



SPOUSAL SUPPORT ADVISORY GUIDELINES

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Spousal Support Advisory Guidelines

Prepared by:

Professor Carol Rogerson
Faculty of Law
University of Toronto

and

Professor Rollie Thompson
Dalhousie Law School

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EXECUTIVE SUMMARY

The **Spousal Support Advisory Guidelines** were developed to bring more certainty and predictability to the determination of spousal support under the federal *Divorce Act*. The Advisory Guidelines project has been supported by the federal Department of Justice. The Advisory Guidelines were released three years ago, in January 2005, in the form of a Draft Proposal and have been used across Canada since then. Comments and feedback were provided and some revisions made. This document is the final version.

The *Spousal Support Advisory Guidelines* are very different from the *Federal Child Support Guidelines*. They **have not been legislated** by the federal government. They are informal guidelines that will operate on **an advisory basis only**. The Advisory Guidelines will be used to determine the amount and duration of spousal support within the existing legal framework of the *Divorce Act* and the judicial decisions interpreting its provisions. The Guidelines are not legally binding and their adoption and use will be voluntary. They are intended as a practical tool to assist spouses, lawyers, mediators and judges in determining the amount and duration of spousal support in typical cases. The various components of the Guidelines—the basic formulas, restructuring, and exceptions—are intended to build upon current practice, reflecting best practices and emerging trends across the country. The process of developing the Advisory Guidelines is described in Chapter 2.

An overview of the structure of the Guidelines is found in Chapter 3.

The Advisory Guidelines do **not** deal with **entitlement**, just amount and duration once entitlement has been found. A mere disparity of income that would generate an amount under the Guidelines does not automatically lead to entitlement. As is set out in Chapter 4, there must be a finding (or an agreement) on entitlement, on a compensatory or non-compensatory or contractual basis, *before* the formulas and the rest of the Guidelines are applied. The basis of entitlement is important, not only as a threshold issue, but also to determine location within the formula ranges or to justify departure from the ranges as an exception. Entitlement issues also arise frequently on review and variation, especially applications to terminate support.

Some limitations on the application of the Guidelines are dealt with in Chapter 5. The Advisory Guidelines have been developed specifically for use under the federal *Divorce Act*. **Provincial/territorial laws** differ in some respects and any use of these Guidelines in the provincial/territorial context must take account of these distinctive statutes, especially on matters of entitlement for unmarried couples and agreements. A **prior agreement** may limit the application of the Guidelines, as the Advisory Guidelines cannot be used to override existing agreements, especially agreements that time limit or waive spousal support.

There are two basic formulas in the proposal: the ***without child support formula*** and the ***with child support formula***. The dividing line between the two is the absence or presence of a dependent child or children of the marriage, and a concurrent child support

obligation, at the time spousal support is determined. Both formulas use **income sharing** as the method for determining the amount of spousal support, not budgets. The formulas produce **ranges** for the amount and duration of support, not just a single number. The precise number chosen within that range is a matter for negotiation or adjudication, depending upon the facts of a particular case.

The starting point under both formulas is the definition of **income** used in the *Federal Child Support Guidelines*, subject to some minor adjustments for spousal support purposes, explained in Chapter 6.

The ***without child support formula***, set out below, is built around two crucial factors: the **gross income difference** between the spouses and the **length of the marriage**. Both the amount and the duration of support increase incrementally with the length of the marriage, as can be seen in the summary box below. The idea that explains this formula is **merger over time**: as a marriage lengthens, spouses more deeply merge their economic and non-economic lives, with each spouse making countless decisions to mould his or her skills, behaviours and finances around those of the other spouse. The gross income difference measures their differential loss of the marital standard of living at the end of the marriage. The formulas for both amount and duration reflect the idea that the longer the marriage, the more the lower income spouse should be protected against such a differential loss. Merger over time captures both the compensatory and non-compensatory spousal support objectives that have been recognized by our law since *Moge* and *Bracklow*.

The Without Child Support Formula

Amount ranges from 1.5 to 2 percent of the difference between the spouses' gross incomes (the **gross income difference**) for each year of marriage (or, more precisely, years of cohabitation), up to a maximum of 50 percent. The maximum range remains fixed for marriages 25 years or longer at 37.5 to 50 percent of income difference. (The upper end of this maximum range is capped at the amount that would result in equalization of the spouses' net incomes—the **net income cap**.)

Duration ranges from .5 to 1 year for each year of marriage. However, support will be **indefinite (duration not specified)** if the marriage is **20 years or longer** in duration *or*, if the marriage has lasted 5 years or longer, when the years of marriage and age of the support recipient (at separation) added together total 65 or more (the **rule of 65**).

Chapter 7 contains examples of the application of the *without child support* formula and the ranges it produces for marriages of different lengths and incomes.

Cases with dependent children and concurrent child support obligations require a different formula, the ***with child support formula***, set out in Chapter 8. These cases raise different considerations: priority must be given to child support; there is usually reduced

ability to pay; and particular tax and benefit issues arise. The rationale for spousal support is also different. Where there are dependent children, the primary rationale is compensatory, as both *Moge* and *Bracklow* made clear. What drives support is not the length of the marriage, or marital interdependency, or merger over time, but the presence of dependent children and the need to provide care and support for those children. This **parental partnership** rationale looks at not just past loss, but also at the continuing economic disadvantage that flows from present and future child care responsibilities, anchored in s. 15.2(6)(b) of the *Divorce Act*.

There are three important differences between the *without child support* formula and the *with child support* formula. First, the *with child support* formula uses the **net incomes** of the spouses, not their gross incomes. Second, this formula divides the **pool** of combined net incomes between the two spouses, not the gross income difference. Third, the upper and lower percentage limits of net income division in the *with child support* formula **do not change with the length of the marriage**.

Set out below is a summary version of the **basic *with child support* formula**, used to determine the amount of spousal support to be paid where the payor spouse pays both child and spousal support to the lower income recipient spouse who is also the parent with custody or primary care of the children.

The Basic *With Child Support* Formula for Amount

(1) Determine the **individual net disposable income (INDI)** of each spouse:

- Guidelines Income *minus* Child Support *minus* Taxes and Deductions = Payor's INDI
- Guidelines Income *minus* Notional Child Support *minus* Taxes and Deductions *Plus* Government Benefits and Credits = Recipient's INDI

(2) Add together the individual net disposable incomes. By iteration, determine the range of spousal support amounts that would be required to leave the lower income recipient spouse with between 40 and 46 percent of the combined INDI.

Net income computations like these require computer software. Basic to this formula is the concept of **individual net disposable income**, an attempt to isolate a **pool** of net disposable income available after adjustment for each spouse's child support obligations. This is done by deducting or backing out their respective **contributions to child support**. The details of these calculations are set out in Chapter 8, along with several examples.

Duration under this basic *with child support* formula also reflects the underlying parental partnership rationale. Initial orders are **indefinite (duration not specified)**, subject to the usual process of review or variation. The formula does, however, provide a **durational range** which is intended to structure the process of review and variation and to limit the

cumulative duration of spousal support. The durational limits under this formula can be thought of as “soft” time limits. There are two tests for duration and whichever produces the longer duration at each end of the range is to be employed:

- First is the **length-of-marriage** test, which is modelled on the duration under the *without child support* formula, i.e. one-half to one year of support for every year of marriage, and which will likely govern for most marriages of ten years or more.
- Second is the **age-of-children** test. The lower end of the durational range is until the youngest child starts full-time school. The upper end of the durational range is until the last or youngest child finishes high school. This test will typically apply to marriages of less than ten years.

Shared and split custody situations require slight variations in the computation of individual net disposable income, as the backing out of child support obligations is a bit more complicated. There is also a different, hybrid formula for cases where **spousal support is paid by the custodial parent**. Under this formula, the spouses’ Guidelines incomes are reduced by the grossed-up amount of child support (actual or notional) and then the *without child support* formula is applied to determine amount and duration. Finally, there is one more hybrid formula for those spousal support cases where the child support for **adult children** is determined under section 3(2)(b) of the *Child Support Guidelines*.

The formulas provide ranges for the amount and duration of spousal support. The location of a precise amount or duration within those ranges—what we refer to as **using the ranges**—will be driven by the **factors** detailed in Chapter 9: the strength of any compensatory claim; the recipient’s needs; the age, number, need and standard of living of any children; the needs and ability to pay or the payor; work incentives for the payor; property division and debts; and self-sufficiency incentives.

Restructuring allows the amount and duration under the formulas to be traded off against each other, so long as the overall value of the restructured award remains within the total or global amounts generated by the formula when amount and duration are combined. Chapter 10 shows how restructuring can be used in three different ways:

- to **front-end load** awards by increasing the amount beyond the formula’s range and shortening duration;
- to **extend duration** beyond the formula’s range by lowering the monthly amount;
or
- to formulate a **lump sum** by combining amount and duration.

“**Ceilings**” and “**floors**” in Chapter 11 define the boundaries of the typical incomes to which the formulas can be applied. The **ceiling** is the income level for the payor spouse above which any formula gives way to discretion, set here at a **gross annual income for the payor of \$350,000**. The **floor** is the income level for the payor below which no support is usually paid, here set at **\$20,000**. To avoid a cliff effect, there is an **exception** for cases where the payor spouse’s gross income is **more than \$20,000 but less than**

\$30,000, where spousal support may not be awarded or may be reduced below the low end of the range. An additional **exception** is also necessary, to allow an award of spousal support **below the income floor** in particular cases.

Any formula, even with restructuring, will have its limits and there will always be exceptional cases. Because the Guidelines are only advisory, departures are always possible on a case-by-case basis where the formula outcomes are inappropriate. The Guidelines do contain a short list of **exceptions** in Chapter 12, intended to identify common categories of departures:

- compelling financial circumstances in the interim period;
- debt payment;
- prior support obligations;
- illness and disability;
- the compensatory exception in short marriages without children;
- reapportionment of property (British Columbia);
- basic needs/hardship under the *without child support* and *custodial payor* formulas;
- non-taxable payor income;
- non-primary parent to fulfil parenting role under the *custodial payor* formula;
- special needs of a child; and
- section 15.3 for small amounts and inadequate compensation under the *with child support* formula.

Self-sufficiency is a central concept in the law of spousal support and Chapter 13 draws together in one place all the aspects of the Advisory Guidelines that promote self-sufficiency, one of the objectives of the *Divorce Act*.

The formulas are intended to apply to initial orders and to the negotiation of initial agreements, including interim arrangements. Given the uncertain state of the current law, it is not possible to make the Advisory Guidelines apply to the full range of issues that can arise on **variation and review**, issues that are considered in Chapter 14. The Advisory Guidelines can be applied on applications to reduce spousal support because of changes in income, for example, when the payor spouse's income goes down or the recipient spouse's income goes up (or ought to have gone up). In some cases, one spouse may wish to apply to vary to **cross over** between the two formulas, mostly in longer marriages once the children are no longer dependent, where the *without child support* formula produces higher ranges.

More difficult issues arise where the payor's income increases or the recipient's income is reduced after separation. The most the formula can do is to establish an upper limit upon any increase in spousal support in such cases. At the present time, no formula can

be constructed to resolve issues around the recipient spouse's remarriage or re-partnering, or subsequent children.

Quebec has different guidelines for determining child support, which have an impact on spousal support determinations. The application of the Advisory Guidelines to *Divorce Act* cases in Quebec raises special issues that are dealt with in Chapter 15.

INTRODUCTION

In 2001 the federal Department of Justice identified the need for a project to explore the possibility of developing some form of advisory spousal support guidelines. The aim of the project was to bring more certainty and predictability to the determination of spousal support under the *Divorce Act*.¹ The project was a response to growing concerns expressed by lawyers, judges, mediators and the public about the lack of certainty and predictability in the current law of spousal support, creating daily dilemmas in advising clients, and negotiating, litigating or—in the case of judges—deciding spousal support issues. We were retained to direct that project.

In January 2005, the Draft Proposal was released, setting out a comprehensive set of Spousal Support Advisory Guidelines. These Advisory Guidelines have been used by spouses, lawyers, mediators and judges across Canada over the past three years. We received detailed comments and feedback on the Draft Proposal. What you hold in your hands is the final version of the Spousal Support Advisory Guidelines. It is the revised version of the earlier Draft Proposal and is now the authoritative document on the Spousal Support Advisory Guidelines. The Draft Proposal is now only of historical interest.

The term “guidelines” inevitably brings to mind the *Federal Child Support Guidelines*, enacted in 1997.² We need to emphasize at the beginning that this comparison must be resisted. This project **does not involve formal, legislative reform**. Unlike the federal, provincial and territorial child support guidelines, these Advisory Guidelines are not legislated. They are instead intended to be **informal guidelines** that operate on an **advisory** basis only, **within the existing legislative framework**. **They do not have the binding force of law** and are applied only to the extent that lawyers and judges find them useful. They are guidelines in the true sense of the word. We have called them *Advisory Guidelines* to differentiate them from the child support guidelines.

Nature and status of the Advisory Guidelines

The Advisory Guidelines are intended as a practical tool to assist in determinations of spousal support **within the current legal framework**—to operate primarily as a starting point in negotiations and settlements. The project was not directed at a theoretical re-ordering of the law of spousal support or at creating a new model of spousal support. The formulas we have developed are intended as proxies for the spousal support objectives found in the *Divorce Act* as elaborated upon by the Supreme Court of Canada. Our goal was to develop guidelines that would achieve appropriate results over a wide range of typical cases.

¹ *Divorce Act*, R.S.C. 1995, c. 3 (2nd Supp).

² The *Federal Child Support Guidelines*, SOR/ 97-175, which were enacted as regulations pursuant to the *Divorce Act*, *ibid*, came into force in May, 1997. All provinces and territories save Quebec (where a different guidelines model applies) have adopted child support guidelines that are either identical or similar to the *Federal Child Support Guidelines*. The Guidelines are based on a percentage-of-income formula.

Given the informal nature of these advisory guidelines, they have been developed with the recognition that they must be broadly consistent with current support outcomes while also providing some much needed structure and consistency to this area of law—a not insignificant challenge. As informal guidelines, they **do not address entitlement**, but deal only with the amount and duration of support **once entitlement has been established**. In the same vein they confer **no power to re-open existing spousal support agreements** beyond what exists under current law.

Content of the Advisory Guidelines

The Advisory Guidelines are based on what is called “income sharing”. Contrary to popular conception, income sharing does not necessarily mean equal sharing. It simply means that spousal support is determined as a percentage of spousal incomes. The percentages can vary according to a number of factors. The Advisory Guidelines offer two basic formulas that base spousal support on spousal incomes and other relevant factors such as the presence or absence of dependent children, and the length of the marriage. The formulas deal with the amount (sometimes referred to as quantum) and duration of spousal support once entitlement to support has been established. The formulas generate ranges of outcomes, rather than precise figures for amount and duration, which may be restructured by trading off amount against duration.

The Guidelines are advisory only and thus always allow for departures from the outcomes generated by the formulas on a case-by-case basis where they are not appropriate. While we have tried to specify exceptions to assist the parties and the courts in framing and assessing any departures from the formulas’ ranges, they are not exhaustive of the grounds for departure. There is still considerable room for the exercise of discretion under the Advisory Guidelines but it will be exercised within a much more defined structure than existed before—one with clearer starting points. Budgets, which are currently the primary tool in spousal support determinations, increasingly play a reduced and less central role.

Documents accompanying this final version

There are two documents being released together:

- (i) this completely-revised final version of the reference document, entitled “The Spousal Support Advisory Guidelines”; and
- (ii) a brief “Report on Revisions” which notes the changes made from the Draft Proposal to this final version.

Still to come, in the near future, is an “Operating Manual”, which will provide a summary step-by-step guide to the Advisory Guidelines, cross-referenced to the final version.

Structure of this final version

While much of the content of this final version has not changed from the Draft Proposal, we have moved it around, by changing the structure and presentation. Some issues that

seemed important at the time of the Draft Proposal are no longer issues, and thus some parts of the Draft Proposal have been removed or shortened. Now that the Advisory Guidelines are better known and widely used, we have highlighted some topics that are often forgotten, topics like entitlement, using the ranges, restructuring, exceptions and self-sufficiency. We have also drawn on the experience with the Advisory Guidelines in the three years since the release of the Draft Proposal in explaining the operation of the scheme.

Before we reach the actual content of the Spousal Support Advisory Guidelines, there are many preliminary matters that must be addressed so that the Advisory Guidelines can be properly understood. In Chapter 1 we provide some necessary background to the project. We review the current legal framework for spousal support—the framework within which the Advisory Guidelines operate—and also discuss the problems within the current law that led to this guidelines initiative.

In Chapter 2 we discuss in more detail the nature of this project, the challenges it raised, and the process by which the Advisory Guidelines were developed .

With Chapter 3, we move into the actual substance of the Advisory Guidelines, providing an overview of their basic structure.

Chapters 4 and 5 deal with two critical threshold questions to be considered before reaching the Advisory Guidelines: is there entitlement to spousal support? and do the Advisory Guidelines apply in this case? The issues of entitlement and the basis for entitlement arise, not only at this threshold point, but also throughout the application of the Guidelines.

Chapter 6 highlights another critical step in the Guidelines analysis, the determination of the incomes of the spouses.

Chapter 7 deals with the first of the two basic formulas around which the Advisory Guidelines are structured—the *without child support* formula, which applies in cases where there are no dependent children and hence no concurrent child support obligation.

Chapter 8 details the other basic formula—the *with child support* formula, which applies in cases where there are dependent children.

Chapter 9 focuses upon how these formula ranges can be used, and the factors that can affect the location of the precise amount and duration within the ranges. Chapter 10 then takes the next step, how the formula ranges can be restructured, by trading off amount against duration, to produce larger amounts or longer durations or lump sum amounts.

Chapter 11 explains how to apply the ceilings and floors, the upper and lower boundaries of the range of incomes for which the formulas operate. Further, this chapter offers guidance on the determination of spousal support in cases above the ceiling or around the floor.

Chapter 12 sets out the exceptions to the use of the formula ranges. The exceptions have been ignored too often in practice and we have therefore given them greater emphasis in this final version. Some of the older exceptions have been clarified, while new ones have been added.

In Chapter 13, we have gathered together all the aspects of the Advisory Guidelines that serve to promote self-sufficiency. Self-sufficiency is an important and difficult issue in the law of spousal support and we thought it deserved a separate chapter in the final version.

Chapter 14 looks at the subsequent uses of the Advisory Guidelines in the process of variation and review. The Advisory Guidelines may have more limited application at these later stages, as issues of continuing entitlement often arise.

Chapter 15 discusses the application of the Advisory Guidelines to divorce cases in Quebec, and some of the adjustments that had to be made for Quebec cases.

At the end of the document, after the conclusion, there can be found a glossary of terms that offers a handy reference point for many of the terms used in this document. Some of these terms will be familiar to family lawyers and judges but not to other readers; others are new terms specific to these Spousal Support Advisory Guidelines.

1 BACKGROUND—THE CURRENT LAW OF SPOUSAL SUPPORT

1.1 The Legislative Framework

Spousal support, when sought in the context of a divorce, is governed by the federal *Divorce Act*. There are also provincial and territorial laws that govern spousal support outside the divorce context, applying to unmarried couples and to married couples who have separated but are not applying for a divorce. The statutory provisions are an important starting point in understanding the law around spousal support; they provide the framework within which the proposed advisory guidelines will operate. The Advisory Guidelines do nothing to alter that legislative framework.

Federal and provincial/territorial spousal support legislation in Canada tends to take the form of relatively open-ended provisions incorporating a variety of factors and objectives. Much room is left for judicial discretion in the interpretation and application of the legislation. Judicial interpretations in turn guide lawyers and mediators advising clients negotiating spousal support settlements.

The specific focus of this project has been on developing informal guidelines to assist in the determination of the amount and duration of spousal support under the *Divorce Act*. The current *Divorce Act*, enacted in 1985, attempts to provide guidance for spousal support determinations by setting out, in s. 15.2 (6), four objectives for spousal support:

- 15.2 (6)** An order ... that provides for the support of a spouse should
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the spouses pursuant to subsection (8) [i.e. through child support];
 - (c) relieve any economic hardship of the spouses arising from the break-down of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

In addition, s. 15.2 (4) lists certain factors to be taken into account in making support orders for a spouse:

- 15.2 (4)** In making an order ... the court shall take into consideration the condition, means, needs and other circumstances of each spouse including
- (a) the length of time the spouses cohabited;
 - (b) the functions performed by the spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of the spouse or child.

Finally, s. 15.2 (5) is more specific, indicating one factor that may *not* be taken into account—spousal misconduct:

15.2 (5) In making an order [for spousal support or an interim order] the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

Provincial/territorial support law is governed by distinctive statutory regimes. However, in practice there is much overlap between federal and provincial/territorial support laws. The leading Supreme Court of Canada decisions on spousal support, *Moge* and *Bracklow*, which will be discussed in more detail below, articulated a broad conceptual framework for spousal support that has been relied upon in decisions under both provincial/territorial and federal legislation. Indeed *Bracklow*, which combined claims under both the *Divorce Act* and provincial legislation, made no real distinction between the two.

The Advisory Guidelines were specifically developed for use under the federal *Divorce Act*.

However, given the overlap between the spousal support regimes in practice, it is not surprising that lawyers and judges have used the Advisory Guidelines under provincial/territorial support legislation. It is important that such use take account of the distinctive features of these statutes. In Chapter 5 on application, below, we discuss in more detail some of the specific issues that arise in the application of the Advisory Guidelines to support determinations under provincial/territorial spousal support laws.

1.2 Judicial Interpretation³

In two important decisions, *Moge v. Moge*⁴ in 1992 and *Bracklow v. Bracklow*,⁵ in 1999, the Supreme Court of Canada has attempted to clarify the general principles that structure our law of spousal support. These decisions, together with the legislation, constitute the current legal framework for spousal support. Our proposed advisory guidelines do nothing to displace these decisions, but are rather an attempt to develop formulas to better implement the principles these decisions recognize.

The combined effect of these two decisions is a very broad basis for spousal support under the *Divorce Act*. Both *Moge* and *Bracklow* can be seen as responses to, and rejections of, the very limited view of spousal support that had emerged from the

³ For a more detailed review of the judicial interpretation of the *Divorce Act*'s spousal support provisions see Carol Rogerson, "The Canadian Law of Spousal Support" (2004), 38 *Family Law Quarterly* 69; Carol Rogerson, "Spousal Support Post-*Bracklow*: The Pendulum Swings Again?" (2001), 19 *Canadian Family Law Quarterly* 185; Rollie Thompson "Everything is Broken: No More Spousal Support Principles?" unpublished paper prepared for the Continuing Legal Education Society of British Columbia Family Law Conference, July 12-13, 2001 available online at www.cle.bc.ca. The Background Paper, discussed at note 11 below and accompanying text, also reviews the current law of spousal support.

⁴ *Moge v. Moge*, [1992] 3 S.C.R. 813.

⁵ *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420.

Supreme Court of Canada's 1987 *Pelech* trilogy⁶ which had emphasized the importance of finality and promoting a clean break between divorced spouses. In the wake of *Pelech*, spousal support came to be viewed as a transitional or rehabilitative remedy. Time-limited spousal support orders came to be the norm, even in cases of long, traditional marriages.

In the ground-breaking *Moge* decision in 1992, the Supreme Court of Canada clearly rejected the *Pelech* trilogy and the clean-break model of spousal support. The Court emphasized that all four support objectives in the 1985 *Divorce Act* had to be given weight and that the clean-break model of spousal support unduly emphasized only one of those objectives—the promotion of spousal self-sufficiency after divorce—at the expense of all the others. Former spouses were obligated to make reasonable efforts to maximize their earning capacity and contribute to their own support but the Court recognized that some spouses, despite their best efforts, would not be able to become self-sufficient. In the Court's view, the clean-break model went too far in deeming spouses to be self-sufficient when they were not. In *Moge* the Court endorsed an expansive compensatory basis for spousal support, portraying its purpose as the equitable distribution between the spouses of the *economic* consequences of the marriage—both its economic advantages and disadvantages. While the Court recognized that many different circumstances could give rise to compensatory claims, the decision focused on the most common situation—where a spouse has sacrificed labour force participation to care for children, both during the marriage and after marriage breakdown. Under the compensatory approach of *Moge*, spousal support came to be understood primarily as a form of compensation for the loss of economic opportunity—or in the language of the *Divorce Act*, the economic disadvantage—resulting from the roles adopted during the marriage.

The compensatory principle from *Moge* continues to play a significant role in structuring our law of spousal support. However, when lower courts attempted to implement the compensatory principle, which the Supreme Court of Canada had presented at a high level of generality, they ran into some difficulties on both the practical and theoretical fronts.

On the practical front, the compensatory principle is difficult to implement. Establishing a support claim requires, in principle, individualized evidence of earning capacity loss. As the Supreme Court of Canada itself acknowledged in *Moge*, providing this form of expert evidence can be costly. Evidence of earning capacity loss can also be difficult to obtain and somewhat hypothetical, particularly in cases of long marriages where the spouse claiming spousal support had no established career before assuming the role of homemaker. Difficult questions of causation can also arise as to why a spouse remained out of the labour force or chose lowly paid employment. On a practical level, effective implementation of the compensatory principle requires the development of proxy

⁶ The three cases were *Pelech v. Pelech*, [1987] 1 S.C.R. 801, *Richardson v. Richardson*, [1987] 1 S.C.R. 857 and *Caron v. Caron*, [1987] 1 S.C.R. 892. All three cases were decided under the earlier, 1968 *Divorce Act* and all three also involved separation agreements in which the former wives had waived their rights to ongoing spousal support. In each case the Court refused to override the agreement and the application for spousal support was dismissed.

measures of economic loss that will inevitably involve some sacrifice of accuracy and theoretical purity.

After *Moge*, Canadian courts showed no enthusiasm for reliance upon expert economic evidence documenting loss of earning capacity.⁷ Instead, “need”—the traditional conceptual anchor of spousal support—became a convenient proxy measure of economic disadvantage. A spouse in economic need was presumed to be suffering economic disadvantage as a result of the marriage; conversely, a spouse not in need was presumed not to have suffered any economic disadvantage as a result of the marriage. The use of need and standard of living as proxy measures for loss of opportunity was expressly endorsed by Bastarache J. A. (as he then was) in *Ross v. Ross*, a New Brunswick case involving a long traditional marriage:

It is in cases where it is not possible to determine the extent of the economic loss of the disadvantaged spouse that the Court will consider need and standard of living as the primary criteria, together with the ability to pay of the other spouse.⁸

At least in longer marriages, need came to be measured against the marital standard of living, a measure suggested by the Supreme Court of Canada itself in *Moge*:

As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution.⁹

The rule that emerged in many lower court decisions was that the goal of spousal support, *after a long marriage*, was to provide the support claimant with a reasonable standard of living judged in light of the marital standard of living. In some cases, as in *Ross*, the principle for long marriages has been expressed as providing similar lifestyles or roughly equivalent standards of living for each of the spouses.

On the theoretical front, the post-*Moge* case law also revealed concerns with the limitations of a pure compensatory analysis that would confine the basis for spousal support to economic loss caused by the roles adopted during the marriage. Some judges shifted the compensatory focus to the economic *advantages* of the marriage in the form of the earning capacity the payor spouse was able to maintain and enhance. Other judges found the compensatory framework itself too restrictive. Compensatory theories narrowed the basis for entitlement. This was something many judges resisted. Some judges read the *Divorce Act* spousal support objectives more broadly, focussing on the section referring to the relief of economic hardship caused by the marriage breakdown. Others read *Moge* as a general directive to ameliorate the post-divorce impoverishment of former spouses. The most serious limitations of a compensatory analysis arose in cases involving ill or disabled spouses whose economic needs were not related to marital roles

⁷ After the Ontario Court of Appeal’s refusal to base an award on such evidence in *Elliot v. Elliot* (1993), 48 R.F.L. (3d) 237 (Ont. C.A.) it virtually disappeared from spousal support cases.

⁸ *Ross v. Ross* (1995), 16 R.F.L. (4th) 1 (N.B.C.A.) at 7.

⁹ See *Moge*, *supra* note 4 at 870.

and who could not claim spousal support based on losses or gains in earning capacity during the marriage.

The Supreme Court of Canada directly addressed these limitations of the compensatory principle in its 1999 decision in *Bracklow*. In that case the Court ruled that there is also a non-compensatory basis for spousal support under the *Divorce Act* based on “need alone.” Thus a former spouse has an obligation to pay spousal support if the other spouse is experiencing economic need at the point of marriage breakdown, even when that need does not arise from the roles adopted during the marriage. The Court based this obligation on a view of marriage as a relationship involving mutual obligations and complex interdependencies that may be difficult to unravel when the marriage breaks down. The Court also spoke of marriage as involving the assumption of basic social obligations, reflecting the view that primary responsibility for support of a needy partner rests upon the family rather than the state. The Court went on to say that the extent of a former spouse’s obligation to meet his or her former partner’s post-divorce needs would be dependent upon many factors, including the length of the relationship, the way the parties had structured their relationship, ability to pay, and the re-partnering or remarriage of the former spouses.

Bracklow clearly expanded the basis of the spousal support obligation under the *Divorce Act* to include need as well as compensation. However, in the course of doing so the decision increased the level of uncertainty about the nature and extent of the spousal support obligation, well beyond what had existed after *Moge*. The Supreme Court of Canada failed to provide a definition of “need,” leaving open the question of whether it meant an inability to provide a basic standard of living or whether it should be assessed in the context of the marital standard of living. After *Bracklow*, many argued that any spouse who experienced a significant decline in standard of living after marriage breakdown was entitled to spousal support.

Even more significantly, *Bracklow* emphasized the highly discretionary, individualized nature of spousal support decisions. The Court was clear that the *Divorce Act* endorses no single theory of spousal support and must retain flexibility to allow judges to respond appropriately to the diverse forms that marital relationships can take. The Court presented spousal support determinations as first and foremost exercises of discretion by trial judges who were required to “balance” the multiple support objectives and factors under the *Divorce Act* and apply them in the context of the facts of particular cases. One of the main messages of *Bracklow* was that there were no rules in spousal support.

1.3 The Problem of Spousal Support and the Need for Guidelines

The culture of spousal support after *Bracklow* was one that emphasized individualized decision making and an absence of rules. Multiple theories of spousal support competed with each other while, on the ground, spousal support cases were negotiated and argued under an amorphous needs-and-means framework dominated by budgets. “Need” means many different things to different people and many different theories of spousal support can be couched in the language of need. The guidelines project sprang from the growing concern expressed by lawyers and judges that the highly discretionary nature of the

current law of spousal support had created an unacceptable degree of uncertainty and unpredictability.¹⁰

Similar fact situations could generate a wide variation in results. Individual judges were provided with little concrete guidance in determining spousal support outcomes and their subjective perceptions of fair outcomes played a large role in determining the spousal support ultimately ordered. Appeals were often of little help because appeal courts frequently dispose of appeals with little explanation, deferring to trial judges on issues of quantum and duration. Lawyers in turn had difficulty predicting outcomes, thus impeding their ability to advise clients and to engage in cost-effective settlement negotiations.

And for those without legal representation or in weak bargaining positions, support claims were simply not pursued. Despite a very broad basis for entitlement under the existing law, many spouses did not claim spousal support, being unwilling to engage in the difficult and costly process required.

More generally, the uncertainty and unpredictability that pervaded the law of spousal support was undermining the legitimacy of the spousal support obligation. The widely differing understandings of the nature of the spousal support obligation generated concerns about unfair outcomes at both ends of the spectrum. In some cases awards were perceived as too low, in others as unjustifiably high.

The Advisory Guidelines were a response to these concerns. They were developed for the purpose of bringing more certainty and predictability to spousal support determinations. They incorporate the basic principles of compensation and need that the Supreme Court of Canada has identified as the bases for spousal support under the *Divorce Act* but provide a more structured way of implementing those principles through formulas based on income sharing, i.e. formulas based on sharing specified percentages of spousal incomes.

1.4 Why Guidelines Now?

Spousal support guidelines rely upon mathematical formulas that determine spousal support as a percentage of spousal incomes. When spousal support guidelines were considered in the past, the idea was rejected as both impossible and undesirable. The conclusion was that it would be impossible to draft guidelines with sufficient flexibility to respond to the diversity of marriages and the multiple objectives of spousal support. The disadvantages of guidelines, in terms of a loss of flexibility, were seen to outweigh any advantages in terms of efficient dispute resolution. In our view, when the Advisory Guidelines project commenced in 2001, the time was ripe for reconsideration. What had changed?

¹⁰ The past tense is used to describe the problems in the law of spousal support that the Advisory Guidelines were intended to address. Since their release in draft form in January of 2005, the Advisory Guidelines have already had an impact in reducing the degree of uncertainty and unpredictability in the current law of spousal support. The use of the past tense should not be taken as suggesting, however, that these problems have been eliminated.

First and foremost, the law of spousal support had become more unstructured, more discretionary and more uncertain over time, particularly since 1999 in the wake of *Bracklow*. After *Moge* and prior to *Bracklow*, there had been some hope that a principled approach to spousal support was developing through the case law. It subsequently became clear that the normal process of judicial development had effectively come to a halt. In that situation, spouses, lawyers and judges began to find attractive the greater certainty and predictability that guidelines would bring, even guidelines that were not perfect.

Second, since 1997 experience with child support guidelines, both at the federal and provincial/territorial levels, had changed the legal culture. Their formulaic approach had accustomed lawyers and judges to the systemic advantages of *average* justice rather than individualized justice, to determining support without budgets and to the concept of income sharing after divorce.

Third, spousal support advisory guidelines were not simply an abstract concept any more. Some American jurisdictions had successfully experimented with such guidelines for more than a decade, as explained in the Background Paper that was prepared for this project.¹¹ Most recently, the influential American Law Institute (ALI) had recommended a formulaic approach to spousal support as part of its comprehensive rethinking of the law of family dissolution, a process begun in the 1990s and culminating in the Institute's final report in 2002.¹² Some American jurisdictions had begun to implement the ALI guidelines. Greater experience with guidelines was yielding more sophisticated models.

Finally, we could see the beginnings of formulaic approaches to the determination of spousal support in the current law. With the greater prevalence of computer software, especially since the *Federal Child Support Guidelines* came into effect in 1997, lawyers and judges could have readily available information on net disposable incomes or monthly cash flow, tax calculations and household standards of living. Armed with this information, some courts began looking to income sharing and standards of living, rather than budgets, to resolve spousal support issues.

All of these changes made spouses, lawyers, mediators and judges more interested in spousal support guidelines. In weighing the advantages and disadvantages of such guidelines, more saw the balance tipping in favour of some type of spousal support advisory guidelines.

As we embarked upon this project we identified four advantages of a scheme of spousal support advisory guidelines. These became the objectives of the project:

¹¹ Carol Rogerson, *Developing Spousal Support Guidelines in Canada: Beginning the Discussion* (December, 2002), available on the Department of Justice website at: <http://canada.justice.gc.ca/en/dept/pub/spousal/index.html>. The Background Paper is discussed in Chapter 2.

¹² American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, 2002). The recommendations with respect to spousal support are found in Chapter 5, "Compensatory Spousal Payments."

- (1) *To reduce conflict and to encourage settlement.* All other financial matters on family dissolution are now governed by rules—property division, pensions, child support. Spousal support is the last remaining pool of unfettered discretion. It is also typically the last financial issue to be resolved. Spousal support thus becomes the flashpoint for unhappiness with all the other financial rules, as well as for any remaining bitterness between spouses. Advisory guidelines can limit the range of results and constrain the issues and information required, thereby encouraging settlement and damping down some of the conflict between the parties.
- (2) *To create consistency and fairness.* When spousal support is determined in an excessively discretionary context, similar fact situations can generate wide variations in results. Moreover, the widely differing understandings of the nature of the spousal support obligation generate concerns about unfairness at both ends of the spectrum—in some cases awards may be too high, and in others too low. Advisory guidelines should create more consistent treatment of spouses who are in similar circumstances as well as more open explanations of how those outcomes were reached. This can enhance the legitimacy and perceived fairness of spousal support awards, as has been the case with the child support amounts.
- (3) *To reduce the costs and improve the efficiency of the process.* In financial matters, it is ultimately dollars weighed against dollars, i.e. the cost of legal fees and disbursements weighed against the money gained or lost in support or property. Advisory guidelines can provide a starting point from which the parties can each decide whether further negotiation or litigation is warranted. Moreover, some spouses who previously would have given up on seeking spousal support because of the costs and unpredictable results of the highly discretionary regime will be more likely to obtain support if advisory guidelines are in place. Guidelines are even more important where one or both parties are unrepresented.
- (4) *To provide a basic structure for further judicial elaboration.* Advisory guidelines can act to encourage or more accurately, kick start, the normal process of legal development in an area of judicial discretion. Under the current discretionary law, that process had nearly ground to a halt. Advisory guidelines can give basic structure and shape to the law, with room left for lawyers and courts to adjust, modify, and identify possible new exceptions, etc. By their very existence, advisory guidelines will create pressure to give reasons for any departures in negotiations or decisions.

The goal of the project was not to raise the current levels of support over the broad run of cases. Greater consistency under a scheme of advisory guidelines would mean that some spouses would see higher support awards and others would see lower awards. We did recognize that a scheme of advisory guidelines would likely lead to more frequent spousal support awards as spouses who previously would have given up on seeking spousal support because of the costs and unpredictable results of the highly discretionary regime would find it easier to claim spousal support.

We move next, in Chapter 2, to a more detailed description of the Advisory Guidelines project, including a discussion of the nature of the guidelines developed and the process that was used to develop them.

2 THE GUIDELINES PROJECT

2.1 The Nature of the Guidelines: Informal and Advisory

There are many preconceptions about what spousal support guidelines are and how they work. Any talk of spousal support guidelines immediately brings to mind the *Federal Child Support Guidelines*. As we emphasized in the introduction, this comparison should be resisted. These Advisory Guidelines are very different.

Unlike the *Federal Child Support Guidelines*, the Spousal Support **Advisory Guidelines** do not involve formal legislative reform. They have not been legislated by the federal government. They are intended to be **informal** guidelines that operate on an **advisory** basis only, within the existing legislative framework.

We know that this concept of informal guidelines is one that many have difficulty understanding initially. Yet think of the early days of the *Federal Child Support Guidelines* before they were formally enacted. Many judges and lawyers used the draft proposed tables informally to assist in the determination of child support. Think also of the normal process of legal development and the ways that various presumptions can develop over time to structure judicial discretion. Such presumptions were starting to develop in the post-*Moge* law of spousal support, but since *Bracklow*, that process has broken down. The Advisory Guidelines project can be thought of as an attempt to facilitate the normal process of legal development by providing a broad structure that can then be adjusted over time as it is tested by individual cases.

The inspiration for the process chosen for the development of these Advisory Guidelines came from the experience of many of the American jurisdictions that have adopted spousal support guidelines. In the American context, spousal support guidelines have generally been the product of bench and bar committees of local bar associations. They were created with the intention of reflecting local practice and providing a more certain framework to guide settlement negotiations. While some of the American guidelines subsequently evolved into legislation, at the initial stages they were informal.

A similar process was adopted for the development of these Advisory Guidelines. They have been created through a process that involves working with judges, lawyers and mediators who have expertise in family law. The goal of the process was to articulate informal guidelines based on emerging patterns embedded in current practice. As for their application, the Advisory Guidelines do not have the force of law.. They are advisory in nature, and they acquire their force through their usefulness.

The federal Department of Justice has supported the development of the Advisory Guidelines by providing financial support, communicating information on the project, participating in the discussions with the working group of family law experts, and keeping provincial and territorial governments informed.

We have called this process for developing the Advisory Guidelines one of working “from the ground up”, in contrast to the “from the top down” process of formal legislative

reform. The process, described in more detail below, was a long one involving many different stages. But before we get to that, we would like to say a bit more about the general nature of this project and some of the challenges it has raised.

2.2 The Challenges of the Project

2.2.1 Theory and practice

As stated in the introduction, this project was not directed at a theoretical re-ordering of the law of spousal support. Its aims were practical rather than theoretical—to provide a practical tool to assist family lawyers, mediators and judges who are confronted daily with the dilemma of determining appropriate levels of spousal support, as well as divorcing and separating spouses. As *Bracklow* has made clear, the *Divorce Act* does not mandate any one model of spousal support. We kept this in mind in constructing these guidelines. Reflecting current practice meant reflecting a wide range of competing views of spousal support. No one theory or model or ideology or formula could be used. The formulas, described in more detail below, incorporate elements of different theories. In addition, the exceptions recognize alternate or subsidiary models of spousal support. There is no theoretical purity in the guidelines we have constructed—they are the product of much compromise, compromises already found in the law of spousal support.

But increased consistency and predictability—the goals of the project—do require structure, even if it does not come from theoretical purity. The project was premised on the view that patterns and structure were beginning to emerge in the law, at least in a range of typical cases—the beginnings of guidelines.¹³ But in the current culture of spousal support, these were often not discussed or articulated or openly acknowledged within the family law system. This project has attempted to build upon and facilitate those developments.

2.2.2 Reflecting current practice, changing current practice

Admittedly, there has been a central tension in the project between reflecting practice and changing practice. As informal rules of practice without the force of law, the Guidelines had to reflect current practice and could not stray too far from existing results over all. That said, there was also much in current practice that was inconsistent, arbitrary and hard to explain. The Advisory Guidelines were developed because of their potential to constrain some of those current practices. In building upon current practice the project has drawn on best practices or emerging trends. The Advisory Guidelines incorporate and reflect much of the current practice of spousal support while at the same time seeking greater consistency and logic in the results.

¹³ See for example V. Jennifer Mackinnon and E. Jane Murray, “Magical Mystery Tour: Seeking Greater Consistency in Spousal Support Awards” (2004), 22 *Canadian Family Law Quarterly* 215.

2.2.3 National guidelines and local spousal support cultures

Early on we faced the problem of squaring national guidelines with local and regional patterns of support. To the extent that local variations reflect higher or lower incomes, income-based guidelines such as these can adjust for that. The ranges provided by the Advisory Guidelines also leave some scope for adjustment towards local patterns and local conditions. It was also our hope that the Advisory Guidelines might lead to some cross-fertilisation of ideas amongst regions, forcing reconsideration of some local practices. The *Divorce Act* is a national statute and it can be argued that the spousal support received in one part of the country should not differ significantly from that received in another. We did worry, however, about whether regional and local variations were so great that any national advisory guidelines based on current practice would be of limited usefulness and that the only solution might lie in “regional” or “provincial” guidelines.

In the three years since the release of the Draft Proposal we have found that by and large the ranges generated by the Advisory Guidelines are able to accommodate the variations in local and regional practices. Some parts of the country inhabit the high end of the ranges, and some the low end, but lawyers and judges have generally found that some part of the “national” ranges is “about right” for their area. In the course of gathering feedback, we did receive comments about particular fact situations and specific subsets of cases, where the ranges seemed “high” or “low” in particular localities or regions. Some of the modest revisions that we have made introduce adjustments to accommodate these fact situations.

2.3 The Development of the Guidelines and the Release of the Draft Proposal

The first stage of the Advisory Guidelines project, which commenced in September 2001, involved the preparation of a lengthy background paper by Professor Rogerson: *Developing Spousal Support Guidelines in Canada: Beginning the Discussion* (December, 2002) (the “Background Paper”). The paper and the project were first discussed at the National Family Law Program in Kelowna, B.C. in July 2002, with the paper being completed in December 2002.

The paper laid the groundwork for exploring the possibility of developing spousal support guidelines. It reviewed in detail the basic building blocks that could be drawn upon in creating guidelines: emerging patterns in the current law, the various theories of spousal support, as well as various models of guidelines that are in effect or proposed in the United States and elsewhere. The Background Paper also laid out a possible process for the development of guidelines—one of building informal guidelines that would reflect current practice and that would operate on an advisory basis only within the existing legislative framework.

For those who want more detail about the multiple sources that have influenced the crafting of the Advisory Guidelines, we encourage you to read the Background Paper.¹⁴

The second stage of the project involved working with a small group of family law experts to discuss developing spousal support guidelines. Those discussions were supplemented by some additional small-scale consultations with other groups of lawyers and judges. The federal Department of Justice constituted what was initially a twelve (now thirteen) person Advisory Working Group on Family Law composed of lawyers, judges, and mediators from across the country. Its purpose was to advise the Department on family law matters generally, one of which was the Guidelines project. (A list of the members of the Advisory Working Group can be found in Appendix A.)

We brought to the project a knowledge of the law of spousal support based upon our own research and our comprehensive reading of reported spousal support decisions. Given that the guidelines were to build on current practice and that litigated cases represent only a very small percentage of the spousal support cases that make their way through the family law system, we knew we needed to draw on practice outside the realm of reported cases. We needed the on-the-ground experience of judges, lawyers and mediators who deal with spousal support issues every day and in many different contexts—advice to clients, negotiations with other lawyers, separation agreements, settlement conferences, mediations and collaborative law. The Advisory Working Group essentially played a consultative role. As directors of the project, we had had the responsibility for making the final judgement calls on the contents of the Advisory Guidelines.

We had five meetings with the Advisory Working Group during this stage of the project: the first in Ottawa (February 2003), the second in Montreal (May 2003), the third in Toronto (November 2003), the fourth in Ottawa (April 2004), and the fifth in Toronto (October 2004).

