

Creating Effective Guidance: The Nature of the Nexus Between Parenting and Child Support Decisions

Report to the Indiana Domestic Relations
Committee of the Indiana Judicial Center on
Amending the Indiana Child Support Guidelines

Analysis of the role that the Indiana Child Support Guidelines has had on judicial decisions with recommendations for modifications to the Indiana Child Support Guidelines to promote more positive parent-child and parent-parent relationships.

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Contents

i.	About Stuart Showalter	3
ii.	Preface	4
iii.	Introduction	5
I.	Child Support Recipients and Obligor	7
II.	Promoting Parenting	9
III.	Accountability of child support expenditures	13
IV.	Actual expenditures <i>for the child</i>	15
V.	Reducing parenting time conflict	19
VI.	Continuity in the child's standard of living	22
VII.	Some other considerations	25
VIII.	Conclusion	28
IX.	Appendices	31
	A. ~ 2008 Washington State Child Support Workgroup - Comment on the Final Report – David Spring Reply to Dr. Betson Comments on the Economic Table and Residential Credit, December 30, 2008	31
	B. ~ Analysis of imputed income portion of the Opinion by the Indiana Court of Appeals in Moore v Moore, 09 May, 2014	39

About Stuart Showalter

Stuart Showalter is an advisor to parents, practitioners and policy makers on matters related to child custody. He married in 1993, fathered one child born in 1996 and was the respondent in a dissolution of marriage action filing in the year 2000. He organized a group of fathers in 2004 to begin seeking change of the maternal preference in child placement decisions. A short time later he abandoned the father's rights concept opting to focus on the needs of children then the rights of parents regardless of gender. Since 2008 he has provided draft legislation, testimony and research assistance for members of the Indiana General Assembly. In 2011 he provided the legal strategy to the American Civil Liberties Union of Indiana that resulted in the reunification of Craig Scarberry with his children upon appeal.^[fn1] Scarberry is the Anderson, Indiana man who lost custody of his children because he was agnostic. Recently he provided concepts and anecdotal evidence that were incorporated into the revised Indiana Parenting Time Guidelines adopted in 2013. He continues to assist mothers and fathers with mediation and reducing biases in child custody cases so decisions may be based upon their merits and the best interest of the children. He is currently preparing his 2014 report on Domestic Violence to the Indiana General Assembly.

Notes

1] Scarberry v Scarberry

Preface

I come to you today with bias intact. My first exposure to child support was about 35 years ago. It was the payments made so the mother of my best friend could make an annual trip to Las Vegas. He lived with his paternal grandmother and rarely saw his father who lived in Florida nor his mother who also lived in Indianapolis – usually on the front stoop of a liquor store.

After my son's mother filed for divorce, sometime following her abandonment of the family, she then showed an interest in him. That interest turned out to be child support paid by me amounting to nearly 70% of what the expenditures had been for the three of us living together^[fn1]. Apparently an adult couple can live nearly free since the cost I expended during my guideline minimum time, plus her contribution plus my 70% contribution had to equal or exceed the cost for three of us to live.

I have also seen a mother petitioning for sole custody state to the court that she needed that to get more child support because she wanted to get a new car. Hers already had 100,000 miles on it. The court granted her request for an increase in parenting time and the subsequent support payments.

I do believe and hold the position that it is more important and beneficial to the children and parents if parents who are responsible for paying support maintain strong ties to the child rather than just “sending a check”. Research has confirmed that maintaining the parent-child ties has numerous benefits^[fn2].

Notes

1] Our cost of living at the time [1999] was less than \$1100 per month. Support was set at \$140 per week[2001]. My parenting time was set at the IPTG minimums in effect at the time, 2002. Cause number 06C01-0006-DR-0180.

2] “Various legal doctrines reflect the view that children’s interests are well served by the maintenance of strong ties to the parents who provide support and guidance to them.” See Scott E. Friedman, *The Law Of Parent-Child Relationships*, Ch. 5 (1992) (describing parental responsibility for the financial support, education, and medical care of children); *id.* Ch. 6 (describing parental authority to discipline children); *id.* Ch. 9[I] (describing tort doctrines that protect the parent-child relationship). *id.*

Introduction

When considering the American child support scheme it is noteworthy that it is based upon law *and* equity.^[fn1] Family law courts issue *in personam* orders enforceable by contempt^[fn2]. In terms of longevity of child welfare dynamics and custody law in other jurisdictions our statutorily based child support mechanisms are still in their infancy^[fn3]. While there have been selective improvements the totality of the current mechanism can largely be seen as a failure^[fn4]. Thus, consideration of novel approaches to the post dissolution or separation support of children should be given greater weight.

In the following chapters I intend to provoke challenges to the scripts that have driven policy and decisions for quite some time. During the existence of our statutory child support schemes we have contemplated and struggled with extricating child support payments from parenting time. While parents may have legitimate and meaningful reasons for seeking the greater share of parenting time we must not allow this to obfuscate the purely financial motives underlying some parents' demands: be those for more time or to reduce time. It is incumbent upon us to mitigate actions based upon these surreptitious motives by providing judicial officers the guidance and tools to quash them while ensuring adequate support both in terms of monetary or monetarily equivalent, and social/emotional development contributions.

Simplistic solutions abound – make parenting time proportional to income so no support payments are ordered, order support payments based upon income disparity regardless of parenting time, establish a flat rate of support regardless of income – which all have shortcomings. Most would fail to meet the guidance of case law^[fn5], rules of equity or the statutory mandate for meeting the support needs of the child^[fn6].

Instead I ask that you consider a few propositions in the following pages that are more complex in nature and may require greater effort to implement.

In my nearly 10 years of child custody advising I have experienced and seen the emotional extremes produced through the family court system. *All judges are crooks and corrupt* is not an uncommon mantra of vocal critics of the family court rules and nearly lethargic pace at which cases are resolved^[fn7]. My area of expertise is in contested child custody particularly among high conflict parents. It

is this perspective from which my lens of child support payments is coloured. Thus, while I profess no expertise in child support I have gleaned from numerous combative relationships the nexus between child support and contested child custody. My passion lies with these high conflict and hostile aggressive parents where I try to mitigate those feelings to produce long-term resolution that ultimately benefits the children.

I have been in courts throughout the state of Indiana and attended the Domestic Relations Committee meetings with regularity for years. I find no term that can be uniformly applied to judges but what I have seen is the limitations of both time and tools that lead to the perception of unjust or corrupt rulings. It is these shortcomings which cause greatest concern for me. It is from this experience and perspective that I tender the following suggestions in which I shall try to offer some solutions for ameliorating those barriers.

Notes

1] *Within this dual system, different rules governed the subject matter, procedure, and enforcement of court orders in law and in equity.* See Lawrence M. Friedman, *A History of American Law* pp. 26-27 (2d ed. 1985) (describing the evolution of law and equity systems in England, and their adoption in the United States).

2] Margaret M. Mahoney, *The Enforcement of Child Custody Orders by Contempt Remedies.* University of Pittsburgh Law Review pp. 844-845.

3] The first reported interspousal custody case appeared in 1804. See Danaya C. Wright, *De Manneville v. De Manneville: Rethinking the Birth of Custody Law under Patriarchy*, 17 *LAW & HIST. REV.* 247 (1999).

4] *Custodial parents receiving the full amount of child support due declined between 2007 and 2009, from 46.8 percent to 41.2 percent.* Custodial Mothers and Fathers and Their Child Support: 2009, U.S. Department of Commerce, Economics and Statistics Administration, U.S. CENSUS BUREAU, Document P60-240, December 2011. pp 1

Although states have implemented various programs designed to prevent arrears build up, arrears growth in the nation has reached unprecedented levels. As of FY 2010, child support arrears debt has reached its highest level at \$110.3 billion dollars. Mark Takayesu, *How Do Child Support Order Amounts Affect Payments and Compliance?*, Orange County, California Department of Child Support Services, October 2011. pg 2.

5] It is well settled that parents have a duty to support their children regardless of a court mandate to pay. See *In re Adoption of N.W.*, 933 N.E.2d 909, 914 (Ind. Ct. App. 2010), *opinion adopted*, 941 N.E.2d 1042 (Ind. 2011).

