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Family Law Newsletters

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— **Franks & Zalev - This Week in Family Law**

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Contents

- Leave Granted, Only to Leave It Alone

Leave Granted, Only to Leave It Alone

***Carrubba-Gomes v. Gomes*, [2025 CarswellOnt 18854](#) (Div. Ct.) — Sachs, Sproat & Lococo JJ.**

We have a general and long-standing rule here at *TWFL* that has admitted only the rarest of exceptions over the years: we do not comment on our own cases.

This case is an exception.

Epstein Cole was counsel for the Appellant/Father. We were successful on our motion for leave to appeal the interim order to the Divisional Court. The Divisional Court then dismissed the appeal, suggesting that even if the lower decision was wrong — it could be fixed at trial.

So we were faced with a dilemma. This is, arguably, an important case on spousal support, motions for interim spousal support and the *Spousal Support Advisory Guidelines*. We feel the Divisional Court got it wrong — very wrong. But we are hopelessly biased. To address the problem, we have — for the first time — invited someone to do a guest comment on *Gomes*. And not just any "someone" — but a "someone" that perhaps knows more about spousal support than pretty much any other someone we might know: Professor Rollie Thompson.

The Divisional Court has recently thawed its formerly frigid approach towards leave in interim or temporary support orders: see *Lokhandwala v. Khan* ([2019](#)), [34 R.F.L. \(8th\) 139](#) (Ont. Div. Ct.) where Justice Corbett set out its previous "guidance". In *Gomes*, a panel of the Ontario Divisional Court (a mid-level appellate court in Ontario that deals with appeals with leave from interim orders) granted leave "on the sole issue of the motion judge's failure to consider, analyze, and apply the *Guidelines* in determining the appropriate amount of temporary spousal support": [2025 CarswellOnt 5305](#) (Div. Ct.) (Bale, Nakatsuru and Shore JJ.).

That's the good news. In granting leave, the Divisional Court finally recognized that interim or temporary orders can go on for a long time, important legal and policy issues can be raised, and erroneous interim decisions can have serious consequences in the period before the trial. The leave to appeal door does not have to be slammed shut, as the Court controls entry to the appeal process.

But, now the bad news: a different panel hearing the appeal ignored the issue for which the previous panel granted leave and upheld the motion judge based on "deference" and "you can always fix it at trial", whenever that trial may be. This begs the question: why grant leave in the first place?

This was a high-income case. The motion judge fixed the Husband's annual income at \$1,729,281. With no income imputed to the Wife, the temporary order set interim child support at \$15,000/month and interim spousal support at \$45,000/month. Only the amount of spousal support was in issue on the appeal.

The couple were married in 2003. They separated in December 2017 according to the Husband and in August 2019 according to the Wife, i.e. 14 to 16 years. The Wife had been a stay-at-home mother. She filed for divorce in February 2023.

The parties had two sons. The older child was 20-years-old and finishing his third year in university away from home. The younger one was in Grade 11. Of importance for spousal support, more than five years later, the spouses were still living under the same roof in the matrimonial home, albeit living separate and apart. They equally shared parenting of the younger son and of the older son when he was home in the summer. The Husband was paying 100% of the carrying costs on the home under a Consent Order, plus all the older son's university expenses.

There were income issues before the motion judge in December 2024. The Husband derived his income from three corporations. Based on an income report for the years 2017-2021, his income was determined to be \$1,729,281 as an average of 2019 and 2021. The Husband made a complicated argument to impute income from one of the corporations to the 50-year-old Wife, but that was unsuccessful. There was no debate that the Wife was entitled to support on both compensatory and non-compensatory grounds. There was no real child support issue, with the \$15,000/month reflecting the full table amount on the Husband's income, plus s. 7 and university expenses. (That said, the motion judge did not consider ss. 4 and 9 of the *Child Support Guidelines*, SOR/97-175 despite the range of the Husband's income, the shared custody situation, and the fact that the older son lived primarily at school.)