The discussions within the Advisory Working Group were directed first at determining the desirability and feasibility of developing advisory guidelines. Initially, not every member of the Group was supportive of spousal support advisory guidelines, but all were receptive to the general idea. There was also agreement that there were certain patterns in spousal support, at least at the level of outcomes and at least in certain kinds of cases. We then began the process of trying to craft advisory guidelines.

At this stage of the project we had already immersed ourselves in reported spousal support decisions to identify dominant patterns and to begin thinking about framing formulas that might capture those patterns. We had also read decisions on a province-by-province, territory-by-territory basis, looking for local patterns. We had identified certain categories of marriages and certain typical fact situations within them. To enhance our understanding of patterns in practice, we started, within the Advisory Working Group, with concrete fact situations to draw out group members' views of likely outcomes. In

¹⁴ The Background Paper has been translated and is available on the Department of Justice web site at <http://canada.justice.gc.ca/en/dept/pub/spousal/index.html> and on the Advisory Guidelines web site of the Faculty of Law, University of Toronto, see note 16, below.

reviewing the group's responses we identified where the answers clustered. We used the responses, in addition to our knowledge of reported decisions, to develop mathematical formulas which would generate amounts of spousal support as a percentage of spousal incomes. From these responses we also developed formulas for duration, the concept of restructuring (trading off amount against duration to increase amount or to extend duration) and exceptions to the formulas.

We then tested out our formulas, restructuring and exceptions on more fact situations. Finally, to ensure that they were acceptable when compared to current practice, we took the revised formulas, restructuring and exceptions and demonstrated the range of outcomes they would generate. Throughout this process of finalizing the formulas, we continued to read decisions, this time to test whether reported decisions fell within the formula ranges and, if not, whether restructuring or exceptions might account for the outcomes.

Given the practical nature of the project, the primary focus of the process was on support outcomes rather than on appropriate theories of spousal support. While people might often disagree at the level of theory, there can be a fair amount of consistency in actual award levels. We also began with the easiest categories of marriages where patterns in the current law are the clearest and where we expected the greatest consistency in outcomes. We began with long marriages, then moved to short marriages without dependent children, and then to marriages with dependent children. Lastly, we tackled the most difficult category, medium duration marriages without dependent children, where there is the most diversity of outcomes and the least consistency in the current law.

We then began the process of crystallizing the guidelines that were emerging in our discussions within the Advisory Working Group into a comprehensive draft proposal for spousal support advisory guidelines. A "Sneak Preview" of the draft proposal was presented at the National Family Law Program in La Malbaie, Quebec in July 2004. The feedback we received there, combined with further discussions within the Advisory Working Group, resulted in some fine-tuning of the proposal. The final version of the document entitled "Spousal Support Advisory Guidelines: A Draft Proposal" was released in January, 2005.¹⁵ At the time we realized that we could work longer on the Draft Proposal and continue to perfect it, but we were of the view that it was important to begin to broaden the discussion, by a public release of the proposed Advisory Guidelines.

2.4 The Second Stage of the Process: Information, Feedback and Revision

With the issuance of the Draft Proposal, the next stage of the process in the guidelines project began—one of discussion, experimentation, feedback and revision. The Draft

¹⁵ Carol Rogerson and Rollie Thompson, *Spousal Support Advisory Guidelines: A Draft Proposal* (January, 2005), available on-line at: <http://www.justice.gc.ca/en/dept/pub/spousal/project/index.html> and also on the Advisory Guidelines web site, see note 16, below. The paper was also issued in French under the title *Lignes directrices facultatives en matière de pensions alimentaires pour époux—Ébauche d'une proposition*.

Proposal was widely circulated amongst family lawyers, mediators and judges and posted on the Department of Justice website. There was also national media coverage of the release of the Draft Proposal.

Although the Advisory Guidelines were presented as a draft, subject to ongoing discussion and revision, it was a comprehensive and detailed draft. We fully expected that lawyers, judges and mediators would begin to use the Advisory Guidelines, despite their draft status, and in fact encouraged them to do so as the best way to test the Guidelines—to find out if they were useful, if they generated generally acceptable results within the current legal framework and to discover their flaws and limitations. We suggested that lawyers, for example, could begin to use the draft Advisory Guidelines to assist in structuring and guiding negotiations about spousal support, either explicitly as a principled basis for negotiation or, more modestly, as a litmus test of the reasonableness of offers or counter-offers derived by budgets or other methods. Judges were informed that they might use the guidelines in a similar fashion. The ranges could provide a check or litmus test to assess the positions of the parties in settlement conferences or in argument in hearings and trials. The Advisory Guidelines could also assist in adjudication, in providing one more way of approaching the discretionary decision to be made in spousal support cases.

The use of the draft Guidelines by lawyers and judges was facilitated by the speedy development and release of software programs to perform the calculations under the Advisory Guidelines' formulas. These software programs found their genesis in the introduction of the *Federal Child Support Guidelines* in 1997 and were already being used by many lawyers and judges prior to the release of the Draft Proposal in 2005. Each of the software suppliers—DIVORCEmate, ChildView and AliForm—incorporated the Spousal Support Advisory Guidelines into their software. We have worked closely with the software suppliers throughout the project and they have been a regular and helpful source of feedback.

After the release of the Draft Proposal we traveled across the country talking to groups of lawyers and judges, groups both large and small. For the most part the sessions were focused on education and information: we explained how the Advisory Guidelines were constructed and how they could be used to improve the consistency and predictability of spousal support awards. We picked up comments and reactions from those who attended these sessions, but many of the early comments reflected lack of knowledge of the Guidelines, or misconceptions or lack of use.

We continued to read reported decisions: to track the courts' use of the Advisory Guidelines, to look at cases where the Guidelines were considered but rejected, to note judicial criticisms and comments, and to refine the exceptions. Even after the release of the Draft Proposal, we continued to read reported spousal support decisions in every province and territory that made no mention of the Advisory Guidelines to determine whether the outcomes were nonetheless consistent with the formulas' ranges.

Monthly updates were prepared, reporting on on-going developments, including judicial decisions considering the Guidelines, feedback that we received in our travels, and any

problems or issues that were emerging. These updates were widely disseminated, posted not only on a web site created for the project¹⁶ but also on a number of other websites used by lawyers and judges.¹⁷

Another meeting of the Advisory Working Group was held in March of 2006 to review on-going developments and discuss emerging issues. By the summer of 2006, a year and half after the release of the Draft Proposal, there was sufficient familiarity and experience with the Advisory Guidelines that it was possible to move into the next phase of the project—one of seeking informed feedback in a structured way with a view to making revisions to the *Draft Proposal*. A new document was prepared to structure that feedback process, the “Issues Paper,” a draft of which was released at the National Family Law Program in Kananaskis, Alberta, in July 2006, and the final version in August 2006.¹⁸ The paper identified issues for revision and, on some issues, possible options for revision.

In September of 2006 we began another cross-Canada tour, this time seeking out feedback from lawyers, mediators and judges, in small groups where the discussion could be very focused. We also invited written responses to the Draft Proposal. We received written comments from members of the public, from individual lawyers and from bar associations.¹⁹

As a result of the feedback we obtained from these sources, supplemented by our continued reading of a steady stream of reported spousal support decisions, we developed a detailed and practical sense of how the Advisory Guidelines were being used on the ground, and a more finely-tuned understanding of what revisions were necessary. With the assistance of the Advisory Working Group at two further meetings (Toronto, November 2006 and Montreal, June 2007) we began to reflect upon the feedback and work on issues for revision. This document, the final version of the Advisory Guidelines, reflects those revisions.

In the next section we discuss in more detail the responses to the Draft Proposal which have shaped the revision process. As will be shown, in general the Advisory Guidelines have had a very warm reception from lawyers, mediators and judges, and the revisions have involved fine-tuning rather than radical revision.

¹⁶ This web site is located at the Faculty of Law, University of Toronto:

English: <http://www.law.utoronto.ca/faculty/rogerson/ssag.html>

French: http://www.law.utoronto.ca/faculty/rogerson/ssag_fr.html

¹⁷ These include QuickLaw, WestlaweCARSWELL, the Canadian Bar Association National Family Law Section website, and for judges, the judicial library on Judicom.

¹⁸ Carol Rogerson and Rollie Thompson, "Issues for Discussion: Revising the Spousal Support Advisory Guidelines" (August 2006), posted on the Advisory Guidelines web site, *supra* note 16.

¹⁹ Comments were received from the Canadian Bar Association, National Family Law Section and from the Family Law Committee of the Barreau du Québec.

2.5 The Response to the Advisory Guidelines

2.5.1 Widespread use of the Advisory Guidelines

The Draft Proposal very quickly achieved one of its goals: the rekindling of serious debate in Canada about the law of spousal support as lawyers, judges and members of the public reacted to its contents. Discussions of developments and issues in spousal support law now invariably focus on the Advisory Guidelines.

Awareness has increased over time, not only within the professional community of family law judges, lawyers, and mediators, but also within the larger population of divorcing spouses trying to navigate their way through the family law system. Over 50,000 copies of the Draft Proposal were downloaded from the Justice web site in the first year after its release. Family law clients now often walk into their lawyers' offices knowing about the Advisory Guidelines. As of February, 2008 there were over 400 judicial decisions from across the country in which the Advisory Guidelines have been considered, including strong endorsements from appellate courts in three provinces: British Columbia, New Brunswick and Ontario. The judicial response to the Guidelines will be discussed in more detail below.

But decided cases are only the tip of the iceberg, as few spousal support cases go to trial. Even more significantly, we learned in our travels across the country that the Advisory Guidelines are being widely used in discussions with clients, in negotiations with other lawyers, and in settlement conferences with judges. In general, the Advisory Guidelines have had a very warm reception from lawyers, mediators and judges, as people appreciate the benefit of greater consistency and predictability. Again and again, we heard that it is helpful to have a range to know that one's claim, offer, settlement or decision is "in the ballpark".

2.5.2 Criticisms of the Guidelines

There have certainly been criticisms of the Advisory Guidelines. Some criticisms were easily dealt with: they were based on misunderstandings about the Draft Proposal and quickly disappeared with a more accurate understanding of the scheme. Other criticisms flagged problems and concerns with specific parts of the Draft Proposal and were very helpful in the process of revising and improving the scheme.

However, there were also more fundamental criticisms leading some to reject the Advisory Guidelines outright. Some critics were fundamentally opposed to the concept of any "guidelines" for spousal support, viewing the nature of the decision-making in spousal support cases as necessarily discretionary and individualized. They criticized the Guidelines for their rigidity—for offering "cookie cutter" answers that fail to deliver individual justice in each case. It was suggested that some judges would simply apply the Guidelines rather than engaging in the hard analytic work demanded by the *Divorce Act*. Other critics were troubled by the informal, advisory status of the guidelines, seeing them

as an illegitimate attempt to change the law outside of the legislative process. These criticisms found judicial expression.²⁰

These criticisms do not represent the dominant view of the Advisory Guidelines that has emerged as the Guidelines have become better understood. We believe it is important, nonetheless, to address the criticisms briefly here.

Criticisms of the Advisory Guidelines as “too rigid” have often assumed a more rigid scheme than the one we actually developed. Some of the concerns about undue rigidity also embodied a fear that the Guidelines would be applied in a rigid and inflexible fashion, whatever our intentions. Our consultations since the release of the Draft Proposal have revealed that unsophisticated use of the Advisory Guidelines by both judges and lawyers is a concern. However, the appropriate remedy, in the minds of most lawyers and judges, is further education rather than rejection of the Advisory Guidelines and the benefits of increased certainty and predictability that they have brought. We have also seen many cases where use of the Advisory Guidelines has enhanced the quality of judicial reasons as judges respond to the benchmarks provided by the Guidelines and decide whether or not the formula outcomes are appropriate.

Those who oppose any form of guidelines for spousal support and who stress the unique nature of every case ignore the fact that there are many typical cases with very similar facts. They also undervalue the importance of consistency. Consistency is related to a fundamental principle of law: equal treatment, the similar treatment of similar cases. The formulas found in the Advisory Guidelines generate outcomes across a wide range of cases in a consistent, principled fashion, serving as a healthy check upon one’s “gut feeling” or budget-based result.

As for the criticism that the Advisory Guidelines are an illegitimate attempt to change the law, it is true that the formulas at the core of the Advisory Guidelines can easily be taken, at first glance, as an entirely new scheme of income-sharing that has been superimposed on the *Divorce Act*. But an understanding of the intentions informing the project and the way in which the Advisory Guidelines were developed counters this first impression. The Advisory Guidelines are intended to reflect current law, not to change it. The formulas were developed to embody, or act as “proxy measures” of, the principles and factors which structure the current law of spousal support. The formula ranges are intended to capture the dominant ranges of support outcomes under the current law and practice.

It must be recognized that some criticisms of the Advisory Guidelines are really criticisms of the current law, reflecting a preference for a stricter compensatory approach, as if *Bracklow* never happened, or a pre-*Moge* approach that placed heavy emphasis on achieving a clean break. The open-ended discretion under the current law allows lawyers and judges to insert their personal theories of spousal support into their determinations of

²⁰ See, for example, the decisions of Justice Trussler in *V.S. v. A.K.*, [2005] A.J. No. 1357, 2005 ABQB 754 (Alta.Q.B), Justice Julien in *D.S. c. M.S.*, [2006] J.Q. no. 506, 2006 QCCS 334 (C.S), and Justice Campbell in *Vanderlinden v. Vanderlinden*, [2007] N.S.J. No. 107, 2007 NSSC 80. The criticisms voiced by Justice Julien were echoed at the appellate level by Quebec Court of Appeal *G.V. v. C.G.*, [2006] J.Q. no. 5231.

the amount and duration of spousal support. Guidelines, even Advisory Guidelines, serve to reveal and hence constrain outcomes at odds with the principles and dominant patterns of the current law.

2.5.3 The Advisory Guidelines in the courts

The case law under the Advisory Guidelines has been burgeoning since the release of the Draft Proposal. As of November 2008 there were over 400 judicial decisions in which the Advisory Guidelines have been considered. There are trial level decisions from every province and territory.²¹ In addition, in their brief lifetime since the release of the Draft Proposal, the Advisory Guidelines have been considered by five provincial courts of appeal. There are 19 appellate level decisions: 12 from the British Columbia Court of Appeal, three from the New Brunswick Court of Appeal, and one each from the Nova Scotia, Alberta, Quebec and Ontario Courts of Appeal.²²

The Advisory Guidelines have received strong endorsement from the British Columbia, New Brunswick and Ontario Courts of Appeal and have been referred to with approval by the Alberta and Nova Scotia Courts of Appeal. They have, however, received what can at best be described as a lukewarm reception from the Quebec Court of Appeal.²³ They have not yet been considered by the Supreme Court of Canada.²⁴

The single most important judicial decision on the Advisory Guidelines to date remains that of the British Columbia Court of Appeal in *Yemchuk v. Yemchuk*,²⁵ released in late August of 2005. In this ground-breaking decision, which was the first appeal court consideration of the Guidelines, the B.C. Court of Appeal approved of the Advisory Guidelines “as a useful tool to assist judges in assessing the quantum and duration of spousal support.” The Court of Appeal stated that the Advisory Guidelines “are intended to reflect the current law rather than to change it”, “to build upon the law as it exists”. The Court described “the move away from a budget-laden analysis” as “appealing”.

In *Yemchuk*, the Court also clarified the legal status of the Guidelines in the courtroom, an issue that had been troubling lawyers and judges. The Advisory Guidelines were not

²¹ As of February 8, 2008 the Advisory Guidelines had been considered in 425 reported cases. British Columbia generated the highest number of decisions (167), far surpassing the other provinces. Ontario came in second (107). A significant number of cases were from Alberta (42) and Nova Scotia (29). After this came Newfoundland and Labrador (23), Saskatchewan (19) and New Brunswick (18).

²² See Carol Rogerson and Rollie Thompson, “The Advisory Guidelines 31 Months Later” (September 12, 2007) and “The Spousal Support Advisory Guidelines Three Years Later” (February 8, 2008), both posted on the Advisory Guidelines web site, *supra* note 16.

²³ *G.V. v. C.G.*, *supra* note 20. At worst the decision can be read as an adoption by the Court of the rigidity and illegitimacy criticisms discussed above, and hence as a rejection of the Advisory Guidelines. At best the decision can be read as a ruling on the facts in which the trial judge was found to have used the Guidelines inappropriately by failing to engage in any of the necessary analysis apart from the Guidelines formula. The use of the Advisory Guidelines in Quebec is discussed more fully in Chapter 15.

²⁴ Leave to appeal was sought but denied in *S.C. v. J.C.*, [2006] N.B.J. No. 186, a decision of the New Brunswick Court of Appeal which endorsed the use of the Advisory Guidelines by the trial judge; see note 26, below.

²⁵ [2005] B.C.J. No. 1748, 2005 BCCA 406.

“law” and would not be legislated. Were they then “evidence” or “expert evidence” and was there a need to “prove” the document? Justice Prowse, writing for the Court, described the Advisory Guidelines in terms similar to a compilation of precedent:

It should also be stressed that the Advisory Guidelines are intended to reflect the current law, rather than to change it. They were drafted by the authors after extensive analyses of the authorities regarding spousal support across the country, particularly the *Moge* and *Bracklow* decisions and those following thereafter. ... While decisions can undoubtedly be found in which the result would not accord with the Advisory Guidelines, I am satisfied that their intention and general effect is to build upon the law as it exists, rather than to present an entirely new approach to the issue of spousal support... They do not operate to displace the courts' reliance on decided authorities (to the extent that relevant authorities are forthcoming) but to supplement them.

The *Draft Proposal* was thus not evidence, but part of legal argument and reasoning, and could be cited like any other article, text or government document. For the judge, the Advisory Guidelines could be used as one more piece of useful information in the determination of the amount and duration of spousal support.

In April of 2006 the New Brunswick Court of Appeal became the second appellate court to approve of the Advisory Guidelines with its decision in *S.C. v. J.C.*²⁶ Following the reasoning in *Yemchuk* on the issue of the Guidelines' consistency with current law, Justice Larlee, writing for the Court of Appeal, approved of the Advisory Guidelines in the following terms:

The guidelines have been referred to in many ways: a check, a cross-check, a litmus test, a useful tool and a starting point. But it is my view that whichever term one likes to employ, their use, through the available software, will help in the long run to bring consistency and predictability to spousal support awards. Not only will they foster settlement, they will also allow spouses to anticipate their support responsibilities at the time of separation.

Since *Yemchuk*, the B.C. Court of Appeal has considered the Advisory Guidelines in 10 other decisions. The most important of these, in terms of the evolving legal status of the Guidelines, is the July 2006 decision in *Redpath v. Redpath*.²⁷ In *Redpath* the Court incorporated the Guidelines ranges into the standard of appellate review:

Cases such as *Hickey*, however, were decided prior to the introduction of the Advisory Guidelines. Now that they are available to provide what is effectively a “range” within which the awards in most cases of this kind should fall, it may be that if a particular award is substantially lower or higher than the range and there are no exceptional circumstances to explain the anomaly, the standard of review should be reformulated to permit appellate intervention.

The Court of Appeal thus recognized that the Advisory Guidelines now offer some benchmarks for the range of acceptable trial results, making it possible to justify appellate intervention when trial decisions fall substantially outside those benchmarks.

In January of 2008, as we were putting the finishing touches to the final version of the Advisory Guidelines, the Ontario Court of Appeal released its decision in *Fisher v.*

²⁶ [2006] N.B.J. No. 186, leave to appeal to the SCC denied, [2006] S.C.C.A. No. 246 (Oct. 19, 2006))

²⁷ [2006] B.C.J. No. 1550, 2006 BCCA 338.

Fisher.²⁸ In *Fisher* the Ontario Court of Appeal followed *Yemchuk* in endorsing the Advisory Guidelines as a useful tool and a “litmus test” for the reasonableness of spousal support awards, while adding the important caveat that the Advisory Guidelines do not replace an individualized analysis and must be applied in their entirety.

As a result of the appellate endorsement of the Advisory Guidelines in British Columbia and New Brunswick, trial courts in those provinces now refer to the Guidelines in virtually every spousal support decision. But even in provinces where there has not been such strong appellate endorsement or any appellate endorsement at all—Ontario (prior to the release of *Fisher*), Nova Scotia, Saskatchewan, Alberta, and Newfoundland and Labrador—we have also seen wide-spread and growing use of the Guidelines by trial judges, in settlement conferences, on applications for interim support and in trials.

2.5.4 Results of the feedback: “the ranges are about right”

The feedback we have gathered since the release of the Draft Proposal, has confirmed the basic structure of the Guideline formulas.²⁹ Some parts of the country inhabit the high end of ranges and some the low ends, but current practice across the country is by and large accommodated by the formula ranges. We did hear about problems with the application of the formulas to particular fact situations and specific subsets of cases, and we took these into account in the revision process, as will be discussed in the chapters that follow. As a result of the feedback we received, the revisions we have made to the Draft Proposal in this final version of the Advisory Guidelines have involved fine-tuning rather than radical revision: some modest tweaking of the formulas and the addition of some new exceptions.³⁰

2.5.5 Unsophisticated use

The main problem that emerged both from the feedback process³¹ and our reading of Guidelines cases is that the Advisory Guidelines are often used in an unsophisticated fashion by both lawyers and judges. Some lawyers and judges seem to focus only on the formulas and to ignore other parts of the Guidelines scheme, such as entitlement, exceptions and restructuring. The choice of a particular amount or duration within the range is often left unexplained. There has been a tendency to convert the Guidelines into default rules, even when such was not intended.

We have tried to be conscious of unsophisticated use in revising the Draft Proposal. While much of the actual content has not changed, we have changed the structure and presentation. We have tried to write more clearly, to respond to some of the misinterpretations and misunderstandings of the Draft Proposal. And we have highlighted

²⁸ *Fisher v. Fisher*, [2008] O.J. No. 38, 2008 ONCA 11.

²⁹ A more detailed discussion of our findings can be found in Carol Rogerson and Rollie Thompson, “The Advisory Guidelines 31 Months Later” (September 12, 2007), posted on the Advisory Guidelines web site, *supra* note 16.

³⁰ The revisions are detailed in the accompanying “Report on Revisions”.

³¹ This concern was emphasized in the submission of the Canadian Bar Association, National Family Law Section, “Spousal Support Advisory Guidelines,” May 2007, referred to *supra*, note 19.

topics that are often forgotten, topics like entitlement, using the ranges, restructuring, exceptions and self-sufficiency.³²

To some extent, unsophisticated use was to be expected in the first year or two of the Advisory Guidelines. Over time, as lawyers and judges become more experienced, we would expect to see a more sophisticated use of all the various parts of the Guidelines—and indeed we have already started to see this happen in places such as British Columbia where the Guidelines are used extensively on a province-wide basis.

³² As part of the revision process we also plan to produce an “operating manual” which will present in a concise format the various steps and considerations involved the use of the Advisory Guidelines. To the extent that the use of computer software has contributed to the problem of unsophisticated use by presenting the formula outcomes without analysis or reasons, we will be working with the software suppliers to encourage the use of more prompts and reminders, to ensure that lawyers and judges remain alert to the full operation of the Advisory Guidelines, before and beyond the formulaic ranges.

3 AN OVERVIEW OF THE ADVISORY GUIDELINES

Spousal support guidelines can be structured in many different ways. For those who are interested, the Background Paper reviews in detail other models of spousal support guidelines. This chapter presents a structural overview of this scheme of Advisory Guidelines. Some of what you will find here has already been touched on, in a less systematic way, in Chapter 2. As well, many of the individual components of the Advisory Guidelines will be discussed more extensively in subsequent chapters. However, we thought it would be helpful for readers to have a sense of the big picture at the beginning.

We begin with a discussion of the basic concept of income sharing on which the Advisory Guidelines are constructed and then move into an organized, step-by-step review of the specific components of the Advisory Guidelines. We have divided this review into three main sections. First, we deal with the preliminary issues that arise *before* any consideration of the formulas—what might be called issues of application. Then we deal with the basic structure of the income-sharing formulas for determination of amount and duration of support that are at the heart of the proposed approach. The outcomes generated by the formulas are not necessarily determinative, however. The final section deals with the steps that can be taken *after* the formula calculations: locating a specific amount or duration within the ranges, restructuring the formula outcomes (by trading off amount against duration), and departing from the amounts and durations generated by the formulas, through exceptions.

3.1 Income Sharing

The core concept on which the Spousal Support Advisory Guidelines are built is **income sharing**. Under the Advisory Guidelines, budgets play a diminished role in determining spousal support outcomes. Instead the Advisory Guidelines look primarily to the incomes of the parties and rely on a mathematical formula to determine the portion of spousal incomes to be shared. Contrary to common perception, **income sharing does not mean equal sharing**. There are many ways of sharing income; it all depends on the formula that is adopted.

You will see below that other factors are also relevant in determining support outcomes under the Advisory Guidelines, such as the presence of dependent children or the length of the marriage. But the income levels of the parties and, and more specifically the income disparity between them, become the primary determinants of support outcomes. Under the Spousal Support Advisory Guidelines, as under the *Child Support Guidelines*, the precise determination of income, including the imputing of income, becomes a much more significant issue than it has been in the past.

Income sharing here is a method, and not a new theory of spousal support. As we have noted earlier, the Advisory Guidelines project has not been driven by a desire to theoretically reorder the law of spousal support. Rather it has been driven by the practical

needs of family law practitioners and judges who deal with the daily dilemmas of advising, negotiating, litigating and deciding spousal support.

It is therefore important to emphasize that **the use of income sharing as a method** for determining the amount of spousal support does not necessarily imply adoption of the income-sharing theories of spousal support identified in the Background Paper. Some of these theories, which are admittedly contentious, rest upon a view of marriage as a relationship of trust and community, which justifies treating marital incomes as joint incomes.

The method of income sharing can be used, however, as a practical and efficient way of implementing many support objectives such as compensation for the economic advantages and disadvantages of the marriage or the recognition of need and economic dependency. Such use of proxy measures already exists in spousal support law—think of the prevalent use of standard of living and a “needs and means” analysis to quantify compensatory support.

The Guidelines do not commit to any particular theory of spousal support. As will become clear in the discussion of the different formulas under these Advisory Guidelines, they aim to accommodate the multiple theories that now inform our law and, to generate results that are in broad conformity with existing patterns in the law.

We now move on to an overview of the basic framework of the specific scheme of income sharing found in the Advisory Guidelines.

3.2 Preliminary Issues—The Applicability of the Advisory Guidelines

3.2.1 Form and force

Unlike the *Federal Child Support Guidelines*, the Spousal Support Advisory Guidelines **have not been legislated**. Following the practice in some American jurisdictions, these are **informal guidelines**. **They are not legally binding. Their use is completely voluntary.** They have been and will be adopted by lawyers and judges to the extent they find them useful, and will operate as a practical tool within **the existing legal framework**. As non-legislated, informal guidelines, these Guidelines are **advisory only**. They are intended as a **starting point** for negotiation and adjudication.

3.2.2 Entitlement

The Advisory Guidelines do **not** deal with entitlement. The informal status of the Guidelines means that they must remain subject to the entitlement provisions of the *Divorce Act*, notably ss. 15.2(4) and (6) as interpreted by the courts. Entitlement therefore remains a threshold issue to be determined before the guidelines will be applicable.

On its own, a mere disparity of income that would generate an amount under the Advisory Guidelines formulas, does not automatically lead to entitlement. There must be a finding (or an agreement) on entitlement, on a compensatory or non-

compensatory or contractual basis, *before* the formulas and the rest of the Guidelines are applied.

The Advisory Guidelines were drafted on the assumption that the current law of spousal support, post-*Bracklow*, continues to offer a very expansive basis for entitlement to spousal support. Effectively any significant income disparity generates an entitlement to some support, leaving amount and duration as the main issues to be determined in spousal support cases. However, the Guidelines leave the issue of when an income disparity is significant, in the sense of signalling entitlement, to the courts. It is open to a court to find no entitlement on a particular set of facts, despite income disparity, and the Advisory Guidelines do not speak to that issue.

The basis of entitlement is important, not only as a threshold issue, but also to determine location within the formula ranges or to justify departure from the ranges as an exception. Entitlement issues also arise frequently on review and variation, especially applications to terminate support.

Entitlement is dealt with in Chapter 4.

3.2.3 Application to provincial/territorial law

The Advisory Guidelines have specifically been developed under the federal *Divorce Act* and are intended for use under that legislation. Provincial/territorial support law is governed by distinct statutory regimes. However, in practice there is much overlap between federal and provincial/territorial support laws.

The broad conceptual framework for spousal support articulated by the Supreme Court of Canada in *Moge* and *Bracklow* has been relied upon under both provincial and federal legislation. Indeed *Bracklow*, which combined claims under the *Divorce Act* and provincial legislation, made no real distinction between the two. Given this overlap, the Advisory Guidelines have been used under provincial/territorial support legislation.

There are some distinctive features of provincial/territorial spousal support laws that need to be taken into account when using the Advisory Guidelines. Many provincial/territorial laws have specific provisions governing entitlement, for example provisions determining which non-marital relationships give rise to a spousal support obligation. Like other issues of entitlement discussed above, this must be a threshold determination before the Advisory Guidelines are applied to determine amount and duration of support. We also note that the list of specific factors to be considered in determining spousal support does vary from statute to statute, with some provincial/territorial legislation making explicit reference, for example, to factors such as property and conduct, although the impact of these differences in wording on spousal support outcomes is unclear.

Provincial laws differ from the *Divorce Act* in their application to unmarried couples but this should not cause any difficulties with respect to the operation of the Advisory Guidelines. Although we conveniently refer to “length of marriage” as a relevant factor in the operation of the formulas, the formulas actually rely upon the period of spousal

cohabitation (including any periods of pre-marital cohabitation), thus easily meshing with provincial/territorial legislation.

The application of the Advisory Guidelines under provincial/territorial legislation is dealt with in Chapter 5.

3.2.4 Application to agreements

The Advisory Guidelines **do not confer any power to re-open or override final agreements on spousal support**. This issue, like entitlement, is outside the scope of the Advisory Guidelines and will continue to be dealt with under the common law doctrine of unconscionability, provincial/territorial statutes and the evolving interpretation of the Supreme Court of Canada's recent decision in *Miglin*.³³ Agreements limiting or waiving spousal support may therefore preclude the application of the Guidelines.

If a final agreement is set aside or overridden under existing law, the Advisory Guidelines *may* be of assistance in determining the amount and duration of support, although the intentions of the parties as reflected in the agreement may also continue to influence the outcome.

As well, the Advisory Guidelines *may* be applicable if a spousal support agreement provides for review or variation.

Further discussion of the application of the Advisory Guidelines in the cases where there are spousal support agreements can be found in Chapters 5 and 14.

3.2.5 Interim orders

The Advisory Guidelines are intended to apply to interim orders as well as final orders. We anticipate, in fact, that they will be particularly valuable at the interim stage, which is now dominated by a needs-and-means analysis—budgets, expenses and deficits that require individualized decision making.

Any periods of interim support clearly have to be included within the durational limits set by the Advisory Guidelines. Otherwise, if duration were only to be fixed in final orders, there would be incentives in both directions—for some to drag out proceedings and for others to speed them up—and general inequity. Interim support is discussed in Chapter 5.

The Advisory Guidelines do recognize that the amount may need to be set differently during the interim period while parties are sorting out their financial situation immediately after separation. To accommodate these short-term concerns, the Guidelines recognize an exception for compelling financial circumstances in the interim period, considered in Chapter 12.

³³ *Miglin v. Miglin*, [2003] 1 S.C.R. 303.

3.2.6 Review and variation

The primary application of the Advisory Guidelines is to **initial determinations** of spousal support at the point of separation or divorce, whether through negotiated agreements or court orders. Ideally a truly comprehensive set of guidelines would apply not only to the initial determination of support but also to subsequent reviews and variations over time. However, these issues have proven the most difficult to reduce to a formula given the uncertainty in the current law concerning the effect of post-separation income changes, remarriage and repartnering, and subsequent children.

In the end, we chose a more modest course, identifying certain situations where the Advisory Guidelines can apply on reviews and variations, including increases in the recipient's income and decreases in the payor's income. We have left others, such as post-separation increases in the payor's income, re-partnering, remarriage and second families, to more discretionary determinations under the evolving framework of current law.

The application of the Advisory Guidelines in the context of review and variation is dealt with more extensively in Chapter 14.

3.3 The Formulas

3.3.1 Two basic formulas

The Advisory Guidelines are constructed around **two basic formulas**, rather than just one formula: the *without child support formula* and the *with child support formula*. The dividing line between the two is the absence or presence of a dependent child or children of the marriage, and a concurrent child support obligation, at the time spousal support is determined.

3.3.2 Determining income

Both formulas use **income sharing** as the method for determining the amount of spousal support, not budgets. Income-sharing formulas work directly from income, as income levels essentially determine the amount of support to be paid. Under the Advisory Guidelines, the accurate determination of income becomes a much more significant issue in spousal support cases than it has in the past, and there may be more incentives to dispute income. However, because the Advisory Guidelines generate ranges and not specific amounts, absolute precision in the determination of income may not be as crucial as under the *Federal Child Support Guidelines*. Many cases will involve combined claims for child and spousal support, where a precise determination of income is already required for child support purposes.

The starting point for the determination of income under both formulas is the definition of income under the *Federal Child Support Guidelines*, including the Schedule III adjustments. More details on the determination of income are found in Chapter 6.

The Advisory Guidelines do not solve the complex issues of income determination that arise in cases involving self-employment income and other forms of non-employment income. In determining income it may be necessary, as under the *Federal Child Support Guidelines*, to **impute income** in situations where a spouse’s actual income does not appropriately reflect his or her earning capacity. In some cases the issue will be imputing income to the payor spouse. On variation and review the issue may be imputing income to the recipient spouse if it is established that the he or she has failed to make appropriate efforts towards self-sufficiency.

3.3.3 The *without child support* formula

In cases where there are no dependent children, the ***without child support* formula** applies. This formula relies heavily upon length of marriage—or more precisely, the length of relationship, including periods of pre-marital cohabitation—to determine both the amount and duration of support. Both amount and duration increase with the length of the relationship. This formula is constructed around the concept of **merger over time** which offers a useful tool for implementing both compensatory and non-compensatory support objectives in cases where there are no dependent children in a way that reflects general patterns in the current law.

Under the basic *without child support* formula:

- The *amount* of spousal support is 1.5 to 2 percent of the difference between the spouses’ gross incomes for each year of marriage, to a maximum range of 37.5 to 50 per cent of the gross income difference for marriages of 25 years or more (The upper end of this maximum range is capped at the amount that would result in equalization of the spouses’ net incomes—the net income cap.)
- *Duration* is .5 to 1 year of support for each year of marriage, with duration becoming indefinite (duration not specified) after 20 years *or*, if the marriage has lasted 5 years or longer, when the years of marriage and age of the support recipient (at separation) added together total 65 or more (the “rule of 65”).

The *without child support* formula is discussed in detail in Chapter 7.

3.3.4 The *with child support* formula

In cases where there are dependent children, the ***with child support* formula** applies. The distinctive treatment of marriages with dependent children and concurrent child support obligations is justified by both theoretical and practical considerations and is reflected in current case law.

On the theoretical front, marriages with dependent children raise strong compensatory claims based on the economic disadvantages flowing from assumption of primary responsibility for child care, not only during the marriage, *but also after separation*. We have identified this aspect of the compensatory principle as it operates in cases involving dependent children as the **parental partnership principle**, and have drawn on this concept in structuring the *with child support* formula. For marriages with dependent

children, length of marriage is not the most important determinant of support outcomes as compared to post-separation child-care responsibilities.

On the practical front, child support must be calculated first and given priority over spousal support. As well, the differential tax treatment of child and spousal support must be taken into account, complicating the calculations. The *with child support* formula thus works with computer software calculations of net disposable incomes

Under the basic *with child support* formula:

- Spousal support is an *amount* that will leave the recipient spouse with between 40 and 46 percent of the spouses' net incomes *after child support has been taken out*. (We refer to the spouses' net income after child support has been taken out as Individual Net Disposable Income or INDI).
- The approach to *duration* under this formula is more complex and flexible than under the *without child support* formula; orders are initially indefinite in form (duration not specified) but the formula also establishes durational ranges which are intended to structure the process of review and variation and which limit the cumulative duration of awards under this formula. These durational limits rely upon both length of marriage and the ages of the children.

The *with child support* formula is really a cluster of formulas dealing with different custodial arrangements. **Shared and split custody** situations require slight variations in the computation of individual net disposable income, as the backing out of child support obligations is a bit more complicated. There is also a different, hybrid formula for cases where **spousal support is paid by the custodial parent**. Under this formula, the spouses' Guidelines incomes are reduced by the grossed-up amount of child support (actual or notional) and then the *without child support* formula is applied to determine amount and duration. Finally, there is one more hybrid formula for those spousal support cases where the child support for **adult children** is determined under section 3(2)(b) of the *Child Support Guidelines*.

The *with child support* formula is discussed in detail in Chapter 8.

3.3.5 Length of marriage

Under the Advisory Guidelines length of marriage is a primary determinant of support outcomes in cases *without* dependent children. Under the *without child support* formula the percentage of income sharing increases with length of the marriage; the same is true for duration of support.

Length of marriage is much less relevant under the *with child support* formula, although it still plays a significant role in determining duration under that formula.

Given the relevance of length of marriage under the Advisory Guidelines, it is important to clarify its meaning. **While we use the convenient term length of marriage, the more**

accurate description is the length of the cohabitation, which includes periods of pre-marital cohabitation, and ends with separation.

3.3.6 Ranges

The Advisory Guidelines do not generate a fixed figure for either amount or duration, but instead produce a **range of outcomes** that provide a starting point for negotiation or adjudication.

Ranges create scope for more individualized decision-making, allowing for argument about where a particular case should fall within the range in light of the *Divorce Act*'s multiple support objectives and factors. Ranges can also accommodate some of the variations in current practice, including local variations in spousal support cultures.

3.3.7 Ceilings and floors

As with the *Federal Child Support Guidelines*, the Spousal Support Advisory Guidelines establish ceilings and floors in terms of the income levels to which they are applicable. Both the ceiling and the floor have been set by reference to the annual gross income of the payor. The ceiling has been set at a gross annual income for the payor of \$350,000 and the floor at a gross annual income of \$20,000. Ceiling and floors are dealt with more extensively in Chapter 11.

3.4 After the Formulas Have Been Applied

Under the Advisory Guidelines there is still much room for flexibility to respond to the facts of particular cases. First, there is considerable room for discretion in the fixing of precise amounts and durations within the ranges generated by the formulas. Second, there is the ability to restructure the formula outcomes by trading off amount against duration. Third the other is the possibility of departing from the formula outcomes by relying upon exceptions.

3.4.1 Using the ranges

The location of a precise amount or duration within those ranges will be driven by the factors detailed in Chapter 9: the strength of any compensatory claim, the recipient's needs, the age, number, needs and standard of living of any children, the needs and ability to pay of the payor, work incentives for the payor, property division and debts, and self-sufficiency incentives.

3.4.2 Restructuring

Although the formulas generate separate figures for amount and duration, the Advisory Guidelines explicitly recognize that these awards can be restructured by trading off amount against duration.

In *Bracklow* the Supreme Court of Canada explicitly recognized that the amount and duration of awards can be configured in different ways to yield awards of similar value

(what the Court called quantum). Thus the Court noted that an order for a smaller amount paid out over a long period of time can be equivalent to an order for a higher amount paid out over a shorter period of time.

Restructuring can be used in three ways:

- to **front-end load** awards by increasing the amount beyond the formulas' ranges and shortening duration;
- to **extend duration** beyond the formulas' ranges by lowering the monthly amount; and
- to formulate a **lump sum** payment by combining amount and duration.

When restructuring is relied upon to resolve issues of inappropriate formula outcomes, awards remain consistent with the overall or global amounts generated by the Advisory Guidelines. **Restructuring thus does not involve an exception or departure from the formulas.**

Restructuring works best when duration is clearly defined, and will thus have its primary application under the *without child support* formula.

Restructuring is dealt with in more detail in Chapter 10.

3.4.3 Exceptions

The formulas are intended to generate appropriate outcomes in the majority of cases. We recognize, however, that there will be cases where the formula outcomes, even after consideration of restructuring, will not generate results consistent with the support objectives and factors under the *Divorce Act*. The informal, advisory nature of the Guidelines means that the formula outcomes are never binding and departures are always possible on a case-by-case basis where the formula outcomes are found to be inappropriate. The Advisory Guidelines do, however, itemize a series of exceptions which, although clearly not exhaustive, are intended to assist lawyers and judges in framing and assessing departures from the formulas. The exceptions create room both for the operation of competing theories of spousal support and for consideration of the particular factual circumstances in individual cases where these may not be sufficiently accommodated by restructuring.

The exceptions are listed and explained in Chapter 12:

- compelling financial circumstances in the interim period;
- debt payments;
- prior support obligations;
- illness or disability of a recipient spouse;
- a compensatory exception for shorter marriages under the *with child support* formula;

- reapportionment of property (British Columbia);
- basic needs/hardship under the *without child support* and *custodial payor* formulas;
- non-taxable payor income;
- non-primary parent to fulfil a parenting role under the *custodial payor* formula;
- special needs of a child; and
- section 15.3 for small amounts and inadequate compensation under the *with child support* formula.

4 ENTITLEMENT

The Advisory Guidelines do **not** deal with entitlement. They deal with the amount and duration of support after a finding of entitlement. The informal status of the Guidelines means that they must remain subject to the entitlement provisions of the *Divorce Act*, notably ss. 15.2(4) and (6), as interpreted by the courts. Entitlement therefore remains a threshold issue to be determined before the Guidelines will be applicable. **On its own, a mere disparity of income that would generate an amount under the Advisory Guidelines formulas does not automatically lead to entitlement.**

The Advisory Guidelines were drafted on the assumption that the current law of spousal support, post-*Bracklow*, offers a very expansive basis for entitlement to spousal support. As a general matter, if there is a significant income disparity at the end of the marriage, there will be an entitlement to some support, leaving amount and duration as the main issues to be determined in spousal support cases. The Advisory Guidelines do not, however, pre-determine when an income disparity will be large enough to create entitlement, leaving that issue to the courts. Nor do the Guidelines preclude the possibility that courts may find no entitlement on particular facts despite a fairly significant income disparity.

We recognize that the Advisory Guidelines may, over time, shape understandings of entitlement.³⁴ But this will be part of the normal evolution of the law in this area. It is also possible that the law of entitlement may change over time, if the Supreme Court of Canada or an appellate court were to decide to narrow or refine *Bracklow*.

Concerns have been raised that the Advisory Guidelines will generate more litigation, or more potential for litigation, on the issue of entitlement as payors will view this as a way of avoiding the application of the Guidelines. In our view, an increased focus on the issue of entitlement would not necessarily be a bad thing given the absence of analysis that tends to prevail in this area of law. And realistically, serious entitlement issues arise only in a relatively narrow range of cases.³⁵ At this point, we have seen no evidence of increased litigation on entitlement.

Since the release of the Draft Proposal we have found that the threshold issue of entitlement is often ignored in practice, with entitlement simply being assumed because there is a difference in spousal incomes that generates an amount of support under the formulas as displayed by the software. We emphasize once again that this is incorrect. **There must be a finding (or agreement) on entitlement before the formulas and the rest of the Guidelines are applied.**

³⁴ For an example of a case in which the Advisory Guidelines were considered in the entitlement analysis see *R.S.R. v. S.M.R.*, [2006] B.C.J. No. 2109, 2006 BCSC 1404.

³⁵ As will be shown in the discussion below, findings of “no entitlement” are most likely in shorter marriages, which are “small stakes” cases. At the other end of the spectrum, entitlement issues are usually fairly clear in “large stakes” cases like long marriages. This means that entitlement is most likely to arise as a contested issue in medium-length cases under the *without child support* formula.

Furthermore, entitlement is not just a threshold issue; entitlement matters throughout the Guidelines. Even where entitlement is found, as it often will be where there is a substantial income disparity, the basis for entitlement in a particular case, e.g. compensatory or non-compensatory, informs the whole subsequent Guidelines analysis, including the discretionary judgments that need to be made on location within the ranges, restructuring and exceptions. As well, issues of continuing entitlement arise on variation and review, most obviously in the context of applications to terminate spousal support. **A crucial step in a Guidelines case is identifying the basis for entitlement with reference to the *Divorce Act* objectives and the leading decisions, such as *Moge* and *Bracklow*.**³⁶

4.1 Entitlement as a Threshold Issue: The “No Entitlement” Cases

In some cases the threshold entitlement analysis will determine that there is no entitlement to spousal support and hence that the Advisory Guidelines are not applicable. As noted above, current spousal support law, post-*Bracklow*, does provide a broad basis for entitlement. *Moge* created a broad basis for compensatory claims for spousal support based on economic disadvantage from the marriage or the conferral of an economic advantage upon the other spouse. But even if it is not possible for a lower-income spouse to make a compensatory claim, *Bracklow* has provided the possibility of a non-compensatory claim based on need or hardship created by the loss of the marital standard of living. Typically a significant disparity in income at the point of marriage breakdown will create an entitlement to some support—at the very least to some time-limited, transitional support.

However, the case law does show that there may be a finding of “no entitlement” despite income disparity. Under the current law it is possible to argue that an income disparity reflects neither economic disadvantage flowing from the marriage nor economic need and hence that there is no entitlement to support. Lawyers using the Advisory Guidelines need to remain aware of these possibilities.