6] Children are the beneficiaries of child support, *Sickels v. State*, 982 N.E.2d 1010, 1013 (Ind. 2013)

7] During a five year period the State of Connecticut, Judicial Branch, reported that the average duration of an uncontested child custody case was over 300 days.

Child Support Recipients and Obligor

Before considering establishing or amending policies related to the child support that parents pay or receive one should be familiar with these people. As many of us already know, the majority of custodial parents were mothers (82.2%), and about 1 in 6 (17.8%) were fathers. These proportions have remained relatively flat over time as they were not statistically different from 1994^[fn1]. While conducting my research I was shocked to come across a statistic by the Census Bureau about the frequency in which child support orders and agreements are put into place. The proportion of custodial parents with a court order or some type of agreement to receive financial support from the noncustodial parent was 50.6% in 2010^[fn2]. I suspect that the proportion of court orders is steadily rising as current cases under the laws requiring courts to issue orders replace cases that age out of the system.

Not surprising though is that most obligors want to support their children and will exert themselves to do so as long as the expectation is not unreasonable^[fn3]. After all, our children are our legacy and we do want to see them have healthy and productive lives. Conflict arises though when that support for the child is usurped by the parent entrusted with the fiduciary responsibility to convert those payments into direct support for the child^[fn4]. Low income on the part of a custodial parent or the obligor can result in the child not receiving the appropriate support that should be allocated to the child.

Over one-quarter (28.3%) of all custodial parents had incomes below poverty, about twice that of the total population (14.3%). Custodial parents receiving the full amount of child support due declined between 2007 and 2009, from 46.8% to 41.2%^[fn5]. This was due primarily to obligors having low or no income as the effects of a worldwide economic slowdown manifest. The probability of ever receiving a payment from the minimum wage group is quite low: 56% of these parents pay nothing in the 12 months following the establishment of a child support order.

It must be acknowledged that child support payments are actually used to support some parents while full compliance would deny to obligors minimum sustenance. This may contribute to the lack of compliance when at least one parent has very low or no earnings. Child support payments represented

20.8% of total income for the custodial parents who received the entire amount of child support payments that was due to them. Quite naturally it would also seem that child support payments represented a higher proportion of income for custodial parents below the poverty level who received full payments. After all, there must be a base amount upon which any child needs to survive. For this class of very low income parents the average child support received in 2009 represented 62.6 percent of their average annual individual income^[fn6]. This is largely due to unemployment by the custodial parents. An obvious implication of this figure is that custodial parents are using child support payments for their own sustenance as we know a child does not account for 5/8's of all household expenses. More details about actual expenses for a child is provided later.

It is worth noting that as more cases are brought within the court system these statistics may be altered. When custodial parents without any agreements and those with informal agreements were asked why a formal legal agreement was not established, the two reasons most often cited were that they did not feel the need to go to court [32.1%] and that the other parent provided financial or "in-kind" support consistent with ability to do so [34.4%]^[fn2].

Custodial parents who were receiving government assistance in 2010 was only 13.8% thanks mostly in large part to effective establishment of support orders. While the majority of custodial parents had received government assistance at some point those who were never assisted amounted to 43.4% of the caseload population^[fn7]. Greater compliance may reduce the proportion of government assistance although, just as in the married parent population, their will always be some people who will rely on government assistance.

notes

1] See Detailed Table 4 at census.gov/hhes/www/childsupport/detailedtables.html

2] Custodial Mothers and Fathers and Their Child Support: 2009, U.S. Department of Commerce, Economics and Statistics Administration, U.S. CENSUS BUREAU, Document P60-240, December 2011.

3] Mark Takayesu, How Do Child Support Order Amounts Affect Payments and Compliance?, Orange County, California Department of Child Support Services, October 2011

4] "It is well established that the right to child support lies exclusively with the child and that a custodial parent holds the support payments in trust for the benefit of the child." Sickels v. State, 982 N.E.2d 1010, 1013 (Ind. 2013) citing In re Hambright, 762 N.E.2d 98, 101 (Ind. 2002); Hicks v. Smith, 919 N.E.2d 1169, 1171 (Ind. Ct. App. 2010), trans. denied. Custodial parents who receive child support funds act as a trustee, and, "as a constructive trustee, [the custodial parent] may not contract away the benefits of the trust." Nill v. Martin, 686 N.E.2d 116, 118 (Ind. 1997).

5] Timothy S. Grall, Custodial Mothers and Fathers and Their Child Support: 2009, current Population Reports, December 2011, US Census Bureau

6] See Detailed Tables 4, 5, and 6 at census.gov/hhes/www/childsupport/detailedtables.html

7] Child Support Enforcement FY 2010 Preliminary Report

Promoting Parenting

There are numerous ways that the child support guidelines can promote or inhibit parental involvement. It ranges from some simple semantics through imputing income or calculating "in-kind" support. As previously noted there are a substantial number of parents who rely upon "in-kind" support in lieu of court ordered child support payments. The application of semantics in the Indiana Parenting Time Guidelines is instructive. The time with the child allotted to the non-custodial parent, known as "visitation", was transmuted to "parenting time" with broad implications^[fn1].

Visiting takes place in hospitals. The visitor is not providing the care but merely appears in a supportive role, to lift the spirits of the sick and injured. The term "visitation" may now be perceived as offensive by non-custodial parents because it ignores the integral part of their relationship to their children that "parenting time" embraces. Yet, it's the same time. Likewise, the terms custodial and non-custodial parents as applied to parenting time must be abolished.

In this section I first provide observations and accounts of ways in which the imposition of child support payments has impeded parenting time. This is followed by means of promoting parenting through application of the Indiana Child Support Guidelines.

First, it seems apparent that there is a "nanny factor" built into the support calculation. That is, as was in my case and many others, the ordered support amount clearly exceeds the actual costs of support provided for the child. Thus, there must be a portion of the support attributable to providing delivery of the support; Supervising, transporting, shopping, preparing meals, and so forth. In essence a nanny payment. I would personally be offended to receive such payments as I did not have a child out of love of money or as an occupation but, rather, for love of my child. In intact families these efforts can be undertaken by either parent or a service provider such as a nanny. The same opportunity should be available to dual residence families rather than the support paying parent being forced to "hire" the other parent to perform these duties when the paying parent is available to do so.

The definitions and limitations on what constitutes a "child support payment" inhibits some parents from providing for their children in ways beyond

what is court ordered. This is more so in high conflict cases or ones in which unreasonable or unattainable income levels have been imputed. It is not uncommon for a parent to only pay support and provide nothing else for the child under the protest of, "I already pay support. Your mother/father can buy that for you." The strict adherence to a non-support expenditure being defined as a gratuity inhibits actual benefits to the child. Parents have a common law duty to support their children^[fn2] as well as possibly having a statutory duty^[fn3]. If the child is provided for under both standards but is still in want of beneficial goods and services – sports equipment, computer – while the receiving parent pockets the support payment windfall this may induce the other to refuse to make non-support expenditures on the child.

A substantial percentage of non-custodial parents already provide in-kind support without any remuneration for doing so. The April 2010 Current Population Survey by the U.S. Census Bureau reported that "in-kind" child support received by custodial parents included the following;

- ~ At least one type of support - 60.3%
- ~ Birthday, holiday, or other gifts - 56.4%
- ~ Clothes, diapers, shoes, etc. - 39.9%
- ~ Food or groceries - 28.3%
- ~ Pay for medical expenses - 18.0%
- ~ Pay for child care or summer camp - 10.3%

The totals shown exceeds 100 percent because respondents could list more than one type. Overall, as indicated at least one type of in-kind support, such as gifts or coverage of expenses, was received from the noncustodial parent by 60.3 percent of all custodial parents on behalf of their children. I immediately caution that the 60% figure should not be given much weight and that a number in the low 40% range should be used. The highest category was gifts at 56% followed by clothing related at 40%. Gifts I feel are not within the realm of "child support" for the purposes of our consideration here. It is more disappointing to see that over 40% did not provide gifts to their children. There is a caveat to these numbers which is that they are reported by custodial parents, some of whom may not acknowledge the non-custodial parent or may return gifts.

