Recommendations for Modification of Child Support Guidelines and Reform of their Use Corresponding to the Views of the Pennsylvania Supreme Court

*Jay H. Todd, Jr. and Roger F. Gay**
Roger F. Gay and Jay H. Todd***

* Project leader; Project for the Improvement of Child Support Litigation Technology, Fiskarnas gata 161 v2, 136 62 Haninge, Sweden; Roger.F.Gay@telia.se

** Jay H. Todd, Jr., PO Box 166, Midland, PA 15059, (724) 764-7722, pfarus@brads.net

> *Most importantly though, we have the underpinning of our Constitution as the fundamental guidepost that has worked so well for hundreds of millions of Americans from all walks of life for more than 200 years. For them, but especially for those for whom the Constitution has not always worked so well, and for future generations, I challenge you to continue your study of the present, learn from and build on our past, and marshall our best abilities to chart an even more just future.*
>
> *Supreme Court Justice Stephen A. Zappala in an address to the Pennsylvania Futures Commission on Justice, March 28,1996.*

Contents

Appendix B: The Child Support Guideline Problem.…Attached

Introduction

The purpose of this paper is to introduce recommendations for reform of child support guidelines and their use.

Primary reference documents include excerpts from an opinion on child support law and the development of child support guidelines by the Pennsylvania Supreme Court, Melzer v. Witsberger (505 Pa. 462; 480 A.2d 991, 1984), a similar opinion cited in Melzer from the Oregon Supreme Court, Smith v Smith, 290 Or 675, 626 P2d 342, 344 (1981), and a report written as part of the Project for the Improvement of Child Support Litigation Technology, in which work cited in both Court's opinions has been extended to produce a more complete child support decision model. (See reference to Franks' mathematics of child support in both Court opinions.) Current Pennsylvania statutes are also cited, both for the purpose of urging consistency with related statutes and improvement.

The Pennsylvania Supreme Court opinion in Melzer v. Witsberger, the Oregon Supreme Court opinion in Smith, and Maurice Franks' papers on the mathematics of child support offer a good starting point for research on developing child support guidelines. In the early 1980s however, the science of child support was in a fledgling state. Franks' work was repeatedly cited at that time as it offered the best theoretical foundation available. To date, the solid relationship he provided between statute, case law, and mathematics has no equal. As is typical with pioneering efforts however, there was still more work to be done.

The Project for the Improvement of Child Support Litigation Technology (PICSLT) was started in 1989 as a research project at Intelligent System Research Corporation. The work on developing a more complete child support science rests largely upon that of Franks' pioneering work along with associated case law and statutes. Other developments, such as Judge Melson's practical work on the early version of the Delaware guidelines and Judith Cassetty's relentless pursuit of understanding the relationships between child support law and mathematics were also influential. For the past few years, the project has focused more on international studies, including the effects of cooperative agreements and child support mathematics in other countries.

Of necessity, a thorough review of the recommendations of Robert G. Williams / Policy Studies, Inc. were made. Because his work was published by the Office of Child Support Enforcement as congressionally mandated "assistance to the states in developing child support guidelines", Mr. Williams' work has had the greatest impact on the design of guidelines in the states. His technical work on guideline design was not based on established child support law but on speculations allegedly derived from fundamentally off-target statistical data. No scientific value was found in the work and it was deemed inappropriate as a

basis for further study.

During the first half of the 1980s, a wealth of literature on development of child support guidelines for general use (not just in welfare cases) began to emerge. Efforts were undertaken by bar and judicial associations and individuals. Reports were written, papers published, and the issues of the application of guidelines in non-welfare cases reviewed by state courts. This stronger effort was stimulated partly by the early publication of Franks' mathematics and partly because a signal had already been sent by federal government sources of the intent to make use of child support guidelines mandatory in all cases. It is a source of wonder that when Congress passed the bill requiring development of state guidelines and mandated technical assistance for the states, the Office of Child Support Enforcement would select people to provide that assistance who knew little to nothing about child support decision-making or the development of child support formula and had no history demonstrating fundamental strength related to any aspect of the problem.

