6 ERRORS THAT YOU COULD MAKE USING THE SSAG (BUT SHOULDN'T, AND NOW WON'T)

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There are things we could do, but should not. We all have our own list of these. Me, I could go skydiving, but I'm not so good with heights so I shouldn't. And there are things, wrong things, errors, that we could do using the Spousal Support Advisory Guidelines, but we should not do. My hope is that you won't make these errors after I'm finished my 6 minutes.

I had to limit myself to 6 errors in the format of this program, and it was hard to winnow them down to 6, so I chose the 6 "biggies".

Before I begin, a bit of SSAG news: Carol Rogerson and I are doing a revised and updated version of the *User's Guide*, last updated in March 2010, for the federal Department of Justice.[1] It will include significant and helpful cases from the past five years. We hope it will come out in the spring of 2015, so watch for it.

1 FORGET ENTITLEMENT, JUST RUN THE SOFTWARE!

The Spousal Support Advisory Guidelines are about amount and duration, and operate ONLY AFTER entitlement has been determined. An income disparity alone does not create entitlement.[2] The SSAG formula may offer some clues, or checks, about entitlement, but nothing more.

We did NOT include an income disparity test for entitlement in the SSAG, consistent with their advisory nature and with our narrower purpose to resolve amount and duration. The American Law Institute did suggest an arithmetical test for entitlement in its proposed "marital duration" claim, some percentage income disparity like 25 per cent difference. We didn't.

The SSAG do not create any arithmetical basis for entitlement.[3] The income-sharing formulas are not a "theory" or "philosophy" of spousal support, but merely a method for calculating the ranges for amounts. Incomes are used as proxies for "loss", for "economic

[1] In the meantime, the March 2010 version can be very helpful for ideas in SSAG cases and the User's Guide is frequently cited in court decisions: *The Spousal Support Advisory Guidelines: A New and Improved User's Guide to the Final Version* (Ottawa: Justice Canada, March 31, 2010).
[2] For a recent discussion of this issue, see *Lee v. Lee*, [2014] B.C.J. No. 2503, 2014 BCCA 383.
[3] Thompson, "Ideas of Spousal Support Entitlement", Legal Education Society of Alberta, March 2013, pp. 22-25 (forthcoming in (2015), 34 Can.Fam.L.Q., Issue No. 1).

disadvantage and advantage", for "need", for "standard of living", as individualised budgets can't be used in formulas.

There are three ways lawyers miss, ignore, or – worse – pretend not to notice that the SSAG don't provide a test of entitlement.

(a) There's an Income Disparity, So There Must Be Entitlement, Right? NO

I've identified this error before,[4] but it is a persistent one. Lawyers will just "run the numbers" and come up with a range for amount and duration. As we know, if there is any income disparity at the end of a marriage or relationship, then the *without child support* formula will produce a range of numbers. A larger disparity is necessary to have this effect under the *with child support* formula. Some lawyers just don't "get" entitlement as a required step, but others try to frame the issues to the advantage of their recipient client, if in an intellectually dishonest fashion.

Obviously, any first cut at entitlement will consider income disparity after separation. If there's no income disparity, then the argument on entitlement becomes difficult, or even impossible. But there must always be a second question: if there is an income disparity, WHY is there an income disparity?

The "reason why" will either be compensatory or non-compensatory. But the difference in incomes may not reflect a difference in standards of living.[5] Or, there may be a disparity in actual incomes, but income ought to be imputed to the lower income spouse, for any one of a number of reasons. Or the income disparity may reflect a dramatic post-separation income increase for the payor. We can easily multiply examples of no entitlement.

(b) A Zero Range for Amount, So No Entitlement, Right? NO Again

Here is the converse outcome, again using an arithmetical approach, one that crops up with some regularity in *with child support* formula cases. Given the priority to child support, there can be a significant income disparity and yet nothing but zeros for the range – 0 to 0 to 0.

