WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #3

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OFFICE OF WEST VIRGINIA SECRETARY OF STATE

NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE AND FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

AGENCY: CHILD ADVOCATE OFFICE Dept. of Health and Human Resources TITLE NUMBER: 78

CITE AUTHORITY W. Va. Code §48A-2-8, 42 U.S.C. §667, 45 C.F.R. §302.56

AMENDMENT TO AN EXISTING RULE: YES X NO ___

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 16

TITLE OF RULE BEING AMENDED: Guidelines for Child Support Awards

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: ___

TITLE OF RULE BEING PROPOSED: ___

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

Ruth Ann Panepinto
Ruth Ann Panepinto, Ph.D.
Secretary
Dept. of Health and Human Resources

17.20

CIRCUMSTANCES REQUIRING PROPOSED
LEGISLATURE RULE
TITLE 78
LEGISLATIVE RULES
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
SERIES 16

Senate Bill 358, W. Va. Code §48A-2-8, was passed in the 1993 Legislative Session and required the Child Advocate Office to amend and update the child support guidelines.

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Guidelines for Child Support Awards

Type of Rule: X **Legislative** ______ **Interpretive** ______ **Procedural**

Agency Department of Health and Human Resources

Address Building 3, Capitol Complex Charleston, W. Va. 25305

1. Effect of Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Estimated Total Cost	$	$	$ -0-	$ -0-	$ -0-
Personal Services			-0-	-0-	-0-
Current Expense			-0-	-0-	-0-
Repairs and Alterations			-0-	-0-	-0-
Equipment			-0-	-0-	-0-
Other			-0-	-0-	-0-

2. **Explanation of above estimates.**

   There is no Fiscal Impact on the state for the proposed legislative rule.

3. **Objectives of these rules:**

   To ammend the West Virginia Child Support Guidelines to conform with Senate Bill 358.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

NONE

B. Economic Impact on Political Subdivisions; Specific Industries; Specific Groups of Citizens.

Obligor wil continue to pay child support tied to their ability to pay. Children will continue to receive child support with consideration for their needs.

C. Economic Impact on Citizens/Public at Large.

SAME AS B

Date 7-9-93

Signature of Agency Head or Authorized Representative

Ruth Ann Panepinto

Ruth Ann Panepinto, Ph.D., Secretary
Department of Health and Human Resources

SUMMARY OF PROCEDURAL RULE
TITLE 78
PROCEDURAL RULES
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
SERIES 17
AMOUNTS TO BE USED IN THE GUIDELINES FOR CHILD SUPPORT AWARDS

This procedural rule establishes numerical criteria to be used in conjunction with 78 WVCSR 16, Guidelines for Child Support Awards, to determine the amount of child support to be awarded in child support establishment and modification cases.

FILED

AUG 16 3 14 PM '93

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

TITLE 78
LEGISLATIVE RULES
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
CHILD ADVOCATE OFFICE
SERIES 16
GUIDELINES FOR CHILD SUPPORT AWARDS

§78-16-1. General.

1.1. Scope. This legislative rule establishes guidelines for child support award amounts so as to ensure uniformity by those persons who make child support recommendations and enter child support orders, to increase predictability for parents, children, and other persons who are directly affected by child support orders, to protect the best interests of the child and maintain the priority of protecting the economic welfare of the child.

1.2. Authority and related code citation. -- W. Va. Code §48A-2-8, 42 U.S.C. §667, 45 C.F.R. §302.56

1.3. Filing date. --

1.4. Effective date. --

1.5. Repeal of former rule. This legislative rule repeals and replaces the following West Virginia Legislative Rule: Department of Health and Human Resources, Series 16, " Guidelines for Child Support Awards," filed April 12, 1988.

§78-16-2. Formula for establishing child support obligations.

2.1. Calculation of gross income. The amount of gross income for a parent includes but is not limited to the following:

2.1.1. Wages, Salary, Commissions, and any other income due or to be due in the future to a parent from his employer or his successor employers.

2.1.1.a. Any payment due or to be due in the future to a parent from a profit-sharing plan, a pension, plan, an insurance contract, an annuity, social security, unemployment compensation, supplemental employment benefits, worker's compensation benefits, state lottery winnings and prizes, and overtime pay.

2.1.1.a.A. Overtime.

2.1.1.a.A.(a) In employment situations where overtime is not normally available, a parent who is offered

overtime employment on an irregular basis shall not be required to accept the offered overtime employment; however, if he/she accepts overtime employment, all income resulting from overtime employment shall be considered on a monthly pro-rated basis in the calculation of the child support obligation.

2.1.1.a.A.(b). A parent who has traditionally accepted overtime employment either on a mandatory recurring overtime basis or an irregular basis shall not voluntarily limit his or her income by refusing to accept overtime employment for the purpose of reducing his or her child support obligation.

2.1.1.a.B. If a court or master determines that a refusal to accept overtime employment results in a self-induced decline in income, the court or master shall attribute the earnings available from overtime work to such parent.

2.1.1.a.C. Such earnings shall be considered on a monthly pro-rated basis in the calculation of child support.

2.1.1.a.C.(a). To determine the monthly pro-rated amount of overtime to be included in the calculation of gross income, take the yearly total of overtime income and divide by twelve (12).

2.1.1.b. All non-cash or fringe benefits or reimburseable expenses to the extent that they provide a parent with benefits or property that he or she would otherwise have to provide for himself or herself including but not limited to: business expense accounts, business credit accounts, social or recreational club membership or tangible property such as automobiles, housing, utilities or meals.

2.1.1.c. Any amount of money which is owing to the parent as a debt from an individual, partnership, association, public or private corporation, the United States or any federal agency, this state or any political subdivision of this state, any other state or political subdivision of another state, or any other legal entity which is indebted to the parent.

2.1.2. Interest

2.1.3. Dividends

2.1.4. The Portion of sub-chapter S corporation distributions attributable to the parent - Property distributed (including cash) other than dividend distributions reported to the recipient on Form 1099-DIV.

2.1.5. Partnership income/distributions

2.1.6. Excess retained earnings in a closely held corporation.

2.1.6.a. Excess accumulation of prior period earnings retained within the corporation over and above;

2.1.6.a.A. The normal working capital reserve requirements of the subject company;

2.1.6.a.B. Financing requirements for future expansion or diversification plans, and;

2.1.6.a.C. Future capital asset budget requirements.

2.1.7. 401-K pension deductions - Pre-tax contributions withheld or deducted in determining an individual's gross taxable income.

2.1.8. Other pension/savings payments - Keogh, etc. - Other pre-tax and after-tax contributions to pension or savings plans.

2.1.9. Capital gain cash flow from the sale of assets.

2.1.10. Rental income cash flow.

2.1.11. At no time shall the fact that a parent has remarried, or the fact that the spouse of a remarried parent is, or is not, gainfully employed, or that said spouse has income from whatever source, be considered in determining whether or not to increase or decrease child support payments by or to the remarried parent.

2.1.12. All information relating to income shall be presented to the court or master based on monthly amounts.

2.1.12.a. To determine the correct monthly income amount for a parent who is paid wages weekly, multiply the weekly pay by fifty-two (52) and divide by twelve (12).

2.1.12.b. To determine the correct monthly income amount for a parent who is paid on a bi-weekly basis, multiply the amount of bi-weekly pay by twenty-six and divide by twelve (12).

2.1.12.c. To determine the correct monthly income for a parent who is paid on a semi-monthly basis, multiply the amount of semi-monthly pay by twenty-four (24) and divide by twelve (12).

2.1.12.d. When income is paid annually, semi-annually, quarterly or on an irregular basis, it shall be pro-rated by dividing the yearly total by twelve (12) to arrive at a correct monthly amount.

2.1.13. If the court or master deems it appropriate, such information may be presented in such other form as the court or master directs.

2.2. Calculation of net income.

2.2.1. The amount of net income for a parent is computed by subtracting from the gross income of such parent the following:

2.2.1.a. Income tax.

2.2.1.a.A. "Income Tax". Defined.

2.2.1.a.A.(a). The term "income tax" or "income taxes" shall mean personal income tax paid by a parent on his or her taxable income under the laws of the United States, the State of West Virginia, any sister state, any territory, any political subdivision of such governmental bodies, and any other taxing jurisdiction, foreign or domestic.

2.2.1.b. Taxes withheld from income.

2.2.1.b.A. "Taxes withheld from income". Defined.

2.2.1.b.A.(a). The term "taxes withheld from income" shall mean the amount of income tax deducted and withheld by a employer from income of a parent, computed in such a manner as to result, so far as is practicable, in withholding an amount substantially equivalent to the income tax estimated to be due.

2.2.1.b.A.(b). The amount of taxes withheld from income, to be valid as a factor in determining the amount of child support owed by a parent, shall be based upon the maximum number of withholding exemptions allowable under the applicable tax law.

2.2.3. Deductions from income required by law.

2.2.3.a. "Deductions from income required by law". Defined.

2.2.3.a.A. The term "deductions from income required by law" means the amount deducted and withheld by an employer from income of a parent as required by law, including, but not limited to, social security taxes, assessments on wages made under the provisions of any employment security law, and child support payments, if paid, made pursuant to a court order or a written separation agreement.

2.2.3.a.B. "Deductions from income required by law" shall not include wage attachments and suggestions which are required by law to be deducted and withheld by the employer, but which are for the enforcement of debts which would not otherwise be considered under the provisions of this legislative rule in determining a parent's net income.

2.2.4. Deductions from income required by an employer as a condition of employment.

2.2.4.a. "Deductions from income required by an employer as a condition of employment". Defined.

2.2.4.a.A. The term "deductions from income required by an employer as a condition of employment" shall mean nonreimbursable amounts deducted and withheld by an employer from income of a parent as payment for uniforms, tools, equipment and other supplies necessary for the performance of services or labor on behalf of the employer.

2.2.4.a.B. Deductions from income required by an employer as a condition of employment" shall not include deductions for food, clothing, shelter, and other necessities of life unless, and only to the extent, that such necessities are provided for use or consumption by the child(ren) for whom support is being calculated.

2.2.4.b. Deductions from income required by an employer for mandatory pension plans are not to be included in this section but are to be attributed to the party as income to be due in the future.

2.2.5. Deductions from income required by a union as a condition of employment.

2.2.5.a. "Deductions from income required by a union as a condition of employment". Defined.

2.2.5.a.A. The term "deductions from income required by a union as a condition of employment" shall mean the reasonable amount deducted and withheld by an employer from income of a parent as dues, fees or other assessments, for the benefit of a labor union or other employee organization, required to be withheld under the terms of a labor-management agreement.

2.2.6. Legitimate business expenses.

2.2.6.a. Legitimate business expenses for self employed income. Defined.

2.2.6.a.A. Adjustments in calculating gross income shall be made by including non cash deductions claimed as part of the party's total income; non-cash deductions include but are not limited to: depreciation, depletion, amortization, use of personal vehicles, use of home, home utilities, pension and or profit sharing contributions for the parent, Internal Revenue Code Section 79 deductions and deductions for self-employment tax (where self employment tax is deducted from income).

2.2.7. The court or master shall disregard any debt, deduction from income or expense which is incurred with the obvious intent of decreasing child support payments.

2.3. Determination of the standard deduction of a parent.

2.3.1. The court or master shall establish the standard deduction of each parent in accordance with the provisions established by procedural rule.

2.4. Calculation of the net income available for primary child support.

2.4.1. The court or master shall determine for each parent the amount of "net income available for primary child support" by subtracting the standard deduction of the parent from the net income of such parent.

2.5. Calculation of the total primary child support need.

2.5.1. The court or master shall establish the primary support need of each child for whom child support is sought in accordance with the provisions established by procedural rule and then total these amounts.

2.5.1.a. Payments or deductions for the benefit of child(ren).

2.5.1.a.A. The court or master shall add to the primary support needs of all the children in question the cost of extraordinary medical expenses and the cost of child care needed to allow a custodial parent to work.

2.5.1.a.A.(a). Other expenses incurred because of the special needs of a child may be allowed if found by the court or master to be necessary. (See Section 5.1. Payments for the benefit of children).

2.5.1.a.A.(b). The amount resulting from these calculations shall be the "total primary child support need."

2.5.1.b. All payments or deductions for the benefit of children included in the formula in the form of hospital and medical insurance, dental and optical insurance, if paid, shall be subtracted from the primary support need of the child.

2.5.1.b.A. To arrive at the amount to be subtracted from the primary support need of the child, pro rate the total payment or deduction by dividing the total amount of the payment or deduction by the total number of persons eligible for benefits under the provisions of the insurance policy and then multiply the resulting pro-rated portion by the number of children for whom support is being sought.

2.5.2. Provided, that in no event shall the credits given under this subdivision reduce the parent's total monthly child support obligation to an amount less than the minimum monthly support obligation established by procedural rule.

2.5.3. Unearned income to the child.

2.5.3.a. The court or master may not deduct payments made to the child, due to the condition of a parent (i.e. social security, disability, supplemental security income (SSI) or retirement payments), as a part of the Primary Support Calculation.

2.5.3.b. The court or master may deduct distributions made from a trust fund which are applied to and utilized for current expenses for the child, as a part of the Primary Support Calculation.

2.5.3.c. Interest accumulated from a trust established for the benefit of the child from which distributions for current expenses are not made may not be deducted as a part of the Primary Support Calculation.

2.5.3.d. Payments that are made to the child due to a condition of the child (i.e. social security disability payments or supplemental security income (SSI)) shall not be deducted from the Primary Support Obligation or subtracted from the available income from the Standard of Living Adjustment.

2.5.4. The amount resulting from these calculations shall be the "total primary child support need".

2.6. Calculation of the primary support obligation of each parent.

2.6.1. The court or master shall divide each parent's net income available for child support by the total net income available for child support from both parents.

2.6.2. The resulting percentage establishes the burden which each parent shall carry with respect to the primary child support needs of the children for whom support is being calculated.

2.6.3. This percentage shall then be multiplied by the total primary child support need in order to arrive at the "primary support obligation of each parent."

2.7. Calculation of the available net income for SOLA support.

2.7.1. SOLA support. Defined.

2.7.1.a. The standard of living adjustment (SOLA) is designed to apportion the discretionary income available to a parent after he or she has met his or her standard deduction and primary support obligation.