We do not offer here a comprehensive review of the case law on entitlement, as this issue is outside the scope of the Guidelines, but merely flag some of the kinds of cases in which courts have found no entitlement to spousal support. Some “no entitlement” cases involve findings that the parties, because of differences in their asset positions or their costs of living, have similar standards of living despite an income disparity.³⁷ In others, the income disparity is the result of post-separation events or choices, such as a job loss on the recipient’s part³⁸ or a post-separation increase in the payor’s income.³⁹ Finally, in

³⁶ A good example is the leading B.C.C.A. decision in *Yemchuk v. Yemchuk*, [2005] B.C.J. No. 1748, 2005 B.C.C.A. The support claim was brought by the husband who had retired early to facilitate the wife’s relocation because of her employment. The trial judge had found no entitlement on the husband’s part. The Court of Appeal overturned that decision, engaging in an extensive analysis of the husband’s entitlement on compensatory grounds, before turning to the Advisory Guidelines as a useful tool in determining the appropriate amount of support.

³⁷ A good example is *Eastwood v. Eastwood*, 2006 CarswellNB 655, 2006 NBQB 413.

³⁸ See *Rezel v. Rezel*, [2007] O.J. No. 1460 (S.C.J.).

³⁹ See *Eastwood*, *supra* note 37.

some cases courts have found that any compensatory or needs-based claims have been met through property division,⁴⁰ including in B.C a reapportionment of assets to meet self-sufficiency concerns, thus eliminating entitlement to spousal support.⁴¹

There are relatively few reported cases where entitlement has not been found. This could be read as confirming the broad basis for entitlement under the current law; alternatively, it could suggest that entitlement issues, even if raised on the facts of particular cases, are often not worth litigating and are settled. Significantly, many of the no entitlement cases involve somewhat atypical fact situations: short marriages, second marriages, claims by men, or claims by non-custodial parents.

4.2 Entitlement at Other Stages of the Guidelines Analysis

Cases where no entitlement is found despite a significant income disparity are infrequent. However, an analysis of entitlement is not only relevant at the threshold stage of determining whether any spousal support at all is to be paid. Even in cases where entitlement is found and spousal support is awarded, **an analysis of the basis of entitlement is a necessary underpinning to the determination of the amount and duration of support.**

The compensatory and non-compensatory bases for spousal support need to be delineated as they generate different support outcomes. The Advisory Guidelines reflect these different bases. For example, as will be shown in Chapters 7 and 8, the *without child support* formula reflects non-compensatory support considerations in its application to cases of short and medium length marriages with no children while the *with child support formula* is largely compensatory. In cases of longer marriages under the *without child support* formula the awards reflect a mix of compensatory and non-compensatory claims.

The delineation of the compensatory and/or non-compensatory basis for entitlement in a particular case is relevant at two particular points in the application of the Guidelines:

- to determine location within the ranges; and
- to determine whether or not the case justifies a departure from the ranges as an exception.

With respect to determining location within the range, in longer marriages under the *without child support* formula, a strong compensatory claim may, for example, suggest an award at the high end of the range whereas a non-compensatory claim based only upon loss of the marital standard of living may suggest an award at the lower end of the range. As well, compensatory claims can be more or less extensive, depending upon the degree of economic disadvantage experienced because of labour force withdrawal. A fuller discussion of using the ranges is found in Chapter 9.

⁴⁰ See *Chutter v. Chutter*, [2007] B.C.J. No. 1247, 2007 BCSC 814.

⁴¹ See *W.J. M. v. L.A.M.*, [2007] B.C.J. No. 1283, 2007 BCSC 842.

The use of the exceptions is dealt with in more detail in Chapter 12. We simply note here that two exceptions are triggered by *compensatory* claims that may not be adequately satisfied by the formula ranges: the compensatory exception for short marriages without children and, in cases with children, the s. 15.3 exception for compensatory claims that must be deferred because of the priority of child support. The application of both of these exceptions therefore requires a delineation of the basis for entitlement.

4.3 Entitlement Issues on Review and Variation

Entitlement issues can also arise on review and variation, most obviously in the context of applications to terminate spousal support. Such applications may be triggered by the recipient's remarriage or by the recipient's employment or simply by the passage of time. In many cases duration under the Advisory Guidelines is indefinite (duration not specified), thus requiring a discretionary determination of whether termination is appropriate. Even in cases where the Advisory Guidelines generate a range for duration, courts may sometimes prefer to make the initial order indefinite and later deal with the issue of termination on a subsequent review or variation, particularly where the suggested time limits are fairly lengthy.

Determining whether termination is appropriate will often require an analysis of whether the initial basis for entitlement continues to exist. Although the issue on termination is often framed in terms of whether the recipient has become "self-sufficient", the issue can also be seen as one of whether there is a continuing entitlement to support. The determination of when a spouse has become self-sufficient is one of those "hard" issues in the law of spousal support that was there before the Advisory Guidelines. While the Guidelines, as discussed in Chapter 13, take into account the obligation to make reasonable efforts towards self-sufficiency, they do not determine the hard issue of when self-sufficiency has been achieved and the law on this continues to evolve.

The result on a termination application may differ depending on whether the initial award was compensatory or non-compensatory in nature, reinforcing once again the need for a delineation of the basis for entitlement.⁴² For example, remarriage may not mean an end to entitlement if the original basis for the support order was compensatory,⁴³ but it may if the basis was non-compensatory.⁴⁴

Thus far we have talked about how entitlement issues arise in the context of applications to reduce or terminate spousal support. Reviews or variations may also give rise to entitlement issues of a somewhat different sort when the recipient applies for an increase in spousal support, either because of a decrease in the recipient's income or a post-separation increase in the payor's income.

As we emphasize in Chapter 14 which deals with the application of the Guidelines in the context of review and variation, one cannot determine the spousal support outcome in

⁴² See *Rezansoff v. Rezansoff*, [2007] S.J. No. 37, 2007 SKQB 32 for an excellent discussion of this in the context of a case involving non-compensatory support.

⁴³ See *J.W.J.McC. v. T.E.R.*, [2007] B.C.J. No. 358, 2007 BCSC 252.

⁴⁴ See *Kelly v. Kelly*, [2007] B.C.J. No. 324, 2007 BCSC 227.

these cases simply by applying the formulas to the new incomes. The current law requires in each of these cases that there be a threshold determination of whether the change in income is relevant to the support obligation and if so, to what extent. The issue can be seen as one of “entitlement,” although it is not always framed in that language, and the analysis requires going back to the compensatory and non-compensatory bases for spousal support. Cases involving a post-separation increase in the payor’s income, for example, can be thought of as raising the issue of the recipient’s entitlement to share in that increase.⁴⁵

⁴⁵ See for example *D.B.C. v. R.M.W.*, [2006] A.J. No. 1629, 2006 ABQB 905 where the wife was found not entitled to a share of the husband’s increased income after separation both because she had not contributed to that increase and because it was unrelated to the marital lifestyle. In fact the husband had decreased his income during the marriage because of a joint marital decision to alter their lifestyle.

5 APPLICATION

In Chapter 4 we dealt with the threshold issue of entitlement that must be addressed before the Advisory Guidelines, and more specifically the formulas, are applied. In this chapter we deal with several other preliminary issues of application that, like entitlement, must be addressed before the formulas are applied.

5.1 Application to provincial/territorial law

The Advisory Guidelines were specifically developed under the federal *Divorce Act* and intended for use under that legislation. Provincial/territorial support law is governed by specific statutory regimes.

However, in practice there is much overlap between federal and provincial/territorial support laws. The broad conceptual framework for spousal support articulated by the Supreme Court of Canada in *Moge* and *Bracklow* has been applied under both provincial and federal legislation. Indeed *Bracklow*, which combined claims under the *Divorce Act* and provincial legislation, made no real distinction between the two.

In the Draft Proposal we recognized that it was possible, given this overlap, that the Advisory Guidelines would be used under provincial/territorial support legislation. In our view there was sufficient flexibility in the Advisory Guidelines, given their informal and non-binding nature and their use of ranges for both amount and duration, to deal with any distinctive patterns in provincial/territorial law. The three years of experience with the Advisory Guidelines since the release of the Draft Proposal have borne out this prediction. The Advisory Guidelines have frequently been used in spousal support determinations under provincial legislation, in cases involving both married couples who have separated but not yet commenced divorce proceedings⁴⁶ and unmarried couples.⁴⁷

We recognize that there are some differences between provincial/territorial support laws and the *Divorce Act*. Many provincial/territorial laws have specific provisions governing entitlement, for example provisions determining which non-marital relationships give rise to a spousal support obligation. However, as discussed in Chapter 4, the Advisory Guidelines only deal with the amount and duration, and not entitlement.

Once an unmarried couple satisfies this additional provincial requirement, e.g. cohabitation for two or three years and proves entitlement, the Advisory Guidelines can

⁴⁶ See for example, *Brown v. Brown*, [2007] N.B.J. No. 330, 2007 NBQB 227 (application to married couple under *Family Services Act*) and *Barter v. Barter*, [2006] N.J. No. 237, 2006 NLUFC 39 (used under *Family Law Act* to determine that agreement satisfies provincial support objectives).

⁴⁷ See for example *McCulloch v. Bawtinheimer*, [2006] A.J. No. 361 (Q.B.) using the Advisory Guidelines in a case involving a six year relationship between “adult interdependent partners” as defined under Alberta legislation. The result in *Bawtinheimer* was consistent with the ranges generated by the *without child support* formula after an explicit use of restructuring. See also *Foley v. Girard*, [2006] O.J. No. 2496, which involved a 20 year same-sex relationship and a result consistent with the *without child support* formula.

then be applied. Under the *without child support* formula, the period of cohabitation for an unmarried couple is the same as the “length of the marriage” for a married couple. Similarly, under the *with child support* formula, there is no distinction drawn, as this formula is driven by net incomes, custodial arrangements and child support obligations.

Provincial/territorial statutes often include specific provisions governing the effect of agreements. However, as will be discussed immediately below, because the Advisory Guidelines do not deal with the effect of agreements there will be no conflict.

Finally, it is important to note that the list of specific factors to be considered in determining spousal support does vary from statute to statute, with some provincial/territorial legislation making explicit reference, for example, to factors such as property⁴⁸ and conduct,⁴⁹ although the impact of these differences in wording on spousal support outcomes is unclear.⁵⁰

5.2 Application to agreements

The Advisory Guidelines **confer no power to re-open or override *final* spousal support agreements.** This issue like entitlement, is outside the scope of the Advisory Guidelines and continues to be dealt with under existing law—the common law doctrine of unconscionability, the evolving law applying the Supreme Court of Canada’s recent decision in *Miglin*,⁵¹ and provincial statutory provisions which deal with the effect of a prior agreement on spousal support. When the *Federal Child Support Guidelines* were brought into force, changes were made to the *Divorce Act* providing, in essence, that the *Guidelines* would prevail over inconsistent child support agreements. The Spousal Support Advisory Guidelines, given their informal nature, do not have such an effect. They do not confer any power to override existing agreements. **A final agreement—i.e. one waiving or terminating spousal support or setting a fixed amount with no provision for review or variation--will thus preclude the application of the Advisory Guidelines unless the agreement can be it set aside or overridden under existing law.**⁵²

The Advisory Guidelines do have an important role to play in the *negotiation* of agreements by providing a more structured framework for negotiation and some benchmarks of fairness. One possible effect of the Advisory Guidelines may thus be a reduction over time in the number of agreements that are subsequently perceived to be

⁴⁸ See for example s. 7(1) of Manitoba’s *Family Maintenance Act*, C.C.S.M. cF20, s. 4(k) of Nova Scotia’s *Family Maintenance and Custody Act*, R.S.N.S. 1989, c. 160 and ss. 8(d) and 9(a) and (b) of Ontario’s *Family Law Act*, R.S.O. 1990, c. F.3.

⁴⁹ See for example s. 33(10) of Ontario’s *Family Law Act*, *ibid*.

⁵⁰ For example the concept of “needs and means” of the spouses under both the *Divorce Act* and provincial/territorial legislation that does not specifically refer to property as a factor arguably encompasses consideration of the spouses’ assets and it is universal practice to determine property division before dealing with spousal support.

⁵¹ *Miglin v. Miglin*, [2003] 1 S.C.R. 303.

⁵² For a cases where the Advisory Guidelines were found inapplicable because of an agreement see *Woodall v. Woodall*, [2005] O.J. No. 3826, 2005 ONCJ 253 (Ont. C.J.).

unfair by one of the parties. Furthermore, when an agreement is challenged, courts may use the outcome under the Advisory Guidelines to assist in identifying unfair agreements. The case law offers several examples of the Advisory Guidelines being used in this way, in the context of either a *Miglin* analysis or an application to override an agreement under provincial legislation.⁵³

If a final spousal support agreement is set aside or over-ridden on the basis of *Miglin* or other applicable legal doctrines, the Advisory Guidelines may be relied upon in determining the amount and duration of support.⁵⁴ However, as is recognized in *Miglin*, in some cases the parties' intentions, as reflected in their agreement, may still continue to influence the spousal support outcome and lead the courts to an outcome different from that suggested by the Advisory Guidelines.⁵⁵

It should not be assumed that the mere presence of a spousal support agreement precludes the application of the Advisory Guidelines. **If the agreement is not a final agreement, but one which provides for review or for variation upon a material change of circumstances, the Advisory Guidelines may be applicable to the determination of the amount and duration of spousal support on review or variation.** This application of the Advisory Guidelines is discussed further in Chapter 14 which deals with variation and review.

5.3 Interim orders

The Advisory Guidelines are intended to apply to interim orders as well as final orders. The interim support setting is an ideal situation for the use of guidelines. There is a need for a quick, easily calculated amount, knowing that more precise adjustments can be made at trial.⁵⁶ Once an income can be established for each party it is possible under the formulas to generate ranges of monthly amounts with relative ease.

Traditionally, interim spousal support has been based upon a needs-and-means analysis, assessed through budgets, current and proposed expenses, etc. All of that can be avoided with guidelines formulas, apart from exceptional cases. Further, conflict between spouses at this interim stage can be significantly reduced and settlements encouraged, another benefit for the spouses and any children of the marriage.⁵⁷

⁵³ See *R.S.M. v. M.S.M.*, [2006] B.C.J. No. 1756, 2006 BCCA 362, *W.(C.L.) v. R.(S.U.)*, 2007 CarswellBC 666, 2007 BCSC 453, *Vanderlans v. Vanderlans*, 2007 CarswellNfld 119, 2007 NLUFC 8; *Rapley v. Rapley*, [2006] B.C.J. No. 3213, 2006 BCSC 1854; *Barter v. Barter*, [2006] N.J. No. 237, 2006 NLUFC 39 and *Chepil v. Chepil*, [2006] B.C.J. No. 15, 2006 BCSC 15.

⁵⁴ See *R.S.M. v. M.S.M.*, *ibid.*

⁵⁵ See *Santoro v. Santoro*, [2006] B.C.J. No. 453, 2006 BCSC 331 (*Miglin* used to override agreement; however guidelines of "limited use" because of prior agreement; spousal support set well below the range under the *without child support* formula).

⁵⁶ Not surprisingly, two of the early American guidelines found their origins in the assessment of interim spousal support, those in California counties and Pennsylvania.

⁵⁷ In *D.R.M. v. R.B.M.*, [2006] B.C.J. No. 3299, 2006 Carswell BC 3177 (S.C.), Justice Martinson set out in detail the rationale for the application of the Advisory Guidelines to interim spousal support orders.

The Advisory Guidelines do recognize that the amount may need to be different during the interim period while parties are sorting out their financial situation immediately after separation. To accommodate these short-term concerns, the Advisory Guidelines recognize an exception for compelling financial circumstances in the interim period which is discussed in Chapter 12, dealing with exceptions.

There is another critical way that the Advisory Guidelines apply to interim orders. Any periods of interim spousal support are to be included within the durational limits fixed by the Advisory Guidelines under either formula. If the computation of duration did not include the period of interim orders, there would be incentives for some parties to drag out proceedings and for others to speed them up. Further, differing periods of interim support would result in inequities amongst spouses, with some receiving support longer and others shorter, a concern especially in cases of shorter marriages.

5.4 Review and Variation

The primary application of the Advisory Guidelines is to **interim and initial determinations** of spousal support at the point of separation or divorce, whether through negotiated agreements or court orders. The Advisory Guidelines also have a role to play in the determination of spousal support in the context of variation and review, but it is a somewhat more limited role. We set out three aspects of this limited role below.

First, the Advisory Guidelines do nothing to change the current structure of the law governing variation and review, including the threshold determinations of whether the conditions for a variation or review have been met.

Second, given that the Advisory Guidelines are based on income sharing, they are well-suited to adjusting spousal support amounts to changing incomes over time. The Guidelines can thus be applied in a very straightforward way to increases in the recipient's income and decreases in the payor's income. However, in some cases, such as post-separation increases in the payor's income or reductions in the recipient's income, there are threshold issues of the relevance of the changed income to the spousal claim—issues essentially of “entitlement.” These threshold issues must be dealt with first, to determine to what extent, if any, the income change is to be taken into account, before the Guidelines can be applied.

Third, the impact of re-partnering, re-marriage and second families on spousal support have proven the most difficult to reduce to a formula given the uncertainty in the current law. We have left these issues to discretionary determinations under the evolving framework of the current law.

The application of the Advisory Guidelines in the context of review and variation is dealt with more extensively in Chapter 14.

6 INCOME

The accurate determination of spousal incomes is critical to the proper application of the Advisory Guidelines. The Advisory Guidelines do not, and cannot, solve the complex issues of income determination that can arise in cases involving self-employment income and various forms of non-employment income. In the majority of cases, income issues are relatively straightforward and any disputes are limited in scope. Because the Advisory Guidelines generate ranges, and not specific amounts, absolute precision in the determination of income may not be as crucial as under the *Federal Child Support Guidelines*.

6.1 The Starting Point for Income Determination

The starting point for the determination of income under the Spousal Support Advisory Guidelines is the definition of income under the *Federal Child Support Guidelines*.

The *Federal Child Support Guidelines* provide an expansive definition of “income” for child support purposes, one that reflects and clarifies much of the pre-*Guidelines* law on income determination. Sections 15 to 20 of the *Child Support Guidelines*, along with Schedule III, create a framework for income determination. Prior to the release of the Spousal Support Advisory Guidelines, most courts used the same definition of income for both child support and spousal support purposes and that practise has continued since January 2005.

The *Child Support Guidelines* use a “gross” income measure, income before taxes and other deductions. This same gross income provides the basis for the calculations under all the formulas found in the Spousal Support Advisory Guidelines.

Some of the technicalities of Schedule III are sometimes forgotten in spousal cases. The income imputing provisions of section 19 are, if anything, even more important than in child support cases. In every spousal support case, two incomes are in issue. Income may need to be imputed to a payor spouse, but in addition a spousal support case may also require that an income be imputed to the recipient spouse, because of self-sufficiency issues. In these cases, income is imputed to the recipient under s. 19(1)(a), for under/unemployment. These imputing issues are considered at greater length in Chapter 13 on Self-sufficiency.

There are a few distinctive income issues that do arise in the spousal support context, addressed below.

6.2 Social Assistance Is Not “Income”

Under s. 4 of Schedule III to the *Federal Child Support Guidelines*, social assistance is treated as income, but only “the amount attributable to the spouse”. This adjustment is required as social assistance is included in line 150 income. For spousal support

purposes, any social assistance received by the recipient spouse has traditionally not been viewed as income, so that a recipient relying entirely on social assistance would be treated as person with zero income.⁵⁸ Turning to the payor spouse, a payor who receives social assistance is by definition unable to support himself or herself and thus has no ability to pay.⁵⁹

For purposes of the Advisory Guidelines, section 4 of Schedule III does not apply. **No amount of social assistance should be treated as income, for either the recipient or the payor.**

6.3 The Child Tax Benefit and Other Child Benefits

Under the *with child support* formula, included in each spouse's income are the amounts identified for various child-related government benefits and refundable credits: the Canadian Child Tax Benefit, the National Child Benefit Supplement, the GST credit (including any portion for the children), the refundable medical expense credit, the Child Disability Benefit, and the various provincial benefit and credit schemes.

Under the *Federal Child Support Guidelines*, these benefits and credits are not treated as income for table amount purposes: see note 6 to Schedule I. There is some controversy about their consideration for section 7 purposes, or for the determination of undue hardship under section 10, with a number of judges now including them.⁶⁰

For lower-income custodial parents, typically the support recipients, these amounts are significant. As for payors, only low-income spouses obtain any of these, basically the GST Credit, and most of these low-income spouses will not be paying spousal support. In some circumstances, the custodial parent and recipient of these benefits and credits will also be the payor of spousal support.

We did consider backing out the child portion of these benefits, since the bulk of the benefits and credits are tied to the children of the marriage in the recipient spouse's care, e.g. the Child Tax Benefit, the child portion of the GST Credit, and the various provincial programs. The logic of doing so would be similar to that applied in respect of the spouses' child support obligations, i.e. to get at the remaining net disposable income available to the spouses as individuals.

In the end, we decided to include these child-related benefits in income under the *with child support* formula, for three reasons.

First, these benefits and credits reduce, sometimes dramatically, with increasing amounts of spousal support transferred to the recipient spouse, especially through the lower and middle income brackets. Including these benefits and credits in the recipient's income

⁵⁸ *Lawrence v. Lawrence*, [2006] B.C.J. No. 210, 2006 BCSC 167 at para. 84.

⁵⁹ *Kortlever v. Kortlever*, [2007] B.C.J. No. 758, 2007 BCSC 487 at para. 39 (both spouses on social assistance, no spousal support).

⁶⁰ Rollie Thompson, "The Chemistry of Support: The Interaction of Spousal and Child Support" (2006), 25 C.F.L.Q. 251 at 284-288.

gives a much clearer picture of the impact of spousal support upon the recipient's actual net disposable income. Second, some fine lines would have to be drawn between child- and non-child related portions of these benefits and credits. A precise disentanglement would be complicated and for little practical gain. Third, for lower income recipient spouses, these amounts are sizeable, more than \$7,000-\$8,000 annually for two children. Their removal would produce significantly higher amounts of spousal support, which would cause significant hardship for payor spouses, especially those with lower incomes, unless the formula percentages were adjusted.

6.4 The Universal Child Care Benefit (UCCB)

The Universal Child Care Benefit (UCCB) came into effect in July 2006, after the release of the Spousal Support Advisory Guidelines. Under the UCCB, parents receive a taxable benefit of \$100 per month for each child under the age of 6. For a custodial parent, the UCCB provides an additional source of taxable income, included in line 150 income.

The UCCB required amendments to the *Federal Child Support Guidelines*, effective March 22, 2007 (SOR/2007-59). The UCCB is not included in income for table amount purposes, under s. 3 of Schedule III. By reason of a new s. 3.1, the UCCB is included in parental incomes for purposes of section 7 expense sharing, but only for those children for whom section 7 expenses are requested. Any UCCB for another child is not to be included in a parent's income. The UCCB is also considered as income for section 10 undue hardship calculations.

Consistent with our treatment of the Child Tax Benefit under the *with child support* formula, **the UCCB for a child who is a child of the marriage will also be included in the income of the custodial parent in determining spousal support.**

6.5 Benefits for Children Other Than Children of the Marriage

Spouses may be receiving child-related benefits for children other than "children of the marriage", children of prior or subsequent relationships. Under the *Federal Child Support Guidelines*, these benefits are generally not treated as part of income for child support purposes at all, thus avoiding the issue. With the 2007 UCCB amendments, section 3.1(b) specifically does exclude any UCCB for a child for whom a section 7 expense is not requested.

Under the *with child support* formulas in the Advisory Guidelines, these benefits are included for "children of the marriage", for the reasons explained above.

Child-related benefits received by a spouse for children other than "children of the marriage" should *not* be included in income for spousal support purposes, under either formula.

This is consistent with our general approach to child support obligations towards other children, discussed at greater length below in Chapter 12 on Exceptions. As the exclusion of these benefits for other children is consistent with the definition of income under the

Federal Child Support Guidelines, no further adjustments need to be made to income under the Spousal Support Advisory Guidelines.

6.6 Non-Taxable Incomes

There are a number of sources of income that are received on a non-taxable basis, most commonly some disability payments, workers' compensation, and income of aboriginal persons earned on reserve. For child support purposes, this income has to be "grossed up" to approximate the equivalent taxable employment income, under s. 19(1)(b). For spousal support purposes, the same grossing-up is required by the *without child support* formula, while the net or non-taxable amount can be used for the basic *with child support* formula.

A complication does arise in the spousal support setting, as spousal support is deductible for the payor and taxable for the recipient. The Advisory Guidelines formulas generate "gross" amounts of spousal support on the assumption that the payor will be able to deduct the support and the recipient will pay tax upon it. What if the payor spouse has only non-taxable income, so that he or she cannot get the benefit of the tax deductibility?

If the payor receives a mix of taxable and non-taxable income, then the payor can get the full benefit of the deduction so long as the spousal support paid is less than the taxable portion of his or her income. The problem only arises where that is not the case, where the payor's income is entirely from non-taxable sources. To be clear, we are speaking here only of income sources that are *legitimately* non-taxable, as opposed to income illegally earned "under the table" and hence not taxed.

In our view, **where a payor spouse has an income entirely or mostly from legitimately non-taxable sources, then an exception must be created**, under both formulas, to take into account the reduced ability to pay of the payor spouse, who can't deduct the support paid, and the needs or loss of the recipient spouse, who still has to pay taxes on spousal support and only receives after-tax support. This exception is discussed in more detail in Chapter 12.

6.7 Time for Determining Income

The proper time for determining income under the Advisory Guidelines is both a theoretical and a practical issue. Spousal incomes will inevitably change between the date of separation and the date when interim matters are resolved, and then again by the date of the trial or trial settlement. In Chapter 14, we consider the difficulties that can arise when the payor's income increases, or the recipient's income decreases, at the stage of variation and review. Here we focus upon income determination at the interim and initial stages.

The *without child support* formula gives theoretical emphasis to the marital standard of living, as measured by the spouses' incomes at or near the date of separation. The marital standard of living during cohabitation ought not be affected by a substantial post-separation increase in the payor's income. The *with child support* formula is not tied so tightly to living standards and incomes at separation, as ability to pay issues loom larger

where both child and spousal support have to be paid. Under both formulas post-separation increases in the recipient's income are relevant given the obligation to pursue self-sufficiency.

The "timing" issue often proves to be a minor one, as not much time passes between separation and interim arrangements, and not much more to the initial divorce order. More importantly, payor incomes do not usually increase that much in the intervening period. Further, where income must be determined for both child support and spousal support, there are practical pressures to use the same income for both purposes, in the interests of simplicity and consistency. The formulas provide ranges for amount, and adjustments can be made through selecting a particular amount within the ranges. Finally, we do not wish to create an unduly technical approach that might encourage litigation over income issues.

The Advisory Guidelines start from the practical position that the relevant time for determining the incomes of the spouses is the date of the hearing or the date of the agreement, at both interim and initial stages.

There will be two situations where there *may* need to be some adjustment to this general approach:

- where there has been a lengthy period of time between the separation and the initial order or agreement, it is more likely that the payor will have experienced a substantial increase in income after separation or that the recipient will have had an income reduction.
- in a small number of cases, even with a shorter separation, the payor can experience a substantial increase in income between separation and the date of initial determination of spousal support.

In these situations, it may be necessary to look more closely at the post-separation income changes, applying the principles set out in Chapter 14.

7 THE WITHOUT CHILD SUPPORT FORMULA

Here we examine the first of the two basic formulas that lie at the core of the Advisory Guidelines—the *without child support formula*. This formula applies in cases where there are no dependent children and hence no concurrent child support obligations. Assuming entitlement, the formula generates ranges for amount and duration of spousal support.

The *without child support* formula covers a diverse range of fact situations, the only unifying factor being the absence of a concurrent child support obligation for a child or children of the marriage.⁶¹ It covers marriages of all lengths where the spouses never had children. It also applies to long marriages where there were children, but they are no longer dependent.⁶² The support claims in these cases involve a mix of compensatory and non-compensatory rationales.

It might seem impossible to develop one formula that could yield appropriate support outcomes over such a wide array of marital situations. In developing the formula we turned to the concept of **merger over time**, which incorporates both compensatory and non-compensatory rationales for spousal support. Put simply, the idea is that as a marriage lengthens, spouses more deeply merge their economic and non-economic lives, resulting in greater claims to the marital standard of living.⁶³ Using that concept, which relates support outcomes to the length of the marriage, we developed a formula that surprisingly generates results consistent with much of current practice, while bringing some much-needed structure.

In what follows we first introduce the basic structure of the *without child support* formula and provide an example of its operation. We then discuss the concept of merger over time that underlies the formula and its relation to existing rationales for spousal support. This is followed by a more detailed examination of the different parts of the formula and a series of further examples illustrating the formula's application in a variety of factual contexts.

7.1 The Basic Structure of the *Without Child Support* Formula

The *without child support* formula is set out in the box below in its most basic form. The formula is in fact two formulas—one for amount and one for duration. The formula generates **ranges** for amount and duration, rather than fixed numbers.

⁶¹ Support obligations to children or spouses from prior relationships are dealt with as exceptions under both formulas; see Chapter 11.

⁶² Some medium length marriages with dependent children in which support is initially determined under the *with child support* formula may cross-over to the without child support formula for a re-determination of amount after child support ceases. Crossover is discussed in Chapter 14, Variation and Review, below.

⁶³ In developing this formula we drew in part on the American Law Institute (ALI) proposals referred to in Chapter 1, including the concept of merger over time. As we discuss further below, this concept—although not the terminology—is strongly anchored in our current law of spousal support.

There are two crucial factors under the formula:

- the **gross income difference** between the spouses, and
- the **length of the marriage**, or more precisely, as will be explained below, the length of the period of cohabitation.

Both amount and duration increase incrementally with the length of marriage.

The *Without Child Support* Formula

Amount ranges from 1.5 to 2 percent of the difference between the spouses' gross incomes (the **gross income difference**) for each year of marriage (or more precisely, year of cohabitation), up to a maximum of 50 percent. The range remains fixed for marriages 25 years or longer, at 37.5 to 50 percent of income difference. (The upper end of this maximum range is capped at the amount that would result in equalization of the spouses' net incomes—the **net income cap**).

Duration ranges from .5 to 1 year for each year of marriage. However support will be **indefinite (duration not specified)** if the marriage is **20 years or longer** in duration *or*, if the marriage has lasted five years or longer, when years of marriage and age of the support recipient (at separation) added together total 65 or more (the **rule of 65**).

A simple example illustrating the basic operation of the *without child support* formula will be helpful at this point before we venture further into its more complex details. The primary purpose of this example is to show the basic calculations required under the formula and to give a sense of the outcomes the formula generates.

Example 7.1

Arthur and Ellen have separated after a 20-year marriage and one child. During the marriage Arthur, who had just finished his commerce degree when the two met, worked for a bank, rising through the ranks and eventually becoming a branch manager. He was transferred several times during the course of the marriage. His gross annual income is now \$90,000. Ellen worked for a few years early in the marriage as a bank teller, then stayed home until their son was in school full time. She worked part time as a store clerk until he finished high school. Their son is now independent. Ellen now works full time as a receptionist earning \$30,000 gross per year. Both Arthur and Ellen are in their mid forties.

Assuming entitlement has been established in this case, here is how support would be determined under the *without child support* formula.

To determine the **amount** of support:

- Determine the **gross income difference** between the parties:
 $\$90,000 - \$30,000 = \$60,000$

- Determine the **applicable percentage** by multiplying the length of the marriage by 1.5-2 percent per year:
 $1.5 \times 20 \text{ years} = \mathbf{30 \text{ percent}}$
to
 $2 \times 20 \text{ years} = \mathbf{40 \text{ percent}}$
- Apply the applicable percentage to the income difference:
 $30 \text{ percent} \times \$60,000 = \$18,000/\text{year} (\mathbf{\$1,500/\text{month}})$
to
 $40 \text{ percent} \times \$60,000 = \$24,000/\text{year} (\mathbf{\$2,000/\text{month}})$

Duration would be indefinite (duration not specified) in this case because the length of the marriage was 20 years.

Thus, assuming entitlement, spousal support under the formula would be in the range of \$1,500 to \$2,000 per month for an indefinite (not specified) duration. This formula amount assumes the usual tax consequences, i.e. deductible to the payor and taxable to the recipient. It would also be open to the normal process of variation and review.

An award of \$1,500 per month, at the low end of the range, would leave Ellen with a gross annual income of \$48,000 and Arthur with one of \$72,000. An award of \$2,000 per month, at the high end of the range, would leave Ellen with a gross annual income of \$54,000 and Arthur with one of \$66,000. In Chapter 9 we deal with the factors that determine the setting of a precise amount within that range.

On first glance, this formula no doubt looks like an entirely new approach to spousal support, far removed both from the *Divorce Act* and its spousal support objectives and factors and from the principles of compensatory and non-compensatory support that the Supreme Court of Canada articulated in *Moge* and *Bracklow*. Before we examine the operation and application of this formula in more detail, we explain the concept of “merger over time” that underlies this formula and how it relates to existing theories of spousal support and the current law. We will show that the formula is a “proxy measure” for factors such as economic disadvantage, need, and standard of living that are currently used to determine spousal support outcomes.

7.2 Merger over Time and Existing Theories of Spousal Support

The idea that underlies the *without child support* formula and explains sharing income in proportion to the length of the marriage is **merger over time**. We use this term⁶⁴ to capture the idea that as a marriage lengthens, spouses merge their economic and non-economic lives more deeply, with each spouse making countless decisions to mould his or her skills, behaviour and finances around those of the other spouse. Under the *without child support* formula, the income difference between the spouses represents their differential loss of the marital standard of living. The formulas for both amount and

⁶⁴ We have taken this term from the American Law Institute (ALI) proposals which are referred to in Chapter 1 above and discussed in more detail in the Background Paper.

duration reflect the idea that the longer the marriage, the more the lower-income spouse should be protected against such a differential loss.

Under this formula, short marriages without children will generate very modest awards, both in terms of amount and duration. In cases where there are adequate resources, the support could be paid out in a single lump sum. Medium length marriages will generate transitional awards of varying lengths and in varying amounts, increasing with the length of the relationship. Long marriages will generate generous spousal support awards on an indefinite basis that will provide the spouses with something approaching equivalent standards of living after marriage breakdown. The formula generates the same ranges for long marriages in which the couple have never had children as for long marriages in which there have been children who are now grown.

While the label may be unfamiliar, the concept of merger over time, which relates the extent of the spousal support claim to the length of the marriage, underlies much of our current law. Its clearest endorsement can be found in Justice L'Heureux-Dubé's much-quoted passage from *Moge*:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the marital standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlementAs marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution.⁶⁵

Merger over time offers an effective way of capturing both the compensatory and non-compensatory spousal support objectives that have been recognized by our law since *Moge* and *Bracklow*. Under our current law, both kinds of support claims have come to be analyzed in terms of loss of the marital standard of living. Budgets, and more specifically budgetary deficits, now play a central role in quantifying this drop in standard of living. Under the *without child support* formula, the spousal income difference serves as a convenient and efficient **proxy measure** for loss of the marital standard of living, replacing the uncertainty and imprecision of budgets. The length of marriage then determines the extent of the claim to be protected against this loss of the marital standard of living.

Merger over time can have a significant compensatory component. One of the common ways in which spouses merge their economic lives is by dividing marital roles to accommodate the responsibilities of child-rearing. Compensatory claims will loom large in one significant segment of marriages covered by the *without child support* formula—long marriages in which there were children of the marriage who are now independent

Compensatory claims, in theory, focus on the lower income spouse's loss of earning capacity, career development, pension benefits etc. as a result of having assumed primary responsibility for child care. However in practice, after *Moge*, courts began to respond to the difficulties of quantifying such losses with any accuracy, particularly in longer marriages, by developing proxy measures of economic loss that focussed on the marital

⁶⁵ *Moge v. Moge*, [1992] 3 S.C.R. 813 at 870.

standard of living. When awarding spousal support in cases involving long traditional marriages, courts began to articulate their goal as providing the lower income spouse with a reasonable standard of living as assessed against the marital standard of living. And increasingly the standard for determining spousal support in long marriages has become a rough equivalency of standards of living.

Merger over time also has a significant non-compensatory component. In cases of long traditional marriages where the children are grown, it is now common to see spousal support justified on a dual basis. Non-compensatory support claims based on dependency over a long period of time are commonly relied upon to supplement compensatory claims based on earning-capacity loss. In marriages where the spouses have never had children—the other segment of marriages covered by the *without child support* formula—spousal support claims are usually non-compensatory in nature, based on need, dependency, and loss of the marital standard of living. Merger over time addresses these non-compensatory claims.

Giving precise content to the concept of non-compensatory or needs-based support has been one of the main challenges in spousal support law since *Bracklow*. One reading of *Bracklow* suggests that non-compensatory support is grounded in the economic dependency or, in Justice McLachlin’s words, the “interdependency” of the spouses. It recognizes the difficulties of disentangling lives that have been intertwined in complex ways over lengthy periods of time. On this broad reading of *Bracklow*, which many courts have accepted, need is not confined to situations of absolute economic necessity, but is a relative concept related to the previous marital standard of living.⁶⁶ On this view entitlement to non-compensatory support arises whenever a lower income spouse experiences a significant drop in standard of living after marriage breakdown as a result of loss of access to the other spouse’s income, with amount and duration resolved by an individual judge’s sense of fairness.

Merger over time incorporates this broad view of non-compensatory support and provides some structure for quantifying awards made on this basis.⁶⁷ It takes account not just of obvious economic losses occasioned by the marriage, but also of the elements of reliance and expectation that develop in spousal relationships and increase with the length of the relationship.

⁶⁶ Some read *Bracklow* as grounding non-compensatory support in a “basic social obligation” theory of spousal support. This somewhat questionable theory, which is discussed in more detail in the Background Paper, understands need in the absolute sense of an inability to meet basic needs and grounds the obligation to meet that need in the status of marriage itself.

⁶⁷ Building as it does on the concept of merger over time, the *without child support* formula does not directly incorporate the “basic social obligation” theory of non-compensatory support that some read *Bracklow* as supporting, see footnote immediately above. The *without child support* formula produces awards that will go some way toward meeting basic needs where they exist, but limits the extent of any basic social obligation by the length of the marriage. However, some of the exceptions identified in Chapter 12, such as the illness/disability exception and the basic needs/hardship exception in short marriages do provide some accommodation for elements of basic social obligation.

The *without child support* formula generates the same ranges for long marriages in which the couple have never had children as for long marriages in which there have been children who are now grown. This result, which flows from the merger over time principle, mirrors what we find in the current law—lengthy marriages involving economic dependency give rise to significant spousal support obligations without regard to the source of the dependency.

We recognize that in some specific situations *the without child support* formula, based as it is on the concept of merger over time which gives significant weight to the length of the marriage, may not adequately satisfy either compensatory or non-compensatory (needs-based) support objectives. Rather than modifying the formula, which in general works well across a wide-range of fact situations and incomes, we have dealt with these problems through exceptions—the exception for disproportionate compensatory claims in shorter marriages; the illness and disability exception, and the basic needs/undue hardship exception in short marriages. These exceptions are discussed in Chapter 12, below.

We now turn to a more detailed examination of the operation and application of the formula.

7.3 Determining the Length of the Relationship

The *without child support* formula relies upon length of marriage for determining both amount and duration of support. While we use the convenient term “length of marriage”, the actual measure under the Advisory Guidelines is the **period of cohabitation**. This includes pre-marital cohabitation and ends with separation. Inclusion of pre-marital cohabitation in determining length of marriage is consistent with what most judges do now in determining spousal support. This way of defining length of marriage also makes the Advisory Guidelines more easily used under provincial spousal support laws, which apply to non-marital relationships.

We have not set precise rules for determining the length of marriage. The simplest approach would be to round up or down to the nearest full year, and this is what we have done in our examples. Another, slightly more complicated, approach would be to allow for half years and round up or down to that. Because the formula generates ranges and not a fixed number, absolute precision in the calculation of the length of the marriage is not required. Addition or subtraction of half a year will likely make little or no difference to the outcome.

7.4 The Formula for Amount

Several aspects of the formula for amount should be noted. First, this formula uses **gross income** (i.e. before tax) figures rather than net (i.e. after tax). (The determination of income is dealt with more fully in Chapter 6.) While net income figures may be marginally more accurate, familiarity and ease of calculation tipped the scales in favour

of using gross income figures.⁶⁸ As you will see in Chapter 8, net income figures are used under the *with child support* formula because of the need to deal with the differential tax treatment of spousal and child support.

Second, this formula applies a specified percentage to the **income difference** between the spouses rather than allocating specified percentages of the *pool* of combined spousal incomes. In applying income sharing to the spousal income difference this formula once again differs from the *with child support* formula where the use of net income figures requires a model of income sharing that applies to a combined pool of spousal incomes.

Third, the formula for amount does not use a fixed or flat percentage for sharing the income differential. Instead, drawing on the underlying concept of merger of time, the formula incorporates a **durational factor** to increase the percentage of income shared as the marriage increases in length.⁶⁹ The durational factor is 1.5 to 2 percent of the gross income difference for each year of marriage.

The **ranges for amount** were developed by first determining the point when maximum sharing would be reached, which we set at 25 years. We also started with the assumption that maximum sharing would involve something close to equalization of incomes, or sharing 50 percent of the gross income difference. We then essentially worked backwards to determine what level of income sharing per year would be required to reach maximum sharing at year 25. The answer was 2 percent per year. In the course of developing the formula, we experimented with different percentage ranges, but the range of 1.5 to 2 percent provided the best fit with outcomes under current practice.

We chose income equalization (50 per cent of the gross income difference) as the **maximum level of income sharing**, potentially reached after 25 years of marriage and representing the full merger of the spouses' lives. Much time was spent considering the arguments for a somewhat lower maximum to take into account incentive effects and the costs of going out to work in situations where only the payor is employed. However, we also recognized that there would be cases where equalization of income would be appropriate. For example where only pension income is being shared after a very long marriage, where both spouses are low income, or perhaps where both spouses are employed after a long marriage, but with a significant income disparity. We drafted the formula to allow for that possibility.

After the release of the Draft Proposal we sought feedback on the issue of whether the maximum level of sharing should be set lower than 50 percent of the gross income difference. We concluded that income equalization should be retained as the maximum level of sharing, but that it should be expressed as equalization of *net* incomes rather than of gross incomes. The formula has therefore been adjusted by capping the upper end of the maximum range at equalization of the spouses' net incomes—the **net income cap**.

⁶⁸ In the revision process we introduced one small element of a net income calculation—an “equalization of net income” cap on the formula, which is discussed below.

⁶⁹ The concept of the durational factor is drawn from the ALI and Maricopa County guidelines; see Chapter 1.

7.4.1 The equalization of net income cap

In long marriages where the formula generates the maximum range of 37.5 to 50 percent of the gross income difference the recipient can end up with more than 50 per cent of the spouses' *net* income, notably where the payor spouse is still employed and subject to tax and employment deductions, and the recipient has little or no income. This result should never occur.

To avoid this result, shortly after the release of the Draft Proposal we began advising lawyers and judges to look closely at the net incomes of the spouses in these longer marriages when determining an appropriate amount within the range. We have now decided to modify the *without child support* formula itself by introducing a **net income cap. The recipient of spousal support should never receive an amount of spousal support that will leave him or her with more than 50 percent of the couple's net disposable income or monthly cash flow.**

Effectively, the introduction of the net income cap retains income equalization as the maximum level of sharing under the *without child support* formula. It simply provides for a more accurate calculation of income equalization. As for lowering the high end of the maximum range below equalization of net income, we concluded that the arguments that supported the initial choice of income equalization as the maximum level of sharing continued to be persuasive. As well, there was no obvious consensus around a lower percentage cap.

The software programs can calculate the "50 percent of net income" limit with precision and the formula range presented on the screen will reflect this limit at the upper end of the range. In computing "net income" for purposes of this cap, the permitted deductions would be federal and provincial income taxes, employment insurance premiums, Canada Pension Plan contributions, and any deductions that benefit the recipient spouse (e.g. medical or dental insurance, group life insurance and other benefit plans). Mandatory pension deductions are not permitted, for the same reasons as under the basic *with child support* formula, explained below in Chapter 8. Union dues and professional fees are already deducted from the spouses' gross incomes, consistent with the *Federal Child Support Guidelines* (see Chapter 6).

One of the advantages of the *without child support* formula is that the calculations can be done without a computer. For those without software, or more precise net income calculations, this net income cap can be calculated crudely by hand, at 48 percent of the gross income difference. This "48 percent" method is a second-best, but adequate, alternative.⁷⁰

In thinking about the maximum level of sharing under this formula it is important to keep in mind that the formula does not **require** an award that would equalize spousal incomes after 25 years, but rather **permits** awards in the range of between 37.5 to 50 per cent of

⁷⁰ The "48 percent" cap will work well in cases where the payor is working and the recipient is not. It will not necessarily be a good proxy for the equalization of net income cap where both parties are working; that will depend upon the spouses' respective tax rates and deductions.

the gross income difference (capped at net income equalization). Consistent with current law, the formula does not generate a general rule of income equalization; it simply provides for the possibility of equalization.