In almost 10 years, PICSLT has investigated an extensive list of issues involved in the design and application of child support guidelines. Much of the study involved merging law and mathematics into one science. Franks certainly began in that vein. Judge Melson's solid understanding of child support law provided the same orientation to the work. The most significant new contribution to the mathematics of child support was in providing a solution to the standard of living adjustment problem. Child support law has traditionally held that payment beyond the basic essential needs of children can be awarded to provide children some protection against the standard of living loss that often accompanies divorce. Until 1994, no formula for calculating the appropriate adjustment existed. In fact, some researchers were concerned that the problem might not be solvable.

The most important recommendation is for the restoration of traditional "due process" in making a child support order. The importance and reasoning should be illustrated. We would have precedence in law for setting all child support awards to $15 per month. At least one state set $15 as the minimum monthly child support award. If we set all awards to this same amount, child support awards would be uniform, uncertainty in the outcome of a child support hearing would be reduced, administrative and court procedures would be simplified, the inability to get a different outcome would "encourage agreement and thereby reduce conflict between parents" ….. In short, we would accomplish all the things that we are supposed to accomplish with child support guidelines except one.

Those familiar with the subtleties of the child support question will know that we haven't considered everything. Although we based the formula on existing child support law, we didn't take all the law into consideration. We didn't consider all the factors that are essential in making an appropriate award. Certainly this method would not adequately consider the needs of children and the

circumstances of the parents in most cases. We have no basis for a claim that the formula produces a ”just and appropriate award in every case”.

Although probably not as obvious to some, child support formulae used in the states today fail the same test. Unvalidated table values alleging themselves to be appropriate divided between parents in proportion to their income, or a fixed percent of the payer’s income, have never come close to proving themselves worthy of the presumption that they produce correct child support award amounts. PICSLT has driven toward the goal of improving child support science and technology in support of mechanizing the process of making an award. Even when a much higher level of confidence can legitimately be placed in a more sophisticated formula, complete dependence on simple mechanics is not the ideal solution.

Not of lesser importance, federal law, state and the federal constitutions demand that presumptive awards be rebuttable. The accompanying report entitled, ”The Child Support Guideline Problem” proposes the integration of child support guidelines with traditional child support law and procedures. A model child support statute meeting all federal requirements is provided and the report includes discussion on this integration in a section entitled, ”Legal Construction”. The remainder of the report focuses mostly on the history of child support guidelines, critical analysis of those in use today, and information related to international agreements.

Below, excerpts from an opinion on child support law and development of guidelines by the Pennsylvania Supreme Court are presented followed by commentary related to the recommendations presented in this overall report.

Views of the Pennsylvania Supreme Court

Description of the need for and general characteristics of a child support guideline, as described by The Supreme Court of the State of Pennsylvania

Excerpts from MELZER v. WITSBERGER, Supreme Court of Pennsylvania,

505 Pa. 462; 480 A.2d 991

July 13, 1984

Opinion written by Justice Rolf Larsen

Mr. Justice Zappala and Mr. Justice Papadakos join this Opinion.

Mr. Justice Flaherty and Mr. Justice McDermott join this Opinion and Mr. Justice Flaherty files a separate Concurring Opinion which Mr. Justice McDermott joins.

Mr. Justice Hutchinson files a Concurring Opinion.

Mr. Chief Justice Nix files a Dissenting Opinion.

(begin excerpts)

The fundamental requirements of child support are clear.

In the matter of child support we have always expressed as the primary purpose the best interest and welfare of the child... . Support, as every other duty encompassed in the role of parenthood, is the equal responsibility of both mother and father. Both must be required to discharge the obligation in accordance with their capacity and ability. Conway v Dana, 456 Pa 536, 540, 318 A2d 324, 326(1974). See also Costello v LeNoir, 462 Pa 36, 40, 337 A2d 866, 868 (1975) ("[E]very parent has a duty to support his or her minor children ... in accordance with the parents' respective abilities to pay....").

Nevertheless, we have never established an orderly method for the calculation of support awards. Rather, our courts have been guided by numerous general principles created by our appellate courts. While there is no shortage of case law announcing these principles, there is a total lack of organization with respect to how these principles interact and how they should be applied in order to arrive at an appropriate award of support.

