

Evidence Based Analysis of the Spousal Support Advisory Guidelines in Alberta

By

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I INTRODUCTION

As lawyers, we tend to think we know a lot about evidence. Family law lawyers know what kind of evidence for an application for spousal support and they know all about the different kinds of evidence and their strengths and limitation. We know how to challenge evidence presented by the opposing side through questioning and cross-examination. Although not evidence *per se*, use of the Spousal Support Advisory Guidelines¹ is now a crucial component of any spousal support application², whether it be to argue for a support award within the SSAG range or to highlight why the award should not be in the range due to the application of an exception³.

Lawyers do not, for the most part, tend to think about evidence beyond the focused scope of the file at hand. We do not generally think about evidence from a research or scholarly perspective, but as lawyers, we have to make sure that we are using the best evidence available when

¹ Spousal Support Advisory Guidelines, July 2008, Federal Department of Justice, Carol Rogerson and Rollie Thompson ("SSAGs").

² Booth, Scott, "The Spousal Support Advisory Guidelines: Avoiding Errors and Unsophisticated Use, 28 CFLQ 339, at p. 2 ("Booth").

³ Booth at p. 4.

advising our clients about the strength and weaknesses of spousal support applications and the likelihood of a support award inside or outside the SSAG range. Lawyers give their professional opinions and those opinions ought not to be based on a limited range of personal experience or opinions adopted from discussions with other lawyers. Experience and anecdotal based opinions, such as where lawyers may express views that the SSAGs are too high or too low in general or in certain situations, are not adequate.

The SSAGs were introduced in draft in 2005⁴, more than 8 years ago⁵, and it is time that every family lawyer involved in spousal support has a full and nuanced understanding of how they are supposed to work. Many excellent articles have been written on how to use the SSAGs, including a user's guide⁶ by the authors, and it is not our intention to summarize those articles. This paper, and the accompanying 2012 and 2013 case summaries, seeks to dispel broad unsupported generalizations about how the SSAGs are being used in Alberta by the courts and replace them with a concrete analysis. The first step, which began last year with the release of the Vogel 2012 Alberta Court Decisions: Spousal/Partner Support Case Summaries, is to find, summarize and break into components, each and every Alberta spousal or partner support decision from all levels of court. It is our intention that this will be a continuing and developing resource for family lawyers in Alberta with new charts released each year.

As valuable as we hope the case summaries to be, the questions surrounding the chart from other practitioners focused on what trends or generalizations could be drawn out of the chart. As such, the second step was to synthesize the data to see if any trends became apparent. Although two years of data is not sufficient for any certainty regarding trends, some initial patterns did become apparent. As more and more data is added each year, the strength of these tools will hopefully become greater and greater.

The last step we undertook was to delve into the cases, searching for the reasons why a spousal support award was out of the SSAG range and linking same, if possible, to one of the exceptions provided for in the SSAGs themselves, always keeping in mind that in some situations the SSAGs were never meant to apply, such as where there is no entitlement⁷, and for payor incomes over \$350,000⁸ and below \$20,000⁹.¹⁰ After all, a support award can hardly

⁴ Spousal Support Advisory Guidelines: A Draft Proposal, January 2005, Federal Department of Justice, Carol Rogerson and Rollie Thompson.

⁵ Balbi, Lonny L., "Creating Order Out of Chaos: Introducing Spousal Support Guidelines", 23 CFLQ 199 (2004).

⁶ The Spousal Support Advisory Guidelines: A New and Improved User's Guide to the Final Version, March 2010, Federal Department of Justice, Carol Rogerson and Rollie Thompson.

⁷ See SSAGs at Chapter 4 Entitlement, and also *MacDonald v Schmutz*, 2012 ABQB 63 (no entitlement, short marriage), *Clarke v Clarke*, 2012 ABQB 92 (no ongoing entitlement), *Samoilova v Mahnic*, 2012 ABQB 465 (no ongoing entitlement, short marriage), *Tomlinson v Tomlinson*, 2012 ABQB 509 (application by husband, no entitlement, non-disclosure, economic consequences not related to marriage/breakdown), *Lemoine v Griffith*, 2012 ABQB 685 (no entitlement due to property division), *Metcalfe v Metcalfe*, 2013 ABQB 213 (end of entitlement), *Rozinsky v Rozinsky*, 2013 ABQB 358 (no entitlement, short marriage, retraining), *Benson v Benson*, 2013 ABQB 515 (no ongoing entitlement), *CSH v EMH*, 2013 ABQB 660, *TA v DZ*, 2013 ABPC 190 (no entitlement past termination date).

⁸ See SSAGs at Chapter 11 Ceilings and Floors, and also *Fraser v Fraser*, 2012 ABQB 660.

⁹ See SSAGs at Chapter 11 Ceilings and Floors, and also *CAG v SG*, 2012 ABQB 529, *Madhoo-Persaud v Mattson*, 2013 ABQB 206, also for payor incomes between approximately \$20,000 and \$30,000 see

be said to fall outside of the SSAG range if in fact it does so because it falls within an exception or because of one of the other reasons described above. However, only some of the Alberta decisions that fall outside of the SSAG ranges can be justified using the SSAGs themselves.

II Alberta Court Decisions: Spousal/Partner Support Case Summaries

The attached charts¹¹, which summarize the 2012 and 2013 Alberta spousal/partner support cases and where possible, provides a comparison with the SSAGs, was conceived by Vogel LLP as a tool for lawyers, judges and mediators to compare at a glance how the Alberta Courts are currently treating the SSAGs and what spousal support decisions have been released recently. The summaries are intended to contain sufficient detail and facts so as to provide a meaningful comparison not just to the SSAGs, but also to any spousal support case which counsel may have that is currently in Court or the subject of a JDR, Mediation or Arbitration.