7.4.2 The problem of amount in short marriages

The feedback we received after the release of the Draft Proposal, combined with our continued reading of Guidelines cases, has confirmed that the ranges for amount generated by the *without child support* formula are “about right” and require no major adjustment beyond the net income cap.

We have generally found that the *without child support* formula works well, generating a reasonable range of outcomes across a wide range of cases from short to long marriages with varying incomes. The formula works extremely well for long marriages, which constitute the majority of the cases in which this formula is applied.⁷¹ For medium length marriages, in some cases the monthly amounts need to be adjusted (i.e. increased) through restructuring (see Chapter 10), but we were well aware of this when we developed the formula. We placed heavy emphasis on restructuring to render the results of the formula consistent with current practice. These are also the cases—medium-length marriages without children—that frequently give rise to exceptions.

During the feedback process we did hear criticisms in some parts of the country that the amounts produced by the formula in shorter marriage cases were “too low”.

In some of these cases, there was a failure to consider the **compensatory exception**—the exception for disproportionate compensatory claims in shorter marriages. In these cases, one spouse may have experienced a significant economic loss as a result of the marriage, by moving or by giving up employment, for example. Or, one spouse may have conferred an economic benefit on the other spouse by funding his or her pursuit of a professional degree or other education and training. This exception is considered in more detail in Chapter 12.

In other, non-compensatory cases, the formula was criticized as not providing enough support for the transition from the marital standard of living back to a lower standard of living based upon the recipient’s earning ability. In these cases, involving marriages of less than 6 or 7 years, there is also little scope for much restructuring. This raised the issue of whether the structure of the formula needed to be fundamentally changed by increasing the percentage level of income-sharing in shorter marriages.

In the end, we concluded against any change to the basic structure of the formula. In the majority of cases across the country the formula works well for short marriages without children, which under current law typically give rise to very limited support obligations,

⁷¹ This is true not only for long marriages/relationships in which there were children who are now adults, but also long marriages/relationships in which the parties had no children. See *Foley v. Girard*, [2006] O.J. No. 2496 (S.C.J.) which involved a 20 year same-sex relationship and *Long-Beck v. Beck*, [2006] N.B.J. No. 398,2006 NBQB 317 which involved a 22 year marriage without children in which the wife quit work with the husband’s consent.

if entitlement is found at all. The modest amounts generated by the formula are typically restructured into a lump sum or into a very short transitional award. In most of these cases, the recipient has a base income, which is supplemented by spousal support. In some parts of the country one does find more generous transitional awards providing the marital standard of living even after short marriages. This is a limited, regional pattern that is difficult to justify under the current principles that govern spousal support.

We do recognize, however, that there is a specific problem for shorter marriages where the recipient has little or no income. In these shorter marriage cases, the formula may generate too little support for the low income recipient even to meet her or his basic needs for a transitional period. The amount required to meet those basic needs will vary from big city to small city to town to rural area. Whether restructuring provides a satisfactory outcome, i.e. more support for a shorter time, will depend upon where the recipient lives. Thus the problem for these short-to-medium-marriage-low-income cases is most acute in big cities.

We did not wish to change the structure of the formula itself for this one sub-set of cases. The best approach to these cases was to create a carefully-tailored exception—the **basic needs/undue hardship exception for short marriages**—discussed further in Chapter 12 on Exceptions below.

7.5 The Formula for Duration

As with amount, duration under the *without child support* formula increases with the length of marriage. Subject to the provisions for indefinite support (duration not specified), the formula generates ranges for duration with the ends of the ranges determined as follows:

- **a minimum duration of half the length of the marriage and**
- **a maximum duration of the length of the marriage.**

It is important to remember, as discussed in Chapter 5 on application, that any periods of interim support are to be included in the durational ranges.

The ranges for duration under the *without child support* formula are admittedly very broad, allowing for an award at the top end of the range that is effectively double in value that at the bottom end. This will be particularly significant in medium-length marriages. Given the uncertainties in the current law on duration, it was not possible to come up with tighter ranges.

The formula also provides for indefinite support (duration not specified) in two circumstances:

- when the marriage has been 20 years or longer in length; or
- when the marriage has lasted five years or longer, **if the years of marriage plus the age of the support recipient at the time of separation equals or exceeds 65 and (the rule of 65).**

The “rule of 65” recognizes that length of marriage cannot be the only factor in determining the duration of spousal support in marriages without dependent children. Age is also a significant factor as it affects the ability to become self-supporting.

7.5.1 The tendency to ignore duration

Our monitoring of the use of the Advisory Guidelines since the release of the Draft Proposal has shown that **in practice the durational aspect of the *without child support* formula is often ignored.** The formula is used to determine the amount of spousal support, but not duration. In some cases awards are for shorter periods of time than the formula suggests. In other cases the durational limits are ignored in favour of indefinite orders.

To ignore duration is to misapply the *without child support* formula. Amount and duration are interrelated parts of the formula—they are a package deal. Using one part of the formula without the other undermines its integrity and coherence. If the durational limits were to be systematically increased, for example, by lowering the threshold for indefinite support, the formula would have to be redesigned and the amounts decreased. Within the scheme of the Advisory Guidelines itself, adjustment of duration beyond the formula requires restructuring and will involve a corresponding adjustment of amount.

In what follows we discuss in more detail four aspects of the formula for duration under the *without child support formula*: indefinite support, the “rule of 65”, time limits in short marriages, and time limits in medium-length marriages. The real problem of duration under this formula has proven to be this last aspect, the use of time limits in marriages that are neither long nor short.

7.5.2 The meaning of “indefinite” support

In using the term “indefinite” we simply adopted a word that had been used for years in spousal support law to mean “an order for support without a time limit at the time it is made”. Under the Advisory Guidelines **an order for indefinite support does not necessarily mean permanent support, and it certainly does not mean that support will continue indefinitely at the level set by the formula.**

Under the current law, orders for indefinite support are open to variation as the parties’ circumstances change over time and may also have review conditions attached to them. The Advisory Guidelines do nothing to change this: **“indefinite” support means support that is subject to the normal process of variation and review.**

Through the process of review and variation the amount of spousal support may be reduced, for example if the recipient’s income increases or if the recipient fails to make reasonable efforts to earn income and income is imputed. Support may even be terminated if the basis for entitlement disappears. It is true that current law supports the idea that after long marriages spousal support will often be permanent, even if the amount is subject to reduction to reflect the recipient’s obligation to pursue self-sufficiency.

In practice, however, most orders for indefinite support after long marriages will be significantly modified, if not eliminated, after the retirement of the payor and the receipt of pension income by the payor and the recipient. “Indefinite” often means “until the payor reaches 65”. Variation and review in the context of the Advisory Guidelines are discussed in more detail in Chapter 14.

After the release of the Draft Proposal we were very surprised to learn from our feedback sessions that the term “indefinite” in the Advisory Guidelines was being misinterpreted by many as meaning “infinite” or “permanent.”

We realized that we would have to develop a new term to express the concept that indefinite orders are not necessarily permanent, that they are subject to review and variation and, through that process, even to time limits and termination. Our solution has been to add “duration not specified” as a parenthetical explanation whenever the term “indefinite” is used in the formulas, i.e. **indefinite (duration not specified)**.

7.5.3 The “rule of 65”: the age factor and indefinite support

The *without child support* formula provides that indefinite (duration not specified) support will be available even in cases where the marriage is shorter than 20 years **if the years of marriage plus the age of the support recipient at the time of separation equals or exceeds 65**. In a shorthand expression, we described this as the “**rule of 65**”.

Thus, if a 10-year marriage ends when the recipient is 55, indefinite (duration not specified) support will be available because years of marriage (10) plus age (55) equals 65. Note that this is only a “rule” about duration, as the amount of support would be limited by the length of the marriage, i.e. 1.5 to 2 per cent per year or 15 to 20 per cent of the gross income difference in a 10-year marriage.

In reality, given the ages of the parties in the cases covered by the rule of 65, there will likely be significant changes in the amount of support ordered upon the retirement of one or both of the spouses. This refinement to the formula for duration is intended to respond to the situation of older spouses who were economically dependent during a medium length marriage and who may have difficulty becoming self-sufficient given their age.

The “rule of 65” for indefinite (duration not specified) support is not available in short marriages (under 5 years in length). The assumption in the current law is that short marriages generate only limited support obligations.

In the Draft Proposal, we struggled with the issue of whether an age component should always be required for indefinite (duration not specified) support—i.e. whether the “rule of 65” should apply even in long marriages. Under a 20-year rule with no age requirement, for example, a 38-year-old spouse leaving a 20-year marriage would be entitled to indefinite (duration not specified) support. Some would argue that indefinite (duration not specified) support is not appropriate for a spouse who is still relatively young and capable of becoming self-sufficient. If the “rule of 65” were generally applicable, support would not become indefinite (duration not specified) even after a 20-year marriage unless the recipient were 45 years of age or older.

Several considerations led us to the conclusion that a 20-year rule without any age requirement was the more appropriate choice. First, a spouse who married young and spent the next 20 years caring for children could be more disadvantaged than someone who married when they were older and had been able to acquire some job skills before withdrawing from the labour force. As well, under the current law it would be very difficult to impose a time-limit on support after a 20-year marriage, even if self-sufficiency and an eventual termination of support were contemplated at some point in the future. The typical order would be an indefinite order subject to review and/or variation. An order for indefinite support (duration not specified) under the Advisory Guidelines is no different.

Despite the frequent misinterpretation of the meaning of “indefinite”, there was no pressure to change either of the conditions for indefinite support. Most of the feedback about the “rule of 65” focussed on technical issues of its application, as there was general agreement on the “rule”.

7.5.4 Time limits in short marriages

The current law of spousal support has no difficulty with time limits in short marriages without children. Time limits, or lump sum orders, are common in these cases. Even in those jurisdictions where appeal courts have discouraged the use of time-limited support, discussed below, short marriages without children are identified as permissible exceptions. In practice, we were told in the feedback phase, these cases are not a problem.

7.5.5 Lowering the threshold for indefinite support?

In some parts of the country, it is very difficult to time limit spousal support, by reason of appellate decisions or local practices. For marriages of less than 20 years, the Draft Proposal incorporated time limits, although these were generous time limits. During the feedback phase, we did canvass the possibility of lowering the threshold for indefinite support, below 20 years.

We found little support for such a change. Even those who wanted to lower the threshold could not agree on what that new threshold should be. Many lawyers, mediators and judges expressed their frustration with the current law on duration, especially their perceived inability to use time limits in a sensible way. The durational limits in the Advisory Guidelines were seen as providing some structure for negotiations, initial decisions and variation or review. Lowering the threshold for indefinite support would not solve the problem and would in practice undermine the usefulness of the Guidelines.

7.5.6 The problem of time limits in medium length marriages

The real “problems” for time limits under the *without child support* formula are concentrated in marriages that are neither “long” (20 years or more) or “short” (under 5 years). For marriages that last 6 to 19 years, in every jurisdiction we were told, it becomes increasingly difficult to impose time limits on initial support orders as the marriage lengthens. At some point, in each jurisdiction, the time limits were seen as inconsistent with the current law on duration. At the same time, as we explained above, many lawyers, mediators and judges wanted to see more use of time limits.

It is certainly true that after *Moge* time limits fell into disfavour because of the associated problems of “crystal ball gazing” and arbitrary terminations of spousal support where self-sufficiency was “deemed” rather than actually achieved. Time-limited orders became less common. However, since *Bracklow*, some judges have brought back time limits, at least for non-compensatory support orders. While time limits are frequently negotiated by parties in agreements and consent orders, the law on time limits remains uncertain. In some parts of the country trial courts feel bound by appellate court rulings confining time-limited orders to a narrow range of exceptional cases, primarily short marriages without children.

It is in marriages of medium length that duration remains uncertain. Here practice varies and depends upon many factors—regional support cultures and the governing provincial appellate court jurisprudence; whether the context is negotiation or court-ordered support; and whether the support claim is compensatory or non-compensatory in nature. The most that can be said is that current law is inconsistent on the issue of time limits in medium-length marriages.

In practice the issue of duration in medium-length marriages is often put off to the future, to be dealt with through ongoing reviews and variations. In some cases this process of review and variation may eventually generate a time-limited order leading to termination. Under current practice uncertainty about duration can generate low monthly awards, as judges or lawyers fear that any monthly amount of support could continue for a long time, even permanently.

In developing the Draft Proposal, it was our view that reasonable time limits for medium length marriages would be an essential element of the scheme, under both the *without child support* and *with child support* formulas, especially if the Guidelines were to generate reasonable monthly amounts. *Bracklow* emphasized this interrelationship between amount and duration, recognizing that a low award paid out over a lengthy period of time is equivalent to an award for a higher amount paid out over a shorter period of time. As well, we were aware of the importance of providing structure in this area to facilitate negotiation and settlement. Recognizing that this was an area of law in flux, we saw a role for the Advisory Guidelines in helping to shape the developing law.

In assessing the compatibility of the time limits generated by the *without child support* formula with current law it is important to keep in mind that they are potentially very generous; in medium length marriages they can extend for up to 19 years. These time

limits are thus very different from the short and arbitrary time limits, typically of between three to five years, that became standard under the clean-break model of spousal support for medium-to-long marriages and which *Moge* rejected. The time limits generated by the formula should be assessed in context—they are potentially for lengthy periods of time and, once marriages are of any significant length, operate in conjunction with generous monthly amounts.

As well, it is important to keep in mind that in the context of the *without child support* formula, support claims in medium-length marriages will typically be non-compensatory. In non-compensatory support cases, one strand of the post-*Bracklow* case law recognizes the appropriateness of time limited orders when the purpose of the support order is to provide a period of transition to a lower standard of living rather than compensation for lost career opportunities. Such use of time limits does not involve “crystal-ball gazing” and the making of arbitrary assumptions about future developments, but rather reflects the basis of entitlement.

In Chapter 8 you will see that we dealt with the issue of time limits in short and medium-length marriages with children somewhat differently, because of the strong compensatory claims in such cases and the need for individualized assessment of recipients’ challenges in over-coming disadvantage resulting from the assumption of the child-rearing role.

We recognize that some provincial appellate court jurisprudence may at this point create barriers to the use of the formula’s time-limits by trial judges. We also recognize that the lengthy time limits potentially generated under the *without child support* formula—up to 19 years in duration—are very different from the typical kinds of time limits with which our law of spousal support is familiar and raise some distinct problems of foreseeability. In our view, the law around time limits will continue to develop and to respond to the durational ranges under the formula. We already see signs of this in the Guidelines case law since the release of the Draft Proposal which offers several examples of judges making somewhat novel time-limited orders for the lengthy durations generated by the *without child support* formula.⁷² In assessing the feasibility of these orders, it is important to remember that time-limited orders are subject to variation. It is thus possible to avoid some of the problems of arbitrary “crystal ball gazing” while reinforcing expectations with respect to the eventual termination of the support order.⁷³

As well, in cases where it is not feasible for courts to impose the time limits generated by the formula in initial orders, the time limits can still be used in a “softer”, more indirect way to structure the on-going process of review and variation and to reinforce expectations of the eventual termination of the order. This is not dissimilar to the use of the time limits under the *with child support* formula where they establish the outside limit

⁷² See for example, *Hance v. Carbone*, 2006 CarswellOnt 7063 (Ont.S.C.J.) (17 ½ yr. marriage; spousal support ordered for 15 years in addition to 6 years time-limited provided under separation agreement) and *Bishop v. Bishop*, [2005] N.S.J. No. 324, 2005 NSSC 220 (N.S.S.C.) (13 year marriage; final order spousal support for 10 years in addition to 1 year interim). For an example under the *with child support* formula, discussed in Chapter 8, see *Fewer v. Fewer*, [2005] N.J. No. 303, 2005 NLTD 163 (N.L.S.C.) (16 ½ yr. marriage; 1 child 15 with wife; spousal support ordered for 16 ½ yrs from separation, subject to variation).

⁷³ The variation of time-limited orders is explicitly discussed in *Fewer, ibid.*

for indefinite (duration not specified) orders. The fact that courts are reluctant to make time limited orders on initial applications does not preclude the eventual use of time limits on subsequent reviews or variations. The Guidelines case law already offers several examples of this “softer” use of time limits in subsequent variations or reviews to bring an eventual termination to what was initially an indefinite order.⁷⁴

Finally, if the durational limits under this formula, even in their “softer” form, are found to be inappropriate in cases close to the 20 year threshold for indefinite support, restructuring can be used to extend duration. As is explained in Chapter 10, duration can be extended by restructuring so long as an appropriate downward adjustment is made to amount so as to keep the total value of the award within the global ranges generated by the formula.

7.6 Making the Formula Concrete—Some Examples

7.6.1 A short-marriage example

In cases of short marriages, marriages of less than 5 years, the *without child support* formula generates very small amounts for a very short duration. The formula will always generate time-limits in these cases.⁷⁵

Example 7.2

Karl and Beth were married for only four years. They had no children. Beth was 25 when they met and Karl was 30. When they married, Beth was a struggling artist. Karl is a music teacher with a gross annual income of \$60,000. Beth now earns \$20,000 per year, selling her work and giving art lessons to children. Entitlement is a threshold issue before the Advisory Guidelines apply. On these facts, given the disparity in income and Beth’s limited income at the point of marriage breakdown, entitlement is likely to be found.

The conditions for indefinite (duration not specified) support do not apply and duration would be calculated on the basis of .5 to 1 year of support for each year of marriage.

To determine the **amount** of support under the formula:

- Determine the **gross income difference** between the parties:
 $\$60,000 - \$20,000 = \$40,000$

⁷⁴ One of the best examples is *Kelly v. Kelly*, [2007] B.C.J. No. 324, 2007 BCSC 227 (17 year relationship, no children, support paid for 9 years; wife remarried; on variation application support recognized as non-compensatory; time-limited to further 19 months, 10 years total.) Another good example under the *custodial payor* formula is *Puddifant v. Puddifant*, [2005] N.S.J. No. 558, 2005 NSSC 340 (S.C.F.D.) (12 year marriage, 1 child with husband, wife mental illness, support paid for 9 years; on husband’s application to terminate support ordered for further 3 years, total 12 years.)

⁷⁵ The “rule of 65”, which allows for indefinite support to older spouses in marriages of less than 20 years in length, does not apply to short marriages (under 5 years).

- Determine the **applicable percentage** by multiplying the length of the marriage by 1.5-2 percent per year:
 $1.5 \times 4 \text{ years} = \mathbf{6 \text{ percent}}$
to
 $2 \times 4 \text{ years} = \mathbf{8 \text{ percent}}$
- Apply the applicable percentage to the income difference:
 $6 \text{ percent} \times \$40,000 = \$2,400/\text{year}$ (**\$200/month**)
to
 $8 \text{ percent} \times \$40,000 = \$3,200/\text{year}$ (**\$267/month**)

Duration of spousal support = $(.5-1) \times 4 \text{ years of marriage} = 2 \text{ to } 4 \text{ years}$

The result under the formula is support in the range of \$200 to \$267 per month for a duration of 2 to 4 years.

In practice, this modest award would likely be converted into a lump sum using **restructuring**, discussed in Chapter 10.

7.6.2 Some medium-length marriage examples

In medium-length marriages (5 to 19 years), the formula generates increasing amounts of support as the marriage increases in length, moving from relatively small percentages at the shorter end of the spectrum to relatively generous amounts after 15 years, when awards of 30 percent of the gross income difference become possible. Except where the rule of 65 is applicable, the formula generates time limits of varying lengths depending on the length of the marriage. The ranges for duration are, however, very wide, leaving much opportunity to respond to the facts of particular cases.

This category covers a diverse array of cases raising a variety of support objectives. Current law is at its most inconsistent in its handling of these cases. This area posed the greatest challenges to developing a single formula that would yield appropriate results. We concluded that our formula based on merger over time provided the best starting point. But not surprisingly, it is in these cases that there will be the most frequent need to rely upon restructuring to massage the formula outcomes and where there will likely be the greatest resort to exceptions.

Example 7.3

Bob and Susan have been married 10 years. They married in their late twenties and Sue is now 38. Bob is employed as a computer salesman and Sue is a hairdresser. Both worked throughout the marriage. There were no children. Bob's gross annual income is \$65,000; Sue's is \$25,000.

Entitlement is a threshold issue before the Advisory Guidelines are applicable. An argument might be made that there is no entitlement to support: Sue is employed full time and could support herself, and there is no compensatory basis for support. However, Sue will suffer a significant drop in standard of living as result of the marriage breakdown and, at an income of \$25,000, will likely experience some economic hardship. Current law would suggest an

entitlement to at least transitional support on a non-compensatory basis to allow Sue to adjust to a lower standard of living.

The case does not satisfy the conditions for indefinite (duration not specified) support. The marriage is under 20 years and the case does not fall within the “rule of 65” for indefinite support because Sue’s age at separation plus years of marriage is below 65 ($38+10=48$).

To determine the **amount** of support under the formula:

- Determine the **gross income difference** between the parties:
 $\$65,000 - \$25,000 = \$40,000$
- Determine the **applicable percentage** by multiplying the length of the marriage by 1.5-2 percent per year:
 $1.5 \times 10 \text{ years} = \mathbf{15 \text{ percent}}$
to
 $2 \times 10 \text{ years} = \mathbf{20 \text{ percent}}$
- Apply the applicable percentage to the income difference:
 $15 \text{ percent} \times \$40,000 = \$6,000/\text{year}$ (**\$500/month**)
to
 $20 \text{ percent} \times \$40,000 = \$8,000/\text{year}$ (**\$667/month**)

Duration of spousal support = $(.5-1) \times 10$ years of marriage = 5 to 10 years

The result under the formula is support in the range of \$500 to \$667 per month for a duration of 5 to 10 years.

Consistent with current law, the formula essentially generates modest top-up support for a transitional period to assist Sue in adjusting from the marital standard of living.

An award of \$500 per month, at the low end of the range, would leave Sue with a gross annual income of \$31,000 and Bob with one of \$59,000. An award of \$667 per month, at the high end of the range, would leave Sue with a gross annual income of \$33,000 and Bob with one of \$57,000. In a marriage of this length the formula does not equalize incomes.

Some might find the amounts generated by the formula too low, even at the high end of the range. An argument could be made that, consistent with current law, any transitional order should put Sue somewhat closer to the marital standard of living for the period of gearing down. As will be discussed in Chapter 10, a **restructuring** of the formula outcome is possible to produce larger amounts for a shorter duration.

Example 7.4

David and Jennifer were married for 12 years. It was a second marriage for both. David was 50 when they met. He is a businessman whose gross annual income is now \$100,000 per year. Now 62, he is in good health, loves his work, and has no immediate plans to retire. Jennifer was 45 when they met, while Jennifer was working in his office. She had been a homemaker for 20 years during her first

marriage and had received time-limited support. When they met she was working in a low-level clerical position earning \$20,000 gross per year. Jennifer, now 57, did not work outside the home during the marriage.

Entitlement is a threshold issue before the Advisory Guidelines are applicable. Given the length of the marriage and Jennifer's lack of income, entitlement to support on non-compensatory grounds would be relatively uncontentious.

The **amount** of support on an income difference of \$18,000 and a 12 year marriage would be calculated as follows:

$$\begin{array}{l} 18 \text{ percent X } \$100,000 = \$18,000/\text{year} (\mathbf{\$1,500/\text{month}}) \\ \text{to} \\ 24 \text{ percent X } \$100,000 = \$24,000/\text{year} (\mathbf{\$2,000/\text{month}}) \end{array}$$

This is a case where the "rule of 65" would govern duration. Because Jennifer's age at separation plus years of marriage is 65 or over ($57+12=69$), the formula provides for indefinite (duration not specified) support, rather than the durational range of 6 to 12 years based on length of marriage alone. A variation in amount would, however, be likely when David retires.

The result under the formula is support in the range of \$1,500 to \$2,000 a month on an indefinite (duration not specified) basis, subject to variation and possibly review.

Support at the low end of the range would leave Jennifer with a gross annual income of \$18,000 and David with one of \$72,000. Support at the high end of the range would leave Jennifer with a gross annual income of \$24,000 and David with one of \$66,000. Again, because of the length of the marriage (12 years), the formula does not generate results that approach income equalization.

7.6.3 Some long-marriage examples

In cases of long marriages (20 years or longer) the formula generates generous levels of spousal support for indefinite periods, reflecting the fairly full merger of the spouses' lives. The long marriages covered by the *without child support* formula fall into two categories: those where there have been children who are no longer dependent and those where the couple did not have children.

Example 7.1 provides an example of the formula's application to a long marriage with children where the wife was a secondary earner. *Example 7.5*, presented below, involves the familiar scenario of a very long traditional marriage.

Example 7.5

John and Mary were married for 28 years. Theirs was a traditional marriage in which John worked his way up the career ladder and now earns \$100,000 gross per year, while Mary stayed home and raised their two children, both of whom are now grown up and on their own. Mary is 50 years of age and has no income. John is 55.

Entitlement to spousal support is clear on these facts and thus the Advisory Guidelines are applicable. Because the length of the marriage is over 25 years, the maximum range for amount applies—37.5 to 50 percent of the gross income difference (capped at equalization of net incomes).

The range for amount on an income difference of \$100,000 after a 28 year marriage would be:

$$\begin{aligned} &37.5 \text{ percent X } \$100,000 = \$37,500/\text{year} (\mathbf{\$3,125/\text{month}}) \\ &\text{to} \\ &50 \text{ percent X } \$100,000 = \$50,000/\text{year} (\mathbf{\$4,167/\text{month, capped at} } \\ &\mathbf{\$4048}^{76}) \end{aligned}$$

Duration is indefinite (duration not specified) because the marriage is 20 years or over in length.

The formula results in a range for support of \$3,125 to \$4,048 per month for an indefinite (unspecified) duration, subject to variation and possibly review.

An award of \$3,125 per month, at the low end of the range, would leave Mary with a gross income of \$37,500 per year and John with one of \$62,500. An award of \$4,048 per month, at the high end of the range, would equalize the net incomes of the parties.

As will be discussed further in Chapter 14, the order is open to variation over time in response to changes in the parties' circumstances, including increases in Mary's income or the imputation of income to her if she fails to make reasonable efforts to contribute to her own support. John's retirement would also likely be grounds for variation.

Example 7.6 involves a long marriage without children.

Example 7.6

Richard is a teacher with a gross annual income of \$75,000. He is in his late forties. His wife, Judy, is the same age. She trained as a music teacher but has worked as a freelance violinist for most of the marriage, with a present gross income of \$15,000 a year. Judy has also been responsible for organizing their active social life and extensive vacations. They were married 20 years. They had no children.

Entitlement will easily be established in this case given the significant income disparity, Judy's limited employment income, and the length of the marriage.

The range for amount under the formula, based on income difference of \$60,000 and a 20 year marriage is:

$$\begin{aligned} &30 \text{ percent X } \$60,000 = \$18,000/\text{year} (\mathbf{\$1,500/\text{month}}) \\ &\text{to} \\ &40 \text{ percent X } \$60,000 = \$24,000/\text{year} (\mathbf{\$2,000/\text{month}}) \end{aligned}$$

⁷⁶ This is based on an assumption of Ontario residence and the applicable tax rates and mandatory deductions in November 2007.

Duration would be indefinite (duration not specified) because the marriage was 20 years in length.

The result under the formula is support in the range from of \$1,500 to \$2,000 per month for an indefinite (unspecified) duration, subject to variation and possibly review.

An award at the lower end of the range would leave Judy with a gross annual income of \$33,000 and Richard with one of \$57,000. An award at the high end of the range would leave Judy with a gross annual income of \$39,000 and Richard with one of \$51,000.

Judy will certainly be expected to increase her income and contribute to her own support. The issue in applying the formula will be whether a gross income of \$30,000 a year, for example, should be attributed to Judy for the purposes of an initial determination of support. If so, support under the formula would be lowered to a range of \$1,125 to \$1,500 per month (or \$13,500 to \$18,000 per year).

More likely, Judy would be given some period of time (for example one or two years) before she would be expected to earn at that level, with support to be adjusted at that point, after a review.

7.7 After the Formula

As the examples in this chapter indicate, many issues remain after the application of the *without child support* formula—issues of choosing an amount and duration within the ranges, restructuring, and exceptions, all addressed in separate chapters below. It is important to keep these other parts of the Advisory Guidelines in mind, particularly in cases involving the *without child support* formula where restructuring and exceptions will frequently need to be used.

8 THE WITH CHILD SUPPORT FORMULA

The dividing line between the two proposed formulas under the Advisory Guidelines is the presence of a child support obligation.⁷⁷ Where the spouses have not had children or the children have grown up and are on their own, the *without child support* formula will apply. Where a spouse is paying child support, the *with child support* formula will apply.

From a technical perspective, there must be a different formula for spousal support in these cases, a formula that takes into account the payment of child support and its priority over spousal support as set out in s. 15.3 of the *Divorce Act*. Further, because of tax and benefit issues, we have to use net rather than gross incomes. Practically, the payment of child support usually means reduced ability to pay spousal support. And, theoretically, there are different rationales for the amount and duration of spousal support where there are still dependent children to be cared for and supported.

This category of cases dominates in practice, in support statistics and in jurisprudence. Any guidelines must generate a workable formula for amount and duration for this category, a formula that can adjust across a wide range of incomes and family circumstances. For the most part, marriages with dependent children will involve spousal support paid by a parent who is also paying child support to the recipient spouse. The basic formula in this chapter is constructed around this typical situation. Variations on the basic formula are required to accommodate cases of shared and split custody. There are also a sizeable number of cases where the spouse paying spousal support has primary parental responsibility for the children. In these custodial payor situations, an alternative formula must be constructed. Finally, we have added one more hybrid formula, applicable in cases where the only remaining children are away at university or otherwise have their child support determined under section 3(2)(b) of the *Child Support Guidelines*.

The *with child support* formula is thus really a family of formulas, adjusted for different parenting arrangements.

8.1 The Compensatory Rationale for Spousal Support

Where there are dependent children, the primary rationale for spousal support is compensatory. After *Moge*, spouses must, as Chief Justice McLachlin put it in *Bracklow*, “compensate each other for foregone careers and missed opportunities during the marriage upon the breakdown of their union.”⁷⁸ The main reason for those foregone careers and missed opportunities is the assumption of primary responsibility by one spouse for the care of children during the marriage. Where one spouse, in a marriage with children, has become a full-time homemaker or has worked outside the home part time or has worked as a secondary earner, there will be disadvantage and loss at the end of the

⁷⁷ The child support obligation must be for a child of the marriage. A child support obligation to a child from a prior marriage or relationship is dealt with as an exception under both formulas, explained in more detail in Chapter 12 on Exceptions below.

⁷⁸ *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at para. 1.

marriage, usually warranting compensatory support. This compensatory rationale is encompassed by the first of the four objectives of spousal support, in s. 15.2(6)(a) of the *Divorce Act*.

Under compensatory theory, it is usually necessary to estimate the spouse's disadvantage or loss by determining what the recipient's career or employment path might have been, had the recipient not adopted his or her role during the marriage—not an easy task. The ideal evidence would be individualized economic evidence of earning capacity loss, but few litigants can afford such evidence and often it would be highly speculative. Some spouses never establish a career or employment history. For others, their pre-marital and marital choices were shaped by their future expected role during marriage. And there are short marriages, where past losses are relatively small and most of the spouse's child-rearing and any associated losses are still to come in the future.

As was explained in Chapter 1, after *Moge*, courts had to develop proxies to measure that loss where there was no clear and specific career or employment path. Need became the most common proxy, calculated through the conventional budget analysis. Sometimes standard of living was used, with the post-separation position of the recipient spouse measured against the marital standard or some reasonable standard of living. In practice, crude compromises were made in applying the compensatory approach.

More recently, what we have called the **parental partnership** rationale has emerged in the literature and in the case law. On this approach, the obligation for spousal support flows from parenthood rather than the marital relationship itself. It is not the length of the marriage, or marital interdependency, or merger over time, that drives this theory of spousal support, but the presence of dependent children and the need to provide care and support for those children. Unlike the conventional compensatory approach, parental partnership looks at not just past loss, but also the continuing economic disadvantage that flows from present and future child-care responsibilities. For shorter marriages with younger children, these present and future responsibilities are more telling. Further, the parental partnership rationale better reflects the reality that many women never acquire a career before marriage, or mould their pre-marital employment in expectation of their primary parental role after marriage.

The parental partnership rationale is firmly anchored in one of the four statutory objectives in s. 15.2(6) of the *Divorce Act*, where clause (b) states a spousal support order should:

apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage.

The 1997 implementation of the *Federal Child Support Guidelines* has reinforced this rationale. Under the Guidelines, only the direct costs of child-rearing—and not even all of them—are included in child support. The indirect costs of child-rearing were left to be compensated through spousal support, as was recognized by the 1995 Family Law Committee's *Report and Recommendations on Child Support*. Principal amongst these indirect costs is the custodial parent's reduced ability to maximize his or her income because of child-care responsibilities. Now that child support is fixed under the *Child*

Support Guidelines and determined by a different method than before 1997, spousal support has to be adjusted to reflect the concerns identified by the parental partnership model.

With the implementation of the *Federal Child Support Guidelines* came the increased use of computer software. The software regularly and graphically displays information like net disposable income, monthly cash flow and household standards of living. This information has made spouses, lawyers, mediators and courts more conscious of the financial implications of child and spousal support, in turn reflected in the use of these concepts in determining the amount of spousal support. Before the *Federal Child Support Guidelines*, and even afterwards for a while, most courts were not prepared to award more than 50 percent of the family's net disposable income to the recipient spouse and children, leaving the single payor spouse with the other 50 percent. With the new software, many courts began consciously to allocate more than 50 percent of a family's net disposable income to the recipient spouse and children, and even as much as 60 percent, as in the Ontario Court of Appeal decision in *Andrews v. Andrews*⁷⁹ and in numerous trial decisions across the country.⁸⁰

These cases also reveal a non-compensatory element found in some decisions where both child and spousal support are paid to the same parent. There is a household standard of living element within the parental partnership rationale that should be openly acknowledged. Both child and spousal support go into the same household, to support the standard of living of both parent and child. In some cases, spousal support is used as a residual financial remedy to shore up the standard of living that the children experience in the recipient's household.

8.2 Background to the Basic Formula

There is no simple way to construct a formula for spousal support where the support payor is also paying child support. First, child support must be determined, as it takes priority over spousal support in assessing the payor's ability to pay. Second, child support is not taxable or deductible, but spousal support is taxable to the recipient and deductible for the payor. Third, child and spousal support must be determined separately, but it is very difficult in any formula to isolate spousal finances cleanly from support of children.

This formula for cases with child support—the *with child support* formula—differs from the *without child support* formula set out in Chapter 7. First, the *with child support* formula uses the **net incomes** of the spouses, not their gross incomes. Second, the *with child support* formula divides the **pool** of combined net incomes between the two spouses, not just the difference between the spouses' gross incomes. Third, in the *with child support* formula, the upper and lower percentage limits for net income division **do not change with the length of the marriage**.

⁷⁹ *Andrews v. Andrews*, (1999), 50 R.F.L. (4th) 1 (Ont. C.A.).

⁸⁰ See for example *Gale v. Gale* (2000), 6 R.F.L. (5th) 157 (Man.Q.B.), *Bastedo v. Bastedo*, [2000] P.E.I.J. No. 49 (S.C.T.D.), *Lyttle v. Bourget*, [1999] N.S.J. No. 298 (S.C.), *Tedham v. Tedham*, [2002] B.C.J. No. 1635 (S.C.), *Clark v. Cooper-Clark*, [2002] N.B.J. No. 41 (Q.B.).

Unlike the *without child support* formula, this formula must use **net income**. While gross income would be simpler to understand, calculate and implement, nothing remains simple once child support has to be considered. Different tax treatment demands more detailed after-tax calculations, and ability to pay must be more accurately assessed. Net income computations will usually require computer software, another unavoidable complication.

Thanks to that same computer software, many lawyers had become familiar with net disposable income or monthly cash flow calculations before the release of the Draft Proposal. Judges were using such calculations to underpin their spousal support decisions. In the software programs, these numbers included child and spousal support to produce what can be called **family net disposable income** or monthly cash flow. This larger pool of net income is then divided between the spouses. Often, more than 50 percent of this family net disposable income is allocated to the recipient spouse and children by way of combined child and spousal support, or sometimes as much as 60 percent and occasionally even more. Under the formula proposed here for spousal support, we divide a different and smaller pool of net income, after removing the spouses' respective child support obligations—what we call **individual net disposable income** or **INDI**.

We considered using the more familiar family net disposable income as the basis for the *with child support* formula, rather than this newer variation of individual net disposable income. In the end we opted for individual net disposable income. First, the family net disposable income of the recipient spouse includes both child and spousal support, bulking up the recipient's income in a somewhat misleading fashion and masking the impact of spousal support upon the recipient parent's individual income. Second, allocating family NDI between spouses blurs the distinction between child and spousal support, between child and adult claims upon income. Individual NDI attempts to back out the child support contributions of each spouse, to obtain a better estimate of the income pool that remains to be divided between the adults. Third, after separation, the spouses see themselves, not as one family, but more as individuals with distinct relationships with their children and their former spouses. Fourth, separating out each spouse's individual net disposable income, after removal of child support obligations, produced a more robust and sophisticated formula, one that adjusted better across income levels and numbers of children.

8.3 The Basic Formula

Set out in the box below is a summary of how this basic *with child support* formula works. Remember that this formula applies where the higher income spouse is paying both child and spousal support to the lower income spouse who is also the primary parent. By primary parent, we mean the spouse with sole custody or the spouse with primary care of the children in a joint custody arrangement.

The Basic With Child Support Formula for Amount

(1) Determine the **individual net disposable income (INDI)** of each spouse:

- Guidelines Income *minus* Child Support *minus* Taxes and Deductions = Payor's INDI
- Guidelines Income *minus* Notional Child Support *minus* Taxes and Deductions *plus* Government Benefits and Credits = Recipient's INDI

(2) Add together the individual net disposable incomes. By iteration, determine the range of spousal support amounts that would be required to leave the lower income recipient spouse with between 40 and 46 per cent of the combined INDI.

8.3.1 Calculating individual net disposable income

Basic to this formula is the concept of **individual net disposable income**, an attempt to isolate a **pool** of net disposable income available after adjustment for child support obligations.

The starting point is the Guidelines income of each spouse as is explained in Chapter 6 above. In the interests of uniformity and efficiency, we basically use the same definition of income as that found in the *Federal Child Support Guidelines*. Next, we deduct or back out from each spouse's income their respective **contributions to child support**.

For the child support **payor**, that is usually the table amount, plus any contributions to special or extraordinary expenses, or any other amount fixed under any other provisions of the *Federal Child Support Guidelines*. For the child support **recipient**, a **notional table amount** is deducted, plus any contributions by the recipient spouse to s. 7 expenses. In reality, the recipient will likely spend more than these amounts through direct spending for the children in her or his care. But by this means we make an adjustment, however imperfect, for the recipient's child support obligation. A formula could be constructed without this notional child support number, but such a formula would have adjusted to the number of children and income levels with less precision and with less transparency about the role of the recipient parent.

Second, **income taxes and other deductions** must be subtracted from the incomes of both the payor and the recipient to obtain net incomes. As spousal support is transferred from one spouse to another, because of tax effects, the size of the total pool of individual net disposable income actually changes slightly, which complicates these calculations. The current software does these calculations automatically, as differing hypothetical amounts of spousal support are transferred, a process called "iteration".

Clearly permissible **deductions** are federal and provincial income taxes, as well as employment insurance premiums and Canada Pension Plan contributions. Union dues and professional fees are already deducted from Guidelines income under the adjustments of Schedule III to the *Federal Child Support Guidelines*. Deductions should be recognized for certain benefits, e.g. medical or dental insurance, group life insurance, and

other benefit plans, especially those that provide immediate or contingent benefits to the former spouse or the children of the marriage.

More contentious are **deductions for mandatory pension contributions**. We concluded that there should **not** be an automatic deduction for such pension contributions, but the size of these mandatory deductions may sometimes be used as a factor to justify fixing an amount towards the lower end of the spousal support range.

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

Third, we **do include** in each spouse's income the amounts identified for **government benefits and refundable credits**. Included are the Child Tax Benefit, the National Child Benefit Supplement, the GST credit, the refundable medical credit, the Child Disability Benefit, the various provincial benefit and credit schemes, and the new Universal Child Care Benefit. Under the *Federal Child Support Guidelines* these benefits and credits are generally **not** treated as income. For the reasons set out in Chapter 6 on Income above, a different approach is warranted for spousal support purposes.

8.3.2 The Basic Formula: Dividing Individual Net Disposable Income

Once the individual net disposable income (INDI) of each spouse has been determined, the next step is to add together these individual net disposable incomes. Then we have to iterate, i.e. to estimate hypothetical spousal support repeatedly, in order to determine the amount of spousal support that will leave the lower income recipient spouse with between 40 and 46 percent of the combined pool of individual net disposable income.

How did we arrive at the percentages for the range, from 40 to 46 percent of the individual net disposable income? This was a critical issue in the construction of this formula. In our earlier Sneak Preview in the summer of 2004, we had suggested a higher range, from 44 to 50 percent of INDI. We ultimately opted for a lower range, after much discussion with the Advisory Working Group, some limited feedback from the Sneak Preview, further reviews of the case law in various provinces, and some more hard thought about the upper and lower bounds for these ranges. Since the release of the Draft Proposal and after our meetings across Canada, we can confirm that this percentage range is appropriate.

We found that a range of 40 to 46 percent of individual net disposable income typically covered spousal support outcomes in the **middle** of the very wide range of outcomes now observed in most Canadian provinces. To capture the middle of the range on a national basis means that some areas will find the upper bound (46 percent) a bit low and other areas will consider even the lower bound (40 percent) at the higher end of their local range.

Prior to the Sneak Preview, we had experimented with a range of 40 to 50 percent of INDI. But that produced far too broad a range in absolute dollar terms. One of the objectives of the Advisory Guidelines is to develop more predictability and consistency in spousal support outcomes and a ten-percentage point range simply failed to do that. A narrower five or six percentage point range is about right.

The lower boundary of this range—40 percent of INDI—does ensure that the recipient spouse will receive not less than 50 percent of the family net disposable income in all cases involving two or more children, and slightly below that in one-child cases.

The upper end of this range—46 percent of INDI—falls short of an equal split, which would leave both spouses in the same individual position. Despite the intellectual attraction of a 50/50 split, there are a number of practical problems that convinced us that it was not appropriate to set the upper limit of the range there. First, very few courts are currently prepared to push spousal support amounts that high. Second, there is a live concern for the access-related expenses of the payor spouse, expenses that are not otherwise reflected in the formula. Most payors are exercising access and most are spending directly upon their children during the time they spend with their children. Third, there are concerns for the payor in the situation where the payor has employment-related expenses and the recipient spouse is at home full time and receiving large spousal support.

We should repeat here a central difference between this formula and the *without child support* formula: **the length of the marriage does not affect the upper and lower percentages in this *with child support* formula.**

We also wish to stress the inter-relationship between the percentage limits and the precise elements of our version of individual net disposable income. If a notional table amount were not removed from the recipient spouse's income, or if government benefits and refundable credits were excluded, then the formula percentages would have to change. Our objective throughout has been to develop formulas that can capture the bulk of current outcomes, while at the same time demonstrating robustness in adjusting across incomes and child support amounts and custodial situations.

As a result of computer software, lawyers and courts became accustomed to calculating net disposable income or monthly cash flow on a *family* basis: the payor's net disposable income after deduction of child and spousal support and taxes, and the recipient's after addition of child and spousal support (and deduction of taxes). How do these more familiar family net disposable income percentages compare to our range of individual net disposable income divisions? Typically, the 46 percent of INDI at the upper end of our

proposed formula generates a family net disposable income for the primary parent spouse of 56 to 58 percent where there are two children. At the lower end of the range, a spousal support amount that leaves the recipient spouse with 40 percent of INDI will typically leave that spouse and the two children with 52 or 53 percent of the family net disposable income. For comparison purposes, we have provided family net disposable income proportions in the examples below.

We recognize that Quebec has a different scheme of determining child support, which in turn has implications for fixing spousal support. The application of the Advisory Guidelines in divorce cases in Quebec is dealt with in more detail in Chapter 15.

8.4 Amounts of Spousal Support: Examples of the Basic Formula

At this point it helps to give a few examples of the ranges of monthly spousal support generated by this basic formula. Then we will move to the issue of duration. For illustration purposes, we assume that these parents and children all live in Ontario, as the use of one jurisdiction simplifies the exposition of the formula's operation.

In the earlier Draft Proposal, the formula calculations were done partially with software and partially by hand. With the release of the Draft Proposal, Canada's three major family law software suppliers incorporated the Spousal Support Advisory Guidelines into their programs, so that the calculations can be done easily and with greater precision. In addition, the ranges for amount have changed since the January 2005 release of the Draft Proposal, due to changes in child support table amounts in May 2006, various changes to federal and provincial taxes and changes in child benefits. The result is that the numbers in these examples are different from those set out in the Draft Proposal.

Example 8.1

Ted and Alice have separated after 11 years together. Ted works at a local manufacturing plant, earning \$80,000 gross per year. Alice has been home with the two children, now aged 8 and 10, who continue to reside with her after separation. After the separation, Alice found work, less than full time, earning \$20,000 gross per year. Alice's mother provides lunch and after-school care for the children, for nothing, when Alice has to work. Ted will pay the table amount for child support, \$1,159 per month. Alice's notional table amount would be \$308. There are no s. 7 expenses (if there were, the spousal amounts would be lower).