2.7.2. Calculate net income available for SOLA support.

2.7.2.a. From each individual's net income available for primary child support, as calculated in accordance with subdivision 2.4, determine the amount of discretionary income available (" net income available for SOLA support") for each parent, if any, by subtracting each parent's portion of the primary support obligation calculated in accordance with subdivision 2.5.

2.8. Calculation of the SOLA support obligations.

2.8.1. An allowance shall be given for the children of the parent's current or previous marriages, who have been adopted by or who have been born to the parent, by counting these children as children who receive a share of the standard of living obligation (SOLA) along with the child(ren) considered in the formula, except for any child for whom a child support payment has been deducted from income pursuant to section 2.2.3.a.

2.8.2. If discretionary income is available, a parent shall be required to pay, as a "SOLA support obligation", amounts calculated as percentages of discretionary income in accordance with the numerical criteria established by procedural rule.

2.8.3. The total amount required to be paid by a parent as SOLA support shall not exceed fifty percent of the parent's discretionary income unless the court sets forth, in writing, findings of specific need.

2.9. Calculation of the per-child share of SOLA support.

2.9.1. Upon determining the total amount required to be paid by a parent as SOLA support, the court or master shall calculate the "per-child share of such SOLA support" by dividing each parent's SOLA support amount by the number of children included in the calculation of that parent's SOLA support.

2.9.2. Once each child's share of the SOLA has been determined, the court or master shall subtract the shares allowed for the children not included in this formula from the parent's individual SOLA support obligation to determine the amount of the parent's individual SOLA support obligation for the children for whom support is being determined in this formula.

2.10. Calculation of the total monthly child support obligation.

2.10.1. The court or master shall determine the "total monthly child support obligation" of each parent by adding together the parent's primary support obligation and SOLA support obligation for the children considered in the formula.

2.10.2. In the usual case involving a noncustodial parent and a custodial parent, the custodial parent shall retain his or her child support obligation and the non-custodial parent shall pay his or her total monthly child support obligation as directed by the court or master.

2.10.3. Split Custody.

2.10.3.a. In cases of split custody, where each parent has custody of one or more of children of the marriage living in his/her household, each parent shall retain that age based share of the support obligation allotted to the child or children in his or her custody .

2.10.3.b. After such retention, if one parent's obligation is greater than that owed by the other, the difference between the amounts owed by the parents shall be paid by the custodial parent owing the greater amount as directed by the court or master.

2.10.3.c. The use of the split custody formula is limited to those cases where a split custody agreement has been incorporated into an order of the court and where the time periods of physical custody of the child are clearly provided for therein.

2.10.4. Joint custody.

2.10.4.a. Joint custody. Defined.

2.10.4.a.A. Where parties share equal physical joint custody on a 50/50 basis, each will be considered to have the child(ren) for six (6) months during the course of year.

2.10.4.a.A.(a). To avoid unnecessary transfers of funds, in cases where parents share equal joint custody, the "pay out" of each parent for the year should be determined by multiplying the monthly support obligation times six months.

2.10.4.a.A.(b). If one parent's yearly obligation is greater than that owed by the other, the excess amount shall be divided by twelve (12) and paid monthly over the course of the year, unless the parties agree otherwise.

2.10.4.b. In cases where parties do not share equal joint custody on a 50/50 basis, the regular formula calculation shall be used and the support obligation of each parent shall be based upon the actual number of months that either parent has actual physical custody of the child or children.

2.10.4.b.A. To avoid unnecessary transfers of funds in cases where parents do not share equal joint custody, the "payout" of each parent for the year should be determined by nultiplying the monthly support obligation times the number of months the parent has actual physical custody of the child(ren).

2.10.4.b.B. In cases where parents do not share equal joint custody, if one parent's yearly obligation is greater than that owed by the other, the excess amount shall be divided by twelve (12) and paid monthly over the course of the year, unless the parties agree otherwise.

2.10.4.c. The use of the joint custody formula is limited to those cases where a joint custody agreement and a parenting agreement have been incorporated into an order of the court and where the time periods of actual physical custody of the child(ren) are clearly provided for therein.

2.10.5. Payments to third parties.

2.10.5.a. Payments to third parties in the form of home loan installments, land contract payments, rent, payments for utility services, property taxes or other expenses or charges reasonably necessary for maintenance of a residence for the parent's children, to the extent that such payments have been specifically denominated as child support by a court order or a valid separation agreement and are specifically denominated as a sum certain, shall, if actually paid, be credited against the parent's total monthly child support obligation;

2.10.5.b. Provided, That in no event shall the credits given under this subdivision reduce the parent's total monthly child support obligation to an amount less than such parent's primary support obligation.

§78-16-3. "Attributed income".

3.1. Attributed income. Defined.

3.1.1. The term "attributed income" shall mean income not actually earned by a parent, but which shall be attributed to such parent because he or she is unemployed, is not working full time, or is working below full earning capacity.

3.1.1.a. Income shall be attributed to a parent who is unemployed, underemployed or is otherwise working below full earning capacity unless one or more of the following conditions exist:

3.1.1.a.A. Such custodial parent is providing care for the children of the marriage to whom the parties owe a joint legal responsibility for support, and such children are of preschool age or are handicapped or otherwise in a situation requiring particular care by the custodial parent;

3.1.1.a.B. Such parent is pursuing a plan of economic self-improvement which will result, within a reasonable time, in an economic benefit to the children to whom the support obligation is owed, including, but not limited to, self-employment or education;

3.1.1.a.C. Such parent is, for valid medical reasons, earning an income in an amount less than that previously earned;

3.1.1.a.D. Such parent has demonstrated to the court that diligent efforts have been made to find and accept available suitable work or to return to customary self-employment, to no avail; or

3.1.1.a.E. The court or master makes a written finding that other circumstances exist which would make the attribution of income inequitable:

3.1.1.a.E.(a). Provided, that in such case, the court or master may decrease the amount of attributed income to the extent required to remove such inequity; or

3.1.2. If a court or master determines that a limitation on income is not justified in that it is a result of a self-induced decline in income, a refusal to occupy time profitably, or an unwillingness to accept employment and earn an adequate sum, the court or master shall consider evidence establishing the parent's earning capacity in the local job market, and shall attribute income to such parent.

3.1.3. If a court or master determines that there is insufficient evidence establishing the parent's earning capacity in the local job market based upon prior employment history, the court or master shall attribute income to such parent in accordance with the amount to be attributed as minimum wage full time employment established by procedural rule.

3.1.4. In any case attributed income shall be the greater of the calculations made in 3.1.2. or 3.1.3.

§78-16-4. "Earnings".

4.1. Earnings. Defined.

4.1.1. The term "earnings" shall mean compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.

4.1.2. Earnings shall be considered a part of the gross to net income calculations established in this rule.

78-16-5. "Payments for the benefit of children".

5.1. Payments for the benefit of children. Defined.

5.1.1. The term "payments for the benefit of children" shall mean an amount or amounts paid by a parent to third parties on a regular, recurring basis for the benefit of the children for whom support is being calculated, including, but not limited to, tuition, health care expenses, hospital insurance, and medical, dental or optical insurance.

5.1.2. Payments for the benefit of children, if paid, which are, in fact, extraordinary medical expenses, costs of child care needed to allow a custodial parent to work or other expenses incurred because of the special needs of a child, may, in the discretion of the court or master, be treated as payments for the benefits of children.

5.2. Under no circumstances shall any payment, expense or deduction for the benefit of children be deducted from the income.

5.3. The court or master shall disregard any debt, deduction or payment which is incurred with the obvious intent of decreasing child support payments.

§78-16-6. "Standard deduction".

6.1. "Standard deduction". Defined.

6.1.1. The term "standard deduction" shall mean the amount of income that a parent must retain to function at maximum productivity.

6.1.2. The standard deduction assigned each parent shall be in keeping with the amounts set by the amounts to be used in the guidelines for child support awards procedural rule.

78-16-7. "Primary child support need". Defined.

7.1. The term "primary child support need" shall mean the presumptive amount of money that a child requires based upon his or her age, for the necessities of life including but not limited to: food, clothing, shelter and medical care, tuition, school related expenses, and extra curricular activities.

7.2. The primary support need assigned to a child for whom support is being calculated, shall be in accordance with the numerical criteria established by procedural rule, unless the court or master determines in writing that a deviation from the presumptive need is supported by clear and convincing evidence.

§78-16-8. Effect of separation agreements.

8.1. "Separation agreement". Defined.

8.1.1. For purposes of this legislative rule, the term "separation agreement" shall have the meaning ascribed to it in subsection (h), section one, article two, chapter forty-eight of the code of West Virginia.

8.2. On and after the effective date of this legislative rule, where the parents execute a separation agreement which provides for the custody and support of the child or children of the parties, the court shall order the payment of child support in accordance with the terms of the agreement, unless the court finds:

8.2.1. That the agreement was obtained by fraud, duress, or other unconscionable conduct by one of the parties, or by a mistake of law on the part of one or both of the parties; or

8.2.2. That the parties, in the separation agreement, have not expressed themselves in terms which, if incorporated into a judicial order, would be enforceable by a court in future proceedings; or

8.2.3. That the agreement, viewed in the context of the children having a right to share in their natural parents' level of living, and considering the best interests of the children, is so inequitable as to defeat the purposes and principles of section eight, article two, chapter forty-eight-a of the code of West

Virginia, and such agreement was inequitable at the time the same was ratified and approved by a court or master; or

8.3. If a separation agreement provides for amounts of child support which would not fall within the guidelines for child support awards promulgated by this legislative rule, and such amounts have been determined as a part of a broader agreement establishing the rights of the parties in such matters as disposition of their separate property or the distribution of marital property, the reason or reasons for such variance should be set forth in the agreement or made a matter of court record, in order that they may be considered in future proceedings involving child support obligations.

§78-16-9. Disregard of formula.

9.1. If, after computing the amount of a child support award in accordance with the provisions of this legislative rule, the court or master determines that the figure resulting from the application of the support guidelines is less than the minimum child support award amount as established by procedural rule, the court or master shall disregard the formula and assign the minimum child support amount to the child(ren) due support in the support action.

9.2. If, after computing the amount of a child support award in accordance with the provisions of this legislative rule, the court or master determines that the figure resulting from the application of the support guidelines is inappropriate as being contrary to the best interests of the children and the parties, and as outlined in §48A-2-8, and does not meet the priority of protecting the economic welfare of the children within the custodial home, the court or master may disregard the formula and not follow the guidelines.

9.1.1. However, in such instance, the court or master shall set forth, in writing, in the order, the reasons for not following the guidelines in the particular case involved.

§78-16-10. In every case, a copy of the calculation of the child support guidelines including gross to net income calculations shall be provided to the parties and attached to the order.

§78-16-11. Effect of promulgation of rule on existing support orders.

11.1. The fact that the revision and promulgation of this legislative rule establishes guidelines for child support awards shall not, in and of itself, constitute a change of circumstances upon which an existing support order may be revised or altered.

11.2. A party seeking a modification of a child support order must show that the welfare of the child or children requires modification and that a substantial change in circumstances that was uncontemplated by either of the parties at the time the order was entered has occurred since the entry of the existing order that was not adequately dealt with in that order.

11.3. Upon the motion of either party and after a showing that a modification would be in the best interests of the child, an order providing for child support payments may be revised or altered for the reason, inter alia, that the existing order provides for child support payments in an amount that is less than eighty-five percent (85%) or more than one hundred fifteen percent (115%) of the amount that would be required to be paid under the revised child support guidelines promulgated pursuant to the provisions of this legislative rule.

§78-16-12. Guidelines for standard deduction, presumptive need, standard of living adjustment (SOLA) percentages, attribution of minimum wage amount and minimum child support award amount.

12.1. The director of the child advocate office shall, by procedural rule as outlined in WVC §29A-3-1 et seq, establish the amounts to be used for standard deductions, primary or presumptive need for child(ren), standard of living (SOLA) percentages, attribution of minimum wage amount and minimum child support order amount as outlined in this rule.

12.2. These amounts shall be reviewed and if necessary modified every three years with the first rule taking effect on July 1, 1994.

DATE: August 16, 1993

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: Sallie Tweel, Acting General Counsel
CHILD ADVOCATE OFFICE

LEGISLATIVE RULE TITLE: Guidelines for Child Support Awards

1. Authorizing statute(s) citation W. Va. Code §48A-2-8, 42 U.S.C. §667, 45 C.F.R. §302.56

2. a. Date filed in State Register with Notice of Hearing:

July 9, 1993

b. What other notice, including advertising, did you give of the hearing?

None

c. Date of hearing(s): August 12, 1993

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached X No comments received ______

e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

August 16, 1993

f. **Name and phone number(s) of agency person(s) to contact for additional information:**

Sallie H. Tweel, Acting General Counsel
Child Advocate Office
Bldg. 6, Room 817
Capitol Complex
Charleston, WV 25305

Telephone No: (304) 558-3780

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

   a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

   ____

   ____

   b. Date of hearing: ______________________________

   c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

   ____

   d. Attach findings and determinations and reasons:

   Attached ______________________________________

SUMMARY OF PROPOSED LEGISLATIVE RULE
TITLE 78
LEGISLATIVE RULES
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
SERIES 16

The proposed Rule addresses the concerns raised by the Legislature in passing Senate Bill 358 as well as many of the issues that have arisen since the establishment of the last set of child support formula guidelines.

The major changes in the proposed Rule include the following:

1. An increase in the self-support deduction for parents and an increase in the primary support obligation for the children involved in the formula so that these amounts will be more reflective of the current cost of living in West Virginia.
2. The handling of second families in the formula was changed by giving children who had been adopted or born to the non-custodial parent in his/her second marriage an equal footing with the children in the formula as part of the standard of living adjustment.
3. The policies on how to handle third party payments from the Social Security Administration and other agencies to children involved in the formula was clarified in light of the Supreme Court's holding in the case of *Farley v. Farley*.
4. Finally the committee has recommended that a minimum child support amount of $100.00 per month be established by the Legislature for use by the Courts.

All persons are ensured of equal treatment by this mechanism, without restricting the authority of the Court to establish an order outside of the scope of the formula, when the unique facts of a particular case so warrant.

TITLE 78
LEGISLATIVE RULES
DEPARTMENT OF HUMAN SERVICES

SERIES 16
GUIDELINES FOR CHILD SUPPORT AWARDS

§78-16-1. General.

1.1. Scope. -- This legislative rule establishes guidelines for child support award amounts so as to ensure greater uniformity by those persons who make child support recommendations and enter child support orders and to increase predictibility for parents, children, and other persons who are directly affected by child support orders.

