6th Annual Recent Developments and Complex Issues in Child and Spousal Support

SSAG Exceptions: Think you are Exceptional? Maybe, maybe not...

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1. Introduction

When Carol Rogerson and Rollie Thompson developed the *Spousal Support Advisory Guidelines* (the "SSAG"), their goal was to bring predictability and certainty to the determination of spousal support under the *Divorce Act*.[2] Spousal support at the time was highly discretionary and it was difficult to predict how much spousal support a Court might order if entitlement were established. In an attempt to address this issue, Professors Rogerson and Thompson developed the formulas to apply to determine spousal support, based on a number of factors, including the parties' incomes and the duration of their relationship. At the same time, they recognized that there were numerous situations in which it may not be appropriate to apply the SSAG formulas. While it is possible to restructure spousal support under the SSAG, there is a limit to the restructuring available. If the formula outcomes are inappropriate, and restructuring does not assist, it may be appropriate to depart from the SSAG ranges and rely on exceptions.[3]

The SSAG exceptions are exactly what they sound like: exceptions to the rule. The SSAG exceptions may help you more often than you think, especially since spousal support is still an area of the law where the discretion exercised can be quite broad. The list of exceptions is intended to identify common categories of departure from the SSAG[4] ranges and is not exhaustive.

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[1] With the assistance of Shawn Duguay, an articling student at Gowling WLG (Canada) LLP.
[2] Professor Carol Rogerson and Professor Rollie Thompson, Spousal Support Advisory Guidelines, July 2008 at vii, online: Ministry of Justice http://justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/spag/pdf/SSAG_eng.pdf (*SSAG*).
[3] *Ibid* at xi.
[4] *Ibid.*

As you may know, there are 11 categories of exceptions:

(1) Compelling financial circumstances in the interim period (12.1)

(2) Debt payment (12.2)

(3) Prior support obligations (12.3)

(4) Illness and disability (12.4)

(5) Compensatory exception in shorter marriages without children (12.5)

(6) Property division: reapportionment of property (B.C.) (12.6)

(7) Basic needs/hardship: without child support, custodial payor formulas (12.7)

(8) Non-taxable payor income (12.8)

(9) Non-primary parent to fulfil parenting role under the custodial payor formula (12.9)

(10) Special needs of child (12.10)

(11) Section 15.3: small amounts, inadequate compensation under the with child support formula (12.11)[5]

Like most things, not all SSAG exceptions are equal. Some are argued much more often than others, such as the illness and disability exception. Others, such as the prior support obligations exception, are more rarely argued. In many cases where the exceptions are cited, the Court does not spend much time analyzing the exceptions; rather, the Court analyzes the situation, determines that the ranges produced by the SSAG are not appropriate, and then proceeds to make reference (or not) to one or more recognized SSAG exceptions.

The purpose of this paper is to give you more information about the SSAG exceptions and a better idea of when you could, or should, resort to them. For the purposes of this paper, we have chosen to focus on three of the more common exceptions, compelling financial circumstances in the interim period (12.1), the illness and disability exception (12.4) and the special needs of a child exception (12.10). We have also noted cases that do not necessarily rely on a particular exception to depart from the ranges in the SSAG under the heading "Can We Craft Our Own Exception?"

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[5] *Ibid.*

2. What Exceptions Have Been Successfully Argued on Interim Motions?

The SSAG deal with interim support orders both as a matter of routine application on interim motions (Chapter 5), and as an exception to the formulas where there are compelling financial circumstances (Chapter 12).

Chapter 5.3 specifically provides that the SSAG are intended to apply to interim orders. While judges hearing interim support motions previously had to rely on the traditional means and needs analysis, which was based on budgets prepared at an early stage and without the benefit of financial disclosure, the introduction of the SSAG ranges has provided a more predictable and consistent framework for determining support pending trial. Chapter 5.3 provides, in part, as follows:

> 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. Once an income can be established for each party it is possible under the formulas to generate ranges of monthly amounts with relative ease.
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> 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. [footnotes omitted]

Of course, Chapter 12 of the Guidelines recognizes several exceptions to the rule, on the basis that the ranges calculated by the Guidelines may not be appropriate to all cases. Chapter 12.3 specifically recognizes an exception for compelling financial circumstances at the interim stage, although other exceptions figure prominently on interim support motions, including the exceptions dealing with debt payments[6] and basic needs/hardship.[7] Chapter 12.1 discusses the use of the interim exception as follows:

> 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

[6] *SSAG, supra* note 2, Chapter 12.2.
[7] *Ibid*, Chapter 12.7.

> 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.

Courts in Ontario have largely endorsed the application of the Guidelines ranges to interim support motions. Indeed, the SSAG have been referred to as "ideal" for use on temporary motions.[8] In *Driscoll v Driscoll*, Justice Lemon cited the following principles, which should govern interim support motions:[9]

1. On applications for interim support the applicant's needs and the respondent's ability to pay assume greater significance;

2. An interim support order should be sufficient to allow the applicant to continue living at the same standard of living enjoyed prior to separation if the payor's ability to pay warrants it;

3. On interim support applications the Court does not embark on an in-depth analysis of the parties' circumstances which is better left to trial. The Court achieves rough justice at best;

4. The Courts should not unduly emphasize any one of the statutory considerations above others;

5. On interim applications the need to achieve economic self-sufficiency is often of less significance;

6. Interim support should be ordered within the range suggested by the *Spousal Support Advisory Guidelines* unless exceptional circumstances indicate otherwise;

7. Interim support should only be ordered where it can be said a *prima facie* case for entitlement has been made out;

8. Where there is a need to resolve contested issues of fact, especially those connected with a threshold issue, such as entitlement, it becomes less advisable to order

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[8] See: *MacKenzie v Flynn*, 2010 ONCJ 184 (CanLii) per Sherr J at para 23, citing *DRM v RBM*, 2006 BCSC 1921 (CanLii).

[9] *Driscoll v Driscoll*, 2009 CanLii 66373 (ON SC) at para 14, citing *Robles v Kuhn*, 2009 BCSC 1163 (CanLii). See also: *Samis v Samis*, 2011 ONCJ 273 (CanLii) per Justice Sherr at paras 43-44, also citing *Robles*. In *Driscoll*, Justice Lemon ordered interim spousal support in an amount just less than the low range of the Guidelines, but on the basis that "[t]hose ranges do not apply when a spouse has 'repartnered'": para 26. While re-partnering may bring a spousal support award outside the ranges, this is not necessarily so if need persists or where the primary basis for the award is compensatory; however, this is a topic for another paper.

interim support.

In the "Spousal Support Advisory Guidelines: The Revised User's Guide" (the "Revised User's Guide"), Professors Rogerson and Thompson indicate that the interim exception "should be one of the most commonly-used exceptions, always on the radar screen on any interim support application."[10] But if the interim exception only applies to exceptional cases, when should it be used?

Some guidance can be found from the decision in *DRM*, where Justice Martinson distinguished between cases with a stabilized interim financial situation as compared to those in financial transition. Specifically:

> The more the financial situation of the spouses has stabilized at the interim stage, the more helpful the quantum found in the *SSAG* may be; adjustments can be made at trial. The more the situation is one of financial transition, where a spouse may be temporarily paying disproportionately more of or fewer of the ongoing financial obligations, the less helpful the quantum may be.[11]

A different view was expressed in the recent case of *Joyce v Joyce*, which came before the Court as an urgent interim support motion before a case conference.[12] Justice Richetti explained the inherent difficulties in determining interim support, and the importance of undertaking a means and needs analysis as follows:

> [33] Interim spousal support motions are often made on conflicting evidence and the lack of a complete record. Since many of the factors in s. 15.2 of the *Divorce Act* cannot be ascertained at the stage of an interim spousal support motion, the needs of the applicant and the respondent's ability to pay take on a greater significance on such motions. Further, the consequences of the separation of the parties are often "fresh" with parties making financial decisions in a stressful situation. The financial affairs of the parties are often in "flux". A careful review of the means, needs and all the surrounding circumstances, particularly financial circumstances, is a must for this court to make a reasonable interim spousal support order.