DIVORCEmate software was used to calculate the SSAG ranges where possible¹². It is important to remember that both available software packages are complex with their own pros and cons and that the majority of problems experienced by users do not stem from issues with the software but rather with unfamiliarity with the software and its capabilities and the SSAGs themselves.¹³ The SSAGs are essentially two short formulas and at the same time a dense package of sophisticated policies, directions and cautions.¹⁴ Proper entry of data into the

Woito v Lajoie, 2012 ABQB 103, *Bartlett v Bartlett*, 2012 ABQB 122, *Rozinsky v Rozinsky*, 2013 ABQB 358, *Southern v Southern*, 2013 ABQB 442.

¹⁰ In addition, there are many other reasons why a decision may not fall within the SSAG range, such as:

- Prior agreement (*Wolters v Wolters*, 2013 ABQB 172, *McCulloch v McCulloch*, 2013 ABQB 177), *Metcalfe v Metcalfe*, 2013 ABQB 213, *Mickels v Mickels*, 2013 ABQB 457, *Kordyban v Kordyban*, 2013 ABQB 500, *Harrison v Harrison*, 2013 ABQB 570).
- Variation of a prior order that did not fall within the SSAG range (*Kuehn v Kuehn*, 2012 ABCA 76, *Benson v Benson*, 2013 ABQB 515, *TA v DZ*, 2013 ABPC 190, *McCulloch v McCulloch*, 2013 ABQB 177 – prior consent order, *TA v DZ*, 2013 ABPC 190)
- Remarriage/re-partnering (*Woito v Lajoie*, 2012 ABQB 103, *CJT v GAT*, 2012 ABQB 193, *HB v AB*, 2012 ABQB 364, *Wolters v Wolters*, 2013 ABQB 172, *McCulloch v McCulloch*, 2013 ABQB 177, *Rozinsky v Rozinsky*, 2013 ABQB 358, *Benson v Benson*, 2013 ABQB 515)
- Delayed support claims (*Erickson v Erickson*, 2012 ABQB 374)
- Post-separation increases in income (*HB v AB*, 2012 ABQB 364, *Caldwell v Caldwell*, 2013 ABCA 268)
- Non-disclosure (*Bujak v Bujak*, 2012 ABQB 458, *Tomlinson v Tomlinson*, 2012 ABQB 509)
- Unstated assumptions
- Imputation of income (*Thorpe v Thorpe*, 2012 ABQB 124, *HB v AB*, 2012 ABQB 364, *Marshall v Marshall*, 2012 ABQB 570, *Jans v Jans*, 2013 ABPC 199, and many other cases from 2012 and 2013 where income was imputed to one or more parties)
- Ability to pay (*Petrunia v Petrunia*, 2012 ABQB 568, *Puddicombe v Vrban*, 2012 ABQB 781, *Madhoo-Persaud v Mattson*, 2013 ABQB 206, *Betovski v Slavica*, 2013 ABQB 387, *Southern v Southern*, 2013 ABQB 442)

¹¹ The 2012 Chart has been updated and is now available at www.vogel-llp.ca, along with the 2013 Chart.

¹² We understand that ChildView is more widely used in Alberta, however, Vogel LLP has a preference for DIVORCEmate.

¹³ Booth at p. 13-17.

¹⁴ Boll, Rosemarie, “The Spousal Support Advisory Guidelines, Part One – Understanding the Formulas”, *LAWNOW* July/August 2011 at pp. 54-56.

software is critical to obtaining accurate and reliable calculations and we have done our best to ensure that the best possible information went into the calculations.¹⁵

III Data Synthesis and Trends

We were not surprised that when presenting the 2012 Chart, many of the questions surrounded trends and directions for future analysis. So we decided to take a much closer look at the cases we were summarizing and start graphing the data to see if there were any obvious trends. With such a small sample size, we were not hopeful. However, at least one trend became apparent.

a) Explanation of the Graphs

Not all of the cases from 2012 and 2013 are depicted. Cases where no SSAG range could be generated, or was not provided in the cases, could not be inserted into the data selection.¹⁶ Further, like the SSAGs, our Chart does not account for entitlement except by noting the award (or lack thereof) and findings regarding entitlement in the summary. Cases where a SSAG range could be generated but no support was awarded are depicted whether that is due to a lack of entitlement or some other reason. Lastly, in many of the cases, the amount awarded changes as it may be a step down award or structured differently for varying reasons. Since only one award value could be easily shown, we chose the value that most represented the entire award. As such, reference to the actual Chart is necessary to get a full understanding of the graphs.

Each graph has as its vertical axis, dollar values. Each graph has as its horizontal axis, the name of each case. For each case name, above there is a “floating” bar graph. The lower red portion of the bar represents the generated SSAG range from the low end of the range to the mid-range. The upper green portion of the bar represents the generated SSAG range from the mid-range to the high end of the range. In other words, where the red and green meets, that is the mid-range value.

The blue dots above each case name are plotted against the floating bars and represent the actual spousal support award. In some cases, there is no accompanying blue dot. This is where the award was not actually discernible or a lump sum award was granted¹⁷. It is thus easy to see by looking at the dollar value on the left side, what the SSAG range for the case is, and where the actual award falls in relation to the range.

The graphs also show quite visually how different each range can be. Some ranges are very tight¹⁸ and others are quite spread out¹⁹. Further, the upper and lower ends of the range, while often close to equal are commonly weighted more heavily towards the top or the bottom²⁰.

¹⁵ For a detailed review and explanation of how to enter information accurately into the software and obtain the best results, see Boyd, John-Paul, “Obtaining Reliable and Repeatable SSAG Calculations, 2009, Department of Justice Canada, and Balbi, Lonny L., “Steps to Using the Spousal Support Advisory Guidelines: Without Child Support Formula/With Child Support Formula”, 28 CFLQ 365/359 (2009).

