

FAMILY LAW

Oh Mann! Modified support formula may lead to trouble

The British Columbia Court of Appeal recently applied a modified “without child” formula from the Spousal Support Advisory Guidelines (SSAG) instead of the traditional “with child” SSAG formula in situations of shared child custody — a dramatic departure from previous Canadian spousal support decisions. The decision raises concerns for households with disparate incomes and as a source of potential new litigation.

In *Mann v. Mann*, [2009] B.C.J. No. 829, Mr. and Mrs. Mann had been married for 15 years, with two children, and separated in 1999.

Many judges in shared custody cases have used a formula that equalizes the income in each household, in contrast to *Mann*'s new spousal support formula. As a practice note, this new spousal support decision departs from the DivorceMate Calculator that automatically defaults to equalizing incomes in both households, so there is not a “have household” versus a “have-not household” situation.

The SSAG states that “the without child... formula may generate too little support for the low income recipient [in a marriage with a substantial income difference] even to meet her or his basic needs for a transitional period.”



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Mann creates the potential for a dramatic disparity between households...

This is a potential consequence of *Mann*, as opposed to the previous use of the “with child” formula. *Mann* creates the potential for a dramatic disparity between households in a very short marriage to even medium length marriages with children.

Previously, in a shared custody situation under the “with child” formula, over 50 percent of the net income would go to the recipient shared custodial spouse — a sharp contrast to a much reduced payment under the “without child”

formula to that spouse that would occur under the *Mann* approach.

The new approach in *Mann* will likely lead to increased claims for shared custody, as shared custody will now have the added attraction of reducing not only child support but drastically reducing spousal support as well.

There is never any real saving of child support under the shared custody calculation, as money saved as child support is simply paid directly to the child by the spouse who now shares custody. However, the new formula in *Mann* can and will lead to a dramatic reduction in spousal support where there is a large difference in the spousal incomes, in all but long-term marriages, due to the multiplication factor per year of cohabitation.

This new formula as espoused by the B.C. appeal court is: “[Respondent’s income (Mr. Mann) – Adjusted child support paid] – [Appellant’s income (Mrs. Mann) + Child support paid + Child tax benefits] = Gross income difference.” This income difference is then multiplied by one-and-a-half to two percent for each year of cohabitation, with duration of the order to be from half a year to a full year for each year of cohabitation.

Applying this formula led to

the lump sum award from trial being set aside and Mr. Mann being directed to pay spousal support of \$900 dollars monthly for eight years. The court took “into account the appellant’s delay in pursuing spousal support, the additional commitments that delay permitted the respondent to make, and the fact that the appellant’s primary contribution was to the advancement of the respondent’s career, as opposed to the acquisition of property, his post-separation income increase, and the child support he paid.”

Mann is also important on the thorny issue of what to do with post-separation income gains. In the trial judge’s decision, the concept of compensatory (as opposed to needs based) support was limited to the year immediately following separation. In the appeal court’s view, compensatory support should more properly encompass a broad range of factors, and not “overlook... the disadvantage to her and the advantage to her husband [because] of the role she played during the marriage.”

Mann states that one can take into account a spouse’s post-separation earnings that were supported by the advances made during the marriage.

Post-separation income was used because the appeal court

noted that in *Leskun v. Leskun*, [2006] S.C.J. No. 25, “the Supreme Court of Canada confirmed that it was proper to take into account capital acquired after the marital break-up when determining a party’s means.”

Under the SSAG, normally one must look to the circumstances during the marriage when assessing the standard of income, and not post-separation income increases. Before the SSAG, lawyers routinely argued that post-separation income nevertheless reflected advantages and disadvantages acquired during a marriage, particularly one of longer duration, and that all of the building blocks to the gain in post-separation income were put in place by the joint efforts of the spouses throughout the course of the marriage. In *Mann*, the court expanded the SSAG principle to include post-separation increases.