Justice Richetti rejected any principle which would mandate the application of the SSAG on an interim motion in all but exceptional circumstances. Rather, as directed by the Court of

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[10] Professor Carol Rogerson and Professor Rollie Thompson, Spousal Support Advisory Guidelines: The Revised User's Guide, April 2016 at p. 60, available: http://www.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/ug_a1-gu_a1/pdf/ug_a1-gu_a1.pdf (*Revised User's Guide).*

[11] *DRM, supra* note 3, at para 26.

[12] *Joyce v Joyce*, 2015 ONSC 4311 (CanLii).

Appeal, the focus of the inquiry should be the factors set out in s. 15.2 of the *Divorce Act* and with the SSAG to be used solely as a "check". As one of the only decisions challenging the routine use of the SSAG ranges on an interim motion, it is worth quoting Justice Richetti's analysis on this point in its entirety:

> [35] I accept that *Samis* generally sets out the factors to be considered in making an interim spousal support award. However, I have serious reservations that "Interim support *should* be ordered within the range of the" SSAG "*unless exceptional circumstances* dictate otherwise" (emphasis added) as described in *Robles'* 3rd additional factor. In my view, the wording of this consideration appears to be mandatory and places the onus on the respondent to establish "exceptional circumstances".
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> [36] This consideration, as set out in *Robles*, would have the effect of giving the SSAG a much greater importance in the determination of an award of interim spousal support than the use of SSAG in determining a final spousal support order. In determining a final spousal support award, the SSAG calculations are a useful tool as a "check" of the Court's conclusion arrived after the application of the factors set out in the *Divorce Act*. The proper approach to the determination of spousal support was described by the Ontario Court of Appeal in *Racco v. Racco*, 2014 ONCA 33 (CanLII):
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> > [25] The application of these principles makes the determination of spousal support highly individual and discretionary. As Professors Rogerson and Thompson state in their introduction to the Spousal Support Advisory Guidelines (Ottawa: Department of Justice, 2008) (SSAG):
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> > > *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.
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> > [44] The principles articulated in the Supreme Court of Canada in connection with the *Divorce Act* provide a framework within which equitable support awards are to be made. Although the SSAG offer a certain level of predictability and consistency once the basis for entitlement has been established, they are advisory only. The Court cannot lose sight of the individual circumstances of a case in determining both entitlement and quantum under section 15 of the *Divorce Act*.
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> [37] I see no reason why the approach described by the Court of Appeal in *Racco* would not also apply to the determination of interim spousal support awards.
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> [38] The interpretation set out in *Robles* regarding the mandatory application of SSAG unless exceptional circumstances exist is contrary to existing authority and, in my view, is neither necessary nor desirable.

Notwithstanding Justice Richetti's view in *Joyce*, a review of the case law reveals that most interim support motions are decided with the SSAG ranges.[13] In fact, even in *Joyce*, the amount of the spousal support award fell within the range when the husband's payments to the lines of credit and the disparity of accommodation costs between the parties were taken into account.[14]

In *BDC v MCM*,[15] the husband argued that his monthly debt payments of $800.00 per month prevented him from paying spousal support within the range. Justice Blishen held that the husband's debt payments, while important, did not take precedence over his obligation to pay support within the range. On this basis, and given the length of the relationship, the needs of the parties, their expenses, the husband's ability to pay, and the lifestyle the family enjoyed while residing together, Justice Blishen ordered support between the mid and high range. Her Honour specifically addressed the interim debt payment argument as follows:

> The obligation in Canada to pay interim spousal support as a matter of justice and social responsibility is at least as important, if not more important, than the obligation to retire commercial and family debts.[16]

The Guidelines ranges have also been applied in cases, notwithstanding compelling financial circumstances which would appear to be exceptional by any standard. In *King v King*,[17] interim support was ordered at the mid-range, even though the parties had had a 30-year relationship and the wife's evidence was that she was living in poverty, including being forced to share a bed with her 75-year-old mother, while the husband continued to reside in the home and drive two luxury vehicles.

The SSAG ranges were also applied in *Feeney v Brown*,[18] notwithstanding that the mother was legitimately unemployed due to her role as the primary caregiver for the parties' three-year old-child who suffered from cerebral palsy. The parties had cohabited for approximately six years.

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[13] For a non-exhaustive list of recent examples, see: *Mesa v Quiros*, 2016 ONSC 1049 (CanLii) (mid-range); *Loubert v Loubert*, 2015 ONSC 5395 (CanLii) (mid-range, both parties having acquired debt), *Nicholson v Nicholson*, 2016 ONSC 5573 (CanLii) (just under mid-range); *Horowitz v Nightingale*, 2015 ONSC 190 (CanLii) (mid-range).
[14] *Joyce*, supra, at paras 56-58.
[15] *BDC v MCM*, 2014 ONSC 6064 (CanLii).
[16] *Ibid* at para 18, citing *Borden v Racicot*, 2003 CanLII 2066 (ON SC).
[17] *King v King*, 2016 ONSC 5264 (CanLii).
[18] *Feeney v Brown*, 2014 ONCJ 435 (CanLii).

The Father earned approximately $51,000.00 per year while the mother had no income except for government benefits and the amounts she received for child support, totaling approximately $27,000.00 per year. Interim support was ordered at $550.00 per month, being the midpoint between the mid and high range.

What, then, makes for an exceptional case? While the exception for compelling financial circumstances in the interim period is a stand-alone exception, the case law reveals that it is often discussed and applied in conjunction with one or more of the other exceptions – most commonly, the debt repayment exception and the basic needs/hardship exception. Perhaps, then, it is the overlap of applicable exceptions that makes a case exceptional on an interim motion. Although the Revised User's Guide suggests that the appropriate approach in those circumstances is to use the interim exception solely and leaving the other exceptions to apply at later stages, the case law has tended to blur the lines.

The interim exception has been used as a basis to award interim support beyond the high end of the range, as well as below the low end of the range. In *Carty-Pusey v Pusey*,[19] the parties had been married for four years. The wife had come to Canada from Jamaica under a sponsorship agreement, signed by the husband, and was fully dependent upon him. Following separation, the wife was without income, homeless and living in a shelter. The husband was a self-employed truck driver, earning an imputed income of $56,000.00 per year. Recognizing that the husband had two children from a prior relationship, the SSAGs provided a range of support between $214.00 and $285.00 per month. After reviewing the wife's budget, the Court applied the interim exception and the basic needs/hardship exception and ordered interim support in the amount of $1,000.00 per month.

In *Singh v Singh*,[20] the wife emigrated from India pursuant to a sponsorship agreement, but the marriage ended after approximately 7 months. The husband earned approximately $45,900.00 per year, and the wife earned approximately $21,120.00 per year, although she sought to enroll in the Marketing and Research Program at the University of Toronto in order to improve her income

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[19] *Carty-Pusey v Pusey*, 2015 ONCJ 382 (CanLii).

[20] *Singh v Singh*, 2013 ONSC 6476 (CanLii). See also *Niranchan v Nadarajah*, 2015 ONCJ 149 (CanLii), where the wife had moved to Canada to marry the husband, giving up a good job and her support network, and had limited income because she was attending school.

earning potential. The SSAG provided for monthly support of $41.00 at the high end. The Court considered both the interim exception and the basic needs exception, and ordered support in the amount of $400.00 per month and that the husband pay for the wife's enrollment in her chosen program at U of T.

In *Tasman v Henderson*,[21] the Court ordered interim interim support in the amount of $1,500.00 per month, well over the high range of $604.00 per month, where the parties had a short marriage without children and the wife had limited income. However, Justice Mitrow time-limited the support to 6 months, to allow the wife to meet her immediate expenses and find alternate accommodation, and encouraged the parties to settle the support issue before the time limit expired.