We have concluded that in order to clarify the application of the case law in this area, it is necessary to set forth a guideline -- a kind of checklist -- to assist hearing courts in child support cases. The purpose of such a guideline is not to divest a hearing court of its authority or discretion to consider all the relevant facts and circumstances in each case, since the resolution of each case must still be based upon those facts and circumstances; rather, its purpose is simply to pro-vide the hearing court with a method for organizing and considering those facts and circumstances in an orderly fashion. We therefore direct that in the future, child support awards should be calculated based upon the following guidelines.

In order to define the support obligation of each parent, a court must first determine the needs of the children: (This determination, as well as the determination of the parents' respective abilities to pay support, must be made as of the time at which support payments are sought. Costello, supra at 40, 337 A2d at 868.) a court has no way of arriving at a reasonable order of support unless it knows how much money is actually required to care for the children involved. Thus, the Superior Court has held that "for purposes of determining whether the rule of Conway v Dana was satisfied it is necessary to know the expenses entailed in child support." Downie v Downie, _ Pa Super _, 461 A2d 293, 294(1983). See also Com ex rel Lyle v Lyle, 248 Pa Super 458, 375 A2d 187, 189 (1977).

We agree with the Superior Court, with the proviso that parents are legally obligated to provide only for the reasonable expenses of raising their children. See Tubb v Middlebrooks, 379 So2d 1272, 1274 (Ala Civ App 1979) (emphasis added) ("It is the rule that the amount of support a parent may be required to pay is to be determined by the reasonable needs of the children and the reasonable ability of the parent to pay.").

This is not to say that children are entitled only to the bare necessities; parents do have an obligation to share with their children the benefit of their financial achievement. See Conway, supra at 538, 318 A2d at 325 ("station in life of the parties" is relevant in determining parents' capacity to support their children). Thus, where the parents' incomes permit, it may be perfectly proper for a court to recognize that certain expenditures for recreation, entertainment, and other nonessential items are reasonable and in the best interest of the children. See Spignola v Spignola, 91 NM 737, 580 P2d 958, 964(1978) ("Where the income, surrounding financial circumstances and station in life of the father demonstrates an ability on his part to furnish additional advantages to his children above their actual needs, the trial court should provide such advantages within reason.").

Nevertheless, neither parent should be obligated to pay for "extras"-those items which go beyond what is reasonably necessary for the children's welfare--in which that parent does not concur. Neither parent should be permitted to increase the parties' support obligations by unilaterally indulging the children in things which are not reasonably necessary for their well-being. that in each case the hearing court must first calculate the reasonable expense of raising the children involved, based upon the particular circumstances--the needs, the custom, and the financial status--of the parties. See Bethea v Bethea, 43 NC App 372, 258 SE2d 796, 799(1979) ("What constitutes necessities depends upon the facts and circumstances of the particular case. They include food, clothing, lodging, medical care and proper education. They are not limited to those things which are absolutely necessary to sustain life, but extend to articles that are reasonably necessary for the proper and suitable maintenance of the child in view of his social station in life, the customs of the social circle in which he lives or is likely to live and the fortune possessed by him and his parents.").

The court must next determine, as a matter of fact, the respective abilities of the parents to support their children. This Court has held that "[e]ach parent's ability to pay is dependant upon his or her property, income and earning capacity. . . ." Costello, supra at 40, 337 A2d at 868. In arriving at the amount which a parent can contribute to the support of his or her children, the court must "make due allowance for the reasonable living expenses of the parent." Id (emphasis added). Thus, a parent may not voluntarily decrease his or her ability to provide child support by making unreasonable or unnecessarily large expenditures for his or her own benefit. Cf. Weiser v Weiser, 238 Pa Super 488, 362 A2d 287, 288(1976) ("It is undisputed that a father or husband cannot intentionally reduce his actual earnings and then use the reduction in earnings to obtain a reduction in the amount of support he must provide for his family."). See also Henderson v

Lekvold, 95 NM 288, 621 P2d 505, 509(1980) (Duty of support is not decreased "when a parent voluntarily assumes an excessive financial burden only for ... his convenience and investment."); County of Stanislaus v Ross, 41 NC App 518, 255 SE2d 229, 232(1979) ("[Father]) may not avoid his duty to support his minor children simply by spending all of the money he earns.").