Under the formula, Ted would pay spousal support in the range of \$474 to \$1,025 per month.

Using the *family* net disposable income figures (or the similar monthly cash flow figures) more familiar to current software users, spousal support of \$1,025 monthly along with the child support would leave Alice and the children with \$4,003 per month and Ted with \$2,976 per month, or 57.4 per cent of the family's net disposable income in favour of Alice and the children. At the lower end of the range, with spousal support of \$474 per month, the net disposable income of the family would be split 52.6/47.4 in favour of Alice and the children, leaving Ted with \$3,326 monthly and Alice and the children with

\$3,684. The amount of spousal support is obviously affected by the **number of children**. If Ted and Alice had only one child, the spousal support range would be higher, from \$888 to \$1,463 per month. If the couple had three children, Ted's ability to pay would be reduced, bringing the range down to \$79 to \$626 monthly. Four children would lower that range even further, down to a range from zero to \$222 per month.

The spousal support range will also be lowered by any payment of section 7 expenses. In our *Example 8.1*, if Alice were paying child care expenses of \$8,000 per year for the two children and Ted paid his proportionate share of the net cost, the formula range would reduce to \$319 to \$925 per month for spousal support.

Example 8.2

Bob and Carol have separated after eight years of marriage and two children, now aged 4 and 6, who are both living with Carol. Bob earns \$40,000 gross annually at a local building supply company, while Carol has found part-time work, earning \$10,000 per year. Carol's mother lives with Carol and provides care for the children when needed. Bob pays the table amount of \$601 per month for the children. Carol's notional table amount of child support would be \$61 per month. There are no s. 7 expenses.

Under the formula, Bob would pay spousal support in the range of zero to \$34 per month.

Again, by way of comparison to the more familiar numbers, if Bob were to pay child support of \$601 and spousal support of \$34 monthly, at the upper end of the range, he would be left with \$1,951 per month, while Carol and the two children would have *family* net disposable income of \$2,325 monthly, or 54.4 percent of the family's net disposable income.

Example 8.3

Drew and Kate have been married for four years. Drew earns \$70,000 gross per year working for a department store. Kate used to work as a clerk in the same store, but she has been home since their first child was born. The children are now 1 and 3, living with Kate. Kate has no Guidelines income (and hence there is no notional table amount for her). Drew will pay the table amount of \$1,043 per month for the two children.

Under the formula, Drew would pay spousal support to Kate in the range of \$908 to \$1,213 per month.

If Drew were to pay spousal support of \$1,213 monthly, he would have \$2,394 per month, while Kate and the children would have *family* net disposable income of \$3,084 monthly, or 56.3 percent of the total family NDI. At the lower end of the range, spousal support of \$908 per month would leave Drew with \$2,604 in family NDI, while Kate and the children would have \$2,780 monthly, or 51.6 percent of the family's NDI.

The formula generates ranges for the amount of spousal support. Chapter 9 below discusses the factors to be considered in fixing a particular amount within the ranges.

8.5 Duration under the Basic Formula

In most cases where there are dependent children, the courts order “indefinite” spousal support, usually subject to review or sometimes just left to variation. Even when the recipient spouse is expected to become self-sufficient in the foreseeable future, courts typically have not often imposed time limits in initial support orders. Where the recipient spouse is not employed outside the home, or is employed part-time, the timing of any review is tied to the age of the children, or to some period of adjustment after separation, or to the completion of a program of education or training. As the recipient spouse becomes employed or more fully employed, spousal support will eventually be reduced, to top up the recipient’s employment earnings, or support may even be terminated. In other cases, support is reduced or terminated if the recipient spouse remarries or re-partners.

In practice, where there are dependent children, few “indefinite” orders are permanent. Many intervening events will lead to changes or even termination. Some of these issues are canvassed in Chapter 14, which deals with variation, review, remarriage, second families, etc. By making initial orders indefinite, the current law simply postpones many of the difficult issues relating to duration and recognizes the fact-specific nature of these determinations.

Under the *without child support* formula, discussed in Chapter 7, there are time limits keyed to the length of the marriage, i.e. .5 to 1 year of spousal support for each year the spouses have cohabited, subject to the exceptions for indefinite (duration not specified) support.

Under the *with child support* formula, one option was simply to leave duration indefinite in all cases, with no durational limits of any kind, thereby avoiding all of the difficult issues of duration where there are dependent children. Such an approach would, however, be inconsistent with our durational approach under the *without child support* formula. It would also be inconsistent with the underlying parental partnership rationale for spousal support. This rationale emphasizes the ongoing responsibilities for child-care after separation and the resulting limitations on the custodial or residential parent’s earning abilities. When those responsibilities cease, there must be some other reason for support to continue, such as the length of the marriage.

Our approach to duration for marriages with dependent children maintains current practices, while introducing the general idea of a range for duration. **Initial orders continue to be indefinite (duration not specified) in form**, subject to the usual processes of review or variation. That does not change. What our approach adds is the acceptance of generally understood **outside limits** on the cumulative duration of spousal support that will inform the process of review and variation.⁸¹

⁸¹ The approach to duration under this formula involves fairly extensive reliance upon review orders. We discuss review orders and the leading Supreme Court of Canada decision, *Leskun v. Leskun*, [2006] 1 S.C.R. 920 in more detail in Chapters 13 and 14. In our view, the role contemplated for review orders under this formula is not inconsistent with *Leskun*.

The durational limits under this formula combine the factors of length of marriage and length of the remaining child-rearing period, under two different tests for duration. For longer marriages, it makes sense that a recipient spouse should get the benefit of the time limits based upon length of marriage that might be obtained under the *without child support* formula, as these will typically run well beyond the end of any child-rearing period. More difficult are shorter marriages where the recipient parent has the care of young children. To deal with these cases we have, under this formula, developed additional durational limits based on the responsibilities of child-rearing and the age of the children.

In what follows we explain in more detail the different elements of the admittedly complex approach to duration under this formula, and then draw these elements together in a concise summation in s. 8.5.4.

8.5.1 The creation of a range for duration in the basic formula

In this final version we have made some changes to the language used to describe and present the two tests for duration under this formula. More importantly, we have also added a lower end for the range under the basic *with child support* formula.

In the Draft Proposal, we did not propose any minimum duration or lower end of the range for duration under the *with child support* formula, only a maximum outside duration. Through the feedback process, we became convinced that some range for duration was required, for three reasons. First, absent a lower end of the range, the maximum duration was not treated as an outside time limit, but instead as a default time limit, i.e. a recipient was seen as possessing an entitlement to receive spousal support for the length of the marriage or until the youngest child finished high school, no matter what. That was never our intention. Second, absent a lower end and following upon the default approach just described, there was no room created for negotiation around duration between the spouses, unlike under the *without child support* formula. Third, after further feedback across Canada and further research, we did get a strong sense of what the lower end of the range could be under the current law.

The real crux of any range is for shorter marriages with pre-school children, where we feared that these recipients might be seriously disadvantaged by creating a lower end of the range. This remains a concern, especially since it appears that the duration of support in these cases is lengthening, as the courts continue to develop an appreciation of the serious continuing disadvantage flowing from a spouse's on-going child care obligations.

We emphasise that the durational limits under this formula must be seen as “softer”, more flexible than under the *without child support* formula given the prominence of the compensatory rationale under this formula. First, the durational limits are not intended to be implemented as time limits on initial orders, but rather to give structure to an on-going process of review and variation. Second, determinations of duration in cases with dependent children are very fact-specific and vary enormously based upon the education, skills and work-experience of the dependent spouse, the ages of the children and the available arrangements for child-care. Our suggested durational range is at best a typical

range that will not be appropriate in all cases. And third, this is an area of law in flux. We see the law over time giving increased emphasis to what we have termed the “parental partnership” concept, which recognizes the ongoing responsibilities for child-care after separation and the resulting limitations on the custodial or residential parent’s earning abilities.

As we explain in more detail below, there are two tests that establish the range for duration under the basic *with child support* formula. We have renamed these test to clarify their rational and operation: the *length-of-marriage* test and the *age-of-children* test. Under these two tests the upper and lower end of the range in each case will be the **longer duration** produced by either test.

Before we explain the two tests for duration, it is import to remember that **the durational limits under the *with child support* formula include any period of spousal support paid at the interim stage**, the same treatment as under the *without child support* formula.

8.5.2 The length-of-marriage test for duration

The first test for duration is the same as the test for duration under the *without child support* formula. It will typically be the applicable test for longer marriages, marriage of ten years or more. The **upper end** is one year of support for each year of marriage, subject to the provisions under the *without child support* formula for indefinite (duration not specified) support after 20 years of marriage. The **lower end** is one-half year of support for each year of marriage. If the children are already in school at the time of separation, then the lower end of the range will always be determined by this *length-of-marriage* test.

Once again, we emphasize that these ”softer” time limits are intended to structure the process of review and variation of initial orders that are indefinite in form; they are not intended to give rise to time-limited orders, at least not initially.

We can use *Example 8.1* above to explain this test. Ted and Alice cohabited for 11 years during their marriage and are now in their late thirties or early forties, with two children, aged 8 and 10 at separation. The initial support order would be indefinite (duration not specified), but it would be expected that the ultimate, cumulative duration of the award would fall somewhere within the range of 5.5 years (lower end) to 11 years (upper end). The maximum outside time limit would be 11 years. Reviews and variations in the meantime may bring support to an end before 11 years, and certainly the amount may have been reduced significantly during this period. But if support is still in pay after 11 years, there would be an expectation, barring exceptional circumstances, that support would be terminated at that point on an application for review or variation.

In the longer marriage cases under the *with child support* formula, where the *length-of-marriage* test defines the durational range, most cases will tend towards the longer end of the durational range and few cases should see support terminate at the lower end, given the strong compensatory claims that are typically present in these cases. The age of the children will be a critical factor in location with the range. Consider *Example 8.1* again: if

support terminated for Alice at lower end of 5.5 years, the children would be only 13 and 15, an age at which the demands of child care can still have considerable impact upon Alice's income-earning abilities. By contrast, if Ted and Alice had been married for 14 years, and the children were 10 and 12 at separation, the lower end of the durational range would see support last until the children were 17 and 19. The choice of a particular duration within this range would be affected by these and other factors set out in Chapter 9.

8.5.3 The age-of-children test for duration

The second test for duration under the basic *with child support* formula is driven by the age of the children of the marriage. It usually operates where the period of time until the last or youngest child finishes high school is greater than the length of the marriage. These are mostly short or short-to-medium marriages, typically (but not always) under 10 years in length. The current case law is inconsistent and erratic on duration for these marriages, ranging from indefinite orders without conditions, to indefinite orders with short review periods and sometimes stringent review conditions, and even occasionally to time limits. Despite the language of indefinite support, the reality in most cases is that support does not continue for long, as re-employment, retraining, remarriage and other changes often intervene to bring spousal support to an end.

We too have struggled with duration for this category of cases. On the one hand, many of these custodial parents face some of the most serious disadvantages of all spouses, especially mothers with little employment history who have very young children in their care, all of which militates in favour of no time limits or very long time limits. On the other hand, many recipient spouses do have good education and employment backgrounds, are younger, and are emerging from shorter marriages and briefer periods out of the paid labour market, all indicators of quicker recovery of earning capacity. Inevitably, as under the current law, this means that reviews are a critical means of sorting out the individual circumstances of the recipient spouses.

The **upper end of the range** for spousal support under this test is **the date when the last or youngest child finishes high school**. Relatively few cases will reach this outside time limit and those that do will likely involve reduced amounts of top-up support by that date. Hence, extensions beyond that date would involve cases that fall within any of the exceptions described in Chapter 12, like the exception for the special needs of a child or the exception under s. 15.3 of the *Divorce Act*.

The **lower end of the range** under this test is also tied to the age of the youngest child and schooling, once again reflecting the parental partnership model. In shorter marriages, spousal support should continue at least until **the date the youngest child starts attending school full-time**. The school date will vary from province to province and from school district to school district, based upon the availability of junior kindergarten, the age rules governing school registration and the program the child takes.

Keep in mind that these tests for duration say nothing about the proper *amount* of spousal support during this period. That will be a function of the recipient's income-earning

ability, her or his ability to undertake part-time or full-time employment. The amount of support may be significantly reduced over the course of any order, or even reduced to zero.

As with longer marriages with dependent children, **the initial support order in these shorter marriage cases will still be indefinite (duration not specified)**, as the determination of self-sufficiency remains an individualized decision. Any time limit will typically only appear after a review or variation hearing, especially in these cases involving young children. This appears to be the pattern in the current Canadian practice, as best as we can discern from the few reported decisions, the feedback we received since the Draft Proposal and the Advisory Working Group.

Take our *Example 8.3* where Drew and Kate have only been married four years, with two pre-school children aged 1 and 3 and Kate at home with them. The upper end of the range for duration would be 17 years, while the lower end would be 5 years, the latter assuming that children in their area start full-time school at age 6. In this typical case, any initial order would likely include a review provision, the review to occur at some point before the youngest child starts school.

8.5.4 The use of the two tests for duration: whichever is longer

In most cases, only one of the two tests, either the *length-of-marriage* test or the *age-of-children* test, will apply to determine both the upper and lower ends of the range. In general, the *length-of-marriage* test applies for longer marriages, marriages of ten years or more, while the *age-of-children* test applies for shorter marriages, those under ten years. But the two tests must be used together, **as it is the longer of the two tests that applies for each end of the range**. Remember that this is a **range** for duration, and that the actual outcome in any particular case will be worked out within that range over a series of orders or agreements, by way or review or variation of an initial order or agreement.

The Basic *With Child Support* Formula for Duration

Initial orders indefinite (duration not specified)

subject to cumulative durational limits implemented by review or variation:

Upper End of the Range: the longer of

- the length of marriage, or
- the date the last or youngest child finishes high school

Lower End of the Range: the longer of

- one-half the length of marriage, or
- the date the youngest child starts full-time school

Take our *Example 8.2* where Bob and Carol have been married for 8 years, with two children aged 4 and 6. The *length-of-marriage* test suggests a durational range of 4 to 8 years, while the *age-of-children* test would suggest a range of 2 to 14 years. The result for

Bob and Carol would be a durational range where the lower end of the range is 4 years (from the *length-of-marriage* test) and of the upper end of the range is 14 years (from the *age-of-children* test). As can be seen, much turns upon the interaction of the length of the marriage and the age of the children.

8.5.5 The problem of short marriages with young children

Applying the two tests for duration under the *with child support* formula, the range for duration will be determined by whichever test produces the longer duration at both the lower and upper ends of the range. Where those bounds are determined by the *length-of-marriage* test, there seems to be little difficulty. The range is the same as that under the *without child support* formula. A durational range of half the length of the marriage to the length of the marriage is intuitively understandable.

The *age-of-children* test is not as simple. It is tied to the presence of children in the marriage, and the economic disadvantages that come with the obligation to care for children. Length of marriage alone no longer provides a measure of the duration of the spousal support obligation, as the case law increasingly demonstrates, even if some spouses think it should. The *age-of-children* test will usually apply in shorter marriages. For shorter marriages with young children, this test will generate a long potential duration at the upper end of the range, one that *can* run as long as the date that the last or youngest child finishes high school, an outcome that raised some concerns during the feedback process. For very short marriages with very young children, the lower end of the range under the *age-of-children* test, added in the revision process, has also raised some concerns.

Critical to understanding these durational issues is the compensatory rationale for spousal support in these shorter marriage cases. Most of the economic disadvantage in these cases is not in the past, but in the future; it is the continuing disadvantage that flows from the obligations of child care and their impact upon the ability of the recipient parent to obtain and maintain employment. Hence the importance of the age of the children in fashioning durational limits. Our understanding of the current law, based both upon reported cases and discussions with lawyers and judges in our cross-country consultations, is that the law applicable to these cases is in flux, showing increasing recognition over time of the on-going economic disadvantage flowing from post-separation child-care responsibilities.

The upper end of the range for duration under the *age-of-children* test—up until the last or youngest child finishes high school—may appear long in a shorter marriage case. Consider Bob and Carol again in *Example 8.2*, where spousal support could potentially last as long as 14 years after an 8-year marriage, if the children are 4 and 6 in Carol's primary care at the date of separation. If duration were tied to the length of the marriage alone, spousal support would otherwise terminate when the children were 12 and 14 years old. But at this point, Carol's employment position may still reflect continuing economic disadvantage and limitations placed on her ability to achieve full-self-sufficiency by her post-separation custodial responsibilities. It may only be as the children reach their teenage years that she can focus more on improving her employment position. Termination at this point might also fail, depending on the facts, to recognize Carol's

continuing child care obligations. A good way to test this outside durational limit is to think about the labour market position of the primary parent if one of those children had special needs or developed problems in their teenage years.

Slightly different problems are raised by the lower end of the durational range under the *age-of-children* test—until the youngest child starts attending school full-time. In the majority of cases, as our consultations revealed, this lower end of the durational range will not be contentious. In marriages of even four or five years, the *age of children* test will begin to yield results similar to the lower end of the durational range under the *length-of-marriage* test. Indeed, the major concern raised by the introduction of the lower end of the durational range in cases of shorter marriages with children, whether defined by length of marriage or age of youngest child starting full-time school, has been that it will create a “ceiling” and stunt the progressive development of the law in this area.

However, in some cases, of *very* short marriages, the *age-of-children* test has raised concerns that it sets the lower end of the durational range too high—i.e., that it establishes a “minimum duration” that is too long because it exceeds the length of the marriage. The kind of case that raises this concern is a fairly extreme set of facts: a marriage as brief as one or two years, with an infant less than a year old. In this hypothetical case, assuming the child would start full-time school at age 6, the lower end of the range for duration under the *age-of-children* test would be five years, which some would suggest is too long for such a short marriage.

In responding to this concern, we note that there are a number of other important dimensions to spousal support in these cases, in addition to duration, that soften the impact of this lower end of the range for duration. First, the lower end of the range for duration does not guarantee any particular *amount* of support. The formula range is driven by the number and age of the children, the spousal incomes, the child custody arrangements, child support amounts, section 7 contributions and tax positions. Much will turn upon the employment status of the recipient, and the recipient’s ability to return to the paid labour market. A recipient is always under an obligation to make reasonable efforts towards self-sufficiency, and, on particular facts, those efforts may be subject to scrutiny in a review scheduled well before the youngest child starts full-time school. Second, in some situations, income will have to be imputed to the recipient, either part-time or full-time, on an individualized basis, often through the process of review. Third, entitlement is always an issue, before reaching the questions of amount and duration under the Advisory Guidelines. In some cases of strong facts—i.e. a recipient with a strong connection to the work-force—there may even be a finding of no entitlement so that the lower end of the range for duration is not engaged. The lower end of the durational range does not create a “minimum entitlement.” Finally, we have said all along that the durational limits under the *with child support* formula are “softer”, less formulaic, than those under the *without child support* formula. In *Moge*, the Supreme Court of Canada emphasized the need for individualized decision-making on self-sufficiency in compensatory support cases and duration under the *with child support* formula must therefore not be too rigidly applied.

8.6 Shared Custody

The basic formula is constructed around the typical fact situation, where the higher income spouse pays child and spousal support to the lower income spouse who has the primary care of the children. Here we address custodial variations, the first being shared custody.

Where the spouses have **shared custody**, the starting point for the calculation of child support under s. 9(a) of the *Federal Child Support Guidelines* is the straight set-off of table amounts for the number of children subject to shared custody, as set out in the Supreme Court decision in *Contino v. Leonelli-Contino*.⁸² That amount is then adjusted, usually upwards, but occasionally downwards, based upon s. 9(b) (increased costs of shared custody and actual spending on children by the spouses) and s. 9(c) (other circumstances, including relative incomes, income levels, assets and debts, household standards of living, any reliance upon previous levels of child support paid). The *Contino* decision was handed down after the release of the Draft Proposal, but the shared custody formula anticipated that outcome. The majority in *Contino* emphasised that there is no presumption in favour of the full table amount for the payor, nor is there any presumption in favour of the straight set-off, under section 9.

Under the basic *with child support* formula, child support is deducted from the payor's income and then that child support amount plus a notional amount for child support is deducted from the recipient's income, to obtain individual net disposable income. Shared custody requires some changes to this basic formula.

Assume for the moment that the payor is paying *only* the straight set-off amount of child support in a shared custody case. If we were only to deduct the smaller set-off amount of child support for the payor spouse in a shared custody situation, that would misrepresent and understate the payor parent's contribution to child support. Shared custody assumes that both parents spend directly upon the child in their shared care. The full table amount (plus any s. 7 contributions) is thus deducted from the payor spouse's net disposable income. For the recipient, the notional table amount (plus any contribution to s. 7 expenses) is deducted from his or her income. This would be done in the calculation of INDI, even though the child support paid by the payor and received by the recipient would be the straight set-off amount.

If the straight set-off of child support is calculated as above, it turns out that the spousal support ranges are basically the same in these shared custody situations as in sole custody situations. Shared custody arrangements do not result in any automatic lowering of spousal support. It was important that the shared custody formula not provide any false financial incentives to encourage shared custody litigation, while at the same time providing ample room within the range to adjust for the realities of shared parenting.

⁸² [2005] 3 S.C.R. 217, 19 R.F.L. (6th) 272.

Example 8.4

Peter and Cynthia have separated after nine years together. Peter works as a reporter at the local television station, earning \$65,000 gross per year, while his wife Cynthia works for a local arts organization, earning \$39,000 gross per year.

Peter and Cynthia share custody of their two children, aged 8 and 7 on a week about, 50/50 basis. In these circumstances, there could be entitlement issues, but we will assume entitlement here for exposition purposes.

First, assume Peter only pays the straight set-off amount of child support, i.e. $\$972 - \$584 = \$388$. We would deduct from Peter's income the full table amount of \$972, of which \$584 is spent by him directly for the children in his care and \$388 is paid as child support to Cynthia. Cynthia's income would still be reduced by her notional table amount of \$584. If Cynthia receives the full amount of the child benefits, and assuming entitlement, then the range for spousal support would be **zero to \$142 per month**.

8.6.1 Adjusting for rotating child benefits

Since the release of the Draft Proposal, there has been a change in policy governing the receipt of the Child Tax Benefit and the child portion of the GST/HST Credit. The Canada Revenue Agency (CRA) decided that parents in shared custody cases "will have their benefits rotated between them *only* on a six-month on, six-month off basis". According to the CRA policy, it is possible for only one shared custody parent to receive the full child benefits provided that the parents do not self-identify or otherwise come to CRA's attention. The same approach has now been extended to the Universal Child Care Benefit (UCCB) in shared custody situations. As with all tax matters, the CRA policy cannot be altered by the parents' agreement or by a court order.

Under the *with child support* formula, these child benefits are treated as income and thus the allocation of the Child Tax Benefit, GST Credit and UCCB can affect the spousal support range for amount. It is therefore critical to be clear on this income issue.

In our *Example 8.4*, if the child benefits are rotated, thereby reducing Cynthia's income, the formula range would be higher, **from zero to \$289 per month**.

8.6.2 Adjusting the ranges for child support that departs from the set-off

To make matters more difficult, in some shared custody cases, the amount of support is increased beyond the straight set-off amount, for various reasons: to reflect the increased costs of shared custody (or the respective abilities of the parents to incur those increased costs); to adjust for the recipient parent's larger share of actual child care costs; to reflect a parent's reliance upon a previous higher amount of child support, as in *Contino*; or to reduce disparities in the standards of living between the parental households. A central concern expressed in *Contino* was that the children not experience any dramatic change in standards of living as they move between the two parental households.

To return to *Example 8.4*, what if Peter pays more than the straight set-off amount of \$388 per month? Much depends upon why Peter pays more. If Peter pays a higher amount of child support because Cynthia spends more on the children or because of the increased costs of shared custody, no adjustment should be made.

On the other hand, if Peter pays more child support simply to reduce the disparity in household standards of living, an adjustment should probably be made to the ranges for spousal support, as there is less need for the same function to be performed by spousal support. For example, if Peter were to pay child support of \$569 per month on this standard-of-living rationale, rather than \$388, then the range for spousal support would be **zero to zero** after adjustment (assuming the full child benefits are paid to Cynthia). At child support of \$569 per month, Cynthia would have noticeably more of the family's net disposable income than Peter, leaving no room for spousal support under the *with child support* formula.

Contino emphasized the discretionary nature of child support in shared custody cases. Departures from the set-off can even sometimes go below the set-off amount. There can be a number of reasons for departing from the set-off amount, either above or below. A careful analysis of those reasons is thus necessary, to determine whether any adjustment should be made in calculating the formula ranges and, eventually, in choosing the appropriate amount within the ranges.

8.6.3 Adjusting the limits of the range

We received much feedback from mediators and lawyers working with shared custody parents, stating that these parents often opt for a 50/50 split of the couple's family net disposable income or monthly cash flow after the payment of child and spousal support (remember that this is a broader and different measure from INDI or individual net disposable income). This option leaves the children with roughly the same resources and standard of living in each household. We agree that this equal split of net income should be available as one of the normal range of outcomes—not mandated, just available—in every shared custody case.

The shared custody formula for spousal support usually includes this 50/50 split within the range, but in some cases this 50/50 split falls just outside the upper or lower end of the range. In these cases, the shared custody range has been broadened to include this 50/50 split. Take *Example 8.4* which shows a range of zero to \$142 per month where Peter pays the set-off amount of \$388 as child support (and assuming that Cynthia receives the full child benefits). At the upper end of the range, Cynthia would be left with 49.7 per cent of the family net disposable income. To increase her share to 50 per cent, the upper end of the spousal support range would have to be \$179. Under our revised shared custody formula, the range here would become zero to \$179 per month, to ensure that the 50/50 split falls within the range.

In what cases has the formula range been adjusted? In cases where parental incomes are lower or not that far apart (like Peter and Cynthia), the upper end of the range has been adjusted upwards a bit. In cases where the recipient parent has little or no income and there are two or more children subject to shared custody, then the lower end of the range

has been adjusted downwards, to ensure that the 50/50 split falls within the range. These adjustments are made automatically by the software programs.

In these latter cases, where there are two or more children subject to shared custody and the recipient has little or no income, the formula will produce a range with a lower end that leaves the lower-income recipient with 50 per cent of the family's net disposable income and the rest of the range will obviously go higher. During the feedback process, some criticized this range of outcomes, suggesting that a shared custody recipient should never receive spousal support that would give her or him more than 50 per cent of the family's net disposable income. After all, they suggested, under this arrangement, both parents face the same ongoing obligations of child care going into the future, with neither parent experiencing more disadvantage.

The answer to these criticisms is that the past *is* relevant in these cases, as there is a reason the recipient has little or no income, usually explained by that parent's past shouldering of the bulk of child care responsibilities. In most shared custody cases, both parents have shared parenting during the relationship, so that there is less disadvantage and less disparity in their incomes at the end of the marriage. Where the recipient has little or no income, she or he will have a greater need for increased support in the short run. But the shared custody arrangement will reduce the impact of ongoing child care upon the recipient's employment prospects, such that progress towards self-sufficiency should occur more quickly. In these cases, spousal support will likely be reduced in the near future on review or variation, and the duration of support may be shorter.

8.7 Split custody

In a **split custody** situation, more significant changes to the basic formula are required. If each parent has one or more children in their primary care or custody, then s. 8 of the *Federal Child Support Guidelines* requires a set-off of table amounts, with each spouse paying the table amount for the number of children in the other spouse's custody. But this means that each parent will also be considered to support the child or children in their care directly, out of their remaining income. Thus, in the split custody situation, a notional table amount must be deducted from *each* parent, not just the recipient but the payor as well.

Since there is one child in each household, there are no economies of scale and accordingly larger proportions of their incomes are devoted to child support, leaving a smaller pool of INDI to be divided by way of spousal support. Again, as with shared custody, this would be done in the calculation of INDI, even though the child support paid by the payor and received by the recipient would be the set-off amount directed by the s. 8 formula.

Example 8.5

Take the case of Peter and Cynthia again, and assume that each parent has custody of one child, same incomes, same facts. Peter's one child table amount would be \$601 per month, Cynthia's \$358 per month. Under s. 8 of the *Federal Child Support Guidelines*, these table amounts would be offset, with Peter paying Cynthia \$243 per month. In calculating Peter's individual net disposable income, for spousal support purposes, the full one child amount is deducted, twice, once for the table amount effectively paid to Cynthia and once for the notional amount spent directly on the child in his care. Similarly, in calculating Cynthia's INDI, a double deduction of her one-child table amount is made, once for the amount effectively paid to Peter for the child in his care, plus a notional table amount for the child in Cynthia's own care.

The actual child support paid by Peter to Cynthia would be \$243, the one-child set-off amount under s. 8. Using the split custody formula for spousal support, Peter would pay spousal support to Cynthia in the range of **zero to \$445 per month**.

8.8 Step-Children

Under the *Divorce Act* and provincial family law statutes, a spouse can be found to stand in the place of a parent towards a child who is not his or her biological or adoptive child.⁸³ With that finding, a step-parent becomes liable to pay child support, in an amount that is "appropriate" under section 5 of the *Child Support Guidelines*, "having regard to these *Guidelines* and any other parent's legal duty to support the child". For the most part, the threshold for finding step-parent status is fairly high, not easily satisfied in short marriages except for very young children.⁸⁴ After the Supreme Court decision in *Chartier*,⁸⁵ some courts have lowered that threshold, making it more likely that a spouse will be found to stand in the place of a parent after a shorter marriage. In British Columbia, the *Family Relations Act* imposes a step-parent child support obligation if "the step-parent contributed to the support and maintenance of the child for at least one year".⁸⁶

During the feedback phase, especially in British Columbia, there were questions about which formula is appropriate to apply in short-marriage step-parent situations or whether there should be an exception under the *with child support* formula for step-parent cases. There were concerns that this formula generated spousal support obligations that were too substantial in such cases.

⁸³ *Divorce Act*, s. 2(2).

⁸⁴ Carol Rogerson, "The Child Support Obligations of Step-Parents" (2001), 18 Can.J.Fam.L. 9; Nick Bala, "Who is a 'Parent'? 'Standing in the Place of a Parent' and Section 5 of the Child Support Guidelines" in Law Society of Upper Canada, *Special Lectures 2006: Family Law* (Toronto: Irwin Law, 2007) at 71.

⁸⁵ *Chartier v. Chartier*, [1999] 1 S.C.R. 242.

⁸⁶ *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 1 "parent". Section 1(2) requires that the step-parent be married to the parent or that they lived together in a marriage-like relationship for at least two years.

In the vast majority of step-parent cases, the *with child support* formula will apply with no difficulty. In many cases, the step-parent will treat the children as his or her own after the breakdown of the marriage. In some of these cases, there will be both step-children and biological children, with all of them treated alike. In other cases, the threshold for the finding of step-parent status will be high enough that the marriage will be a medium-to-long one, with substantial spousal support obligations.

In our view, the short marriage concerns are now resolved by the creation of a range for duration under this formula. Upon closer analysis, the difficulty in these step-parent cases was not the range for amount, but the potentially long duration under the *age-of-children* test for the upper end of the range and its use as a “default rule”. An example can demonstrate how the addition of a lower end for the durational range allows for a reasonable range of outcomes in step-parent cases.

Example 8.6

Art and Kathie have been married for 5 years. Art earns \$80,000 per year and Kathie earns \$20,000. Kathie had two children from a previous relationship at the time she and Art got married, two girls who are now 10 and 12. Assume that Kathie does not receive any child support from the girls’ father and that she has sole custody of the girls.

Under the *Federal Child Support Guidelines*, Art could be required to pay as much as the table amount of child support, \$1,159 per month. If Art pays the full table amount, **the basic *with child support* formula would produce an amount for spousal support in the range of \$474 to \$1,025 per month.**

As for the duration of spousal support, the order would be **indefinite (duration not specified), with a cumulative durational range of 2.5 years at the lower end to 8 years at the upper end.** The upper end of the durational range here is determined by the *age-of-children* test, i.e. when the youngest daughter (now 10) finishes high school at age 18, or 8 years. The lower end, however, is fixed by the *length-of-marriage* test, as both children are older and in full-time school, i.e. one-half the length of the marriage, or 2 ½ years. Upon a future review or a variation application, a court could put a relatively short time limit on spousal support, depending upon the facts.

The facts of this simple example can be modified to strengthen or weaken the spousal support claim. If the girls are younger during their relationship with Art, so that they are only 6 and 8 at separation, then the durational range would be 2 ½ to 12 years and there would be strong factors pushing towards the upper end of the range. Contrast the effect of the low British Columbia threshold under the *Family Relations Act*. The girls are 6 and 8 at separation, but assume that Art was only married to Kathie for two years. The upper end of the durational range would still be 12 years, but the lower end would be reduced to one year, i.e. one-half year for each year of marriage.

Under section 8 of the *Child Support Guidelines*, it is possible for a step-parent to pay less than the table amount of child support if appropriate. A reduced amount is only

ordered or agreed upon when the biological parent is already paying child support.⁸⁷ Where the amount of child support is reduced under s. 8, the *with child support* formula range should be calculated using the full table amount rather than the reduced amount.⁸⁸

8.9 A Hybrid Formula for Spousal Support Paid by the Custodial Parent (The *Custodial Payor* Formula)

The basic formula for marriages with dependent children assumes that the higher income spouse pays both child and spousal support to the recipient parent, who also has sole custody or primary care of the children. The spousal support to be paid must then adjust for the payor's child support payments. The shared and split custody situations may change the math, but both still involve the higher income spouse paying both child and spousal support to the recipient.

A different formula is required where the higher income spouse paying spousal support is also the parent with sole custody or primary care of the children. Now spousal support and child support flow in opposite directions. The *without child support* formula does not apply, however, as it assumes no dependent children. While we could have left this situation as an exception, with no formulaic solution, it is common enough that we constructed a formula to guide outcomes in this situation.

Either of the two formulas could be used as a starting point and then modified to accommodate custodial payors. We chose to start from the *without child support* formula for custodial payors. In this situation the recipient parent does not have the primary care of children and thus more closely resembles the single recipient in the *without child support* formula. The primary rationale for the payment of spousal support in these cases will be merger over time, rather than parental partnership. That said, a number of lower income recipient spouses in this situation will continue to play an important role in their children's lives and any formula must be able to adjust in such cases. The other advantage of the *without child support* formula is ease of calculation, but the formula will have to be modified to back out child support and to take into account tax implications.

Most of these cases will involve older children and longer marriages, where the husband is the higher-income payor and the parent with primary care. In many of these cases, the non-custodial wife may have a sizeable compensatory claim from her past role in child-rearing, which will be reflected in the range for spousal support, and the location of any amount within that range. In these cases involving older children and longer marriages, the children will cease to be children of the marriage within a few years and the wife will cross-over into the *without child support* formula, as is explained below in Chapter 14 on variation and review. In a subset of custodial payor cases, there will be illness or disability issues for the non-custodial spouses, many of which can be accommodated within the ranges or restructuring, but exceptions will be made in some cases, as

⁸⁷ Sometimes a court will order the step-parent to pay less than the full table amount, leaving the custodial parent to take steps to obtain or increase child support from the biological parent.

⁸⁸ Given the way the formula works, any reduction in the step-parent's child support would otherwise lead to an increase in the range for spousal support, an inappropriate result.

discussed below in Chapter 12 below. There is a small minority of custodial payor cases that involve young children, shorter marriages and husbands claiming spousal support from their wives.

**Formula for Spousal Support Paid by Custodial Parent
(The *Custodial Payor* Formula)**

- (1) Reduce the payor spouse's Guidelines income by the **grossed-up notional table amount** for child support (plus a gross-up of any contributions to s. 7 expenses).
- (2) If the recipient spouse is paying child support, reduce the recipient's Guidelines income by the **grossed-up amount of child support paid** (table amount plus any s. 7 contributions).
- (3) Determine the **adjusted gross income difference** between the spouses and then quantum ranges from 1.5 percent to 2 percent for each year of marriage, up to a maximum of 50.
- (4) **Duration** ranges from .5 to 1 year of support for each year of marriage, with the same rules for indefinite (duration not specified) support as under the *without child support* formula.

In reducing gross incomes by grossed-up amounts for child support, this formula does the same thing conceptually as the basic *with child support* formula—it establishes the spouses' available incomes after their child support obligations are fulfilled. To gross up the child support will require a calculation of the gross value of the non-taxable child support, using the appropriate marginal tax rate for the payor or recipient spouse.

Example 8.6

Matt earns \$100,000 gross per year and has custody of two teenage children. Anna earns \$30,000 gross per year. The spouses separated after 16 years together. There are no s. 7 expenses.

Assume entitlement to spousal support has been established.

First, Matt's income is reduced by the table amount for two children, \$1,404, grossed-up to \$2,525 per month or \$30,300 annually. Matt's reduced income would thus be \$69,700. Anna is required to pay child support at the table amount of \$444 per month, grossed-up to \$625 monthly or \$7,500 annually. Anna's reduced income would be \$22,500. After a 16-year marriage, Anna would receive a range of 24 to 32 percent of the adjusted gross income difference of \$47,200.

Under the *custodial payor* formula, Matt would pay spousal support in a range from \$944 to \$1,259 per month, for a duration of 8 to 16 years.

There is one **exception** distinctive to this *custodial payor* formula, discussed in more detail below in Chapter 12. Where the recipient spouse and non-primary parent plays an important role in the child's care and upbringing after separation, yet the marriage is shorter and the child is younger, the ranges for amount and duration applied under this *custodial payor* formula may not allow that spouse to continue to fulfil that parental role.

In our view, in such cases, under this **parenting exception**, it should be possible to exceed the upper limits on both amount and duration for that purpose.

8.10 A Hybrid Formula for Adult Children and Section 3(2)(b)

After the release of the Draft Proposal, we added another formula to this family of formulas, another hybrid formula, this time for adult children whose child support is determined under section 3(2)(b) of the *Federal Child Support Guidelines*. In these cases of children who are the age of majority or over, the table-amount-plus-section-7-expenses approach is considered “inappropriate”. Under the case law, these are usually cases where:

- (i) the adult child attends a post-secondary institution away from home;
- (ii) the adult child makes a sizeable contribution to his or her own education expenses; or
- (iii) there are other non-parental resources to defray education expenses, like scholarships or RESP’s or grandparent monies.

Under section 3(2)(b), an individual budget is usually prepared for the adult child and, after the child and other contributions are deducted, the remaining deficit is then apportioned between the parents, based upon their incomes or some other arrangement. These child support amounts will differ significantly from any amounts using the table and section 7 expenses, almost invariably lower.

This *adult children* formula will *only* apply where the child support for *all* the remaining children of the marriage is determined under section 3(2)(b) of the *Child Support Guidelines* and there are *no* children for whom a table amount of child support is being paid under section 3(1) or section 3(2)(a). It should not be used, for example, where there is one older child away at university and another still at home in high school. In that case, the basic *with child support* formula would be used, with any necessary adjustment to the amounts of child support contributed by each parent for the child away at school.

Under this *adult children* formula, like the *custodial payor* formula, the framework of the *without child support* formula is used, but adjusted for the child support amounts paid, another hybrid formula. Once each parent’s contribution to the child’s budget has been allocated under s. 3(2)(b), those actual child support amounts are grossed up and deducted from each spouse’s gross income. Then the *without child support* formula is applied, using the adjusted gross income difference and the length of marriage factor to determine amount and duration. The box above for the *custodial payor* can be used to describe the calculations, with one change: the actual amounts of each parent’s contribution to child support will be grossed up, rather than table and section 7 amounts.

Example 8.7

Take Matt and Anna from the previous *Example 8.6* and assume that there is only one child of the marriage, now 20 years old and attending university away from

home. Matt earns \$100,000 and Anna earns \$30,000. Their son's tuition, books and living expenses total \$20,000 and, through a mix of summer employment and scholarships, he can contribute \$5,000. The parents have agreed to divide the remaining \$15,000 between them, \$12,000 by Matt (\$1,000 per month) and \$3,000 by Anna (\$250 per month).

Under this formula, Matt's gross income would be reduced by the grossed up amount of the child support, or \$21,300, while Anna's grossed up contribution would be \$4,100. The adjusted gross income difference would be \$78,700 less \$25,900, leaving \$52,800.

After a 16-year marriage, under this formula, the range for spousal support for Anna is 24 to 32 per cent of \$52,800, or \$1,056 to \$1,408 per month, for whatever duration would remain of the original 8 to 16 years.

Another practical advantage of this formula is that it eases the transition between formulas. Most of these cases are longer marriages and, once the last child ceases to be a "child of the marriage" and child support stops, the spouses will "cross over" to the unadjusted *without child support* formula, described briefly below. In *Example 8.7*, when the son ceases to be a "child of the marriage" in a few years, Anna's spousal support would be determined by crossing over to the *without child support* formula, with no adjustment any longer for child support. The range for amount would be 24 to 32 per cent of the gross income difference of \$70,000, or \$1,400 to \$1,867 per month, again for whatever duration would remain of the original 8 to 16 years.

8.11 Crossover to the *With Child Support* Formula

There is one last issue to be flagged here, that of crossover between the two formulas. The most frequent crossover situation will be in cases where child support ceases after a medium-to-long marriage, where the children were older or even university-age at the time of the initial order, as in *Example 8.7* above. At this point, either spouse can apply to vary, to bring spousal support under the *without child support* formula. In most cases, it will be the recipient making the application, to obtain an increase in support under the *without child support* formula, once child support is no longer payable and the payor's ability to pay is improved as a result. Specific examples of crossover are considered in Chapter 14 on variation and review.

9 USING THE RANGES

The formulas generate **ranges** for amount and for duration as well unless the conditions for indefinite (duration not specified) support are met. The ranges allow the parties and their counsel, or a court, to adjust amount and duration to accommodate the specifics of the individual case in light of the support factors and objectives found in the *Divorce Act*.

In this section we can only highlight in the most general way the sorts of factors that could be taken into account in fixing precise amounts and time periods and that might push a determination up or down within the ranges. Most of the relevant factors will be the same as those that now operate within the present discretionary case law, the difference being that here they will operate within the boundaries created by the formulas. Also, as under current law, no single factor will be determinative and several factors may be at play in any given case, sometimes pushing in different directions.

9.1 Strength of Any Compensatory Claim

A strong compensatory claim will be a factor that favours a support award at the higher end of the ranges both for amount and duration. A spouse who has suffered significant economic disadvantage as a result of the marital roles and whose claims are based on both compensatory and non-compensatory grounds may have a stronger support claim under the *without child support* formula than a spouse whose economic circumstances are not the result of marital roles and who can only claim non-compensatory support based upon loss of the marital standard of living. In *Examples 7.1* and *7.5*, both of which involved long marriages where one spouse sacrificed employment opportunities as a result of child care responsibilities, this factor of a strong compensatory claim could weigh in favour of an award at the higher end of the range in as compared to some of our other examples where there were no children.

Under the *with child support* formula, compensatory principles would also suggest that the more the recipient spouse gave up in the paid labour market, the higher one would go within the range. To give a simple example, two tax lawyers marry fresh out of law school, but one stays home with the children and the other pursues a career within a large law firm. Compensatory logic would dictate that something close to the maximum 46 percent of INDI would make sense here, as the payor spouse's income is a very good proxy measure of where the recipient spouse would have been. Given the presence of dependent children under this formula, almost every case will have a compensatory element and the lower and higher ends of the range reflect that. What moves a case up or down the range is the relative strength or weakness of the compensatory claim.

9.2 Recipient's Needs

In a case where the recipient has limited income and/or earning capacity, because of age or other circumstances, the recipient's needs may push an award to the higher end of the ranges for amount and duration.

Conversely, the absence of compelling need may be a factor that pushes an award to the lower end of the range, for example, where the recipient already has a solid base of employment or other income. Or the recipient spouse may have reduced living expenses, living in a mortgage-free matrimonial home or subsidized housing or family-provided housing. Or the recipient may be cohabiting with a new partner, thereby reducing her or his expenses.

In *Example 7.4*, where Jennifer is unemployed at the age of 57, this need factor might weigh in favour of an award at the higher end of the range. *Example 7.2*, in contrast, where Sue is only 38 and earning \$25,000 per year, the need factor may not be as compelling, suggesting an award at the lower end of the range. In *Example 7.1* the absence of compelling need on Ellen's part, given her income of \$30,000 per year, might suggest an award at the lower end of the range, but this would be counter-balanced by Ellen's strong compensatory claim.

9.3 Age, Number, Needs and Standard of Living of Children

The age, number and needs of the children will affect placement within the range under the *with child support* formula. A child with special needs will usually demand more time and resources from the care-giving parent, thus reducing that parent's ability to earn in the paid labour market and pushing spousal support towards the upper end. The same will generally be true for the parent with primary care of an infant or toddler, as contrasted to care of an older child or adolescent. That lower base of income will generate a higher range for amount, of course, but here we speak of location within the range as well.

Generally speaking, when ability to pay is in issue, the larger the number of children, the less income is left available to pay spousal support, and the ranges will be lower, consistent with s. 15.3 of the *Divorce Act*. In these cases of squeezed ranges for spousal support, there will be strong reasons to go higher in this "depressed" range, to generate some compensatory support for the primary parent. As income levels rise for the parents of three or more children, the spousal support ranges will adjust upwards and there will be more flexibility for the location of amount within the ranges.