There can be no question that the case of *Osanlo v Onghaei* qualifies as exceptional.[22] In that case, the parties and the children resided in Canada but had travelled back to Iran. While there, the husband commenced divorce proceedings and all of the wife's official documentation went missing. The husband then took the children back to Canada, and advised Iranian authorities that he would not consent to the wife leaving the jurisdiction of Iran. The wife finally obtained replacement documentation and was able to secure passage out of Iran, but by this time the children had been residing in Ontario in the care of the husband and his new partner for some time. Although the custodial payor formula was technically applicable to the facts of the case, Justice McGee held that the range suggested by that formula was not appropriate because the children were in the father's care only as a result of his unilateral action in removing them from Iran without the wife's consent. The wife had always had been the children's primary caregiver, and she should have equal opportunity to obtain suitable accommodations for the children. On this basis, Justice McGee held that this case was exceptional and that it would be appropriate to base interim support on a more equitable sharing of Net Disposable Income. Justice McGee ordered interim support in the amount of $4,260.00 per month, giving the wife 35% of NDI, well above the high range of $2,404.00 per month.

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[21] *Tasman v Henderson*, 2013 ONSC 4377 (CanLii).
[22] *Osanlo v Onghaei*, 2012 ONSC 2158 (CanLii).

As noted above, sometimes the compelling financial circumstances are those of the support payor and justify an amount of spousal support falling below the low range. In *Oster v Oster*,[23] the Court chose not to order any spousal support where there was only a small income disparity between the parties, the wife was receiving Table support from the husband, and she continued to occupy the matrimonial home with the children.

In *Harrison v Harrison*,[24] the parties were involved in complex litigation arising out of a previous consent order and involving third parties. The wife and the parties' child continued to reside in the matrimonial home, which was owned by the husband and for which he was paying the mortgage, insurance and taxes. The husband argued that the wife had no need for interim spousal support, because he was paying for her living expenses. The SSAG provided for a range of support between $1,220.00 and $1,958.00 per month; the Court ordered interim support in the amount of $1,000.00 per month, but also ordered the husband to continue paying the mortgage, insurance, taxes on the matrimonial home.

The decision in *Harrison* is not unlike that in *Joyce*, referred to above. In that case, the SSAG generated a range of spousal support between $1,620 at the low end to $2,081 at the high end. After undertaking a means and needs analysis, Justice Richetti ordered interim spousal support in the amount of $700 per month. However, His Honour then compared the interim support amount to the SSAG ranges, taking into account the debts being paid by the husband:

> [58] How does this compare with the $700 per month, I have determined using the factors in the *Divorce Act*? Actually, when you add the Husband's payment of the Wife's portion of the line of credit debt of approximately $600 per month (without consideration of the favourable tax consequences to the Wife) and the disparity in their accommodation expenses which is approximately $300-400 (being half of the difference between their approximate accommodation expenses), the amount is within the SSAG range.

A creative approach was taken in *Maelbrancke v Proctor*,[25] where the parties cohabited for only 3 years and 2 months and had no children together, although the common-law wife had two children from a previous relationship. The husband earned approximately $55,000.00 per year and owned the house in which the parties had been living. The wife was not working at the time of

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[23] *Oster v Oster*, 2014 ONSC 7183 (CanLii).
[24] *Harrison v Harrison*, 2015 ONSC 505 (CanLii).
[25] *Maelbrancke v Proctor*, 2016 ONSC 1788 (CanLii).

separation and, as a result of the parties improperly filing their tax returns, had had her government benefits reduced by half. The Court granted the husband a writ of possession with respect to his home, which required the wife to find new accommodations. The Court ordered interim support in the amount of $600.00 per month, pursuant to the SSAG ranges, for a 3 month period, to be reduced to $114.00 per month thereafter. However, taking into account that the wife would need to find new accommodations, the Court also ordered the husband to make a $1,200.00 lump sum payment to the wife to assist her with the transition to a new home.

Certainly it can be said that, as a matter of routine practice, the SSAG ranges apply on an interim motion. However, while the SSAG bring a predictable framework to the issue of interim support, the traditional means and needs analysis has not been entirely replaced.

Of course, all spousal support orders are subject to an element of discretion and an interim order, in particular, is considered to be an imperfect attempt at rough justice. As a result, there is no bright line test as to what makes in a case exceptional on an interim motion. In most cases, this will require a review and analysis of each party's income (means) and his or her ability to meet ongoing and new financial obligations in the interim period (needs). Although difficult to produce on an interim motion, to the extent that counsel is able to produce evidence with respect to income and expenses, including the cost of maintaining mortgage and other payments, obtaining new accommodations, servicing debt, and re-training for the workforce, this type of evidence appears to have assisted the Court in many of the cases applying the interim exception.

3. SSAG and the Illness or Disability Exception: From Three Paths to One

Since the Supreme Court decision in *Bracklow,* and the later inception of the SSAG, cases involving the calculation of support payments to a disabled spouse have been fraught with inconsistency. Although illness and disability are clearly outlined as possible exceptions to applying the SSAG ranges in Section 12.4, Carol Rogerson and Rollie Thompson continue to note that without clear guidance as to the scope or operation of the exception, its application by the Courts has so far been widely divergent. From this inconsistency, three lines of decisions have emerged and are outlined in the SSAG:

1. The Court will increase the amount of support payable, and will extend the duration;

2. The Court will lower the amount of support payable, but will extend the duration;

3. The Court will make no exception, and resolve both amount and duration within the formula provided by the SSAG.[26]

There has been little movement by the Courts themselves to unify their approach to applying this SSAG exception, and factual differences between the cases remain the determining factor for which line of decisions is applied. Without clear guidance from a Court of binding authority, this trend is likely to continue. However in the publication of the Revised User's Guide in April 2016, the authors put forward their own guidance as to the preferred method for dealing with these exceptions, and since the Revised User's Guide's release, some Courts have taken note. As the Revised User's Guide states:

> Until appellate courts provide further guidance, these divergent approaches towards illness and disability will continue. As for us, we stated in the SSAG, "Our preference would be the … 'no exception' approach, which seems more consistent with the modern limits of spousal support as a remedy." We will have to await further developments in the law.[27]

While the Revised User's Guide is merely an informative document, and has no binding authority on the Courts, some Courts have begun to make specific reference to this passage and its sister passage in the SSAG itself, and have accordingly kept their decisions within the quantum and duration suggested by the SSAG ranges. There appears to some support growing for such a position, and as the Revised User's Guide states "this is the approach that was recommended in the SSAG and that was reflected in the *Bracklow* decision on re-trial."[28] Under this approach the Courts are in essence opting not to recognize any illness or disability as an exception, but instead holding that the SSAG formulas are sufficient for any determination in such cases.[29] The extent to which this exception begins to be further utilized in this manner is wholly dependent on the weight the Courts afford this opinion in the SSAG. For the time being, at least until an appellate Court rules otherwise, there may begin to be a shift towards the "no exception" approach as outlined in the Revised User's Guide and the SSAG, but it is still too early to tell for certain.

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[26] *Revised User's Guide*, *supra* note 10 at 62.
[27] *Ibid* at 64.
[28] *Ibid* at 63.
[29] *Ibid* at 64.

Decisions applying the illness and disability exception, particularly in short to medium term marriages, are often hard cases and attract difficult assessments of the means and needs the parties who are in dire circumstances. As a result, this exception is one of the most commonly applied, as these matters consistently make it to trial. It is most often applied in short to medium length marriages where the *without child formula*, or *custodial payor formula* creates a SSAG range that the Court deems to be too low, or too short.[30] This creates a reoccurring issue throughout the case law where the facts surrounding the means and needs of the payor and recipient appear to be the most salient facts, with the Courts applying the exception as necessary to achieve a result it deems just.

Based on the cases reviewed below, in determining whether the facts should attract the application of the illness or disability exception, the Courts will weigh factors such as:

- The nature of the entitlement (needs based versus compensatory);
- The nature of the disability, and how this impacts the disabled parties needs/means;
- The extent of the medical evidence available to support the claim for disability;
- The duration of the marriage, very short term marriages will often yield limited support durations, even where there is a need; and
- Whether there is anything about the circumstances that is so exceptional that the Court must look outside the ranges in the SSAG.

