

DIVORCEmate News & Views

For Users of DIVORCEmate Software

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“To SSAG or Not To SSAG, That Is The Question” The Whole Country is Talking!

For over 17 years, our DIVORCEmate News & Views has been an important source of information for our 6,000+ software users. Please ensure that it is circulated to all family law professional staff.

“No time to read the 139 page Spousal Support Advisory Guidelines, then read this abridged, newsletter summary of Christine’s paper first!”
- Mark Harris, President, DIVORCEmate

**“To SSAG or Not To SSAG,
That Is The Question!”**
S. Christine Montgomery, B.A., LL.B.

What are the Spousal Support Advisory Guidelines?

In January of 2005, the Federal Department of Justice released a paper entitled “Spousal Support Advisory Guidelines: A Draft Proposal” (the “SSAG”), prepared by Professors Carol Rogerson and Rollie Thompson. The SSAG are guidelines, which address the issues of amount and duration of spousal support. The SSAG are *not* legislated and operate on an advisory and completely voluntary basis only. The SSAG do not deal with entitlement to spousal support, just amount and duration of spousal support once entitlement has been found.

What are the formulas under the SSAG?

The SSAG provide two basic formulas (and one hybrid formula), which produce ranges for both the amount and the duration of spousal support. It is important to remember that amount and duration are interrelated parts of the formulas, and cannot be considered in isolation.

The first formula is the “Without Child Support” Formula, which applies when there are no children of the marriage, or when there are children, but they are no longer dependent as of the date of separation. This is the most straightforward formula.

The next formula is the “With Child Support” Formula, which applies when there are dependent children of the marriage *and* a concurrent child and spousal support obligation payable to the same person. This formula is very complex and *cannot be done by hand* unless you are a skilled lawyer, tax accountant *and mathematician*.

Finally, there is a hybrid formula that applies where the payor of spousal support is the custodial parent. While not as complex as the “With Child Support” Formula, it does require a gross-up of child support as part of its calculation, which is easily done by a computer program. ...hence, the introduction of our newest software – “CHEQUEmate” Spousal Guidelines Calculator!

What is CHEQUEmate?

The CHEQUEmate is the newest Tools+ 2005 module. CHEQUEmate quickly calculates the ranges of amount and duration of spousal support payments in accordance with the formulas contained in the SSAG.

What is the “Without Child Support” Formula?

Amount: ranges from 1.5% to 2.0% of the difference between the spouses’ gross incomes (the “gross income difference”) for each year of marriage (including pre-marital cohabitation), up to a maximum of 50%. The range remains fixed for marriages/cohabitation of 25 years or longer at 37.5% (1.5% x 25) to 50.0% (2% x 25) of the gross income difference.

Duration: ranges from 0.5 to 1 year for each year of marriage (including pre-marital cohabitation). Where the marriage/cohabitation is 20+ years, or where the marriage/cohabitation is 5+ years and the age of the recipient plus the years of marriage/cohabitation is 65+ years (“Rule of 65”), support will be indefinite in duration.

What is the “With Child Support” Formula for “Amount” (Sole, Shared and Split)?

Amount: Determine the range of spousal support amounts that would be required to leave the lower income recipient spouse with between 40% and 46% of the parties’ combined individual net disposable incomes (“INDI”):

INDI in Sole Custody and Shared Custody:

Payor’s INDI = CSG Income – Child Support (Basic Table + share of Special Expenses) – Taxes/ Deductions + Gov’t Benefits/Credits – Spousal Support

Recipient’s INDI = CSG Income – Child Support (Notional Basic Table + share of Special Expenses) – Taxes/Deductions + Gov’t Benefits/Credits + Spousal Support

INDI in Split Custody:

Payor’s INDI = CSG Income – Child Support (Basic Table for child(ren) living with recipient + Notional Basic Table for child(ren) living with payor + share of Special Expenses) – Taxes/Deductions + Gov’t Benefits/Credits – Spousal Support

Recipient’s INDI = CSG Income – Child Support (Basic Table for child(ren) living with payor + Notional Basic Table for child(ren) living with recipient + share of Special Expenses) – Taxes/Deductions + Gov’t Benefits/Credits + Spousal Support

What is the “With Child Support” Formula for “Duration”?