Standard of living concerns may also tend to push spousal support awards towards the higher end of the range. Even when spousal support is at the maximum 46 percent of individual net disposable income, a homemaker recipient and the children will be left with a noticeably lower household standard of living (assuming no new partners or children for either spouse). At lower income levels, the needs of the children's household will create pressure to move to the higher end of the range.

9.4 Needs and Ability to Pay of Payor

Need and limited ability to pay on the part of the payor spouse may push an award to the lower ends of the ranges. These factors will clearly have special importance at the lower end of the income spectrum, even above the floor of \$20,000. (The floor is discussed further in Chapter 11 below.) In some cases where the need of the lower-income recipient

spouse is pressing, the lower-income payor spouse may also be struggling to maintain some modest standard of living.

Even though the *without child support* formula uses gross incomes to work out the amounts, it is always important to look at the net income consequences of any particular amount of spousal support, especially for the payor. In longer marriages under this formula, where the formula percentages are higher, this is critical, especially where the payor has large mandatory deductions, including any pension deductions, compared to the recipient. These deductions may be a factor in going lower in the range for amount.⁸⁹

The *with child support* formula uses net incomes for its calculations, adjusting for tax and certain standardized deductions. But this formula does not deduct mandatory pension contributions, for the reasons explained in Chapter 8 above. Mandatory pension deductions may become an important factor to select a lower amount within the ranges at lower income levels, to ensure that the payor spouse has enough net income for his or her own needs.⁹⁰

Also a concern for lower income payors under the *with child support* formula will be their direct spending on expenses for the children during their time with the children. A lower income payor should be left with sufficient funds to exercise meaningful access to his or her children.

9.5 Work Incentives for Payor

The previous factor focussed upon the needs and ability to pay of the payor. Here we want to isolate a separate concern, the need to preserve work incentives for the payor. This concern will be particularly important in two situations: long marriages under the *without child support* formula and most cases of substantial child support under the *with child support* formula. The problem will be most acute at low-to-middle income levels.

Here we are not speaking about employment deductions from the payor's pay, discussed immediately above. One obvious concern here is the additional out-of-pocket costs of going to work every day, not covered by any employer and not reflected in income or deductions from pay, e.g. clothing, commuting to work, parking, tools, etc. For example, where a payor has substantial commuting expenses in an urban area, this may be a factor for going lower in the range.

A less precise, but perhaps more important, concern under this heading is the payor's net income after payment of taxes, deductions, child support (if any) and spousal support, and the marginal gain in this remaining income from any additional gross income earned. This more nebulous work incentive concern will come to the fore where the payor is working in the paid labour market and the recipient is not, especially under the *without*

⁸⁹ It is not correct, as some have done, to reduce the payor's gross income by the amount of the deductions. The formula range must first be calculated properly, using the gross incomes, and then judgment exercised about location within that range, with the amount of the deductions used as one factor amongst others.

⁹⁰ Again, it is not correct to deduct the mandatory pension contribution from a spouse's INDI and lower the whole range. These contributions are just one factor in locating an amount within the range.

child support formula. In longer marriage cases under this formula, the percentages of gross income will be high enough to raise this issue, making it a factor to go lower in the range for amount.

Under the *with child support* formula, the recipient may be home full time with the care of children, so that this argument of “work incentive” is less compelling. And, under either formula, if the recipient of spousal support is also working, whether full-time or part-time, this version of “work incentive” for the payor virtually disappears.

9.6 Property Division and Debts

Underpinning the Advisory Guidelines is a basic assumption that the parties have accumulated the typical family or matrimonial property for couples of their age, incomes and obligations, and that their property is divided equally under the matrimonial property laws. Significant departures from those assumptions may affect where support is fixed within the ranges for amount and duration.

An absence of property to be divided might suggest an award at the higher end of the range. If the recipient receives a large amount of property, the low end of the range might be more appropriate. Similarly, if the recipient holds sizeable exempt or excluded assets after division, that too might militate in favour of the lower end of the range.

Where one spouse assumes a disproportionate share of the family debts, it may be necessary to use the debt payment exception described below in Chapter 12. But there will be other cases, not so severe, where the debt payments of one spouse will just be a factor pushing the amount higher or lower within the range, depending upon which spouse is paying the debts.

9.7 Self-Sufficiency Incentives

Self-sufficiency incentives may push in different directions. As often happens under the current case law, support might be fixed at the lower end of the ranges to encourage the recipient to make greater efforts to self-sufficiency, although imputing income also goes a long way towards responding to this concern. On the other hand, the need to promote self-sufficiency might lead to an award at the higher end of the range where this could mean that a recipient spouse obtains re-training or education leading to more remunerative employment and less support in the long term. Self-sufficiency issues are discussed at greater length in the separate Chapter 13 below.

This is not an exhaustive list, but rather an attempt to identify some of the more obvious factors that might affect how and where amount and duration are fixed within the ranges. The ranges also allow room for local and regional differences in support outcomes, recognizing that awards in some parts of the country are higher than in others.

10 RESTRUCTURING

10.1 The General Concept: Trading Off Amount Against Duration

Under the Advisory Guidelines there are several mechanisms that allow outcomes to be adjusted in response to the facts of particular cases. As discussed in Chapter 9, above, there is considerable flexibility in the fixing of precise amounts and durations within the ranges generated by the formulas. Here we discuss a second mechanism for flexibility—the ability to “restructure” the formula outcomes by trading off amount against duration. In Chapter 12, which follows, we discuss the third method—that of departing from the formula outcomes by relying upon exceptions.

Although the formulas generate separate figures for amount and duration, the Advisory Guidelines explicitly recognize that these awards can be “restructured” by trading off amount against duration. The only limit is that the overall value of the restructured award should remain within the global—or total—amounts generated by the formula when amount is multiplied by duration.

While the terminology of restructuring is new, the concept of trading off amount against duration is an established feature of current spousal support practice. Such tradeoffs are commonly made in separation agreements and consent orders. In *Bracklow* the Supreme Court of Canada acknowledged that such an adjustment can also be made by judges, explicitly recognizing that the amount and duration of awards can be configured in different ways to yield awards of similar value (or quantum). Thus the Court noted that an order for a smaller amount paid out over a long period of time can be equivalent to an order for a higher amount paid out over a shorter period of time.

Under the Advisory Guidelines a certain degree of adjustment of amount against duration will occur when precise amounts and duration are being fixed within the ranges (see Chapter 9). However, in particular cases an appropriate award will require an adjustment beyond the limits of the formula’s ranges. Restructuring allows the formula to continue to act as a tool to guide such deviations from the ranges because the overall value of the award remains within the global amounts set by the formula. In this way restructuring differs from exceptions, discussed below in Chapter 12, which involve an actual departure from the global range of outcomes suggested by the formula.

When restructuring is relied upon to resolve issues of inappropriate formula outcomes for amount or duration, awards remain consistent with the overall or global amounts generated by the Advisory Guidelines.

Restructuring can be used in three ways:

- first, to **front-end load** awards by increasing the amount beyond the formulas’ ranges and shortening duration⁹¹

⁹¹ See for example *McCulloch v. Bawtinheimer*, [2006] A.J. No. 361 (Q.B.).

- second, to **extend duration** beyond the formulas’ ranges by lowering the monthly amount; and
- third, to formulate a **lump sum** payment by combining amount and duration⁹²

Restructuring was a crucial component in the development of the Advisory Guidelines, particularly the development of the *without child support* formula. It was the only way in which some of the results generated by the formula could be rendered consistent with current practice. **Restructuring is thus an important aspect of a SSAG analysis after the formulas have been applied to generate ranges for amount and duration.**⁹³

In practice, restructuring has often been ignored. In many cases, particularly short marriages under the *without child support formula*, courts have found the amounts generated by the formula too low and have then simply concluded that the Advisory Guidelines do not yield an appropriate outcome and are of no further use.⁹⁴ The failure to consider restructuring is unfortunate because it means that an important element of flexibility is not being utilized. The structure and guidance provided by the Guidelines are thus being lost in a number of cases where these benefits would otherwise be available.

10.2 How Does Restructuring Work? Some Examples

We now provide some examples of the different ways restructuring might be used and set out the basic calculation of the “global ranges” generated by the formulas. **Note that the calculations provided in these examples are very simplified** and do *not* take into account the time-value of money or the various future contingencies that could affect the value of awards over time. In practice, more sophisticated calculations may take such factors into account.⁹⁵ Computer software programs may assist in some of the calculations required by restructuring.⁹⁶ If periodic payments are converted into a lump sum, the different tax consequences must be taken into account in arriving at a comparable lump sum.

Despite such software programs, however, there will also be a certain amount of guess-work involved in restructuring. But this is already familiar to family law lawyers who frequently make trade-offs between amount and duration in settlement negotiations and spousal support agreements. Restructuring by means of a lump sum payment or an

⁹² See *Smith v. Smith*, [2006] B.C.J. No. 2920, 2006 BCSC 1655 and *Martin v. Martin*, [2007] O.J. No. 467.

⁹³ A good discussion of restructuring and its place within the overall scheme of the Advisory Guidelines is found in *McCulloch v. Bawtinheimer*, *supra* note 91.

⁹⁴ For an appellate example see the B.C. Court of Appeal decision in *Toth v. Kuhn*, [2007] B.C.J. No. 244, BCCA 83; for a trial level example see *Wang v. Poon*, [2007] B.C.J. No. 271, 2007 BCSC 194.

⁹⁵ Two cases offer careful examples of restructuring to fix a lump sum. From B.C. see *Smith v. Smith*, *supra* note 92 (present value of monthly support if paid until payor 65, discounted for tax and adjusted for reapportionment, resulting in lump sum of \$25,0000). From Ontario see *Martin v. Martin*, *supra* note 92, (9 year marriage with 2 children, husband the support claimant, lump sum support at the low end of the global range awarded under the custodial payor formula adjusted for tax).

⁹⁶ See for example DIVORCEmate’s new SUMmate Quantum v. Duration Analyzer.

increase in amount above the formula amounts will also require a finding of ability to pay on the payor's part.

Our examples focus on the first and second uses of restructuring. We have assumed that the third use of restructuring—converting a periodic order to a lump sum in a short marriage—is familiar and straightforward, and so we have not provided a specific example.

As will be discussed further below, the primary use of restructuring will be under the *without child support* formula which generates fixed time limits. Our examples reflect this. Following these examples we will discuss in more detail the use of restructuring under each of the Guideline formulas.

10.2.1 Example 1: restructuring by front-end loading

Our first example involves front-end loading to increase the amount outside the formula's range by reducing duration. This involves choosing a durational limit at the low end of the formula's range or below it. Front-end loading may be appropriate in shorter marriages under the *without child support* formula where the monthly formula amounts are relatively modest. Restructuring will provide a generous but relatively short transitional award. Under current practice, spousal support awards in such cases will be shaped by the goal of cutting the ties between the parties fairly quickly and allowing them to go their separate ways. Front-end loading may also be desirable in cases where the recipient spouse needs significant support for a short period to undertake a program of retraining or education, or where the recipient spouse has a low base income.

Example 10.1

Here we return to the case of Bob and Susan in *Example 7.3*, who were married 10 years and had no children. They are both in their late thirties and employed full time. Bob's gross annual income as a computer salesman is \$65,000; Sue's as a hairdresser is \$25,000.

Under the *without child support* formula a 10 year marriage such as this gives rise to a range for amount of 15 to 20 percent of the gross income difference. Under the formula, spousal support would be in the range of \$500 to \$667 per month (or \$6,000 to \$8,000 per year) for a period of 5 to 10 years.

Given the parties' ages and employment situations and the length of the marriage, the appropriate award in this case would likely be one that cut the ties between the parties fairly quickly. The monthly amounts generated by the formula might also appear low when assessed against current practice. Both of these concerns could be met by providing transitional support at a higher level than the formula allows, for example \$1,300 per month (which represents roughly 39 percent of the income difference) for only 3 years, rather than the 5-year minimum duration under the formula.

Restructuring requires the calculation of the global or total amounts generated by the formula when amount is multiplied by duration. On the facts of this example, the simplified calculation of the minimum and maximum global awards under the *without child support* formula would be as follows:

- low end of global range (low end of range for monthly amount x low end of range for duration in months)
\$500 per month for 5 years (\$500 x 60 months) = \$30,000
- high end of global range (high end of range for monthly amount x high end of range for duration in months)
\$667 per month for 10 years (\$667 x 120 months) = \$80,040

The global range in this example would therefore be between \$30,000 and \$80,040.

The proposed award of \$1,300 per month for three years, which has a total value of \$46,800 (\$1,300 x 36 months), would be permissible under restructuring as it falls within the global ranges generated by the formula, even though it falls outside the formula's specific ranges for amount and duration.

Although this example uses a fixed monthly amount for the duration of the restructured award, it would also be possible to restructure using step-down awards, as long as the total amount of the award falls within the range set by the formula. In the example above, restructuring would allow an award of \$1,500 per month for the first year, 1,000 per month for the second year, and \$750 per month for the third year. The total value of the award—\$39,000—falls within the global amounts generated by the formula.

10.2.2 Example 2: restructuring by extending duration and reducing amount

Our second example shows the use of restructuring to extend duration by cutting back on amount. Depending on how much of an extension of duration is required, this can be accomplished either by choosing an amount at the lower end of the formula's range for amount or by setting an amount *below* the formula's range. This use of restructuring might be desirable in medium-length marriages where the recipient spouse will have long-term need and would be better off with modest supplements to income over a longer period of time than with more generous payments over the time period suggested by the formula.

Example 10.2

Brian and Gail were married for 15 years and had no children. Both are 45. Gail is a phys ed teacher earning \$70,000 gross per year. Brian worked as a trainer in the early years of the marriage but was forced to stop working because of a debilitating illness. He now receives CPP disability of \$10,000 per year.

For a 15-year marriage, the *without child support* formula generates an amount ranging from 22.5 to 30 percent of the gross income difference. Here the formula

results in a range for spousal support of \$1,125 to \$1,500 per month (or \$13,500 to \$18,000 per year), for a duration of from 7.5 to 15 years.

An award of 15 years' duration would take Brian to the age of 60. The desirable result in this case might be to provide support until Brian reaches age 65 when he will start to receive pension benefits. Restructuring would permit this.

On the facts of this example, the simplified calculation of the minimum and maximum global awards under the *without child support* formula would be as follows:

- low end of global range (low end of range for monthly amount x low end of range for duration in months)
\$1,125 per month for 7.5 years (\$1,125 X 90 months) = \$101,250
- high end of global range (high end of range for monthly amount x high end of range for duration in months)
\$1,500 per month for 15 years (\$1,500 X 180 months) = \$270,000

The global range in this example would therefore be between \$101,250 and \$270,000.

Because of Brian's need and the length of the marriage, absent restructuring, this would likely be a case where the award would tend towards the upper end of the ranges for both amount and duration. Using restructuring, the award could be extended to 20 years to take Brian to age 65 if the amount were set at the lowest end of the formula's range: \$1,125 per month. In this case, the total amount of the award (\$1,125 x 240 months) would equal the maximum global amount set by the formula, \$270,000.

Although this example extends duration for a defined period, it might also be possible to use restructuring to extend duration indefinitely, recognizing, however, that the total value of an indefinite (duration not specified) award cannot be calculated with precision. A certain amount of guesswork would inevitably be involved in determining how low the amount of the indefinite award should be set to achieve some rough equivalence with the formula amounts.

10.3 When Should You Think About Restructuring?

In practice, restructuring has often been ignored. Here we try to flag the different kinds of fact situations, under each formula, where restructuring should be considered as an option.

10.3.1 Restructuring under the *without child support* formula

The primary use of restructuring will be under the *without child support* formula. To trade off amount against duration ideally requires a fixed duration for the award. As a result, restructuring will generally only be advisable in cases where the formula generates time limits rather than indefinite (duration not specified) support. It will thus have limited application under the *with child support* formula where duration is often uncertain.

More specifically, restructuring should be kept in mind in three particular kinds of cases under the *without child support* formula where it may often be appropriate:

- **shorter marriages without children**

In some very short marriages cases where the support entitlement is limited and there is available property, a lump sum award that allows for a clean break may be appropriate. Restructuring allows for this.

In other short marriage cases without children the purpose of the award is to provide a period of transition to allow the recipient an opportunity to adjust to a lower standard of living. Such awards, under current practice, often provide fairly generous levels of support during this transitional period. The amounts generated under the formula in the case of shorter marriages are often lower than current practice. Restructuring should be considered as a way to increase the amount of the award beyond the high end of the formula's range by reducing duration.

The possibility of this use of restructuring to generate amounts consistent with current practice was a crucial factor in the development of the *without child support* formula. We knew that the amounts generated by the formula in some medium-length marriages, assessed on their own, would often be lower than current practice. But we also recognized that current awards were consistent with the total value of the awards generated by the formula when amount and duration were combined to yield global ranges.

Example 10.1 illustrates this use.⁹⁷

- **long-term disability after a medium-length marriage**

The use of restructuring to extend duration should be considered in medium-length marriages where the recipient spouse will have long-term need because of illness or disability. The recipient may prefer more modest supplements to income over a longer period of time than more generous payments over the maximum time period permitted by the formula.

Example 10.2 illustrates this use.

We do recognize, as discussed in Chapter 12 on exceptions, that current law is uncertain in its treatment of illness and disability cases. In some cases, therefore, courts may find restructuring inadequate and then treat these cases as exceptions warranting a departure from the global ranges generated by the formula.

- **longer marriages where the formula generates a time limit but current practice dictates indefinite support**

Under the *without child support* formula, support becomes indefinite (duration not specified) after 20 years of marriage. For marriages under that length, the formula

⁹⁷ For an example in the Guidelines case law see *McCulloch v. Bawtinheimer*, *supra* note 91.

generates time limits. Current practice, however, may preclude time limits in marriages shorter than 20 years, for example after 15 or 18 years.

What often happens in practice is that these longer durational limits of the Advisory Guidelines are simply ignored and only the ranges for amount are considered. In Chapter 7 we recognize that some courts may not be willing to implement the longer time limits under the *without child support* formula in initial orders and we suggest a “softer” use of the time limits to structure the on-going process of variation and review. But if it is contemplated that the support will likely not terminate at the end of maximum duration, even on this “softer” use of time-limits, restructuring should be applied. The extension of duration beyond the maximum end of the formula’s range will require some trade-off of amount, at least a reduction to the low end of the range, if not below.

By way of example, this use of restructuring may arise in cases where there were dependent children at the time of separation who have since become independent and there has been a cross-over from the *with child support* formula. The age of the recipient may be such that the maximum duration based on length of marriage will not run to age 60 or 65 for the recipient, whenever pension income kicks in. Restructuring may be used to extend duration to that age by adjusting amount downward.

10.3.2 Restructuring under the *with child support* formula

For the most part, restructuring has less relevance for marriages with dependent children, for a number of reasons. After explaining these limitations, we will identify the circumstances in which restructuring is a practical option under this formula.

First, under the basic *with child support* formula, all orders are indefinite in form, within the framework of the two tests for determining the durational range that will structure the process of review and variation. The “softer” nature of the time limits under this formula make restructuring a more uncertain enterprise.

Second, restructuring to extend duration is unlikely to turn up under this formula. By the time the spouses reach the end of this formula’s maximum duration, they will most likely have “crossed over” to the *without child support* formula, as explained above.

The third important limit on restructuring under this formula is the payor’s ability to pay, applicable to the options of front-end loading or a lump sum. Where there are three children or more (or sometimes two children plus large section 7 expenses), there is little or no room to increase spousal support above the ranges, except for very high payor incomes.

The most likely circumstances for the use of front-end loading or a lump sum under the basic *with child support* formula will be cases where the recipient wants spousal support above the upper end of the range for a shorter period, e.g. to pursue a more expensive educational program. Many of these will be shorter marriage cases. To convert periodic payments to a lump sum, obviously there will have to be assets or resources available to

the payor to make the lump sum payment. For front-end loading to occur, the following cases would be prime candidates, as there will be some additional ability to pay available:

- only one child;
- shared custody
- two children, no s. 7 expenses and higher incomes
- higher incomes generally.

The addition of a lower end to the durational range under this formula in this final version does create more room for negotiation over duration, which creates the conditions amenable to restructuring in these cases and perhaps some others.

10.3.3 Restructuring under the *custodial payor* formula

The *custodial payor* formula, applicable in cases where there are dependent children but the recipient spouse is not the custodial parent, is a modified version of the *without child formula*. Its adoption of the *without child support* formula's durational ranges means that restructuring may be used the same way under this formula as under the *without child support formula*, discussed above.⁹⁸

⁹⁸ The Ontario case of *Martin*, *supra* note 92, is a good example of restructuring under the *custodial payor* formula, used to create a lump sum award at the low end of the global range for the husband after a nine year marriage.

11 CEILINGS AND FLOORS

Any guidelines must address the question of “ceilings” and “floors”. The **ceiling** is the income level for the paying spouse above which any income-sharing formula gives way to discretion. The **floor** is the income level for the payor below which no support would generally be payable.

In the case of the *Federal Child Support Guidelines*, to take a familiar example, once the payor’s income is over \$150,000, section 4 provides that the amount of child support is the table amount for the first \$150,000 plus any additional discretionary amount on the balance of the payor’s income above \$150,000. In practice courts have been prepared to follow the table formula for child support up to much higher income levels. At the other end, the floor for child support under the table formula is an income of about \$8,000, based upon the personal tax exemption for a single person. This is a true floor in that the paying parent is deemed unable to pay any child support below that income level.

Ceilings and floors are trickier to establish for any spousal support formula. In practical terms, ceilings and floors attempt to define the upper and lower bounds of the typical case, for which guideline formulas can generate acceptable results. The benefits of consistency and predictability should be extended as far upwards and downwards as possible, while we recognise the important practical issues at each end of the income spectrum.

First we will explain the reasons for the ceiling and the floor: **the ceiling of \$350,000 of gross payor income, and the floor of \$20,000 of gross payor income.**

Above the ceiling and below the floor, the formulas do not operate, leaving these very high and very low income cases to be dealt with like “exceptions”, which we discuss next in this Chapter. But these situations are not really “exceptions”, as they lie outside the typical income levels for which the formulas were constructed.

11.1 The Ceiling

The shorthand term “ceiling” may be misleading. Under the *Federal Child Support Guidelines*, there is no absolute ceiling, just an income level above which the standard fixed-percentage-of-income formula can be varied, to generate a lesser percentage of income above that level. We propose a similar approach here.

Under the Spousal Support Advisory Guidelines, a ceiling could be based on the payor’s income, or the monthly amount of support paid, or the recipient’s income, or some form of standard of living test. Our preference is to use the payor’s gross income as the basis for the ceiling.

The ceiling is a gross annual payor income of \$350,000. After the payor’s gross income reaches the ceiling of **\$350,000**, the formulas should no longer be automatically applied to divide income beyond that threshold. But the \$350,000 is not a “cap” either, as

spousal support can and often will increase for income above that ceiling, on a case-by-case basis. Below, we discuss possible approaches for cases above the ceiling.

In the feedback on the Draft Proposal, we heard very few suggestions for a lower or higher income level for the ceiling. In large urban areas, an income of \$350,000 was seen as a reasonable upper boundary for the use of formulas. By contrast, in rural areas and in other lower-income areas, some judges and lawyers began to feel uneasy with the higher-income ranges under the formulas somewhere between \$150,000 and \$250,000, leading to the development of informal “ceilings” at lower levels in these first few years under the Advisory Guidelines. Based on this experience, we have not revised the ceiling, leaving the law to develop further in this small number of high income cases.

11.2 The Floor

A floor for the Advisory Guidelines is more significant, if it sets the amount of support at zero below that floor. In our view, that should generally be the effect of the floor. The *Federal Child Support Guidelines* use a very low floor, about \$8,000 gross per year. The floor for spousal support has to be higher than that.

There should generally not be any amount of spousal support payable until the payor’s gross income exceeds \$20,000 per year. A minimum wage or poverty line income would be too low for a floor, providing too little incentive for the payor to continue working, given prevailing tax rates. A review of the case law suggests that judges almost never order spousal support where payors make less than \$20,000, or even slightly more. According to child support database information, where dependent children are involved, if the payor’s income is below \$20,000 gross annually, spousal support is only ordered or agreed upon in less than 2 percent of cases and the percentages for incomes of \$20,000 to \$29,000 are only about 2.5 percent.

Below this floor, there will be occasional cases where there will be entitlement to spousal support. There is also a need for flexibility for incomes just above the floor, to avoid any “cliff effect” and to accommodate ability to pay concerns. These are discussed below.

11.3 Payor Income Above the \$350,000 Ceiling

To repeat, the ceiling is not a “cap” on spousal support, nor does it bar the continued use of the formulas as one method of arriving at an amount in a particular case. The examples below illustrate the operation of the ceiling and some of the issues that arise in cases above the ceiling.

Example 11.1

In a long-marriage case, assume one spouse earns \$350,000 gross per year and the other has no income, after 25 years of marriage. Under the *without child support* formula, a 25-year marriage would call for sharing between 37.5 to 50 percent of the gross income difference, i.e., annual spousal support in the range of \$131,250 to \$175,000 (capped at \$173,232), or \$10,937 to \$14,583 (capped at \$14,436) monthly.

If the payor earned more, say \$500,000, a court could leave spousal support in that same range or, in its discretion, a court might go higher, but no formula would push the court or the parties to do so and it would be an individualized decision. If the formula were to be applied for an income of \$500,000, the support would rise to \$15,625 to \$20,833 (capped at \$20,688) monthly. Or the court or the parties might settle upon an amount somewhere in between these two ranges. These are large numbers for support in this case, but keep in mind that this is the very top end of the formula, with a long marriage, a high payor income and no income for the recipient⁹⁹

Example 11.2

Take the same facts as *Example 11.1* above, with the payor earning \$350,000 gross per year and the recipient having no income, but add two teenage children living with the recipient. Assume that child support would follow the table formula, with child support of \$4,312 per month (using the Ontario tables).

Spousal support under the *with child support* formula, would produce a range from \$7,585 to \$9,160 per month.

If the payor earns more than \$350,000, e.g. \$500,000, a court can decide to go higher or not. Under the *with child support* formula the operation of the ceiling is complicated by the fact that child support increases as incomes rise above the ceiling. We can suggest two possible approaches for these very high income cases using the *with child support* formula.

The first approach uses the formula to determine a minimum amount for spousal support, an approach we can call “minimum plus”. A notional calculation would be required to calculate spousal support at the \$350,000 ceiling, using *the child support payable at the ceiling*. This would determine the “minimum” spousal support range. In *Example 11.2*, that range would be \$7,585 to \$9,160. There would be discretion to add to that minimum for incomes over \$350,000, after taking into account the *actual* amount of child support being paid by the payor at that higher income level, which would be \$6,052 per month at \$500,000. This approach might make more sense where the payor’s income is closer to the ceiling.¹⁰⁰

The second approach would be one of pure discretion. Once the payor’s income exceeded the ceiling, then there would be no “minimum” for spousal support, just a dollar figure that would take into account the *actual* amount of child support paid, an amount which

⁹⁹ For an early case under this formula, well above the ceiling at a payor income of \$1.26 million, see *Modry v. Modry*, [2005] A.J. No. 442 (Alta.Q.B.). For a custodial payor case, where the amount was below the low end of the range on an income of \$500,000, see *Milton v. Milton*, [2007] N.B.J. No. 414, 2007 NBQB 363 (N.B.Q.B.).

¹⁰⁰ For a case that took this approach, see *J.W.McC. v. T.E.R.*, [2007] B.C.J. No. 358, 2007 BCSC 252 (B.C.S.C.), where the range was calculated for \$350,000 and then the high end of that range used, as the payor earned \$400,000. Other B.C. judges have used the formula above the ceiling in *with child support* formula cases: *Teja v. Dhanda*, [2007] B.C.J. No. 1853, 2007 BCSC 1247 (B.C.S.C.) (just below low end of range, \$425,000); and *E.(Y.J.) v. R.(Y.N.)*, 2007 CarswellBC 782, 2007 BCSC 509 (B.C.S.C.) (mid-point of range, \$602,400).

can be very large for high income cases. At some point, the large amounts of child support include a component that compensates the recipient spouse for the indirect costs of child-care responsibilities, leaving less need for spousal support to do so. This approach will become more important where the payor's income is well above the ceiling.¹⁰¹

What is clear is that the larger stakes at these income levels and the complexities of the individual cases mean that the Advisory Guidelines will have less significance to the outcomes above the ceiling, whether negotiated or litigated.

11.4 Payor Income Below \$20,000/\$30,000

The "floor" for the use of the formulas is a gross payor income of \$20,000 per year. Below that floor, spousal support orders are rare and thus exceptional. For payor incomes between \$20,000 and \$30,000, there is no presumption against support, but it may be necessary to depart from the lower end of the formula ranges, in light of ability to pay considerations.

First is the situation involving payor incomes **below the floor of \$20,000**. In general, the formulas for amount and duration will not operate where the payor spouse's gross income is less than \$20,000 per year, as it will be rare that there will be sufficient ability to pay.¹⁰² There may, however, be exceptional cases where spousal support might be paid, e.g. where the payor spouse is living with parents or otherwise has significantly reduced living expenses, or where both spouses are retired and on low incomes after a long marriage.¹⁰³ Formulas may be less helpful in determining amounts in such cases.

There is another good reason for allowing for spousal support in exceptional situations below the income floor. The Advisory Guidelines address amount and duration, not entitlement. An absolute income floor for amount would effectively create an entitlement rule, something that these guidelines should not do, in light of their informal and advisory nature. The issue of entitlement must always remain open, as a threshold issue, to be defined by the legislation and judicial interpretation of that legislation.

The examples below illustrate the operation of this \$20,000 floor.

Example 11.3

To take an example at the lower extreme, assume the higher income spouse earns \$18,000 gross per year as employment income, after a 25-year marriage, but the other spouse has no income at all.

¹⁰¹ In one Alberta case, where the payor earned \$670,965, the full table amount of child support was ordered, but spousal support was much lower than a formulaic result (but in the middle of the range for an income of \$350,000): *T.L.P. v. F.J.P.*, [2007] A.J. No. 1114, 2007 ABQB 600 (Alta.Q.B.).

¹⁰² For example, *A.M.R. v. B.E.R.*, [2005] P.E.I.J. No. 83, 2005 PESCTD 62 (P.E.I.S.C.) (wife earned \$18,557, husband received workers compensation grossed up to \$13,525).

¹⁰³ For example, *M.(W.M.) v. M.(H.S.)*, 2007 CarswellBC 2667, 2007 BCSC 1629 (B.C.S.C.) (older couple, husband on disability income \$17,800, wife no income, \$600/mo. ordered, middle of range).

With a floor of \$20,000, there would usually be zero spousal support payable at \$18,000, despite the income difference. The range for spousal support generated by the *without child support* formula would have been \$562 to \$750 (capped at \$706) per month. At the top end of this range, using Ontario figures, each spouse would have 50 per cent of the net income, but only \$737 per month each, below social assistance rates in most jurisdictions. Even at the low end of this range, the payor would only have monthly net income of \$880 compared to the recipient's \$596 monthly.

Example 11.4

Assume the payor earns \$20,000 gross per year, the other spouse has no income and they have one child, which would mean a table amount of child support of \$172 per month in Ontario.

If we applied the *with child support* formula here, spousal support would range from \$319 to \$436 per month. At these levels, the custodial parent and one child would be left at around 80 per cent of the already-too-low low-income measure used in Schedule II of the *Federal Child Support Guidelines* to compare household standards of living, while leaving the paying spouse a net monthly income of about \$925 per month.

These numbers only improve slightly, even in the one-child case, for those earning \$25,000 per year. The table amount of child support would be \$211 per month. After payment of spousal support in the range of \$436 to \$569 per month the payor's net disposable income inches up just below \$1,100 per month.

For spouses with low incomes, we must be particularly concerned about work incentives, welfare rates and net disposable incomes. There may be compelling arguments for low-income payors to pay child support at very low income levels, but the same arguments cannot be made for support for adult spouses.

There is a second related concern for those payors whose incomes are **more than \$20,000 but less than \$30,000**. For these payors, assuming entitlement, consideration should be given to the percentages sought under the applicable formula, the net disposable income left to the payor spouse, and the impact of a spousal support payment upon the work incentives and marginal gains of the payor.¹⁰⁴ For example, under the *without child support* formula, a shorter marriage would mean a smaller percentage and hence a smaller bite of the payor's income, in contrast to our 25-year marriage examples above. Or, to take another example, for a payor with an income in this \$20,000 to \$30,000 region and whose shifts, overtime hours or seasonal work are changeable, there are realistic concerns about disincentives to work. This flexibility will also avoid a "cliff effect" for payors just above the \$20,000 floor, where a payor would suddenly go from zero spousal support to a formula amount simply because of making a few dollars more per year.

¹⁰⁴ For a careful analysis of this exception, see *Maitland v. Maitland*, [2005] O.J. No. 2252 (Ont.S.C.J.) (husband truck driver earned \$28,439, wife no income, amount below range ordered).

As these cases are just above the income floor, these are situations that could be treated as “exceptions” to the operation of the formulas, unlike those cases where the payor’s income is below the floor. But the concerns in these two situations both arise from the operation of the floor, so we have dealt with them here together.

12 EXCEPTIONS

The formulas are intended to generate appropriate outcomes in the majority of cases. The formulas set out in Chapters 7 and 8 have been designed to cover a wide range of *typical* cases. There will be unusual or atypical cases, however, where the formulas generate results inconsistent with the support factors and objectives found in the *Divorce Act* and an appropriate result can only be achieved by departing from the formula.

The term **exceptions** refers, under the Advisory Guidelines, to recognized **categories of departures** from the ranges of amounts and durations for spousal support under the formulas. Exceptions are the last step in a support determination in cases covered by formulas. The formulas provide two other opportunities, discussed above, to shape awards that are responsive to the exigencies of individual cases. First, the ranges for amount and duration provide considerable scope to adjust **within those ranges** to the particular facts of any case (Chapter 9). Second, **restructuring** provides a further means to push and pull amount and duration above and below the ranges generated by the formula (Chapter 10). Only if *neither* of these steps can accommodate the unusual facts of a specific case should it become necessary to resort to these exceptions.

As we emphasize throughout this document, the Advisory Guidelines are informal rules and are not legally binding. In principle, the formula outcomes can be ignored whenever they are viewed as inappropriate. Departures from the formula outcomes could thus have been left entirely to case-by-case determination, without any need for categorical exceptions. In our view, however, it is important to the integrity of the Advisory Guidelines that exceptions be listed and defined. It is only the systemic benefits of consistency, predictability, coherence and fairness that encourage all concerned to work within the formula ranges. We took the view that exceptions should be stated, to structure and constrain departures from the formula in the interests of consistency and predictability.

We recognize that any list of itemized exceptions will not be exhaustive. There will always be unusual and even one-of-a-kind fact situations in spousal support cases, as in family law generally. But there are certain familiar categories of “hard” cases that come up with sufficient regularity that an exception can both recognize their existence and offer some guidance to their resolution. Following conventional legal principles, a spouse who claims to fall within one of these exceptions ought to bear the burden of proof.

Since the release of the Draft Proposal, one surprise has been the failure of lawyers and judges to use the listed “exceptions” to the formulas. In this final version, we have therefore assembled all the exceptions in one chapter, with more refinements and specifics about their potential use. We have also added some new exceptions, reflecting the feedback received since the Draft Proposal. For ease of reference, we will first list all the exceptions, before discussing each in turn:

- (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
- (11) Section 15.3: small amounts, inadequate compensation under the with child support formula

12.1 Compelling Financial Circumstances in the Interim Period

We have listed this exception first, as it is the first exception that most will encounter. There are some situations in the interim period where there may have to be an exception for compelling financial circumstances. When spouses separate, it is not always possible to adjust the household finances quickly. One of the spouses may have to bear large and often unmovable (at least in the short run) expenses, most likely for housing or debts. In most instances, the ranges generated by the formulas will cover these exceptional cases, but there may be some difficulties where marriages are shorter or incomes are lower or property has not yet been divided. Interim spousal support can be adjusted back to the formula amounts once a house has been sold or a spouse has moved or debts have been refinanced.

Below we offer some examples of how this exception might operate.

Example 12.1

In *Example 8.1*, Ted earns \$80,000 gross per year and Alice makes \$20,000. Alice and the two children remain in the family home after the separation. Assume that Alice has to make a large monthly mortgage payment, in the amount of \$2,100 per month, as the couple had recently purchased a new home. Under the *with child support* formula, the range for spousal support would be \$471 to \$1,021 per month, on top of child support of \$1,159 monthly.

At the interim stage, spousal support might have to be increased above the upper end of the range if Alice continues to make the mortgage payments. If Ted were to make the mortgage payments, then spousal support might have to be reduced below the lower end of the range at this interim stage.

The “compelling financial circumstances” in the interim period will usually involve such mortgage or debt expenses, especially under the *with child support* formula where the spouses are more often at the limit of their abilities to pay after separation. But there can also be other kinds of “compelling financial circumstances” at this interim stage, as in the next example.

Example 12.2

In a modification of *Example 7.2*, Karl and Beth have been married for only two years. They have no children. Beth was 25 when they met and Karl was 30. When they married, Beth was a struggling artist who earned a meagre gross income of \$12,000 a year giving art lessons to children. Karl is a music teacher with a gross annual income of \$60,000. With Karl’s encouragement, Beth stopped working during the marriage to devote herself to her painting. They lived in a house Karl owned before the marriage, which Beth will get some share of when the property is eventually divided. Beth has gone to live with a friend, but wants to rent her own apartment.

Using the *without child support* formula, a two-year marriage would generate a range for amount of 3 to 4 percent of the gross income difference of \$60,000 (assessing Beth’s income as zero, which it would be at the point when interim support is claimed). The result would be support in the range of \$150 to \$200 per month for between one and two years.

Until Beth finds work and gets her share of the property, she is going to require a minimum of \$1000 per month. Even restructuring the award to provide \$400 per month for a year would not meet these needs. The **interim exception** could be relied upon to make an interim award in a higher amount.¹⁰⁵

While we have added another exception below for “basic needs/hardship” under the *without child support* formula more generally, it is preferable to use this interim exception for shorter term or purely transitional needs. The “basic needs/hardship” exception should only be considered at the trial or initial determination stage, after a full review of the merits on all the evidence, including any interim exception granted.

12.2 Debt Payment

The existence of marital debts does not necessarily affect spousal support. In many cases debts are adequately taken into account in property division, reducing the amount of shareable property. However, where a couple has a negative net worth, i.e., debts greater than assets, then the allocation of the debt payments can have a dramatic impact upon ability to pay.

If the payor is required to pay a disproportionate share of the debts, then there may have to be some reduction in support from the lower end of the range generated by the

¹⁰⁵ In *Kirk v. Hackl*, [2007] S.J. No. 87, 2007 SKQB 82 (Sask.Q.B.), two exceptions were at work, both disability and interim circumstances.

formulas. The reduction may only be for a specified period, depending upon the balance remaining to be paid. At the end of that period, support could automatically revert to an amount within the range or, in some cases, a review may be ordered at that time. Conversely, if less frequently, the recipient may sometimes need an amount of support above the upper end of the range, in order to make payments on a family debt.

Where assets exceed debts, however, there can be little reason for a debt exception, as the party responsible for the debt will usually also hold the corresponding asset or other assets.

The limits of this exception can be refined, thanks in part to feedback received since the Draft Proposal:

- the total family debts must exceed the total family assets, or the payor's debts must exceed his or her assets;
- the qualifying debts must be "family debts";
- the debt payments must be "excessive or unusually high".

Each of these three refinements deserves comment.

In all property regimes, this spousal support exception can apply where total family debts exceed total family assets. In some Canadian property regimes, however, courts are empowered to allocate specific assets to a particular spouse, so that it is possible to leave one spouse with net assets and the other spouse is left with the family debts. In these regimes, the debt payment exception should be extended to this situation where one spouse has a "net debt" position.

The debts must be "family debts", i.e. debts taken into account in the division of the family or marital property or debts incurred to support the family during cohabitation.

Further, most debt payments can be accommodated within the formula ranges and it is only "excessive or unusually high" debt payments that compel going outside the ranges to make an exception. Implicit in this latter condition is that the debtor has made all reasonable efforts to refinance and reduce the debt payments first.

12.3 Prior Support Obligations

An obligation to pay support for a prior spouse or for prior children will affect the support to be paid to a subsequent spouse. Generally speaking, the courts have adopted a first-family-first approach for payors in such cases, subject to a very limited exception for low-income payors. Under the current law, courts determine the amount of any support for the second spouse taking into account the prior support obligations and the payor's budget.

We have created an exception for these prior support obligations. Most often, the prior support obligation will involve child support, but spousal support may also be involved after a longer first marriage and then a shorter second marriage.

In the vast majority of cases, the prior support obligation will involve a payment to another party. But there can also be cases where a spouse is a custodial parent for a prior child in his or her care who is not a “child of the marriage”. A custodial parent in this case has as much of a “prior support obligation” as does a support payor. We have modified this exception since the Draft Proposal to recognize this reality.

12.3.1 Prior support under the without child support formula

Where there are prior support obligations, the payor’s gross income will have to be adjusted to reflect those obligations, *before* computing the gross income difference and applying the percentage ranges to that difference. Adjusting for a **prior spousal support obligation** is simple, as spousal support is paid on a gross or before-tax basis: deduct the amount of spousal support paid from the spouse’s gross income to establish the spouse’s gross income. For a **prior child support obligation**, as child support is paid on a net or after-tax basis, the calculation is slightly more complicated: first, gross up the child support amount to reflect the payor’s marginal tax rate on the amount paid and then deduct the grossed up amount from the spouse’s gross income.

The effect of this prior support deduction is to leave the payor spouse with a lower gross income. The payor would thus have a lower income, the size of the gross income difference would be reduced and hence the formula amount of support for the second spouse would be lower.

12.3.2 Prior support under the *with child support* formula

An obligation to pay support for a prior spouse or prior children requires a slightly different adjustment under this formula, which works with net incomes rather than the gross incomes of the *without child support* formula. . In calculating the payor spouse’s individual net disposable income, this exception will require that any amounts of support paid to prior spouses or children be deducted, thereby reducing the size of the pool of individual net disposable income between the current spouses and also reducing the payor’s share of that smaller pool. Because we are working with net income under this formula, there is no need to gross up any child support amounts and the software can work out the after-tax value of the gross amount of spousal support.

12.3.3 Prior children in the spouse’s care

Where a payor has a child of a prior relationship in his or her care after separation, a child who is not a “child of the marriage”, the spouse has a different sort of “prior support obligation” towards that child, one not fixed in a support agreement or order, but an obligation nonetheless. Consistent with our approach for custodial parents under the with child support formula, the custodial parent’s support obligation towards that prior child can be estimated by using an amount of “notional child support”, based upon the table amount for that child or children for a person with the custodial parent’s Guidelines income. In some cases, a further adjustment may have to be made for any section 7 expenses paid by the custodial parent.

Example 12.3

Assume the same facts for Ted and Alice in *Example 8.1*, but this time assume that Ted's 16-year-old son of an earlier marriage comes to live with Ted after separation. In calculating the range under the *with child support* formula, Ted's income would have to be reduced by the one-child table amount (\$719, using Ontario figures), which would reduce the range for spousal support to Alice, down from \$471 to \$1,021 **to \$15 to \$471 monthly**.

12.4 Illness and disability

Many cases of illness or disability can be accommodated within the formulas. The central concern in many of these cases will be the recipient's need for long-term or indefinite support. Indefinite (duration not specified) support would be available under the formulas after 20 years of marriage or based upon the "rule of 65". And, in most medium-to-long marriages, with or without children, the ranges for duration and amount offer considerable scope to accommodate the needs of an ill or disabled spouse. Disability will be an important factor in locating the amount and duration within the ranges in these cases, a point already noted above in Chapter 9.

In some medium-length marriages, where the formulas generate time limits, **restructuring** may have to be employed (Chapter 10). Under restructuring, the monthly amount can be reduced and the duration extended beyond the maximum, especially where spousal support is effectively bridging until retirement, when the recipient's pension and old age benefits become payable. For this to be effective, the support amounts generated by the formula would have to be large enough to allow for a reasonable lower amount of monthly support. *Example 7.8*, the case of Gail and Brian, where Brian is suffering from a chronic illness at the end of their 15-year marriage, illustrates the use of restructuring to deal with the needs of an ill or disabled spouse.

For many cases, however, neither the breadth of the ranges nor the expanded possibilities of restructuring are seen to provide an adequate response to illness or disability. In these cases, there are three distinct approaches to long-term disability, three approaches that became more sharply defined after *Bracklow* in 1999. Because these are "hard" cases, more of them turn up in the reported decisions. Below we have framed these three approaches using the language of the Advisory Guidelines, as courts increasingly have used the Guidelines to consider these issues.

Faced with a recipient with a long-term disability, Canadian courts have responded with one of three approaches, here stated in declining order of frequency.

- (i) *Lower Amount, Extend Duration*: most courts will extend duration, even to be "indefinite", while keeping the amount within the range, at or near the low end;
- (ii) *No Exception*: a slightly smaller number of courts will fix an amount in the range, often towards the upper end, and use the maximum duration, even though that means support will end while need continues;

- (iii) *Increase Amount, Extend Duration*: a much smaller group of courts will respond to the greater need in disability cases by increasing amount and extending duration.