That left the amount of interim spousal support to be determined. The motion judge mentioned the *Spousal Support Advisory Guidelines* for incomes over \$350,000, describing the formulas as "no longer applicable or presumptive" and requiring "a case-specific analysis". He cited *Fielding v. Fielding* (2015), 70 R.F.L. (7th) 253 (Ont. C.A.), for the principle that "the Court should typically avoid setting spousal support on the basis of a 50/50 distribution of Net Disposable Income".

The judge below then dove into the Wife's budget, which he found to be "likely inflated" and settled on monthly personal and (shared) household expenses of \$30,000. After deducting child support of \$15,000, that left \$15,000 after-tax for spousal support purposes, for which the court ordered monthly spousal support of \$45,000, described as "grossed up to account of the resulting tax obligations". This appears to have been an error — as noted below, \$15,000 does not "gross up" to \$45,000. Rather, \$45,000 gross produces about \$25,000 after tax, not \$15,000. All of this was "without prejudice to the parties' joint rights to revisit these amounts at trial for the purpose of retroactive and/or ongoing and future readjustments".

Spousal support of \$45,000 a month reflects the very high end of the SSAG range for the *with child support* formula, on the full income of \$1,729,281, an unusual location in the range for such a high income case. There was no discussion why that location at the top end of the SSAG range was required on an interim basis. After tax, that amount of spousal support, coupled with the child support, significantly exceeded the wife's monthly expenses, by about \$10,000/month. And, remember — the Husband was already solely paying the housing expenses and the s. 7 and university expenses.

In this context, a much more careful SSAG analysis was needed, which was explicit in the order granting leave to appeal. Unfortunately, on the appeal proper, that did not happen. The Divisional Court dismissed the appeal, relying heavily on "deference," the wide discretion in high income cases, and the ability to revisit the amount at trial. This was a missed opportunity for the Divisional Court to offer some direction to lower courts regarding the use of the *Spousal Support Advisory Guidelines* and motions for interim spousal support.

High-income spousal support cases force us to think hard about the rationale for support: see SSAG (2008), ch. 11 and Revised User's Guide (RUG) (2016), ch. 11. See also Thompson, "It's Complicated: How Entitlement Wends Its Way In and Out of the SSAG" (2025), 44 Can.Fam.L.Q. 147; and Prewer and Strathopolous, "Support on the Margins: A Review of the Case Law Relating to High-Income and Low-Income Families" (2025), 43 Can.Fam.L.Q. 275.

For the appeal panel, Justice Lococo recited some general SSAG authorities at paras. 50-56, with a foreshadowing emphasis that the SSAG are "only advisory", "tools only", and "not to be applied mechanically or automatically". The Court then cited the eight principles of interim spousal support from *Driscoll v. Driscoll*, 2009 CarswellOnt 7393 (S.C.J.), which Justice Lemon drew from Master Keighley in *Robles v. Kuhn*, 2009 CarswellBC 2239 (B.C. S.C.). The sixth of those principles is: "Interim support should be ordered within the range suggested by the *Spousal Support Advisory Guidelines* unless exceptional circumstances indicate otherwise."

This then takes us to the heart of the leave issue in this case, namely the motion judge's explanation of the "range" and his location in the range — or, more pointedly, the *lack* of any such explanation.

Justice Lococo did agree that "it would have been of assistance had the motion judge been more fulsome in his explanation relating to the application of the SSAGs" (para. 62). This was perhaps an overly kind statement given that there was really no such discussion in the reasons below. But it was not an error of law or an error of mixed fact and law. Why? Because the order was temporary in nature.

The order granting leave to appeal referred to one issue, the possible "failure to consider, analyze and apply" the SSAG. The motion judge did not state the SSAG range, did not explain how it was obtained, did not account for s. 7 expenses, did not refer to NDI, did not explain how he determined location of the amount in the range — and could not possibly have known the effect of his Order — to grant the Wife **56%** of the Net Disposable Income in a shared parenting situation. Nothing even close to "fulsome". Had the motion judge done a proper SSAG analysis, it would have been clear what an unusual outcome he had produced.

What constitutes a "proper" SSAG analysis? Assuming entitlement is determined or, as in *Gomes*, conceded, here's the basic steps:

1. Determine each spouse's income;
2. Choose the correct SSAG formula;
3. Calculate the SSAG ranges for those incomes (just amount for an interim order, amount and duration for all others); and
4. Determine and explain location in the range, after reviewing the factors listed in the SSAG, including net disposable income (NDI) and budget expenses.

