



**THE SPOUSAL SUPPORT ADVISORY GUIDELINES: AVOIDING
ERRORS AND UNSOPHISTICATED USE**

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Introduction

The Spousal Support Advisory Guidelines are in widespread use across Canada. They are influential in the determination of spousal support in many many peoples' post-separation lives. In the writers' jurisdiction, British Columbia, the Advisory Guidelines have been used to inform the appellate standard of review¹. So, while they are not themselves the law, it is fair to say that the Advisory Guidelines are now a very important part of legal practice.

The purpose of this paper is to explore some (by no means all) of the difficulties practitioners may encounter in applying the Advisory Guidelines and taking their results to court. Understanding the limitations of the Advisory Guidelines and their complexity is key to knowing when they are going to be sensible and helpful and when one may commit error by applying a formula without thinking.

Note that it is always possible to think up unusual facts and scenarios which do not fit with established law and which will create unrealistic results when the Advisory Guidelines are applied. However, such situations are best dealt with on an individualized basis – they are not amenable to formulaic analysis. The issues discussed in this paper are issues that arise on more than such a “one-off” basis. They include issues that arise in practice due to the necessity in many cases to use computer software to perform Advisory Guidelines calculations. These issues are not necessarily intrinsic to the Advisory Guidelines themselves. However, if software is required to implement the Advisory Guidelines, there is little practical utility in a distinction.

The specific issues discussed below are:

- 1) The Advisory Guidelines are complex. Treat them with care.
- 2) Income determination issues.
- 3) The Exception for compelling circumstances on interim applications.
- 4) The Software. Can one trust the printouts generated by the software and proffered by counsel?

1) The Advisory Guidelines are complex.

It is true that the Advisory Guidelines are complex. However, the law upon which their development was based was complex. The law was also, with respect, applied inconsistently such that results in any given case were very hard to predict. Given the complexity of the law of spousal support it is somewhat difficult to understand why there would be an expectation that the Advisory Guidelines should be simple. Perhaps the explanation for it is a combination of the following:

- A. The Advisory Guidelines in practice are implemented through the use of a computer program. Unsophisticated users of computer programs are often misled into thinking that if the computer says something, it must be right, look no further.
- B. The central feature of the Advisory Guidelines are relatively simple formulae. However, simple formulae often describe something that is more complex. In high school it was sufficient to memorize a formula to get the right answer on a math test. However, for an Engineer or an Architect creating a real world solution, it is essential that the concepts behind an arithmetical formula be fully understood along with all of the limitations of when it is and is not appropriate to use the formula.
- C. They are defined as “Guidelines”. That is an apt descriptor. However, it suggests a similarity between the Spousal Support Advisory Guidelines and the *Child Support Guidelines*. These are two very different creatures. The Advisory Guidelines attempt to create a methodology for a consistent approach to arriving at a reasonable range of advisory support outcomes. A court always retains discretion to part from them. The *Child Support Guidelines* are a more simple code which produce a correct answer from which there is fairly limited discretion to depart.

Regardless of the reasons why, it is the writer's respectful opinion that the complexity of the Advisory Guidelines is to be expected given the need for them to flexibly accommodate so many different fact situations. In short, much of their complexity is unavoidable and it should not form a basis for rejecting them.

The Advisory Guideline authors have noted that one of the early problems with the implementation of the Advisory Guidelines has been the problem of “unsophisticated use”. They note that too often, the output provided by the software was both the beginning and the end of the analysisⁱⁱ. This is certainly consistent with the writers' experience – both in becoming personally educated in the use of the Advisory Guidelines and in dealing with other counsel. The bottom line is that in order to avoid the pitfalls of “unsophisticated use”, one has to actually read the **July 2008** Advisory Guidelines.

Having read the Advisory Guidelines, it will be apparent that they are not, except in very basic cases, a tool that significantly simplifies the exercise of determining an appropriate amount of spousal support. Rather, they provide a consistent methodology, founded on existing principals of spousal support law, for arriving at a range of spousal support. Essentially, the method is:

1. Determine whether there is a basis for entitlement and whether it is compensatory, non-compensatory, or a combination of both.

