
Child Support Update
Additional Handouts

July 26, 2017

MCLE Conference Center, Boston



Massachusetts Continuing Legal Education, Inc.

Ten Winter Place, Boston MA 02108-4751 | 617-482-2205 | fax 617-482-9498 | www.mcle.org

Child Support Update 2017

BREAKING NEWS: New Child Support Guidelines just issued. Come see how they impact your case.

Product Number: 2170464P01

Date(s): Wednesday, 7/26/2017, 2:00 pm - 5:00 pm

Location: MCLE Conference Center, Ten Winter Place, Boston

CLE Credits: 3 substantive credits, 0 ethics credits

Agenda

- | | |
|------------|--|
| 2:00- 2:05 | Welcome and Introduction
Linda A. Ouellette, Esq., <i>Lawson Weitzen & Bankert LLP</i> , Boston, Chair |
| 2:05-2:45 | Overview of Guideline Changes
Michael G. Xavier, Esq., <i>Prince Lobel Tye LLP</i> , Boston |
| 2:45-3:05 | Worksheet Review
Michael G. Xavier, Esq., <i>Prince Lobel Tye LLP</i> , Boston |
| 3:05-3:20 | Networking and Refreshment Break |
| 3:20- 4:45 | Changes in Depth
Panel |
| 4:45-5:00 | "Ask the Experts" Q&A Session
Panel |

About the Faculty

LINDA A. OUELLETTE is a partner with the law firm of Cataldo Law Offices, LLP in Franklin, Massachusetts, where she concentrates her practice in the field of family law. Prior to joining this firm, she practiced for many years in Boston, and has managed a domestic relations practice since 1989. Prior to that time, she was an Assistant District Attorney in Middlesex County, where she gained valuable trial and courtroom experience, and she began her career as a litigator with the Boston firm of Hale and Dorr. Linda is a magna cum laude graduate of Boston College Law School, where she served as managing editor for the Boston College Law Review and was elected to the Order of the Coif. She is a member of the Steering Committee of the Boston Bar Association's Family Law Committee. She is also a member of MCLE's Family Law Curriculum Committee and formerly served as the Committee's Co-Chair. She is a frequent lecturer for MCLE and other legal education groups, and has been recognized as a "Super Lawyer" in the field of family law by Boston Magazine.

DENISE M. FITZGERALD is an administrative attorney in the Massachusetts Probate and Family Court's Administrative Office. Ms. Fitzgerald served for two years as a judicial law clerk to the justices of the Probate and Family Court and also served as the Chief Law Clerk. She is a graduate of Tufts University and an honors graduate of New England School of Law.

LINDA M. MEDONIS is the Deputy Court Administrator for all of the Probate and Family Courts in Massachusetts. She was appointed to that position in September of 2013. Prior to her appointment, she was a partner at PrinceLobelTye where she focused her practice on family law matters including complicated divorce cases involving multiple assets and difficult compensation structures for privately held businesses. Linda has practiced family law for close to 30 years. She has been a panelist on numerous educational programs. She most recently was a member of the Child Support Guidelines Task Force.

JEFFREY A. SOILSON is a partner at Sally & Fitch LLP in Boston, where he represents clients in a broad range of family law matters with a focus on large-asset divorce and high-conflict custody cases. He serves as a certified divorce mediator, trained conciliator, and parenting coordinator—often in an effort to reduce the negative impact of high-conflict litigation on children of divorce and separation. Volunteering and providing leadership in organizations that are dedicated to promoting healthy coparenting for children in high-conflict families, Mr. Soilson also serves on the boards of directors of the Massachusetts chapters of the Association of Family and Conciliation Courts and Overcoming Barriers. He is a fellow in the American Academy of Matrimonial Lawyers and treasurer of its Massachusetts chapter, as well as a fellow in the International Academy of Matrimonial Lawyers. Mr. Soilson has been ranked at the highest level of legal ability, "AV Preeminent," in the Martindale-Hubbell Law Directory. In 2015, he was named a "Top 100 Massachusetts Super Lawyer" and a "Top 100 New England Super Lawyer" in the area of family law in annual lists published in Boston magazine. He has received the rating of "Superb" by Avvo, a website that provides lawyer ratings and other legal resources. Mr. Soilson is also listed in the family law section of the 2015 edition of The Best Lawyers in America.

MICHAEL G. XAVIER is a partner at Prince Lobel Glovsky & Tye. A trial lawyer, Michael concentrates his practice in all areas of family law litigation and probate litigation, including pre- and postnuptial agreements, complex divorce cases, modification, removal, guardianships, conservatorships, adoptions, will contests, same-sex divorce, and custody. Michael also represents clients in restraining order hearings and criminal matters. He is particularly interested in cutting-edge legal issues, such as reproductive technology and non-traditional marriages. Recently, Michael participated in a training program regarding same-sex marriages for probation officers in the Commonwealth of Massachusetts, and he has lectured at Suffolk University Law School on Same Sex Marriage, Divorce and Parentage Issues. In October 2010, Michael was recognized as a "Rising Star" by Massachusetts Super Lawyer magazine. Michael is a graduate of the College of the Holy Cross and Northeastern University School of Law. He also served as a law clerk to the Superior Court Justices of Massachusetts upon graduation from law school and is a former Assistant District Attorney.