That's a first cut. Zeros may mean no entitlement, if the income disparity at the end of the marriage is not large and that's because both spouses have worked full-time in the paid labour market. But zeros may just mean "no ability to pay" and a significant compensatory entitlement: think of any middle-income family with three or four children, where one spouse works part-time. There is entitlement, just no money, and the claim might revive under s. 15.3

[4] "Fifteen Spousal Support Errors and Fifteen 'Corrections': How to Avoid SSAG Screwups, *Miglin* Moments and Changing Variations" in Ontario Bar Association, *Institute: Family Law* (Toronto, February 10, 2012).

[5] E.g. the husband moved to Toronto from New Brunswick after separation, earning a higher income after a marriage in New Brunswick where both spouses earned about the same: *Eastwood v. Eastwood*, 2006 NBQB 413, 2006 CarswellNB 655.

of the *Divorce Act*, once the children leave home or finish post-secondary education and ability to pay returns for the payor.[6]

(c) The Formula Produces an Amount, So There Must Still be Entitlement: Not So Fast

Duration is often forgotten in the SSAG analysis. The formulas generate ranges for amount *and* duration. Amount alone is not enough. Duration is nothing more or less than the end of entitlement. When support stops, there may still be – and usually is – an income disparity between the spouses.

Under the *without child support* formula, time limits are generated for relationships of less than twenty years (or for those with an older recipient under the "rule of 65"). Amount and duration are interrelated in assessing quantum, as *Bracklow* reminded us.

Under the *with child support* formula, there are also time limits, but softer and more flexible, only implemented through variation and review. Again, it is possible, even likely, that support will end despite the presence of income disparity.

2 TREAT THE MID-RANGE FOR AMOUNT AS A DEFAULT!

This may come as a surprise to many: the mid-point of the SSAG ranges for amount is NOT the default outcome. It is not the "norm", with the upper and lower ends of the range reserved for exceptional cases. Too often judges treat the mid-point as such, especially under the *with child support* formula. Our review of SSAG cases has revealed that 60 per cent of all reported *with child support* cases order the mid-point. A mid-point outcome apparently does not need any explanation either, with outcomes above or below more likely to result in reasons.

If anything, the *with child support* cases should more often resolve in the upper half of the range, as the formula already adjusts for "average" ability to pay. Most of these cases are strongly compensatory and there is great "need" in the home of the primary carer for the children, which should push amounts higher in the range. In shared custody cases, by contrast, the default outcome in bi-nuclear cases (no new partners, no new children) should be the spousal support which generates a 50/50 split of net disposable income (NDI).[7]

We see less of a pattern of "default to the mid" under the *without child support* formula. This formula is simpler, less driven by ability to pay, with more diverse fact situations. And budgets may be more important in these cases.

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[6] Thompson, "The Chemistry of Support: The Interaction of Child and Spousal Support" (2006), 25 Can.Fam.L.Q. 251 at 279-84. The leading s. 15.3 case is now *Gray v. Gray*, [2014] O.J. No. 4519, 2014 ONCA 659.
[7] Thompson, "The TLC of Shared Custody: Time, Language and Cash" (2013), 32 Can.Fam.L.Q. 315 at 341-4.

Chapter 9 of the *Final Version* provides considerable guidance on location within the range. Courts need to explain why they located an amount within the range. Some judges are very clear why they chose a particular location, offering a model for others.[8]

3 USE THE LENGTH OF THE MARRIAGE TO FIX DURATION FOR SHORTER MARRIAGES WITH YOUNG CHILDREN!

This continues to be a problem in the decided cases. I've talked about it before, at the Family Law Summit and at the National Family Law Program this past year. But lawyers and courts continue to make this error in cases of shorter marriages or relationships with young children. In these cases, courts will fix a time limit at the initial stage and the time limit will be the full length of the short period of cohabitation, i.e. 4 years after a 4-year marriage, even though the recipient has children aged 1 and 3 in her primary care. Sometimes that will be all the recipient or her lawyer requests.

This is clearly the wrong outcome in most cases. A review of the 2013-14 Ontario cases revealed that four of the six *with child support* cases where the marriage was six years or less produced initial time limits, and the time limits were short.[9] In two other cases, courts did the right thing, ordering indefinite support.[10] Even an appeal court can make this mistake, as the B.C. Court of Appeal did, upholding the trial decision in *McKenzie v. Perestrelo*.[11]

Remember there are **two** tests for duration under the *with child support* formula. Not just the length of marriage test, but also the age of children test. The latter test is more important for shorter marriages, running from the time the youngest child commences full-time school to the upper end when the last child finishes high school.