The motion judge did the first step and confined himself to budget expenses in the fourth step. The rest was missing. Even at the interim stage, more is required.

Here the correct SSAG formula was the basic "*with child support*" formula, as there were two children for whom child support was paid. Under that formula, priority must be given to child support before calculating spousal support. The Husband was paying the full table amount of \$15,000/month tax-free, as the Wife had zero income in calculating the shared parenting set-off. The Husband was also paying all the university expenses for the older child plus all s. 7 expenses for the younger one. The Divisional Court airily dismissed the husband's complaint as, "at most, a question of mixed fact and law", again, particularly as it was a temporary order.

The failure to consider s. 7 expenses is the single most common *SSAG* error committed by lawyers and judges, according to the RUG at p. 4. It is *clearly* an error of law, if the SSAG are to be applied. There was no discussion of these expenses in the motion judge's decision. If the SSAG are to be applied, they must be applied in their entirety: *Mason v. Mason* (2014), 47 R.F.L. (7th) 173 (Ont. S.C.J.), rev'd (2016), 83 R.F.L. (7th) 1 (Ont. C.A.); *Wharry v. Wharry* (2016), 89 R.F.L. (7th) 61 (Ont. C.A.); *Domirti v. Domirti*, 2010 CarswellBC 2864 (B.C. C.A.); and *Fisher v. Fisher* (2008), 47 R.F.L. (6th) 235 (Ont. C.A.).

Further on this, Justice Lococo is just wrong to treat SSAG calculations as if they were evidence at para. 74, where no weight was given to the correct calculations offered on appeal as the s. 7 expenses were not taken into account in the calculations

provided to the motion judge. SSAG calculations are not evidence. That point was made years ago in the seminal reasons of Justice Prowse in *Yemchuk v. Yemchuk* (2005), 16 R.F.L. (6th) 430 (B.C. C.A.) at para. 64: the SSAG "do not constitute evidence, but are properly treated as part of counsel's submissions". Provided the necessary evidence is before the trial-level judge, one would think that an appellate court would want correct calculations in its reasoning.

The motion judge in *Gomes* did not state the relevant SSAG range or ranges, another missing step. For incomes over \$350,000, it is true that the SSAG range works differently. This is explained in more detail in my "It's Complicated" article.

Most lawyers and judges just do a straight calculation of the conventional SSAG formulas for the actual high income of the payor. At incomes not much above \$350,000, this may not be a problem, especially if a judge opts for the low end of this SSAG range, e.g. *Dancy v. Mason* (2019), 25 R.F.L. (8th) 93 (Ont. C.A.) (\$632,827 payor income, amount just below low SSAG upheld).

Yet it is not technically correct to just calculate the SSAG range on the payor's actual income, as was pointed out by the Ontario Court of Appeal in *Plese v. Herjavec* (2020), 49 R.F.L. (8th) 28 (Ont. C.A.), at paras. 54-58 (\$5.9 million payor income), and more recently in *R.L. v. M.F.* (2025), 19 R.F.L. (9th) 39 (Ont. C.A.), at para. 54 (\$2,031,822). Technically, the "high-income formula" range for payor incomes above \$350,000 is much broader, with the low end of this range being the low end of the formula range for a payor income of \$350,000 and the high end being the high end on the payor's actual income. Occasionally, some lawyers argue that a judge has to explain a "departure" from the "SSAG range" for the payor's actual income, as a means to shift the burden to the other party. Wrong, as the "high-income formula" range described in *Plese* is very broad, reflecting the greater discretion for incomes above \$350,000.

In *Gomes*, the motion judge ordered interim spousal support of \$45,000/month, an amount at the high end of the SSAG range on the Husband's actual income of \$1,729,281. So, no problem, right? That's what the deferential Divisional Court said at para. 73. But there was no explanation by the court below for the location in the expanded range or for choosing the very high end of the range on quite a high income. As the Court of Appeal reminded us in *Mason v. Mason* (2016), 83 R.F.L. (7th) 1 (Ont. C.A.) at paras. 199-203, a court should not default to the mid-range, but should explain its choice of location in the range. This was not done.

