requires software to “iterate,” by transferring differing amounts of support until the requisite proportion of individual net disposable income is left in the hands of the recipient spouse.

Lawyers are already using these advisory guidelines in negotiations around Ontario. Lawyers are also presenting the guidelines’ ranges as part of their arguments in court. Judges will sometimes ask lawyers what the “status” of these guidelines are. Obviously, they are not binding “law” that must be applied. They are not “evidence” or “expert evidence” either. The guidelines can best be described as part of reasoning and argument, akin to the familiar DIVORCEmate income calculations, but one step beyond, since the ranges incorporate the existing case law on amount and duration. In a written brief or argument, I would suggest that lawyers refer to the leading appellate authorities on spousal support, cite some relevant and similar cases, make the usual case-specific arguments, and then provide the guidelines ranges for the information of the court. Some judges will openly refer to these numbers in court, but others will prefer not to do so (although most will still want to know if they are “in the ballpark”).

The best way to get a sense of how these guidelines work is to use them in actual files. I encourage lawyers to use them in developing a principled claim or offer, or in putting forward a reasoned argument in court. At first, use them as a check or litmus test for your usual methods. Over time, you may find that you start with the ranges and then tweak your proposals, using actual housing, debt and other “hard” expenses as well as the factors and steps identified above.

At the present time, Prof. Rogerson and I are traveling around the country, speaking to groups of lawyers and judges about the advisory guidelines. In the fall, as lawyers and judges gain practical experience with the guidelines, we are hoping to receive helpful feedback for revisions and improvements.

## Revisions in the works

Already we can identify a couple of areas that will be revised. First, cases of post-secondary students where s. 3(2)(b) of the *Child Support Guidelines* applies and the individual budget method is used, either because the student attends studies away from home or the student makes a sizeable contribution to his or her expenses. In these cases, child support does not resemble the “table-plus-section-7-expenses” approach that underpins the “with child support” formula. Hence, we suggest that the “without child support” formula be used, with the respective amounts of parental child support “grossed up” and deducted from each

parent’s gross income. Second, cases of shared custody. We are waiting for the Supreme Court of Canada’s decision in the *Contino* appeal, the Ontario case involving how to calculate child support under s. 9 of the *Child Support Guidelines*. Once that decision is handed down, there will likely have to be some changes made to the application of the with child support formula in such cases.

Try out the guidelines. Read the full Draft Proposal. We think they should help lawyers in this difficult area of family law, as another practical tool in spousal support cases.

# Calculation software IS ESSENTIAL TO ACCURATELY FOLLOW SSAG FORMULAS

The formulas for calculating spousal support in the new spousal support advisory guidelines (“SSAG”) are so complex that it takes specialized software to ensure you’re getting it right. In fact, in the SSAG themselves, the authors repeatedly recommend lawyers use software to perform the calculations.

The guidelines use two main formulas: one to calculate spousal support without dependent children and one to calculate spousal support with dependent children. While the formula for spousal support without dependent children is supposedly simple enough that it can be calculated using pen and paper, it can still be problematic: In one of the first reported cases of a judge using this formula, the results arrived at were incorrect.

The “with child support” formula’s complexity lies in the calculation of the parties’ respective Individual Net Disposable Incomes (“INDI”), which excludes spousal support for the payor, and which includes spousal support for the recipient, all the while searching for the appropriate spousal support amount! As the spousal support amount changes, so do the other factors used in the calculation of INDI – the special expenses’ component of child support (if any), the taxes and deductions and the government benefits and credits. This spousal support range can only be determined by numerous, complex, cyclical mathematical calculations, known as ‘iterations’.

In Ontario, the most popular software available is the CHEQUEmate Spousal Guidelines Calculator (CHEQUEmate),

which is a spousal support calculator developed as part of DIVORCEmate Software Inc.’s Tools+ product group. CHEQUEmate calculates the SSAG ranges for both the amount and duration of spousal support. The software incorporates the substantive content with a help feature that provides assistance with the inputting of information as well as in-depth information to help family law practitioners understand the rationale behind the calculations.

Mark Harris, President of DIVORCEmate, says that CHEQUEmate was designed in direct consultation with Carol Rogerson and Rollie Thompson, the authors of the SSAG, as well as a team of family law practitioners, accountants familiar with family law, and experienced programmers. While CHEQUEmate easily handles the mathematical formulas, Harris cautions that lawyers must understand and be able to apply the SSAG in order to properly serve their clients: “Our products are the ‘power tools’ of the trade, but they are not a substitute for knowing the law. I encourage lawyers to take the time to read the draft paper.”

How judges will use the SSAG remains to be seen: Harris notes, “Judges appear to be using the SSAG in case conferences and settlement conferences; they provide a starting point for discussion.”

Information on CHEQUEmate software is available from DIVORCEmate at 416-718-3461 or 1-800-653-0925 x440, or by e-mail at [markharris@divorcemate.com](mailto:markharris@divorcemate.com).