The proportion of custodial mothers receiving in-kind support (58.1%) was lower than that of custodial fathers (70.4%). While policy should not

distinguish among gender class I provide this information only for a contextual basis. While the Census Bureau made no findings in regards to this disparity I suspect that it is related to more of a feeling of detachment to their children by fathers. Much of this I suspect is the result of parental status of fathers established through paternity proceedings in which fathers may have not been aware of their status until years after the child's birth and may have other established families. To the extent that child support payment orders can distinguish between those providing in-kind support and those willing to only make a financial contribution I feel it would engage more fathers into the fold of their children's daily lives to the benefit of all. Custodial parents with a child support agreement or award were more likely than those without awards to receive in-kind support (63.9% and 56.6%, respectively). Although courts disfavor crediting parents with "in-kind" support contributions^[fn4] that policy should be reconsidered and adopted by rule.

Therefore, I propose a two-tiered payment structure be considered. A rate for a parent who purchases and delivers groceries, takes the children shopping for clothing, and engages in the activities that make one a parent to the child not just a weekend play date for entertainment purposes. For the parent who abandons or rejects these responsibilities and dumps them on the custodial parent then a higher rate considerate of the custodial parents' "opportunity costs" is appropriate.

This should also advance Indiana toward the public policy goal of increasing the rate of compliance with child support payment court orders. Parents who feel more connected to the child are more likely to pay support^[fn5] as are those who feel that the order is reasonable^[fn6].

It is essential that we recognize and promote the concept that parenting – nurturing a child -- is supporting the child. The support provided by "being there" and showing an interest in the child is much more valuable in terms of the child's social-emotional development and maturity than money can provide^[fn7]. As I have just mentioned those parents who enjoy frequent and meaningful parenting time are more likely to be compliant with existing support orders^[fn8]. To that end, much like those parents who have established their own "in-kind" support practices, the State of Indiana should be encouraging greater parental involvement in the lives of children through "in-kind" payment support

orders. If it takes a financial incentive to initiate the process I am confident that it will be a sound investment.

Being an involved parent naturally leads to expenditures that extend beyond providing mere support. However, a parent who would otherwise gladly make the non support expenditures on a child but who is entrenched in battle with the other parent may not do so as that may only facilitate the hoarding of a support windfall. By granting a support credit to the paying parent so long as the child receives necessary support this provides for greater opportunities for the child and strengthening of parent-child bonds. Such a possibility may be best applied to low income obligors who due to lack of employment may be available for performing more "in-kind" activities. This does require a paper trail and, at times, may lead to evidentiary hearings. I firmly believe that this would lead to fewer child support modification or contempt hearings which are the most common post decree litigation actions^[fn9]. And, again, this would be a sound investment that Indiana should consider.

Notes

1]Use of Term "Parenting Time." Throughout these Guidelines the words "parenting time" have been used instead of the word "visitation" so as to emphasize the importance of the time a parent spend with a child. The concept that a non-custodial parent "visits" with a child does not convey the reality of the continuing parent-child relationship. Indiana Parenting Time Guidelines, commentary at Preamble. 28 March 2013.

2]It is well settled that parents have a duty to support their children regardless of a court mandate to pay. See *In re Adoption of N.W.*, 933 N.E.2d 909, 914 (Ind. Ct. App. 2010), *opinion adopted*, 941 N.E.2d 1042 (Ind. 2011).

3] Indiana Code 31-16-6 et seq.

4] In general, a parent obligated to pay child support will not be allowed credit for payments that do not conform to the support order. *Decker v. Decker*, 829 N.E.2d 77, 79 (Ind. Ct. App. 2005). Furthermore, gifts, entertainment and other similar, incidental expenditures made by the non-custodial parent should not be credited against child support arrearages. *Payson v. Payson*, 442 N.E.2d 1123, 1129 (Ind. Ct. App. 1982) (citing *Whitman v. Whitman*, 405 N.E.2d 608, 613-14 (Ind. Ct. App. 1980)).

5]Child Support Enforcement Handbook. 2008, Department of Health and Human Services, Administration for Children and Families, Office of Child Support Enforcement. pp. 57-58

6] Haskins, R. Child support: A father's view. In *Child support: From debt collection to social policy*.

7] "Research shows that children benefit from positive relationships with both parents resulting in better school performance with fewer problems, lower chances of suspension, expulsion from or dropping out of school, and decreased likelihood of risky behaviors including use of drugs and alcohol and early sexual involvement." VA Child Support Enforcement Program, 2009 Fact Sheet, p. 10

8] Seltzer, J.A., Schaeffer, N.C., and Charng, H.W. Family ties after divorce: The relationship between visiting and paying child support. *Journal of Marriage and the Family* (1989) 51:1013-32

9] See Amy Koel et al., *Patterns of Relitigation in the Postdivorce Family*, 56 J. MARRIAGE & FAM. 265 (1994). Also numerous law firms cite these as their most common post-divorce actions. See <http://www.weintraub-law.com/after-your-divorce/>; <http://harmonydivorcemediation.com/post-divorce-judgment-modifications-los-angeles.html>

Accountability of child support expenditures

As with the gratuity proposition a general lack of accountability of support provided to the child can produce conflict between some parents. While accounting can be ordered^[fn1] it is rarely done. I have heard or read with great regularity the claim of, "I don't receive enough support to pay for everything." What this belief and statement fails to recognize is the obligation of the parent receiving support to also contribute a share of his or her income although this is already provided for when calculating support^[fn2]. This feeling of the other parent not carrying his or her burden leads to violations of parenting time and increases levels of conflict.

Parents who feel that they have received an equitable child support order are more likely to comply with the terms of the order^[fn3]. Greater compliance reduces parenting conflict as well as the use of enforcement proceedings undertaken by the court. Thus, petitions for modification of parenting time or support payment orders as well as enforcement proceedings are likely to be reduced when accounting of expenditures is made. The initial investment in a more lengthy evidentiary process should be a net gain considering the reduction in future court proceedings as I have speculated.

Trial courts should conduct a paper review of child support orders not less than every three years. As part of the review, motions for modification that do not require a change in circumstances as provided by statute^[fn4] could be tendered by the court or any party and set for hearing if requested. I believe that this will provide support for the child consistent with the ability of the parents to provide it while adapting to the changing needs of the children as occurs in intact families.

A corollary benefit to this review process would be the availability of data gleaned from trial courts reviewing child support matters. These records could be transmitted to a central repository where the state could use the income and expenditure data for consideration in setting future child support guidelines.

This review process could assist in meliorating an additional factor that leads to inhibiting parent-child relationships – support not being based upon actual expenditures for the child.

Notes

1] see IC 31-16-9-6 Accounting of future expenditures. At the time of entering an order for support or at any subsequent time, the court may order, upon a proper showing of necessity, the spouse or other person receiving support payments to provide an accounting to the court of future expenditures upon such

terms and conditions as the court decrees. *As added by P.L.1-1997, SEC.8.*

2] Indiana Child Support Obligation Worksheet, line 6. Parent's Child Support Obligation

3] Haskins, R. Child support: A father's view. In *Child support: From debt collection to social policy*.

4] see IC 31-16-8-1 Modification or revocation of child support order or maintenance order. [m]odification may be made only: (1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable; or (2) upon a showing that: (A) a party has been ordered to pay an amount in child support that differs by more than twenty percent (20%) from the amount that would be ordered by applying the child support guidelines; and (B) the order requested to be modified or revoked was issued at least twelve (12) months before the petition requesting modification was filed. *As added by P.L.1-1997, SEC.8. Amended by P.L.103-2007, SEC.19.*

Actual support expenditures for the child

As with any matters related to financial decisions different people exhibit different temperaments when it comes to earning, spending, and saving. These variances not only extend across cultures but populations within cultures. Some populations or individuals have such a predilection to consumerism that their spending exceeds their resources in either earnings or savings. In recent years this was evident through housing foreclosures and financial crises in places such as Greece. Thus, bankruptcy may be their escape. On the opposite end may be those who are morally opposed to consumerism who reuse, recycle, and re-purpose while enjoying substantial growth in their savings or charitable donations. While both could have identical incomes, the amounts apportioned to rearing their children could vary widely.