What follows is an overview of recent case law applying this exception, with the intent to highlight any general trends that are emerging. The decisions reviewed suggest that there may be some movement towards the application of the no exception rule in order to fit even cases with hard facts within the formulas suggested by the SSAG. However, in spite of some evidence of this as a possible trend, it must be noted that the application of the illness and disability exception continues to be applied along the three lines of cases outlined above, and is sure to continue to do so until there is further guidance on its application.

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[30] *Ibid.*

3.1 Moving towards "No Exception"

Jordan v Jordan[31] featured an application for a termination of ongoing spousal support payments. The parties had cohabited for 17 years, and at the time of the application they had been separated for 17 years. The Separation Agreement provided for monthly support of $1,800 per month. Mrs. Jordan had chronic back pain that prevented her from entering the work force, but was not sufficient to attract CPP benefits. The Court found her medical evidence to be inadmissible and insufficient.

The Court held that even if it was wrong in its determination of the extent of Mrs. Jordan's disability, the facts would still not attract an indeterminate support order. Citing the Revised User's Guide, the Court stated:

> However, even if I am wrong and the claimant's disability remains a factor to be considered in the duration of spousal support, this does not necessarily demand an indeterminate support order. The *Spousal Support Advisory Guidelines: The Revised User's Guide*, (Ottawa: Department of Justice, 2016) state that the SSAG support the "no exception" approach to a disabled spouse claiming support: 63. Support may be given at the higher end of the range, but it ought to be time limited in accordance with formula ranges. There is support from the Court of Appeal for this approach: *Powell v. Levesque*, 2014 BCCA 33 (CanLII) [Powell]; *Shen v. Tong*, 2013 BCCA 519 (CanLII) at para. 86. In *Powell*, the Court of Appeal reiterated that even though one party may have an ongoing need for support, the need of that one party is not the sole criterion; the circumstances of both parties must be considered: para.30. As above, I am doubtful that the claimant has a need for spousal support. But even if she does, this does not warrant a support order when the respondent does not have the means to pay it.[32] [emphasis added]

In *Brown v MacKeen,*[33] a motion brought by the wife dealing with quantum of interim child and spousal support. In this case the parties had a long term traditional marriage which lasted 20 years, so there was we no real question as to entitlement or to duration. There were two children of the marriage, so the *with child formula* was applied. The central issue was the quantum of spousal support to be awarded in light of the wife's long term disability.

The Court found Ms. Brown's need for support to be self-evident, and in determining the quantum of support the Court canvassed the financial statements of both parties – using the means

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[31] *Jordan v Jordan*, 2016 BCSC 1354 (CanLii).
[32] *Ibid* at para 83.
[33] *Brown v MacKeen,* 2016 NSSC 4 (CanLii).

and needs of each as the primary consideration. Although the Court discussed the fact that illness and disability were enumerated exceptions under the SSAG, after reviewing the statements of income and expenses of both parties, and performing a means and needs analysis, the Court settled on support that was within the SSAG ranges of both parties (just below the high end of the husband's range and just below the low end of the wife's range).

Ward v Jones[34] is another case in which the Court resolved the question of support for a disabled spouse within the framework provided by the SSAG, without reference to the disability exceptions. Here the parties cohabited as spouses for 14 years. During the relationship, the applicant was involved in a serious car accident which prevented her from being able to work, and her only source of income was CPP disability benefits. The parties had drafted their own Separation Agreement without legal advice, and it specified that spousal support would be payable by the respondent in accordance with the SSAG for three years. It also stated that the terms could be varied by Court order. After the three years had elapsed the Respondent terminated his payments, and the Applicant sought to alter the quantum and duration. Following the cessation of support, the Applicant was left in poverty and unable to work, while the Respondent was earning over $100,000.00 per year. The Court reviewed *Bracklow* and *Gray*, and determined that:

> ...A sick or disabled spouse is entitled to spousal support when the marriage ends and a spouse has an obligation to support a former spouse over and above what is required to compensate the spouse for her loss incurred as a result of the marriage and its breakdown or to fulfill contractual support agreements.[35]

The Court found that based on the circumstances, the termination of spousal support after only three years was unconscionable. The Court granted the Applicant four more years of support as requested, noting that she would likely be entitled to indefinite support had she asked for such. In regards to quantum, the Court applied the SSAG, but awarded an amount slightly below the low end, which was again the amount requested by the Applicant. No explicit reference was made to the disability exception, although the wife's disability did factor into the Court's assessment of her request for increased quantum and duration.

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[34] *Ward v Jones*, 2015 ONSC 2752 (CanLii).
[35] *Ibid* at para 47.

In *BMP v SLB,*[36] the parties lived in a marriage like relationship for seven and a half years, and had one child together. The applicant was diagnosed with Crohn's disease early on in the relationship, and was chronically ill for the final few years before separation. While he had earned an income throughout the relationship, he took medical leave in 2011, and since that time his disability insurance had been terminated. In calculating spousal support, the Court made reference to the illness and disability exceptions in the SSAG, but made its determination in consideration of the factual circumstances of the parties as a whole. In spite of the exceptions, the Court's conclusion was within the ranges suggested by the SSAG, as they held that it would be appropriate to award the low end of the SSAG range, but for the maximum duration which was seven years. This case is somewhat unique in that it featured a custodial payor, and a claimant who was attempting to rely on the disability exception.

Powell v Levesque[37] dealt with the appeal of an application for a variation of spousal support that was denied at trial. The parties were a same sex couple that had lived in a marriage like relationship for 8 years, separating in 1998. The Applicant had paid spousal support for 12 years prior to the application, but the trial judge found that her early retirement from the military was not a sufficiently compelling reason to vary support. The respondent in this case suffered from a severe ambulatory disability and was unable to work throughout the relationship or after its breakdown.

The entitlement to support in this case was entirely needs based, and the Court was tasked with deciding whether, after 12 years, the appellant had satisfied her spousal support obligation. The Court was satisfied the issue could be resolved using the SSAG's guidance, and applied it without reference to the illness or disability exception. In determining that the support obligation had been satisfied, the Court stated:

> ...The circumstances that gave rise to the respondent's initial entitlement to support remained essentially the same for the variation application. The respondent continues to have few assets, she is unable to work by reason of her disability and other serious health issues, and she has an ongoing need for support. The appellant continues have the larger income albeit it has significantly decreased since the Consent Order. In these

[36] *BMP v SLB*, 2015 BCSC 448 (CanLii).
[37] *Powell v Levesque*, 2014 BCCA 33 (CanLii).

> circumstances, I am satisfied SSAG can offer guidance in determining the appropriate order.
>
> Assuming an eight-year relationship, an annual income of $52,000 for the appellant, and an annual income of $13,277 for the respondent, the SSAG "without child support" formula yields a range of spousal support in the amount of $387-$516 and a duration in the range of 4-8 years. At the time of the application, the appellant had paid spousal support of $500, which had increased to $658 (as of December 2010), for a period of 12 years. In these circumstances, I am of the opinion that the appellant's obligation to pay spousal support has been discharged and the respondent's entitlement to spousal support is at an end.[38]

In *Shen v Tong,*[39] the parties were married for three years, and had cohabited in a marriage like relationship for 4 years prior to that. There were no children of the marriage, but the mother did have a child from previous marriage for whom support was ordered. The appeal was brought by the wife on the grounds that the trial judge erred on four grounds, one of which was the limiting her spousal support to $1,500.00 per month for one year. The mother had been injured in an automobile accident prior to marriage, and was no longer able to earn income anywhere near she had prior to the accident. The medical evidence presented in support of the mother's disability was not entirely persuasive, and it appeared she was able to return to some kind of employment in a limited capacity.

