

Alimony act, support guidelines poor combo for children

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Family law, as it has developed over the past 35 years, has had at least two guiding principles: to promote consistency and predictability, and to protect the interests of children.

The Alimony Reform Act of 2011 (effective March 1, 2012) coupled with the revised Child Support Guidelines (effective Aug. 1, 2013) have had a profound impact on children. When examined together, both primarily reflect the latest compromise between parents in the continuing saga over the allocation of money to meet their respective needs. But it is ironic that at a time when there is so much discussion about the importance of children having a voice in divorce and paternity cases, there was little acknowledgment of their interests during the deliberations around the alimony act and the revised support guidelines.

Prior to the passage of federal legislation compelling states to adopt child support guidelines, Massachusetts, like all other states, gave each judge the almost unfettered discretion to base support orders on the alleged needs of the custodial parent and the ability of the payor to meet those needs.

The result was both inconsistency and unpredictability in support orders, but also orders that gave priority to the payor parent over the welfare of minor children.

The mandated Child Support Guidelines turned the previous basis for granting support on its head by recognizing that need was a function of available income and that the purpose of support was to make a fair allocation of the available income, leaving it to the parties to set their respective needs. The mandated allocation gave more priority to the needs of children than courts were allowing under prior law.

One of the guiding principles underlying the original guidelines was to give children born out of wedlock the same economic benefit as those born within the marriage. Because the custodial parent of a child born out of wedlock was not eligible for alimony, there was recognition that child support needed to cover at least a portion of the shared costs of the household. Therefore, more than the direct costs attributable to the minor child were considered.

Although the original child support worksheet was simple and required adjustment in order to deal with specific payments for health insurance costs and child care, those worksheets, as amended, were easily understood and could be prepared by parties with little, if any, help from lawyers.

The drastic changes that have occurred in the Child Support Guidelines over time, culminating with the 2013 guidelines, have gone a long way toward undermining and gutting the purpose of the original guidelines.

First: The basic orders have been reduced drastically. They are no longer determined by the concept of family need but are allegedly based on the individual direct costs that are attributable to the child.

At a time when 40 percent of children are born out of wedlock, well over half of the family law cases in the Probate & Family Court relate to paternity and not divorce. Under the current guidelines, children residing in a household not eligible to receive alimony do not receive the economic benefits that the original Child Support Guidelines intended to provide. The impact on children is readily apparent.

Second: The guideline worksheets have become so sophisticated that lawyers must resort to reliance on computer programs to complete the calculations. That increased complexity occurs at a time when pro se litigants in many counties exceed 50 percent. The pro se litigants do not have access to sophisticated legal software to assist in guideline calculations.

While the Probate & Family Court website does provide a worksheet for calculation of the guidelines, the public may not be aware of that assistance.

Third: The amount of child support is now directly tied to the time that the child spends with each parent. Because the payor gets a reduction in child support when his or her time allocation exceeds 35 percent, the door is wide open for litigation over parenting time.

Basic household expenses such as mortgage payments, rent and insurance premiums do not change because a child spends a few more hours with one parent or the other.

The Alimony Reform Act, standing alone, represents a reasonable compromise between the interests of former spouses. It opens up options and provides a structure to develop predictability and consistency over time. However, the Alimony Reform Act in the context of families with minor children represents a profound philosophical shift that is not in the best interests of children.

Prior to the act and the term limits on alimony it imposes, a parent in a marriage - most often the mother - could make the choice of staying home and taking care of children with the understanding that, if the marriage failed, she could count on indefinite support from her husband.

With the adoption of term limits, the decision of how much time, if at all, to remain out of the workplace for the benefit of children is more difficult.

The absence of coordination between the Alimony Reform Act and the Child Support Guidelines has led to unpredictability and inconsistency in support orders.

Because the child support amount varies from 11 to 22 percent of gross income, and the alimony rate varies between 30 and 35 percent, whether the child support order is determined before or after the alimony order or made part of an unallocated order can make a significant and critical difference.

There is no standard approach by Probate & Family Court judges, and, indeed, individual judges change their approach from case to case depending on the facts of the case.

In October 1978, I wrote an article for the Boston Bar Journal entitled "Consistency and Predictability in Alimony and Support Orders." The concept I proposed - that support should be based on an allocation of income rather than a bottom-up determination of need and ability to pay - was somewhat revolutionary. As evidenced by the federally mandated Child Support Guidelines, that concept took hold.

The state developed predictable and consistent guidelines and raised the standard of living of children, which was noted throughout the country. The American Law Institute in its "Principles of the Law of Family Dissolution" cited the Massachusetts' guidelines formula as the best.

Unfortunately, over time the formula changed, resulting in reduced child support payments, complicated work sheets, and reduced predictability and consistency.

The primary impetus for the change came from fathers who objected to the shift from the strictly needs-based approach to the income-allocation approach as they were called upon to pay more.

Arguing over what a pair of shoes should cost as opposed to taking a broader approach as to the cost of raising a child within a family tended to underestimate the true cost of raising a child.

Over time, fathers have become more actively involved in child rearing as distinguished from being just the primary wage earner. However, in the vast majority of divorce and paternity cases in which one parent assumes more or most child-rearing responsibilities, the energy of the "primary" parent is diverted by the necessity of supplementing decreased levels of support.

Tying child support to the amount of time one parent spends with a child is overly simplistic and fails to consider the scope of responsibility assumed by the primary parent.

For example, if the recipient parent earns \$300 a week, and the payor earns \$500 a week, support would vary from \$100 a week if the time allocation was up to one-third, \$77 if the allocation was between one-third and one-half, and \$44 a week if the division of time was 50-50.

Determining variations in support based on time alone does not reflect the best interests of the children. Although the court has discretion to require parents to share specific costs for the children beyond the basic order, such as extracurricular activities and tutoring, this represents a reversion to the pre-guideline era with all of its attendant problems.

Justice Oliver Wendell Holmes said that law is the product of experience more than of logic. The drastic change in both the way of determining child support and the level of child support is an effort to reflect the changing nature of families in which fathers play a larger role in raising children, and mothers play a bigger role in economic activity outside the home.

Although the forces driving the Alimony Reform Act and the revised Child Support Guidelines are understandable and represent compromises that parents can live with, the two taken together have had an adverse impact on children.

Hopefully, the child's voice will be given a greater opportunity to be heard at the next go-round.

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