I fall into that category of those morally opposed to consumerism. While my income is currently low, even if it was to double or triple I would still have the same house, grow food in my garden, ride a bicycle for transportation, and shop primarily at yard sales. Thus, like I did while married, my expenditures on my son would still be based upon need rather than money available at the moment. There is no direct correlation established between income and spending. This creates a disjunction when the child support guidelines are applied to parents' incomes. The guidelines are presumed to arrive at the amount parents spend on their children but presumptions are less likely to be as accurate as real data. We cannot escape the reality that parents do spend support money on themselves^[fn1]. When the presumption exceeds the real data a windfall is created that can instead boost one parent's standard of living at the expense of the other^[fn2]. This provides an opportunity for parents to grapple for the windfall. While some will simply let it go, or agree to methods of reallocating extraordinary expenses others will escalate it into conflict over the reduction or allocation of the support windfall. Disagreements are likely to arise which may precede hostilities that may otherwise not have occurred.

So whether future guidelines are based upon reporting data from parents, the collection of additional data prior to the setting of initial support orders I feel is essential to retaining or establishing confidence in the judiciary and the child support payment system. Regardless of whether any such "nanny factor" or

parenting time and support presumptions are considered I do believe that we need to substantially expand the CSOW to collect more information. Parents are well aware of the costs of providing support^[fn2] to their children, much of which can be documented – housing, clothing, and medical insurance or care – through distinguishable payments.

Housing expense is easily calculated if a parent rents an apartment. If the parent has a bedroom for the child then the difference between the charge for a unit with one less bedroom and the actual unit being rented is the cost for the child plus a small percent of utilities^[fn4].

The CSOW should be expanded to include more line items of actual expenses incurred on behalf of the child. By narrowing the range of discrepancy between a support order based upon actual costs and a support order based upon a guideline presumption parents should be more satisfied that the amount is just. Additionally, petitions for modification and subsequent hearings should decrease as parents who believe that the order is unjust would be less likely to be able to meet the statutory requirements for a modification^[fn5]. Another factor that is likely to be affected by support being based on actual expenditures is lack of compliance through inability to pay the amount ordered^[fn6].

On average, households in the lowest income group spent 25% of their pre-tax income on a child while those in the middle-income group spent 16% and those in the highest group only 12%^[fn7]. The range among these percentages would be narrower if after-tax income were considered. The percent of income spent on a child declines with overall expenditures as income rises. This is because, in general, expenses on a child for goods and services considered to be necessities – actual support -- does not vary as much as those considered to be discretionary^[fn7].

Families across the income groups spend in a range of 31-35% on housing. The percentage rises in proportion to income. The food budget shares ranged between 17 to 25 percent for a child in a two-child, husband-wife family. The health care budget shares ranged between 16 to 25 percent for a child in a two-child, husband-wife family. That final statistic clearly demonstrates that parents need to be more proactive in protecting the well-being of their children. In the past 20 years [my age of 25-45 years] my non dental health industry provider based and pharmacological healthcare costs have been less than \$100. My

greatest healthcare expenses have been sporting equipment and real food.

Overall, about three-fifths of expenditures on children are support based^[fn8]. The USDA estimates that a single child accounts for 27% of household expenses in a two-parent household. Applying the support proportion returns a mean spending on a single child of 16.5%. It is no wonder that support payments drop off significantly when support payments exceed 19% of a parent's income when that parent is still obligated to provide support for the child while in his or her care.

The guidelines calculator, if it is to be presumed to establish the correct amount of support^[fn9], should be adjusted to produce a number that more accurately represents the actual amounts that the United States Department of Agriculture has determined is actually spent on the support of children. This is not only equitable but would be consistent with what the spending habits of parents had been prior to the child support payment order being established.

notes

1] Although there was evidence that Father gave Mother some money for X.J.M.'s support, Mother did not use that money for X.J.M.'s benefit. IN RE: THE PATERNITY OF X.J.M., b/n/f A.D.M., No. 82A05-0908-JV-467

2] The Georgia Supreme Court in Georgia Department of Human Resources v. Sweat et al overturned a finding by trial court judge the Honourable C. Dane Perkins, Judge of Superior Court, Alapaha Judicial Circuit, State of Georgia on February 25, 2002 that proclaimed Georgia's child support calculations unconstitutional. Finding 7 - "Evidence presented ...show that the Guideline presumptive awards include such large amounts of hidden alimony (presumptive award less an economics based award) that a non-custodial parent is unable to provide for a child when in the non-custodial parent's care to the same extent as in the custodial parent's household. Presumptive awards have been shown to typically exceed total actual costs [of child raising] according to the U.S. Department of Agriculture Such excessive child support awards are not in the best interest of the child...[and] leave[] the non-custodial parent in poverty while the custodial parent enjoys a notably higher standard of living."

see also. Indiana Child Support Guideline 1 (the Guidelines attempt to give children the standard of living they would have enjoyed had the marriage not been dissolved); *Bussert v. Bussert*, 677 N.E.2d 68, 71 (Ind. Ct. App. 1997) (child support payments are for the benefit of the child and should not be used to leverage one parent's standard of living at the expense of the other), *trans. denied*.

3] see IC 35-46-1-1 Definitions. As used in this chapter: "Support" means food, clothing, shelter, or medical care.

4] The USDA accounts for utilities being an additional 16% of rent.

<http://www.rurdev.usda.gov/SupportDocuments/3560-2chapter07.pdf>

5] see IC 31-16-8-1 Modification or revocation of child support order or maintenance order. [m]odification may be made only: (1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable; or (2) upon a showing that: (A) a party has been ordered to pay an amount in child support that differs by more than twenty percent (20%) from the amount that would be ordered by applying the child support guidelines; and (B) the order requested to be modified or revoked was issued at least twelve (12) months before the petition requesting modification was filed. *As added by P.L.1-1997, SEC.8. Amended by P.L.103-2007, SEC.19.*

6] 11% of obligors owed 54% of the arrears. 75% of those obligors had no reported income or income less than \$10,000 per year. Dr. Elaine Sorensen, Urban Institute, (2007).

A mere showing that a parent has a regular income, standing alone, is not sufficient to indicate parental ability to provide support. In re Adoption of N.W., 933 N.E.2d 909, 913 (Ind. Ct. App. 2010), adopted on transfer, 941 N.E.2d 1042 (Ind. 2011). To determine the ability to pay, it is necessary to consider the totality of the circumstances. In re Adoption of M.A.S., 815 N.E.2d 216, 221 (Ind. Ct. App. 2004).

7] United States Department of Agriculture, Center for Nutrition Policy and Promotion. Miscellaneous Publication Number 1528-2009, Expenditures on Children by Families, 2009.

8] U.S. average for the younger child in middle-income, husband-wife families with two children is 61% of expenditures are spent on support. United States Department of Agriculture, Center for Nutrition Policy and Promotion. Miscellaneous Publication Number 1528-2009, Expenditures on Children by Families, 2009.

9] A trial court's calculation of child support under the Guidelines is presumptively valid. Morgal-Henrich v. Henrich, 970 N.E.2d 207, 212 (Ind. Ct. App. 2012).

Reducing Parenting Time Conflict

There are parents who wrongly so withhold child support payments or parenting time in retaliation for the other being withheld. Public policy has shown disfavour for these actions^[fn1] and courts have clearly opined that parenting time is exercised independent of whether support is paid^[fn2].

There is a great line of caselaw that seeks to extricate child support from parenting time by creating a duality which appears in both statute and consciousness^[fn3]. But I contend that in reality the two are critically intertwined, that there is a clear nexus between these perceptual distinctions. In effect they are two facets of the same act and it is essential that we recognize and further enhance this nexus.