The Court reviewed the law regarding the SSAG and the illness and disability exception, but concluded that the matter fell properly within the range suggested by SSAG formula. The Court used the mid-point of the range, and based on the short duration of the marriage fixed a three year limit on the support payments. In making this determination the Court looked at the short duration of the marriage, and the cumulative effect of the factors affecting her earning capacity, and determined that the facts in this case would fit properly within the range recommended by the SSAG:

> Although there is some uncertainty as to when or if Ms. Tong will return to full-time employment, it must be recalled that this is a relationship of relatively short duration. Further, Ms. Tong is now employed, although admittedly not earning anywhere close to her previous income and she has received a reapportionment of the family assets. She also has her own non-family assets. Quite apart from any disability she may suffer, of which there was a paucity of medical evidence at trial, her entitlement to non-compensatory spousal support should be of a limited duration. I am satisfied that the cumulative effect of the factors affecting her earning capacity supports an award for a fixed term of three

[38] *Ibid* at paras 42-43.
[39] *Shen v Tong*, 2013 BCCA 519 (CanLii).

> years, but not longer. The circumstances of this case are not so exceptional that this Court needs to look outside the SSAG to determine the duration or quantum of support. Mr. Shen should not be required to pay indefinite support. Given my conclusion in this regard, an order for review is not appropriate.[40]

In *RL v LAB,*[41] the parties were married for 14 years, and the only outstanding issue was spousal support. The wife in this case suffered from anorexia nervosa, which rendered her unable to work. There was strong medical evidence put forward to support the diagnosis, however the disability was not permanent, and if her recovery progressed she would be able to work within one to two years. In determining support, the Court referred to the SSAG, and settled on a quantum that was slightly higher than the SSAG range. The basis for this increase was the wife's need combined with a tax windfall the husband had received as a result of the wife's bankruptcy post separation. When determining the duration of support, the Court made specific reference to the disability exception, but also took note of the SSAG author's preference for the 'no exception' approach. As the husband was 67 years old and the wife's disability not likely to be permanent, the Court adopted the 'no exception' approach and found it would be unreasonable to extend the duration, instead ordering that spousal support should terminate within the mid-range suggested by the Guidelines.

Soschin v Tabatchnik[42] dealt with parties who had cohabited for period of 11 and a half years. Following separation the applicant had suffered two injuries which left her physically and mentally unable to work, and as a result her income was entirely from ODSP. Despite the applicant's disability, based on the nature of the relationship (both were independent and free to pursue career and educational goals), the Court concluded this was not an instance where the applicant could have expected to receive indefinite support. However, the Court did note the role the applicant's injuries and mental health conditions played in restricting her self-sufficiency. The Court concluded that a lump sum payment was appropriate under these circumstances, and settled on an amount that was representative of the mid-range of both quantum and duration.

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[40] *Ibid* at para 87.
[41] *RL v LAB*, 2013 PESC 24 (CanLii).
[42] *Soschin v Tabatchnik*, 2013 ONSC 1707 (CanLii).

3.2 Maintaining Higher Amount, Longer Duration

In *Embree v Embree,*[43] the Court dealt with an application for a final order as to spousal support and a retroactive claim for child support. The parties had been married and cohabited for 14 years, and were separated in 2004. The wife in this matter had been severely impaired in an automobile accident during the marriage and was no longer able to work. The husband had been paying interim spousal support of $1,750.00 pursuant to previous orders. Support was ordered in the mid to upper range of the SSAG, but the duration was made indefinite on the basis of the wife's disability, as stated:

> Ms. Daniels' long-term disability is an exception in the application of the SSAG to the limited duration of spousal support for this medium length marriage. In the circumstances of this marriage and her medical condition, the duration of support should not be limited to the length of the marriage. Given her disability, I find that spousal support should continue indefinitely.[44]

Black v Black[45] featured the appeal of a denied application for variation or termination of spousal support brought by Mr. Black. The marriage was short term and non-traditional, lasting for 8 years and 4 months, ending in 2003. There were no children of the marriage. Mrs. Black became ill with a major depressive disorder prior to the marriage in 2000 and withdrew from the workforce, following the marriage she was diagnosed with several other ailments that caused her to be permanently disabled. The parties had in place a domestic contract which stipulated the husband was to pay spousal support as well as the health premiums which the wife relied on.

The Court opined the motion judge's failure to apply the disability exception in this case, and concluded that on the basis of the short duration of the marriage, the nature of the wife's disability, and the fact that the husband had fully supported her needs for the last two years of the marriage, that the wife's case was exceptional and should be outside of the SSAG ranges.[46] The Court ordered that support should continue at the rate specified in the original domestic contract, including the health care premiums, and that it should be indefinite in duration.

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[43] *Embree v Embree*, 2016 BCSC 415 (CanLii).
[44] *Ibid* at para 100.
[45] *Black v Black*, 2015 NBCA 63 (CanLii).
[46] *Ibid* at para 28.

Knapp v Knapp[47] was a case where the parties were married for 8 years, but had cohabited for 12.5. While there were no children of the marriage, the wife had a child from a previous relationship, and the husband stood in the place of a parent. The wife in this case suffered from severe mental illness and was in receipt of CPP disability benefits.

In making its calculations as to the quantum and duration of spousal support, the Court assessed the totality of the circumstances and concluded that they warranted a variation from the SSAG ranges suggested. In calculating the quantum of support the Court opted for the high end of the range, and also opted to include the husband's bonus in calculating income, which led to further upward adjustment. The Court set the duration as being indefinite, but ordered that there should be a review *de novo* after 6 and a half years. This was decided on the basis that the wife had shown positive reaction to medication in the past, and the child from a previous relationship would be finished post-secondary education at that time. While the quantum was high, and the duration indefinite, it was qualified by a review order which could take place after the minimum SSAG duration was reached.[48]

In *Aujla v Singh,*[49] the parties were married for just under 5 years, with no children. Two years prior to the end of the marriage, the wife was diagnosed with multiple sclerosis, and by the end of the marriage was no longer able to work or attend to her own care. At the time of trial the wife had begun living in a nursing home, and was unable to perform even basic tasks, and her only income was meagre disability benefits through CPP and Manulife.

The Court recognized the importance of relying on the SSAG, but noted that the SSAG itself recognizes exceptional factual circumstances. The Court thoroughly reviewed the illness and disability exception in the SSAG, and even made specific reference to the drafters' preference for the "no exception" approach, stating "[a]s noted in the Guidelines themselves, the preference of the authors is "No Exception", that is, an amount should be fixed within the appropriate range, notwithstanding the recipient's disability."[50] Based on the meagre income of the parties, the

[47] *Knapp v Knapp*, 2014 ONSC 1631 (CanLii).
[48] *Ibid* at paras 51-53.
[49] *Aujla v Singh*, 2012 ONSC 5217 (CanLii).
[50] *Ibid* at para 39.

application of the SSAG *without child* formula produced a very low amount that was payable for only 5 years.

In resolving the matter, the Court weighed the wife's circumstances, and found that this was an appropriate circumstance in which to exceed the Guidelines, stating:

> While the authors of the Guidelines suggest that in a case involving disability the best approach is to stay within the Guidelines, I am prepared to exceed them to an extent in this case. The respondent has multiple sclerosis. She is in a wheelchair, and cannot do anything but the most basic things. She is unable to look after herself in any meaningful way. She is in a nursing home, and will likely be there for the balance of her life. Her income is very modest.[51]

Thus, the Court opted to go outside of the SSAG ranges and awarded approximately one and a half times the maximum quantum ($300.00 per month), and made the obligation extend for an indefinite duration.

Van Rythoven v van Rythoven[52] featured an appeal by the husband of a final order for indefinite spousal support. In this case the parties had been married for 13 years, and had entered into an agreement for time limited spousal support following separation. The wife had been unsuccessful in prior applications to extend the period of spousal support, but the medical conditions which had plagued her during the marriage had worsened and she was no longer able to work. At the time the matter was heard her only income was from ODSP, and her means were very meagre. The applications judge had considered the SSAG, but based on the means and needs of the parties, concluded they would be of limited utility. The Divisional Court supported this reasoning and the departure from the SSAG and confirmed that the appropriate quantum of spousal support was at the high end of the range for an indefinite duration.