The wife's budget is a factor in location in the range, which the motion judge did discuss, but without a stated SSAG range, it just becomes a "needs-and-means" exercise. Lawyers for high-income payors usually love arguing budgets, using them as a form of "cap" on support. In this case, the motion judge clearly miscalculated his budget-based amount, as the after-tax spousal support, coupled with the child support, actually left the wife with about \$10,000 *more* than her monthly budget of \$30,000.

Nor did the motion judge assess the net disposable income (NDI) consequences of his location in the range. His spousal support decision left the wife with 56.6% of the NDI on an income well above the \$350,000 SSAG "ceiling." As the Court of Appeal noted in *R.L. v. M.F.* and quoted by the Divisional Court in *Gomes* at para. 72, "NDI is not a target *per se*, but an important way to test the reasonableness of different outcomes". But the Divisional Court misses the point: to determine location in the range, a court should look at NDI — not just the percentage distribution — but also the actual dollars in each household. That did not happen at either level of Court in *Gomes*.

I should note here a common misunderstanding, or misuse, of Justice Benotto's sweeping statement in *Fielding v. Fielding* (2015), 70 R.F.L. (7th) 253 (Ont. C.A.): "Equalization of income (or "NDI") has never been the basis upon which spousal support is determined in Canada." That statement is correct on the facts of that case and correct as a general statement, but *wrong in some SSAG cases*. Remember the facts of *Fielding*: a 17-year relationship, two of the children with the husband and one with the wife, where the wife claimed that the trial judge had erred by not giving her 50% of the NDI. That argument was obviously wrong in *Fielding*, given the split custody version of the *with child support* formula. Further, even if there had been no children, and the *without child support* formula applied, income equalization is not available after a 17-year marriage. But there are two prominent situations where Justice Benotto's statement is wrong: the shared custody version of the *with child support* formula, where spousal support generating 50/50 NDI is the default outcome and always available within the range

(SSAG, section 8.6); and the *without child support* formula for long marriages of 25 years or more, where the high end of the range reflects 50/50 NDI (SSAG, sections 7.2, 7.4.1).

The Divisional Court in *Gomes* is thus correct in rejecting the *Fielding* 50/50 argument at paras. 66-72. Under the *with child support* formula, for payor incomes below \$350,000, the recipient spouse and children routinely receive more than 50% NDI. For below-ceiling incomes under this formula, the real limit on spousal support is the limited ability to pay spousal support after giving priority to child support. The same limits do not drive location in the range for high incomes.

The "more than 50% NDI" cases cited by the Court at para. 71 are not helpful for the *Gomes* case. In the pre-SSAG case of *Andrews v. Andrews* (1999), 50 R.F.L. (4th) 1 (Ont. C.A.), the wife had primary care of three children, two of them with special needs, the husband earned \$200,000/year, and spousal support resulted in 60% NDI to the wife and children. In *Laurain v. Clarke* (2013), 34 R.F.L. (7th) 187 (Ont. S.C.J.), the wife had primary care of two children, the husband's evidence of his income was unreliable, income was imputed to him of \$130,000, and spousal support resulted in 55.6% NDI to the wife and children. Finally, the Court referred to the complicated high-income case of *R.N. v. C.S.*, 2020 CarswellOnt 7613 (C.J.), where Justice Sager had to impute income to the husband where he had serious disclosure and credibility issues, imputing his income as \$452,306, and where the wife had at various times three or four or two of their children in her primary care, warranting 64-65% NDI to her.

None of this Divisional Court discussion confronts the real NDI issues in *Gomes*. How does one explain a location at the very high end of the very high SSAG range, i.e. \$45,000/month, when that spousal support generates NDI to the wife and the one (equally parented) child at home of 56.6%? When the husband is also paying the carrying costs of the home and the section 7 expenses, and when that support amount leaves the wife with a sizeable surplus pending trial? When the husband's income is not less than \$350,000 or even close to that income, but \$1.7 million? When the motion judge fails to undertake the most basic SSAG analysis? It's not good enough to say, "deference, just an interim order". Why grant leave in the first place?