In a short marriage with young children, most of the primary carer's disadvantage lies ahead of her, not behind her, namely the labour market consequences for the parent of ongoing child care identified in s. 15.2(6)(b) of the *Divorce Act*. The strong compensatory claim will mean any time limit should be generous, tending towards the upper end of the "age of children" range. In my view, the failure to see beyond the length of the marriage in these cases is a failure of compensatory analysis.

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[8] *Reid v Carnduff*, 2014 ONSC 605 (Wildman J.); *H.F. v M.H.*, 2014 ONCJ 450 (Sherr J.); *Mayer v. Mayer*, 2013 ONSC 7099 (Shaw J.); *Hari v. Hari*, 2013 ONSC 5562 (Shaw J.).

[9] *Okafor v. Bowyer-Okafor*, [2014] O.J. No. 41, 2014 ONSC 120 (together 2.5 years, marred 2, child 5 with wife, time limit of 3.5 years); *Chase v. Chase*, [2013] O.J. No. 4008, 2013 ONSC 5335 (together 5 years, married 3, child 5, shared custody, wife new partner, 7 year time limit); *Balayo v. Meadows*, [2013] O.J. No. 3751, 2013 ONSC 5321 (cohabited 4 years, child 4 with wife, wife living with parents, no entitlement!); *P.M.D. v. D.M.C.*, [2013] O.J. No. 3722, 2013 ONSC 5220 (together 6 years, married 1, children 6 and 5 with wife, 5 year time limit). Interim decisions are omitted, since duration is left to trial.

[10] *H.F. v. M.H.*, [2014] O.J. No. 4207, 2014 ONCJ 450 (married 6 years, 3 children 9, 7 and 6 with wife, income not imputed to wife, indefinite); *Dupuis v. Desrosiers*, [2013] O.J. No. 6014, 2013 ONCJ 720 (cohabited 6 years, child 6 with cerebral palsy, shared custody, no income imputed to wife, indefinite, review in 3 years).

[11] [2014] B.C.J. No. 734, 2014 BCCA 161 (together 2 years, child 2 with wife, support ordered for 18 months).

4 ALWAYS TRY TO IMPUTE INCOME TO THE OTHER SPOUSE!

The SSAG are income-based guidelines. An obvious way to get more spousal support is to impute more income to the other spouse, while steadfastly resisting any imputation of income to your own client. Everyone wants to "impute" these days, the new SSAG intramural sport. We see this at work in other provinces too. Fully 10 of the last 23 B.C. SSAG appeals have involved attempts to impute income. Once the basics of the SSAG have been worked out, what's left for litigation is income determination.

There are many ways to attribute or impute income to a payor. Many of the provisions found in s. 19(1) of the *Child Support Guidelines* involve "attributing" income to a payor, whether for child support or spousal support, i.e. getting a proper fix on what the payor *actually* earns. These are grounds like s. 19(1)(b) (exempt from paying income tax) or s. 19(1)(g) (unreasonably deducting expenses) or s. 19(1)(h) (dividends, capital gains, etc.). Then there are the "true" imputing grounds, where an income is determined for the payor even though he or she does not earn that income, notably the ever-popular s. 19(1)(a) (un- or under-employment) or s. 19(1)(e) (assets not reasonably used to generate income) or s. 19(1)(f) (failure to disclose income information).

To impute income, you need to create an evidentiary basis for the court to do so.[12] If a recipient is not working outside the home, a court can take judicial notice of the Ontario minimum wage and then impute either a part-time or a full-time minimum wage income.[13] Some evidence will be needed, not on the wages, but on the likely hours worked, especially where there are children.

It is harder to impute an income above the minimum wage.[14] If a person works part-time, then a full-time income can be imputed, using the same wage or salary rate. You can also impute income based upon recent employment history, where a spouse has left a job (not possible if a recipient has been out of the labour force for a long period of time). Or you can call experienced people who work in the relevant field, or even call an occupational expert of some kind.

