Spousal Support Advisory Guidelines: High Income Families[1]

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Almost a decade into the Spousal Support Advisory Guidelines ("SSAG") era, we are coming to terms with the guidelines. Courts are using SSAG fairly routinely and thereby providing more predictability to parties although the suggested support ranges are not always met with enthusiasm by recipients or payors. SSAG appear to have raised average spousal support awards in some communities and lowered them in others. Anecdotally, SSAGs have increased marginal support awards where pre SSAG no support would likely have been agreed to or, possibly, even asked for. After initial skepticism in Ontario, since the Court of Appeal decision in *Fisher v. Fisher*[2], courts have increasingly applied SSAG as a matter of course. The remaining areas of contention are the outlying situations highlighted by the devisors of SSAG in the initial statement of the proposal, such as variations and high income families.[3] The latter is the subject of this paper.

SSAG set broad income limits from nil to $350,000/year over which warnings are programmed to appear on the *Divorcemate* software. It is intriguing that years after the introduction of the *Federal Child Support Guidelines* which at first the bar

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[2] *Fisher v. Fisher*2008 CarswellOnt 43

[3] *Gray v. Gray* CarswellOnt 13066 (Ont.C.A.) is a recent statement of how to use SSAG in variation cases.

believed to have a hard limit of $150,000 (that did not survive the first significant high income case, *Francis v. Baker*[4]) that the SSAG drafters should have chosen to impose an income limit at all and that it should be at a higher level than child support. Following *Francis v. Baker* and a cluster of high income cases a rough rule of thumb that no court would interfere with table child support for annual income at or under $1 million/year has settled into practice. Is there an equivalent rule thumb for SSAG high income cases?

The Spousal Support Advisory Guidelines – July 2008 report sets out the intentions of the drafters for high income spousal support cases. The drafters set a ceiling of $350,000 while emphasizing that "ceiling" is not meant to be a hard cap but rather a point at which the formula is capable of adjustment. In the words of the report:

> 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. **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.
> Guidelines.[5]

There is now a reasonably deep jurisprudence that has developed across the country on SSAG making it possible to identify a direction.

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[4] *Francis v. Baker*1999 CarswellOnt 2734 (S.C.C.)
[5] *Spousal Support Advisory Guidelines – July 2008* Report, para 11.1

1. *$350,000 may be a "ceiling" but it is not a hard cap*

This may seem an obvious point given that the drafters took pains to explain that ceiling did not mean "cap." Courts have affirmed this on numerous occasions. In *Elgner v. Elgner,* Madam Justice Greer describes the SSAGs as " a starting point."[6] In *Trombetta v. Trombetta* McMunagle J. also stated that the $350,000 ceiling is not a cap.[7] Having said that in neither of those cases did the court simple order the SSAG generated support figure. In each case, the courts considered the SSAG figure and ordered a lower monthly amount.

2. *Budgets matter*

Budgets are still very important in high income spousal support cases. In cases in which courts depart from the guidelines, whether child or spousal, the inability to justify the guideline amounts based on a realistic budget may result in a lower award. In *K.R.M. v. F.B.M*, Tindale J. ordered child support of $10,000/month and spousal support of $8000/month on an income of $895,898/year. This is much less than the child support table amount of $14,513/month and the SSAG range of $18,555 - $21,843/month. The support recipient, however, stated she had direct child related expenses of only $4,420/month on her budget and the court found her personal expenses claimed to be excessive. [8] Siilarly in *Maskobi v. Maskobi,* McGee J. ordered spousal support of $12,500/month although the payor's income of $955,000/year generated SSAG in the range of $18,500 - $24,193. The

[6] *Elgner v. Elgner* 2009 CarswellOnt 7702 (Ont.S.C.) at para. 34
[7] *Trombetta v. Trombetta* 2011 CarswellOnt 318 (Ont.S.C.) at para. 32
[8] *K.R.M. v. F.B.M.* 2013 CarswellBC 468

claimant had a "low" budget ("low" being a relative concept). Even so, the monthly support award exceeded the budget but McGee J. assumed that the support claimant would require funds to relocate and pay legal costs.

Where a support claimant did prove "need" of $21,000/month in *Jackson v. Boyle-Jackson*, Festeryga J. ordered spousal support of $18,900 from within the SSAG ranges.[9]

In an appropriate case, the SSAG ranges may be too low even in a high income family. In *Loesch v. Walji*, the British Columbia Court of Appeal affirmed a lower court decision imposing interim spousal support of $50,000/month where the SSAG ranges were "only" $30-35,000/month. The court had evidence of need and of the payor's ability to pay in the greater amount. The appeal court characterized this result as one of "pure discretion" in which the payor's stated income appeared vastly less than his expenses and lifestyle would suggest.[10]

3. *The philosophical contest between "economic merger" and "transfer of capital" plays a role*

   After a long term marriage the concept of "economic merger" or equalizing incomes may come into play. In *Cork v. Cork*, Warkentin J. commented that

[9] *Jackson v. Boyle-Jackson*2009 CarswellOnt 861 (Ont.S.C.)
[10] *Loesch v. Walji* 2008 CarswellBC 982 (B.C.C.A) at para 49

the objective of equalizing incomes after a long term marriage has less force in high income cases.[11] Nor is a long term marriage with children enough to support a SSAG award if there is no evidence led of a high lifestyle during the marriage or ongoing need. [12] The higher the income, the higher the monthly awards generated by the SSAG calculation. Even after a long term marriage with children the amounts may seem little more than a wealth transfer. [13]

4. *Applying SSAG is more than running the numbers*

   There are cases in which the courts simply apply the mid range SSAG figure to incomes over the $350,000 ceiling. In *Gibson v. Gibson*, Quinlan J. ordered spousal support at the mid range on income of $696,838/year with the quantum of support to be recalculated each year along with child support in accordance with the payor's income.[14] This decision is perhaps the exception that proves the rule. In most of the reported high income SSAG decisions the court considers the length of the marriage, lifestyle during the marriage and the budget of the applicant, considers the SSAG ranges and then orders an amount that is somewhat less than those ranges.[15]

Are courts applying SSAG to high income cases? If by this question we really mean need counsel do no more than input the income and push enter on the support calculation software, then the answer is no. Yet SSAG is almost invariably referenced

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[11] *Cork v. Cork* 2014 CarswellOnt 5516 (Ont.S.C.) at para. 28-30.
[12] *Firth v. Allerton* 2013 CarswellOnt 6690 (Ont.S.C.)
[13] *Dobbin v. Dobbin* 2009 CarswellNFLD 50 (U.F.C.)
[14] *Gibson v. Gibson* 2011 CarswellOnt 6951 (Ont.S.C.)
[15] See *Elgner, supra*, *Trombetta, supra*, *Milton v. Milton* 2008 CarswellNB 591 (NBCA), *Smith v. Smith*2008 CarswellBC 1218 (B.C.C.A.), *McCain v. McCain* 2012 CarswellOnt 16853 (Ont.S.C.). Wilson v. Wilson2009 CarswellBC 3504 (BCSC)

by the courts. The decisions that stand for the proposition SSAG is of no use are far and few between. In the high income cases, the SSAG calculations and concepts are almost invariably considered but are used a little more subtly, perhaps, than in the lower income ranges to provide a cross check to the quantum of support the court deems appropriate. Where budgets and lifestyle are carefully proven at a high level, the SSAG ranges provide reassurance to a court that a significant spousal support award is appropriate, albeit possibly in an amount somewhat short of the actual ranges.