**CHILD SUPPORT
UPDATE 2017**

MCLE
JULY 26, 2017
MICHAEL G. XAVIER, ESQ.
PRINCE LOBEL TYE LLP

PREAMBLE

- Effective Date: September 15, 2017
- Mandatory review every four years – 45 C.F.R. § 302.56
- Guidelines include Commentary that may be used by Trial Court departments, litigants, and attorneys to resolve questions of interpretation or application of the guidelines.

PREAMBLE - Continued

- Guidelines worksheet must be completed in all cases where a child support order may be established or modified.
- Further Clarification – Guidelines Worksheet is necessary for the Court to determine whether there is a deviation from the presumptive child support order such that findings must be completed.
- Guidelines based on various considerations, including but not limited to, each parent's earnings, income, and other evidence of ability to pay.

Principles - Changes in Section

- Para 4: Protecting a Basic Subsistence level of income for parents;
- Para 5: Recognizing that Deviations Should Be Used when Appropriate to tailor a child support order to the unique circumstances of a particular family;
- Para 9: Recognizing the importance, availability, and cost of health coverage for the child;
- Themes: Health Care Coverage Costs and Deviation

New Child Support Guidelines - Changes

- **Attribution of Income:** Expanded language – The Court shall also consider the specific circumstances of the parent, to the extent known and presented the Court, including, but not limited to, the assets, residence, education, training, job skills, literacy, criminal record and other employment barriers, age, health, past employment and earnings history, as well as the party's record of seeking work, the availability of employment at the attributed level of employers willing to hire the parent, and the relevant prevailing earnings level in the local community.

New Guidelines-Continued

- **Imputation of Income:** Section Name Changed from Unreported Income. Commentary cites Crowe v. Fong
- **Minimum Level of Application:** Decrease to \$115 a week from \$150 per week in income in gross income. Minimum weekly order is \$25 per week increase from \$18.46 per week.
- **Parenting Time:** Eliminates Child Support Calculation when parenting time for payor is more than one-third but less than fifty percent. Reason: Increased Litigation

Relationship between Child Support and Alimony

- **Unallocated Support:** Task Force encourages Court to consider unallocated support orders.
- **Fechtor v. Fechter** cited.
- When issuing an alimony order, "the court shall exclude from its income calculation gross income which the Court has already considered for setting a child support order." G.L. c. 208, §53 (c)(2). However, the converse is not stated in the statute. Stay tuned for 2021. Issue to be reviewed.

CHANGES IN CALCULATIONS

- **Child Care Costs:** Adjustment made so that parents share the cost proportionately. Involves a two-step calculation. First, a parent who is paying the child care deducts the out-of-pocket costs from his or her gross income. Second, the parties share the total child care costs for both parents in proportion to their income available for support. The combined adjustment for child care and health care costs is capped at 15% of the child support order.
- **Child Support for Children Between Ages of 18 and 23:** Reduction of Child Support for Children Over 18 unless child is in high school, absent deviation.

CHANGES IN CALCULATIONS

- **Health Care Coverage:** Adjustment made so that parents share the cost proportionately. Involves a two-step calculation. First, a parent who is paying the health care deducts the out-of-pocket costs from his or her gross income. Second, the parties share the total health care costs for both parents in proportion to their income available for support. The combined adjustment for child care and health care costs is capped at 15% of the child support order.

DEVIATION

- **Findings**
 - Amount of guidelines order.
 - Unjust or Inappropriate.
 - Specific Facts Warranting Adjustment.
 - Best Interest.
- **Clarifications and Refinements**
 - No factor takes priority over the other.
 - The phrase "financial consequences" added to Para 2 and 3.
 - "Substantially" is added to Para 8.

Post-Secondary Educational Expenses

- Contribution to Post-secondary Educational Expenses is not presumptive.
- No parent shall be ordered to pay an amount in excess of fifty percent of the undergraduate, in-state resident costs of the University of Massachusetts-Amherst, unless the Court enters written findings that a parent has the ability to pay a higher amount.
- Costs are defined as mandatory fees, tuition, and room and board for the University of Massachusetts – Amherst.
- Limitation on post-secondary educational expenses not mandatory.

Modifications

- **Previously ordered health care coverage is still available but no longer at a reasonable cost or without an undue hardship.**
- **Paragraph B of the Modification Section deleted. Paragraph B was premised on the assumption that Mass law provides for a separate standard to be used by the Court when DOR is providing IV-D services in a case where the order is less than 3 years old. Inconsistency std. applied on mods.**

New Forms

- **Child Support Guidelines Worksheet**
- **Findings and Determination For Child Support and Post-Secondary Education**
- **Instructions for Completing the Guidelines Worksheet for the 2017 Child Support Guidelines**

I. Income Definition

- D. Imputation of Income
 1. When the Court finds that a parent has, in whole or in part, undocumented or unreported income, the Court may reasonably impute income to the parent based on all the evidence submitted, including, but not limited to, evidence of the parent's ownership and maintenance of assets, and the parent's lifestyle, expenses and spending patterns.
 2. Expense reimbursements, in-kind payments or benefits received by a parent, personal use of business property, and payment of personal expenses by a business in the course of employment, self-employment, or operation of a business may be included as income if such payments are significant and reduce personal living expenses.
 3. In circumstances where the Court finds that a parent has unreported income, the Court may adjust the amount of income upward by a reasonable percentage to take into account the absence of income taxes that normally would be due and payable on the unreported income.