Once the court has determined the reasonable needs of the children and the amount of each parent's income which remains after the deduction of the parent's reasonable living expenses, it must calculate each parent's total support obligation in accordance with the following formula:

Assume that parent A has $15,000/year available for support, that parent B has $5,000/year available for support, and that it costs $6,000 to support that couple's child for one year. The parents' total annual support obligations would be calculated as follows:

Parent A's total support obligation = 15,000 / 15,000 + 5,000 X 6,000 = $4,500

Parent B's total support obligation = 5,000 / 15,000 + 5,000 X 6,000 = $1,500
With a total of $20,000 available for child support, parent A is obligated to provide 75% of the support required ($4,500) and parent B must provide the remaining 25% ($1,500).

Mother's total support obligation = Mother's income available for support / Mother's income available for support + Father's income available for support X Child(ren)'s needs

Father's total support obligation = Father's income available for support / Mother's income available for support + Father's income available for support X Child(ren)'s needs

We note at this point that the amount of time a parent spends with his or her children has no bearing on the parent's obligation of support. Even a parent who never sees his or her children has a duty to support those children to the best of his or her ability.

We also note that a parent's total support obligation is not the equivalent of an award of support entered against that parent. Each parent's total support obligation includes support provided directly to the child, as well as support which is paid to the other parent for the child's benefit.

Once each parent's total support obligation has been defined, the court must determine what portion of that obligation may be offset by support provided directly to the children, and what portion of the support obligation must be satisfied by way of support payments to the other parent. It is clear that at least some portion of both parents' total support obligations may be fulfilled by the provision of support directly to the children. As the Supreme Court of Oregon

has noted: child support itself may take forms other than direct monetary contribution [to the custodial parent]. It may take the form of payments for medical care . . ., life insurance in the child's name on a parent's life ..., a trust for the child's education ..., or hospital, medical or dental insurance. All such forms of indirect support must be included in determining the just and proper contribution of a parent toward the support and welfare of the child. Smith v Smith, 290 Or 675, 626 P2d 342, 344 (1981).

As with the other elements of child support, a parent may receive credit against his or her support obligation only for those expenditures which actually satisfy the obligation of reasonable and necessary support; a parent should receive no credit for making voluntary payments for those "extras" which do not constitute support in the first place. (We emphasize that any credit for support provided directly to the child must be based upon the figures submitted to the court at the time of hearing, and may be calculated only by the hearing court in arriving at an award of support. A parent is never permitted to unilaterally reduce a court-ordered support payment in order to compensate him or herself for expenditures on behalf of a child.) See Prescott v Prescott, 284 Pa Super 430, 426 A2d 123, 125(1981) ("[The father] should not have been given credit for these expenditures for nonessential items .... The fact that [the father] chose to purchase luxury items for his sons does not change the fact that he had a court-ordered obligation to contribute to their basic support and welfare first, which he failed to do."); Shapera v Levitt, 260 Pa Super 447, 394 A2d 1011, 1014(1978) ("Gifts to the son . . . are, of course, welcomed by the son and may contribute to his happiness and well-being; but they cannot be made a substitute for a fair contribution to the custodial parent for basis support.").

For example, if a parent does not normally spend money on his or her child, the parent will receive no credit for support provided directly to the child. If the parent is then ordered to pay $150 per month as child support, the parent must continue to pay $150 every month, regardless of any subsequent expenditures on behalf of the child; if the parent has spent $25 on clothes for the child, the parent may not reduce that month's support payment to $125. If another parent regularly spends $25 per month on clothes for his or her child, the parent may bring that fact to the attention of the hearing court and the court may consider that fact in determining the parent's credit for support provided directly to the child. If the court then orders that parent to pay $150 per month as child support, that parent must also pay $150 per month, regardless of any expenditures for the child. If that parent subsequently spends $50 in one month for the child's clothing, that parent also may not reduce his or her support payment to offset the amount spent on clothes.

Of course, if the overall circumstances of any of the parties change--i.e., a decrease in income, an increase in regular monthly expenses--either parent may apply to the court for a modification of a support order.