2. Determine income for spousal support purposes. Step 1 and Step 2 will occur together because income differences will form part of the entitlement analysis. Additionally, the basis for entitlement may influence whether income is imputed.
3. If entitlement is found, determine the correct formula to apply in the given fact situation.
4. Using the correctly selected formula calculate the range of support and duration.
5. Consider again the basis for entitlement, factors affecting the parties' cash flow and their financial realities in terms of where the appropriate amount of support lies within the range.
6. Consider whether restructuring by increasing or reducing duration and correspondingly decreasing or increasing quantum makes sense given the financial realities of the parties.
7. Consider whether there is an exception to the application of the Advisory Guidelines which would indicate a result outside of the predicted range.
8. Consider whether the Advisory Guidelines ought to apply at all. For instance, in situations of incomes over \$350,000.00 or below \$20,000.00 or where there may be other exceptional reasons dictating that support should be determined pursuant to an individual discretionary exercise.ⁱⁱⁱ

As lawyers and judges become more familiar with and "sophisticated" in their use of the process, errors due to misunderstanding will decrease. A decrease in such errors should increase consistency. However, there is another concern – namely, that increasing sophistication and complexity may combine to erode the goals of consistency and predictability. Within the multi-step process described above there are many points of departure from the formulae where an exercise of discretion will affect the range of potential outcomes. Most significantly, the process of income determination^{iv} (which is discussed more fully below), the consideration of exceptions and the addition of new exceptions are areas rife with potential for "sophisticated" counsel to make creative arguments and for judges to exercise considerable discretion.

2) Income Determination Issues

The determination of income is a critical step in the Advisory Guidelines process – all results are based on a determination of income for both parties^v. The starting point for income determination under the Advisory Guidelines is to adopt the approach taken under the Child Support Guidelines, regardless of whether there are children of the marriage. That approach tends to capture all resources and benefits available to a payor to build up their income for support purposes. For instance, personal benefits corporately expensed, available corporate pre-tax income, housing allowances, and the benefit of barter exchanges may all be included in the "Guideline Income" of the payor for child support purposes. Generally speaking, the existing law on spousal support endorses an expansive definition of "means" in s. 15.2(4) of the *Divorce Act* so there is a reasonable basis for starting with the CSG income approach.

The process of income determination pursuant to the CSG's can be quite complicated. This is particularly so when imputing income. Sections 17 to 19 of the CSG's provide a broad array of methods for imputing income. The problem of how to apply those sections fairly and consistently has spawned a lot of child support litigation. As unfortunate as that was, the benefit is that we have a pretty good idea of how those sections are to be used to impute. But should we always approach imputation of income for spousal support purposes in exactly the same way as we do for child support purposes?

Situations without children

A significant assumption underpinning the without child support formula is that "spousal income difference serves as a convenient and efficient proxy measure for loss of the marital standard of living, replacing the uncertainty and imprecision of budgets."^{vi} But there are cases where this assumption doesn't necessarily hold true. Where spenders have a marital standard of living that does not reflect their means – i.e. they are exhausting income and/or capital at an unsustainable rate or, where one or both parties do not utilize all of their available sources of income to maintain their standard of living, it is arguable that income is no longer an appropriate proxy measure of loss of the marital standard of living. In cases where there is overspending there is not much of a problem. Since the spending pattern and marital standard of living is usually unsustainable, support results should be based on the income available to the parties going forward. On the other hand, a party may have significant sources of income which they do not utilize at all to support the marital standard of living. For instance, an investment derived by gift or inheritance which a party intends to pass on to their children. Every year the investment generates income which the party declares but then plows that income back into the investment. If it was always understood by both parties that the investment and its returns would be made available to their children it is difficult to argue that the income earned on the investment during marriage relates to the marital standard of living, i.e. it was not a form of savings for the parties' retirement. Another example might be where one party operates a company with significant corporate pre-tax income and chooses to build the value of the corporation by increasing its retained earnings. In such cases and where there is no compensatory basis for entitlement, it is less than clear to the writer that the all inclusive approach to income determination required by the *Child Support Guidelines* is always suitable for the determination of income for spousal support purposes.