1.2. Authority and Related Code Citation. -- W. Va. Code §48A-2-8, 42 U.S.C. §667, 45 C.F.R. §302.56.

1.3. Filing date. -- April 12, 1988

1.4. Effective date. -- May 2, 1988

1.5. Repeal of former rule. -- This legislative rule repeals the following West Virginia Legislative Rule: "Department of Human Services, Series 16, Guidelines for Child Support Awards," filed September 23, 1987.

§78-16-2. Formula For Establishing Child Support Obligations.

2.1. Calculation of net income. -- The amount of net income for a support obligor is computed by subtracting from the income of such support obligor the following:

2.1.1. Income tax (see Section 6);

2.1.2. Taxes withheld from income (see Section 7);

2.1.3. Deductions from income required by law (see Section 8);

2.1.4. Deductions from income required by an employer as a condition of employment (see Section 9);

2.1.5. Deductions from income required by a union as a condition of employment (see Section 10);

2.1.6. Legitimate business expenses (see Section 11);

2.1.7. Deductions for the benefit of children (see Section 12); and

2.1.8. Payments for the benefit of children (see Section 13).

2.1.9. Indebtedness (see Section 14).

2.2. Determination of the self support need of an obligor. -- The court or master shall establish the self-support need of each support obligor in accordance with the provisions of Section 14 of this legislative rule.

2.3. Determination of the net income available for primary child support. -- The court or master shall determine for each support obligor the amount of "net income available for primary child support" by subtracting the self-support need of the obligor from the net income of such obligor.

2.4. Determination of the total primary child support need. -- The court or master shall establish the primary support need of each child for whom child support is sought and then total these amounts. The court or master shall add to the primary support needs of all the children in question the cost of extraordinary medical expenses and the cost of child care needed to allow a custodial parent to work, unless such expenses or costs have been deducted from income. Other expenses incurred because of the spe-

cial needs of a child may be allowed if found by the court or master to be necessary. The court or master shall deduct from the primary support needs of a child the unearned income of such child. The amount resulting from these calculations shall be the "total primary child support need."

2.5. Determination of the primary support obligation of each obligor. -- The court or master shall divide each support obligor's net income available for child support by the total net income available for child support from both obligors. The resulting percentage establishes the burden which each support obligor should carry with respect to the primary child support needs of their children. This percentage should then be multiplied by the total primary child support need in order to arrive at the "primary support obligation of each obligor."

2.6. Determination of the available net income for SOLA support. -- The standard of living adjustment (SOLA) is designed to apportion the discretionary income available to a support obligor after he or she has met the obligor's self-support needs and primary support obligation. From the net income available for primary child support, as calculated in accordance with subdivision 2.3, determine the amount of discretionary income available ("available net income for SOLA support"), if any, by subtracting the following:

2.6.1. The primary support obligation calculated in accordance with subdivision 2.5; and

2.6.2. Other primary support obligations owed to children of the support obligor not of the union of the parties to the case, unless such obligations have been deducted from income.

2.7. Calculation of the SOLA support obligations. -- If discretionary income is available, a support obligor shall be required to pay, as a "SOLA support obligation", amounts calculated as percentages of discretionary income, as follows:

First child	15%
Second and third child	10% each
Fourth, fifth, and sixth child	5% each

2.7.1. The total amount required to be paid by an obligor as SOLA support shall not exceed fifty percent of the support obligor's discretionary income unless the court sets forth, in writing, findings of specific need.

2.7.2. If the discretionary income of either support obligor exceeds six thousand dollars per month, or if the combined discretionary income of both support obligors exceeds eight thousand dollars per month, the court or master may not apply the percentages set forth in this section. Under such circumstances, the court shall equitably determine the SOLA support obligation so as to avoid a windfall to either support obligor or a hardship on either support obligor, and shall be cognizant of the fact that an excessive amount of SOLA support may not be in the best interests of the child or children.

2.8. Calculation of the per-child share of SOLA support. -- Upon determining the total amount required to be paid by an obligor as SOLA support, the court or master shall calculate the "per-child share of such SOLA support."

2.9. Determination of the total monthly child support obligation. -- The court or master shall determine the "total monthly child support obligation" of each support obligor by adding together the obligor's primary support obligation and SOLA support obligation.

2.9.1. In the usual case involving a noncustodial parent and a custodial parent, the custodial parent shall retain his or her child support obligation and the noncustodial parent shall pay his or her total monthly child support obligation as directed by the court or master.

2.9.2. In cases of split custody, where each support obligor is also a custodial parent, each support obligor shall retain that share of the support obligation owed to the child or children in his or her custody. After such retention, if one parent's obligation is greater than that owed by the other, the difference between the amounts owed by the support obligors shall be paid by the custodial parent owing the greater amount as directed by the court or master.

2.9.3. Where parties share physical joint custody on an equal basis, each will be considered to have the child for six (6) months during the course of year. To avoid unnecessary transfers of funds, the "pay out" of each parent for the year should be determined by multiplying the monthly support obligation times six months. If one parent's yearly obligation is greater than that owed by the other, the excess amount shall be divided by twelve (12) and paid monthly over the course of the year, unless the parties agree otherwise.

2.9.4. Payments to third parties in the form of home loan installments, land contract payments, rent, payments for utility services, property taxes, insurance coverage, or other expenses or charges reasonably necessary for maintenance of a residence for the support obligor's children, to the extent that such payments have been specifically denominated as child support by a court order or a valid separation agreement, shall, if actually paid, be credited against the support obligor's total monthly child support obligation: Provided, That in no event shall the credits given under this subdivision reduce the support obligor's total monthly child support obligation to an amount less than such support obligor's primary support obligation.

§78-16-3. "Income" Defined.

3.1. The term "income" shall mean any of the following:

3.1.1. Commissions, earnings, salaries, wages, and other income due or to be due in the future to a support obligor from his or her employer and successor employers, including fringe benefits such as business expense accounts, business credit accounts, and tangible property such as automobiles and meals, to the extent that they provide a support obligor with property or services he or she would otherwise have to provide;

3.1.2. Any payment due to a support obligor from a profit-sharing plan, a pension plan, an insurance contract, an annuity, social security, unemployment compensation, supplemental employment benefits, and workers' compensation payable under a workers' compensation law as temporary total disability benefits;

3.1.3. Any amount of money which is owing to a support obligor as a debt from an individual, partnership, association, public or private corporation, the United States or any federal agency, this state or any political subdivision of this state, any other state or a political subdivision of another state, or any other legal entity which is indebted to the obligor: Provided, That the court or master may disregard money owing to a support obligor as a debt upon a finding that the debt is uncollectible through reasonable collection procedures; and

3.1.4. Attributed income of the support obligor calculated in accordance with the provisions of this legislative rule.

3.1.5. At no time shall the fact that a parent has remarried, or the fact that the spouse of a remarried parent is, or is not, gainfully employed, or that said spouse has income from whatever source, be considered in determining whether or not to increase or decrease child support payments by or to the remarried parent.

3.2. To the extent practicable, all information relating to income shall be presented to the court or master based on monthly amounts. For example, when a party is paid wages weekly, the pay should be multiplied by fifty-two (52) and divided by twelve (12) to arrive at a correct monthly amount. If the court or master deems it appropriate, such information may be presented in such other form as the court or master directs.

§78-16-4. "Attributed Income" Defined.

4.1. The term "attributed income" shall mean income not actually earned by a support obligor, but which may be attributed to such support obligor because he or she is unemployed, is not working full time, or is working below full earning capacity.

4.1.1. Income shall not be attributed to a support obligor who is unemployed or underemployed or is otherwise working below full earning capacity if any of the following conditions exist:

4.1.1.1. Such support obligor is providing care required by the children to whom the parties owe a joint legal responsibility for support, and such children are of preschool age or are handicaped or otherwise in a situation requiring particular care by the support obligor;

4.1.1.2. Such support obligor is pursuing a plan of economic self-improvement which will result, within a reasonable time, in an economic benefit to the children to whom the support obligation is owed, including, but not limited to, self-employment or education;

4.1.1.3. Such support obligor is, for valid medical reasons, earning an income in an amount less than that previously earned;

4.1.1.4. Such support obligor has made diligent efforts to find and accept available suitable work or to return to customary self-employment, to no avail; or

4.1.1.5. The court or master makes a finding that other circumstances exist which would make the attribution of income inequitable: Provided, That in such case, the court or master may decrease the amount of attributed income to the extent required to remove such inequity.

4.1.2. If a court or master determines that a limitation on income is not justified in that it is a result of a self-induced decline in income, a refusal to occupy time profitably, or an unwillingness to accept employment and earn an adequate sum, the court or master may consider evidence establishing the support obligor's earning capacity in the local job market, and may attribute income to such obligor.

4.1.3. As an alternative to the method of determining attributed income provided for in subdivision 4.1.2, where a support obligor is remarried and is unemployed, underemployed or is otherwise working below full earning capacity, the court or master may attribute income to the support obligor in an amount not to exceed that which could be derived by the obligor from full-time employment at the current minimum wage.

(Example 1. The parties have two teenage children and are divorced. During their marriage, both support obligors worked as professionals and earned substantial incomes. Since the divorce, the ex-wife has remarried, had a child by her second marriage, and has elected not to work. Since the ex-wife's failure to work is a matter of choice, and is not based on care required by the children of her marriage to the ex-husband, the court or master may establish her earning capacity in the local job market and attribute income to her. In the alternative, the court or master may attribute income to her in an amount not to exceed that which she would receive from full-time employment at the current minimum wage.)

(Example 2. The support obligor formerly worked at a production job in a manufacturing plant, earning an annual income of $24,000.00. He voluntarily left this former employment to start his own business, and is currently earning $18,000.00 annually in this self-employed capacity. The limitation on income is self-imposed, and the court or master should attribute income to the support obligor based on his earning capabilities at the present time, rather than his actual earnings, unless the court or master determines that the self-employment of the obligor will, in a reasonable time, result in an economic benefit to the children.)

(Example 3. The support obligor has left her employment and enrolled as a full-time student, seeking a degree as a registered nurse. If the court finds that her educational plans will, within a reasonable time, result in a economic benefit to the children to whom the support obligation is owed, income will not be attributed to her.)

4.1.4. In any case attributed income shall be the lesser of the calculations made in 4.1.2 or 4.1.3.

§78-16-5. "Earnings" Defined.

5.1. The term "earnings" shall mean compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.

§78-16-6. "Income Tax" Defined.

6.1. The term "income tax" or "income taxes" shall mean personal income tax paid by a support obligor on his or her taxable income under the laws of the United States, the State of West Virginia, any sister state, any territory, any political subdivision of such governmental bodies, and any other taxing jurisdiction, foreign or domestic.

§78-16-7. "Taxes Withheld From Income" Defined.

7.1. The term "taxes withheld from income" shall mean the amount of income tax deducted and withheld by a employer from income of a support obligor, computed in such a manner as to result, so far as is practicable, in withholding an amount substantially equivalent to the income tax estimated to be due. The amount of taxes withheld from income, to be valid as a factor in determining the amount of child support owed by a support obligor, shall be based upon the maximum number of withholding exemptions allowable under the applicable tax law.

§78-16-8. "Deductions From Income Required By Law" Defined.

8.1. The term "deductions from income required by law" shall mean the amount deducted and withheld by an employer from income of a support obligor as required by law, including, but not limited to, attachments, social security taxes, assessments on wages made under the provisions of any employment security law, and child support payments made pursuant to a court order or a valid written separation agreement. "Deductions from income required by law" shall not include wage attachments and suggestions which are required by law to be deducted and withheld by the employer, but which are for the enforcement of debts which would not otherwise be considered under the provisions of this legislative rule in determining a support obligor's net income.

(Example 1. The support obligor purchased, on credit, a satellite dish for personal use, defaulted on payments, and has had judgment rendered against him for the amount owing. An attachment of his wages to enforce this judgment would not be recognized as a deduction from income required by law. The underlying debt is such that it would not be considered in determining net income if it were not a wage attachment.)

(Example 2. The support obligor incurred indebtedness with a hospital for necessary hospital and medical services delivered to his dependent child, did not pay, and has had judgment rendered against him. An attachment to enforce this debt would be recognized as a deduction from income required by law, since the underlying debt was incurred for necessary health care for a dependent.)

§78-16-9. "Deductions From Income Required By An Employer As A Condition Of Employment" Defined.

9.1. The term "deductions from income required by an employer as a condition of employment " shall mean the amount deducted and withheld by an employer from income of a support obligor as payment for uniforms, tools, equipment and other supplies necessary for the performance of services or labor on behalf of the employer. "Deductions from income required by an employer as a condition of employment" shall not include deductions for food, clothing, shelter, and other necessities of life unless, and only to the extent, that such necessities are provided for use or consumption by the support obligor's children.

§78-16-10. "Deductions From Income Required By A Union As A Condition Of Employment" Defined

10.1. The term "deductions from income required by a union as a condition of employment" shall mean the amount deducted and withheld by an employer from income of a support obligor as dues, fees or other assessments, for the benefit of a labor union or other employee organization, required to be withheld under the terms of a labor-management agreement.

(Example 1. As a part of the labor-management contract at the plant where the support obligor works, two (2) cents per hour is deducted from every worker's wages to support a union sponsored pre-paid legal services plan. This is a deduction from income required by a union as a condition of employment, even though no part of it may inure to the benefit of the support obligor's children.)

§78-16-11. "Legitimate Business Expense" Defined.

11.1. The term "legitimate business expense" or "business expense" shall mean expenses paid for or incurred by a support obligor, in connection with the performance by him or her of services for an employer or another person or as a self-employed person, which expenses are not reimburseable, and which are lawfully deductible in computing taxable income under applicable income tax laws.

§78-16-12. "Deductions For The Benefit Of Children" Defined.

12.1. The term "deductions for the benefit of children" shall mean the amount deducted and withheld by an employer from income of a support obligor and paid to third parties for the benefit of the support obligor's children, including, but not limited to, hospital insurance and medical, dental or optical insurance.

12.2. Deductions for the benefit of children which are, in fact, extraordinary medical expenses, costs of child care needed to allow a custodial parent to work or other expenses incurred because of the special needs of a child, may, in the discretion of the court or master, be treated as deductions for the benefit of children and subtracted from income. If such costs and expenses are subtracted from income under subsection 2.1, they shall not be added to primary support needs under subsection 2.4. If such costs and expenses are not deducted from income, and are used in calculating the primary child support need, such deductions shall be subtracted, as child support payments, from the total monthly child support obligation of the obligor as calculated under subsection 2.9.