¹⁶ In cases where a SSAG range could not be generated but one was provided in the case, the one from the case is used.

¹⁷ As in *Kretschmer v Terrigno*, 2011 ABQB 221 and 2012 ABCA 345.

¹⁸ Such as *Marshall v Marshall*, 2012 ABQB 570.

b) Graphical Representation of 2012 Data

Of the 47 spousal support cases, 38 contained enough data to represent graphically. Eight cases did not contain enough information to generate a SSAG range nor was one provided in the case.²¹ None of the 2012 cases had a payor income less than \$20,000 and only two had payor incomes \$30,000 or less²². Only one case²³ had an income over \$350,000. There were at least five cases represented on the graph where no entitlement or no ongoing entitlement was found.²⁴

Initially, the 2012 cases were plotted simply in order of their neutral citation. Although it was informational to see the cases graphed, it was obvious that observing a trend would be very difficult. In an attempt to tease out a trend, the cases were arranged in ascending order based on their mid-range SSAG value, with the lowest mid-range on the left and the highest mid-range on the right. We decided to use the mid-range as we felt that would result in the least skewed results due to some cases where the high and/or low ranges are very tight or greatly spread out.²⁵

Up to a mid-range value of almost exactly \$3,000²⁶, the spousal support awards, as compared to the correlating SSAG ranges, are diverse. About ten cases are within or very close to the SSAG range. Five cases are clearly above the SSAG range and seven are below. Many of the cases that fall within the range are in the \$500 to \$1,000 SSAG mid-range, although in two cases the mid-ranges are above \$1,000 and the award still came above the high end. As the SSAG range approached \$1,000, more support awards started to fall under the SSAG range. But all in all, there were no real trends to observe. It is apparent that for SSAG ranges with a mid-range of \$3,000 or less, the courts are more or less following the SSAGs and departing from them at least half the time.

For the 2012 cases with a mid-range of \$3,000 or more²⁷, the landscape changes significantly. For the remaining 15 cases, only six fall within or close to the SSAG range and none fall above the mid-range value. All of the remaining nine cases fall under the SSAG range and in many cases, well under, the low end of the SSAG range.

¹⁹ Such as *Fraser v Fraser*, 2012 ABQB 660.

²⁰ Such as is the case with *Engler v Engler*, 2012 ABQB 442.

²¹ One case, *Kretschmer*, does not have a blue dot as a lump sum award was granted.

²² *Woito v Lajoie*, 2012 ABQB 103, *Bartlett v Bartlett*, 2012 ABQB 122, which could be graphed.

²³ *Fraser v Fraser*, 2012 ABQB 660.

²⁴ See note 7 regarding entitlement (* denotes payor income under \$20,000; ** denotes payor income over \$350,000; *** denotes no entitlement or no ongoing entitlement).

²⁵ We also decided against using the payor's income as the ordering factor because for the SSAGs, it is the income differential that is the controlling factor. Ordering the cases by payor's income would not properly take into account the payee's income and would result in a difficult to interpret staggered graph.

²⁶ The last case being *Engler v Engler*, 2012 ABQB 442.

²⁷ Cases including and following *Mew v Mew*, 2012 ABCA 382 and 2011 ABQB 531.

c) Graphical Representation of 2013 Data

Of the 31 spousal support cases, 25 contained enough data to represent graphically. Six cases did not contain enough information to generate a SSAG range nor was one provided in the case. Only one case had a payor income below \$20,000²⁸ and only one case had a payor income between \$20,000 and \$30,000²⁹. None of the 2013 cases had a payor income over \$350,000³⁰. There were at least seven cases represented on the graph where no entitlement or no ongoing entitlement was found.³¹

As with the 2012 Graph that ordered the cases by neutral citation, we could not easily observe any obvious trends. As such, as with the 2012 cases, the 2013 cases were ordered in ascending order from lowest mid-range value to highest mid-range value.³² We were very interested to see if the trend for 2012 would be repeated for 2013.

Up to a mid-range value of \$3,000³³, the spousal support awards, as compared to the correlating SSAG ranges, are diverse and more sporadic than was seen with 2012. Of 17 cases, only five are within or near to the SSAG range. Not counting the cases where no award was granted (such as for lack of entitlement), which were more numerous in 2013 than in 2012, four cases fall above and three fall below the SSAG range. Again, it is apparent that for SSAG ranges with a mid-range of \$3,000 or less, the courts are more or less following the SSAGs and departing from them about half the time.

For the 2013 cases with a mid-range of \$3,000 or more³⁴, the landscape changes significantly. The remaining eight cases all fall below and mostly well below the low end of the SSAG range.

d) Discussion

It is apparent that for SSAG ranges with a mid-range of \$3,000 or less, the courts are more or less following the SSAGs and departing from them (falling outside the range) about half the

²⁸ *Madhoo-Persaud v Mattson*, 2013 ABQB 206, which could not graphed.

²⁹ *Rozinsky v Rozinsky*, 2013 ABQB 358.

³⁰ Although *Metcalfe v Metcalfe*, 2013 ABQB 213 comes very close and *McCulloch v McCulloch*, 2013 ABQB 177 likely had a payor income closer to \$1,000,000 (only retirement allowance was provided).

³¹ * denotes payor income under \$20,000; ** denotes payor income over \$350,000; *** denotes no entitlement or no ongoing entitlement.

³² One case, *Bull*, did not contain enough information to generate a SSAG range but provided a SSAG range in the case, albeit without the mid-range value. For the case of *Bull*, the entire bar appears green and it was placed in order using the mid-point between the low and high value given in the case. It should also be noted that *McCulloch* is also an anomaly, in that the only incomes provided in the case were for the parties' retirement allowances only and it was very clear that the payor's income was substantially higher than his allowance and possibly closer to about \$1,000,000.