Duration: Spousal support is indefinite in form, with the latest of the following outside time limits:

a. Medium/Longer Marriage Test: one year of support for every year of marriage/cohabitation;

b. Shorter/Medium Marriage Test: number of years until youngest child finishes high school, subject to review, at a minimum:

- (i) where the children are pre-school age at time of initial order, no later than the month after the last or youngest child commences full-time school; or
- (ii) where the children are under 12 years at time of initial order, no later than the month after last, or youngest child, turns 12 years.

Where the marriage/cohabitation is 20+ years, or where the marriage is 5+ years and the age of the recipient plus the years of marriage is 65+ years (“Rule of 65”), support will be indefinite in duration.

Why is there so much confusion about “INDI”?

The INDI confusion may arise from the "boxed" definition of the “With Child Support” Formula found on page 68 of the SSAG, which does not expressly mention the + / - of spousal support in the first step, and is therefore somewhat misleading in its definition.

If, however, you look at the second step in the “boxed” definition, the necessary inclusion/deduction of spousal support from INDI, as appropriate, is implicitly evident, since the only way to determine the range of spousal support is to deduct it from the payor’s INDI and include it in the recipient’s INDI. (This was expressly done in the sample calculation in Appendix C of the SSAG, especially page 115.)

What makes this calculation of INDI so complex is the fact that as the spousal support amount changes, so do the Special Expenses’ component of Child Support (if applicable), the Taxes and Deductions and the Government Benefits and Credits. So the question

becomes, how do you solve for an answer, when the answer affects the components making up that answer? This spousal support range can only be determined by complex trial and error mathematical calculations, known as “iterations”. These iterations are most easily calculated by a computer and specialized software, namely CHEQUEmate.

So while it is important to understand the logic and mathematics that go into these tricky calculations, it’s not necessary to do these calculations yourself – all you have to do is push the “Calculate” button, and CHEQUEmate does the rest!

What amounts are deducted as “Child Support” in the calculation of each party’s INDI in the “With Child Support” Formula of SSAG?

The amounts differ for the payor and the recipient depending on the custody arrangement:

Custody	Payor	Recipient
Sole	Basic Table + Share of Special Expenses	Notional Table + Share of Special Expenses
Shared	Basic Table (even if payor is only paying setoff amount or is paying more or less than the setoff amount) + Share of Special Expenses	Basic Table (even if payor is only paying setoff amount or is paying more or less than the setoff amount) + Share of Special Expenses
Split	Basic Table (for children with recipient) + Notional Table (for children with payor) + Share of Special Expenses	Basic Table (for children with payor) + Notional Table (for children with recipient) + Share of Special Expenses

IMPORTANT: The recipient’s INDI does NOT include child support received from the payor.

“Notional Table” refers to a “notional” amount of child support that is deducted from the custodial party’s INDI to represent the money that party is presumed to spend on the child(ren) in his/her care. The “notional” amount is based on the basic table support under the CSG as a proxy measure of the custodial party’s contribution to the children in his/her care.

Sole and Shared custody often results in the same spousal support amounts under SSAG because the Basic Table amount in Shared is equal to the Notional Table amount in Sole although the child support amounts and the corresponding family NDI apportionment continue to be very different in Sole and Shared.

What is the difference between CHEQUEmate's INDI and SUPPORTmate's NDI?

Net Disposable Income ("NDI" in SUPPORTmate) is the "food, clothing and housing" money available (ie. the actual cash in hand) for each party *and* the child(ren) living with him/her, after payment of taxes, CPP, EI, other adjustments etc. and after receipt of government benefits including the Child Tax Benefit and GST credit, if any.