Clearly, the B.C. courts continue to be the vanguard in developing SSAG principles and a ruling by the Supreme Court of Canada on what formula is correct is a virtual certainty. ■

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Ontario’s disclosure law is now in line with legislation in other jurisdictions

Adoption

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for adoption, and 20 years later is a pillar of the Catholic Church. She has a new family and doesn’t want to be visited by that child, and should be entitled to live her life with her promised privacy maintained by the government.”

In his Sept. 19, 2007 decision, Superior Court Justice Edward Belobaba noted that Ontario was the only jurisdiction in Canada — “indeed in North America” — that planned to give “a retroactive, unqualified right to obtain confidential identifying information of an adopted person or birth parent without the consent and even over the objections of the individual whose information [would have been] disclosed.”

Now, Ontario’s adoption information disclosure law is in line with similar legislation in the other four provinces, as well as in the U.K. and the Australian state of New South Wales.

In addition to the veto, Ontario’s current law includes features found in the 2005 legisla-

tion. Adopted adults and birth parents can file a notice of contact

preference to indicate how they would like to be contacted, such as via e-mail or regular mail. They can also file a no-contact notice if they don’t want to be contacted but are willing to have their identifying information released.

Anyone found guilty of breaching this provision could face a maximum fine of \$50,000.

The Act “protects those who don’t want their information to be disclosed, protects those who don’t mind if information is disclosed but don’t want to be contacted, and also protects those who want to be reunited with a son or daughter or parent, but don’t want anyone else to know,” said Ontario Community and Social Services Minister Madeleine Meilleur, who is also a lawyer and who is responsible for the legislation.

As of June 15, 2,737 people had applied for adoption information. Over the past 30 years, about 75,000 Ontarians sought to find birth relatives through the

province’s voluntary adoption disclosure registry. As of June 15, there have been 1,446 no-contact requests, 1,827 requests regarding contact preferences and 5,905 requests for disclosure vetoes.

That veto option makes the law “fabulous” and “terrific,” said Toronto lawyer Stacey Stevens, who worked with Ruby on the constitutional challenge.



Ruby



Meilleur



Stevens

“It was never a case of saying that open adoption records were wrong. It was all about giving the person who doesn’t want to be found the right to make that choice,” said Stevens, a member of the personal injury group at Thomson Rogers in Toronto.

She explained that under the 2005 law, if a person, such as someone who had been adopted, didn’t want his or her contact information disclosed, that individual had to apply to Ontario’s

Office of the Registrar General, which would then set up a hearing.

“The adopted person would have to hire a lawyer and prove a case of severe physical, psychological or sexual harm in the event that the information got released,” said Stevens.

The person — say a birth parent — who sought the information would have both received a copy of the adopted adult’s application setting out the reasons why the information shouldn’t be released and then be given an opportunity to respond.

“It would have created a very adversarial relationship,” explained Stevens, who added that the government would have had the option to conduct a medical, psychological or other evaluation “just because you didn’t want to have your identifying information released.”

“There are people out there now whose rights to privacy are going to be protected. Even though it’s a small number of people — we did a good thing for them,” she said. “But more importantly, to give the government the power to release information that it keeps on us without our consent

is too much.”

Stevens has a personal connection to the issue that Ruby was unaware of when he recruited her to work on the case.

At the age of 14, her stepfather (married to her birth mother) told her that he had legally adopted her. More than two decades later, in 2002, she went in search of her birth father, a captain with Toronto Fire Services, only to find out that he had died six months before.

However, through a lead she first received from a former colleague of his, Stevens did make contact with his wife, who didn’t know her late husband had another daughter. Stevens also discovered she has two stepsisters.

Still, had Ontario’s adoption records been open without non-disclosure provisions back then, she wonders what might have happened if she had obtained contact information on her birth father and just showed up at his house while he was still alive.

“In hindsight, I probably wouldn’t have received a very warm welcome given the fact that he had never told anybody about me.” ■