Consider the following fact scenario:

Husband – 50 years old, Wife – 45 years old. Duration of marriage 10 years, second marriage for both. There are no children. When the parties commenced cohabitation, the wife worked full time as a teacher and has continued to do so throughout the relationship. She earns \$45,000.00. The husband is self-employed through his own construction company that he has built and run for 30 years. He has historically worked very long hours building the business. In recent years, the construction company has boomed. Over the last three years the husband has drawn income of \$120,000.00. The company's retained earnings have grown at an average of \$100,000.00 per year over each of the past three years. Of this amount, 40% is required for expansion, working capital, and bonding purposes and the rest is available to take as income, but the husband chooses to grow equity in the business. On the wife's income, she will not be able to maintain her expenses on separation based on a lifestyle that is even close to her married lifestyle. There are no significant compensatory factors.

The income issue is whether or not to impute corporate pre-tax income to the husband pursuant to s. 18 of the *Child Support Guidelines*. It almost certainly would be for child support purposes^{vii}. However, there are competing arguments available as to whether this should be included in income for support purposes. For example:

- a) In favour of imputing this income is the argument that the corporate asset is a family asset and its increase in value represents savings for the family. Savings are a part of lifestyle and so income should be imputed to allow the wife to continue saving after separation. Income should be imputed to maintain consistency with income determination under the Child Support Guidelines.
- b) An argument might be made that the wife is not entitled to participate in this income since it was generated solely through the husband's efforts and he works extremely hard at building the business whereas the wife has had far more free time to devote to pursue her interests. The wife will be receiving a compensation payment from the husband for her share of the value of this family asset. The husband will have to finance that buyout by incurring debt and service the debt over time. Should the wife benefit from both the division and the payment of support based on future corporate income at least part of which must be used to service the debt incurred to compensate the wife on division of assets?
- c) What if the asset is not a family asset either because it lacks that character or it has been excluded by agreement? Since the wife cannot participate in the growth of the asset during marriage how can it be said that the marital standard of living includes this as a form of savings?

The results of the Advisory Guidelines calculations in this scenario are:

10 Year Relationship				Support			Cost to Payor	
				Low	Mid	High	Lump Sum Low	Lump Sum High
Corporate Income not imputed				\$938.00	\$1,094.00	\$1,250.00	\$31,000.00	\$77,000.00
Corporate Income imputed				\$1,688.00	\$1,969.00	\$2,250.00	\$57,000.00	\$144,000.00

The range of outcomes in each case is very different. The bottom of the range where income is imputed significantly exceeds the top of the range where it is not. The lump sum cost to the payor of imputing the additional income is essentially doubled regardless of duration. If a judge imputes the income in one case and not in another, the results will not be consistent regardless of what is done within the ranges. Note as well that the Advisory Guidelines do permit the argument that there may be different "Guideline" incomes for spousal and child support purposes. For example, deductions for mandatory health and life insurance which benefits the family. Such amounts are not deducted for child support purposes.

Potential Double Dipping Situations

Another situation to be careful of is the potential for double dipping where there is a long term marriage and pensioned spouses. If the payor spouse is employed at the time of separation but will likely pay support after retirement based on pension income differential and the length of marriage, is it fair for the payor to pay support while employed based on gross employment income (with no deduction for mandatory pension contributions) and on gross retirement pension income based on post separation accruals in the pension?

Imputing Income to the Support Recipient

Another area of difficulty that is going to arise in practice is with income imputation to a support recipient who either has sole or shared custody of children. According to the Advisory Guidelines, imputing income pursuant to CSG s. 19(1) is the appropriate way to address self-sufficiency issues. However, how difficult is it going to be to convince a court to impute income where there is a significant negative impact on children. In shared custody situations this problem is exacerbated by the “usual” set off approach for determination of child support. That is, not only would the recipient who is being imputed income have a consequent reduction in spousal support, they would also have a reduction in child support if “Guidelines” income is the same for both child and spousal support. Will this deter imputation for spousal support purposes even where it is clear that a spouse is intentionally underemployed?

3) Exception: Interim Applications

One of the exceptions under the Advisory Guidelines is “Compelling Financial Circumstances” on an interim application. One could argue that such circumstances are more the rule than the exception in a difficult economy. It is easy to conceive of situations, particularly on interim applications, where one or both of the parties are faced with unsustainable expenses arising upon their separation. Consider the following scenario:

Husband, John Doe – income of \$100,000.00 per year as an Engineer, 38 years old. Wife, Jane Doe – works part time in retail, income of \$10,000.00 per year, 36 years old. 10 year marriage, two kids, aged 6 and 8. Principal asset is family residence. Husband moves out and (luckily) stays in his parents' suite. The children will reside primarily with the wife in the family residence, but will spend four overnights per fortnight with the husband. Mortgage and monthly property tax instalments on the family residence are \$2,500.00. Wife wants husband to continue making mortgage payments.