Commentary D

- No Forms W-2 or 1099
- Actual available resources not reported for tax purposes
- See *Crowe v. Fong*, 45 Mass. App. Ct. 673 (1988) (instructional regarding Section I.D.)
- "perquisite or in-kind income" (no rent / free car)
- Section previously entitled "Unreported Income"
- Focus on Undocumented and Unreported
- See past interchangeable use of terms (imputation and attribution) [e.g. *MC v. TK*, 463 Mass. 226 (2012): Father argued that judge erred in *attributing* income to him, and the judge failed to make the requisite findings on which *imputed* income might have been based.]

I. Income Definition

- C. Self-Employment and Other Business Income

Income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely-held corporation is defined as *gross receipts minus ordinary and necessary expenses required to produce income*. In general, income and expenses from self-employment or operation of a business should be *carefully reviewed* to determine the appropriate level of gross income available to the parent to satisfy a child support obligation. In many cases, this amount *will differ from a determination of business income for tax purposes*.

Commentary C

- Whelan v. Whelan, 74 Mass. App. Ct. 616, 626-27 (2009), "in determining income from self-employment, a judge must determine whether claimed business deductions are *reasonable and necessary to the production of income, without regard to whether those deductions may be claimed for Federal or State income tax purposes.*"
- Zoffreo v. Zoffreo, 76 Mass. App. Ct. 1105 (2010), "[t]he fact that [a parent] is permitted under the tax laws to deduct an amount for *depreciation* does not mean that those funds, which are *not out of pocket expenses*, are not available to pay child support."

Commentary C (cont.)

- Undistributed earnings of S corporation – available income to meet a child support obligation?
- See JS v. C.C., 454 Mass. 652, 662-63 (2009) for relevant factors, including:
 - How much control over corporate distributions does the shareholder / payor have?
 - Are there legitimate business interests that justify not making a corporate distribution? (e.g. maintaining a reasonable reserve for contingent liabilities)
 - Is there affirmative evidence of an attempt to shield income by means of retained earnings?

Commentary C (cont.)

- Rental Income
 - When we include it in determining income for child support purposes are we double counting?
 - No. See Fehrm-Cappuccino v. Cappuccino, 90 Mass. App. Ct. 525 (2016), "there is no risk of double counting, where 'neither the value of [the father's interest in [the asset]] nor the [father's] ability to earn income is diminished by treating the [father's interest in [the asset]] as a marital asset as well as a source of income by which [the father] can meet his support obligations."

II.D. Parenting Time

- Basic calculation
 - A primary residence with one parent and spending approximately one-third of the time with the other parent
 - Guidelines worksheet = Rebuttable presumption

II.D. Parenting Time (cont.)

- Shared (equal or approximately equal) parenting: cross-calculations
- Deviation available where substantially less than one-third
- More than one child
- NO MORE "MORE THAN ONE-THIRD LESS THAN ONE HALF" CALCULATION

II.F. Child Support 18 - 23

- See Table B: 25% reduction for child 18 or older (unless still enrolled in high school)
- Child support for a child age 18 or older?
 - Consider the reason for the child's continued residence with and principal dependence on recipient
 - Child's academic circumstances
 - Child's living situation
 - Available resources of parents
 - Each parent's contribution to the costs of post-secondary education for that child or others of the family

Commentary II.F.

- Child support order for children who have turned 18 but are still in high school / mandatory not permissive
- 25%: takes into consideration factors typical of this age group – living away at school (less expenses) – living at home (should be working to contribute to expenses)

II.G. Contribution to Post-Secondary Educational Expenses

- Discretionary not presumptive
- Factors include
 - Cost
 - Child’s aptitude
 - Child’s living situation
 - Available resources of parents and child
 - Availability of financial aid
 - Any other relevant factors

II.G. Contribution to Secondary Educational Expenses (cont.)

- One-half UMASS-Amherst cap
 - Unless written findings of that a parent has ability to pay a higher amount
 - Mandatory fees, tuition and room and board
 - See “Published Annual College Costs Before Financial Aid” (College Board’s Annual Survey of Colleges)
 - Court must consider combined amount if it has exercised discretion to order support for a child over age 18
 - Doesn’t apply to children already enrolled before effective date (See Commentary G)
 - Doesn’t apply to parents financially able to pay using assets or other resources (See Commentary G)

Case Name _____

Date Prepared _____

Docket Number _____

Name of Preparer _____

CHILD SUPPORT GUIDELINES WORKSHEET

All dollar amounts are weekly. Round all numbers to the nearest whole dollar or percentage.

1. NUMBER AND AGES OF CHILDREN

- a. Number of children under age 18 []
- b. Number of children 18 years or older who may be eligible to be covered by this order []
- c. Total number of children to be covered by this order = []

2. INCOME

	Recipient	Payor
a. Gross weekly income	\$ []	\$ []
b. Minus Child care cost paid	\$ ([])	\$ ([])
c. Minus Health care cost paid	\$ ([])	\$ ([])
d. Minus Dental/vision insurance cost paid	\$ ([])	\$ ([])
e. Minus Other support obligations paid	\$ ([])	\$ ([])
f. Available income	2(a) - Sum of 2(b) through 2(e) = \$ []	\$ []
g. Combined available income	Recipient 2(f) + Payor 2(f) = \$ []	
h. Share of combined available income	2(f) + 2(g) (Min 0%, Max 100%) = [] %	[] %