Historically child support has been used in opposition to feminism^[fn4]. Adherents to a patriarchal structure welcomed the use of child support payments and alimony as a means by which to keep women "in their place" in the home. As women achieved parity in the previously male dominated corporate world the support structure, inclusive of the "nanny factor" became outmoded but not obsolete. We would be in denial to say that child support is not seen or used as a means to achieve a financial windfall and exert control of each other as adversarial parties in a legal proceeding and of the children. It is subtilized through the parenting time arguments under the elusive undefined best interest standard. Untangling this reality may appear as a fanciful whim but it should be at the forefront of our consciousness when considering Indiana's child support policy.

This year I have drafted and intend to have introduced in the upcoming session a bill for a presumption of 50/50 parenting time^[fn5]. That unless good cause is shown and a trial court issues special findings^[fn6] to the contrary the parenting time order would establish a near equal division of parenting time. I propose that in an effort to mediate the support/parenting time conflict that support should also be based upon a 50/50 presumption, which also accounts for income disparity. That is, each parent would contribute an equal *portion* of his or her income toward support of the child.

That is not unlike the current process where parents pay a share of income toward support of the child which is then adjusted by the parenting time factor to compensate for an increase or decrease in the actual expenditures

commensurate with such division of providing actual support. The system, while presumably equitable, integrates support and parenting time. Thus, seeking to restrict or increase parenting time respective of who is paying or receiving support payments may be motivated by financial incentives. Instead I propose an alternative that disentangles support and parenting time by declaring some support obligations to be a gratuity.

Under this scheme the parent who petitions for a greater share of parenting time would not receive a greater amount of support as the "in-kind" or actual support provided would be considered that parent's gratuity^[fn7]. The parent receiving less parenting time would not escape paying additional support commensurate with less parenting time credit. Instead the NCP would be required to either spend the difference in a gratuitous manner^[fn8] for the child or pay into an account for the child such as an education fund.

In this manner a parent could not receive a child support windfall by taking on additional parenting responsibilities and neither would a parent be able to reduce his or her support payments by seeking additional parenting time that may otherwise not have been ordered.

Notes

1] IPTG, 2013, Section I(C)(1) Commentary - "Parents share a joint and equal responsibility for following parenting time orders. A child shares none of this responsibility and should not be permitted to shoulder the burden of this decision. Unacceptable excuses for denying parenting time include the following: The noncustodial parent is behind in support."

see also New Jersey Judiciary, Administrative Office of the Courts. "The custodial parent does not have the right to withhold parenting time and the noncustodial parent has an obligation to pay child support regardless of parenting time issues. Child support is intended for the child's economic needs and parenting time for the emotional needs."

2]"[v]isitation rights and child support are separate issues, not to be comingled. A court cannot condition visitation upon the payment of child support if a custodial parent is not entitled to do so." Farmer v. Farmer, 735 N.E.2d 285, 288 (Ind. Ct. App. 2000).

3] "The concept of parents negotiating away parenting time as a means to eliminate the obligation to pay child support is repugnant and contrary to public policy. Attorneys should refuse to be a part of such discussion and should advise their clients that any such discussion is unacceptable," Justice Steven David wrote in Perkinson v. Perkinson, 989 N.E.2d 758 (Ind. 2013)

see also http://divorce.lovetoknow.com/Child_Support_and_Visitation_Rights;

http://singleparents.about.com/od/statebystateresources/a/unpaid_child_support.htm

4] The "maternal preference" standard which was pervasive in culture, rule and law held that children should, by nature, be placed in the care and control of the mother following divorce. This standard, established prior to no-fault divorce, was rooted in anti-feminism. The primary objective was to keep women out of the workplace - from invading the sanctity of the male dominated business, political, and legal culture. Thus, "spousal maintenance," high child support payment orders, and custody awards were liberally granted to women.

<http://bcchildadvocates.blogspot.com/2014/04/the-reasons-that-men-especially-fathers.html>

5] <http://stuartshowalter.com/Portals/0/Public%20Policy/Shared%20Parenting%20-%20Mishler.pdf>

6] Indiana Trial Rule 52(A) Findings by the Court (A) Effect. In the case of issues tried upon the facts without a jury or with an advisory jury, the court shall determine the facts and judgment shall be entered thereon pursuant to Rule 58. Upon its own motion, or the written request of any party filed with the court prior to the admission of evidence, the court in all actions tried upon the facts without a jury or with an advisory jury . . . shall find the facts specially and state its conclusions thereon.

7] Support provided for child which exceeds that which is ordered by the court is considered gratuitous. Indiana courts have recognized that voluntary over-payments and continuing support beyond a legal obligation are gratuitous acts by parents that are welcomed. "[w]e recognize that the parents in intact families often contribute, to the extent of their ability, to their children's support even after their children have reached the age of twenty-one. When the need exists, such gestures of familial affection, solidarity and support are to be commended, if not encouraged. Similar acts involving parent-child in a dissolved marital relationship are entitled to judicial recognition. This is true because in the formulation and enforcement of support orders the courts seek to eliminate or minimize the prejudicial economic impact of dissolution." Olson v. Olson, 445 N.E.2d 1386, 1389-90 (Ind. Ct. App. 1983).

"The well-established rule in Indiana is that over-payments of child support are generally viewed as voluntary and gratuitous." See, e.g., R.R.F. v. L.L.F., 935 N.E.2d 243, 252 (Ind. Ct. App. 2010).

8] Those considered to be discretionary - entertainment, such as portable media players, sports equipment, computers, etc.; and reading materials, such as nonschool books, magazines, etc. United States Department of Agriculture, Center for Nutrition Policy and Promotion. Miscellaneous Publication Number 1528-2009, Expenditures on Children by Families, 2009.

Continuity in the child's standard of living

Dissolution or separation between parents is equated with major life stressors that can contribute to or cause anxiety, depression, tumult, and animosity in their lives. It is our public policy that the children of these parents not be so affected by parental hostilities^[fn1]. Consistent with maintenance of separate homes, the degree of adversarial litigation, and difficulty emotionally adapting to the new situation, parents may also suffer extreme financial hardships. Likewise, it is our public policy that the children enjoy the same standard of living that they would have had the parents' marriage stayed intact or had they chosen to cohabitate in the case of paternity actions^[fn2] and the guidelines are presumed to do that^[fn3].

Trying to maintain the child's standard of living consistent with a probable outcome had the parents resided together may be an effort in futility. The very concept that parents who may have, while living together, exhausted all of their finite resources on living expenses can subsequently maintain the same standard of living in separate households is contrary to logic. In separate households, where fixed expenses account for the majority of spending and increase proportionally as income decreases, parents have less discretionary income and they along with the children are likely to experience a reduced standard of living. Both mothers and fathers experience declines in income following divorce^[fn4].

The ultimate result of trying to achieve this ideal is that either one or both parents will experience a reduced standard of living. This is rightfully so as it was the selfishness of the parents that produced the result of disjointed living arrangements for the child. Too often though the result is that one parent is unable to provide sustenance for himself or herself. Some to the point of being rendered homeless or without an automobile. When these parents exercise parenting time the child, as a natural consequence, will experience the same homelessness or decline in available resources – in direct contradiction to the public policy that created the defect.

The CSOW should include a minimum sustenance calculation for each parent. Consistent with the trial courts' mandate, judicial officers should be guided to inquire into the veracity of the calculation and then ensure that an amount of support awarded does not reduce a parent's remaining financial resources to less

than that which was found to be necessary to maintain sustenance^[fn5].

The harsh reality is, as the courts have acknowledged in some cases, that the child will experience a severe decline in the standard of living in one household while possibly experiencing an increase in the other^[fn6]. This may be by way of applying the guidelines in a manner not consistent with the needs of the parents or a parent trying to win affections of the child. Children would be better served by continuity in their standard of living between households even if that does entail a reduction in their standard of living across the board.

Maintaining the child's standard of living is usually dependent upon regular payment of court ordered support. In order for child support to be reliable, child support orders must be set accurately and based on a noncustodial parent's actual ability to pay them. Research shows that setting a realistic order improves the chances that child support payment will continue over time^[fn7]. Research consistently finds that parents are more likely to stay current on their child support payments if the support obligation is 20 percent of earnings, or lower^[fn8].