The payor's NDI also *removes* the actual child support paid to the recipient.

The recipient's NDI *includes* the actual child support received from the payor and does *not* remove a "notional" Table amount. The SSAG often refer to this as *Family* Net Disposable Income.

Individual Net Disposable Income ("INDI") under SSAG is the "food, clothing and housing" money available for each party individually, *not including* the child(ren) living with him/her. INDI *removes* the actual child support paid by the payor to the recipient and any notional support a custodial parent is presumed to spend on the children in his/her care. For a more detailed discussion of the child support excluded from INDI, see the question above.

In many cases, the range of support under the SSAG is very broad. How do I know where in the range support should be?

The SSAG discuss many factors to be considered in determining the appropriate placement of support within the range generated by the formulas. We have highlighted some of these factors for you.

The following factors *may* favour a support award at the higher end of the range:

- a. Recipient has a strong compensatory claim.
- b. Recipient has limited income.
- c. Recipient has limited earning capacity.
- d. Recipient has compelling needs & standard of living.
- e. The recipient is older.
- f. The recipient will be undertaking retraining or education in the immediate future, which is aimed at promoting self-sufficiency.
- g. There is no property to be divided.
- h. There are local or regional differences (e.g. parts of Ontario, especially 416 and 905 area codes).
- i. The recipient has primary care of very young children, several children and/or special needs children.
- j. The marriage is long term.
- k. The marriage is short with young children and a stay-at-home custodial parent.

The following factors *may* support an award at the lower end of the range:

- a. Recipient has a weak compensatory claim.
- b. Payor has limited income.
- c. Payor has limited earning capacity/ability to pay.

- d. Recipient does not have significant needs.
- e. Payor has significant needs.
- f. Recipient is younger.
- g. Unequal division of property in favour of recipient.
- h. Debts exceed assets and the payor is carrying a disproportionate share of debts.
- i. In the case of a traditional marriage, the payor has costs associated with going to work, in contrast to the non-working recipient.
- j. An incentive for the recipient to make greater efforts towards self-sufficiency is needed (although imputing income can also address this factor).
- k. There are local and regional differences.
- l. The payor has significant direct access costs (especially important when the payor is at the lower end of the income spectrum).
- m. The payor makes mandatory deductions for pension contributions (especially important when the payor is at the lower end of the income spectrum).
- n. Recipient has remarried/repartnered.

How do I know if I should be outside the SSAG range altogether?

Some of the above-noted factors may be so extreme as to push an award outside the formula ranges altogether. The formulas are intended to generate appropriate results in a wide range of *typical* cases; exceptions are required for *unusual* cases. Some of the factors considered "exceptions" under the SSAG are as follows:

- a. Debts exceed assets and the payor is carrying a disproportionate share of those debts.
- b. The recipient has a large compensatory claim disproportionate to the length of the marriage (particularly in short to medium length marriages).
- c. The recipient's illness or disability is not accommodated by the maximums in the ranges or by restructuring (eg. young recipient; short marriage; payor has low income).
- d. The payor (or recipient) has prior spousal or child support obligations, requiring that spouse's gross income to be adjusted prior to applying the formula ("first family first" exception). CHEQUEmate handles this exception.
- e. The recipient is a non-custodial parent from a short marriage with a young child (or children) who needs support in excess of the "without child support formula" to fulfil his/her parental role (the "parenting exception").
- f. Where there are compelling financial circumstances at an interim stage (eg. spouse carries a disproportionate share of housing expenses in short run).
- g. The payor's gross income is between \$20K and \$30K.
- h. The payor's gross income is below the income floor of \$20,000, but the payor still has an ability to pay spousal support (eg. payor lives with parents and has reduced needs/expenses).

These factors and exceptions are not intended to be an exhaustive list.

What issues are beyond the scope of the SSAG?