³³ The last case being *Richards v Richards*, 2013 ABQB 484.

³⁴ Cases including and following *TGC v LAC*, 2013 ABQB 88.

time.³⁵ However, for the cases with a mid-range of \$3,000 or higher, all of the cases (23) fell at or below the mid-range with only a few cases falling within or close to the SSAG range.

There are quite a few reasons why the spousal support awards might not be aligning with the SSAG ranges in these higher range cases. First, on a case by case basis, there may be an explanation for the departure such those reasons described in notes 7 to 10. Second, it is possible that, for Alberta at least, the SSAG calculations are not appropriate and are not working. As stated in the SSAGs themselves, the SSAGs, in their entirety, are “intended to build upon current practice, reflecting best practices and emerging trends across the country” (p. vii). If current case law indicates that Alberta courts consistently come well below SSAG ranges for higher range cases, then perhaps the SSAGs are not reflective and are not building on current practice in this regard. Second, and on a somewhat related note, it is possible that in Alberta, at higher payor incomes and thus higher SSAG ranges are simply not palatable in Alberta courts, whether an exception or other rule applies or not.

Third, and much more optimistically, it is entirely possible that for the majority of the higher range cases that fall below the SSAGs, an exception has or ought to have applied. As will be explained in more detail below, there are very few cases where an exception is cited. It is hard to imagine that is because the exceptions rarely apply, rather, it is more likely that they are not being argued and thus not being cited in reasons. In our view, in order to be the most effective advocates we can be, it is imperative that in every spousal support application, whether interim or final, the exceptions must be canvassed to see if any apply. Precedent affidavits and briefs for advancing or defending against a spousal support application should contain the list so that these important arguments will not be missed.

In an application for spousal support, we are not doing our best advocacy for our clients if we are not making all reasonable arguments in support of spousal support within the range or above the range where appropriate. When defending against a spousal support application, we are not doing our best advocacy if we are not using arguments from the SSAGs as to why the range may not be appropriate and why an award if granted, should come under the range. These arguments in regard to the exceptions may also be extremely useful for arguing within the ranges provided by the SSAGs, as one side will often argue for the high end and the other for the low end.

IV Exceptions

a) Back to Basics: Summary of the Exceptions³⁶

The formulas used by the SSAGs are designed to generate appropriate outcomes in “typical” cases. For some unusual or atypical cases, an appropriate result, taking into consideration the factors and objectives in the *Divorce Act*, can only be achieved by departing from the SSAG ranges. As such, in Chapter 12, 11 exceptions are listed, which serve as a non-exhaustive list of scenarios that *may* warrant departure from the SSAG range.

³⁵ It should be noted that this analysis does not take into account restructuring such as lengthening or shortening duration and decreasing or increasing the monthly amount, which technically falls with the SSAGs.

³⁶ SSAGs pp. 116-117.

Determination of whether an exception applies is the last step of the analysis but must not be forgotten. The writers of the SSAGs were themselves surprised at the failure of judges and lawyers to use the listed exceptions and note that the first four would be the most commonly used.³⁷

The SSAGs are firm that it is only where adjusting within the range and/or restructuring cannot accommodate the unusual facts that recourse is to be made to the exceptions. For the purposes of a court application, practically speaking, recourse must always be had to the exceptions, especially when defending, as one never knows quite where the judge might be coming from or where he or she might end up. The person who claims that the case falls within an exception will generally bear the burden of proof and practically speaking, this will almost always be the defendant.

We would recommend to all family lawyers to go back to Chapter 12 of the SSAGs and read in detail about all of the potential exceptions. However, what follows is a summary which we hope will get family lawyers started in the right direction. The exceptions are:

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

Before considering the exceptions, lawyers and judges cannot overlook Chapter 11, 13 and 14. These sections will not be discussed in detail here but in summary, Chapter 11 reminds us that at very high and low payor incomes, it may be proper to move away from the formulas. Chapter 13 is a reminder that self-sufficiency remains an important consideration³⁸. And Chapter 14 outlines that there are special considerations when parties are dealing with post-separation

³⁷ Thompson, Rollie, "Forgotten? The SSAG Exceptions", *The Lawyer's Weekly*, Vol. 29, No. 45.

³⁸ See *Bartlett v Bartlett*, 2012 ABQB 122 (compensatory claim but wife out-earned husband), *Morrison v Morrison*, 2012 ABQB 510 (wife self-sufficient with the exception of paying off her credit card bills), *Lawlor v Lawlor*, 2012 ABQB 723, *Jenson v Jenson*, 2013 ABQB 98, *Metcalfe v Metcalfe*, 2013 ABQB 356, *Rozinsky v Rozinsky*, 2013 ABQB 358, *McNeill v McNeill*, 2013 ABQB 564.

changes in income, re-partnering and second families, which will often require discretionary decisions on a case by case basis.³⁹

With all of the noted departures from the SSAG ranges for 2012 and 2013, it cannot be that none of the listed exceptions apply or could explain the departure. What is more likely is that counsel are not satisfactorily arguing that an exception applies and as a result, the courts are not referencing any exceptions contained in the SSAGs when the award is outside the range. The following cases cited under each exception are those from 2012 and 2013 where counsel could have argued the application of an exception and/or where the ultimate support award might have hinged to some extent on that exception. The cases listed do not indicate that an exception necessarily *ought* to have applied, only that it could have been argued.