Based on the Doe's incomes the with child support formula produces a range of spousal support between \$1,222.00 to \$1,926.00 per month. The net disposable incomes available to both parties as a result of these support payments are summarized in the table below.

	Spousal Support	Husband NDI	Wife NDI	Aggregate NDI
SSAG Low	\$1,222	\$3,705	\$3,977	\$7,682
SSAG Mid	\$1,589	\$3,479	\$4,131	\$7,610
SSAG Hi	\$1,926	\$3,226	\$4,289	\$7,515

If Mr. Doe is going to pay \$2,500.00 monthly towards the mortgage then he will only have \$1,200.00 per month left over for all his other expenses, which looks low. At page 117 of the Advisory Guidelines, the authors work through a similar scenario suggesting that an exception below the range would be appropriate if the husband has to pay the entirety of the mortgage. There is no guidance as to what degree of adjustment is appropriate. In fact, the only way to figure this out is to conduct the usual means and needs analysis to determine what the parties have left to spend on housing after all of their other basic living expenses are met.

A breakdown of the parties' basic expenses is set out in the table below:

Expenses (not including cost of housing) - John and Jane Doe					
	Category		Married	Jane after Separation	John After Separation
	Utilities		\$500.00	\$500.00	\$125.00
	Food and Household Expense		\$1,000.00	\$700.00	\$400.00
	Vehicles (insurance, gas, repairs)		\$800.00	\$425.00	\$425.00
	Vacation		\$350.00	\$0.00	\$0.00
	All personal including medical		\$1,000.00	\$650.00	\$375.00
	All children		\$650.00	\$650.00	\$200.00
	Debt		\$350.00	\$0.00	\$350.00
		TOTALS:	<u>\$4,650.00</u>	<u>\$2,925.00</u>	<u>\$1875.00</u>

While the parties resided together they had approximately \$7200 per month in net disposable income between them. This was just adequate for them to meet their ongoing expenses. In future, if Mr. Doe is going to meet his post-separation expenses and pay the mortgage, he will need net disposable income after payment of all support of \$1875 plus \$2500 = \$4375. What support payments will enable him to do this?

The following table illustrates the effect of varied support payments on the parties' cash available to pay housing expenses:

	Spousal Support	Husband NDI	Husband after non-housing expenses	Wife NDI	Wife after non-housing expenses	Aggregate NDI	Total amount for Housing
	\$0	\$4,455	\$2,580	\$2,929	\$4	\$7,384	\$2,584
	\$450	\$4,182	\$2,307	\$3,379	\$454	\$7,561	\$2,761
	\$800	\$3,966	\$2,091	\$3,729	\$804	\$7,695	\$2,895
	\$900	\$3,904	\$2,029	\$3,824	\$899	\$7,728	\$2,928
	\$1,000	\$3,842	\$1,967	\$3,871	\$946	\$7,713	\$2,913
SSAG Low	\$1,222	\$3,705	\$1,830	\$3,977	\$1,052	\$7,682	\$2,882
SSAG Mid	\$1,589	\$3,479	\$1,604	\$4,131	\$1,206	\$7,610	\$2,810
SSAG Hi	\$1,926	\$3,226	\$1,351	\$4,289	\$1,364	\$7,515	\$2,715
	\$2,500	\$2,882	\$1,007	\$4,554	\$1,629	\$7,436	\$2,636
	\$3,000	\$2,530	\$655	\$4,861	\$1,936	\$7,391	\$2,591

What can be seen is that in order for one or the other party to carry the debt payment, the support amounts would have to vary widely and a very low spousal support award is a possibility if the husband is going to carry the entire payment. However, such a result ignores the loss of the tax benefit of allocating some of the husbands' income to the wife. In the table above, there is approximately \$350 more per month available in net after tax income between the parties if support is ordered at \$900 per month. The amount is still below the Advisory Guidelines range but this is the optimum result. A judge being presented with this information might award support at that level and order that the mortgage payments be shared in proportions, say \$2000 to the husband and \$500 to the wife. Still another might order that the mortgage payments be divided equally and the husband should pay at the top of the Advisory Guideline range^{viii}. The point is that the analysis that is undertaken to deal with this kind of situation is really the traditional individualized means and needs analysis. The range of possible outcomes is broad and the Advisory Guidelines ranges can be made to fit, but they do not and should not govern the analysis (and nor should the suggested approach to dealing with the exception decreasing below the range to permit husband to carry the mortgage).