In *Dingle v Dingle,*[53] the Court dealt with the issue of support stemming from a marriage of 9 years. The applicant suffered from Fibromyalgia and Chronic Pain syndrome among other conditions, had been unable to work with any consistency since the marriage began. Post-separation, she relied on social assistance, and the help of family and friends to support herself. In

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[51] *Ibid* at para 55.
[52] *van Rythoven v van Rythoven*, 2010 ONSC 5923 (Div Court) (Westlaw).
[53] *Dingle v Dingle*, 2010 ONCJ 731 (CanLii).

making its determination, the Court made its calculations pursuant to the SSAG, but determined the formula outcome to be inappropriate given the length of the marriage and the comparative financial circumstances of the parties. The Court made reference to the disability exceptions, specifically noting the drafters' preference for 'no exception,' but was not prepared to time limit the award, as the Court held:

> I am not prepared to time-limit the award. This is a long-term disability case, not a case where the support is designed to assist the applicant in a transition to self-sufficiency.[54]

Thus the final order was for support in the upper end of the range suggested by the SSAG, and was to be paid on an indefinite basis, subject only to a material change in circumstances.

3.3 Lower Quantum, Longer Duration

Cases which lower the quantum, but extend the duration were the most infrequent of the three. In *Gray v Gray,*[55] the parties were married for approximately 16 years, and had four children. The mother had not worked since 1994 when she suffered a suspected heart attack, and was ultimately diagnosed with leukemia. She had been unable to work since that time, and was in receipt of long term disability and CPP disability benefits. This matter was an appeal by the mother from a motion by the father to end child and spousal support.

The Court of Appeal found that the motion judge had erred in failing to take the SSAG into account when assessing support. This case differs from those above somewhat as there was a strong compensatory claim and a persisting need, and it was on this basis that Court opted to choose the low end of the SSAG range, but to extend the obligation indefinitely, subject to a material change in circumstances. As the Court stated in determining the indefinite range:

> The duration of support is also an issue that ought to be contemplated under the SSAG. For a 16 year marriage, with the incomes of these parties, the SSAG suggest support for a duration of 8 to 16 years from the date of separation, subject to variation and possibly review. The motion judge declined to terminate spousal support, and instead granted an indefinite award, subject to review. He noted that Ms. Gray continued to need support,

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[54] *Ibid* at para 46.
[55] *Gray v Gray,* 2014 ONCA 65 (CanLii).

> based on her income and precarious health. I agree in this instance, that support ought to be indefinite, until a review occurs as a result of a material change in circumstance. [56]

In *Hickey v Princ,*[57] the parties were married for 17 years, and there were no children of the marriage. The wife suffered from fibromyalgia and chronic fatigue syndrome, in addition to other cognitive and neurological difficulties, and was unable to work outside of the home. This matter was an appeal to the Divisional Court of a successful motion by the husband to terminate spousal support.

This case offers a good example of the impact of the divergent approaches by the Courts to the issue of spousal support and disability. The motions judge had applied the SSAG and determined that there was no further entitlement to spousal support, citing the July 2008 publication of the SSAG, he concluded that illness did not equate to a never ending support entitlement.[58] The Divisional Court disagreed with this however, and following *Gray*, they concluded that the nature of the wife's disability was such that she would not be able to reach self-sufficiency and the indefinite obligation the husband was attempting to terminate should be maintained. The matter of disability was dealt with summarily as the Court concluded that "the Appellant remains disabled and unable to support herself, and there is no prospect that her situation will change in the future. She continues to need support. Support ought to be indefinite."[59] The inconsistent approach between Courts is very apparent in this case, and shows the difficulties the Courts have in making these assessments without clear guidance.

In *Schaldach v Schaldach*[60] the Court dealt with a motion to vary spousal support, and a cross-motion to increase the amount of support payable. In this case the parties had been in a traditional marriage for 13 years, with the mother largely staying at home to care for the parties' two children. The mother suffered from a variety of health problems and was also in a number of car accidents, including one major one shortly after the divorce was granted. The culmination of her illnesses severely impacted her ability to find employment, and for that reason, the original spousal support order made in 2001, was not time limited. The husband sought to terminate spousal

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[56] *Ibid* at para 49.
[57] *Hickey v Princ,* 2015 ONSC 5596 (CanLii).
[58] *Ibid* at para 104.
[59] *Ibid* at para 11.
[60] *Schaldach v Schaldach,* 2015 ONSC 1574 (CanLii).

support on the basis that he had fulfilled his obligation by paying for support for nearly 18 years, when the marriage itself was only 13 years in duration.

The Court referred to *Bracklow* and balanced the objectives of spousal support, concluding that the commitment of marriage involves the potential for a lifelong obligation. Thus the Court held that in spite of the husband paying for longer than the SSAG would suggest, to discontinue spousal support would abandon the mother to destitution, and so fairness and the obligations inherent in the marriage relationship dictated that his spousal support obligation should continue. It is worth noting that the entire analysis was performed within the context of the husband reaching the threshold for a material change in circumstance, which was not met. The Court did warn that the wife should financially prepare for such a material change to occur in the future as the Husband neared retirement. In regards to the wife's motion to increase support, the Court agreed that the un-indexed amount agreed upon in 2001 was too low, and thus increased the support payable by the Husband to the low-end of the SSAG range. No explicit mention was given to SSAG disability exception, but the wife's disability played a large role in the Court's determination of her ongoing need for support.

3.4 Other Issues Arising in Disability Cases

In the recent update to the Revised User's Guide, the authors also remind us that there are additional issues which can arise in disability cases, as reproduced below:

- More complex issues of entitlement may arise when the disability occurs after separation; see *Tscherner v. Farrell*, above; *Soschin v. Tabatchnik*, above; and cases discussed below under "Changing Incomes".

- In disability cases where the payor is a custodial parent, the needs of children need to be balanced against the needs of the disabled spouse: see *Tscherner v. Farrell*, above; *Patel*, above; and *Kuziora v. Fournier*, 2012 ONSC 1569. See also the discussion of the custodial payor formula, above under "The *With Child Support* Formula".

- It is also important to note the income issues that can arise in disability cases. CPP disability payments are included in income but social assistance payments are not, even if labelled ODSP or AISH. Workers' compensation benefits are included in income but are non-

taxable, so will need to be grossed up. Most long-term disability insurance payments are also non-taxable, as it common for these insurance schemes to be employee-funded.[61]

4. How do a Child's Special Needs Impact Quantum and Duration?

While the illness and disability exception may be argued in situations where a spouse is unable to work or is limited in his or her capacity to work due to health issues, exception 12.10, "Child's Special Needs," may be argued when it is the child of the relationship who is affected by illness or disability. The purpose of this exception is to recognize that the primary caregiver to a child with special needs may be unable to work or be limited in his or her capacity to work on a full-time basis, as a result of his or her child care responsibilities. Even when parties have outside help, children with special needs may still require more attention than a party working full-time is able to give them. In some cases, raising a child with special needs may be a full-time job in itself.

In cases where there is a child with special needs, the responsibilities of the primary caregiver may be significant and may negatively impact both short and long-term earning capacity. The exception may be used to argue that either the SSAG quantum or duration is inappropriate, or both. The issues of quantum and duration that may be raised in the case of a child with special needs are detailed in the SSAG. Chapter 12.10 provides:

> A child with special needs can raise issues of both amount and duration in spousal support law, issues that may require an exception.
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> 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.
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> 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

[61] *Revised User's Guide*, *supra* note 10, at 64.

needs child may not fully reflect all the costs imposed upon the recipient spouse's household by that child.[62]

According to the Revised User's Guide, the leading case on this exception is the decision of the Manitoba Court of Appeal in *Rémillard v Rémillard*,[63] 2014 MBCA 304. In that case, the parties had a 16-year relationship and had two children, one of whom died shortly after the parties separated and one of whom was severely disabled and required constant care. The parties' surviving child was 12 years old at the time of trial.

The mother, as primary caregiver, had stayed home to care for the child since the child's birth and continued to care primarily for the child after separation. The father had pursued post-secondary studies at the beginning of the relationship and became a professional engineer. By the time the parties went to trial, the father's income exceeded $180,000.00. The mother remained unemployed after separation, but she repartnered and her new partner earned a good income. They also had a child together.