After *Bracklow*, the law in this area remains uncertain. In our view, the third approach is the least consistent with *Bracklow*. The case law is dominated by the first two approaches, each of which can find support in the *Bracklow* decision. Our preference would be the second, “no exception” approach, which seems more consistent with the modern limits of spousal support as a remedy. But a slight majority of the reported cases see these cases as exceptions, mostly preferring the first, “lower amount, extended duration” approach. For now, as there is no dominant pattern or trend in the case law, we must recognize the possibility of an exception for these cases and leave the law to develop.

In order to explain the use of the ranges, restructuring and these three alternative approaches, it is best to use an example. We will change the facts slightly in *Example 7.3*, the case of Bob and Sue.

Example 12.4

Bob and Sue have been married for 10 years. Sue is now 38, and Bob earns \$65,000 per year. There are no children. Assume that Sue worked as a hairdresser, earning \$25,000 a year, but then became ill and unable to work towards the end of the marriage, with no prospect of future improvement. She now receives \$10,000 per year thanks to CPP disability.

Under the *without child support* formula, the applicable percentages for amount after a 10 year marriage would still be, as on the original facts, 15 to 20 percent, but now applied to a gross income difference of \$55,000. **Spousal support under the formula would be in the range of \$687 to \$917 per month (or \$8,250 to \$11,000 annually) for a duration ranging from 5 to 10 years.**

At the maximum duration, Sue would only obtain spousal support until age 48. Suppose Sue wants to receive support until age 60, another 12 years or 22 years in total.

Restructuring could be attempted. The maximum global amount under the formula would be \$110,000 (\$917 per month for 10 years). If this global amount were stretched over 22 years (and ignoring any discounting for time), that could generate an annual amount of \$5,000 per year or \$417 per month.

Under the “no exception” approach, Sue’s support would be limited by the maximum amount and duration generated by the formula, subject to an extension of the maximum duration by means of restructuring. Current law offers support for this “no exception” approach, specifically the *Bracklow* case itself. *Bracklow* involved a support claim by a disabled spouse on facts quite similar to those in our example of Bob and Sue. The final

result in *Bracklow* is consistent with the *without child support* formula, without resort to an exception.¹⁰⁶

Bracklow involved a seven-year relationship. At the time of the original trial, Mr. Bracklow was earning \$44,000 gross per year and Mrs. Bracklow's income from CPP was \$787 per month, or roughly \$9,500 per year. The final result in the case, taking into account the interim support paid, was a time-limited order of \$400 per month for slightly more than seven years. The *with child support* formula yields a similar result. Under the formula, after a 7 year marriage the range for support is 10.5 to 14 percent of the gross income difference, which in *Bracklow* was \$34,500. The range for support would therefore be \$301 to \$402 per month (or \$3623 to \$4830 per year) for a duration of 3.5 to 7 years duration. Thus the results generated by the formula might also be seen as appropriate for the case of Bob and Sue.¹⁰⁷

If Sue's claim for support is seen as warranting an exception, our preferred solution would be to extend the duration of support to age 60 as Sue requests, but for an amount at the low end of the range, i.e. \$687 monthly or \$8,250 per year. Typically these will be cases where the recipient is younger or the marriage is shorter or the payor's income is not high. Under this exception, we suggest that it is best to **lengthen the maximum durational limit, while keeping the amount within the range, more specifically at or near the lower end of the range.**

Under the third approach above, a court might order the upper end of the range, or \$917 per month in Sue's case, but without any time limit of 5 to 10 years. Duration would be thus be "indefinite (duration not specified)", which for practical purposes might be "permanent" in such a case.¹⁰⁸ As stated earlier, this third approach is used much less often and is least consistent with *Bracklow*.

At most, what we propose here is a limited exception for illness and disability cases, as these are the cases that the courts often treat as exceptional. Some might propose that there be a similar and additional exception based upon age for older recipient spouses. In our view, there are sufficient accommodations for age in the *without child support* formula. The recipient's age will be a factor in fixing amount and duration within the ranges and there is also the rule of 65 for indefinite support.

Some would even broaden this exception beyond illness and disability, into something more like a "basic social obligation" exception, where the recipient has basic needs beyond any formula support for one of any number of reasons. We believe that the sheer breadth of a basic social obligation exception would undermine the integrity and consistency of any formula or guidelines.

¹⁰⁶ The result of the Supreme Court of Canada decision was to return the case for a re-hearing of Mrs. Bracklow's claim for spousal support. The rehearing decision is reported at (1999), 3 R.F.L. (5th) 179 (B.C.S.C.).

¹⁰⁷ For examples of cases where no exception was made, see *Puddifant v. Puddifant*, [2005] N.S.J. No. 558, 2005 NSSC 340 (N.S.S.C.F.D.); *Williston v. Williston*, [2006] B.C.J. No. 3248, 2006 BCSC 1869 (B.C.S.C.); and *Wise v. Wise*, [2006] B.C.J. No. 1143, 2006 BCSC 945 (B.C.S.C.).

¹⁰⁸ For example, *Bramhill v. Dick*, [2007] B.C.J. No. 387, 2007 BCSC 262 (B.C.S.C.).

The illness or disability exception will usually arise where there are problems with the maximum duration under the *without child support* formula, where the marriage is of short-to-medium duration. Under the basic *with child support* formula, there will be much less need for this exception, given the lengthy maximum duration available to a primary parent under the shorter-marriage test for duration.

Disability does come up regularly under the *custodial payor* formula, as it often explains why the mother is the non-custodial parent. Under the *custodial payor* formula, there is another exception described below, an exception for a non-custodial parent to fulfil her or his parenting role, a parenting exception that may provide more spousal support for an ill or disabled non-custodial parent. However, if the non-custodial parent is not actively involved in parenting, perhaps because of the illness or disability, then the illness or disability exception might be applied.

Three years after the release of the Draft Proposal, the language of the Advisory Guidelines is now being used to address these difficult issues of illness and disability, but the law remains in a state of flux. Some courts make an exception, others don't, and we have to await further developments.

12.5 The compensatory exception in short marriages without children

The merger over time concept incorporates both compensatory and non-compensatory elements. In longer marriages the *without child support* formula thus generates high percentage ranges for sharing the gross income difference. In these longer marriages, by recognizing strong non-compensatory claims to the marital standard of living, the formula amounts also fully recognize any compensatory claims based on loss of earning capacity or career damage.

For short- or medium-length marriages, however, the *without child support* formula produces smaller amounts of support, reflecting the reduced importance of compensatory considerations, especially as most of these will be marriages without children. More important in these short-to-medium marriages is the transitional function of non-compensatory support, with the transition being longer or shorter depending upon the expectation and reliance interests flowing from the length of the marriage.

But some short- or medium-length marriages can involve large *compensatory* claims, disproportionate to the length of the marriage, even without any children involved. These compensatory claims may relate to an economic loss or may involve a restitutionary claim for an economic advantage conferred. Some examples come to mind:

- One spouse is transferred for employment purposes, on one or more occasions, forcing the other spouse to give up his or her job and to become a secondary earner.

- One spouse moves across the country to marry, giving up his or her job or business to do so.¹⁰⁹
- One spouse works to put the other through a post-secondary or professional program but the couple separates shortly after graduation as in *Caratun v. Caratun*¹¹⁰ before the supporting spouse has been able to enjoy any of the benefits of the other spouse's enhanced earning capacity.

There could undoubtedly be other examples.

If a claimant spouse can prove such a disproportionate compensatory claim, then this exception allows for an individualized determination of the amount of spousal support, based upon the size and nature of that claim. The formula will not offer much assistance.

The compensatory principles set out in *Moge*, and reaffirmed in *Bracklow*, continue to develop in the case law. Thus, the precise scope of this exception will reflect the evolution of those principles.

A compensatory exception is unnecessary under the *with child support* formula, given the weight given to compensatory considerations in the construction of this formula and the generous maximum durations available under the two tests for duration.

12.6 Property Division, Reapportionment of Property

Spousal support is only determined after the division of family or matrimonial property. In Canada, there is a different regime for property division in every province and territory. All the property regimes have a few common characteristics: special rules governing the matrimonial home, a defined pool of family or matrimonial property, and a strong presumption of equal division of that pool. In most cases, there will be some net accumulation of property and it will be divided equally. Apart from the debt payment exception already mentioned, there are two other situations where a possible "property" exception has been suggested in determining spousal support: unequal division of property, or high property awards.

The remedies of property division and spousal support perform distinct functions and have different rationales. In the Draft Proposal, we therefore did not propose a general exception for unequal property division. We were less categorical about any exception for high property awards. We do recognize that British Columbia's property law is different and thus justifies an exception, as B.C. law allows unequal division or

¹⁰⁹ For example, *Ahn v. Ahn*, [2007] B.C.J. No. 1702, 2007 BCSC 1148 (B.C.S.C.); *Fuller v. Matthews*, [2007] B.C.J. No. 656, 2007 BCSC 444 (B.C.S.C.).

¹¹⁰ *Caratun v. Caratun* (1993), 42 R.F.L. (3d) 113 (Ont. C.A.). The ALI proposals also contain an exception for disproportionate compensatory losses in short marriages. With respect to *Caratun*-type cases, the ALI's proposals frame these as reimbursement support cases which involve compensation for a *loss*, i.e., the loss either spouse incurs when the marriage is dissolved before that spouse realizes a fair return from his or her investment in the other spouse's earning capacity. Spousal support in these cases, the ALI suggests, ought to be the reimbursement of living and other expenses contributed by the claimant spouse.

“reapportionment” on grounds that ordinarily are taken into consideration for the spousal support remedy.

Before considering these exceptions, we realise that, in many settlements, the division of property is used to fund a lump sum payment of spousal support. The Advisory Guidelines can actually assist in negotiating that outcome, as the ranges for amount and duration can offer guidance in converting all or a portion of periodic spousal support into a lump sum amount through restructuring. But this is not an “exception”, just restructuring and paying the lump sum spousal support through property division. Any “property exception” would work the other way, i.e. the unequal division or high property award is made first and then spousal support is reduced below the ranges because of the property division.

12.6.1 Reapportionment of property (British Columbia)

Unlike any other Canadian matrimonial property statute, the British Columbia *Family Relations Act* empowers a court to reapportion, or divide unequally, property between spouses on grounds that overlap with spousal support considerations. Among the grounds in section 65(1), entitled “Judicial reapportionment based on fairness”, can be found factor (e):

- (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to
 - (a) the duration of the marriage,
 - (b) the duration of the period during which the spouses have lived separate and apart,
 - (c) the date when property was acquired or disposed of,
 - (d) the extent to which property was acquired by the spouse through inheritance or gift,
 - (e) the needs of each spouse to become or remain economically independent and self-sufficient, or
 - (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

Factors (e) (self-sufficiency) and (f) (capacity or liabilities) are frequently used to adjust for the economic disadvantage of the lower-income spouse at the end of the marriage. There is a substantial case law on reapportionment on these grounds, which we do not need to repeat here.¹¹¹ One of the concerns of the case law has been to avoid double recovery.

In its spousal support decisions since the release of the Draft Proposal, the British Columbia Court of Appeal has applied reapportionment law in the context of the Spousal Support Advisory Guidelines. In many instances, any adjustment for reapportionment can be made by reducing support within the ranges. But sometimes an exception has to be

¹¹¹ The leading decision would be *Toth v. Toth* (1995), 13 B.C.L.R. (3d) 1, 17 R.F.L. (4th) 55 (B.C.C.A.).

recognized: spousal support may have to be reduced below the formula ranges where a sufficiently large reappportionment order has been made under section 65 on the grounds stated in clauses (1)(e) and (f).¹¹²

In the distinctive property regime in British Columbia, **and only in British Columbia**, there is thus an exception available where a sufficiently large reappportionment order has been made on these “spousal support” grounds.

12.6.2 An exception for high property awards?

Some have suggested that a high property award should constitute an exception for spousal support purposes. On this view, property and support are alternative financial remedies that can be substituted, one for the other, so that a high property award always justifies lower spousal support. While this view does find some acceptance in the case law, so too does the more compelling view that property and support are governed by distinctive laws and serve different purposes and that a high property award should not in and of itself dictate a significant reduction of spousal support. Recognizing high property awards as an explicit exception would, in our view, inappropriately entrench a contested view. Again, we have to leave the law to develop further in this area.

If there were an exception of this kind, it would result in an amount of spousal support set below the low end of the range or for a shorter duration, where there is a high property award.

It should be kept in mind that the Advisory Guidelines can already accommodate some of these “high property” concerns, without any exception. First, each spouse is expected to generate reasonable income from his or her assets and income can be imputed where a spouse fails to do so. The income imputed will affect the operation of the formula (Chapter 6). Second, as discussed above, property-related concerns may, in some cases, determine whether support is fixed at the upper or lower ends of the ranges for amount or duration, e.g. an absence of property to be divided or a large amount of property or continuing equalization payments (Chapter 9). Third, many high property cases are also high-income cases, bringing into play the ceiling above which the formula will not necessarily apply (Chapter 11).

Finally, there will be some cases where a high property award means no entitlement to spousal support, as the recipient of the property will thereby become economically self-sufficient, overcoming any disadvantage or need at the end of the marriage (Chapter 4). This is not an “exception” to the Advisory Guidelines, however, but an instance where the threshold requirement of entitlement is not met, so that the Advisory Guidelines are not engaged.

¹¹² *Tedham v. Tedham*, [2005] B.C.J. No. 2186, 2005 BCCA 502, 261 D.L.R. (4th) 332, 47 B.C.L.R. (4th) 254, 20 R.F.L. (6th) 217; *Narayan v. Narayan*, [2006] B.C.J. No. 3178, 2006 BCCA 561, 62 B.C.L.R. (4th) 116, 34 R.F.L. (6th) 272; *MacEachern v. MacEachern*, [2006] B.C.J. No. 2917, 2006 BCCA 508, 62 B.C.L.R. (4th) 95, 33 R.F.L. (6th) 315, [2007] 3 W.W.R. 471; *Foster v. Foster*, [2007] B.C.J. No. 244, 2007 BCCA 83, 64 B.C.L.R. (4th) 259, 37 R.F.L. (6th) 139.

12.6.3 *Boston v. Boston*

One last property point: the Advisory Guidelines on amount and duration do not change the law from *Boston v. Boston*¹¹³ governing double-dipping, mostly from pensions. That law remains in place, as a possible constraint upon the amount of support, determining if some portion of income should be excluded from the formula because it has been previously shared under property division.¹¹⁴

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

The *without child support* formula works well across a wide range of cases from short to long marriages with varying incomes. In some parts of the country and in some cases, there is a specific problem for shorter marriages where the recipient has little or no income. In these shorter-marriage cases, the formula is seen as generating too little support for the low income recipient to meet her or his basic needs for a transitional period that goes beyond any interim exception.

Restructuring in these cases will sometimes still not generate an amount or a duration that is sufficient, in the eyes of some, to “relieve any economic hardship of the spouses arising from the breakdown of the marriage”, as stated in section 15.2(6)(c) of the *Divorce Act*. To complicate matters further, the amount required to meet basic needs will vary from big city to small city to town to rural area. Whether restructuring provides a satisfactory outcome, i.e. more support for a shorter time, will depend upon where the recipient lives. Thus the problem for these short-to-medium-marriage-low-income cases seems to be most acute in big cities.¹¹⁵

We did not wish to change the structure of the formula itself for this one sub-set of cases. The best approach to these cases was to create a carefully-tailored exception, **the basic needs/hardship exception**, leaving the basic formula intact for the vast majority of cases where the formula produces a reasonable range of outcomes.

Other exceptions may avoid the need to resort to this basic needs/hardship exception. In some short marriages without children, the **compensatory exception** may apply, with more generous outcomes than under this exception. The basic needs/hardship exception is non-compensatory. In other cases, in shorter marriages, the **compelling financial circumstances at the interim stage** can provide for a higher amount of support for a transitional period, such that no further exception need be applied by the time of trial. Earlier, we made clear that basic needs/hardship exception should only be considered at the trial or initial determination stage, after a full review of the merits on all the evidence, including any interim exception granted.

¹¹³ *Boston v. Boston*, [2001] 2 S.C.R. 413.

¹¹⁴ For examples of Guidelines cases applying *Boston*, see *Pettigrew v. Pettigrew*, [2006] N.S.J. No. 321, 2006 NSCA 98 (N.S.C.A.), affirming [2005] N.S.J. No. 616, 2005 NSSC 219 (N.S.S.C.); *Puddifant v. Puddifant*, [2005] N.S.J. No. 558, 2005 NSSC 340 (N.S.S.C.F.D.); *Vanderlans v. Vanderlans*, [2007] N.J. No. 121, 2007 NLUFC 8 (N.L.U.F.C.).

¹¹⁵ For example, *Simpson v. Grignon*, [2007] O.J. No. 1915, 2007 CarswellOnt 3095 (Ont.S.C.J.).

The basic needs/hardship exception applies under the *without child support* formula and the *custodial payor* formula, *only* in these circumstances:

- the formula range, even after restructuring, will not provide sufficient income for the recipient to meet her or his basic needs
- the reason will be that the recipient's base or non-support income is zero or too low
- the marriage will typically be short to medium in length, e.g. 1 to 10 years
- the payor spouse will have the ability to pay.

We should be clear that this exception is only intended to ease the transition in these hardship cases. It is not intended to provide the marital standard of living, but only a standard of basic needs. And it is not intended to provide support for a long period of time after a shorter marriage, but only for a short transition period.

One situation where the **basic needs/hardship exception** has been applied is immigration sponsorship cases, where a marriage breaks down while a sponsorship agreement is in place. Most spousal sponsorship agreements now run for a period of three years from the date the immigrating spouse becomes a permanent resident.¹¹⁶ In some cases of very short marriages, the three-year agreement has been used as a measure of the appropriate duration for the period that the payor spouse covers basic needs through spousal support.¹¹⁷

A simple example will illustrate the application of this exception:

Example 12.5

Rob and Donna have been married for 5 years, a second marriage with no children. Rob earns \$60,000 per year. Donna is 53 years old and has no income. Much turns upon why Donna has no income.

If Donna has no income because she moved twice in the past 5 years to accommodate Rob's employment transfers, then the compensatory exception would apply, with spousal support based upon Donna's loss.

But if Donna has no income because she has few skills and is unemployed at the end of the marriage, then her entitlement will be non-compensatory. Under the *without child support* formula, the range would be \$4,500 to \$6000 per year (\$375 to \$500 per month) for 2 ½ to 5 years. This range would not meet Donna's basic needs in any part of Canada.

¹¹⁶ The duration of such sponsorship agreements was once as long as 10 years, reduced now to 3 years: *Immigration and Refugee Protection Regulations*, SOR/2002-227, as am. SOR/2004-167 and SOR/2005-61, s. 132.

¹¹⁷ For example, *Gidey v. Abay*, [2007] O.J. No. 3693 (Ont.S.C.J.); *T.M. v. M.A.G.*, [2006] B.C.J. No. 3479, 2006 BCPC 604 (B.C.P.C.).

By means of restructuring, using the maxima for amount and duration, the formula could generate as much as \$15,000 per year for 2 years. In some parts of Canada, that might be enough to meet Donna's basic needs. In a city, however, Donna might need \$20,000 a year for those two years to meet her basic needs, as part of the transition from married life.

In the end, we remain uneasy about recognizing this exception. Many would suggest that the restructured outcome for Donna of \$15,000 per year for two years is perfectly reasonable, even in a big city, so that no exception is warranted at all. Others would see the restructured amount as too low, or the duration as too short, thus warranting an exception, and cases to that effect can be found in the post-Guidelines case law. For the most part, those who pressed for this exception can be found in big cities and it may be that this specific exception is not necessary outside of those big cities.

12.8 Non-Taxable Payor Income

Both formulas produce a "gross" amount of spousal support, i.e. an amount that is deductible from taxable income for the payor and included in taxable income for the recipient. As we noted in Chapter 6 on Income, some payors have incomes based entirely on legitimately non-taxable sources, usually workers' compensation or disability payments or income earned by an aboriginal person on reserve.¹¹⁸ In these cases, the payor is unable to deduct the support paid, contrary to the assumption built into the formulas for determining amount.

Some of the recipients may pay little or no tax on the support income received, due to their low incomes, but that is not our concern here. Nor are we concerned with payors who earn income tax-free by working "under the table" or by understating their income for tax purposes. Here we are concerned with payors who legitimately receive their income on a non-taxable basis.

What warrants this **non-taxable exception** is when the non-deductibility of the spousal support poses a problem for the payor's ability to pay, as the non-taxable payor is unable to pay the gross amount of spousal support that would be required of a payor with the benefits of deductibility.

Under the *without child support* formula, ability to pay will usually only become an issue in longer marriage cases, marriages of 15 years or more. In these longer marriage cases, the 50/50 net income "cap" will simplify the use of this exception, as the upper limit on spousal support will be equalization of the spouses' net incomes. A simple example helps to explain why.

Example 12.6

Donna and Jeff have been married for many years, with two adult children. Later in his career, Jeff experienced became unable to work and Jeff now receives a

¹¹⁸ For a case of an aboriginal person earning income on reserve, see *James v. Torrens*, [2007] S.J. No. 334, 2007 SKQB 219 (Sask.Q.B.).

disability pension of \$37,500 per year, non-taxable. Grossed up, his disability pension would be worth \$50,000 per year. Donna works part-time on account of health issues and earns \$10,000 gross per year.

Under the *without child support* formula, if Donna and Jeff have been married for 25 years and using the gross income difference, spousal support would be **\$1,250 to \$1,667 per month, indefinite (duration not specified)**. But Jeff cannot deduct any amount for the spousal support paid, even though Donna will have to include it as taxable income.

In this final version, we have added a net income “cap” under this formula, so that the upper end of the range for support would leave both Jeff and Donna with 50 per cent of the net income. This net income calculation takes into account Jeff’s inability to deduct his support and Donna’s payment of tax on that support. The “cap” would kick in at **\$1,318 per month** (using Ontario tax rates), well below the formula’s upper limit of \$1,667 monthly (if Jeff’s income were taxable, the “cap” would still take effect, but much higher, at \$1,575 per month).

That would only leave a narrow range of **\$1,250 to \$1,318 per month** if we applied the “cap” literally. Practically, the **non-taxable exception** would mean that a court or the parties will likely have to go lower than \$1,250 per month in most cases, in consideration of Jeff’s ability to pay.

What if Donna and Jeff were married for 20 years? Using the gross income difference, the range would be \$1,000 to \$1,333 per month, indefinite (duration not specified). The net income “cap” would only have a small impact here, as it would limit the upper end of the range to \$1,318. Ability to pay concerns for Jeff’s position would be much diminished and this non-taxable exception may not be required.

The problems are actually more serious at higher income levels, especially where the support recipient has to pay a higher rate of tax. If the payor receives \$68,388 non-taxable, the equivalent of a grossed-up income of \$100,000 and the recipient earned \$30,000 per year, the net income “cap” has an even greater impact than it does for Donna and Jeff. Most cases of non-taxable income involve low-to-middle incomes rather than such higher incomes.

Because the *with child support* formula already uses net incomes for its calculations, the basic formula automatically adjusts for the non-deductibility of support. The result is that the whole range under this formula is reduced downward, but it is important to be aware of the reduction and the amounts involved. Another example can help, if we go back to the familiar example of Ted and Alice.

Example 12.7

Ted and Alice have been married for 11 years and have two children aged 8 and 10, as in *Example 8.1*. Alice still earns \$20,000, but Ted now receives a non-taxable disability pension totalling \$56,900 per year (grossed-up, this would be equivalent to \$80,000 of employment income). This means that Ted still pays

\$1,159 per month in child support and there are no section 7 expenses. When Ted earned \$80,000 per year in employment income, the spousal support range was **\$474 to \$1,025 per month**, using Ontario rates. Now that Ted receives a non-taxable disability pension, the range is **reduced to \$380 to \$797 per month**. The difference in the two ranges reflects the effect of Ted being unable to deduct the spousal support for tax purposes.

It might be possible to make an exception here, to increase spousal support above the upper end of the automatically-reduced non-taxable range, pushing up towards \$1,025 per month, in order to improve the financial situation of the recipient and the children. At \$1,025 per month, however, almost 61 per cent of the family's net disposable income or monthly cash flow would be left in Alice's household.

The important point is to appreciate how much the basic *with child support* formula has reduced the range for amount when the payor's income is non-taxable, in order to make the necessary judgment about whether an exception should be made, to increase spousal support above the calculated range.

In every one of these **non-taxable exception** cases, it is necessary to balance the tax positions of the spouses—the reduced ability to pay of the payor spouse, who can't deduct the support paid, and the needs or loss of the recipient spouse, who still has to pay taxes on spousal support and only receives after-tax support.

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

In many cases, the *custodial payor* formula will apply because a father has become the custodial or primary parent of older children, after a medium to long marriage. In these cases, this hybrid formula will provide reasonable amounts of spousal support for durations that will extend beyond the children reaching the age of majority. But in some cases the *custodial payor* formula will be applied after a shorter marriage, with younger children.

There is an exception distinctive to the *custodial payor* formula, flagged earlier in Chapter 8 and reflected in the Nova Scotia case of *Davey v. Davey*.¹¹⁹ It is quite a narrow exception, unlikely to be raised very often, but worth noting. To come within this exception:

- the recipient spouse and non-custodial parent must play an important role in the child's care and upbringing after separation
- the marriage is shorter and the child is younger
- the ranges for amount and duration are low enough and short enough under the custodial payor formula that the non-custodial parent may not be able to continue to fulfil his or her parental role.

¹¹⁹ *Davey v. Davey* (2003), 36 R.F.L. (5th) 297 (N.S.C.A.), affirming (2002), 205 N.S.R. (2d) 367 (N.S.S.C.).

Some of these cases may involve an element of illness or disability, as in *Davey*. Under this exception, however, the focus is upon the recipient's parenting role, rather than the disability. Most often, the exception will be used to extend the **duration** of spousal support, until the child is old enough and the parenting functions are much reduced. Less frequently, the **amount** of support might need to be increased, to ensure the recipient spouse has sufficient resources to meet the specific demands of parenting.

In practical terms, this parenting exception should be considered first, before reaching the more general illness and disability exception discussed above. If the non-custodial parent does not play an important parenting role, perhaps because of the illness or disability, then the more general exception can be properly used.

12.10 Special Needs of Child

A child with special needs can raise issues of both amount and duration in spousal support law, issues that may require an exception.¹²⁰

First, **duration**. A child with special needs can obviously affect the ability of the primary parent to obtain employment, whether part-time or full-time. This may require that the duration of support be extended beyond the length of the marriage or beyond the last child finishing high school, the two possible maximum time limits under the *with child support* formula.

Second, **amount**. Again, a special needs child will often mean that the primary parent cannot work as much, perhaps not even part-time, and thus the amount of spousal support will be increased because of the recipient's lower income, an adjustment that can be accommodated by the *with child support* formula. But even then, there may be a need to go above the upper end of the range, to leave an even larger percentage of the family's net disposable income in the hands of the primary parent, above the typical maxima of 54 per cent (1 child) or 58 per cent (2 children) or even 61 per cent (3 children). In these cases, spousal support awards go beyond the usual compensatory rationale under the *with child support* formula, to reflect a larger component of supplementing the children's household standard of living. The table amount of child support and section 7 expenses for the special needs child may not fully reflect all the costs imposed upon the recipient spouse's household by that child.

¹²⁰ *Yeates v. Yeates*, 2007 CarswellOnt 2107 (Ont.S.C.J.); *Frouws v. Frouws*, [2007] B.C.J. No. 282, 2007 BCSC 195 (B.C.S.C.).

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

The *with child support* formula gives priority to child support, as required by s. 15.3(1) of the *Divorce Act* and by similar provisions found in provincial statutes. In cases where the spouses have three or four children, or where there are large section 7 expenses, there may be little or no room left for spousal support, despite the substantial economic disadvantage to the custodial parent.¹²¹ The maximum time limits may end spousal support after the last child finishes high school or after the length of the marriage, despite the potential inadequacy of the compensation in such cases. The Advisory Guidelines must be consistent with section 15.3(2) and (3) of the *Divorce Act* and thus there must be an exception for **duration**, using the terms of s. 15.3(2):

- 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 less than it otherwise would have been
- or the parties agree to those terms as part of an agreement.

This **section 15.3** exception would recognize that spousal support may have to continue past the time limits in these cases. And, further, in some of these cases, the amount of spousal support may even have to increase upon variation or review as the children cease to be “children of the marriage”, but any of these increases in amount should remain within the formula ranges. These outcomes are entirely consistent with compensatory theory and section 15.3 of the *Divorce Act*.

¹²¹ For an example, see *C.E.A.P. v. P.E.P.*, [2006] B.C.J. No. 3295, 2006 BCSC 1913 (B.C.S.C.).

13 SELF-SUFFICIENCY

A central topic of every conference and meeting about the Advisory Guidelines has been self-sufficiency. It is not surprising that any attempt to bring greater consistency and predictability to spousal support awards should bring this topic to the forefront. Some have criticized the Advisory Guidelines for generating “entitlements” to support, “entitlements” seen as too generous in amount and duration, eliminating any incentives for recipients to pursue self-sufficiency. Others have criticized the Advisory Guidelines for not producing “answers” or “rules” on the hard issues of self-sufficiency.

The language of the fourth objective in section 15.2(6)(d) of the *Divorce Act* has been parsed and argued in case after case: “in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.” We were frequently asked, “How do the Spousal Support Advisory Guidelines promote self-sufficiency?”

To understand what the Advisory Guidelines can and can’t do under the rubric of self-sufficiency, it is important to start with the legal framework within which the Guidelines operate.

After *Pelech* in 1987 and before *Moge* in 1992, the Canadian law of spousal support gave priority to self-sufficiency as part of a “clean break” approach, as spousal support was only intended to facilitate the transition to independence for the recipient.¹²² A recipient could be “deemed” to be self-sufficient, based upon optimistic projections of training or likely employment, even after lengthy traditional marriages. Once the recipient found full-time employment of any kind, spousal support would often be terminated or entitlement would be denied. The *Moge* decision rejected this approach, emphasizing that self-sufficiency is only one of the four objectives set out in s. 15.2(6) and all four objectives must be considered in determining spousal support. Self-sufficiency is no longer to be “deemed” where a spouse continues to experience economic disadvantage after the end of a marriage. *Moge* directed Canadian courts to take a more realistic view of self-sufficiency, not to underestimate the effects of post-marital disadvantage nor to overestimate the labour market prospects of separated and divorced spouses. Self-sufficiency requires an individualized decision, based upon evidence specific to *this* recipient and *this* payor.

The 1999 *Bracklow* decision said little new about self-sufficiency, as its focus was upon the non-compensatory basis for support, this in a case where the wife was ill and unable to work.

Self-sufficiency was very much an issue in *Leskun*, where the husband argued that the wife had breached her legal duty to become self-sufficient, eliciting this response from the Court: “Failure to achieve self-sufficiency is not breach of ‘a duty’ and is simply one factor amongst others to be taken into account.”¹²³ *Leskun* also affirmed the use of review

¹²² Carol Rogerson, “The Canadian Law of Spousal Support” (2004), 38 F.L.Q. 69.

¹²³ *Leskun v. Leskun*, [2006] 1 S.C.R. 920, 34 R.F.L. (6th) 1 at para. 27.

orders, which have proved useful in encouraging and monitoring self-sufficiency in cases of indefinite spousal support orders.

After *Moge*, self-sufficiency has not been treated as an absolute standard, requiring the recipient to take any job at the end of a marriage. As the Ontario Court of Appeal said in *Allaire v. Allaire*, “self-sufficiency is not a free-standing concept. It must be seen in the context of the standard of living previously enjoyed by the parties.”¹²⁴

These are very general directions on the subject of self-sufficiency, leaving lawyers, mediators and trial judges to work out specifics in each case. After *Moge*, the determination of self-sufficiency requires a highly individualized analysis, not amenable to “guidelines”. What the Advisory Guidelines can do is to encourage self-sufficiency through various aspects of their design, aspects described below.

Strictly speaking, “self-sufficiency” is a concept primarily of importance in compensatory cases, which can arise under either formula: always under the *with child support* formula, and in many longer marriages and a few shorter ones under the *without child support* formula. In these longer marriages under the latter formula, there will be grown up children or one spouse will have subordinated his or her career and employment, leaving one spouse disadvantaged at the end of the marriage. The compensatory exception, described above in Chapter 12, will also raise self-sufficiency issues.

The term “self-sufficiency” has often taken on a broader meaning in practice, with some application to non-compensatory cases too. It can refer to the recipient’s obligation to earn income to his or her present capacity. Or, used even more loosely, it sometimes just means that the payor’s obligation to pay spousal support should be ended and the recipient should be required to live within her or his means.

13.1 Entitlement

Entitlement is the first step in the spousal support analysis, before reaching the Advisory Guidelines as to amount and duration. Self-sufficiency is one of the major arguments against entitlement, i.e. the recipient cannot show any “economic disadvantage” or “need” at the end of the marriage. Entitlement issues are discussed at greater length in Chapter 4 above.

“Self-sufficiency” as a threshold entitlement issue comes up more often in cases of shorter, childless marriages or in cases where the recipient already has a significant income, whether from employment or investments. Occasionally, as mentioned in Chapter 12 on Exceptions, there will be a very large property award that raises an issue of threshold entitlement.

¹²⁴ (2003), 35 R.F.L. (5th) 256 (Ont.C.A.) at para. 21.

13.2 Imputing Income

The Spousal Support Advisory Guidelines are income-based guidelines and thus require much more careful attention to the actual incomes, or the income-earning capacities, of both spouses. By focussing on income, the Guidelines actually encourage a more sophisticated analysis of “self-sufficiency” on the part of the recipient, rather than some rough-and-ready downward adjustment of the monthly amount of support. Consistent with *Moge*, the question is usually: what income could this specific recipient earn, with his or her experience, education and qualifications? As the B.C. Court of Appeal explained in *MacEachern*, imputing income provides a ready means of assessing and encouraging self-sufficiency. In that case, the Court imputed a low-wage full-time retail sales income to the wife who was working only part-time and who had not made “wholehearted” efforts, and then fixed the amount of spousal support at the low end of the range under the *with child support* formula.¹²⁵

Imputing income imposes a discipline on our thinking about self-sufficiency. What sort of employment might the recipient find? Is the employment available full-time or part-time? How much can the recipient realistically contribute to her or his own support? What are the prospects of any improvement in that income? If there is training or education required, how will that change the employment prospects of the support recipient?

The answers to these questions will often generate different estimates of potential income. These estimated incomes can in turn be used to generate ranges under the formulas. Where the recipient’s income, actual or imputed, is lower and the payor has a much higher income, as in many long traditional marriages, then the different estimates of income will often produce little change in the ranges, making the imputation of income less telling to the final outcome. In other cases, however, the spouses’ competing views on how much income to impute to a recipient will be the crux of the spousal support dispute, usually where the recipient might have considerable earning power.

13.3 Using the Ranges

We have already discussed self-sufficiency as a factor affecting location with the ranges in Chapter 9 above.

In some cases, as in *MacEachern*, a court may opt for the lower end of the formula range for amount, in order to provide the recipient an incentive to earn more. A court may do this even after imputing income to the recipient, especially if the court has been kind in the income imputed.

In other cases, a court may push the amount to the upper end of the range, to provide a recipient with the necessary funds to undertake education or training, all with a view eventually to reduce or even eliminate the support once the recipient obtains higher

¹²⁵ *MacEachern v. MacEachern*, [2006] B.C.J. No. 2917, 2006 BCCA 508 (B.C.C.A.).

paying employment. For this option, the court will need a specific plan brought forward by the recipient.

13.4 Restructuring

As is explained in Chapter 10 on Restructuring, a court or the parties can “front-end load” spousal support by restructuring, in order to generate a large enough amount of support for a period of education or training by the recipient. Restructuring may be necessary to accomplish this self-sufficiency purpose when even the upper end of the ranges on amount and duration do not generate enough support. Most likely examples would be shorter marriages or lower incomes under the *without child support* formula or cases of higher child support or lower incomes under the *with child support* formula.

Another form of restructuring that can promote self-sufficiency is the “step-down order”, with the amount of spousal support reducing over time at fixed intervals.

Finally, the lump sum support order is often justified as encouraging self-sufficiency, both by its implicit time limit and by its assurance that the lump sum will not be reduced by any future new employment or income.

13.5 Time Limits: The *Without Child Support* Formula

For marriages under 20 years in length, apart from the “rule of 65”, the *without child support* formula produces time limits on the payment of spousal support. After a ten-year marriage, for example, the duration of support will be 5 to 10 years. In these cases without children, spousal support will usually be non-compensatory, providing a period of transition from the higher shared standard of living during the marriage back to whatever standard the recipient can sustain by herself or himself. The time limit defines the end of that period.

Time limits provide clear direction to the recipient that support will end and that the recipient will have to obtain income from another source or live at the lower standard of living from that time forward. In this sense, time limits in the non-compensatory setting further the more limited notion of self-sufficiency that operates in such cases.

Many Canadian courts are uneasy about time limits in some longer marriages under 20 years in length and currently prefer to make indefinite (duration not specified) orders. Even in these cases, the Advisory Guidelines still seek to implement time limits, albeit in a “softer” way, by using the process of review and variation to signal the eventual termination of support.

13.6 Time Limits: The *With Child Support* Formula

Implicit in *Moge* is that the Court’s concerns about “deemed self-sufficiency” were largely focussed upon the compensatory setting. Time limits will operate differently in compensatory cases, especially in those cases that fall under the *with child support* formula. Individual orders will be indefinite in duration, unlike the time-limited orders

found in most cases under the *without child support* formula. The upper and lower ends of the durational range under the *with child support* formula provide the outer limits of the process of review and variation.

At some point, the recipient's disadvantage may be fully compensated and complete "self-sufficiency" attained, such that spousal support can terminate in a compensatory case. Under the *with child support* formula, any termination of support will usually happen through the process of variation or review, as there must be evidence on these issues before a court can terminate or time limit support. In this sense, time limits under the *with child support* formula are "softer", more flexible than in most cases under the *without child support* formula.

Even in this "softer" form, however, the time limits under this formula encourage self-sufficiency, in a more structured way than a succession of indefinite orders with no defined end-point.

13.7 Review Orders

Along with imputing income, the most frequent mechanism used in our law to promote self-sufficiency has become the review order, a form of order that was developed after *Moge* and once described as "the halfway house between indefinite orders and time-limited orders".¹²⁶ The review order is grounded in s. 15.2(3) of the *Divorce Act*, the court's power to "impose terms, conditions or restrictions in connection with the [spousal support] order as it thinks fit and just". In its 2006 *Leskun* decision, the Supreme Court of Canada affirmed the use of review orders and identified as three examples justifying their use, "the need to... start a program of education, train or upgrade skills, or obtain employment".¹²⁷ As part of the infrastructure of support law, review orders are a critical element of the Advisory Guidelines.

Review orders can permit a court to monitor a recipient's progress towards self-sufficiency, without any need to prove a change in circumstances.¹²⁸ Review hearings can be scheduled at critical times, like the completion of a training or education program or after a child starts full-time school or after a period of job-seeking. After *Leskun*, the terms of review should be more clearly set out in the terms of the order, "to tightly circumscribe the issue" for the review hearing and thus to avoid relitigation. The court can set out in the court order, or the parties in an agreement, the recipient's plan, which will form the basis for the review.

Where there are serious questions about the self-sufficiency efforts of a recipient, a court can even make a "terminating review order", i.e. spousal support is time limited, but the time limit is made subject to review and possible extension. This offers an example of a "softer" use of time limits in compensatory cases.

¹²⁶ Rogerson, "Spousal Support Post *Bracklow*: The Pendulum Swings Again?", *supra* note 3 at 255.

¹²⁷ *Leskun v. Leskun*, [2006] 1 S.C.R. 920 at para. 36.

¹²⁸ For a recent discussion of review orders, see David Aston, "Review Orders: Let's Have Another Look" (2007), 26 C.F.L.Q. 253.

13.8 Indefinite Support Is Not Permanent Support

Under the Advisory Guidelines duration of spousal support will be indefinite, under both formulas, where the parties have been married for 20 years or more, or where the “rule of 65” applies. But indefinite support, under the Guidelines as under the current law, does not necessarily mean that support is “permanent” or “infinite”, only that the duration has not been specified. We have purposely changed the language in this final version to convey that notion; our new terminology is “indefinite (duration not specified)”. Duration may be specified at some point in the future and support terminated, if entitlement ceases.

Even in long traditional marriages, self-sufficiency remains a consideration, “in so far as practicable”, to use the language of s. 15.2(6)(d). For the most part, these self-sufficiency issues will come up on a variation where there is a change of circumstances or on a review as described above. Entitlement may then be revisited for any number of reasons—the recipient finding employment, the recipient’s remarriage or repartnering, the payor’s retirement or loss of employment, etc.—and support may be terminated if entitlement has ceased.

Where the recipient does remain entitled to spousal support under an indefinite (duration not specified) order or agreement, the amount of support will inevitably change over time through the process of variation or review. As described above, in some circumstances, income may be imputed to a recipient, to assess or encourage the recipient’s contribution to his or her own support.

13.9 Real Incentives for Self-Sufficiency

All of the above reflect various ways that the Spousal Support Advisory Guidelines can “promote self-sufficiency” as required by s. 15.2(6)(d) of the *Divorce Act*. In the end, however, the real encouragement for self-sufficiency is not found in spousal support law, or in the Advisory Guidelines, but in the harsh economic reality facing most separated or divorced spouses. In all but the highest income cases, a recipient must find more income in order to avoid a drop in her or his standard of living, as spousal support is limited by the payor’s ability to pay. The limits of that ability to pay spousal support will be reached more quickly under the *with child support* formula, given the priority to child support.

14 VARIATION, REVIEW, REMARRIAGE, SECOND FAMILIES

The formulas proposed in Chapters 7 and 8 are intended to apply to initial orders and to the negotiation of initial agreements. Where there is an entitlement to support, the formulas generate ranges for both amount and duration of spousal support at the time of divorce. The formulas will also determine a range of amounts for interim orders under the *Divorce Act*. What role do the Advisory Guidelines play thereafter, upon variation or review? What about remarriage or re-partnering or second families? These issues proved to be some of the most difficult of all in constructing spousal support guidelines. In the earlier parts we have touched upon some of these issues.

Ideally a truly comprehensive set of advisory guidelines would apply to the full range of issues that can arise on variation and review. The current state of the law renders that impossible at the present time. We opted for a more modest approach at this stage—to apply the Guideline formulas as far as consensus and the current case law allow, and no more. We identified certain situations where the Advisory Guidelines would apply on reviews and variations, including increases in the recipient’s income and decreases in the payor’s income. We have left others, such as post-separation increases in the payor’s income, re-partnering, remarriage and second families, to discretionary, case-by-case determinations under the evolving framework of current law. We hope that, at some later stage, after a period of experience with the Advisory Guidelines, it will be possible to develop formulaic ranges to guide resolution of these remaining issues.

14.1 Material Changes, Reviews and Issues of Continuing Entitlement

We should make clear at the outset that the Advisory Guidelines do not—and cannot—affect the basic legal structure of variation and review. Under section 17(4.1) of the *Divorce Act*, a material change of circumstances is a threshold requirement for the variation of court-ordered spousal support. Section 17(7) sets out the objectives of an order varying spousal support and section 17(10) addresses variations after spousal support has ended, imposing a further condition that the changed circumstances be related to the marriage.

The process of review allows for reassessments of support without the requirement of a material change in circumstances, a process elaborated by appeal and trial courts in case law. The Supreme Court of Canada approved the use of review orders in *Leskun* in 2006.¹²⁹ Review orders are justified where there is “genuine and material uncertainty at the time of the original trial” as to the spouses’ finances in the near future. “Common examples are the need to establish a new residence, start a program of education, train or upgrade skills, or obtain employment”, stated the Court. If a review term is included in an order, the issues to be reviewed should be precisely identified in the order, to avoid mere relitigation of the whole case.

¹²⁹ *Leskun v. Leskun*, [2006] 1 S.C.R. 920.

None of this is affected by the Advisory Guidelines, which deal with the amount and duration of spousal support. The spouse seeking to vary court-ordered support will still have to prove a material change before the advisory guidelines can operate to determine amount and duration. In a similar vein, a review is possible only if a provision for review was included in the initial order and only if any preconditions for review are met, e.g. the passage of a period of time or the completion of a training program. Only then will it be possible for the Advisory Guidelines to be applied to determine amount and duration.

If spousal support has been negotiated, the result will be a separation agreement that deals with spousal support. The possibilities for reviewing or modifying spousal support that the spouses have agreed upon will depend on many factors, including the drafting of the agreement and whether or not the agreement has subsequently been incorporated into the divorce judgement.

We will deal first with the situation where there has been no incorporation of the agreement. The effect of subsequent changes in the parties' situation will be governed by the terms of the agreement. If the agreement provides for reviews by the parties at specified times or if it includes a material change clause, and if the conditions for these are met, it is possible for the Advisory Guidelines to apply to determine amount and duration. However, the Advisory Guidelines will have no application if the agreement is a final agreement in which spousal support has been waived or time-limited.