3. PROPORTIONAL SUPPORT AMOUNTS

a. Applicable available income	2(g) or \$4,808, whichever is less	\$ []
b. Support amount for one child	From Table A or Guidelines Chart for 3(a)	\$ []
c. Adjustment for number and ages of children covered by this order	From Table B	x []
d. Combined support amount	3(b) x 3(c)	= \$ []
e. Minus Recipient's share of support	3(d) x Recipient 2(h)	\$ ([])
f. Payor's share of support	3(d) - 3(e) or \$25, whichever is more	= \$ []

4. ADJUSTMENT FOR CHILD CARE AND HEALTH CARE COSTS

	Recipient	Payor
a. Child care and health care cost paid	2(b) + 2(c) + 2(d)	\$ []
b. Payor's share of Recipient's cost	Payor 2(h) x Recipient 4(a)	\$ []
c. Minus Recipient's share of Payor's cost	Recipient 2(h) x Payor 4(a)	\$ ([])
d. Payor's net cost	4(b) - 4(c)	= \$ []
e. Maximum adjustment amount	3(f) x 0.15	[]

Adjustment applied to order

- f. If 4(d) is ≥ \$0, enter 4(d) or 4(e), whichever is less; otherwise enter zero \$ []
- g. If 4(d) is < \$0, enter the positive value of 4(d) or 4(e), whichever is less; otherwise enter zero \$ ([])
- h. Payor's adjusted share of support $3(f) + 4(f) - 4(g)$ or \$25, whichever is more = \$ []

5. ADJUSTED WEEKLY SUPPORT AMOUNT

- a. Support as % of Recipient income $4(h) + \text{Recipient } 2(f)$ %
- b. Payor's adjusted weekly support amount = \$
- If 5(a) is $\geq 10\%$, enter 4(h) or \$25, whichever is more*
Otherwise enter 4(h) or $(5(a) + 10\%) \times \text{Payor } 2(f)$, whichever is less but not less than \$25

6. ADDITIONAL INCOME ABOVE \$4,808

- a. Combined additional income $2(g) - \$4,808$ or \$0, whichever is more = \$
- b. Share of combined additional income $6(a) \times 2(h)$ = \$ \$

TABLE A: CHILD SUPPORT OBLIGATION SCHEDULE
All dollar amounts are weekly and rounded to the nearest dollar.

INCOME FROM LINE 2(g)		CHILD SUPPORT AMOUNT (1 CHILD)			
Minimum	Maximum				
\$-	\$115	\$25 per week, unless the court deviates			
\$116	\$750	22%			
\$751	\$1250	\$165	+ 21%	above	\$750
\$1251	\$2,000	\$270	+ 19%	above	\$1250
\$2,001	\$3,000	\$413	+ 15%	above	\$2,000
\$3,001	\$4,000	\$563	+ 12%	above	\$3,000
\$4,001	\$4,808	\$683	+ 11%	above	\$4,000

TABLE B: ADJUSTMENT FOR NUMBER AND AGES OF CHILDREN

		CHILDREN 18 OR OLDER					
		0	1	2	3	4	5
CHILDREN UNDER 18	0		.75	.94	1.04	1.09	1.11
	1	1.00	1.09	1.15	1.18	1.18	
	2	1.25	1.27	1.27	1.26		
	3	1.38	1.36	1.33			
	4	1.45	1.41				
	5	1.48					

**FINDINGS AND DETERMINATIONS
FOR CHILD SUPPORT AND
POST-SECONDARY EDUCATION**

Docket No. _____

**Commonwealth of Massachusetts
The Trial Court
Probate and Family Court**

Case name: _____
Payor is _____
Recipient is _____

_____ Division

MINIMUM AND MAXIMUM LEVELS - Section II. C. of the 2017 Child Support Guidelines

The combined gross income of the parties exceeds \$250,000.

IMPUTATION OF INCOME - Section I. D. of the 2017 Child Support Guidelines

The Court finds that the payor has gross income that is undocumented or unreported. Accordingly, the Court imputes income of \$ _____ based on:

The Court finds that the recipient has gross income that is undocumented or unreported. Accordingly, the Court imputes income of \$ _____ based on:

ATTRIBUTION OF INCOME - Section I. E. of the 2017 Child Support Guidelines

The Court finds that the payor is capable of working and is unemployed or underemployed.

The Court determines that the payor is earning less than could be earned through reasonable effort. Accordingly, the Court attributes income of \$ _____ based on:

The Court finds that the recipient is capable of working and is unemployed or underemployed.

The Court determines that the recipient is earning less than could be earned through reasonable effort. Accordingly, the Court attributes income of \$ _____ based on:

CHILD SUPPORT FOR CHILDREN BETWEEN AGES 18 AND 23 - Section II. F. of the 2017 Child Support Guidelines

The Court finds that the _____ is 18 or older and attending high school, but shall not be considered to be under age 18 for purposes of the guidelines and Table B because:
(first born, second born, etc.)

The Court finds that the _____ is 18 or older and attending high school, but shall not be considered to be under age 18 for purposes of the guidelines and Table B because:
(first born, second born, etc.)