The trial judge was clearly more persuaded by the father's evidence than she was by the mother's evidence. She ordered that the Father pay the Table amount of child support based on an income of $150,000.00. She found that the child was not in need of child support based on an income over $150,000.00, given that there was community support available to her, both financial and otherwise. With respect to spousal support, the judge focused largely on the principle of self-sufficiency and found that the mother had not made reasonable efforts to become self-sufficient since separation. She was of the view that there was sufficient community support available to assist the mother in caring for the child to allow her to seek full-time employment, or, in her words, to do "anything she wants."[64] The trial judge imputed an income of $25,000.00 per year to the 40-year-old mother "approximately 20 months after the death of the parties' older child and 8 months after the birth of her younger child."[65] She ordered gradually decreasing spousal support, which

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[62] *SSAG, supra* note 2, at 70.
[63] *Rémillard v Rémillard*, 2014 MBCA 304 (CanLii).
[64] *Rémillard v Rémillard*, 2013 MBQB 99 at para 37, rev'd 2014 MCBA 101 (CanLii).
[65] *Rémillard, supra* note 63, at para 23, quoting paragraph 42 of the trial judgment.

terminated after three years. (The trial judge also ordered the mother to pay double the father's bill of costs.)

The quantum of support ordered by the trial judge, even in the first year, was well below the SSAG ranges. The trial judge found that the SSAG did not apply because the mother was cohabiting with a new partner and because the child support payments already resulted in a "significant monthly income to the mother,"[66] given the benefits that the child was receiving.

The Manitoba Court of Appeal allowed the mother's appeal of the child and spousal support awards. The Court found that the trial judge had erred by failing to start with the presumption that the Table amount of child support was appropriate. The Court found the child was entitled to benefit from the Table amount, based on the father's income. With respect to spousal support, the Court found that the trial judge's emphasis on the principle of self-sufficiency resulted in an award that did not adequately reflect the compensatory support to which the mother was entitled. Among other errors, the Court found that the trial judge was wrong to conclude that the home care available to the child was sufficient to allow the mother to return to full-time employment. The mother sought spousal support in the lower range of the SSAG and a review in five years.

The Court of Appeal confirmed that the SSAG had a role to play in the determination of spousal support in this case, even if the mother had repartnered, and referred specifically to section 14.7 of the SSAG.[67] In determining the quantum of support that was appropriate, the Court specifically considered the SSAG exception relating to children with special needs, as well as a number of factors, including the mother's entitlement to compensatory support, her continuing caregiver role for the parties' child, the father's income and the mother's new partner. The Court ordered spousal support within the range of the SSAG ($4,000.00 per month, which was more or less the mid-range) for the months leading up to the mother's cohabitation with her new partner. From that point onward, the Court ordered spousal support that was slightly below the low range of the SSAG ($3,000.00). The Court agreed with the mother that the spousal support should be

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[66] *Ibid* at para 22.

[67] *SSAG*, *supra* note 2. Section 14.7 of the SSAG refers to the recipient spouse's remarriage or repartnering and the effect of this repartnering on spousal support.

indefinite, given that "this is a relatively long-term marriage that involves a child who will never gain independence"[68] and that it was unrealistic to expect the mother to become self-sufficient within the five-year limit imposed by the trial judge. The Court allowed for a review in five years.

Shortly before the *Remillard* decision was released, Justice Zisman of the Ontario Superior Court analyzed the SSAG exception for children with special needs in another difficult case involving not one, but two children with special needs, and parties with relatively modest means. In *Krause v Zadow*,[69] the parties were married for 10 years and had three children, two of whom were special needs children with Autism Spectrum disorders. The mother was the children's primary caregiver. Following separation, the parties entered into a separation agreement, whereby the father agreed to pay spousal support that was well above the SSAG ranges, with no termination date. According to the terms of the agreement, the spousal support could be reviewed annually at the request of either party or upon a material change in circumstances.

Nineteen months after the parties entered into the separation agreement, the father's income decreased by $30,000.00 (from $120,000.00 to $90,000.00). He contacted the mother requesting a decrease in his support obligations. The mother did not agree to any reduction in support. Then, two and a half years later, the father's employment was terminated. The mother did not consent to a change, which led the father to commence a motion to change.

At the time the motion was heard, the father had secured new employment, but his income was $72,000.00. The mother was working 10 hours per week and earning an income of approximately $7,000.00. The father argued that his spousal support obligation should be reduced and then terminated after 8 years. The mother argued that the father should pay spousal support based on an imputed income of $100,000.00 and that the payments should continue indefinitely because she could not work full-time due to the needs of the children. Neither party had any significant assets.

The Court in *Krause* found that there had been a material change in circumstances requiring a variation of spousal support. In considering the appropriate amount of spousal support to order, the Court found the SSAG exception for children with special needs was applicable. The Court

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[68] *Rémillard, supra* note 63, at para 144.
[69] *Krause v Zadow*, 2014 ONCJ 475 (CanLii).

found that it was appropriate to use the actual incomes of the parties in considering the support payable. The Court awarded the mother spousal support of $700.00 per month, which was significantly higher than the SSAG range and left the mother with 63.5% of the parties' net disposable incomes, but at a ratio similar to the support in the parties' separation agreement.

The Court refused to make the support award time-limited. The Court held that it was unrealistic to assume the mother would be able to work full-time in the foreseeable future given her childcare responsibilities. The Court also inferred from the separation agreement, which had no termination date for spousal support, that the parties knew "that the mother's childcare responsibilities would interfere with her ability to be self-supporting and would curtail her job opportunities."[70]

M(SR) v M(NGT),[71] is another case that specifically considered the special needs of the child exception. In this case, the parties were in a relationship for nine years and had two children, one of whom was diagnosed with autism and later, leukemia. The child was receiving extensive therapy and treatments to treat both conditions.

The British Columbia Supreme Court indicated that this was a strong case for application of the exception. While the Court recognized that the father had been regularly and actively involved in the care of the child with special needs, it found that the lion's share of parental involvement of the child in therapy had been with the mother, since the father had a successful career and was away for much of the day at work. The mother's care of the child was considered by the Court to be more than a full-time job. The Court recognized that the demands on the mother and the costs of the child's care and treatment added to the financial burden in the mother's home, even though many of the costs were section 7 expenses, which were shared by the parties.

In *M(SR)*, the Court was clear that the exception to the SSAG applied, and in fact, stated that it was "hard to imagine a case more suited to" the application of the exception.[72] Nevertheless, the Court proceeded to order that the father pay spousal support *within the range of the SSAG* (slightly less than the high range). The father had proposed less than the low range of spousal

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[70] *Ibid* at para 79.
[71] *M(SR) v M(NGT)*, 2012 BCSC 820 (CanLii).
[72] *Ibid* at para 49.

support, resulting in approximately equal net disposable incomes for the two households, but the Court found this proposal to be inappropriate considering that the mother was primarily responsible for maintaining a home for three people. The Court, while endorsing the exception for a child's special needs, may have decided to stay within the range of the SSAG because of the relatively high quantum of support: spousal support of $14,000.00 per month, and child support of $7,140.00 per month.

There are cases where the Courts have ordered spousal support outside of the SSAG ranges in consideration of a child's special needs, without ever referencing the SSAG exception. In *Jans v Jans*,[73] the parties had a 21-year relationship and three children, two of whom remained children of the marriage for support purposes at the time of the trial. The older child did not require ongoing care at the time of trial as she was a full-time post-secondary student. However, the parties' youngest child remained a minor, and also had Down's syndrome. The parties had a traditional marriage: the mother cared for the children and the father worked full-time outside of the home.

The mother's role as primary caregiver to the children was particularly demanding during the marriage and following separation due to the disability of the parties' youngest child. That child required extensive care, and the mother had little respite from her responsibilities as his primary caregiver. Post-separation, the father had little to do with the parties' youngest child and left the mother to care for him. The mother worked two part-time jobs while caring for the youngest child in order to pay her household expenses. Her annual income was approximately $25,000.00 per year. The father was self-employed and had a seasonal business, working only 8 months of the year. His income was approximately $42,000.00 per year.