Finally, any amount of his or her total support obligation for which a parent does

not receive credit must be paid to the other parent as child support for the benefit of the children, in accordance with the following formula:

Support to be paid to father = Mother's total support obligation - Support provided by mother directly to children

Support to be paid to mother = Father's total support obligation - Support provided by father directly to children

[T]here is nothing in our law which requires the new spouse to support minor children of the first marriage, . . . if the second wife was gainfully employed and if her earnings or a portion thereof was contributed to the family budget, such facts would be relevant in determining the father's ability to pay for his minor children. Commonwealth ex rel. Travitzky v. Travitzky, 230 Pa. Super. 435, 326 A.2d 883, 885 (1974). Accordingly, any portion of [the] wife's income which was used to defray family expenses would be relevant to a determination of appellant's ability to contribute to the support of his children. [Presumably, this rule would apply to the income of a second spouse of a custodial parent as well.]

HUTCHINSON, J.: …. "I believe that all the factors set forth in the majority opinion are relevant in this and most such cases. As such, I commend them to our trial courts for consideration. However, I believe the majority opinion unduly emphasizes their use in a mechanistic way which cannot replace the individualized judgment of an experienced trial judge." …

DISSENT: NIX, C.J.

I must express my strong disagreement with the majority's unwise and unwarranted attempt to transform the highly sensitive process of determining the equitable allocation of responsibility for child support into a rigid and sterile mathematical exercise. Moreover, the soundness of the proposed mechanistic formula has yet to be satisfactorily demonstrated. n(1) The formula approach urged by appellant and embraced by the majority represents the views of a single practitioner in the field. n(2)

The majority's hastily concocted guidelines are thus being promulgated without the benefit of adequate guidance from those with expertise in this highly complex and controversial area. Nor can this Court realistically lay claim to the expertise which would assure the reliability of its equation. Moreover, a determination as to the wisdom and necessity of adopting such mandatory guidelines would normally rest with the legislature. Even if the Court could properly make that judgment, it should do so through the rule-making process and only after thorough study and input from bench and bar n(3).

I can discern no basis for the majority's conclusion that mathematical certainty is an adequate surrogate for judicial sensitivity. It is essential to our system of justice that such determinations be made on an individualized basis, according

proper weight to all relevant factors and recognizing the unique characteristics of each family situation. The uniform guidelines imposed upon the process relieve the court of its responsibility to balance the equities in each case, allowing the court to hide behind a mathematical formula and detracting from actual consideration of the parties' situation. Thus I am constrained to conclude that reliance on such a formula is jurisprudentially unsound and constitutes an imprudent exercise of this Court's supervisory power.

n(1) Although the factors identified are legitimate, the majority has failed to establish the appropriateness of assigning each factor a fixed value in an equation to be uniformly applied in all cases. The proper weight to be given such factors depends on the facts of the individual case.

n(2) The majority relies on three articles by Maurice R. Franks, Esquire, a Colorado attorney, for its formula. See Franks, Summing Up Child Support: A New Formula, District Lawyer (July-August, 1983); Franks, How to Calculate Child Support, 86 Case & Comment 3 (1981); Franks, The Mathematical Calculation of Child Support, 2 Family L. Rev. 260 (1979).

[We note that we have seen no evidence that Franks went to any great political effort to reform the system to force conformance with the mathematics he proposed. The first court to make note of Franks' work appears to have been the Oregon Supreme Court in the Smith case cited in the majority opinion. In Smith however, the Oregon Supreme Court did not go so far as the Pa Court in recommending rigid application of a formula. Corresponding to the view of one man described in this dissent would seem more appropriate today to a non-practitioner by the name of Robert G. Williams.]

n(3) Although it can be argued that the majority has offered this formula only as an aid to the trial court in reaching its decision, experience demonstrates that undue reliance will be placed upon the results of the mathematical computations, particularly in close cases, rather than upon the wisdom and the experience of the jurists entering the order.

Commentary

Much work on the development of mathematics corresponding to established child support law has been completed in the 14 years since the Court issued the opinion above. Since that time, federal law has been written specifying requirements for state child support guidelines and those requirements have also been taken into account.

The accompanying report, "The Child Support Guideline Problem", as well as supportive detailed technical material cited in the report takes the basic description of child support law given by the Court as first principle. In addition to the "equal duty principle" expressed by the Court and supported citations, the report also recommends a basic definition of child support and authorization to

include consideration of related family circumstances. These three essentials comprise what the logistician behind the report calls the ”three fundamental laws of child support”. The model child support statute included in the report, as well as a great deal of detailed technical work has been constructed with the three fundamental laws as foundation.