When you propose to impute income to one spouse or another, it is always worth assessing whether your imputing will move the SSAG range enough to make a difference. For example, if the payor earns $250,000 a year and there are two young children in the wife's primary care, imputing a minimum wage income of $10,000 or $20,000 to the wife will leave a great deal of overlap in the ranges. For the recipient, conceding some amount may be more efficient than arguing the point. For the payor, it may be a lot of effort, for little reward. A movement within the range can quickly wipe out any apparent gain to either side.

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[12] See my older article, "Slackers, Shirkers and Career-Changers: Imputing Income for Under/Unemployment" (2007), 26 Can.Fam.L.Q. 135.

[13] Only 9 per cent of Ontario employees work at the minimum wage, currently $11 an hour.

[14] You can look for help to *Drygala v. Pauli*, [2002] O.J. No. 3731, 29 R.F.L. (5th) 293 (Ont.C.A.).

5 JUST DO ONE CALCULATION, AND DON'T WORRY ABOUT THOSE INPUTS!

Two bad tendencies are reflected in this error. First, too often lawyers just put forward a single calculation, one that reflects their "best" or "hoped for" incomes for the payor and the recipient. Second, the lawyer conducting the negotiations, mediation, conference or hearing is often not fully aware of the inputs and the assumptions underpinning the calculations.

Calculations for alternative income scenarios are an excellent way of preparing for resolution of spousal support cases. It is the rare case where there will be quick agreement on the precise incomes of the spouses. That's partly because all income determination is prospective in nature, with the inevitably uncertainty that follows. It's also partly because many individuals have fluctuating incomes, especially in these days of less stable jobs, changing work hours and multiple sources of income. And, finally, it's because we're all trying to impute income to the other spouse (see no. 4 above). In preparing your case, run different income scenarios and see how the formula ranges respond, to help you frame your client's best approach.

At a conference or in the courtroom, multiple calculations for different incomes demonstrate an appreciation of your role as an officer of the court, to assist the court in triangulating the outcome. This may be particularly valuable at the interim or temporary support stage, where income has to be decided quickly and on limited information.[15] It is not a sign of weakness to do multiple calculations where income is uncertain, but a simple recognition of uncertainty. Where judges can't or won't do their own calculations, it may also lead to quicker resolution, as it is always possible to triangulate the result with close-enough-calculations once incomes have been determined.

"Transparency" should also be the watchword in SSAG calculations with your colleagues and the court. Even if you didn't do the calculations yourself, it is critical to know what the inputs were and what assumptions were made.

I have often found differences between lawyers reflect errors by one or other of them in working out SSAG numbers. In one case, the lawyer had just plugged in dividend income as "employment income". In another, the lawyer had treated the recipient wife's social assistance as "income".[16] In yet another, in a custodial payor case, there was no claim for child support by the higher-income custodial parent, but the lawyer had not overridden the child support table amount by setting the amount to zero.[17] One of the most common errors continues to be a

[15] For a good example where the court did five different calculations, in addition to the one provided by the wife, on a temporary support motion, see the decision of Justice Czutrin in *Saunders v. Saunders*, [2014] O.J. No. 1961, 2014 ONSC 2459,

[16] The social assistance error continues to show up in reported Ontario cases, especially with the language of Ontario Disability Support Program or Ontario Works.

[17] If the lower-income recipient is not paying child support to the higher-income payor of spousal support in the custodial payor situation (fairly common), then the SSAG range for amount will be too high, unless this adjustment is made.

failure to take section 7 expenses into account in the SSAG calculations under the *with child support* formula, an error which leaves the SSAG range for amount higher than it should be.[18]

6 STICK TO THE FORMULAS, IGNORE THE EXCEPTIONS, OR ANY UNUSUAL FACTS!

There has been a steady increase in the use of the SSAG exceptions, better every year, but there are still too many cases where exceptions are missed. If the formula ranges seem to produce "wrong" outcomes for amount or duration, you should immediately go to Chapter 12 of the SSAG. Eleven exceptions are listed there. These exceptions are more likely to be needed under the *without child support* formula, as its simpler formula does not respond as flexibly to the diverse fact situations in these cases.[19] As I detail the exceptions below, I've noted some recent Ontario decisions, or helpful appeal decisions from other provinces.