These issues include, among other things: post-separation increases in the payor's income or decreases in the recipient's income; re-partnering/remarriage, particularly in the case of the recipient; second families.

What is restructuring under the SSAG?

The SSAG permit spousal support awards to be "restructured" if a straight application of the formulas does not generate appropriate awards. "Restructuring" is the trade-off of amount against duration to arrive at an award within the global amount generated by the formula when amount is multiplied by duration. Awards may be restructured in three ways: front-end loading (increasing amount by shortening duration); extending duration (by decreasing amount); formulating lump sum payments (by combining amount and duration).

Is there a ceiling beyond which the SSAG formulas do not apply?

The SSAG provide that where the payor has a gross annual income of more than \$350,000, the formulas should no longer be applied to divide income. Instead, the court will have to exercise discretion. See chapter 7.1 of the SSAG. CHEQUEmate will flag a payor's gross annual income that is over \$350,000, but will continue to apply the formulas for the purposes of allowing the user to possibly formulate an argument as to how the court might exercise its discretion if it wished to award a very high amount of support (being mindful that the continued application of the formulas over the ceiling is not advocated by the SSAG).

Is there a floor below which the SSAG formulas do not apply?

The SSAG provide that where the payor has a gross annual income of \$20,000 or less, no spousal support should be payable. See chapter 7.2 of the SSAG. There is an exception, however, for support to be paid below the income floor in exceptional cases where the payor spouse has significantly reduced expenses (eg. living with parents).

Note that there is also the possibility of an exception to the formulas where the payor's income is more than \$20,000 but less than \$30,000 to eliminate a "cliff effect".

CHEQUEmate will flag a payor's gross annual income that is less than \$20,000, or between \$20,000 and \$30,000 inclusive, but will continue to apply the formulas for the purposes of allowing the user to formulate an argument as to whether or not an exception applies.

What is the difference between SUPPORTmate and CHEQUEmate? Do I need both programs?

CHEQUEmate provides a range of spousal support payments according to the SSAG, while SUPPORTmate allows the critical examination of this range and its effect

on NDI for the family, as well as the individual, in the context of each client's particular circumstances.

SUPPORTmate allows the user to put the SSAG support range into perspective by comparing cash flows and percentages for the payor as well as the recipient and children.

SUPPORTmate allows the brainstorming of taxable spousal support only, or any combination of child support (under the Guidelines or otherwise) combined with spousal support. SUPPORTmate calculates for five possible "what if" scenarios: the income taxes paid; GST, CCTB, NCB and refundable cash credits; net disposable income; net after tax cost or benefit to the payor and recipient.

Under the SSAG, there are a number of instances when one would want to engage in an in depth examination of the very criteria that SUPPORTmate analyzes:

- Placement of spousal support within the SSAG range;
- Exceptions to the SSAG formulas;
- Restructuring of support awards;
- Discretionary issues.

As Professor Rollie Thompson states:

"The use of SUPPORTmate and those family NDI numbers is really important, not just in this transition phase (where Ontario judges still think in family NDI terms), but also for the location of the right amount within the ranges. In particular, the family NDI numbers should be calculated and argued carefully in cases of shared and split custody. Also, I tell audiences that close attention to net disposable income numbers is critical for high end "Without Child Support" formula cases (those of 25 years or more at the ceiling) and at the low end for any case below \$30,000 and those just above \$30,000."

In short, SUPPORTmate complements CHEQUEmate, and is an essential tool in negotiating and advocating each individual client's spousal support position.

Will judges follow the SSAG?

This remains to be seen. Most judges will likely want to see the SSAG ranges for spousal support at the very least to use as a "litmus test", particularly in interim orders and case conferences.

We can tell you that we have shipped 200+ copies of Tools+ including CHEQUEmate to judges in Ontario, B.C., and other provinces across Canada! In addition, we have either trained or personally spoken to numerous members of the Judiciary and their support staff regarding SSAG formulae calculations.