Case Name: _____	Docket No.
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CONTRIBUTION TO POST-SECONDARY EDUCATION - Section II. G. of the 2017 Child Support Guidelines

- The Court finds that the payor has the ability to pay an amount higher than 50% of the undergraduate, in-state resident costs of the University of Massachusetts - Amherst because:

- The Court finds that the recipient has the ability to pay an amount higher than 50% of the undergraduate, in-state resident costs of the University of Massachusetts - Amherst because:

HEALTH CARE COVERAGE - Section II. H. of the 2017 Child Support Guidelines

- The Court determines that the additional cost paid by the payor to insure a person not covered by the child support order unreasonably reduces the amount of child support. The Court allows \$ _____ to be deducted from gross income on the guidelines worksheet.
- The Court determines that the additional cost paid by the recipient to insure a person not covered by the child support order unreasonably reduces the amount of child support. The Court allows \$ _____ to be deducted from gross income on the guidelines worksheet.
- Health care coverage is available to the payor through employment or other means at a reasonable cost. However, the cost of such coverage creates an undue hardship on the payor because:

DENTAL/VISION INSURANCE - Section II. I. of the 2017 Child Support Guidelines

- The Court determines that the additional cost paid by the payor to insure a person not covered by the child support order unreasonably reduces the amount of child support. The Court allows \$ _____ to be deducted from gross income on the guidelines worksheet.
- The Court determines that the additional cost paid by the recipient to insure a person not covered by the child support order unreasonably reduces the amount of child support. The Court allows \$ _____ to be deducted from gross income on the guidelines worksheet.

Case Name: _____

DEVIATION - Section IV. of the 2017 Child Support Guidelines

The guidelines are applicable in this case. The amount of the child support order that would result from the application of the guidelines is \$ _____ Weekly Bi-weekly Monthly Other(specify) _____

However, the Court finds the presumptiveness of the guidelines has been rebutted because, after considering the best interests of the child, the application of the guidelines would be unjust or inappropriate.

The specific circumstance of the case which justify departure from the guidelines are:

- the parties agree and the Court has reviewed and approved their agreement dated _____
- a child has ongoing special needs or aptitudes with financial consequences
- a child has ongoing extraordinary mental, physical, or developmental needs with financial consequences
- a parent _____ has ongoing extraordinary mental, physical, or developmental needs with financial consequences
Name
- a parent _____ has extraordinary expenses for health care coverage
Name
- a parent _____ has extraordinary travel or other expenses related to parenting
Name
- a parent _____ is absorbing a child care cost that is disproportionate in relation to his or her income
Name
- a parent _____ provides substantially less than one-third of the parenting time for a child or children
Name
- the payor is incarcerated and has insufficient financial resources to pay support
- application of the guidelines, particularly in low income cases, leaves a parent _____ without the ability to self support
Name
- application of the guidelines would result in a gross disparity in the standard of living between the two households such that one household is left with an unreasonably low percentage of the combined available income
- application of the guidelines may adversely impact reunification of a parent and child where the child has been temporarily removed from the household in accordance with G. L. c. 119
- absent deviation, application of the guidelines would lead to an order that is unjust, inappropriate or not in the best interests of the child, considering the Principles of the 2017 Child Support Guidelines
- this is a modification of an order that deviated from the guidelines at the time it entered and the facts that gave rise to the deviation still exists, deviation continues to be in the child's best interest, and the guidelines amount would be unjust or inappropriate under the circumstances
- other:

Case Name: _____	Docket No. _____
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FOR COURT USE ONLY

After hearing, at which _____ and/ or _____
Name Name

was present, the Court entered an order dated _____.

_____ was ordered to pay child support in the amount of
Name

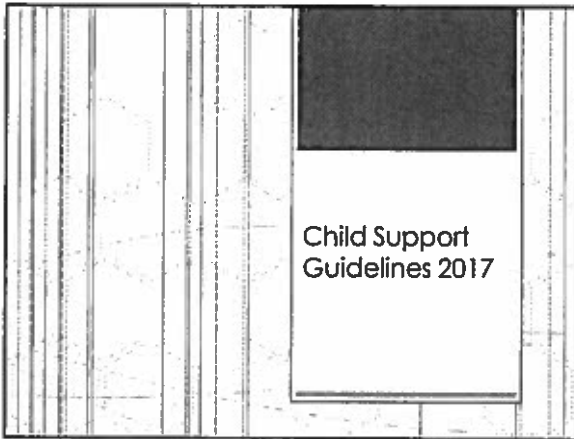
\$ _____ Weekly Bi-weekly Monthly Other(specify) _____

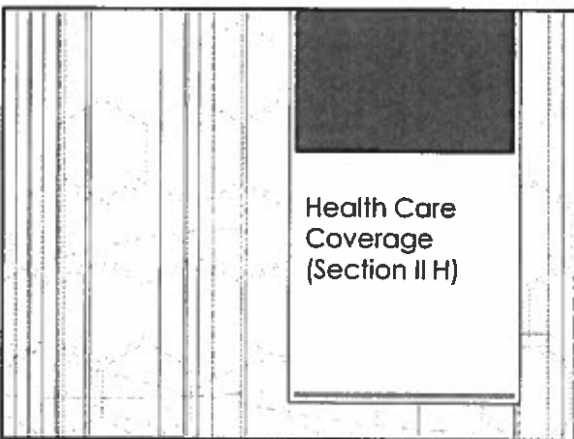
Date _____

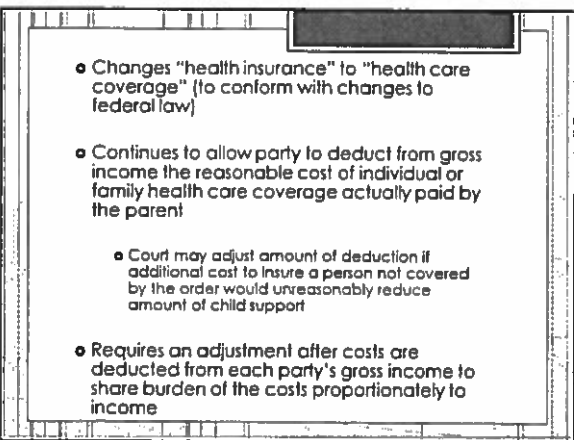
Judge of the Probate and Family Court

THIS FORM MUST BE FILED AND DOCKETED WITH THE CASE

SAMPLE







• Alters and expands analysis prior to issuance of order of requiring health care coverage

• Is health care coverage available to cover a child through an employer or otherwise available at a reasonable cost?