Of the eleven exceptions, the four most commonly-used ones are the following:

- compelling financial circumstances in the interim period[20]
- debt payment[21]
- basic needs/hardship[22]
- prior support obligations[23]

Illness or disability is a frequent issue in the case law, and a common exception. Note that many disability issues can be resolved within the formulas. If it is a long marriage, then there will be a decent amount of support and an indefinite duration. If it is a later marriage, with an older recipient, the "rule of 65" may solve the duration issue, even if the amount isn't so large. If the disabled individual has the primary care of the children, spousal support will be indefinite (at least initially) and the amount will be generous. The illness or disability "exception" will be needed where the marriage is short-to-medium in length and there are no children in the care of the recipient, but the disability is long-term. There are still three common lines of decisions in the decided cases:

- High in the range on amount, indefinite[24]
- No exception, generous but time-limited support[25]
- Low in the range on amount, indefinite[26]

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[18] Often an agreement or order will include a term providing for the cost-sharing of future section 7 expenses, but with no specification of amounts. You can either do a loose estimate, or in a pinch you can just settle on a spousal support amount that is lower in the range than would otherwise be the case.
[19] Also the exceptions will be needed more often under the *custodial payor* formula, which uses a hybrid version of the *without child support* formula.
[20] *Tasman v. Henderson*, 2013 ONSC 4377 (Mitrow J.); *Singh v. Singh*, 2013 ONSC 6476 (Price J.).
[21] *Dunn v. Dunn*, 2011 ONSC 6899 (Hennessy J.).
[22] *Singh*, *Tasman*, above, note 20;
[23] *Newcombe v. Newcombe*, 2011 ONSC 1094 (Heeney J.).
[24] *Knapp v. Knapp*, 2014 ONSC 1631 (Shaw J.); *van Rythoven v. van Rythoven*, 2010 ONSC 5923 (Div.Ct.).
[25] *Hickey v. Princ*, 2014 ONSC 5272 (Abrams J.).

Another five exceptions turn up less frequently:

- Compensatory exception in short marriages without children[27]
- Non-taxable payor income[28]
- Non-primary parent to fulfil parenting role[29]
- Special needs of child[30]
- Section 15.3, inadequate compensation[31]

Left off this list are the property division exceptions, as there is not enough time to go into these issues here.

One final plea: family law is full of unusual and odd fact situations, no less so for spousal support cases. The SSAG formulas were devised for "typical" cases, to assist in their resolution. The Guidelines themselves are informal and advisory, which means that departures from the formulas can take place even if there is no listed "exception" in Chapter 12. When faced with unusual facts, some lawyers and some judges try to jam them into the SSAG formulas anyway. Often I hear from the lawyer who tries to make a sophisticated argument about the interplay of unusual facts and why these mean the resolution should fall outside the SSAG ranges, but neither the other lawyer nor the court are prepared to listen. Unusual facts demand a willingness to think "outside the formula ranges", and even outside the listed exceptions.

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[26] *Tscherner v. Farrell*, 2014 ONSC 876 (Vogelsang J.); *Gray v. Gray*, 2014 ONCA 659 (other issues too).
[27] *Stergios v. Kim*, 2011 ONCA 836; *R.M.S. v. F.P.C.S.*, 2011 BCCA 53.
[28] *Fiddler v. Fiddler*, 2014 ONSC 4068 (Shaw J.).
[29] *R.M.S. v. F.P.C.S.*, above, note 27.
[30] *Remillard v. Remillard*, 2014 MBCA 101; *Krause v. Zadow*, 2014 ONCJ 475 (Zisman J.); *Feeney v. Brown*, 2014 ONCJ 435 (Brophy J.).
[31] *Gray v. Gray*, 2014 ONCA 659; *Beck v. Beckett*, 2011 ONCA 559.