



Torkin|Manes BULLETIN

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FOCUS ON FAMILY LAW

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Spousal support advisory guidelines: a draft proposal

The proposed Spousal Support Advisory Guidelines (the "Advisory Guidelines") were released in late January of 2005. The Advisory Guidelines were prepared by Professor Carol Rogerson of the University of Toronto, Faculty of Law and Professor Rollie Thompson of Dalhousie Law School. The Advisory Guidelines were released in the form of a Draft Proposal, released to the judiciary, lawyers and the public in a form inviting comments and feedback. The Advisory Guidelines are not being legislated; they are not legally binding and their adoption and use will be voluntary. Further, the Advisory Guidelines do not deal with entitlement; just amount and duration of support once entitlement has been found.

Knowledge of the Advisory Guidelines is important to anyone dealing with a spousal support claim. As such, we have reproduced sections of an Executive Summary of the Advisory Guidelines, prepared by Profs Rogerson and Thompson, for your assistance and comment. The full guidelines, including the complete Executive Summary, can be accessed on the Department of Justice Web site at www.justice.gc.ca/en/dept/pub/spousal/project/.

Executive Summary

There are two basic formulas in the proposal: the *without child support formula* and the *with child support formula*. The dividing line between the two is the absence or presence of a dependent child or children of the marriage, and a concurrent child support obligation, at the time spousal support is determined. Both formulas use **income sharing** as the method for determining the amount of spousal support, not budgets. The formulas produce **ranges** for the amount and duration of support, not just a single number. The precise number chosen within that range will be a matter for negotiation or adjudication, depending upon the facts of a particular case.

The *without child support formula* is built around two crucial factors: the **gross income difference** between the spouses and the **length of the marriage**. Both the amount and the duration of support increase incrementally with the length of the marriage, as can be seen in the summary box below. The idea that explains this formula is **merger over time**: as a marriage lengthens, spouses more deeply merge their economic and non-economic lives, with each spouse making countless decisions to mould his or her skills, behaviours and

finances around those of the other spouse. The gross income difference measures their differential loss of the marital standard of living at the end of the marriage. The formulas for both amount and duration reflect the idea that the longer the marriage, the more the lower income spouse should be protected against such a differential loss. Merger over time captures both the compensatory and non-compensatory spousal support objectives that have been recognized by our law since *Moge* and *Bracklow*.

The WITHOUT CHILD SUPPORT FORMULA

Amount ranges from 1.5 to 2 percent of the difference between the spouses' gross incomes (the **gross income difference**) for each year of marriage (or, more precisely, years of cohabitation), up to a maximum of 50 percent. The range remains fixed for marriages 25 years or longer at 37.5 to 50 percent of income difference.

Duration ranges from .5 to 1 year for each year of marriage. However, support will be **indefinite** if the marriage is **20 years or longer in duration** or, if the marriage has lasted 5 years or longer, when the years of marriage and age of the support recipient (at separation) added together total 65 or more (the **rule of 65**.)

Because the guidelines are only advisory, departures are always possible on a case-by-case basis where the formula outcomes are inappropriate. Under both this

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formula and the *with child support* formula, the proposed guidelines do offer a short list of exceptions, intended to identify common categories of departures: a compensatory exception in short relationships, illness and disability, debt payment, prior support obligations, and compelling financial circumstances in the interim period.

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

There are three important differences between the *without child support* formula and the *with child support* formula. First, the *with child support* formula uses the net incomes of the spouses, not their gross incomes. Second, this formula divides the pool of combined net incomes between the two spouses, not the gross income

difference. Third, the upper and lower percentage limits of net income division in the *with child support* formula do not change with the length of the marriage.

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

THE BASIC WITH CHILD SUPPORT Formula

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

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

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

Duration under this basic *with child support* formula also reflects the underlying parental partnership rationale. Initial orders would be indefinite in form, subject to the usual process of review or variation. There would, however, be outside time limits on the cumulative duration of spousal support, which would structure the process of review and variation. There are two tests for duration and whichever produces the longer duration will apply:

- First is the longer-marriage test, which is modelled on the maximum duration under the *without child*

support formula, i.e. one year of support for every year of marriage, and which will likely govern for most marriages of ten years or more.

- The second test is the shorter-marriage test, which sets the outside time limit for support at the time that the last or youngest child finishes high school and which will typically apply for marriages under ten years. In these shorter-marriage cases, there will likely be review conditions attached. Relatively few cases will reach this outside time limit and those that do will likely involve reduced amounts of top-up support by that time.

As with the *Federal Child Support Guidelines*, there is a ceiling and a floor that sets the range of incomes to which the formulas apply. The ceiling is the income level for the payor spouse above which any formula gives way to discretion, set here at a **gross annual income for the payor of \$350,000**. The floor is the income level for the payor below which no support is to be paid, here set at **\$20,000**. To avoid a cliff effect, there is an exception for cases where the payor spouse's gross income is **more than \$20,000 but less than \$30,000**, where spousal support may not be awarded or may be reduced below the low end of the range. An additional exception is also necessary, to allow an award of spousal support **below the income floor** in particular cases.

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