(Example 1. Out of each pay check received by a support obligor, a deduction is made and paid to a credit union as payments on a loan made by the credit union to the support obligor. Whether or not this is a deduction for the benefit of children depends upon the application of the loan proceeds. If, for example, the loan proceeds were used to pay for necessary orthodontic work performed on the parties' child, the deduction could, in the discretion of the court, be a deduction for the benefit of children and be subtracted from income, or, alternatively, could be subtracted from the obligor's total monthly child support obligation.)

§78-16-13. "Payments For The Benefit Of Children" Defined.

13.1. The term "payments for the benefit of children" shall mean an amount or amounts paid by a support obligor to third parties on a regular, recurring basis for the benefit of the support obligor's children, including, but not limited to, tuition, health care expenses, hospital insurance, and medical, dental or optical insurance.

13.2. Payments for the benefit of children which are, in fact, extraordinary medical expenses, costs of child care needed to allow a custodial parent to work or other expenses incurred because of the special needs of a child, may, in the discretion of the court or master, be treated as payments for the benefits of children and subtracted from income. If such costs and expenses are subtracted from income under subsection 2.1, they shall not be added to primary support needs under subsection 2.4. If such costs and expenses are not deducted from income, and are used in calculating the primary child support need, such payments shall be subtracted, as child support payments, from the total monthly child support obligation of the obligor as calculated under subsection 2.9.

§78-16-14. "Indebtedness" Defined.

14.1. The term "indebtedness" means any legal or contractural obligation incurred as follows:

(1) For the necessary support of a child with regard to food, clothing, shelter and medical care;

(2) For the purpose of acquisitions or additions to or additions intended to add to the value of marital property of the parties as defined in section one, article two, chapter forty-eight of the code of West Virginia, one thousand nine hundred thirty-one, as amended.

14.2. The court or master may disregard any debt which is incurred with the obvious intent of decreasing child support payments.

§78-16-15. "Self-Support Need Of An Obligor" Defined.

15.1. The term "self-support need of an obligor" or "primary self-support need of an obligor" shall mean the absolute minimum amount of income that a support obligor must retain to function at maximum productivity.

15.2. In determining self-support need of an obligor, the court or master shall consider only debts and expenses for food, clothing, shelter, medical care, and job-required transportation.

15.3. If presented, the court or master shall consider evidence of probative facts as to the needs of a support obligor with regard to a consideration of matters described in subsection 15.2, and if such evidence is convincing, may determine that a variance from the presumptive minimum need is supported by such evidence. If such evidence is not presented, or is not convincing, the self-support need of an obligor will be the presumptive minimum need of such obligor as calculated under the provisions of Section 17.

§78-16-16. "Primary Child Support Need" Defined.

16.1. The term "primary child support need" shall mean the absolute minimum amount of money that a child requires for food, clothing, shelter and medical care.

16.2. The primary support need of a child will be the presumptive minimum need of such child as calculated under the provisions of Section 17, unless the court or master determines that a variance from the presumptive minimum need is supported by convincing evidence.

§78-16-17. "Presumptive Minimum Need" Defined.

17.1. The term "presumptive minimum need" shall mean the amount of money that a person is presumed to need for the necessities of life, based upon their rank in their particular household. The presumptive minimum needs of the several members of a given household are as follows:

First member	\$450 per month
Second member	\$180 per month
Third and Fourth members	\$135 per month
Each additional member	\$ 90 per month

17.1.1. The first member of a household is the adult head of a household: Provided: That in a case where a support obligor lives with his or her parents or other separate family, the support obligor and the children in his or her custody will be considered to be in a household by themselves. The remaining members of the household shall be ranked according to their age.

17.1.2. Four hundred fifty dollars (\$450) per month is established as the presumptive minimum need for an unmarried first member of a household.

17.1.3. Where a support obligor is remarried and both the support obligor and his or her present spouse are fully employed, they are to be treated as a unit. The minimum presumptive need of the couple would be \$730 (\$450 for the first person + \$180 for the second person in the same household + \$100 additional work-related expense for the employed spouse). The support obligor will be allowed 50% of this amount, or \$365, as his or her minimum presumptive need.

17.1.4. In a case where a support obligor is remarried and unemployed, and the court or master has attributed income to the obligor, the obligor and his or her spouse are to be treated as a unit, and the minimum presumptive need of the couple would be \$630 (\$450 for the first person + \$180 for the second person in the same household). The support obligor will be allowed 50% of this amount, or \$315, as his or her minimum presumptive need. No additional work-related expenses will be allowed, since the obligor is not employed outside of the home.

§78-16-18. "Separation Agreement" Defined; Effect Of Separation Agreements.

18.1. For purposes of this legislative rule, the term "separation agreement" shall have the meaning ascribed to it in subsection (h), section one, article two, chapter forty-eight of the code of West Virginia.

18.2. On and after the effective date of this legislative rule, where the support obligors execute a separation agreement which provides for the custody and support of the child or children of the parties, the court shall order the payment of child support in accordance with the terms of the agreement, unless the court finds:

18.2.1. That the agreement was obtained by fraud, duress, or other unconscionable conduct by one of the parties, or by a mistake of law on the part of one or both of the parties; or

18.2.2. That the parties, in the separation agreement, have not expressed themselves in terms which, if incorporated into a judicial order, would be enforceable by a court in future proceedings; or

18.2.3. That the agreement, viewed in the context of the children having a right to share in their natural parents' level of living, and considering the best interests of the children, is so inequitable as to defeat the purposes and principles of section eight, article two, chapter forty-eight-a of the code of West Virginia, and such agreement was inequitable at the time the same was ratified and approved by a court or master; or

18.3. If a separation agreement provides for amounts of child support which would not fall within the guidelines for child support awards promulgated by this legislative rule, and such amounts have been determined as a part of a broader agreement establishing the rights of the parties in such matters as disposition of their separate property or the distribution of marital property, the reason or reasons for such variance should be set forth in the agreement or made a matter of court record, in order that they may be considered in future proceedings involving child support obligations.

§78-16-19. Disregard Of Formula.

19.1. If, after computing the amount of a child support award in accordance with the provisions of this legislative rule, the court or master determines that the application of support guidelines are inappropriate as being contrary to the best interests of the children and the parties, the court or master may disregard the formula and not follow the guidelines. In such instance, the court or master shall set forth, in writing, the reasons for not following the guidelines in the particular case involved.

§78-16-20. Effect Of Promulgation Of Rule On Existing Support Orders.

20.1. The fact that the promulgation of this legislative rule establishes guidelines for child support awards shall not, in and of itself, constitute a change of circumstances upon which an existing support order may be revised or altered. A party seeking a modification of a child support order must show a substantial change in circumstances since the entry of the existing order, regardless of whether such change was within the contemplation of the parties at the time the order was entered. The Legislature, by authorizing the promulgation of this legislative rule by general law during the regular session of the Legislature, one thousand nine hundred eighty-eight, expressly intends to overrule the decision of the Supreme Court of Appeals in Lambert v. Miller, W.Va., 358 S.E.2d 785 (1987), to the extent that the decision in such case conflicts with the provisions of this subsection 20.1.

SUMMARY OF CURRENT LEGISLATIVE RULE
TITLE 78
LEGISLATIVE RULES
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
SERIES 16

The current West Virginia Child Support guidelines were adopted from the Delaware Child Support Formula, also known as the Melson Formula.

The basic principles underlying the formula can be summarized as follows:

1. Parents are entitled to keep sufficient income to meet their most basic needs in order to encourage continued employment.
2. Until the basic needs of the children are met, parents should not be permitted to retain any more income than that required to provide the bare necessities for their own self-support.
3. Where income is sufficient to cover the basic needs of the parents and all dependents, children are entitled to share in any additional income so that they can benefit from the absent parent's higher standard of living.

These principles were formulated into a guideline that serves as the method under which the Court presumes that a fair and equitable amount of child support will be derived.

This presumption is <u>rebuttable</u> in that it will be applied unless and until a parent presents facts that persuade the Court that application of the formula would be inequitable to either the absent parent, the custodial parent, or the child.

PUBLIC HEARING ON PROPOSED
LEGISLATIVE RULES
TITLE 78
LEGISLATIVE RULES
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
SERIES 16

DATE: August 12, 1993

TIMES: 9:00 AM, Commencing at 10:00 AM

Martha Hill, Director of Child Advocate Office, served as facilitator for the hearing; welcoming all, stating 5 minutes, allowing for additional time to speak due to the few attending. Introductions of Bob Wilkinson, who assisted as facilitator and answered most of the questioned asked by audience; Sallie Tweel, Acting General Counsel of CAO, and, Charles Burgoyne, Administrative Assistant from Region 19. Other CAO staff present: Sally Brown, CAO Legal Assistant, Ruth Belcher, Secretary of the CAO Legal Unit--taking notes of the Hearing, and Kandi Bowen, Secretary serving as Timekeeper.

Speakers:

Martha: Requesting Claudia Caruthers to come to the podium. Claudia declining to speak. Wanda McConihey was also asked to speak and declined.

Robin Cokely: Representing the WV Women Comm. Maintaining the c/s formula which is fair to custodial parents and their children--particularly important to Women Comm. because 86% of all single parent households are headed by women. Women are most likely to be awarded custody of children when a divorce occurs. Further, they and their children are more likely to end up in poverty as a result of the divorce. Statistics show that the quickest way for a woman to end up in poverty is to have children and get divorce.

According to the 1990 census data 40% of female headed homes live in poverty. This is extremely ...when you take into account that living in poverty at the time '90 census data meant that we made less than $12,500 for a parent to afford to survive on.

Even though according to statistic women headed household are more likely to be adversely affected....This is not a single sex issue; ...household also suffers. Almost one quarter of these families live in poverty.

The bottom line of this issue is that children suffer the most!...no matter which parent they be with. When a child lives with a single parent, of either sex, she has a 56% chance of living in poverty. She lives with a female single parent, she has a 60% chance of living in poverty.

My point of reviewing these statistics with you is to illustrate just how important these regulations--where apparent comments about today are: For many custodial parents child support payment are the deciding factor of whether the children have adequate care and the best of care. Without those payments of support these families might not make it.

The Women Commission thinks that ... child support regulations are generally fair to both custodial and non-custodial parents. The proposed changes about the increase in the self support deduction for parents and an increase in the primary support obligation for children involved in the formula. ...better reflection of the cost of living in this state. By designing change is reflected in the economy and this should be helpful to both parents. Those changes also gives children of second families equal footing of children in the formula. This change represents a balance between change that non-custodial parents have the ability to adequately support a second family and maintain an obligation that they have to their children of former marriages.

Finally, the Commission feels that its imperative to include the recommendation of $100 per month minimum in child support in these regulations. $100 does not go far towards the needs of the children; however, the inclusion of the minimum payments to the regulation...the obligation that non-custodial parents have to their children.

Our experience through phone calls, public forums, and legal...workshops, women from around the state have shown us the need for a change....Story after story tells us that in the majority of cases child support is not buying luxuries, pleasure boats or trips to Disney World, it's used for food, clothing and shelter.

Historically, the legal system has been tough on women. While--Generally, it works in custody of children that had weren't been so generous with rewards but probably just as important in the past. Reforms to the past 5 years have gone far to insure that obligors meet those responsibilities--but we are concerned that because women haven't organized as a portent body that these gains will be lost. While we are each are now living in ...minimum wage job, it's hard to spend the time, energy and money to change laws. It hard to come to a public hearing in the middle of a workday.

In summary, we believe that these proposed regulations are fair to all parties. We encourage the Child Advocate Office to submit the regulations as they are and make no further changes. We, also, in considering this request, we all must not forget the women who make up 86% of all custodial parents.

Back to Martha: Steve, I'm sorry I can't get your last name.

Steve Hairston: Hairston, Hairston.

Karen Hairston: Good morning, my name is Karen Hairston and I will jus--...this has been a concern with me and my husband. What you say I understand and all of that, I'm jus--I'd like to speak on another subject. Ok. Uh, I'm a wife of a man who has children. We are barely able to live because of these laws, ok. I think that each man is obligated to support his child; I thoroughly believe in that. I also have sister who is a single mother. Believe it or not we don't....I do understand the need for the father to help to support his child. I think these cases should be looked at more closer. I think that it should be, uh, re-examined according to need.

We're paying like--ok, now, we got back child support. But, what's happen with us is that, uh, my husband's ex-wife work...Union Carbide...20 weeks plus. Ok. We're paying back child support for a child who's now 21 years old. Uh, ah, maybe a thousand dollars every two weeks he brings home three hundred. He couldn't really afford to live without me. And, I don't think that quite fair to me as....But, it just that--I mean that I think that if you had re-examined this thing....This thing uses this over this child's head--she's not able to this, she want to do that. Where she couldn't afford to even with a job. But the money was there. It jus--individual cases. I think that--overall all that--you're doing a great job with what you doing. I just think that each case needs to be examined closer.

We also pay child support for another child who's mother works at Union Carbide and he's only to give her like $18.46 every two weeks. O.K. My thinking, that don't buy anything. What is $18.46? You can't do anything with that. So, I just, uh, we do more than that. Ok. School clothing, braces, glasses, uh, security checks for, you know,...all those little extra things that came in. You know, this was what we were doing. But that has--it doesn't carry any weight when it comes before the court. It doesn't. It's jus--according to the judges.

I just--I mean, and a lot of times these things are used guns against the people. Uh, it just needs to be closer looked at, I feel, individually by case. I have no problem with men--supporting their children. I think it's their obligation to do it. If you were a father, you'll do this. And because something happens to the relationship I say still do what you should do. And what this basically does, it kind of pushes the kids away from their parents. It hard for a man after being stripped like that to go into the rightful place of this child's life and to spend quality time with the child....I think all states should be considering the things that you're doing. And, when you go to, you know, do this award, I think that maybe if you could--and I realize there's a lot of people out there and the statistic I'm sure are quite high for a single parent....But, if you could just maybe jus--I don't really know that's why I'm asking you is there--I guess you couldn't really sit down and each person, individually, and talk with them. You know, and see what the situation is or have individually hearings. Uh, the money that we pay we're not really sure how much of it them kids are getting. According to them, they're getting like--it's not anything like what he's paying. And, we have no way--I mean we've called, we've tried to check and find out where the rest of the money is--....It is kind of hard to pay your money into somebody; especially, when we could use also. And, one of the reasons we don't have children is because we can't afford to have children.