• Health care coverage deemed available to the payor at reasonable cost if available through employer

• If available at a reasonable cost, does the cost of such coverage create an undue hardship on the payor? If so, payor shall not be required to provide such coverage

• Factors for determining "undue hardship" include whether requirement to maintain coverage would prevent payment of some or all of the child support; whether the coverage is sufficiently comprehensive to meet the child's health care needs so that significant uninsured expenses will not be incurred; whether the payor's gross income is less than 300% of the federal poverty guidelines for the payor's household; and other "relevant factors"

• If health care coverage is available at a reasonable cost and does not cause undue hardship, then the child support order shall include a requirement that the coverage be obtained or maintained for the child by payor

• By statute only payor may be required to obtain health care coverage

• Recipient only by agreement of the parties

• If health care coverage not available at a reasonable cost or would create an undue burden on the payor, and if the IV-D agency (i.e. DOR) is providing services, Court must order payor to notify the agency if access to health care coverage becomes available

• If the IV-D agency providing services, Court must order payor to notify the recipient if access to health care coverage for the child becomes available

• Cost of dental/vision insurance insuring the child(ren) to be included in adjustment made for health care costs and child care in proportion to income

Existing Support
Obligations
and
Responsibility
for Children in
the Case Under
Consideration
(Section II K)

• Changes clarify and expand upon circumstances where deductions can be made to a party's gross income based on the legal responsibility to support a child or former spouse not part of the case under consideration

• Requires "sufficient proof" of hypothetical (as opposed to actual) order to pay support

Three circumstances identified:

- The amount of a prior order for child or former spouse if proof is provided for both the order and payments made (but not including arrears)
- Voluntary payments actually paid to support a child not a part of the case under consideration and with whom the parent does not reside
 - Payments must be reasonable
 - Must provide proof of legal obligation to support child and actual payments made to the other parent/guardian
- The amount of a hypothetical obligation to support a child with whom the party resides but for whom no support order exists

- Determined based on child support worksheet using gross incomes of both parents
 - Must provide sufficient proof of legal obligation to support child and gross income of the other parent
- Relies on decision in DOR v. Mason M. 439 Mass. 665 (2003) endorsing use of hypothetical order
- Raises practical issues of providing "proof" for other non-party parent

Maximum Levels/Interplay of Child Support and Alimony (Sections II A and C)

- Concepts remain the same but language is slightly reworded
- Continues to require calculation of support on first \$250,000 of combined income in same proportion as the parties' incomes
 - Order which results is the minimum presumptive order
 - Child support based on average is in the discretion of the court
 - Different options: alimony, child support based on additional income of each party, deviation with high figure, overriding worksheet to include full incomes

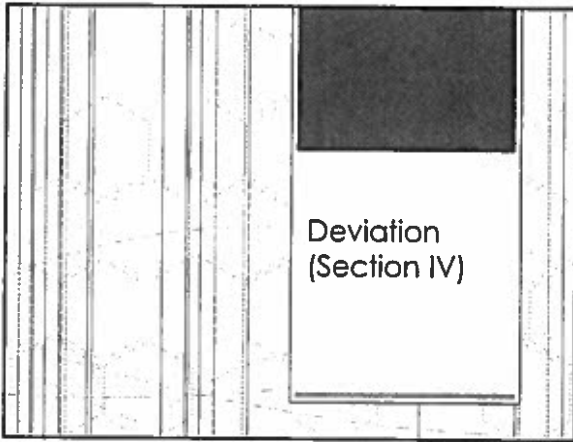
- Guidelines continue to not preclude support order from being designated as alimony (in whole or in part) or as unallocated support without being deemed a deviation, as long as tax consequences are considered and after-tax support received by the recipient is not diminished
- Specific reference to use of "unallocated support" is added

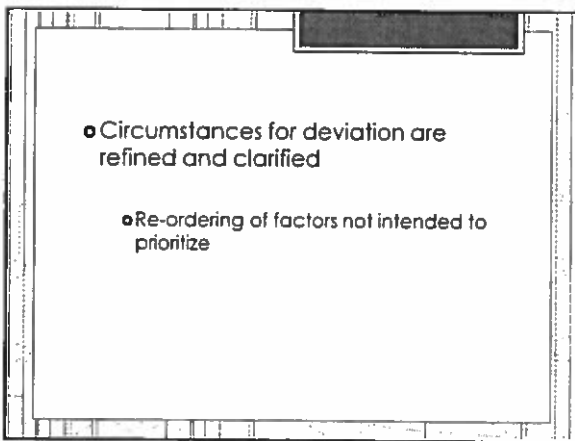
- Parties must present evidence of tax consequences of proposed order based on Fechtor v. Fechter, 26 Mass. App. Ct. 857 (1989)
 - Importance of providing accountant's calculations or other evidence at either temporary order hearing or at trial
- Continues to recognize prohibition against "double dipping" in the Alimony Reform Law, but does not adopt similar prohibition for child support
 - No prohibition against determining alimony first and then calculation child support based on reconstituted incomes
- Continues to encourage parties to prepare alternate calculations of alimony and child support to determine most equitable result