What if Mr. Doe has to rent an apartment at \$1000 per month to accommodate himself and the children? Now, there is not enough money to go around and he will want Ms. Doe to pay the mortgage. The suggested solution of an exception increasing above or below the range to accommodate the allocation of all of the debt payment to one party cannot work in this situation. The only workable solution for the family is to divide responsibility for the mortgage payments and set support based on that division. Again, how that is achieved is going to be a matter of individualized discretion in the means and needs analysis. With respect, the support amount in such a case ought to be driven primarily by the assessment of the least painful means of sharing the shortfall between the parties regardless of whether the support amount ends up inside or outside of the formula range.

According to the Advisory Guidelines:

The interim setting is an ideal situation for the use of the guidelines. There is a need for a quick, easily calculated amount, knowing that more precise adjustments can be made at trial^{ix}

To be fair, there will be many cases where the Advisory Guidelines are helpful in an interim setting. In addition, the range predicted in the examples is capable of being utilized to solve the problem, but only after performing a thorough means and needs analysis. The kinds of "Compelling Financial Circumstances" discussed above are going to be present very often. As a consequence, there are likely to be many interim applications where the Advisory Guidelines formulae do not provide a quick and easy solution and a traditional means and needs analysis must be employed.

4) Computer Software Issues

The with child support formula calculations under the Advisory Guidelines require the use of computer software. This is because the calculation of spousal support under this formula requires a series of repetitive calculations that narrow in on the correct spousal support range. This process of repeating the calculations over and over is what is described as "iteration" in the Advisory Guidelines. While it is possible to perform the calculation by hand it is tedious and unrealistic to expect anyone to do so. The need to use software in the first place is a limitation of sorts in that it creates an accessibility problem for those who either do not have the resources or are computer illiterate.

The most widely used software packages are DIVORCEmate and ChildView. DIVORCEmate appears to be in widespread use by practitioners and the Courts in British Columbia and Ontario. The writer understands that ChildView is most widely used in Alberta and that both products are used in varying degrees in a number of other Provinces. The writer is very familiar with the DIVORCEmate software. In preparing this paper, the writer obtained a Demo copy of the ChildView software and spent some time becoming familiar with that package but I am by no means an "expert" user of that product and the comments made in this paper are with that qualification.

Both software packages were originally developed to calculate child support obligations under the *Child Support Guidelines*. They both do this well. They both also handle basic Advisory Guidelines calculations well.

One troubling difference between the two software packages is the fact that they appear to produce slightly different results using the same input data. Schedule A to this paper contains printouts of the Advisory Guidelines data produced by ChildView and DIVORCEmate, using identical input^x. The monthly spousal support payments predicted by the two packages are different by approximately \$200.00 per month. The fact scenario in the Schedule A example was dictated by the demo version of the ChildView program. A review of the results suggests that the difference may arise from the DIVORCEmate software calculating a refundable dividend tax credit which does not appear to be included in the ChildView data. The difference is not easy to identify and one can imagine that if two different software packages are in use in a jurisdiction this could be a source of confusion and frustration.

What follows are some general comments about the ease of use of the DIVORCEmate software package and a discussion of certain practical limitations in their use, namely:

- A. Advisory Guidelines calculations that the software packages are unable to handle; and
- B. The problem of transparency of the results produced by the software calculations.

Some Comments on Ease of Use

Both DIVORCEmate and ChildView are complicated to use in all but the simplest of cases. Much of this complication is unavoidable because of the breadth of the information required in order to perform both child and spousal support calculations. Information about the parties' incomes, the children's residency situation, government benefits received by the parties for the children, tax credits, tax deductions, and extraordinary expenses are all capable of being taken into account. However, with both products the user must toggle between several screens and search through many lines of text to locate where the information is to be input.

Both products have a different but logical sequence of data entry. The DIVORCEmate package has the advantage that in each data entry screen tabs for all of the other data entry screens are displayed so it is a one mouse click process to move between the screens.