Notes

1] "Fostering a child's relationship with the noncustodial parent is an important factor bearing on the child's best interest and, ideally, a child should have a well-founded relationship with each parent." *In re Marriage of Kenda and Pleskovic*, 873 N.E.2d 729, 739 (Ind. Ct. App. 2007), *trans. denied*.

"[t]he welfare of the child, not the wishes and desires of the parents, is the primary concern of the courts." *In re Paternity of M.J.M.*, 766 N.E.2d 1203, 1209 (Ind. Ct. App. 2002).

In both *Owensby and Ferguson*, we held that a trial court may not issue or change a custody order for the purpose of punishing a parent and that it is the child's welfare, not the parents', that controls the actions of the trial court. *Owensby v. Lepper*, 666 N.E.2d 1251, 1256 (Ind. Ct. App. 1996), *reh'g denied*; *In re Marriage of Ferguson*, 519 N.E.2d 735, 736 (Ind. Ct. App. 1988)

2] The guideline approach is promulgated in Indiana Code section 31-16-6-1, which considers, among other things, the standard of living the child would have enjoyed if the marriage had not been dissolved and the financial resources and needs of the noncustodial parent. *Nikolayev v. Nikolayev*, 985 N.E.2d 29, 33 (Ind. Ct. App. 2013).

3] *Payton v. Payton*, 847 N.E.2d 251, 253 (Ind. Ct. App. 2006) (child support awards under the Guidelines are designed to provide the children as closely as possible with the same standard of living they would have enjoyed had the marriage not been dissolved.)

4] Contrary to claims that divorce impoverishes women but enriches men, divorce was found to render negative economic consequences on both men and women. White women experience an income loss of between 12 and 30 percent (or an average of 22 percent) following divorce, while the income loss among white divorced men ranges between 8 and 13 percent (or an average of 10 percent). *Atlee L. Stroup and Gene E. Pollock, "Economic Consequences of Marital Dissolution," Journal of Divorce and Remarriage 22 (1994): 37-54.*

5] Child support calculations are made utilizing the income shares model set forth in the Indiana Child Support Guidelines. *Sandlin v. Sandlin*, 972 N.E.2d 371, 374 (Ind. Ct. App. 2012). The guideline approach is promulgated in Indiana Code section 31-16-6-1, which considers, among other things, the standard of living the child would have enjoyed if the marriage had not been dissolved and the financial resources and needs of the noncustodial parent. *Nikolayev v. Nikolayev*, 985 N.E.2d 29, 33 (Ind. Ct. App. 2013).

6] We recognize that determination of how to apply a child's receipt of Social Security Retirement benefits in a child support order can be complicated, and present challenges to a trial court—and not applying those benefits poses the risk that the trial court may fashion a child support order under which "the children of divorcing parents enjoy a standard of living much greater than that which they enjoyed pre-dissolution." *Thompson v. Thompson*, 868 N.E.2d 862, 865 (Ind. Ct. App. 2007). This would most certainly be the opposite—but equally inappropriate—danger of applying the Poynter methodology. And we likewise agree—and our Child Support Guidelines now reflect—that a mechanical application of the trial court methodology in *Stultz* (i.e., a strict denial of credit) would be improper, and the opinion "should be applied to provide for the exercise of the trial court's discretion." *Id.* at 868 (encouraging use of methodology from *Stultz's* footnote 2). "[U]tilizing such a methodology will promote the aims of the Support Guidelines, will treat similarly situated families the same, and will provide for children receiving the same degree of support post-dissolution that they had when their parents' marriage was intact." *Id.*

7] Carl Formoso, *Determining the Composition and Collectibility of Child Support Arrearages*, Washington Department of Social and Health Services, Division of Child Support, 2003.

8] Mark Takayesu, *How Do Child Support Order Amounts Affect Payments and Compliance?*, Orange County Child Support Services, 2011; Carl Formoso, *Determining the Composition and Collectibility of Child Support Arrearages*, Washington Department of Social and Health Services, Division of Child Support, 2003; U.S. Department of Health and Human Services, Office of Inspector General, *The Establishment of Child Support Orders for Low Income Non-custodial Parents*, U.S. Department of Health and Human Services, OEI-05-99-00390, 2000.

Some other considerations

Divorce can have a substantial negative impact on some parents emotionally that interferes with their ability to earn a living and successfully manage their finances. Women are more likely to suffer periods of depression^[fn1] and this can lead to missed work, increased medical costs, a reliance upon convenience foods and services, and reduced financial stability which leads to increased stress. All of these can have a negative impact upon the children. Judicial officers should be encouraged to consider the emotional well-being of parents and the impact that guideline support amounts may have upon them and deviate temporarily if warranted.

Obligors that are the most difficult from whom to collect include NCP is institutionalized, receives Social Security Administration benefits, is disabled, incarcerated, works for payment under the table, or is engaged in illegal activities^[fn2]. Researches have pointed out several actions available to states for use in managing arrears debt to address this population^[fn2]. Of these actions, setting realistic orders is of primary importance. In this paper I have provide some novel approaches to setting realistic support orders.

Research indicates that orders set above 19% of NCP's income leads to lower performance in the form of lower compliance, arrears growth, and missed monthly payments. This finding was found to be true regardless of differences in NCP income, size of family (number of children) and controlling for a host of other potential factors. This 19% threshold in setting an order is recommended for policy makers to assure the highest compliance and collections received^[fn3].

This group is responsible for the majority of arrears owed. In nine states only 11% of the obligors with an obligation owed 54% of the total arrears balance. Each owed an average of \$30,000^[fn2]. Three quarters of these obligors, referred to as high debtors, had not reported income or had reported income less than \$10,000 per year. These obligors were identified as primarily non-payers and referred to as a group from which it is most difficult to collect child support^[fn2].

These researches proposed adopting some of the strategies used by various states which include the following:

- ~ Set realistic orders
- ~ Increase parent participation in the order establishment process

- ~ Reduce the length and use of retroactive support
- ~ Early Intervention
- ~ Increase review and modification of orders
- ~ Conduct amnesty programs
- ~ Implement arrears compromise programs

A key highlight emphasized in the *National Child Support Enforcement Strategic Plan* is prevention of the build-up of unpaid support (arrearages) through early intervention rather than traditional debt threshold-based enforcement. This can be accomplished through setting appropriate orders from the beginning, modifying existing orders, contacting the noncustodial parent immediately after a scheduled payment is missed and updating child support guidelines based on change in circumstances^[fn4].

Setting appropriate orders as a means to manage arrears debt was well documented in previous research^[fn2]. If orders are appropriately set from the beginning of a case, this results in higher compliance, less arrears accumulation, and more collections being distributed to families. Many of these families live in poverty and receiving this financial support helps alleviate poverty.

Raising an individual parent's child support payment order does not necessarily increase payments. In fact, responsible fathers actively engaging in their children's lives may have high orders which leads them in making high payments^[fn5]. Thus, it is not the setting of a high support order that leads to higher collections but, rather, it is engaging fathers more proactively in their children's lives that leads to high support payments. At the same time they are also making greater "in-kind" contributions.

Judicial officers, practitioners and parents should be encouraged to examine whether a parent receives an Earned Income Credit, government provided support, school meals, or a tax deduction that may offset the total balance of expenses for the child.

Finally, courts should be extremely reticent to impute income to a parent. Imputed income has been a significant barrier to support payments as research shows it is often applied to parents unable to pay rather than those unwilling or who avoid earnings to reduce their portion of support. It is not appropriate to impute income where a parent is not intentionally seeking to avoid a

support obligation^[fn6] and the guidelines should clearly reflect this. In Appendix B I have provided the relevant portion of a recent opinion by the Indiana Court of Appeals regarding the problems associated with imputing income in this situation. Instead of imputing income judicial officers should be encouraged to order disclosure of financial records or otherwise discover actual income. Nationally, imputing income is being shunned and reserved for only the most recalcitrant obligors^[fn7].

However, when a parent has remarried and quits working for earnings so as to avoid having an income for child support calculation purposes then the earnings of the subsequent spouse should be used in calculating that parent's support obligation as that parent and the children are now receiving the in-kind support from his or her new spouse.