Speaker, Sally Brown: Uh, I'm a Legal Assistant who's with the State Child Advocate Office...guidelines and I would just to have the opportunity to let you know that...if you feel that the money is not being used for the benefit of the children, you do have a right to ask the Court to require an accounting of how the money is spent.

Karen Hairson: ...We went--first of all I was to say...in time for this, you know. Uh, legally, uh, we couldn't really find out any--any rights that we had through the attorney that we spoke with. Because--because it wasn't back then--I realize this. And, got filled out yet because, you know, it just that the other things weren't being considered. And, the same person that we made this agreement with, you know, she just kind of reneged on her part of the review agreement. And, this kind of stuff--holding the bag. Uh, no I don't know. I really don't want--I don't--I need--you send out this little piece of paper of a formula on it. O.K. But, then here's where you get the formula and he's paying like--what, $400 and the kids get $70 and that's a lot a month. We can't seem to figure out where it goes to.

Let's--I mean, to me that the concern. If they were getting it that would be one thing. And, then, you know, like it's deducted from his payroll, which means that its going someplace. But, then when the children get check they're getting like seventy bucks a month--I mean every two. [Confirmation question to Mr. Hairson]. Isn't it two weeks?

Mr. Hairson: Yeah.

Mrs. Hairson: Seventy bucks every two weeks. And, he's paying like $600 a month. And, that's a lot of money that's not accounted for.

Mr. Hairson: Every time I call down--down there I get the run around. I can't talk to nobody. They say, well, woman come in at

1:00, I call at 1:00 she's tied up, and then, I'm gone to work, so--you know.

Mrs. Hairson: It's been hard for me because I--you know, I don't have children. And, I mean, we've been married for over ten years and from the beginning it was like it's o.k. so you need to do this. Well, I'm the one who's really blind because I really didn't see. A lot of this ignorance is on the man's part too. Because you're doing what you need to do. But, you're not getting--just like the woman who did the paperwork, you know what I mean. So if you don't have receipts to prove that you done this and this, and this it's like you haven't done anything. O.k. Uh, you know, and I understand because it was just problem after problem after problem whenever we hadn't talked. So it's easier just to give the money. Well, I'm having problems with her to write a check. And, he was going through a phase like "oh, I don't really want to create a problem. But, now I know that he wishes that he had--you know, third check party check mighta work, you know, whatever it took to keep your receipts. Uh, it just--uh, you don't have any control over that part of it. I'm saying that if you work, somewhere there's a record indicating the salary. O.K. And, I don't think that's quite fair to take all of one person's money and give to someone else who--who's able to do for his money.

Speaker, Bob Wilkinson: Unless it's really back child support.

Mrs. Harrison: It's like 55% of the salary, as I understand. If he wasn't married, it would be 65% of his salary. And--I mean, how do you expect someone to live and it's not--you know, we knew that this was going on. The current was no problem. Alright, it just that current we thought that the back had been kind of settled because of the things, that we were doing those extra things. Because when he married--before he worked with Libby Owens we paid big bucks. O.K. And, as I said, ignorance played a big part of it; because we never would have asked to have it reduced once Libby Owens had closed down. O.K. From there he went to training classes at minimum wage trying to pay as much money that it'd stop accumulating that difference. O.K. None of that was considered. None of it. And I know that it not your position to educate on how to be persistent. And, that's what--to me, that's what'll do it. It's not your job to educate people on how to--how we should go about--uh, we go to when you have it reduce because you're not making the money that you once did. Because, the child doesn't stop growing, the child doesn't stop needing. I realize this. It just that I think that when it comes these things need to be looked at closer. I do.

Claudia Caruthers: At first I offered not to speak but I--I think as being a single custodial parent for over seven years, I still have one minor child at home and probably owed over $30,000 by court-ordered child support. And, with the child support I have to provide housing, food, utilities, clothing and also medical coverage. He was ordered--by court order to have the coverage on our two minor children and he has no medical coverage. Uh, I have struggled and my parents have helped me raise my children. Uh, I do understand your point of view. But, I...think that my daughter knew--uh, it was the one from her first marriage would have to get in line with one or two other ex-wives....Children not only need financial support from their fathers, they also need emotional support. And, lots of times the children aren't--not even, uh, given the emotional support that they need. And--and I that is the big issue also. And, I also, you know, both-both parent have to live but when two people decide to have a child I think it is both parents responsibility. And, I had two minor children at home last year and my income was only $5,600. So, I cannot--I could've account for every penny. And, uh, if it was not for automatic wage withholding, I would not receive my current plus 10% on my arrearages. Uh, he would not willing do anything. And, da, you know, I just-- I think that it is not so much as a mother/father issue and it should be made a children issue. Because children do suffer more than people realize. I have went through divorce, my daughter right now is having very hard times because she needs a father. I told her she could spend--there's no, you know, set visitation--.Anytime she wants to spend time with her father... she can spend. Because I think she is entitled to both Parent. Thank you for your time, etc.

Martha: These will probably be the....

Questions: by Claudia Caruthers - Standard Deduction of $450 under Old formula--A person can bring in receipts, claiming household--utility, whatever, in the Law Master--with.. place of $450.

ANSWERS: by Bob Wilkinson - Passage in current regulations eludes to the ability to that....very few Law Masters Use that. It isn't in there anymore. ,

Claudia Caruthers: Asking additional questions relating to the Standard deductions.

Bob Wilkinson: Very unusual for that particular issue to come up. Normally, what happens is the non-custodial parents will bring in receipts and want to have them put in as third party payments under the primary support obligation to knock down the primary support OR they will want to have it applied towards the difference of gross and net. The difference in the gross and net in the primary support have a very significant impact on current support.

Additional answers to Ms. Caruthers inquiries are given by Bob Wilkinson and Sally Brown, who assisted in the drafting on the Proposed Rules.

Bob Wilkinson: Are there Any other questions? We have another speaker, Mrs. Pat Cunyers.

Pat Cunyers: Yeah, and I'm the facilitator for ... County Schools this question--it's more of a question than a statement. If I, uh, young lady has a child--conceives a child, there is no marriage. And, she marries someone other than the father of the child....Can she apply for child support--she's not receiving child support from the marriage--can she apply for child support from the father of the child who is...?

Bob Wilkinson: Recital of the question asked, then, proceeds to answer. Establishment of paternity involving a dis-establishment of paternity of which the law frown upon, referencing Supreme Court Case *Michael K.T. v. Tina L.T.* sets standards for similar cases.

Martha: Further touches upon the subject, seeking clarifications within the question asked by Ms. Cunyers.

Bob and Martha: Martha states anything she has in documentation. Bob exclaims Birth Certification and Marriage License are the two most important legal documents surrounding....If she could get those.

Bob: Are there any other questions?

Sally B: Asks Bob to explain the Section of the Guideline on Attribution of Income and the minimum amount of income to be attributed to unemployed or underemployed obligors.

Bob: Refer to the Attribution of Income Section in the Guidelines and cites the two scenarios listed. Bob makes comments regarding the problem in current regulations: The final phrase in Attribution for Income says that "in every case you will use the lesser of the two. So that you have a situation where the parent who is suppose to paying steps down in income but they don't step down as far as minimum wage. That particular clause require you to go to the second clause. So that when you have a fall in income, you went all the way to minimum wage. If you were following that. This discrepancy has been changed in the Proposed Legislature Guidelines. In the Procedural Rules...one of the most important things that we've done is--you have a problem when you're inside the Legislative setting, when you have to come in with considerations of setting income when you have items out there like the cost of--ever increasing cost of living for custodial parents and cost of living for the children. And, also, we have this minimum wage that we're suppose set and it changes every now and then as well. Because of the way our old guidelines were setup--because it was all legislative rule, in order to get it changed we had to go in before the Legislature to get it changed. So this is the first change that we're having on the amounts since they were adopted, I believe in 1988....So it's been five years since any of those amounts changed. Now, the minimum wage amount is just alluded to. But, the remainder of the amounts have not changed in five years: The self-support deduction hasn't changed for the parents and the primary need amounts haven't changed for the children. So what we decided to do was to put this in procedural rule, which gives the Legislature the ability to go back and review it once we have done it. But, it also empowers us to go back and use--get in standard, which is basically the cost of living and that's--and to raise these every three years. We go back and we amend these--these ever changing standards of the minimum wage and the standard of living, uh, estimates for the parents and the children every three years under the Procedural Rules. Are there any questions about that? So, we will be revisiting this in three years but it won't go into the substance of issues that are raised in the Legislative Rules. It will only change the numbers. The Legislature has the power to go back to any rule--any session that it wants to. I think the practice will show that it will probably be awhile before the Legislature revisits the Child Support Guidelines.

Bob: Any other questions, comments?

Martha: Thank you all for coming today; uh, please feel free to submit any written comments you want to; uh, you're always welc--if you like a complete copy of the Rules....Uh, you're more than welcome to continue to comment on the rules to be presented to Legislature the upcoming Session. And, we'll hope everybody in that station have some kind of rule in place. Thanks again for coming and please remember our office is in the building right over to your...I guess. And we encourage you all if you have any problems, please come by and see us. Thank you.

SIGN IN SHEET

NAME	ADDRESS	SENDING WRITTEN COMMENTS	WOULD LIKE TO SPEAK
Claudia Caruthers	P.O. Box 146 Hometown WV 25109		
Wanda McConihay	170 Crows Dr., Ripley WV 25271	→ Mail copy of guidelines	
Robin Cokeley	Bldg 16, Rm 637		Yes
Steve) Kevin Hensley	1805 1/2 7th		
Karen Houston	1805 1/2 7th Ave, Chas. WV 25312		YES
[illegible]			
Pat Conyers	33 Gaines St		
	Montgomery, W.V		Yes

CHANGES TO PROPOSED LEGISLATIVE RULE
TITLE 78
LEGISLATIVE RULES
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
SERIES 16

Section 2.2.3a.A. was amended by deleting the very last phrase "incorporated as an Order of the Court." This change was made as it was discovered that this phrase was inadvertently left in the proposed rule. A written separation agreement is valid and enforceable even though it has not been incorporated as an Order of the Court.

CHILD ADVOCATE OFFICE
REPLY TO COMMENTS
TITLE 78
LEGISLATIVE RULES
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
SERIES 16

Attached.

Response of Child Support Guidelines Committee to
Comments received during Comment Period
for Proposed Child Support Guidelines

The Committee received written comments on the following issues and submits the following responses:

1. The necessity of a correction of Section 2.2.3.b. to 2.2.3.a. was noted and completed.

2. Comment regarding Section 2.10.3.c. Split Custody provisions:

   The language regarding Split Custody situations was added at the request of Family Law Masters who have experienced difficulties in the handling of cases where an adolescent child makes frequent changes in his or her place of abode based upon which parent the child happens to be angry with at the time. An example of this may be found in Phillips v. Phillips, 425 S.E.2d 834 (W.Va. 1992).

   In an attempt to discourage the indiscriminate or capricious switching of actual physical custody of a child or children without the parents obtaining prior judicial approval, the committee chose to address this situation by applying prerequisites to situations in which the Split Custody formula may be applied. These prerequisites are similar to those required for application of the Joint Custody formula.

3. Sections 2.2.4.b. and 4.1.1 where contributions to mandatory pension plans are considered to be earnings.

   In keeping with statutory definitions of income which include "income to be paid in the future", the committee decided that all deductions for pension plans, whether voluntary or mandatory, must be included in the determination of income.

4. Section 2.5.1.b.A. where parents are included in the total number of persons eligible for health insurance benefits.

   The committee recognizes that in many cases, a single parent may have health insurance coverage for himself or herself by an employer at no extra cost. However, the committee also recognizes that in many cases, a remarried absent parent may be covered by health insurance provided by their subsequent spouse's employer and that in this case, without the presence of the court order requiring him/her to provide health insurance coverage for the infant children, the absent parent may opt not to take advantage of the coverage provided by his employer.

   In either case, the absent parent and all persons who received benefits under the policy (subsequent spouse, step-children, half children, etc.) are required to meet premium and deductible requirements before benefits are paid on their behalf. The committee felt that because there are frequent instances where a subsequent spouse or children are also eligible for benefits under a health insurance policy, it would be an inequitable windfall to the absent parent for him/her to be able to deduct the entire amount of the insurance premium as a payment or deduction for the benefit of the child.

The committee decided that if a decision had to be made that would be inequitable to the parent or inequitable to the child, that it was better to err on the side of the child.

5. Section 2.8 where an absent parent's children from prior or subsequent marriages are included in the SOLA calculation.

   It was not the intent of the committee to grant a credit for the benefit of prior or subsequent children of an absent parent where support for that prior or subsequent child has not been provided or is not actually being provided at the time the formula is being calculated.

   Due to time constraints for filing of the Proposed Legislative Rule, the committee will take this issue under advisement and will make a recommendation regarding this issue to the Legislative Rule Committee at the time they take the proposed rule under consideration.

6. The comment was made that neither AFDC not SSI benefits have not been addressed in the proposed formula.

   The committee addressed these issues in Section 2.5.3, particularly in section 2.5.3.d., regarding "unearned income of the child".

7. Section 2.5.3.a. the question as to whether Farley provides for a dollar for dollar set-off of Social Security benefits against an obligor's child support obligations arose.

   The committee discussed the implications of Farley with great particularity in conjunction with other recent cases in other jurisdictions at great length. They came to the conclusion that the SSI benefits paid on a child's behalf are an entitlement that is not paid on the basis of the break up of the family, nor is it deducted from the absent parent's benefits. The payment is in fact a payment made to the child in addition to the benefits a parent receives and therefore, the absent parent on whose account the benefits to the child are paid still should be required to contribute to the child's support in accordance with the calculation of the support guidelines and the parent's ability to pay.

Allowing a dollar for dollar credit to the absent parent who still receives his full benefit amount negates the intent of the requirement that a parent should share in the support of his/her child.

8. Sections 5.1 and 9.1 which mandate the disregard of the formula calculation where it results in an amount less than the minimum support amount of $100.00 per month.

   The committee recognizes that the minimum child support amount of $100 per month may exceed a parent's ability to pay in cases where a child receives AFDC and in actuality receives only a $50.00 per month disregard check.