In addition, a wealth of case law was considered in order to understand the precedence that had been established for dealing with various family circumstances. As was mentioned above, the Smith case in Oregon was a primary source. In Smith, the Oregon Court cites many other cases as is usual as well as Franks’ work on the mathematics of child support. Further work brought all this together in an integration of law and mathematics which is now referred to as child support science.

The Court’s wish for ”a kind of checklist” to provide the hearing court with a method for organizing and considering relevant facts and circumstances in an orderly fashion is one that is easy to fulfill. Any local bar association, experienced family lawyer or family court judge can build a check list. Such a list would obviously assist courts in considering issues that should be and it would also seem obvious that use of such lists would provide a more orderly approach than waiting for the litigants themselves to present their cases. But it would seem that no list would ever be complete enough.

For that reason, the PICSLT work focused on general methods for doing calculations. There are a small number of different types of expenses, those which are included in a standard award (based on "reasonable need" and "reasonable ability to pay") and those which have generally been treated as "add-ons", or "in-kind", for example. These types
appear to be reasonably easy to identify in practice, especially if there's a proper list of what's included in the standard award.

The Court wrote; ”In order to define the support obligation of each parent, a court must first determine the needs of the children …”, ”a court has no way of arriving at a reasonable order of support unless it knows how much money is actually required to care for the children involved”, and ”for the purposes of determining whether the rule of Conway v Dana was satisfied it is necessary to know the expenses entailed in child support.”

”…. Parents are legally obligated to provide only for the reasonable expenses of raising their children.” ”It is the rule that the amount of support a parent may be required to pay is to be determined by the reasonable needs of the children and the reasonable ability of the parent to pay.”

The term ”reasonable ability to pay” needs clarification. Other courts have determined that ”the burden on the one paying support should not be so heavy as to preclude the ability to support oneself and one's other dependents.” (Hockema v. Hockema, 18 Or. App. 273, 524 P.2d 1238 (1974)). In the words of

the Pennsylvania Court, ”In arriving at the amount which a parent can contribute to the support of his or her children, the court must make due allowance for the reasonable living expenses of the parent.” Thus, when the income of the paying parent is equal to or less than the amount needed for self support, ”ability to pay” child support is equal to zero. We must take this as the basis for the definition of ”reasonable ability to pay”. ”Ability to pay”, for the purpose of establishing a child support award, is net income minus self support needs. It has been found through careful study of the ”self-support reserve” issue, that applying this definition to both parents in all cases is the only way to produce reasonable results that are consistent in logic, as is done in the Delaware formula.

As stated above, we can identify different types of expenses, such as those which are commonly treated as ”add-ons” and ”in-kind” contributions. If we were to add day care expenses or extraordinary medical expenses for example, we would do that before proceeding to calculate the ”standard award”. As in the Delaware formula, we would then deduct each parents’ share of such expenses from their ”ability to pay”. This is certainly the most rational thing to do. If each parent has a take home pay of $700 per month, and a child care bill of $300 per month, they will have only $550 each per month remaining after paying the child support bill. We believe that the calculation must fit the facts.

Before stating further what details this part of the Court’s analysis implies, we should go to the next paragraph and take the following into consideration at the same time. ”This is not to say that children are entitled only to the bare necessities: parents do have an obligation to share with their children the benefit of their financial achievement,” in relation to the ”parents’ capacity to support their children.” ”Where the income, surrounding financial circumstances and station in life of the father demonstrates an ability on his part to furnish additional advantages to his children above their actual needs, the trial court should provide such advantages within reason."

Given that we will take all this into consideration in this commentary (and more below) it is possible to mention the first recommended step in the mathematical process of assessing children’s ”standard” needs. It is better to be sure as we go that it is understood what is not meant as well as what is. ”Standard” in this context, does not mean subsistence level needs. (We note that the Delaware model takes this approach.) But in most non-welfare cases, the award decision does not depend upon subsistence level needs, but -- on the basis of capacity -- what parents ordinarily spend on their children.