1. ***Compelling Financial Circumstances in the Interim Period***⁴⁰

If lawyers and judges begin to actively use the exceptions in their arguments and judgments, this will likely be the most heavily used exception. Indeed, the interim stage is often the ideal situation for use of the SSAGs.⁴¹ Emphasis should be placed on the word “Interim”. It is broad category and can account for the fact that it often takes time to sort out finances upon separation, even on an interim basis, especially with respect to debts. There is clearly overlap between this exception, #2 Debt Payments and #7 Basic Needs/Hardship. The difference appears to be that this is the proper exception to use when those issues are alive at the interim stage. In a difficult economy, one could imagine that this exception could almost become a norm and may cause counsel and the courts to conduct the usual means and needs analysis to determine if the parties’ basic needs are met.⁴²

Examples: Where the Wife, who has little to no income, stays in the matrimonial home with the children. If she makes the mortgage payments, support might arguably be above the SSAG range. If the Husband makes the mortgage payments, support might arguably be below the SSAG range.

Where at separation the Wife is not working and there are no children. The Wife may need interim support above the SSAG range to meet her needs while she looks for work and before property is divided.

Case Law: *Kretschmer v Terrigno*, 2012 ABCA 345 (lump sum award)
Adolph v Adolph, 2012 ABQB 63 (delay of property division)
FMB v ARA, 2012 ABQB 140
Gould v Gould, 2012 ABQB 403 (questionably an interim award)
Leeson v Chow, 2-12 ABQB 755
Cushnie v Cushnie, 2013 ABQB 690

³⁹ Boll, Rosemarie, “The Spousal Support Advisory Guidelines, Part Three – Exceptions and More”, *LAWNOW*, November/December 2011 at pp. 68-71.

⁴⁰ SSAGs 12.1 pp. 117-118.

⁴¹ Booth at p. 11.

⁴² Booth at pp. 8-9.

2. **Debt Payment**⁴³

In the vast majority of cases, debts will be taken into account, along with assets, in the division of matrimonial property and there will be no need to determine if there should be any effect on spousal support. Where this may not be the case is in situations where the parties have a negative net worth. If there is a disproportionate sharing of debts, ability to pay may be affected. If the payor is required to pay more of the debt, support may be appropriate below the low end of the SSAG range. The opposite holds true if the payee has the greater share of the debts, although this would be less common.

Remember, debts must exceed assets, they must be “family debts” and the payments must be “excessive or unusually high”.

Example: Where either the Husband or Wife is paying off the large family line of credit and there are only nominal assets.

Case Law: *Anstey v Anstey*, 2012 ABQB 67 (high debt load serviced by husband)
CJT v GAT, 2012 ABQB 193
Toenjes v Toenjes, 2012 ABQB 409
Bull v Bull, 2013 ABQB 366 (award reduced for debt payment)

3. **Prior Support Obligations (including notional child support)**⁴⁴

This exception applies to prior spouses as well as prior children. The general approach is “first family first” except in limited cases where the payor has a very low income. There are different calculations depending on the formula being used. This exception also applies where a payor has a child from a prior relationship in his or her care. The amount of the support obligation can be estimated by using the payor’s notional child support amount based on his or her guideline income. Section 7 expenses should not be forgotten in the calculation.

Without Child Support Formula: For spousal support, deduct the amount of spousal support from the payor’s gross income. For child support, gross up the child support amount using the payor’s marginal tax rate and then deduct the grossed up amount from the payor’s gross income.

With Child Support Formula: As this formula works with net incomes, there is no need to gross up any child support amounts. The software can work out the after tax value of the gross amount of spousal support.

Examples: Where the Husband owes child support or spousal support to his spouse and/or children from his first marriage.

Where the Husband has custody of a minor child from a previous marriage.

Case Law *Shukalkin v Shukalkina*, 2012 ABCA 274 (post-separation child)
CWT v KAT, 2013 ABQB 678
Los v Los, 2013 ABPC 127

⁴³ SSAGs 12.2 pp. 118-119.

⁴⁴ SSAGs 12.3 pp. 120-121.

4. *Illness and Disability*⁴⁵

Usually cases involving illness and disability can be accommodated within the normal ranges. That is especially true where the duration is indefinite. This exception will usually arise under the Without Child Support Formula for marriages of short to medium duration. However, for SSAG ranges with time limits, restructuring is recommended as a first consideration, such as reducing the monthly amount and extending the duration. An example of restructuring would be to calculate the maximum global amount using the high end of the range and the maximum duration, and then dividing this global amount by the number of years that the support was being stretched over.

Example: \$917 per month x 10 years = \$110,040 over 20 years = \$459 per month

Where restructuring does not prove to be an adequate tool to deal with illness and disability there are three approaches in order of decreasing frequency:

- i) Lower amount, extended duration (can be indefinite);
- ii) No exception to the SSAGs (but may use the higher end and maximum duration); and
- iii) Higher amount, extended duration.

The authors suggest that if restructuring does not provide the solution, and an exception is warranted, the preference should be to extend the duration using the low end of the SSAG range. This exemption will also frequently occur where the custodial parent is the payor as that situation often naturally flows from the illness or disability. In these cases exception #9 below should also be considered.