The reality of child support being used by a custodial parent must be known to some of the paying parents as well as those who are recalcitrant and may be motivated not to pay when they know their payments are being used to support the other parent. Therefore, policy makers and judicial officers should strive to ensure that "support" is used for the child, and that barriers to NCP direct involvement with spending decisions be eliminated. These efforts would very likely reduce recalcitrant attitudes and increase compliance.

Notes

1] "Depression is about twice as common in women as in men, with about 1 in 4 women suffering from depression at some point during her lifetime." Ruta Nonacs, M.D., Ph.D , *A Deeper Shade of Blue: A Woman's Guide to Recognizing and Treating Depression in Her Childbearing Years*

2] Sorensen, E. Sousa, L., & Schaner, S (2007). "Assessing Child Support Arrears in Nine Large States and the Nation." Washington DC: Urban Institute.

3] Mark Takayesu, *Setting Appropriate Orders to Increase Future Compliance and Payments*, Orange County, California Department of Child Support Services, 08 March 2013

4] *Child Support Enforcement Handbook*. 2008, Department of Health and Human Services, Administration for Children and Families, Office of Child Support Enforcement. pp.

5] Meyer, D. R., Ha, Y., & Hu, M.C. (2008). "Do high child support orders discourage child support payments?" *Social Service Review*, 82, 93-118.

6] "Where a parent is unemployed or underemployed for a legitimate purpose other than avoiding child support, there are no grounds for imputing potential income." *Trabucco v. Trabucco*, 944 N.E.2d 544, 550 (Ind. Ct. App. 2011), *trans. denied*.

7] If there is no information about the noncustodial parent's ability to pay, the child support order often is based on "imputed income." However, this practice leads to greater arrears than if orders are based on actual income and is being used less and less. Income is most likely to be imputed when the noncustodial parent fails to respond, such as not attending a child support hearing, and a default order is entered. Many states are trying to reduce the issuance of default orders, and to more fully engage parents in the establishment of orders.

Conclusion

Money is no more a commodity or natural resource than a battery is a producer of electricity. The transfer of money between parents does not ensure support of a child. It still takes a parent to exchange that money for the goods or services that constitute support. It is the granting of authority to a parent to exercise that fiduciary responsibility and the manner of its execution that often leads to conflict.

We should not conceive conflict through divorce to be an anomaly or even a condition to challenge. After all, divorce is generally not the result of harmonious cohabitation and child rearing. But it is that smaller portion which are high conflict that pose the greatest challenge to us and drain a highly disproportionate amount of our resources. These are the cases I handle. These are the parents whose conflict has often been exacerbated by the adversarial nature of the proceedings and the tools available that can facilitate the war state of mind.

The child support guidelines are such a tool when applied haphazardly or in an oppressive authoritarian manner. Where we find individuality being sacrificed for uniformity and efficiency we are likely to find increased conflict amongst those who are adversely affected by this automation. I would like to see a greater emphasis placed upon making judicial inquiries into the historical level of support provided to the children, the parental contributions, the general level of expenditures and the impact of this life changing event has upon the parents and their ability to successfully cope. This takes time. This may include finding resources for parents. This takes effort in writing findings. But it does not come at a cost. It comes with a benefit, the benefit that children receive from having two parents directly participating in their support and upbringing.

Instead of a cost in time I see what may be an extra half day of hearing on support issues as an investment. Parents who feel that they were able to have their case properly adjudicated, were treated like individual sentient beings, and received detailed findings and conclusion substantiating the court's ruling are much less likely to engage in protracted litigation -- including appeals -- which is characteristic of high conflict parenting.

Essential to child support compliance is setting appropriate levels of support that goes *to the child*. As shown herein support payments are sometimes used to support parents and not the child which results in reduced compliance. Additionally, as the following graph depicts, there is a clear income threshold for which compliance drops dramatically. Policy makers should consider this threshold when calculating

support.

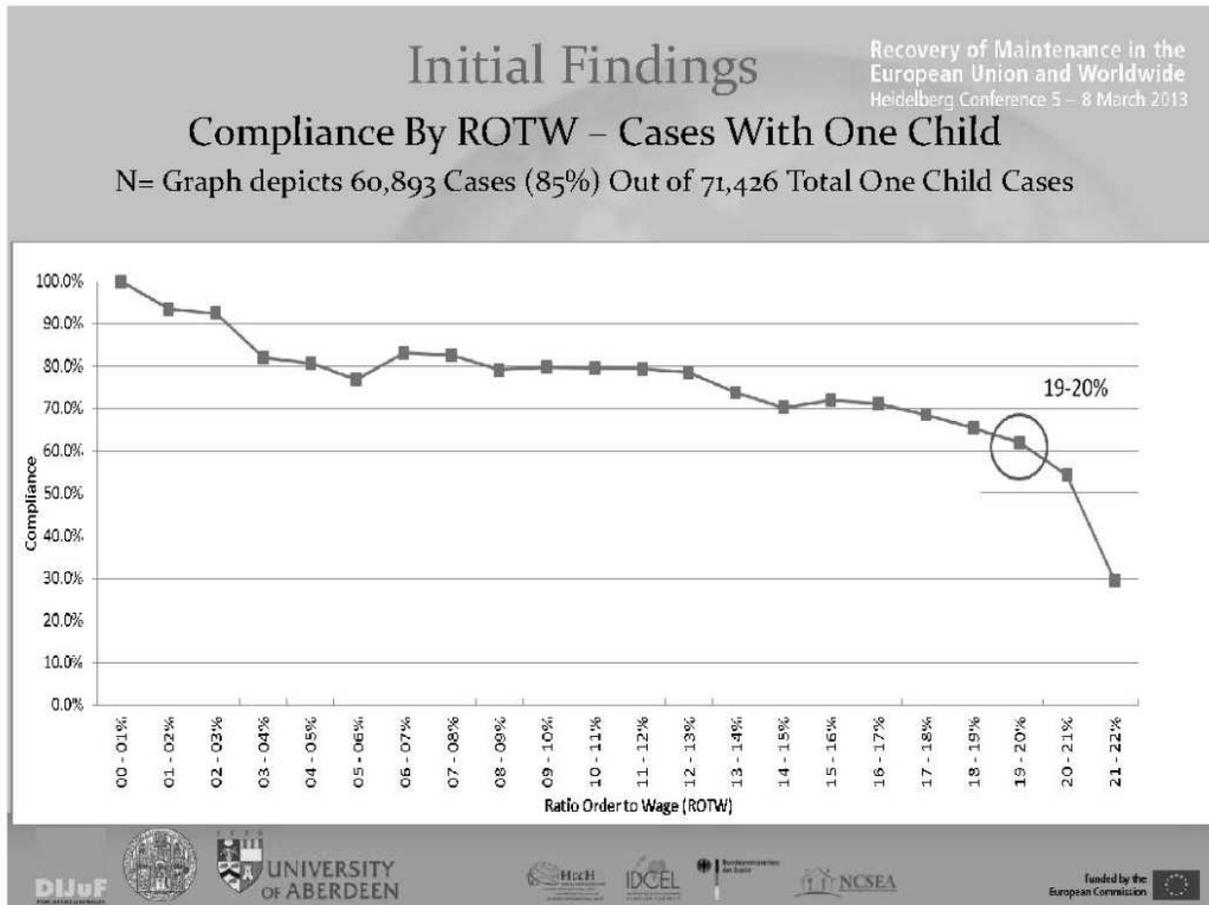


Chart courtesy of Mark Takayesu, Orange County Department of Child Support Services. Used by permission.

The accumulation of arrears, whether through delay in setting a support payment order or an obligors inconsistency in paying, is also a barrier to future compliance. I therefore recommend that courts immediately contact a parent after missing a payment, especially when set through a wage withholding order, and seek information from the parent to consider setting a modification hearing[fnx - sua sponte]. Retroactive setting of support should be allowed only in very limited circumstances where the parent had clear notice that support would be sought but engaged in some type of action to intentionally evade or delay the legal process. The parent seeking support has an obligation to prosecute that action in a timely manner and failure to do so should constitute a waiver^[fn1].