The Court found that the father was able to earn some income during the 4 months when he was not operating his business, and imputed an income of approximately $50,000.00 to him. The Court found that the SSAG ranges were inappropriate given the parties' roles during the relationship and post-separation, and notably, the fact that the mother was the sole caregiver for a disabled child, which made it difficult for her to improve her financial situation.

[73] *Jans v Jans*, 2013 ABPC 199 (CanLii).

The Court did not specifically refer to the SSAG exception for parents of children with a disability in *Jans*. However, the Court stated that the SSAG did not "sufficiently take into consideration the fact that the mother is solely responsible for the financial effects of having to care for a disabled child," and proceeded to depart from the SSAG range and order spousal support that was higher than the high range. The Court was of the view that if the father's child support obligation decreased in the future, the father's spousal support obligation should be re-examined.

There are a few conclusions that may be drawn from these cases. First, caring for a child with special needs can be as or more demanding than a regular full-time job and can make it very difficult for the caregiving parent to improve his or her financial situation post-separation. Second, reference by the Court to the SSAG exception for a child with special needs does not necessarily result in an award that is higher than the SSAG ranges for quantum or longer in duration. In some circumstances, it may still be appropriate to use the SSAG ranges, as in *M(SR)*.

Third, there are a number of factors that may be considered by the Court in determining the appropriate spousal support payable in a case where a child has special needs, the most notable being the cost of caring for the child and the impact of the child care responsibilities on the recipient spouse's employment prospects. In many cases, including those summarized above, a parent who is primarily responsible for caring for a child with special needs simply *cannot* work full-time or at all. At the same time, that parent may have very high household expenses, given the child's special needs, and not all of these expenses may qualify as section 7 expenses. This can cause significant financial hardship for the recipient spouse. In order to try to remedy this problem, the Courts have made spousal support awards, where in the recipient spouse may have a higher net disposable income than the payor spouse or the duration may be extended.

5. Can We Craft Our Own Exception?

While most "exceptional" cases are likely to fit within one of the eleven exceptions outlined in Chapter 12, the SSAG "recognize that any list of itemized exceptions will not be exhaustive" and that "[t]here will always be unusual and even one-of-a-kind fact situations in spousal support cases, as in family law generally."[74] Indeed, in *Castedo v Haldorsen*,[75] Justice

[74] *SSAG, supra* note 2, Chapter 12.
[75] *Castedo v Haldorsen*, 2016 ONSC 3870 (CanLii).

Doyle specifically noted that "the exceptions are not meant to be exhaustive as the authors acknowledge that there could be other exceptional circumstances which would require a departure from the ranges from the SSAGs..."[76]

Given the discretionary nature of spousal support orders, there is room to craft new exceptions on a case-by-case basis. In *Castedo*, the parties had been married for 17 years but had no children. The wife earned approximately $89,000.00 per year; while the husband previously had earning potential, he suffered from a variety of medical issues following a car accident prior to separation and had difficulty sustaining employment. Pursuant to the terms of a separation agreement, the wife agreed to pay $1,400.00 per month in spousal support, with a review to take place in May 2016. Following separation, the wife re-partnered and gave birth to two children in 2014 and 2016. In addition to the obligations to her infant children, including child care costs, the wife also paid for the parties' loss on the matrimonial home and continued to pay their debts. Both parties struggled financially, and the wife claimed that she did not have the ability to pay spousal support in the range suggested by the SSAG, which was between $1,389.00 per month at the low end and $1,825.00 per month at the high end.

On the review, Justice Doyle departed from the Guidelines and ordered the wife to pay support in the amount of $1,000.00 per month, below the low end of the range. The basis for the departure from the Guidelines was that "there is not enough money to go around,"[77] which Justice Doyle unpacked as follows:

> [128] The Court is departing from the formula ranges in this case for the following reasons:
>
> i. she is servicing the debts from the marriage;
>
> ii. she has a second family with two infants needing her financial support;
>
> iii. the Respondent needs to move towards financial independence including determining with certainty his medical needs and then move towards full time work, if possible; and

[76] *Ibid* at para 130.
[77] *Ibid* at para 129.

iv. the parties themselves recognized the fairness of departing from the SSAGs ranges in their agreement when they permitted the Applicant to pay less than the SSAGs ranges as she was assuming the joint debts.

None of these bases, taken on their own, can be said to represent a new exception. For example, there is already an exception in Chapter 12.2 for debt payments and, while not a recognized exception, Chapter 14.8 considers that second families may have an impact on a payor's ability to pay spousal support to a spouse from a prior relationship. Although the case law is by no means settled on this point, Justice Lang specifically acknowledged in *Fisher v Fisher*[78] "that while courts generally recognize a "first-family-first" principle (which provides that a payor's obligations to the first family take priority over any subsequent obligations, inevitably new obligations to a second family may decrease a payor's ability to pay support for a first family."[79]

One can imagine any number of scenarios which might result in "not enough money to go around," but which do not otherwise meet the tests for the debt payment or undue hardship/basic need exceptions. In the Revised User's Guide, Professors Rogerson and Thompson raise unusually high pension contributions or medical expenses as possible bases for departing from the Guidelines.[80] In *Briere v Saint-Pierre*, for example, the Court took into account the payor's mandatory pension contributions to the teacher's pension plan, in the amount of $8,256.00 per year.[81] Spousal support was ordered in the amount of $2,000.00 per month, just below the low end of the range of $2,265.00, although the payor was also ordered to continue making the mortgage payments on the parties' condominium until it was sold and the minimum payments on the parties' joint debts.

Of course, there might also be special circumstances where the recipient simply does not need support in the amounts set out by the Guidelines. In *Schloegl v McCroary*,[82] for example, the Court ordered spousal support of $1,000.00 per month, below the low range of $1,154.00 per

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[78] *Fisher v Fisher*, 2008 ONCA 11 (CanLii).
[79] *Ibid* at para 39.
[80] *Revised User's Guide, supra* note 10, at 71-72.
[81] *Briere v Saint- Pierre*, 2007 CanLii 29338 (ON SC). Note that the Court also took into account the recipient's voluntary RRSP contribution.
[82] *Schloegl v McCroary*, 2008 BCSC 1722 (CanLii).

month, on the basis that it was the wife's intention to reside with her mother on a long-term basis and there was no evidence that she would be required to pay any rent.

It may also be possible to argue in some parts of the country that the Guidelines ranges provide too much support in more communities where the cost of living may be less than in a larger centre, such as Toronto. For example, in *Boju v Corr*,[83] the wife sought, and Justice Harvison Young ordered, interim support in the amount of $500.00 per month which was significantly below the low end of the range, to take into account that the mother was living with her parents in Arizona, where the cost of living was lower than in Ontario. This reasoning was also applied in *Snape v Snape*,[84] albeit in reverse, where Justice Sachs held that "[t]he amount ordered by way of spousal support is higher than the high end of the Spousal Support Advisory Guidelines, but given the costs associated with raising children in Metropolitan Toronto and the other circumstances of the parties, the amount is appropriate."[85]

While the SSAG are a helpful tool for the Court and the parties, they are still "informal and advisory" and "departures from the formulas can take place even if there is no listed 'exception' in Chapter 12."[86] Although purists would likely say that Justice Doyle's decision in *Castedo* does not represent a new exception, her focus on the principle that "there is not enough money to go around" is instructive and, in some ways, suggests that the traditional means and needs analysis may still be an appropriate tool in certain exceptional circumstances. In cases where the SSAG ranges appear to be inconsistent with a realistic assessment of the payor's ability to pay and/or the recipient's need, it may be the right case for the application of one of the listed exception in Chapter 12…or a new one altogether.

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[83] *Boju v Corr*, 2009 CanLii 3781 (ON SC) (CanLii).
[84] *Snape v Snape*, 2011 ONSC 3857 (CanLii).
[85] *Ibid* at para 30.
[86] *Revised User's Guide*, *supra* note 10, at 71.