Both packages produce lengthy and detailed on screen and printed reports setting out support ranges and net income figures.

Representatives of both products indicated that the majority of problems users report are not problems intrinsic to the software itself^{xi}. Rather, they arise either because the user is insufficiently familiar with the software (where does dividend income go?) or because they are unfamiliar with the Advisory Guidelines. It is fair to say that in order to use the software reliably, one must first have a good working knowledge of the ins and outs of the Advisory Guidelines and one must spend time working with and becoming familiar with how the software operates.

A. What the Software Will Not Handle

Most significantly, the ChildView software does not appear to handle income imputation pursuant to ss.17-19 of the Child Support Guidelines. There are no input screens for this information. The ChildView website indicates that capability will be developed.

The DIVORCEmate software does include input screens to handle imputed income pursuant to ss. 17-19 of the Child Support Guidelines. However, DIVORCEmate has its own shortcomings in how it handles imputed income.

A screen capture showing the s. 19 imputation of income screen in DIVORCEmate is set out below.

The screenshot displays the DIVORCEmate software interface. The main window shows the 'Income (Annual)' section with input fields for Father and Mother. A 'Summary (Monthly)' section for John (Father) is also visible. An 'Adjustments to Income' dialog box is open, showing a table of adjustments for Father and Mother. The dialog box includes a text area for 'Intentionally under-employed or unemployed' and a 'Current CSG income for table lookup purposes' section.

	Father	Mother
Gross employment income	\$150,000	\$25,000
Self-employed income (net)	\$0	\$5,000
Canadian dividends (standard rate)	\$0	\$0
Canadian Dividends (small business)	\$20,000	\$0
Taxable capital gains	\$0	\$0
Taxable child support - 3rd party	\$0	\$0
Taxable child support - other party	\$0	\$0
Other taxable income	\$10,000	\$0
Other non-taxable income	\$0	\$0
Social Assistance	\$0	\$0
Workers compensation benefits	\$0	\$0

	Father	Mother
+ Intentionally under-employed or unemployed	\$0	\$0
exempt from paying income tax	\$0	\$0
+ Lives in country with significantly lower tax rates	\$0	\$0
+ Income has been diverted	\$0	\$0
+ Property not reasonably utilized to generate income	\$0	\$0
+ Failure to provide income information	\$0	\$0
+ Unreasonably deducts expenses	\$0	\$0
- Income taxed at lower rate (eg. dividends, capital gains)	\$0	\$0
+ Beneficiary under a trust	\$0	\$0
Other income, as may be applicable	\$0	\$0

Intentionally under-employed or unemployed:
 CSG, s.19(1)(a). The spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse. Input a reasonable amount of income according to the person's

	Father	Mother
Current CSG income for table lookup purposes	\$180,000	\$30,000

In the lower portion of the s. 19 screen there is an information box. These are common to many DIVORCEmate screens. They contain invaluable information about when and how to enter data into the input screen and information about software limitations. Without reading this text in its entirety a user could be led to believe that since there is a data input screen for imputed income, DIVORCEmate will appropriately handle imputed income. However, the fact is that DIVORCEmate will take imputed income and add it to gross income for the purposes of calculating support, but it will not take into account the tax implications of the payor either notionally receiving the income or actually drawing the income. One should never ignore these information boxes despite the fact that they are lengthy. It would be helpful, however, if the software designers could place the important warnings that one can only see after scrolling through many lines of text, at the beginning of the information box.¹

In addition, the "SUPPORTmate" printout (see Schedule A for an example) which summarizes the Advisory Guidelines calculations does not include imputed income in the calculation of net disposable incomes available to the parties. As a result, where income is imputed from a source and a party is actually required to draw on that source in order to produce sufficient income to pay the additional amounts of support, the tax consequences to the party and the effect on net disposable income are not displayed in the output. Rather, the net disposable income that is displayed reflects what the party has left after support at imputed income levels is deducted from income from all non-imputed sources.