Also, Justice Canada reported that 10,000 copies of SSAG were downloaded from the Justice Canada website within seven days of the Paper's release and 25,000 were downloaded to the end of April!

If you would like to obtain a complete copy of Christine's excellent paper regarding the SSAG, please go to our website at www.divorcemate.com.

What other interesting points should I know about SSAG?

- ☑ The SSAG are NOT legally binding, but are rather informal and completely voluntary.
- ☑ The SSAG provide a “check” or “litmus test” in case conferences or negotiations.
- ☑ The SSAG may have more application in interim orders.
- ☑ The threshold issue of entitlement is NOT addressed in the SSAG; entitlement is already assumed.
- ☑ The formula outcomes are only the first step in determining spousal support under the SSAG.
- ☑ Amount and duration are interrelated parts of the formulas, and cannot be considered in isolation.
- ☑ Regional differences (both within and between provinces) are NOT addressed in the SSAG (although position in the range *may* somewhat address these differences).
- ☑ Cost of living differences are NOT addressed in the SSAG, and will be relevant particularly where the parties live in disparate communities (although position in the range *may* somewhat address these differences).
- ☑ The definition of income under the SSAG is the same definition as the federal Child Support Guidelines (the “CSG”), which includes Schedule III adjustments and ss. 17, 18 and 19 (imputing income) adjustments.
- ☑ Imputing income can help to deal with the “disincentives of self-sufficiency created by generous amounts of spousal support” and may be fair and reasonable in subsequent reviews or variations.
- ☑ Be careful grossing up incomes in the “With Child Support” Formula; accounting for actual income taxes *and not “notional” income taxes* may skew results.
- ☑ The length of marriage under the SSAG *includes* any period of pre-marital cohabitation.
- ☑ The SSAG’s “Rule of 65” (length of marriage/cohabitation plus age of recipient) does NOT apply to marriages/cohabitation of less than 5 years.
- ☑ Spousal support may “cross over” from the “With Child Support” formula to the “Without Child Support” formula, by way of a variation, when the children cease to be “children of the marriage”.
- ☑ All spousal support orders/agreements are subject to the normal processes of variation and review according to the relevant legislation and the caselaw.
- ☑ Once the SSAG case law is established, look for changes to our Precedents+ Separation Agreement and Interim Separation Agreement.
- ☑ The SSAG are a work-in-progress, subject to discussion, experimentation and feedback.

With respect to the “With Child Support” formula:

- ☑ Orders are indefinite in form, with outside time limits; spousal support may well decrease or terminate altogether prior to the outside time limit.
- ☑ Be wary of the SSAG’s boxed formula which fails to +/- spousal support in calculation of INDI and which forgets to include payor’s Government Benefits and Credits.
- ☑ The more child support, the less spousal support.
- ☑ Child support paid by the payor is NOT included in the calculation of the recipient’s INDI.
- ☑ Mandatory pension contributions are *expressly* not allowed as deductions from income when calculating INDI.
- ☑ In shorter/medium length marriages, spousal support is subject to review, *at a minimum*, when the youngest child is in school full-time or when the youngest child turns 12 years. Reviews may be scheduled at different times and for other reasons as well, as ordered by the court or as agreed upon by the parties.
- ☑ In shared custody cases, *no* adjustment should be made to the child support paid even if the court orders or the parties agree that an amount more or less than the straight set-off amount (ie. the difference between the parties’ respective basic table amounts under the CSG) should be paid; this may need to be changed under the SSAG once the SCC releases *Contino v. Leonelli-Contino*.
- ☑ Length of marriage has no influence on quantum in the “With Child Support” formula.
- ☑ In cases where child support for an older child is determined under s. 3(2)(b) of the CSG, the authors of the SSAG have suggested that it might be advisable to use a variation on the “Without Child Support” formula to calculate spousal support, as set out in one of the questions above.