   However, the committee also is aware that in a large number of cases, particularly low wage earning NPA cases where the parties are ineligible for any benefits and live under the national poverty level, the awarding of $50.00 minimum child support order has been greatly abused and a parent's ability to contribute towards his/her child's support is not adequately examined. The $100.00 per month minimum support award was developed to address these abuses and to establish a more uniform level of child support throughout the state.

   The $100.00 per month minimum support award was also developed in answer to a national trend towards increasing the amount of child support that may be distributed to AFDC recipients in the form of a disregard payment

9. Section 3.1, a commentator felt that setting the Presumptive or Primary Need according to the age of the child/ren would precipitate a flood of modification requests.

   The committee agrees that this change may initially result in a flood of modification requests. However, in as much as Section 48A-2-8(d)(5) specifically mandates that the child support guidelines recognize that "as a child grows older, expenditures on children increase, particularly during the teenage years", the committee is of the opinion that an age-based primary support award is a more appropriate standard than a standard based upon a child's position in the family that can be substantially altered depending upon whether the parents have remarried or the presence of half- or step-siblings in a household.

   In order to prospectively avoid a plethora of modifications due to the inevitable eventuality that each child in the order will attain the age at which he/she is entitled to an increase in support, the court, in its discretion, may incorporate language providing for automatic support increases as each child reaches the age at which the new support amount becomes affective.

10. One commentator questioned the use of a Gross amount as opposed to using a Net amount in determining the amount of

Minimum Wage income to be attributed to an unemployed or under employed obligor.

The committee chose to attribute a gross amount rather than a net amount, leaving the determination of the amount of taxes to be deducted to a case by case basis. This was done in recognition of the fact that the actual amount withheld for taxes varies from case as well as the fact that tax laws frequently change which may also result in a change in the amounts to be withheld.

11. One commentator cited the failure of the proposed guidelines in meeting the simplicity test.

At the onset of their numerous meetings, it became evident to the committee that the conflict between the need for simplicity in the formula as opposed to fairness to the child for whom support was being sought was one of the greatest obstacles they faced.

When the best interests of the child benchmark was applied to the question presented, the committee unanimously determined that simplification of the formula at the expense of determination of a fair amount of child support was not appropriate.

12. Commentary was received regarding the inappropriateness of the organization of the proposed formula.

The committee determined that the organization of the current guidelines was too cumbersome for use by pro se litigants who were unfamiliar with use of the formula, the procedures and definitions or criteria for each step.

As a result, in an attempt to simplify the calculation process, the organization of the current formula was changed by combining all references to each particular stage of the formula (i.e. definitions, instructions, procedures, necessary supporting documentation, etc.) into one section.

The committee supported the new format over the organization of the current formula which requires the person calculating the formula to turn from one section of the formula to another in order to read information specific to the stage of the formula he/she is working on.

13. One commentator questioned the actual necessity of making any changes in the formula because the bench and bar have just now become acclimated to the formula and are accustomed to it. This commentator also cited the expense and time that would be necessary for training on the new formula.

The committee generally supported the current version of the Melson formula that West Virginia has adapted for its use. The committee was introduced to changes that the state of Delaware has made in the formula to account for changes in cost of living and poverty level criteria. The committee was also informed that the State of Delaware was scheduled to review and revise their formula for a third time in 1993.

Additionally, the committee received three mandates for consideration in their regularly scheduled review and revision of the current guidelines from the West Virginia Legislature in Senate Bill 358 in addition to a deadline by which time the review and revision must be completed.

For these reasons and in an attempt to address concerns addressed to the committee by family law practitioners, members of the bench and members of the legal community who come in contact with and use the formula in their day to day occupations, the committee chose to make additional modifications in the formula as they found necessary.

14. One commentator question the manner in which the calculation from Gross to Net is to be completed for cases where minimum wage income is attributed to an unemployed or underemployed obligor.

The committee did not anticipate that there would be any difference in the manner in which the calculation from gross to net would be accomplished in cases where income is attributed to an unemployed or underemployed obligor.

15. A commentator claimed that there is a lack of direction regarding the time period for which verification of income is required in order to calculate the child support obligation.

The committee felt that this issue has been adequately addressed by the new Family Law Rules enacted by the Supreme Court of Appeals of West Virginia and did not wish to appear redundant.

16. A commentator asserts that some of the proposed changes result in more equitable distribution of the limited resources between low-income obligee families and obligors while other changes do little to improve the financial situation of children living in poverty.

The committee recognizes this conflict and dedicated a substantial amount of time in their numerous meetings in an attempt to balance the needs of both the parents and children of low-income families whose total income is insufficient to meet the basis standards of need set out in the guidelines.

In this endeavor, the committee made use of numerous references and resources including the Federal Cost of Living Index, Federal Poverty Level figures and a recent publication

by the Children's Policy Institute of West Virginia regarding Appropriate Standards of Need.

In addition, the conflict between the prioritization of the needs of low-income first families as opposed to those of subsequent families was discussed with great particularity.

There was a great deal of concern expressed regarding the availability of support to meet the needs of children of low-income families whose parents work making salaries so low that their families remain below the poverty level, yet too high for them to be eligible for public assistance.

Several alternative formulas were discarded because they failed to equitably meet the needs of these families.

The committee attempted to address the needs of these families by increasing the Self Support amount and the SOLA percentages as well as changing the manner in which the Primary Support Amount was determined.

COMMENTS
TO PROPOSED LEGISLATIVE RULES
TITLE 78
LEGISLATIVE RULES
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
SERIES 16

Attached.

AUG 1 0 1993

CHILD ADVOCATE OFFICE

MEMORANDUM

DATE: August 5, 1993

TO: Chris Moffatt

FROM: Beth Longo

SUBJECT: Proposed guidelines

Just to prove I read your memos, I would like to make some comments on the proposed guideline changes. . .

1) I think they are very good in general and should address some of the inequities of the current formula.

2) In subsection 2.8.1 your reference is to 2.2.3.a. rather than b. There is no 2.2.3.b.

3) 2.10.3.c. confuses split custody with joint custody. Split custody is where each parent is awarded one or more of the parties' children and may be ordered without the agreement of the parties. In split custody cases, there are no "time periods of physical custody." Both issues apply to joint not split custody. You need to delete that subsection entirely to allow the split custody formula to be available in split custody cases. Otherwise it precludes its use altogether since the conditions do not apply to split custody. You have the same conditions rightly apply to joint custody in subsection 2.10.4.c.

Hope this has been helpful.

BL/kls

RECEIVED

JUL 23 1993

CHILD ADVOCATE OFFICE

WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

Memorandum

Gaston Caperton
Governor
Martha Hill
Director

DATE: July 22, 1993

TO: Christopher G. Moffatt, General Counsel, Child Advocate Office

FROM: Sue Staples, Administrative Assistant, Region 12, Child Advocate Office

SUBJECT: Proposed Child Support Guidelines

I have reviewed the proposed guidelines with Carolyn Avers, Legal Assistant in Region 12. Carolyn is considered the Child Support Guideline "expert" in this Region by the local court and has been instrumental in educating the Fayette and Nicholas Bar Association on application of the guidelines.

The following comments are offered:

Pro's

2.1.1.a.A Clarifies overtime pay

2.5.a.a.A. Places credit for child care and extraordinary medical expenses in one section.

2.5.1 b. Clarifies where the deductions are to be made for hospital medical, dental, and optical insurance, if paid for the benefit of the child/children included in the formula. Some attorneys were deducting this expense from the income instead of the obligation Also, this clarifies the proportionate share for the child/children included in the formula.

2.10.3 Clarifies Split Custody

2.10.4. Clarifies Joint Custody

Con's

2.2.4.b.
4.1.1. Treats mandatory deductions for pension plans as earnings. By attributing these deductions to future income without allowing the deduction from the gross income, the parent would charged with the income twice.

2.5.1.b.A. As written, allows parent to be included in the total number of persons eligible for benefits under the provisions of the insurance policy when it is possible that the parent would have coverage without any cost. Many group policies/plans do no charge the employee for for single coverage, but only charge for dependant coverage.

2.8. It does not seem fair to the child/children included in the formula to permit a SOLA allowance to the Absent Parents' children by a previous marriage, without consideration of whether, or not, the Absent Parent is actually contributing to that child's support.

Nowhere in the formula does it address AFDC or SSI. It is our understanding that Federal Program benefits are not to be considered income under the Child Support Guideline.

RECEIVED
JUL 27 1993
CHILD ...

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July 23, 1993

Mr. Christopher G. Moffatt, General Counsel
Child Advocate Office, Capitol Complex
Building 6, Room 817-B
Charleston, WV 25305

RE: Proposed child support guidelines

Dear Mr. Moffatt:

Enclosed please find my comments upon the proposed child support guidelines. I believe your proposals make some much needed changes in the guidelines and overall are a great improvement.

Thank you for an opportunity to provide comment upon the proposed changes. If there are any questions which I might answer or any manner in which I might be of assistance, please contact my office.

Sincerely,

Diana L. Johnson

Diana L. Johnson
Family Law Master

DLJ:bls
Enclosure

COMMENTS ON
PROPOSED CHILD SUPPORT GUIDELINES

78-16-2.5.3.a. This section is unclear. Where may the deduction be made? Doesn't the Farley decision provide for a dollar for dollar set-off of these payments against the child support obligation?

78-16-2.8.1. Excellent provision!

78-16-2.10.4.c. Good definition of joint custody formula. This area has always created difficulties.

78-16-9.1 I disagree with making it madatory that the court or law master disregard the child support formula in situations where the obligation is below the minimum. There are cases where the obligor cannot pay more than the formula.

78-17-3.1 This will precipitate a flood of modifications as each child reaches an age which places them within the next age category. I would prefer to have the amounts raised while still basing them upon the child's position in the household.

78-17-5.1 What is the basis for using $100.00 as the minimum child support obligation? The practice in my region has been to use a $50.00 minimum which was based upon the $50.00 set-off from AFDC. This would appear more logical in that: 1. We are to make every effort to benefit the children and, if the mother is an AFDC receipient, she will receive the $50.00 set-off; and, 2. We must assume that there are persons unable to pay support in accordance with the child support formula if are setting a minimum.

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AUG 0 1993

August 5, 1993

Mr. Christopher G. Moffatt
General Counsel
Child Advocate Office
Capitol Complex
Building 6, Room 817-B
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RE: Comments to Proposed Revised Child Support Guidelines

Dear Mr. Moffatt:

I have reviewed the proposed Revised Child Support Guidelines and have the following comments.

In regards to Sections 78-17-1, et seq.:

Having the primary support needs of the children to be set according to the age of the children is an interesting concept but will have problems in application. Does having a child crossing a threshold age entitle one to a modification of child support absent some other change of circumstances? Where at the time of the hearing to establish child support a child is 12 years and 9 months should the order make provisions for now and for three months' in the future?

When it comes to establishing an attribution of minimum wage in Section 78-17-6 why has a gross amount been set rather than a net? There may be variations in the net due to the number of deductions but the differences these variations make in the actual child support amounts are only a few dollars; not enough difference to make it worth while going through tax tables to calculate withholding for each circumstance.

The minimum child support amount established by section 78-17-5.1 may be too high for a number of areas of the State. A minimum is a convenient idea. It is unclear from the rule if there is any time when the minimum child support amount should <u>not</u> apply. Some standards should be established for the application of the minimum amount. Guidelines do not look fair when they do not work both ways.

In Section 78-17-2 it is good that you have simplified the self support deduction. It is hard to justify variations in the self support amount in the current guidelines. A single non-variable self support deduction make the most sense if you have such a thing in a formula.

In regards to Section 78-16-2.5.3 the unearned income provisions seem too strict. While I agree that it may be inappropriate to deduct SSI paid to a child for a condition of the child, I think to disallow such payments to a child for a condition of a parent, at least the payor parent, is extremely burdensome to the payor parent and an unwarranted windfall to the payee parent and to the child.

As a general statement these proposals, like the current Guidelines fails the keep it simple test. While the system may be mathematically fair and meet all the necessary goals, no one who fails to understand it will think it fair. You have put together 17 pages of nearly incomprehensible regulations in a system where approximately half of the persons who use the system and who will be subject to the guidelines appear without counsel to attempt to explain this to them. People do not trust what they do not understand. A system that sacrificed extreme accuracy for simplicity and predictability by its users might prove more palatable. In this vein I find the actual format of the proposed revisions difficult to read and comprehend with all of its sub-numbered paragraphs and such. It discourages me to attempt to read it, and I can imagine a layman trying to wade through this and making sense of it.

As a second general statement I question the necessity of changing the formula method. We have just gotten the bar and the public, to some extent, use to the formula we now use. It makes sense to adjust the self support amounts, primary supports and SOLA percentages to account for changes in the economy. But to change the method after just getting over the initial confusion is to ask for trouble and backlash. Besides, I'm used to doing it this way!

Thank you for your attention to these matters. I hope you find these comments useful. I am sorry that I will not be able to attend the public hearing, but your notice of same came after my docket had been set for that date. Please let me know if there are additional hearings or meetings that I might attend.

Very truly yours,

David P. Born
Family Law Master,
Region 16

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August 12, 1993

Christopher G. Moffatt
General Counsel
Child Advocate Office
Capitol Complex
Building 6 Room 817-B
Charleston, WV 25305

RE: Proposed revised Child Support Guidelines

Dear Mr. Moffatt:

I am generally quite pleased with the proposed revisions in the child support guidelines and applaud you for a job well done. I do have some concerns regarding the proposed revisions. I am unable to attend the public Hearing, but ask that the following comments be given due consideration.

1. **PROPOSED RULE 78-17-5: MINIMUM CHILD SUPPORT AMOUNT**

I am opposed to setting a minimum child support order amount of $100 as set forth in the proposed rule. I take issue with both the language of the rule and the amount proposed.