In the new science of child support, analysis of children’s ”standard needs” (related to ”standard award” mentioned above) begins with the financial circumstances of the custodial parent (or both parents in shared custody) and ” normal” or ”reasonable” spending on children for a standard list of expenses in that context. In addition, both Court’s agree that children are entitled to more, based on their parents’ capacity. We have been forced to use the custodial

parent's financial circumstances as the starting point by logic and fact of life.

By contrast, many states now base their guidelines on Williams' model which uses "estimates" of spending that might occur if the parents were living together and sharing all the expenses of a single household. Such is not the case in the circumstances in which child support is awarded. As illustration, consider that if joint income is $50,000 per year, it could mean that one parent's income is anywhere between $50,000 per year and nothing. If a custodial parent lives alone and has just enough income to support herself, the financial circumstances in the primary home are much different than if the custodial parent earns $25,000 per year and has remarried to a man who earns $50,000 per year. Joint income, and table values related to joint parental income, have no relationship at all to family economic circumstances in the context of a child support award decision.

The analysis does not end with what the custodial parent would spend on her own however. Finding an amount by which this expenditure should be increased in light of the parents' capacity to support their children is known as the " standard of living adjustment problem". In 1994, a solution was found and a formula developed that accounts for both parents' ability to pay. (Papers cited in "The Child Support Guideline Problem".) It was recognized that the financial circumstances of the custodial parent control the standard of living of children. (With reference to the statistical, "normal", typical, or "reasonable".) The basic idea is to increase the standard of living in the custodial parent home so far as one can with "child support" alone.

It was found that beyond this maximum, any increase in the "child support" award would mostly consist of spousal support or alimony which is not consistent with state law (60 P.S. 1610), and even violates explicit state prohibitions (23 P.S. 3706). Generally, legal experts agree that spousal support or alimony should not (must not) be included as part of a child support award. Spousal support can be awarded separately <u>when appropriate</u> and as a matter of fact, spousal support is not child support.

The Oregon Court of Appeals gave a similar opinion saying, "Child support is recovered from the party not given custody, but the money is for the support and welfare of the children, not for the enrichment of the custodial parent." (In re Marriage of Hering, 84 Or App 360, 733 P2d 956 (1987).)

The solution to the standard of living adjustment problem was found by calculating the greatest increase in the standard of living in the custodial parent household as the result of a "fair share" (in light of all other considerations in making an award) contribution by a paying parent paying child support. In other words, so far as one can go before additional amounts must be considered alimony or spousal support, which according to law we cannot include in a child support award. Once seeing that solution, it was realized that any smaller amount would violate the "equal duty principle". It was therefore concluded that

in theory, there is only one correct amount to be awarded in each child support case.

”It is clear that at least some portion of both parents’ total support obligations may be fulfilled by the provision of support directly to the children. As the Supreme Court of Oregon has noted: child support itself may take forms other than direct monetary contribution [to the custodial parent]. It may take the form of payments for medical care . . ., life insurance in the child's name on a parent's life ..., a trust for the child's education ..., or hospital, medical or dental insurance. All such forms of indirect support must be included in determining the just and proper contribution of a parent toward the support and welfare of the child. Smith v Smith, 290 Or 675, 626 P2d 342, 344 (1981)."

A key phrase in the commentary is "All such forms of indirect support must be included in determining the just and proper contribution ...." This can be taken as further validation of the ”third fundamental law”, which is that courts must have the authority to consider all relevant circumstances. The new science of child support has been constructed to provide support, through a relatively small number of simple accounting procedures, to deal with a long list of possible considerations.

Pennsylvania Statutes

This section provides text of Pennsylvania statutes that will be referred to in other sections.

23 Pa.C.S. Section 3706 BAR TO ALIMONY.

No petitioner is entitled to receive an award of alimony where the petitioner, subsequent to the divorce pursuant to which alimony is being sought, has entered into cohabitation with a person of the opposite sex who is not a member of the family of the petitioner within the degrees of consanguinity.

23 P.S. 43B Section 4322 Support guideline

(a) Statewide guideline.--Child and spousal support shall be awarded pursuant to a Statewide guideline as established by general rule by the Supreme Court, so that persons similarly situated shall be treated similarly. The guideline shall be based upon the reasonable needs of the child or spouse seeking support and the ability of the obligor to provide support. In determining the reasonable needs of the child or spouse seeking support and the ability of the obligor to provide support, the guideline shall place primary emphasis on the net incomes and earning capacities of the parties, with allowable deviations for unusual needs, extraordinary expenses and other factors, such as the parties' assets, as warrant

special attention. The guideline so developed shall be reviewed at least once every four years.