¹ If one has the fortitude to scroll through the entire box, it reads as follows: Note the highlighted warnings that appear at the very bottom (my emphasis added):

CSG, s.19(1)(a). The spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse. Input a reasonable amount of income according to the person's education, abilities and experience. Parties must make an effort to maintain employment suiting their education, experience and abilities, or income may be imputed. In *Drygala v. Pauli* (2002), 61 O.R. (3d) 711, the Ontario Court of Appeal held that there is no need to find a specific intent to evade child support obligations before income can be imputed. This is consistent with the approach adopted by the Manitoba Court of Appeal in *Donovan v. Donovan* (2000), 190 D.L.R. (4th) 696. However, in *Hunt v. Smolis-Hunt* (2001), 20 R.F.L. (5th) 409, the Alberta Court of Appeal held that s.19(1)(a) requires proof of a specific intent to avoid child support obligations or circumstances which permit the court to infer a specific intent. Spouses should be aware of the other spouse working part-time, or a 4-day workweek. A court will not tolerate payors who arrange their affairs so as to avoid paying child support. Clients should be advised accordingly. See: *Abdilla v. Abdilla*, 2004 CarswellOnt 4524 (S.C.J.), *White v. Comeau*, 2003 CarswellOnt 1140 (S.C.J.), *Egan v. Egan*, 2003 CarswellBC 1 (S.C.), *Kaye v. Kaye* (2002), 32 R.F.L. (5th) 368 (Ont. Div. Ct.) and *X.(R.L.) v. X.(J.F.)*, 2002 CarswellBC 1934 (S.C.). However, a parent is not intentionally underemployed where he or she is unemployed because of ill health or misfortune: see *Metzler v. Metzler*, 2002 CarswellOnt 3149 (S.C.J.). Evidence of lifestyle may be used to impute income. See: *Orszak v. Orszak*, 2000 CarswellOnt 1574 (S.C.J.), *Chen v. Chen* (2000), 5 R.F.L. (5th) 288 (Ont. S.C.J.) and *Currie v. Currie* (1999), 2 RFL (5th) 153 (Ont. S.C.J.). In a clear case, a court may impute income on an interim motion. See: *Gillett v. Smyth*, 2002 CarswellOnt 3737 (Ont. S.C.J.). However, generally the Courts take a conservative approach on interim motions. See: *Bedard v. Bedard* (2003), 36 R.F.L. (5th) 10 (Ont. S.C.J.) and *Kadikoff v. Kadikoff*, 2003 CarswellOnt 1251 (S.C.J.). The amounts input increase the party's Income for CSG and SSAG purposes, but not for SUPPORTmate purposes. **IMPORTANT: The tax implications of this increased income, however, are NOT taken into account in the calculation of spousal support under the "With Child Support" Formula of SSAG, nor in the calculation of NDI in SUPPORTmate. Therefore, instead of inputting this amount in this field, you may want to input this amount under "Gross employment income" on the Start Page. We strongly suggest you contact your family law accounting professional if "Imputing Income" is an issue.**

In practice, income is imputed regularly from a variety of sources. The Advisory Guidelines make it clear that income will be imputed even more frequently in spousal support scenarios where there are self-sufficiency issues. This inability to handle imputed income is a problem for judges and lawyers. Counsel can do their best to estimate an appropriate amount of income to impute. They can then crunch the numbers and, with the help of their accounting professional or if they themselves are skilled, they can figure out how to account for the tax implications which the software will not handle. Counsel can then present accurate results to the Court. As often happens though, the Court may make findings regarding the appropriate amount of income to impute that are different than those suggested by either counsel. What then? Either the Court is stuck with figuring out the correct amount of spousal support or a reference might be directed or the parties required to re-attend with further submissions. Another alternative is to ignore the tax effects as in many cases the tax effects will be relatively minor. However, that will still leave the problem of not having an accurate assessment of net disposable income. None of these alternatives seem satisfactory nor will they promote the efficiency, consistency and predictability objectives of the Advisory Guidelines.

There are workarounds for this problem. For instance, income imputed due to intentional underemployment could simply be added to a party's gross employment income. In other cases – for example, imputation of income from a non taxable source, it is less clear as to how to work around the software's shortcomings and deal with tax implications. In all such cases, one is required to have a fairly high level of understanding of how the software works and how income is taxed.

B Transparency

If the Advisory Guidelines are going to work properly and gain further acceptance, lawyers and judges are going to have to be able to trust that the printouts they receive in submissions accurately set out the correct support amounts, duration ranges and resulting net income available to the parties. At present, it is not uncommon for two counsel to show up in court and provide one another with calculations at the commencement of argument. Both provide different results on the same facts and neither can understand how the other got there. This is not good.