Case Law: *Lane v Lane*, 2012 ABCA 2 (both husband and W had health issues)
MacDonald v Schmutz, 2012 ABQB 43 (husband had health issues)
Clarke v Clarke, 2012 ABQB 92 (lack of evidence for wife's health issues)
Jones v Jones, 2012 ABQB 93 (husband had health issues)
Woito v Lajoie, 2012 ABQB 102 (husband claimed health issues)
EET v ANT, 2012 ABQB 142 and 298 (wife had cancer)
Toenjes v Toenjes, 2012 ABQB 409 (reduced ability to work)
Samoilova v Mahnic, 2012 ABQB 465 (wife had anxiety and depression)
CAG v SG, 2012 ABQB 529 (both had health issues)
Mancini v Phelan, 2012 ABQB 536 (both parties ill after separation)
Mulick v Mulick, 2012 ABQB 592 (wife's medical condition related to marriage)
BGF v DMF, 2012 ABQB 698 (wife had health issues but had been receiving support for 16 years after an 8 year marriage)
Caldwell v Caldwell, 2013 ABCA 268 (lengthy duration)
Omeltchenko v Christopoulos, 2013 ABQB 33 (wife claimed injuries from abuse)
DJ v SJ, 2013 ABQB 94 (wife claimed depression and chronic pain)
Madhoo-Persaud, 2013 ABQB 206 (husband on disability)
Richards v Richards, 2013 ABQB 484 (wife's work limited by health issues)
Kordyban v Kordyban, 2013 ABQB 500 (wife had spine problems)
McNeill v McNeill, 2013 ABQB 564 (wife claimed health problems)

⁴⁵ SSAGs 12.4 pp. 121-124.

5. Compensatory Exception in Shorter Marriages Without Children⁴⁶

This exception will not apply to long term marriages which incorporate both compensatory and non-compensatory claims through high percentage SSAG ranges. It is also unlikely to apply using the With Child Support Formula given the generous duration maximums when children are involved. For short and medium length marriages, appropriately smaller ranges of support are produced reflecting weaker compensatory claims and a transitional function.

However, in some cases there are large compensatory claims involved even without children which are disproportionate to the length of the marriage.

Examples: Husband is transferred for employment, forcing the Wife to give up her employment and become a secondary earner.

Wife moves a long distance to marry, giving up her employment.

Wife works to put the Husband through post-secondary education but the parties separate shortly after graduation.

Case Law: *McCullouch v Bawtinheimer*, 2006 ABQB 232 (Sullivan J.) (Rejected)

6. Property Division: Reapportionment of Property (B.C.) and High Property Awards⁴⁷

Spousal support is determined after the division of property and each jurisdiction as its own matrimonial property regime. The matrimonial property regime in B.C. warrants special consideration and that is discussed in detail in the SSAGs. The debt exception is dealt with separately (above). The other two scenarios are for unequal division of property and high property awards. It is important to remember that incorporating a lump sum spousal support amount into property division is not using the exception but rather a restructuring method. This property exception would operate following an unequal division or high property award to reduce spousal support below the range for a shorter duration.

The authors are tentative regarding whether there is truly an exception for high property awards. The SSAGs can accommodate high property awards to some extent in that each party is expected to generate reasonable income from property and can be imputed income if they fail to do so. In fact, if the property award is large enough to mean that economic self-sufficiency is attained, then there will be no entitlement and the SSAGs are not engaged. Further, high property cases are often high income cases and the SSAG formula may not necessarily apply above the ceiling. Lastly, the arguments against double-dipping found in *Boston* cannot be overlooked and some portion of income, such as from a pension, may need to be excluded from income.

Case Law: *Jones v Jones*, 2012 ABQB 93 (wife received 100% of the matrimonial home)
Lemoine v Griffith, 2012 ABQB 685
Jenson v Jenson, 2013 ABQB 98
McCulloch v McCulloch, 2013 ABQB 177
DRS v DLS, 2013 ABQB 474 (husband had dissipated assets)

⁴⁶ SSAGs 12.5 pp. 124-125.

⁴⁷ SSAGs 12.6 pp. 125-128.

7. Basic Needs/Hardship: Without Child Support and Custodial Payor Formulas⁴⁸

In some shorter-term marriages, where the recipient has little or no income, the SSAG formulas can result in too little support to meet basic needs that goes beyond any interim exception (#1). Restructuring may not help the situation. Problems can be most acute in larger cities where higher amounts are required to meet basic needs. This exception may come up frequently in immigration sponsorship cases before the immigrating spouse becomes a permanent resident. This is non-compensatory exception and should be reserved as much as possible for the final determination stage.

This exception will only apply for the Without Child Support Formula and Custodial Payor Formula where:

- i) Restructuring also does not provide sufficient income to meet basic needs;
- ii) The recipient's non-support income is low or nil;
- iii) The marriage is short to medium in length; and
- iv) The payor has the ability to pay.

Case Law: *Marshall v Marshall*, 2012 ABQB 570
Rozinsky v Rozinsky, 2013 ABQB 358 (wife not required to pay child support)
Omonova v Omonova, 2013 ABQB 384

8. Non-Taxable Payor Income⁴⁹

The SSAG formulas are based on the presumption that spousal support is tax-deductible for the payor and included in the taxable income of the recipient. In some cases, such as with disability payments, the payor is unable to deduct the spousal support paid. This exception does not apply to payors who do not properly declare their otherwise taxable income. The exception does not automatically apply if the payor has legitimate non-taxable income. It only applies if, as a result of having non-taxable income, the payor's ability to pay is affected without the benefits of deductibility.

Without Child Support Formula: Ability to pay in the context of this exception will usually only be an issue for longer marriages, where there is an upper limit "cap" on spousal support (equalization of incomes based on NDI). The proper approach is to gross up the payor's non-taxable income and calculate the SSAG range using this gross income, taking into account the 50/50 cap.

Example: Husband and Wife have been married 25 years and have two adult children. They are both 50 years old. The Husband receives a disability pension of \$37,500 per year which is non-taxable. The Wife works part-time due to health issues and earns \$10,000 per year. The Husband's net income should be grossed up by the most appropriate tax rate and this number should be used to calculate the SSAG range. However, the DIVORCEmate software, and presumably Childview as well, allows for non-taxable income to be grossed up

⁴⁸ SSAGs 12.7 pp. 128-130.

⁴⁹ SSAGs 12.8 pp. 130-132

automatically using taxes for the applicable province and calculates the proper cap based on the actual 50/50 NDI split.