The language proposed is ambiguous in that it does not set forth with specificity in what circumstances a minimum amount would be considered. It was/is the Family Law Master practice in Mercer County to attribute a minimum support amount to the custodial parent thereby reducing the obligor's child support amount by $50. This creates an extremely onerous burden on low-income wage-earning custodial parents who might not otherwise earn enough to have income available for child support (although their meagre earnings are obviously being shared with the children in their care). I suggest that the Rule be made clear that the minimum amount is the amount the non-custodial parent must pay. I believe the following language adequately addresses this concern: **"The minimum amount a support obligor shall be ORDERED to pay to the support obligee shall be $50 per month."**

I do not oppose a minimum child support amount because I believe the support obligation falls even on the poorest of the poor. However, I have been unable to discern any sceneraio except that of a disabled parent who receives SSI (maximum amount is just over $400) or a part-time employee who is seeking better employment (otherwise minimum wage could be attributed) [if a minimum wage of $737 is attributed the obligor would still have over $100 available for child support even after subtracting FICA and income tax per the tax tables] upon whom such minimum would fall. I do not believe artritrarily requiring a $100 minimum payment from such a low-income obligor can be justified by either the statutory frame work or the best interest of the child. If the custodial parent receives public benefits only $50 of the minimum amount will go to the children as a pass through. Requiring the low-income obligor to repay the public debt certainly does not benefit the children, nor does repaying AFDC dollars with SSI dollars benefit the tax payer. Further, the disencentive a $100 deduction from income represents to a wage earner will potentially lead to less marginal employment rather than more and could be detrimental to the child by creating such disencentives. Nor does an additional $50 payment substanially affect the tax burden.

The statutory frame work contemplates that children share the income level of both parents. Unfortunately, the children of disabled and marginally employed parents suffer from the poverty of their parents. A $50 minimum payment can be met even by an SSI receipient without rendering them destitute and/or homeless. A $100 minimum amount could force such a person into such conditions.

2. PROPOSED RULE 78-17-6: ATTRIBUTION OF MINIMUM WAGE AMOUNT

I would add to that section the proviso that withholding from income is calculated in the same manner for attributed income as for persons who actually are paid a minimum wage (i.e. by looking at the tax tables). When I read this section, it was unclear how you got from gross income to net income for attributed income.

3. LEGISLATIVE RULE 2.2.4.B: DEDUCTIONS FROM INCOME FOR PENSION PLANS

I am concerned about adding mandatory pension deductions back in for purposes of calculating child support. The support obligor has no control over such income and cannot make it available under any circumstances for the use of his children. Further in reference to the statutory requirements, this is not money that would be available to the children if they were living in an intact two parent household. Mandatory pension plans are set up to provide for persons in their old age. I believe that one can assume that in the vast majority of households the children would be long past the age for receiving child support at such time as the income becomes available to the obligor. It appears to me to be contrary to the rule allowing deductions for mandatory amounts withheld from income and, in addition, I believe it is contrary to public policy to require support on income. The obligor is not actually receiving because their employer has established a pension plan to meet a legitimate societal need.

4. I am concerned that no direction is given regarding the time period to be used in calculating child support. While

considerable requirements have been added regarding partnership income distributions, interest income, dividend distributions, etc., it is not clear how far back income is to be considered in planning for distributions as child support in the future. I do not have an easy solution to this thorny problem, however I believe the most recent federal tax return should be presumptively used unless the support obligor can produce substantial evidence of a deviation from the prior years income (see Stephans v. Stephans). I believe that the rules should include recent case law requirements to the effect that both parents are required to provide the most recent tax return, as well as, year to date earnings, dividends, interest, etc. statements.

Thank you for your consideration of these comments.

Sincerely,

Mary E. Griffith/sjh

Mary Ellen Griffith

MEG/sjh

cc: file

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COMMENTS ON PROPOSED AMENDMENTS TO TITLE 78 DEPARTMENT OF HEALTH AND HUMAN RESOURCES CHILD ADVOCATE OFFICE SERIES 16 GUIDELINES FOR CHILD SUPPORT AWARDS

SUMMARY

In general, the proposed rule is a mixed bag for low-income families. Although some of the proposed changes would result in more equitable distribution of limited resources between obligee families and obligors, other changes would do little to improve the situation of children living in poverty.

The development of a minimum child support amount is a positive step. In general, all parents should contribute in at least some manner to the support of their children. A minimum support amount could be unfair in some cases, however, particularly if it were as high as $100.00 per month, as proposed in the accompanying procedural rule. Rather than use a minimum support provision to reallocate an arbitrary amount of money between members of low-income families, our clients support another means of balancing the needs of parents and children when the parents' total income is not enough to meet the basic standards of need set out in the guidelines.

If there is insufficient income to provide for the basic support of the parents and the children, resources should be shared on a pro-rated basis. By allocating income between parents and children in this manner, each will share proportionately in the available resources, and none will be forced to suffer disproportionate poverty. Our clients therefore propose the following addition to the guidelines as a means of adjusting the self-support deduction for parents and the primary need amounts for children in such cases:

<u>Calculation of primary support obligation of each parent where primary child support need is not met</u>

a. If the total net income available for child support from both parents is less than the total primary child support need, a needs adjustment percentage shall be calculated prior to the calculation of the primary support obligation of each parent.

b. The needs adjustment percentage shall be calculated by dividing the sum of the parents' net incomes by the sum of their combined standard deductions and the total primary support need.

c. The standard deduction for each parent and the primary child support need for each child shall be multiplied by the needs adjustment percentage to obtain the adjusted standard deduction and the adjusted primary child support need.

d. Where adjusted standard deductions and adjusted primary support need are calculated in accordance with this section, the primary support obligation of each parent shall be calculated by using the adjusted standard deduction and the adjusted primary child support need amounts, in accordance with this rule.

Our clients are also concerned about the need for frequent modification proceedings due to age-based primary support amounts, and we therefore suggest that the Child Advocate Office explore the possibility of guidelines that would provide for automatic adjustments in child support as part of an initial child support order. Such automatic adjustments might reduce the need for frequent modifications, based upon children moving into a new category for support purposes.

Other, more specific comments are set forth in the analysis that follows.

ANALYSIS OF PROPOSED GUIDELINES

Minimum support and an alternative for low-income families

From the standpoint of low-income families, perhaps the biggest change incorporated in the proposed rule is the establishment of a minimum child support award. Our clients see merit in this concept, and believe that it is appropriate to recognize the duty of all parents to contribute to their children's support, even if only in nominal amount.

-- Minimum support as a means to allocate limited resources

The minimum support requirement is apparently intended to deal with a larger issue, however, particularly if it is ultimately set at the proposed level of $100.00 per month. Because of problems in applying the guidelines to situations where the non-custodial parent's net income is less than his or her self-support deduction, children in these cases have in some instances been granted inadequate support or no support at all. In such situations, children may face the prospect of deepening poverty, while their non-custodial parents maintain or even improve upon their previous standard of living following a divorce or other dissolution of the family unit.

For example, without the minimum support provision, a non-custodial parent who earns up to $550.00 per month would pay no child support under the proposed guidelines, even if the custodial parent was legitimately unable to work and had no income with which to support the children. A minimum support award in this situation would provide at least some relief for the children, while at the same time balancing the hardship between the two parents to some extent.

Unfortunately, however, an established minimum child support provision does not balance the interests of parents and children with any real precision. In some cases, even a $100.00 minimum support award would be unfairly low, and in other cases such an award would be unfairly high. For example, a non-custodial parent with several children who receives net income of $640.00 per month should pay more than $100.00 per month in child support, if the custodial parent's other income were only $300 per month.

Conversely, if the custodial parent enjoys a comfortable income, while the non-custodial parent receives only disability benefits of less than $450 per month, a minimum support award of $100 might serve only to impoverish the non-custodial parent.[1]

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[1] The problem of a potentially excessive minimum support amount is of particular concern in that the proposed rule does not appear to allow for any departure from the minimum support requirement, no matter how compelling the facts of a given case. Section 78-16-9 requires that the court or master "shall disregard the formula and assign the minimum child support amount" whenever the formula produces a result less than the minimum support amount.

-- <u>Better allocation of resources and needs</u>

The problems of providing support for children when a parent's income is relatively low can be better addressed by means other than a minimum support requirement. In particular, our clients suggest the use of a system that would adjust the amounts used for parents' self-support deduction and the children's primary support need where the primary support need of the children would not otherwise be met under the formula. Such a system would have many of the advantages of a minimum support amount, but would avoid most of its more serious flaws.

Such a system of adjusted need allowances could work as follows: If the amount available for the primary child support need is less than the primary support need for the children, each family member would be expected to share in the shortfall and to make ends meet with a reduced need allowance. The standard deduction for both parents and the children's primary support need would all be reduced, in accordance with the ratio of the total need to the total net income of the parents. In this way, each person would share on a pro-rated basis in the limited resources available, and none would benefit at the expense of the others.

At the very least, the guidelines should expressly state that any minimum support amount should not be applied where the primary support need of the children is met without resort to the minimum support provision, and the application of the minimum support provision would deprive the non-custodial parent of the means of supporting himself or herself.

-- Illustrations of the adjusted need proposal

To illustrate this proposal, one might imagine a situation where the parents of a ten-year-old and an eight-year-old each had a net monthly income of about $600. Using the figures set out in the proposed procedural rule, each parent would have only $50 available for the primary support of the two children, after deducting their own self-support allowances. Because this amount would not provide for the children's primary support under the guidelines, our proposal would call for the calculation of a income-to-need percentage, by dividing the total net income of the parents by the total need allowances of the entire family.

In this example, the calculation would result in a figure of 80% ($1200 divided by $1500). Each parent's self-support deduction and the children's primary support need would then be multiplied by this percentage, to obtain an adjusted need allowance. Using these adjusted amounts, child support would be set at $160.00 per month.[2] Neither the children nor the non-custodial parent would be required to bear the entire burden of the shortfall between income and basic needs. This approach is more equitable than the $100 minimum support proposal, because it distributes the income available among the parents and the children in accordance with their needs.

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[2] The calculations for this example are set out in Appendix A, along with several other illustrations of how the adjusted need allowance system would work.

Although the adjusted need allowance method produces a child support award higher than the proposed minimum support amount in the example above, it would produce lower support awards in other situations, where the minimum support proposal would be unfairly burdensome on support obligors. For example, if the custodial parent of a thirteen-year-old child had a $600 per month net income, and the non-custodial parent's only income was SSI in the amount of $434 per month, the income-to-need ratio method would result in a support order of $6.41 per month.[3] The custodial parent would have $606.41 for supporting his or her household, and the non-custodial parent would still have $427.59. In contrast, the proposed minimum support provision would result in a total of $700 for the custodial household and only $334 for the non-custodial parent.

Although the adjusted needs allowance method would, in some cases, produce little or no child support, it clearly generates results more closely tied to the parties' particular circumstances. Our clients urge the adoption of this method to calculate support where income is insufficient to meet basic needs, coupled with a relatively low minimum child support amount in all but the most unusual cases.

<u>Age-based primary support</u>

The proposed guidelines would take into account the recognized fact that older children, as a general rule, require greater

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[3] The calculations for this example are also set out in Appendix A.

amounts of money to support than do younger children.[4] To obtain this greater amount of child support, however, custodial parents will probably have to petition the courts for a modification of their support awards.

If several children of different ages are involved, modification petitions might be needed every year or two. For example, if the three levels of support set out in the proposed procedural rule are eventually adopted, a family with children of the ages 2, 4, 9, and 11 could conceivably be in court for modification proceedings for four consecutive years.

This burden on custodial parents and on the courts could be minimized by establishing child support at the initial proceeding for the next several years, taking into account the anticipated advancement of the children through any established age categories. For example, if the only child of a marriage is eleven at the time his parents divorce, the court could set child support at the proper amount for the time of the divorce, with a provision for the child support to increase appropriately upon the child's thirteenth birthday, without further court action. Such an approach should be considered for inclusion in the guidelines.

<u>Gross income</u>

The proposed rule improves upon the current guidelines somewhat by including greater detail in its calculation of gross

[4] Although the age-based need amounts are set out in the proposed procedural rule, the legislative rule refers to "age-based" need amounts.

income. It would be helpful to include a general definition that would clearly include self-employment income and other income not specifically mentioned in the rule. For example, it might be stated that gross income includes all amounts includable as income for purposes of federal or state income taxation, unless specifically excluded by the guidelines.

-- <u>Overtime</u>

With regard to overtime income, the proposal adequately addresses the concerns raised by the 1993 amendments to the West Virginia Code, in §48A-2-8. The proposed rule adopts a general principle that appears to be followed in many, if not most, jurisdictions within the state already. When income is received from overtime employment, that income is considered in the same manner as any other form of income. This solution allows children to share in the parent's resources; at the same time, it does not require the parent receiving overtime income to pay a disproportionate share of this type of income for child support.

The main problem including overtime income in child support calculations is that one cannot always accurately predict the future availability of such income. Obligors with a long history of receiving regular overtime frequently come into hearings with dubious claims that they expect a drastic cut in their overtime earnings in the future; other obligors appear to intentionally reduce their overtime income for a few months before a child support hearing, only to return back to "business-as-usual" immediately after their support obligation is set based upon an artificially low income.

The proposed rule deals with the somewhat unpredictable nature of overtime income in a reasonable way -- by looking at a party's past history of overtime income. There is no better predictor of future overtime than the average amount of overtime earned over a reasonable length of time in the past. This approach also has the advantage of allowing parents to maintain their existing employment patterns without penalty in child support calculations.

Although the basic approach of the proposed rule to overtime is workable and realistic, there are at least two practical problems with the proposed rule. First, it may be difficult to obtain the information needed for support calculations. An employer may not report to an employee the total number of overtime hours worked in a given twelve-month period; W-2 forms and tax returns do not break down income into overtime and non-overtime income categories. Unless an employee's pay stub includes a "year-to-date" breakdown on overtime, it may be impossible to obtain effective access to the information contemplated by the rule.

To deal with this potential problem, the rule could be revised to reflect other types of information that might be available. Since overtime income is treated basically the same as other forms of income, total income figures from W-2 forms or tax returns could be used to determine child support, without the need to break down income into overtime and non-overtime. If such an approach is adopted, it will be necessary to take into account pay raises made effective during or after the year for which the information is available.

The second potential problem with the proposed rule is that its wording suggests that persons can be required to work overtime. Our clients agree with the principle that individuals should be attributed income for voluntarily reducing their incomes in efforts to reduce their contributions to the support of their children. They do not believe that the guidelines should state that a parent "shall not voluntarily limit his or her income by refusing to accept overtime employment," as in proposed section 78-16-2.1.1.a.A.(b). The guidelines can properly refuse to recognize the voluntary reduction in income caused by the refusal to accept overtime employment, but they cannot properly require a person to accept such employment. Indeed, the prohibition on involuntary servitude found in the thirteenth amendment to the U.S. Constitution might bar such a direct requirement on overtime.