Parents and practitioners should be encouraged to forgive arrears as a condition of future compliance. Credit should also be afforded for "in-kind" acts

such as a NCP performing services such as automotive repairs or home maintenance that would have otherwise been an expense to the custodial parent. These would not be depriving the child of support but would instead be an acceptable way of reallocating payment responsibilities^[fn2].

All of us understand that the Indiana Child Support Guidelines are not going to be the end all panacea for ensuring that all children are provided with necessary support. But what constitutes support is and should be mutable to the circumstances in which individual parties find themselves. It is time to view child support in a new milieu which recognizes the changing roles of parents in our current labour market and gender based economic realities.

Policy makers deciding matter of child support should read these two reports in their entirety before setting or making any policy changes.

~ *How Do Child Support Order Amounts Affect Payments and Compliance?* by Mark Takayesu, October 2011. Available at

<http://stuartshowalter.com/AboutStuartShowalter/PublicPolicy.aspx>

~ *Setting Appropriate Orders to Increase Future Compliance and Payments* by Mark Takayesu, 08 March 2013. Available at

<http://stuartshowalter.com/AboutStuartShowalter/PublicPolicy.aspx>

Additionally, I have provided an Appendix which is a Reply to Dr. Betson Comments on the Economic Table and Residential Credit by David Spring who sat on the 2008 Washington State Child Support Workgroup.

notes

1] Laches is an equitable defense that may be raised to stop a person from asserting a claim that he would normally be entitled to assert. *Ind. Real Estate Comm'n v. Ackman*, 766 N.E.2d 1269, 1273 (Ind. Ct. App. 2002). The rationale behind the doctrine of laches is that a person who, for an unreasonable length of time, has neglected to assert a claim against another waives the right to assert the claim when this delay prejudices the person against whom he would assert it. *Id.* Laches requires: (1) inexcusable delay in asserting a known right; (2) an implied waiver arising from knowing acquiescence in existing conditions; and (3) a change in circumstances causing prejudice to the adverse party. *SMDfund, Inc. v. Fort Wayne-Allen Cnty. Airport Auth.*, 831 N.E.2d 725, 729 (Ind. 2005), cert. denied, 546 U.S. 1093, 126 S. Ct. 1051 (2006).

2] It has long been established by this Court that "[a]ny agreement purporting to contract away these [child support] rights is directly contrary to this State's public policy of protecting the welfare of children." *Straub v. B.M.T.*, 645 N.E.2d 597, 600 (Ind. 1994). See also *Trent v. Trent*, 829 N.E.2d 81, 86 (Ind. Ct. App. 2005). In *Halum v. Halum*, 492 N.E.2d 30, 33 (Ind. Ct. App. 1986), the Court of Appeals held that a "custodial parent may not bargain away the children's right to support."

APPENDIX A

APPENDIX B

Analysis of imputed income portion of the Opinion by the Indiana Court of Appeals in Moore v Moore, 09 May, 2014

The issue on review for the Court was:

"Did the trial court abuse its discretion when it imputed income to Father?"

Brian Moore contended upon appeal that the trial court erred when it imputed income to him based upon the question to him by counsel for Kristy Moore of whether he could earn \$50,000 per year. Mr. Moore did not respond that he could not but instead objected as to the question calling for speculation. He then testified that he had never made that much as a contractor. He further testified that he had earnings of around \$400-\$500 per week the prior year but because of the onslaught of litigation perpetuated by Mother and having acted as his own attorney his business profits were down to about \$100 per week and he was borrowing money from his mother to make ends meet.

The GAL report stated: "Mr. Moore, despite having a master's degree in Finance from the IU School of Business, has failed to keep a steady job." What the GAL, who was conclusively proven to have committed perjury during the proceedings^[fn1], overlooked is what the Court of Appeals noted;

"Father has an undergraduate degree from Butler and a MBA from Indiana University. He has worked as an independent contractor, however, since before the marriage."

The trial court stated at one point "I have great concern about the fact that Father has not had any stable employment since 2008" which is a period preceding the dissolution of marriage. The Court of Appeals went on to note that Father "stated that he had lacked motivation to work and that the construction market had declined, resulting in no income in 2010 and only a few small remodeling jobs in 2011." Further, that "at the August 2012 hearing, however, Father testified that he was making between \$400 and \$500 per week." It becomes clear from this that Mr. Moore's occupation *prior* to, during the marriage and since the December 2009 dissolution had been in the building trades.

Despite this clear knowledge about Father's work history and income, with respect to Father's income, the trial court made the following findings:

36. Father is a "general contractor" who is doing work for Woodridge. Father testified that he works between 20-40 hours per week and that he can control his schedule. Father failed to tender any evidence regarding his pay from Woodridge. Father refused to provide any pay information to the GAL.

37. Father receives money from his Mother each month; he estimated the sum to be around \$1,000.00.

38. Father testified that he would be able to earn \$50,000.00 per year, but for the preparation of his case in this cause.

39. The Court concludes that Father is purposefully under-employed and is capable of earning at least \$961.54 per week. Father's request that the Court use \$100 per week as his income is unreasonable and the Court does not find Father's testimony credible that he only earns \$100 per week.

The Court of Appeals stated "Among other things, the court ordered that . . . Father was under-employed and capable of earning[sic] at least \$961.54 per week." As a basis for vacating the child support order the Court concluded, "Father contends that the trial court erred by imputing income to him for child support purposes in the amount of \$50,000 per year. He claims the evidence does not support this amount. We agree."

In support of the Court's conclusion that the trial court had improperly imputed income to Mr. Moore it relied upon the following statements of the evidence and argument.

"The original settlement agreement set Father's weekly income at \$428 per week. Further, eight months before the final day of the underlying evidentiary hearing, Father testified that he was earning between \$400 and \$500 per week."

"The trial court determined that Father was capable of earning \$50,000 per year. This finding is not supported by the evidence and is clearly erroneous. When asked by Mother's counsel if he was capable of earning \$50,000 a year, Father testified that he had never made that much in his current field, which he had been in throughout the marriage and thereafter. At the time of dissolution, the parties agreed that Father was earning about \$22,200 per year. Nothing in the record indicates that Father's income potential improved, let alone more than doubled, since the dissolution."

"On remand, the trial court is directed to reconsider Father's weekly income and child support obligation. This may be done by returning to the original income figure of \$428 per week based upon Father's failure to establish different income figures, or the court may find that an increase is warranted based upon the regular and continuing support Father receives from his mother. Once Father's gross weekly income is determined, the trial court shall recalculate Father's support obligation accordingly."^[fn2]

In this case the trial court should reassess the wrongly imputed income figure that resulted in an erroneous support order of \$100 per week to reflect that Mother should be paying Father^[fn3]. However it has come at a significant cost. Mr. Moore has sold business equipment, was forced to terminate his business lease and cut back on his working hours to pay for the appeal costs^[fn4] and write the appeal himself. Additionally, he was found in contempt of court and sentenced to a jail term for failure to pay the support based upon imputed income and has appealed that ruling^[fn5]. The contempt has been stayed pending results of the appeal which should conclude that the sentence be vacated based upon the underlying support award lacking an evidentiary basis.

notes

1] Del Anderson, the GAL from Child Advocates, Inc., testified that the Pendleton Elementary School had to go on "lock-down" because of a threat made by Mr. Moore. However, the school principal, school system superintendent, and the Pendleton Chief of Police all testified that there had been no threat nor any "lock-down" as alleged by Mr. Anderson who fabricated the story.

2] [T]he regular support Father received from his mother could be properly imputed as income. See *Glass v. Oeder*, 716 N.E.2d at 417 ("Glass' rent-free living arrangement provides him with a lower living cost that presumably frees up money for the support of his children and was a proper basis for the trial court to impute income").

3] Mr Moore has completed a CSOW using income for Mother as she testified and his own at \$428 per week. Based upon the current parenting time arrangement she would pay to him \$5 per week.

4] In addition to the \$250 filing fee and nearly \$2500 for the transcript Mr Moore also had to pay my professional fees for coaching him and keeping him focused during the time he wrote his appeal.

5] That cause number is 49A04-1310-DR-499 which has been fully briefed.