(b) Rebuttable presumption.--There shall be a rebuttable presumption, in any judicial or expedited process, that the amount of the award which would result from the application of such guideline is the correct amount of support to be awarded. A written finding or specific finding on the record that the application of the guideline would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption in that case, provided that the finding is based upon criteria established by the Supreme Court by general rule within one year of the effective date of this act.

60 P.S. 1610 (b) Financial matters. (2) Maintenance. The decree may award to either party an allowance for future support denominated as maintenance, in an amount the court finds to be fair, just and equitable under all of the circumstances. …. In any event, the court may not award maintenance for a period of time in excess of 121 months. ….

Recommendations

”Most importantly though, we have the underpinning of our Constitution as the fundamental guidepost that has worked so well for hundreds of millions of Americans from all walks of life for more than 200 years. For them, but especially for those for whom the Constitution has not always worked so well, and for future generations, I challenge you to continue your study of the present, learn from and build on our past, and marshall our best abilities to chart an even more just future.” (Address by Supreme Court Justice Stephen A. Zappala to the Pennsylvania Futures Commission on Justice March 28,1996.)

23 P.S. 43B Section 4322 (Support guideline) is not adequately constructed so as to provide parents ”due process of law”, nor to fundamentally provide pressure to assure a just and appropriate child support award in each case as prescribed by federal law.

The statute contains many of the elements needed, but rather than assuring that child support awards will be based on such considerations as ”reasonable needs of the child or spouse seeking support and the ability of the obligor to provide support”, it directs that a child support formula will be built on those ideas. The link between elements of a child support formula and the actual circumstances of the family - if such a thing exists at all - tends to be hidden within obscurely and magically derived numbers in tables than can never be related to the financial circumstances of broken families.

Litigants seeking to rebut the presumptive amount on the basis that it is ”unjust or inappropriate” must do so without any path for legally establishing that their concept of ”just” and ”appropriate” must be recognized by a court. The process

established by the law is one in which the formula is tested in some general and perhaps capricious way, rather than testing an individual case in which one or both parents perceive the presumption to be in error.

The model statute presented in the accompanying report, ”The Child Support Guideline Problem” uses traditional child support statutes as its basis. It is modified, in the most obvious and direct manner possible, to conform to federal requirements for presumptive (rebuttable) use of a state child support guideline. It does contain within its logic, the ”three fundamental laws”, which themselves were typically to be found in the logic of traditional child support statutes.

In addition, it authorizes the courts to consider relevant factors in the determination of a child support award, whether or not they are explicitly given in the standard formula. Its construction would support rebuttle based on the reasoned argument that some part of the particular circumstances of the family are not properly accounted for by the standard formula. In addition, it provides the proper legal structure to directly challenge the standard award, should it itself produce unjust or inappropriate results. Supporting such a challenge, when appropriate, places pressure to conform where pressure should be - on continuing to improve child support guidelines so that their use consistently produces just and appropriate results.

In defining the relationship between the traditional style statute and the child support guideline the way we have, it is possible to satisfy nearly everyone. The majority opinion given in Melzer v. Witsberger, in the Smith opinion from the Oregon Supreme Court, as well as many others which are based on traditional child support law, provides clarification of the principles underlying just and appropriate awards. These same principles are consistently found in traditional statutes throughout many states. The PICSLT model pursues the effort to model the law itself rather than to modify the basic principles.

The majority opinion favors the use of guidelines to assist courts in making just and appropriate decisions. Since that opinion was presented, the federal government has established a requirement for use of statewide guidelines in every child support case as a condition for receiving funding related to the welfare program.

We also feel that the dissenting judges may feel much more comfortable with this approach. Although mathematics and numeric tables can provide courts with great convenience, and if properly constructed even assure fair results, but the recommended approach recognizes that the promise of fair results is not the same as delivery. In the overly political world of child support reform that exists today, too much can go wrong. And in any case, the presumptive award must be rebuttable as a matter of federal, state, and constitutional law. We therefore see the integration of child support mathematics with a traditional due process structure as the only legal option.