Schedule A to this paper contains the reports that may be printed out from DIVORCEmate and ChildView, respectively, displaying the results of the Advisory Guidelines calculations. This is often the only calculation information that is included in submissions by counsel. It is not sufficient. These reports do not show how the income of a party was determined, the effects of any imputed income, nor how significant extraordinary expenses may have been handled.

As stated above, both software packages are very complicated. There are many opportunities to mishandle input. The saying “garbage in – garbage out” is apt. At a minimum, counsel should provide, and the court should require, print outs showing how the income of a party was determined. Both software packages produce these types of reports. Schedule B contains a sample print out for DIVORCEmate and Schedule C contains the corresponding sample print out for ChildView. Counsel should supply these printouts along with their calculation results so that there is appropriate transparency.

Even where complete reports are provided, it is still possible for figures to be buried in the analysis so that they are not apparent in either of the printed reports. Where there is disagreement about what the correct Advisory Guidelines results are in a given situation counsel must be prepared to give, and the court should demand, an explanation for the difference. In such cases, or wherever the results don't "feel" right, typical questions that may be asked in order to determine the reasons for the differences are:

- a) How was income determined? From what sources?
- b) What deductions and credits have been applied to reduce taxable income?
- c) Were components of the income imputed?
- d) Were any of the tax implications of imputed income taken into account?
- e) How were tax benefits attributable to the children allocated?
- f) What s. 7 expenses have been included, at what amounts, and who is being credited for paying them?
- g) Have any adjustments been made to calculated child support where:
 - i. CSG s. 9 support is other than a straight set-off?
 - ii. To ensure that the full amount of child support is deducted for a step child even where there has been a CSG s. 5 reduction in the actual amount of support payable?
 - iii. CSG s. 3(2)(b) or s. 4 provide for amounts of support different from the table amount?
- h) Do the net disposable income figures reflect what is actually available to a party?

These questions should also be asked when there is an unrepresented party or where one counsel has no access to the software or is unfamiliar with the print outs and results.

Conclusion

The Advisory Guidelines provide a sensible, if complicated, procedure for predicting a reasonable range of spousal support in many cases. Though not law they are an essential part of the practice of family law in British Columbia. To be used effectively, how they work and their limitations must be understood. Likewise, the software which is required to perform Advisory Guidelines calculations must be understood. A computer will not correct a user's misunderstanding of the facts, the law, or the Advisory Guidelines.

ENDNOTES

ⁱ *Redpath v. Repath* 2006 BCCA 338 and *Dunnigan v. Park* 2007 BCCA 329.

ⁱⁱ Spousal Support Advisory Guidelines, July 2008, Federal Department of Justice; Carol Rogerson and Rollie Thompson, at p. 25.

ⁱⁱⁱ This step could arguably precede step 3, above, except that in jurisdictions where the standard of appellate review includes reference to the Advisory Guidelines, it makes sense to consider the Advisory Guidelines numbers before deciding that the individualized discretionary analysis must be done.

^{iv} The Advisory Guidelines state: "The income imputing provisions of s. 19 are, if anything, even more important than in child support cases." The idea of imputing income to a recipient spouse to address self-sufficiency issues is not completely new. However, it has been relatively uncommon and the suggestion is that it will now be more commonplace in order to properly calculate the Advisory Guidelines support range.

^v Spousal Support Advisory Guidelines, July 2008, Federal Department of Justice; Carol Rogerson and Rollie Thompson, at p. 46.

^{vi} Spousal Support Advisory Guidelines, July 2008, Federal Department of Justice; Carol Rogerson and Rollie Thompson, at p. 54.

^{vii} See *Hausman v. Klukas* 2009 BCCA 32

^{viii} Dividing the payment equally might also take the problem out of the "Compelling Financial Circumstances" exception.

^{ix} Spousal Support Advisory Guidelines, July 2008, Federal Department of Justice; Carol Rogerson and Rollie Thompson, at p. 44.

^x These printouts were generated from the ChildView and DivorceMate products current as at January 16, 2009.

^{xi} the writer spoke with Steven Krieger of DIVORCEmate. Lonny Balbi, Q.C. was kind enough to arrange for me to speak with Susan Roberts of ChildView.