Notably, and as was the case in *Mancini v Phelan*, the court or the parties will likely have to go lower than the low end of the SSAG range considering the ability to pay.

With Child Support Formula: This formula already uses net incomes for its calculations and so the basic formula already adjusts for the non-deductibility of support.

Example: Husband and Wife have been married 11 years and have two children, aged 8 and 10. They are both 36 years old. The Husband receives a disability pension of \$60,000 per year which is non-taxable. Using a tax rate of 40% the Husband grossed up income would be \$100,000 which would be used to generate the applicable SSAG range. However, again the more precise method is to allow the software to calculate the gross-up, assuming that the lawyer is familiar enough with the software. The reduction in the SSAG range reflects the effect of the Husband being unable to deduct spousal support for tax purposes.

It is important to recognize how much the basic formula has already reduced the SSAG range for non-taxable income. Whether an exception will be made to increase spousal support above the high end of the reduced range to improve the financial situation of the recipient and the children will depend on: the tax positions of each spouse, the payor's reduced ability to pay due to non-deductibility, and the recipient's needs who still has to pay taxes on the spousal support but only receives after tax support.

Case Law: *Mancini v Phelan*, 2012 ABQB 536 (Exception applied)

9. *Non-Primary Parent to Fulfill Parenting Role Under the Custodial Payor Formula*⁵⁰

This exception might apply where the payor is the primary caregiver for the child or one or more of the children, as can be the case with older children. For medium to long term marriages the *Custodial Payor Formula* will provide reasonable amounts of spousal support extending beyond the children reaching the age of majority. But in some cases the *Custodial Payor Formula* will apply to a shorter marriage with young children, which is where this narrow exception may come into play. There are 3 requirements:

- i) Both parties must play an important role in the child's care and upbringing after separation;
- ii) The marriage must be short and involve a young child; and
- iii) The amounts and duration under the *Custodial Payor Formula* must be so low/short that the non-custodial parent may not be able to continue to fulfill his or her parental role.

These types of cases may involve elements of illness and disability. The exception will most often be an extension of duration, as opposed to an increase in the amount of support.

⁵⁰ SSAGs 12.9 pp. 132-133.

10. **Special Needs of Child**⁵¹

A child with special needs can affect the ability of the primary parent to obtain or maintain full-time employment, meaning that the duration of support might be extended beyond the time limits used by the *With Child Support Formula* (length of marriage/last child finishing high school). With respect to variation of the amount, using the higher end of the SSAG range may provide the extra funds required to account for the recipient's lower income, but in some cases, it may be necessary to go above the high end of the range. The table amount and sharing of section 7 expenses may not properly reflect the recipient spouse's full costs of caring for the high needs child.

Case Law: *BGF v DMF*, 2012 ABQB 698 (but children no longer dependent)
Caldwell v Caldwell, 2013 ABCA 268
Jans v Jans, 2013 ABPC 199 (Down's Syndrome child)

11. **Section 15.3: Small Amounts and Inadequate Compensation Under the With Child Support Formula**⁵²

Priority is given to child support and the *With Child Support Formula* reflects this rule. But where there are many children or high section 7 expenses, there may be little left over for spousal support, despite economic disadvantage, need and/or a strong compensatory claim. As such, in these cases, there may be an exception to duration pursuant to ss. 15.3(2) and (3) of the *Divorce Act*. Further, spousal support may have to commence or increase or be subject to review as the children become independent.

For ease of reference, s. 15.3 is reproduced below.

Priority to child support

15.3

- (1) Where a court is considering an application for a child support order and an application for a spousal support order, the court shall give priority to child support in determining the applications.

Reasons

- (2) Where, as a result of giving priority to child support, the court is unable to make a spousal support order or the court makes a spousal support order in an amount that is less than it otherwise would have been, the court shall record its reasons for having done so.

Consequences of reduction or termination of child support order

- (3) Where, as a result of giving priority to child support, a spousal support order was not made, or the amount of a spousal support order is less than it otherwise would have been, any subsequent reduction or termination of that child support constitutes a change of circumstances for the purposes of applying for a spousal

⁵¹ SSAGs 12.10 p. 133.

⁵² SSAGs 12.11 p. 134.

support order, or a variation order in respect of the spousal support order, as the case may be.

b) Case dealing directly with the application (or rejection) of an exception

There are few Alberta cases that deal directly with the SSAG exceptions. A search for Alberta cases containing the terms “Spousal Support Advisory Guidelines” and “exception” yielded 27 cases, with only three pertaining to the exceptions listed in the SSAGs. Of these, *Mancini v Phelan* is the most instructive on one particular exception.

1. *Mancini v Phelan*, 2012 ABQB 536 (Poelman J.)

The parties were married 34 years at separation and had raised two children. The Wife had been a stay at home mother and home maker and after separation cared for her elderly father as well as working a retail position. The Husband had worked as an engineer but three years after separation, he developed an immune disorder and began to receive short-term and then long-term disability benefits. Full recovery was expected but only after considerable time and physical rehabilitation. Property was divided equally.

The Husband did not dispute the Wife’s entitlement to spousal support. However, the parties disagreed over how that support ought to be properly calculated, and specifically, for his current non-taxable income, what adjustment should be made for the fact that spousal support would be non-deductible. The Court calculated that the grossed up equivalent of the Husband’s disability payments of \$122,000 per year was approximately \$178,000. The Wife’s income was imputed at \$40,000 per year.

The Court noted that the SSAGs are recognized as a useful cross-check or starting point but must not become a substitute for judicial discretion. Having considered all of the factors under section 15.2 of the *Divorce Act*, the Court held that a spousal support amount in the mid-range was fair and reasonable. The Court noted the range as \$4,310 to \$5,014 to \$5,718 based on the Husband’s grossed up income. An award was granted for retroactive support.