As has been emphasized at many points in this document, the Advisory Guidelines do not deal with the effect of a prior agreement on spousal support. As informal guidelines, they confer no power to override agreements. The *Miglin*¹³⁰ case continues to govern the issue of the effect of a prior agreement on a court's ability to award spousal support. The Advisory Guidelines will only be helpful *after* the *Miglin* analysis, if a finding has been made that a final agreement is not determinative and spousal support is to be determined afresh by the court.

In cases where a spousal support agreement has been incorporated into the divorce judgment—as is the practice in many parts of the country—the agreement is treated as a court order. If the agreement provides for review or includes a material change clause, and those conditions are met, the Advisory Guidelines may be applicable to determine amount and duration. If the agreement is a final agreement, waiving or time-limiting support, the threshold requirement of a change in circumstances under s. 17 of the *Divorce Act* would have to be satisfied before a variation could be granted, as well as the causal connection requirement in s. 17(10) if the spousal support had ended at the time of the application. Given that the court order in these cases rests upon an agreement, the *Miglin* analysis would also be relevant in determining whether the requirement of material change had been met and whether a variation was appropriate.

Apart from the issue of the governing legal framework, **a review or variation may involve issues of continuing entitlement that would determine the application of the Advisory Guidelines. Entitlement is always a live issue, a precondition to**

¹³⁰ *Miglin v. Miglin*, [2003] 1 S.C.R. 303.

determining amount and duration under the Guidelines, as is discussed in Chapter 2 above. As circumstances change, with changes in employment and income, retirement, remarriage, re-partnering and second families, entitlement may come to the forefront as a threshold issue.

Variations and reviews raise many different issues for resolution.¹³¹ In Chapters 7 and 8, we canvassed some of these issues, especially in our discussions of duration. In what follows we will organize our discussion of this material around the different kinds of issues that are raised on variations and reviews.

14.2 Applications to Reduce Spousal Support Because of Changes in Income

The largest category of variations and reviews consists of applications seeking a reduction in spousal support based upon a change in the income of one party or the other. One of three reasons provides the foundation for the application:

- (i) the payor spouse's income goes down;
- (ii) the recipient spouse's income goes up; or
- (iii) the payor spouse applies to reduce or terminate support on the grounds that the recipient spouse ought to have a higher income.

In each of these three situations the Advisory Guidelines can be used to determine the amount of support. In some situations, the Advisory Guidelines can even result in the termination of spousal support, if the amount of support falls to zero with little or no prospect of future change.

In situations (i) and (iii), difficult questions of imputing income can arise. In situation (i), there can be questions about the good faith and reasonableness of the payor spouse who alleges an income reduction, which in turn may call for imputing income to the payor. In situation (iii), income may have to be imputed to a recipient spouse who has failed to maximize earning capacity, as has been discussed above in Chapter 13 on self-sufficiency.

Under the *without child support* formula, as the gross income difference between the spouses narrows, spousal support will be reduced. Similarly, under the *with child support* formula, as the disparity between the spouses' net incomes is reduced, so too is the amount of spousal support required to bring the income of the lower income recipient spouse up to the desired percentage. In some cases with children, this may mean the end of entitlement, but in others it may just reflect a current inability to pay and the postponement of payment of spousal support, consistent with section 15.3 of the *Divorce*

¹³¹ For an excellent discussion of the use of the Advisory Guidelines in variation applications which touches on many of the issues we deal with below see the British Columbia Court of Appeal's December 2007 decision in *Beninger v. Beninger*, [2007] B.C.J. No. 2657, 2007BCCA. Justice Prowse, writing for the Court, dispels the common misunderstanding that Advisory Guidelines have no application in variation applications, finding instead that they may be applied, but with careful attention to the limits of their applicability.

Act. At some point, as the disparity in spousal incomes narrows under either formula, entitlement may disappear.

We provide below some examples of how the Advisory Guidelines would apply to variation or review applications in this category.

Example 14.1

In *Example 7.2* John and Mary had been married for 25 years in a traditional marriage, with two grown-up children. Mary had no income, but John was earning \$100,000 gross per year. Now assume that John has lost his previous job and changed employers, with a reduction in his annual gross income down to \$80,000, while Mary still has no income.

On a variation application by John, the range for spousal support would be reduced, under the *without child support* formula, from the initial \$3,125 to \$4,167 (capped at \$4,046) per month, down to \$2,500 to \$3,333 (capped at \$3,216) per month.

Example 14.2

In *Example 8.1* Ted was earning \$80,000 gross per year at the end of an 11-year marriage, with two children aged 8 and 10, while Alice was working part time, earning \$20,000 gross per year. Now assume that Alice has found a full-time job, increasing her gross annual income to \$35,000, while Ted still earns \$80,000.

On a variation or review under the *with child support* formula, Alice's increase in income would reduce the range for spousal support, from the original \$474 to \$1,025, down to \$52 to \$741 per month.

Example 14.3

Again using *Example 6.1* above, now assume that the children are 13 and 14 and Alice is still working part-time, but Ted alleges that Alice was offered a full-time job by her employer and she turned it down.

Upon review or variation, a court might decide to impute the full-time income of \$35,000 per year to Alice and to reduce support to the same range as above, of \$52 to \$741 per month. Or a court might not be prepared to go to that full amount, instead imputing a slightly lower income, such as \$30,000, which would produce a range of \$163 to \$846 per month.

14.3 The Payor's Post-Separation Income Increase

There are two possible formulaic extremes here. At one extreme, one could decide that any post-separation income increase of the payor spouse should not affect the amount of spousal support. After all, some would suggest, the recipient is entitled to a sharing of the marital standard of living, but no more. Certainly, this bright-line method would be predictable and administratively simple. At the other extreme, one could argue that the formulas should just continue to be applied to any income increase for the payor. This

again would offer a predictable result, but one which the basic principles of spousal support would not justify in all cases. This approach is most compelling after a long traditional marriage

Under the current law, it is impossible to maintain either of these approaches to the exclusion of the other. Some rough notion of causation is applied to post-separation income increases for the payor, in determining both whether the income increase should be reflected in increased spousal support and, if it should, by how much. It all depends on the length of the marriage, the roles adopted during the marriage, the time elapsed between the date of separation and the subsequent income increase, and the reason for the income increase (e.g. new job vs. promotion within same employer, or career continuation vs. new venture). The extent of sharing of these post-separation increases involves a complex, fact-based decision.¹³²

We can propose one formulaic limit in these cases: the upper limit upon any increased spousal support ought to be the numbers generated by the formulas. As the following examples show, that upper limit offers some help in defining a range of possible results after a post-separation income increase.

Example 14.4

In *Example 7.1*, Arthur and Ellen were married for 20 years and had one grown-up child. At the time of the initial order, Arthur earned \$90,000 gross per year and Ellen earned \$30,000, both working full time. Under the *without child support* formula, spousal support was indefinite (duration not specified), in the range of \$1,500 to \$2,000 per month. Arthur's income increases to \$110,000 gross per year, while Ellen's remains unchanged.

A court, on an application for variation, might order that none, some or all of Arthur's post-separation income increase be taken into account. If *all* the increase were taken into account, the formula would define the upper limits of any varied spousal support within a range of \$2,000 to \$2,666 per month.

Example 14.5

The arithmetic becomes more complicated under the *with child support* formula. When the payor spouse's income increases, then child support will usually increase too, if requested. Let's go back once again to Ted and Alice in *Example 6.1*. At the time of the initial order, Ted earned \$80,000 gross per year and Alice earned \$20,000, after 11 years together. Their two children were aged 8 and 10 at that time. Spousal support under the formula was in a range from \$474 to \$1,025 monthly. Assume Ted's income subsequently increases, to \$100,000 gross per year. His child support for two children will rise from \$1,159 to \$1,404 per month.

¹³² Most of the major cases on this issue are reviewed in *D.B.C. v. R.M.W.*, [2006] A.J. No. 1629, 2006 ABQB 905 (Alta.Q.B.) at paras. 22-32. See also *Kelly v. Kelly*, [2007] B.C.J. No. 324, 2007 BCSC 227 (B.C.S.C.), where both spouses had also remarried. In *Beninger*, *supra* note 131, the B.C.C.A. found on the facts that the wife was entitled to share in the increased income and used the Advisory Guidelines ranges based on the husband's current income to determine the amount of support.

If none of Ted's increase were taken into account for spousal support purposes, then Ted would pay child support of \$1,404 and the range for spousal support would remain unchanged at \$474 to \$1,025 per month. The result would be that Alice's percentage of family net disposable income would drop, as would her percentage of INDI, calculated using Ted's new income. At the other extreme, the full amount of the increase might be taken into account under the spousal support formula, generating a new and higher range of \$961 to \$1,715 per month.

14.4 The Recipient's Reduced Income After Separation

Suppose the recipient loses employment after the initial order, or suffers an illness or disability, or otherwise suffers a reduction in income. If either of the income-sharing formulas were applied, any reduction in the recipient's income after separation would lead to an increase in the spousal support payable. Once again, as with the payor's post-separation increase, some notion of causation seems to operate under the current law, requiring another complex, fact-based decision. While a formulaic solution is thus not possible, the same upper limit can be applied, i.e. the upper limit upon any increased spousal support ought to be the numbers generated by the formulas.

Example 14.6

In *Example 7.1*, Ellen was working full time and earning \$30,000 gross per year at the time of the initial determination. Assume Ellen has been reduced to part-time hours and now earns \$20,000 gross per year, while Arthur's income is unchanged at \$90,000.

The initial range of spousal support was \$1,500 to \$2,000 monthly, where it would remain if none of Ellen's income reduction were taken into account. The range could rise as high as \$1,750 to \$2,333 monthly if the full amount of Ellen's reduction were considered.

14.5 Crossover Between the Two Formulas

As children get older, finish their education or otherwise cease to be children of the marriage, then the child support obligation ends. What happens at that point? In our view, it should be possible for either spouse to apply to cross over from the *with child support* formula to the *without child support* formula, by way of application to vary or review. This crossover would be entirely consistent with the approach and language of s. 15.3 of the *Divorce Act*, especially s. 15.3(3). Section 15.3(3) provides that in cases where spousal support was reduced or not ordered because of the priority given to child support, any subsequent reduction or termination of child support constitutes a change of circumstances for the purposes of bringing an application to vary spousal support.

The crossover from the one formula to the other will only affect the **amount** of spousal support, but not the duration. Under the first, longer-marriage test for duration under the *with child support* formula, which applies to medium-to-long marriages with dependent children, the outcome will tend towards the upper end of the range for duration in most cases.

Crossover situations will mostly arise in medium-to-long marriages, where the children are older at the time of the initial order. These are the cases where duration is driven by the length of the marriage, so that after child support ceases, spousal support will usually remain payable for a further period. In short-to-medium length marriages with dependent children, the outside limit of duration is the end of the child-rearing period, so no spousal support would ordinarily be payable after child support has ended, subject to section 15.3(3). Thus there is little potential for crossover between the formulas.

Often the application to vary, to cross over to the *without child support* formula, will come from the recipient spouse in a longer marriage. Consider the following example.

Example 14.7

Take once again the example of Ted and Alice in *Example 8.1*. At the time of the divorce Ted made \$80,000 gross per year and Alice earned \$20,000. They had been married 11 years with children aged 8 and 10 at separation.

Under the *with child support* formula, spousal support was initially in the range of \$474 to \$1,025 per month. Under the longer-marriage test for duration, the range for duration was 5 ½ to 11 years. Recall that the 11-year maximum was derived from the first test for duration, based upon the length of their marriage, as that was longer than the time remaining to the end of high school for the youngest child (which was 10 years). If their two children pursued any post-secondary studies, then child support would still be payable and the *with child support* formula would continue to apply right to the end of the 11-year maximum for spousal support, although the amount of support would likely have changed based on improvements in Alice's employment situation.

If we change those facts slightly, however, then the potential for crossover emerges. If Ted and Alice had been married for 20 years at separation and thereafter their children finished school and child support terminated, Alice might wish to apply to vary, to cross over.

Under the *with child support* formula, the initial range of spousal support was \$474 to \$1,025 per month with two children in the primary care of Alice. Before reaching the crossover stage, the *with child support* formula could adjust to just one child being left at home, as the table amount of child support would reduce to \$719 and the spousal support range would rise to \$1,217 to \$1,703 if Ted still earns \$80,000 and Alice \$20,000. At the crossover stage, assuming the spouses' incomes remained the same, the range would be higher under the *without child support* formula: \$1,500 to \$2,000 per month for a 20 year marriage with that gross income difference.

If Ted and Alice had been together for 25 years, the new range after crossover would be even higher. The new range would be between \$1,875 and \$2,500 (capped at \$2,428) per month. These higher numbers flow from two factors: the impact of length of marriage upon the *without child support* ranges, and the additional ability to pay freed up by the absence of a child support obligation.

In drawing out these possibilities, we have assumed that both spouses' incomes and circumstances have remained unchanged over time, which is very unlikely. It would be much more likely that Alice's income would be higher, as she was working part time at the time of the initial order. Her higher income would likely have reduced her spousal support. But Ted's income might have gone up too, which may have affected his spousal support, depending upon the treatment of his post-separation income increase as discussed above.

Situations where the payor spouse would be the one applying to vary and cross over to the *without child support* formula would be fewer. Given the way the two formulas operate, for the most part, these would be cases where the marriage lasted 15 years or less. In these cases, the payor spouse would argue that the *without child support* formula, where the percentages are driven by the length of the marriage, would produce a lower range for spousal support compared to the *with child support* formula. We provide an example below.

Example 14.8

Let's start again with Ted and Alice, assuming they have the same incomes they did at the point of separation as in *Example 14.7*. Assume that their children pursue no post-secondary employment and that child support ends after 10 years. Spousal support will likely still be paid for another year based upon their 11-year marriage.

Ted might apply to vary, arguing that spousal support should be fixed in the *without child support* range of \$825 to \$1100 if the initial support had been determined by the range for one child of \$1,217 to \$1,703 monthly. Again, however, it must be remembered that incomes *will* change over time, which in turn will alter the stakes and the incentives involved in crossover questions.

14.6 The Payor's Remarriage or Re-partnering

The payor's remarriage or re-partnering usually is **not** grounds for a reduction in spousal support under the current law, apart from some exceptional cases. Where there were ability to pay limitations upon the support previously ordered, the payor's remarriage or re-partnering may even improve the payor's ability to pay, as a result of the sharing of expenses with the new spouse or partner. There is no need for any formulaic adjustment here.

14.7 The Recipient's Remarriage or Re-partnering

The remarriage or re-partnering of the support recipient does have an effect on spousal support under the current law, but how much and when and why are less certain. There is little consensus in the decided cases. Remarriage does not mean automatic termination of spousal support, but support is often reduced or suspended or sometimes even terminated. Compensatory support is often treated differently from non-compensatory support. Much depends upon the standard of living in the recipient's new household. The length of the first marriage seems to make a difference, consistent with concepts of merger over time. The age of the recipient spouse also influences outcomes.

In particular fact situations, usually at the extremes of these sorts of factors, we can predict outcomes. For example, after a short-to-medium first marriage, where the recipient spouse is younger and the support is non-compensatory and for transitional purposes, remarriage by the recipient is likely to result in termination of support. At the other extreme, where spousal support is being paid to an older spouse after a long traditional marriage, remarriage is unlikely to terminate spousal support, although the amount may be reduced.

An ability to predict in some cases, however, is not sufficient to underpin a formula for adjustment to the new spouse's or partner's income. Ideally, a formula would provide a means of incorporating some amount of gross income from the new spouse or partner, to reduce the income disparity under either formula. Any such incorporation could increase with each year of the new marriage or relationship. Where the recipient remarries or re-partners with someone who has a similar or higher income than the previous spouse, eventually—faster or slower, depending upon the formula adopted—spousal support would be extinguished. Where the recipient remarries or re-partners with a lower income spouse, support might continue under such a formula until the maximum durational limit, unless terminated earlier.

We have been unable to construct a formula with sufficient consensus or flexibility to adjust to these situations, despite considerable feedback that a formula would be desirable. In this final version, we still have to leave the issues surrounding the recipient's remarriage or re-partnering to individual case-by-case negotiation and decision making.

14.8 Second Families

Second families—or, more accurately, subsequent children—raise some of the most difficult issues in support law. We have already addressed prior support obligations for prior spouses and prior children as an exception under both formulas in Chapter 12. We have also addressed remarriage and re-partnering in this Chapter. Under this heading, we consider a different issue, that of support for subsequent children.

By “subsequent children”, we mean children who are born or adopted after the separation of the spouses. For the most part, subsequent children will be an issue upon variation or review, but it is possible that these issues can arise at the point of the initial determination of spousal support.

Since the coming into force of the *Federal Child Support Guidelines*, courts have struggled with these issues in the child support setting, left largely to discretionary decision making, mostly under the undue hardship provisions in the *Child Support Guidelines*.¹³³ The issues do not get any easier when the potential conflict between child support and spousal support is added to the mix.

¹³³ See Rollie Thompson, “The Second Family Conundrum in Child Support” (2001), 18 *Canadian Journal of Family Law* 227.

The first-family-first philosophy is the most common approach. On this view, the payor's obligations to the children and spouse of the first marriage take priority over any subsequent obligations. Most who adopt the first-family-first principle will acknowledge a narrow exception: where payment of first-family support would drive the second family onto social assistance or otherwise into poverty, relief may be granted, but only in extreme cases. Other than this narrow exception, first-family-first provides a simple rule for child and spousal support: no change for subsequent children.

If child support is the only issue, there is a strong second philosophy that runs through the cases: to determine child support in a way that treats all the payor's children equally. This is usually done through the use of household standard of living calculations. This equal-treatment-of-children approach gives greater weight to the interests of subsequent children, but gives no guidance to balancing the demands of spousal support to a first spouse vs. support for subsequent children. There is a tendency on this approach to give reduced weight to spousal support, given the concern for equal treatment of the payor's *children*. Reduced spousal support is often used as a means of adjustment between the households.

In the absence of any clear policy in the *Federal Child Support Guidelines* on this issue, it is difficult, if not impossible to articulate any related policy on spousal support vs. subsequent children. For now, again with some regret, we must leave the issues of quantum and duration to discretion or case-by-case decision making. Any changes in child support policy on second families would have important implications for spousal support issues.

15 THE ADVISORY GUIDELINES IN QUEBEC

Inevitably, the application of the Spousal Support Advisory Guidelines to divorce cases in Quebec requires some modifications. The most obvious modifications flow from Quebec's guidelines for the determination of child support, which differ in important ways from the *Federal Child Support Guidelines*. A few other modifications are also noted below.

The bulk of Quebec's guidelines are found in the *Regulation Respecting the Determination of Child Support Payments*, to which are attached as schedules the child support determination form and the table.¹³⁴ The *Regulation* is made under authority of the *Code of Civil Procedure* and the *Civil Code*, both of which also contain provisions governing the determination of child support.¹³⁵ These provisions will be referred to here as the child support rules. These rules apply to determine child support under the *Civil Code* and under the federal *Divorce Act*.

For these Quebec rules to become the “applicable guidelines” for child support in Quebec divorce proceedings, Quebec was designated by the federal government under the *Divorce Act*.¹³⁶ The Quebec rules thus apply to determine child support in divorce proceedings when both spouses are ordinarily resident in Quebec. Where one of the parents resides outside Quebec, then the *Federal Child Support Guidelines* apply. The Quebec child support rules therefore apply to most divorces in Quebec.

In Quebec, the computer software used to make income, support and tax calculations is AliForm. AliForm has added the Advisory Guidelines to its collection of family law programs.

15.1 The Definition of Income

In the formulas, the starting point for the determination of income is Guidelines income, a measure of gross income defined in considerable detail under the *Federal Child Support Guidelines*. The major reason for this choice was to simplify the determination of income by using the same definition for both child and spousal support.

For the same reason, in the Quebec context, the formulas will start with the definition of annual income (revenu annuel) in section 9 of the *Regulation Respecting the Determination of Child Support Payments*. It too is a gross income measure, with a broad scope very similar to Guidelines income.

¹³⁴ Decret 484-97, 1997 G.O. II, 2117 and 2605, modified by Decret 777-97, 1997 G.O. II, 3648 and Decret 1312-2003, 2003 G.O. II, 5396. The form is Schedule I and the table is Schedule II.

¹³⁵ L.Q. 1996, c. 68 and L.Q. 2004, c. 5. Sections 585 to 596 of the *Civil Code* govern the support of children, with sections 587.1 to 587.3 implementing the child support rules. Sections 825.8 to 825.14 of the *Code of Civil Procedure* regulate the procedure for determining child support

¹³⁶ *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp), ss. 2(1) applicable guidelines, (5) and (6). The designation is S.O.R./97-237.

15.2 Length of Marriage Under the *Without Child Support* Formula

Under the *without* child support formula set out in Chapter 7, length of marriage is critical in determining both the amount and the duration of spousal support. Length of marriage is defined as the period of spousal cohabitation, including any period of pre-marital cohabitation, and ending with the date of separation. The inclusion of pre-marital cohabitation in part reflects provincial/territorial family laws accepting cohabitation for a specified period as a basis for spousal support in non-marital relationships.

Under the *Civil Code*, by contrast, there is no entitlement to spousal support for unmarried cohabitants. In Quebec divorce cases, some judges therefore ignore any period of pre-marital cohabitation, while other judges treat that period as a relevant consideration in determining spousal support in divorce proceedings. That difference of opinion will have important implications for outcomes under the Advisory Guidelines in the application of the *without child support* formula.

15.3 Child Support and the *With Child Support* Formula

In the few circumstances where one party lives outside the province and the federal guidelines apply in a Quebec divorce, no adjustments to the *with child support* formula are necessary. The Quebec child support rules apply in most divorce cases, however, and when these rules apply, some modifications *are* required.

It should be noted that section 825.13 of the Quebec *Code of Civil Procedure* clearly gives priority to child support over spousal support, in language similar to s. 15.3(1) of the *Divorce Act*.¹³⁷

While there are some broad similarities between the two schemes, the Quebec child support rules differ from the federal guidelines in significant respects:

- both parents' incomes are taken into account;
- the floor is higher, as there is a \$10,000 basic deduction for self-support;
- the ceiling for the combined disposable incomes of the parents is \$200,000 annually;
- access to the child of between 20 and 40 per cent of the time by the non-custodial parent affects the amount of child support;
- additional expenses are defined somewhat differently, especially for extracurricular activities (which need not be extraordinary);
- the value of the assets of a parent may affect the amount of child support, as may the resources available to the child;

¹³⁷ Section 825.13 states: "The support to be provided to a child is determined without regard to support claimed by a parent of the child for himself."

- an adjustment can be made if child support is more than 50 per cent of a parent's disposable income;
- undue hardship does not include a standard-of-living test; and
- only simple hardship is now required for any adjustment for a parent's support obligations respecting other children.¹³⁸

The *with child support* formula set out in Chapter 8 works easily and effectively with the Quebec child support rules. The Quebec rules first generate the respective contributions to child support—the amounts to be backed out in determining each spouse's individual net disposable income. The percentage ranges under the basic formula are then applied to the remaining pool of INDI to generate the amount of spousal support.

Government benefits and refundable credits also have to be added back to the recipient spouse's INDI in cases under the Quebec child support rules. As with Guidelines income, these sources of income are not included under the definition of annual income in the Quebec rules.

Step-by-step, here is how the *with child support* formula works with the Quebec child support rules:

- First, the Quebec rules use an income-shares formula, where the table sets out the basic annual contribution for the child required jointly from the parents based upon their combined disposable incomes as defined in the *Regulation*.
- Second, to this basic annual contribution are added any child-care expenses, post-secondary education expenses and any other special expenses.
- Third, to determine the payor's child support, the Quebec rules calculate the respective parental child support contributions based upon each parent's disposable income. The Quebec rules thus calculate an actual contribution for the recipient spouse, avoiding any need to compute a notional table amount.
- Fourth, the Quebec rules adjust parental child support contributions explicitly and mathematically for different custodial arrangements, including sole custody, sole custody with access between 20 and 40 per cent of the time (described as sole custody with visiting and prolonged outing rights), split custody (described as sole custody granted to each parent), shared custody, and any combinations of the foregoing arrangements.

¹³⁸ See Jean-Marie Fortin and Jocelyn Verdon, *AliForm annoté Barème québécois: Aspects civils et fiscaux*, 2nd ed. (Brossard: Publications CCH, 2004) and also Dominique Goubau, "Comparison of Federal and Quebec Regulations for Determining Child Support," and Jean-Marie Fortin, "Quebec Guidelines for the Determination of Child Support," in *Federal Child Support Guidelines Reference Manual* (Ottawa, 1998) at J-7 to J-25 and J-29 to J-41. The Quebec rules are also explained in Department of Justice, *Children Come First: A Report to Parliament Reviewing the Provisions and Operation of the Federal Child Support Guidelines* (Ottawa, 2002), Volume 2 at 23-28.

The respective contributions, after any such adjustments, then become the basis for calculating individual net disposable income for each spouse and in turn for determining the ranges of spousal support.

Apart from these adjustments, the Spousal Support Advisory Guidelines operate in essentially the same fashion in divorce cases in Quebec as in the other provinces and territories.

15.4 The Current State of the Advisory Guidelines in Quebec

Until the Quebec Court of Appeal decision in *G.V. v. C.G.* in June of 2006,¹³⁹ there had been a great deal of interest in the Advisory Guidelines amongst lawyers and mediators.¹⁴⁰ There were a number of reported trial decisions, some using the Guidelines, others criticising them. After the Court of Appeal decision, the use of the Advisory Guidelines was dramatically reduced. As a result, three years after the Draft Proposal, unlike in the rest of Canada, there has been little practical experience with the Advisory Guidelines in Quebec and thus little feedback to be provided for the final version.

The appeal in *G.V. v. C.G.* involved a 32-year marriage with three children, two of whom were independent and the youngest resided with the husband. The wife was 55, earning \$50,000 per year, while the husband earned \$227,000 per year. The wife paid child support to the husband of \$15,948 per year. The trial judge had applied the Advisory Guidelines, which produced a range of \$4,500 to \$6,000 per month under the *custodial payor* formula, to order spousal support of \$4,500 per month, on an indefinite basis.

The Court of Appeal allowed the husband's appeal and reduced spousal support to \$2,705 per month, after engaging in a detailed analysis of the wife's expense budget. The trial judge was found to have erred in relying heavily upon the Advisory Guidelines rather than engaging in a detailed individual analysis.

The decision did not reject in principle the use of the Advisory Guidelines. For the Court, Forget J.A. stated: "the dossier as it is and the brief pleadings of counsel on this aspect do not permit us, in my opinion, to pronounce a judgment of principle upon the utilization of the Advisory Guidelines." The Court of Appeal did refer to earlier criticisms of the Guidelines contained in trial judgments by Justices Julien and Gendreau. The Court did not disagree with the decision in *Yemchuk*, but emphasised that the B.C. Court of Appeal had not endorsed an "automatic" application of the Advisory Guidelines without an individual analysis.

Since the Quebec Court of Appeal decision, there have been virtually no trial decisions even referring to the Guidelines. In turn, lawyers and mediators rarely use the Advisory Guidelines now in negotiations and mediations, apart from the occasional reference in preparing a case. Lawyers and mediators now await some sign from the Courts that the

¹³⁹ [2006] J.Q. no. 5231 (Que.C.A.).

¹⁴⁰ In particular, the Family Law Committee of the Barreau du Québec has supported the principles and objectives of the Advisory Guidelines and their use as a tool for reference, orientation, consultation and validation of spousal support.

Advisory Guidelines can be a useful tool in spousal support cases. Only after a period of prolonged use will it be possible to obtain the necessary practical feedback to make further changes to the Advisory Guidelines in Quebec.

16 CONCLUSION

For those of you who have read this document from beginning to end, we know that it has been a long and winding road to get here. The Advisory Guidelines are admittedly complex. But spousal support raises many difficult issues. There are no simple solutions and there is no “one big formula”. That is why the Advisory Guidelines contain two formulas, not one: the *without child support* formula and the *with child support* formula. The formulas generate not precise numbers but ranges for both the amount and the duration of spousal support. The *with child support* formula is actually a family of formulas, each one adjusting for different custodial arrangements. The formulas become even more flexible with the use of restructuring. Finally, there are a series of exceptions to both formulas.

In the three years since the release of the Draft Proposal, the Advisory Guidelines have been used by spouses, lawyers, mediators and judges to assist in the resolution of thousands of cases across Canada. The Advisory Guidelines have already served to refocus and revitalize discussions about the law and practice of spousal support in Canada. Over that three-year period, revisions and adjustments have been made to the Advisory Guidelines in response to comments, criticisms and suggestions from those same spouses, lawyers, mediators and judges. This final version of the Spousal Support Advisory Guidelines brings to an end the most intensive part of the process.

The Department of Justice continues to monitor developments in the law of spousal support and will now be monitoring the Advisory Guidelines. If there is a major appellate decision, that may spark a need for review as well. It must not be forgotten that the Advisory Guidelines are intended to be a reflection of the current law.

The software suppliers make regular adjustments to their programs for changes in tax rates and structures, changes in government benefits and the like. This means that the formulas will be updated regularly on these technical matters.

Finally, it now appears that the Spousal Support Advisory Guidelines have become entrenched as a useful tool in the law of spousal support. As such, they have now become part of the everyday analysis employed by spouses, lawyers, mediators and judges. Undoubtedly legal publishers will step in, to provide analysis and updates on the case law. The Advisory Guidelines will continue to be a topic on family law programs for lawyers, mediators and judges. In only a few short years, the Spousal Support Advisory Guidelines have gone from concept to Draft Proposal to final version, and now belong to all those who operate in the field of family law.

APPENDIX A
MEMBERS OF THE ADVISORY WORKING GROUP ON
FAMILY LAW 2002-2007

Justice David Aston (London, Ont.)

Lonny Balbi (family lawyer and past chair of CBA National Family Law Section,
Calgary, Alta.)

Julia Cornish (family lawyer and past chair of CBA National Family Law Section,
Dartmouth, N.S.)

Justice Robyn Diamond (Winnipeg, Man.) (2003-2007)

Philip Epstein (family law lawyer, Toronto, Ont.)

Rhonda Freeman (Director, Families in Transition, Toronto, Ont.)

Marie Gordon (family lawyer, Edmonton, Alta.)

Miriam Grassby (family lawyer; Montreal, Que.)

Justice Richard LeBlanc (Corner Brook, Nfld.)

M. Justin Levesque (mediator, Montreal, Que.) (2002-2004)

Justice Jennifer Mackinnon (Ottawa, Ont.)

Justice Donna Martinson (Vancouver, B.C.)

Barbara Nelson (family lawyer; Vancouver, B.C.)

Jocelyn Verdun (family law lawyer, Quebec City, Que.) (2007)

Justice Donna Wilson (Regina, Sask.) (2006-2007)

GLOSSARY OF TERMS

Advisory guidelines: Guidelines, for the determination of support, that are not legislated or mandatory but non-legislated, informal and voluntary in nature, sometimes called “true guidelines” to distinguish them from the *Federal Child Support Guidelines*, which are legislated and mandatory. Generally a shorthand reference to the spousal support advisory guidelines proposed in this document.

Agreement: An agreement or contract between the spouses, usually in writing, setting out their respective rights and obligations during their marriage or upon marriage breakdown. The agreement may be negotiated by the spouses on their own, with their counsel, or through mediation. For the purposes of these *Advisory Guidelines*, the agreement would include terms affecting spousal support or child support or both, as well as terms concerning custody, access, parenting and division of family property. Usually the agreement will be in the form of a separation agreement. The agreement may or may not be incorporated into a “consent order.” (*See also consent order.*)

Ceiling: Under the *Advisory Guidelines*, to determine spousal support, the income level for the payor spouse above which the income-sharing formula no longer applies and any additional level of support is determined on a discretionary basis.

Child of the marriage: Under the *Divorce Act*, a child of the spouses who, at the material time, is under the age of majority, or is the age of majority or over but unable by reason of illness, disability, education or other cause, to support himself or herself. Included is a step-child or other child, for whom one parent or both stand in the place of a parent. Sometimes the term **dependent child** is used to describe a “child of the marriage.”

Child support: An amount of money paid by one parent to the other for the support of a child. Under the *Federal Child Support Guidelines*, there is a presumption that this amount consists of the “table amount” of support, determined by the child support tables, plus any contribution to section 7 “special or extraordinary expenses” such as child care, some education and medical expenses, or certain extracurricular expenses. (*See also table amount of child support and special or extraordinary expenses.*)

Computer software: Programs intended to assist family law lawyers, judges, mediators and others to calculate child support and spousal support. In Canada three software programs are currently available: DIVORCEmate, ChildView and, in Quebec, Aliform.

Compensatory support: Spousal support intended to compensate spouses for the economic consequences of the marriage. Compensatory support is typically awarded to recognize the economic losses one spouse has incurred as a result of the marriage and marital roles such as the loss of earning capacity, career development, pension benefits, etc. because of a decision to withdraw from the labour force for family reasons. Compensatory support may also be awarded, however, to compensate one spouse for economic benefits conferred on the other spouse during the marriage such as financial

support for professional training. Compensatory support also includes spousal support intended to recognize the economic impact of post-divorce child-care responsibilities on a custodial parent, most commonly limitations on employment. (*See also non-compensatory support.*)

Consent order: An order made by the court based upon the agreement of the spouses. The agreement may take the form of a separation agreement, minutes of settlement, or an agreement stated on the record in court.

Corollary relief: The technical term used by the federal *Divorce Act* to describe orders for custody and access, child support and spousal support.

Crossover: Under the *Advisory Guidelines*, refers to the situation where one spouse applies to vary spousal support after child support has ceased and the *with child support* formula is no longer applicable, to bring spousal support under the *without child support* formula.

Divorce: The proceeding in which legally married spouses are divorced under the federal *Divorce Act*. Often, the term is used to describe the divorce judgment granted at the same time that corollary relief is granted. The divorce takes legal effect 31 days after the divorce judgment. (*See also corollary relief.*)

Duration: When spousal support is paid on a monthly basis, the length of time for which spousal support is to be paid. Duration may be indefinite or time-limited. Duration may be changed upon subsequent review or variation. (*See also indefinite and time-limited.*)

Durational factor: Used in the *without child support* formula under the *Advisory Guidelines*, to determine the percentage of income to be shared, based upon the length of the marriage. The durational factor is 1.5 to 2 percent of the gross income difference for each year included in the length of marriage. (*See also length of the marriage.*)

Entitlement: This is the threshold question in spousal support of whether a spouse has any claim to spousal support at all. After entitlement has been established, issues of amount and duration can be addressed. The issue of entitlement can arise in any context where spousal support is in issue—interim support, initial orders or agreements for support, or reviews or variations of existing support orders.

Exception: Under the *Advisory Guidelines*, a recognized category of commonly recurring facts or circumstances that may justify a departure from the amount or duration of spousal support that would otherwise be determined under the formulas.

Family net disposable income: A measure of the net disposable income of the recipient spouse, which includes both spousal and child support received by that spouse. It measures the net disposable income of the whole family, including that of the spouse and the children, available to meet their needs. For the payor spouse, his or her net disposable income is the same whether described as family net disposable income or individual net disposable income, as both child and spousal support paid are always deducted. (*See also net disposable income and individual net disposable income.*)

Federal Child Support Guidelines: Regulations under the federal *Divorce Act* setting out the rules and tables that determine how much child support a spouse or parent must pay. Most provinces and territories have similar child support guidelines under their family laws, except for Alberta. Quebec has a different scheme of child support guidelines, which applies to determine child support for residents of Quebec.

Floor: Under the *Advisory Guidelines*, the income level for the payor spouse below which the formulas do not apply.

Formula: Under the *Advisory Guidelines*, the specific method of calculating the amount and duration of spousal support for a category of cases, including the percentages of income to be shared. (See also *with child support formula* and *without child support formula*.)

Global amount: Under the *Advisory Guidelines*, the total dollar amount of spousal support payable under the formula when amount is multiplied by duration—the monthly amount can be multiplied by the number of months of duration for which it is paid—to produce this global amount. No adjustment is made in this raw calculation for any discount, present value or tax adjustment.

Government benefits and refundable credits: A category of income that includes the federal Child Tax Benefit, the National Child Benefit, the GST credit, the refundable medical credit and various provincial benefit and credit schemes.

Gross income difference: Under the *Advisory Guidelines*, the difference between the gross or Guidelines incomes of the spouses, which forms the basis for the percentage division under the “*without child support*” formula. (See also **Guidelines income**.)

Grossed-up amount of child support: Child support is not tax deductible for the payor parent, which means that child support is a “net” amount, paid out of the parent’s after-tax income. In certain cases where gross income is used in the advisory guidelines, it is necessary to gross up the amount of child support, e.g. under the custodial payor formula or the exception for prior support obligations. To gross up child support, the parent’s marginal tax rate is used to calculate a before-tax or gross amount. Software programs can be used to assist in this calculation.

Guidelines income: A measure of gross income, as defined in the *Federal Child Support Guidelines*, including the adjustments found in Schedule III to those *Guidelines*.

Income sharing: A formulaic method used to determine the amount of support to be paid, either spousal support or child support, based upon the incomes of the parents or spouses, rather than expense budgets, budget deficits, or some other method.

Indefinite: Spousal support that has no limit on its duration but is subject to review or variation. Indefinite support does not necessarily mean permanent support, as the amount may be varied over time and the support obligation may even be terminated. Under the *Advisory Guidelines*, there are two tests for indefinite support: where the length of the marriage is 20 years or longer, or where the rule of 65 applies. (See also **rule of 65**.)

Individual net disposable income (INDI): A spouse's *individual* net disposable income reflects the net disposable income available to the spouse after deducting his or her contributions to child support. For the recipient spouse, individual net disposable income will be the net disposable income, including any spousal support received, after deducting the payor's child support paid as well as the recipient's notional table amount of child support plus any contributions by the recipient to special or extraordinary expenses for the child or children. For the payor spouse, his or her individual net disposable income will be the net disposable income after payment of both child support and spousal support. (*See also family net disposable income, net disposable income, notional table amount of child support, and special or extraordinary expenses.*)

Initial order: The order for custody, child support or spousal support made at the time of the divorce or, in some cases, the first order made thereafter. Sometimes referred to as an "original order" and to be contrasted with subsequent orders made on variation or review. Not to be confused with interim orders. (*See also interim support, variation and review.*)

Interim support: An order for child support or spousal support or both, made after a divorce proceeding has been commenced, based upon limited evidence and intended to operate on a temporary basis until the divorce and initial order for corollary relief. An interim support order can be revisited and revised at any time, up to and including the divorce and initial order for corollary relief. (*See also corollary relief, divorce and initial order.*)

Length of the marriage: Under the *Advisory Guidelines*, the total period of time the spouses have cohabited, including any periods of pre-marital cohabitation and ending at the time of separation.

Lump sum spousal support: Spousal support can be paid on a periodic basis, e.g., monthly amounts, or it can be paid in a lump sum, usually just one or a few payments. Lump sum payments are not tax deductible for the payor and are not treated as taxable income for the recipient.

Net disposable income: An after-tax measure of income, after inclusion and deduction of the amounts more fully described in Chapter 6. The starting point is Guidelines income, to which government benefits and refundable credits are added and from which income taxes and other deductions are then subtracted. For the payor spouse, child and spousal support paid is deducted. For the recipient spouse, spousal support will be included, but child support received may or may not be included, depending upon whether the measure is *family* net disposable income or *individual* net disposable income. (*See also family net disposable income, government benefits and refundable credits, Guidelines income, and individual net disposable income.*)

Non-compensatory support: Spousal support based on need and dependency, apart from any compensatory considerations. In its 1999 decision in the case of *Bracklow*, the Supreme Court of Canada held that the spousal support objectives of the *Divorce Act* were not exclusively compensatory, but also encompassed non-compensatory purposes.

Notional table amount of child support: The table amount of child support that a spouse would pay under the *Child Support Guidelines*, based upon the spouse's income, even though that amount is not actually being paid to the other spouse. The notional table amount is used as a proxy or adjustment in the *with child support* formula to reflect the spouse's direct spending upon a child as a custodial parent. (See also **table amount of child support**.)

Prior support obligation: An obligation to pay child or spousal support for a child or spouse from a prior relationship, when determining child or spousal support to be paid upon the breakdown of a subsequent marriage. Prior support obligations are an *exception* under the formulas.

Property division: Each province and territory has its own statute that provides for the division of family or marital or matrimonial property between spouses upon separation or divorce. Court orders and agreements thus often deal with property division, as well as custody and access, child support and spousal support. Provincial/territorial laws vary in their details. Property to be divided will typically include the family home, its contents, pensions, motor vehicles, investments, bank accounts, etc. Typically, debts will also be considered as part of the property division.

Provincial/territorial family law: Under the Constitution, the federal government has legislative responsibility for divorce, reflected in the federal *Divorce Act*. The *Divorce Act* deals with custody, child support and spousal support for divorcing spouses. All other family law matters fall under the legislative responsibility of the provinces and territories. Provincial/territorial family law is set out in the statutes of each province or territory and the titles of those statutes vary from province to province, e.g. in B.C., the *Family Relations Act* or in Ontario, the *Family Law Act* and the *Children's Law Reform Act*. These provincial/territorial family laws deal with custody and support issues for separated but not divorced married spouses, as well as cohabiting partners and unmarried parents. The division of family property in all cases, including divorcing spouses, is a matter for provincial/territorial family law.

Quantum: A Latin term, used by lawyers and judges, which means the amount of support to be paid, as opposed to the duration of that support. "Quantum" thus usually refers to the monthly amount of spousal support.

Ranges: Under the *Advisory Guidelines*, the upper and lower limits for the amount of spousal support, or the duration of spousal support, as determined by the appropriate formula. The formulas generate ranges for amount and duration, rather than precise numbers as under the *Federal Child Support Guidelines*.

Restructuring: Under the *Advisory Guidelines*, the trading-off of amount against duration to restructure the outcomes generated by the formulas. Restructuring may be used in one of three ways: (1) to increase the amount of spousal support and shorten duration; (2) to extend duration and reduce the monthly amount; or (3) to formulate a lump sum by multiplying amount by duration. In restructuring, the global amount of support remains the same. (See also **global amount** and **lump sum spousal support**.)

Review: A proceeding, provided for by the terms of an order for support that involves the return of a support issue to the court for review, without the need for either spouse to prove a material change of circumstances. A review is thus different from a variation. A review term in a support order will usually direct the timing of the future review. It may attach conditions to be satisfied by one or both of the spouses prior to the scheduled review. It may also direct the issues to be determined and the evidence to be provided at the review. (*See also variation.*)

Rule of 65: Under the *Advisory Guidelines*, one of the tests for indefinite spousal support under the *without child support* formula, calculated by adding together the age of the support recipient at the time of separation and the length of the marriage in years. (*See also length of marriage.*)

Shared custody: Defined in section 9 of the *Federal Child Support Guidelines* as a situation where each spouse “exercises a right of access to, or has physical custody of, a child [of the marriage] for not less than 40 per cent of the time over the course of a year.”

Special or extraordinary expenses: Expenses for children listed in section 7 of the *Federal Child Support Guidelines*, to which both parents will generally contribute based upon their respective incomes. Included in these expenses are: child care expenses; child-related medical and dental insurance premiums; certain health-related expenses; extraordinary expenses for primary or secondary education or specific educational programs; expenses for post-secondary education; or extraordinary expenses for extracurricular activities. The presumptive amount of child support to be paid under the *Federal Child Support Guidelines* consists of the table amount of child support plus the payor’s contribution to any s. 7 expenses.

Split custody: Defined in section 8 of the *Federal Child Support Guidelines* as a situation “where each spouse has custody of one or more children” of the marriage.

Spouse: Under the *Divorce Act*, spouse means a legally married spouse. Generally, the term “spouse” also includes a person who is a former spouse. At the time of writing, the *Divorce Act* definition of spouse had not been amended to include spouses in same-sex marriages but the term will encompass them if such an amendment is made. Under provincial/territorial family law, the definition of “spouse” varies, but generally has been extended to include certain “common law” or cohabiting couples who are not legally married. Provincial/territorial law may also extend support obligations to certain relationships other than spousal relationships, such as civil unions or same-sex partnerships.

Table amount of child support: The basic amount of child support that a payor parent is required to pay under the *Federal Child Support Guidelines*, based upon the child support tables. The table amount is determined by the payor’s *Guidelines* income, the number of children and the appropriate province/territory, usually the province/territory in which the payor spouse resides.

Time limit: Sets a specified or limited period of time during which the monthly amount of support is to be paid. (*See also duration.*)

Variation: An application by a spouse, after an initial order has been made, to vary or change the terms of a previous order, including the terms relating to child or spousal support. Variation applications are governed by section 17 of the federal *Divorce Act*. There may be a number of variation orders granted over time between spouses or former spouses. In order to obtain a variation, the spouse will have to establish a material change in circumstances since the making of the most recent previous order.

With child support formula: The formula under these *Advisory Guidelines* for calculating amount and duration of spousal support that applies in cases where there are dependent children and hence where there is a concurrent child support obligation to a child or children of the marriage. (*See also formula, child of the marriage and without child support formula.*)

Without child support formula: The formula under these *Advisory Guidelines* that applies in cases where there are no dependent children and hence where there is no concurrent child support obligation to a child or children of the marriage. This formula applies not only to marriages where there were no children of the marriage, but also to marriages where there were children, but the children are no longer dependent. (*See also formula, child of the marriage, and with child support formula.*)

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