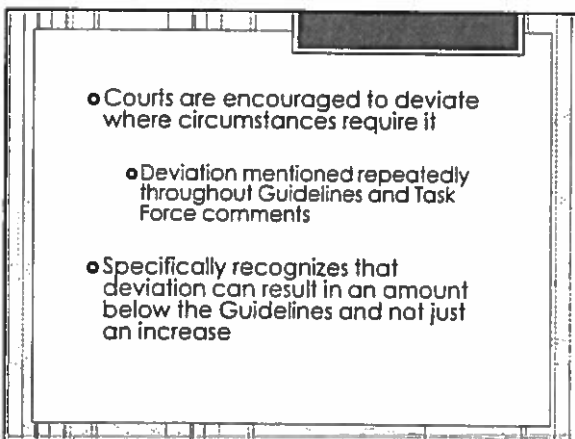
- Task Force noted that there have been no appellate decisions or statutory changes to address the "double dip" issue regarding child support, and deferred the issue to the next quadrennial review
- Task Force specifically encourages courts to consider unallocated support order (despite "challenges" regarding tax consequences) for cases where there are disparate levels of income

- Unallocated support has the same tax consequences as alimony – i.e. taxable to recipient and deductible by payor
- Must meet general requirements of Section 71 of the IRC Section 71(b)(1)

- Subject to the same "pitfalls" as alimony when it is being used to "taxify" child support
 - Recapture if it is terminated based on a child-related contingency
 - Recapture if alimony is reduced or terminated too quickly (deemed a property payment, which is not deductible)
- Importance of engaging appropriate assistance from tax professional







- Circumstances supporting deviation must be ongoing and with financial consequences and not just occasional or one-time
- Amount of parenting time provided by paying parent must be "substantially less" than one-third to emphasize that a parenting plan in the child's best interests is the first step in establishing a child support order
- Child support worksheet with presumptive child support amount must be provided to the Court at the time deviation is requested
 - Applies even if the deviation is agreed upon
 - Important of providing proposed findings to the Court to justify deviation

26 U.S. Code § 71 - Alimony and separate maintenance payments

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

(a) GENERAL RULE

Gross income includes amounts received as alimony or separate maintenance payments.

(b) ALIMONY OR SEPARATE MAINTENANCE PAYMENTS DEFINED For purposes of this section—

(1) IN GENERAL The term “alimony or separate maintenance payment” means any payment in cash if—

(A) such payment is received by (or on behalf of) a spouse under a divorce or separation instrument,

(B) the divorce or separation instrument does not designate such payment as a payment which is not includible in gross income under this section and not allowable as a deduction under section 215,

(C) in the case of an individual legally separated from his spouse under a decree of divorce or of separate maintenance, the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and

(D) there is no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse.

(2) DIVORCE OR SEPARATION INSTRUMENT The term “divorce or separation instrument” means—

(A) a decree of divorce or separate maintenance or a written instrument incident to such a decree,

(B) a written separation agreement, or

(C) a decree (not described in subparagraph (A)) requiring a spouse to make payments for the support or maintenance of the other spouse.

(c) PAYMENTS TO SUPPORT CHILDREN

(1) IN GENERAL

Subsection (a) shall not apply to that part of any payment which the terms of the divorce or separation instrument fix (in terms of an amount of money or a part of the payment) as a sum which is payable for the support of children of the payor spouse.

(2) TREATMENT OF CERTAIN REDUCTIONS RELATED TO CONTINGENCIES INVOLVING CHILD

For purposes of paragraph (1), if any amount specified in the instrument will be reduced—

(A) on the happening of a contingency specified in the instrument relating to a child (such as attaining a specified age, marrying, dying, leaving school, or a similar contingency), or

(B) at a time which can clearly be associated with a contingency of a kind specified in subparagraph (A),

an amount equal to the amount of such reduction will be treated as an amount fixed as payable for the support of children of the payor spouse.

(3) SPECIAL RULE WHERE PAYMENT IS LESS THAN AMOUNT SPECIFIED IN INSTRUMENT

For purposes of this subsection, if any payment is less than the amount specified in the instrument, then so much of such payment as does not exceed the sum payable for support shall be considered a payment for such support.

(d) SPOUSE

For purposes of this section, the term "spouse" includes a former spouse.

(e) EXCEPTION FOR JOINT RETURNS

This section and section 215 shall not apply if the spouses make a joint return with each other.

(f) RECOMPUTATION WHERE EXCESS FRONT-LOADING OF ALIMONY PAYMENTS

(1) IN GENERAL If there are excess alimony payments—

(A) the payor spouse shall include the amount of such excess payments in gross income for the payor spouse's taxable year beginning in the 3rd post-separation year, and

(B) the payee spouse shall be allowed a deduction in computing adjusted gross income for the amount of such excess payments for the payee's taxable year beginning in the 3rd post-separation year.