For ongoing support the Court noted that calculations under the SSAGs rest on the assumption that support payments are taxable in the hand of the recipient and tax deductible by the payor. Deductibility affects ability to pay. If the Husband cannot receive a tax deduction for spousal support payments made, his ability to pay is decreased. Direct reference was made to Chapter 12.8 of the SSAGs “Non-Taxable Payor Income”.

The Wife argued that the starting point was to calculate the SSAG range based on the Husband’s grossed up income of \$178,000. The Husband’s position was that the starting position for the calculation was his non-taxable actual income of \$122,000. Both parties agreed that a downward adjustment would need to be made for the loss of tax deductibility. A joint expert indicated that a 30% tax rate would be fair, with a reduction of 15% to the spousal support payments so that the parties equally shared the loss of tax savings.

The Court elected to start the calculation using the Husband’s grossed up income because, all things being equal, a payor with a taxable income of \$122,000 has less ability to pay than a payor with non-taxable income in the same amount. The Husband’s financial position was held to be more comparable to a person earning a taxable income of \$178,000, with the exception of the loss of deductibility. As such, the Court set ongoing spousal support at \$4,250 per month,

being \$5,000 per month (mid-range) less 15% to account for the loss of tax savings as shared equally by the parties.

The end result is a spousal support number that fell just below the generated SSAG range. However, because an exception clearly applied here, one cannot really say that there was a true departure from the SSAGs.

2. *EET v ANT, 2012 ABQB 298 (Lee J.)*

The Court reproduces the exceptions listed in Chapter 12 of the SSAGs, highlighting number 4: illness and disability. The parties were in a long term traditional marriage of 26 years and had one child, age 10. The Wife was suffering from cancer and had a grade 10 education. The Husband earned \$102,000 per year. Although not perfectly clear, it appears that the parties were still residing together in the matrimonial home.

This case is somewhat confusing. Although the Court states that the Wife is entitled to spousal support close to the high end of the SSAGs due to her low job skills and cancer, as well as due to her strong compensatory claim, spousal support was awarded at \$1,800 per month, which falls below the low end of the range. The Wife had applied for \$3,600 per month in spousal support if she had exclusive possession of the home and was paying all of the expenses.

Ultimately, the Court dismissed the Wife's application for exclusive possession and ordered the Husband to pay \$1,800 per month in spousal support, \$890 per month in child support, plus all of the expenses associated with the matrimonial home, which were estimated at \$1,800 per month. So although the actual spousal support award came under the low end of the SSAGs, the Wife was not required to pay any expenses related to the matrimonial home where she was residing with the child. Assuming that gives her a benefit of at least half of that amount, being \$900, the total spousal support amount is approximately \$2,700 per month, which falls just under the high end of the range. Despite the fact that this case falls squarely within one of the enumerated exceptions, there was in fact, no departure from the SSAG range.

3. *McCullouch v Bawtinheimer, 2006 ABQB 232 (Sullivan J.)*

Although a much older case and one that was decided when the SSAGs were in their infancy, this case cannot be ignored simply for the dearth of cases that deal directly with exceptions. The parties were not married but cohabited for approximately six years. The Wife, for lack of a better word, applied for support as an adult interdependent partner pursuant to the *Family Law Act*. They had no children.

The Wife had multiple jobs over the course of the relationship, only part of which was due to the Husband being transferred in his employment twice. The Husband's current income was estimated at \$103,000 per year and as a result of a previous marriage was required to pay \$1,300 per month to his ex-spouse. The Wife was expected to earn \$27,000 in the current year including employment income and EI. The Court provides detailed calculations using the Without Child Support Formula.

Having found that the parties qualified as adult interdependent partners, the Court went on to find that the Wife was entitled to support. The Court notes that the SSAGs are not legally binding but serve as a tool or as a litmus test. There is a discussion of the effect of the prior support award and a determination that those amounts must be deducted from the Husband's gross income, resulting in a notional gross income of \$87,400.

Two exceptions are considered, and rejected. The first is number 5, the compensation exception, which is described in the SSAGs as “Compensatory exception in shorter marriages without children”. The second is number 2, debt payment. In this case, although there were no children, the Wife had a compensatory claim due to the fact that her spouse was transferred for employment purposes, forcing her to give up her employment and be a secondary income earner. However, the Wife in this case had not established a disproportionate claim that could not be addressed within the SSAG range. With respect to debts, since the debt obligations of the Husband were considered in the division of property, the Court did not determine that the case fell within this exception. Spousal support was ordered in a step down fashion over 2 years from \$2,000 to \$1,000 to \$500 per month.

V Conclusion

Analysis of the 2012 and 2013 case law indicates that where the facts generate a mid-range SSAG value of less than \$3,000, it is common to see awards fall within or near to the SSAG range. Otherwise, deviations above or below the SSAG range occur about equally. However, when the mid-range of the SSAGs is greater than \$3,000, there is a much greater tendency for the award to fall at the low end of the SSAGs or well below the SSAGs, even for payor incomes that do not approach \$350,000. As a result, it may be much more difficult in Alberta to argue for an award within the SSAG range for these cases.

If there is one thing to be said about the SSAGs and their use in Alberta, it is that regardless of the case law to date, lawyers need to use them. That means delving into the text of the SSAGs, not just using the formulas through the software packages, and incorporating this information into our legal argument, whether it be at the interim or trial stage. Doing so will help us better advocate for our clients and will hopefully help judges develop a full and detailed body of Alberta case law regarding the SSAG exceptions and all the other instances where the SSAGs might or might not apply.

VI References

Although not all of the following papers and reference materials have been referenced directly in this paper, I am indebted to the people who have written on this topic and all of the papers listed added to this paper and my understanding of the SSAGs and how they are being used in Alberta.

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