(2) EXCESS ALIMONY PAYMENTS For purposes of this subsection, the term "excess alimony payments" mean the sum of—

(A) the excess payments for the 1st post-separation year, and

(B) the excess payments for the 2nd post-separation year.

(3) EXCESS PAYMENTS FOR 1ST POST-SEPARATION YEAR For purposes of this subsection, the amount of the excess payments for the 1st post-separation year is the excess (if any) of—

(A) the amount of the alimony or separate maintenance payments paid by the payor spouse during the 1st post-separation year, over

(B) the sum of—

(i) the average of—

(I) the alimony or separate maintenance payments paid by the payor spouse during the 2nd post-separation year, reduced by the excess payments for the 2nd post-separation year, and

(II) the alimony or separate maintenance payments paid by the payor spouse during the 3rd post-separation year, plus

(ii) \$15,000.

(4) EXCESS PAYMENTS FOR 2ND POST-SEPARATION YEAR For purposes of this subsection, the amount of the excess payments for the 2nd post-separation year is the excess (if any) of—

(A) the amount of the alimony or separate maintenance payments paid by the payor spouse during the 2nd post-separation year, over

(B) the sum of—

(i) the amount of the alimony or separate maintenance payments paid by the payor spouse during the 3rd post-separation year, plus

(ii) \$15,000.

(5) EXCEPTIONS

(A) Where payment ceases by reason of death or remarriage Paragraph (1) shall not apply if—

(i) either spouse dies before the close of the 3rd post-separation year, or the payee spouse remarries before the close of the 3rd post-separation year, and

(ii) the alimony or separate maintenance payments cease by reason of such death or remarriage.

(B) Support payments

For purposes of this subsection, the term “alimony or separate maintenance payment” shall not include any payment received under a decree described in subsection (b)(2)(C).

(C) Fluctuating payments not within control of payor spouse

For purposes of this subsection, the term “alimony or separate maintenance payment” shall not include any payment to the extent it is made pursuant to a continuing liability (over a period of not less than 3 years) to pay a fixed portion or portions of the income from a business or property or from compensation for employment or self-employment.

(6) POST-SEPARATION YEARS

For purposes of this subsection, the term “1st post-separation years” means the 1st calendar year in which the payor spouse paid to the payee spouse alimony or separate maintenance payments to which this section applies. The 2nd and 3rd post-separation years shall be the 1st and 2nd succeeding calendar years, respectively.

(g) CROSS REFERENCES

(1) For deduction of alimony or separate maintenance payments, see section 215.

(2) For taxable status of income of an estate or trust in the case of divorce, etc., see section 682.

(Aug. 16, 1954, ch. 736, 68A Stat. 19; Pub. L. 98-369, div. A, title IV, § 422(a), July 18, 1984, 98 Stat. 795; Pub. L. 99-514, title XVIII, § 1843(a)-(c)(1), (d), Oct. 22, 1986, 100 Stat. 2853, 2855.)

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Topic 452 - Alimony

Tax Treatment of Alimony

Amounts paid to a spouse or a former spouse under a divorce or separation instrument (including a divorce decree, a separate maintenance decree, or a written separation agreement) may be alimony for federal tax purposes. Alimony is deductible by the payer spouse, and the recipient spouse must include it in income.

Alimony Requirements

A payment is alimony only if all the following requirements are met:

- The spouses don't file a joint return with each other;
- The payment is in cash (including checks or money orders);
- The payment is to or for a spouse or a former spouse made under a divorce or separation instrument;
- The divorce or separation instrument doesn't designate the payment as not alimony;
- The spouses aren't members of the same household when the payment is made (This requirement applies only if the spouses are legally separated under a decree of divorce or of separate maintenance.);
- There's no liability to make the payment (in cash or property) after the death of the recipient spouse; and
- The payment isn't treated as child support or a property settlement.

Payments Not Alimony

Not all payments under a divorce or separation instrument are alimony. Alimony doesn't include:

- Child support,
- Noncash property settlements, whether in a lump-sum or installments,
- Payments that are your spouse's part of community property income,
- Payments to keep up the payer's property,
- Use of the payer's property, or
- Voluntary payments (that is, payments not required by a divorce or separation instrument).

Child support is never deductible and isn't considered income. Additionally, if a divorce or separation instrument provides for alimony and child support, and the payer spouse pays less than the total required, the payments apply to child support first. Only the remaining amount is considered alimony.

Reporting Alimony

If you paid amounts that are considered alimony, you may deduct from income the amount of alimony you paid whether or not you itemize your deductions. Alimony payments are only deductible on [Form 1040](#) (PDF), *U.S. Individual Income Tax Return*. You must enter the social security number (SSN) or individual taxpayer identification number (ITIN) of the spouse or former spouse receiving the payments or your deduction may be disallowed and you may have to pay a \$50 penalty.

If you received amounts that are considered alimony, you must include the amount of alimony you received as income. You may only report alimony received on Form 1040, or on Schedule NEC, [Form 1040NR](#) (PDF), *U.S. Nonresident Alien Income Tax Return*. You must provide your SSN or ITIN to the spouse or former spouse making the payments, otherwise you may have to pay a \$50 penalty.

Additional Information

For more detailed information on the requirements for alimony and instances in which you may need to recapture an amount that was reported or deducted (recapture of alimony), see [Publication 504, Divorced or Separated Individuals](#). For more information on decrees and agreements executed before 1985, see the 2004 version of [Publication 504](#).

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