This second objection can be cured by simple drafting changes. For example, the section cited above could be changed to read: "A parent who has traditionally accepted overtime employment . . . shall be attributed income equal to the amount of income he or she would have received from overtime employment refused by that parent."

The problem here may be only one of language. Language can be important, however, in creating and reinforcing perceptions. It is not wise to foster the perception that obligor parents are somehow enslaved by the system, being directly required to work overtime for purposes of child support. Parents should recognize that they can choose to reduce their overtime, with the understanding that their child support obligation will have to be paid out of their remaining earnings.

-- <u>Seasonal and irregular employment</u>

Our clients support the proposed rule for averaging irregular income over the course of a year. In general, a child's need for a reliable and steady flow of child support is important enough to outweigh the parent's understandable desire to make child support fit neatly with his or her income for the current month.

There may be situations, however, where the use of alternative schedules for child support payments should be considered. Indeed, the Legislature has mandated that the guidelines provide for the use of such alternative payment schedules on a discretionary basis. Guidelines should be provided to specify the general circumstances under which the presumption for regular payments might be overcome by the need to vary the periodic amount of payments, and to assure that such variance would be minimized to the extent practicable.

In addition, any rule that averages income on an annual basis must also take into account that recent increases in the rate of pay will not be accurately reflected in such an average. Such pay increases would presumably continue to be available for the payment of child support during the coming year, and the child support calculation should therefore take into consideration any recent non-seasonal changes in income.

For example, a parent might work only twenty hours per week from October to March, and forty hours per week from April to

September. If such a worker earned $7.00 per hour from January through November of a given year, and then received a pay raise in December to $8.00 per hour, his or her gross income for that year would be about $11,000.00. His or her expected income for the next year, at the same number of hours but with the higher rate of pay, would be almost $12,500.00. The formula should obviously take into account the wage increase in setting child support.

-- Other issues concerning income

The rule tends to focus on cash as a basis for counting income and deductions from income (see §§ 2.1.9, 2.1.10, 2.2.6). Because of the greater potential for manipulation of income under other possible approaches, our clients agree with the approach taken by the proposed rule. The courts should be given discretion, however, to use another basis for counting income when a parent attempts to defer or otherwise avoid income to reduce his or her support obligation.

With regard to the calculation of net income, the provision on business expenses (§ 2.2.6) is somewhat confusing. There is no definition of what would be a legitimate business expense that could properly be deducted from income. The first three lines of § 2.2.6.a.A are especially confusing; the provision would probably be more clear if it simply stated that non-cash expenses are not deductible as business expenses, even though they might be allowed as deductible expenses for income tax purposes.

Unearned income of children

Previously the guidelines have not expressly defined unearned income of children, which may be deducted from the children's primary support need. Under the new proposal, it appears that only distributions from trust funds would be considered unearned income for purposes of the guidelines. We believe that this approach may be unnecessarily restrictive. Disability payments, and particularly such payments received because of the condition of the obligor parent, should probably be taken into account in calculating child support.

Multiple family situations

We recognize that one of the most difficult issues faced in developing a child support formula is the issue of how to treat children of several families, all of whom are entitled to reasonable support. It appears, however, that the proposed guidelines omit any means to allow for the primary support of other children unless a support order has been entered for those children. Under the current guidelines, § 2.6.2, the primary support obligations of other children are deducted prior to the SOLA calculation, unless those obligations have been set forth in a court order and deducted from income previously in the formula. We do not see a similar provision in the proposal, and suspect that this may have been inadvertent.

In other respects, the proposed rule establishes an appropriate balance on the issue of multiple families. An obligor should be expected to provide for the primary support of all children before determining any Standard of Living Adjustment (SOLA), and each child should share equally in the SOLA amount.

Split custody

In section 2.10.3.c, the proposal seems to confuse "split" custody (where one or more children are in the custody of each parent) with "joint" custody (where the parents share custody of the same child or children). The guidelines need to provide for the not uncommon situation where parties may have several children, with one or more of the children living with each parent.

General organization and structure

Particularly in light of the apparent trend toward greater pro se participation in child support matters, it would be a major advantage for any revised guidelines to be easily understood by lay persons. Unfortunately, the proposed support formula is made unnecessarily confusing by its structure and organization.

In particular, it would be extremely helpful if all definitions were grouped in a single section, rather than spread throughout the rule. Grouped in this fashion, defined terms could be found easily, and the reader could focus on the actual mechanics of the rule without unnecessary distraction. A careful review of the structure of the rule would also yield opportunities to add greater clarity.

CONCLUSION

Although the proposed guidelines represent well-reasoned options on several points, we strongly urge the Department of Health and Human Resources to consider additional means to ensure that child support awards reflect an appropriate balance between parents and children, particularly where incomes are too low to satisfy the amounts ordinarily used to calculate the basic needs of these persons. We also urge the Department to consider fully the other suggestions made in these comments.

Respectfully submitted,

Robert E. Richardson

Robert E. Richardson

DATE: August 12, 1993

APPENDIX A

APPLICATION OF SUGGESTED SUPPORT FORMULA WHERE TOTAL INCOME IS INADEQUATE TO MEET SELF-SUPPORT NEED AND PRIMARY SUPPORT NEED FOR CHILDREN

Example 1 --

Custodial Parent Income	$600.00
Non-Custodial Parent Income	600.00
Total	$1200.00

Standard deduction - custodial parent	$550.00
Standard deduction - non-custodial parent	550.00
Primary support need (two children)	400.00
Total need	$1500.00

Needs adjustment percentage = 80%

Adjusted standard deduction = $550 x 80% = $440.00

Adjusted primary support need = $400 x 80% = $320.00

	Custodial parent	Non-custodial parent	Total
Net income	$600.00	$600.00	
Adjusted deduction	-440.00	-440.00	
Available for support	$160.00	$160.00	$320.00
Percent of total available income	50%	50%	
x adjusted primary	$320.00	$320.00	
Support obligation	$160.00	$160.00	

Example 2 --

Custodial Parent Income	$600.00
Non-Custodial Parent Income	434.00
Total	$1034.00

Standard deduction - custodial parent	$550.00
Standard deduction - non-custodial parent	550.00
Primary support need (1 child)	230.00
Total need	$1330.00

Needs adjustment percentage = 77.74%

Adjusted standard deduction = $550 x 77.74% = $427.59

Adjusted primary support need = $200 x 77.74% = $178.81

	Custodial parent	Non-custodial parent	Total
Net income	$600.00	$434.00	
Adjusted deduction	-427.59	-427.59	
Available for support	$172.41	$ 6.41	$178.82
Percent of total available income	96.42%	3.58%	
x adjusted primary	$178.81	$178.81	
Support obligation	$172.40	$ 6.41	

Example 3 --

Custodial Parent Income	$800.00
Non-Custodial Parent Income	700.00
Total	$1500.00

Standard deduction - custodial parent	$550.00
Standard deduction - non-custodial parent	550.00
Primary support need (3 children)	600.00
Total need	$1700.00

Needs adjustment percentage = 88.24%

Adjusted standard deduction = $550 x 88.24% = $485.29

Adjusted primary support need = $600 x 88.24% = $529.41

	Custodial parent	Non-custodial parent	Total
Net income	$800.00	$700.00	
Adjusted deduction	-485.29	-485.29	
Available for support	$314.71	$214.71	$529.42
Percent of total available income	59.44%	40.56%	
x adjusted primary	$529.41	$529.41	
Support obligation	$314.70	$214.71	

Example 4 --

Custodial Parent Income	$600.00
Non-Custodial Parent Income	300.00
Total	$900.00

Standard deduction - custodial parent	$550.00
Standard deduction - non-custodial parent	550.00
Primary support need (one child)	200.00
Total need	$1300.00

Needs adjustment percentage = 69.23%

Adjusted standard deduction = $550 x 69.23% = $380.77

Adjusted primary support need = $200 x 69.23% = $138.46

	Custodial parent	Non-custodial parent	Total
Net income	$600.00	$300.00	
Adjusted deduction	-380.77	-380.77	
Available for support	219.23	-----	$219.23
Percent of total available income	100%	0%	
x adjusted primary	$138.46	$138.46	
Support obligation	$138.46	$ 0.00	

Example 5--

Custodial Parent Income	$ 0.00
Non-Custodial Parent Income	300.00
Total	$300.00

Standard deduction - custodial parent	$550.00
Standard deduction - non-custodial parent	550.00
Primary support need (one child)	200.00
Total need	$1300.00

Needs adjustment percentage = 23.08%

Adjusted standard deduction = $550 x 23.08% = $126.92

Adjusted primary support need = $200 x 23.08% = $46.15

	Custodial parent	Non-custodial parent	Total
Net income	$ 0.00	$300.00	
Adjusted deduction	-126.92	-126.92	
Available for support	------	173.08	$173.08
Percent of total available income	0%	100%	
x adjusted primary	$ 46.15	$ 46.15	
Support obligation	$ 0.00	$ 46.15	

PERTINENT STATE AND FEDERAL
LAWS AND COURT CASES
TITLE 78
LEGISLATIVE RULES
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
SERIES 16

Attached.

New Legislation

information or who deliberately fails to disclose information pursuant to the provisions of this section is guilty of false swearing.

CHAPTER 48A. ENFORCEMENT OF FAMILY OBLIGATIONS.

ARTICLE 2. WEST VIRGINIA CHILD ADVOCATE OFFICE.

§48A-2-8. Guidelines for child support awards.

(a) The director of the child advocate office shall, by legislative rule, establish guidelines for child support award amounts so as to ensure greater uniformity by those persons who make child support recommendations and enter child support orders and to increase predictability for parents, children and other persons who are directly affected by child support orders. There shall be a rebuttable presumption, in any proceeding before a family law master or circuit court judge for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption in that case. The guidelines shall not be followed:

(1) When the child support award proposed to be made pursuant to the guidelines has been disclosed to the parties and each party has made a knowing and intelligent waiver of said amount, and the support obligors have entered into an agreement which provides for the custody and support of the child or children of the parties; or

(2) When the child support award proposed to be made pursuant to the guidelines would be contrary to the best interests of the child or children, or contrary to the best interests of the parties.

(b) The Legislature, by the enactment of this article, recognizes that children have a right to share in their natural parents' level of living. Accordingly, guidelines promulgated under the provisions of this section shall not be based upon any schedule of minimum costs for rearing children based upon subsistence level amounts set forth by various agencies of government. The Legislature recognizes that expenditures in families are not made in accordance with subsistence level standards, but are rather made in proportion to household income, and as parental incomes increase or decrease, the actual dollar expenditures for children also increase or decrease correspondingly. In order to ensure that children properly share in their parents' resources, regardless of family structure, the guidelines shall be structured so as to provide that after a consideration of respective parental incomes, that child support will be related, to the extent practicable, to the level of living which such children would enjoy if they were living in a household with both parents present.

(c) The guidelines promulgated under the provisions of this section shall take into consideration the financial contributions of both parents. The Legislature recognizes that expenditures in households are made in aggregate form and that total family income is pooled to determine the level at which the family can live. The guidelines shall provide for examining the financial contributions of both parents in relationship to total income, so as to establish and equitably apportion the child support obligation. Under the guidelines, the child support obligation of each parent will vary proportionately according to their individual incomes.

(d) The guidelines shall be structured so as to take into consideration any preexisting support orders which impose additional duties of support upon an obligor outside of the instant case and shall provide direction in cases involving split or shared custody.

(e) The guidelines shall have application to cases of divorce, paternity, actions for support and modifications thereof.

(f) In promulgating the legislative rule provided for under the provisions of this section,. the director shall be directed by the following legislative findings:

(1) That amounts to be fixed as child support should not include awards for alimony, notwithstanding the fact that any amount fixed as child support will impact upon the living conditions of custodial parents;

(2) That parental expenditures on children represent a relatively constant percentage of family consumption as family consumption increases, so that as family income increases, the family's level of consumption increases, and the children should share in and benefit from this increase;

(3) That parental expenditures on children represent a declining proportion of family income as the gross income of the family increases, so that while total dollar outlays for children have a positive relationship to the family's gross income, the proportion of gross family income allotted for the children has a negative relationship to gross income;

(4) That expenditures on children vary according to the number of children in the family, and as the number of children in the family increase, the expenditures for the children as a group increase and the expenditures on each individual child decrease; so that due to increasing economies of scale and the increased sharing of resources among family members, spending will not increase in direct proportion to the number of children;

(5) That as children grow older, expenditures on children increase, particularly during the teenage years.

(g) The director of the child advocate office shall review the guidelines at least once every four years to ensure that their application results in the determination of appropriate child support awards. Such four-year period shall begin on the first day of July, one thousand nine hundred eighty-nine. Upon completion of the four-year review period ending on the thirtieth day of June, one thousand nine hundred ninety-three, after consulting with the supreme court of appeals, circuit judges and family law masters, the director shall propose for promulgation a legislative rule in accordance with the provisions of article three, chapter twenty-nine-a of this code which amends and updates the guidelines required by this section. Such proposed amended rule, shall include, but not be limited to, provisions regarding the following subject matters:

(1) In determining the child support obligation of a parent whose employment income consists, in part, of compensation for overtime hours worked, the guidelines shall provide for a child support order which includes a consideration of such overtime compensation, balancing the interest of children to share in the resources of such parent with the interest of the parent in not being penalized for accepting overtime work. Any formula which is used to compute anticipated overtime compensation shall allow for the irregular nature of such compensation.

(2) In determining the child support obligation of a parent whose employment income consists of compensation for seasonal employment, the guidelines shall provide for discretionary use of alternative payment schedules which may vary the periodic amounts required to be paid.

(3) In determining the child support obligation of a parent whose support obligation extends to the children of more than one family, the guidelines shall be structured so as to equitably provide for all children to whom the obligor owes a duty of support.

ARTICLE 4. PROCEEDINGS BEFORE A MASTER.

§48A-4-1. Appointment of family law masters; term of office; vacancy; removal.

(a) The family law masters holding office on the effective date of this section by virtue of appointments made under the prior enactments of this article shall continue their service for a term of office ending on ıder this paragraph must be ed in accordance with para-)(3) of this section.

! by the Office of Management ret under control number 0960-

648, May 9, 1985, as amended at 50 Aug. 6, 1985; 51 FR 37731, Oct.

Notice of collection of assigned rt.

fective October 1, 1985, the n shall provide that the IV-D at least annually, must send a the amount of support pay- ollected during the past year iduals who have assigned support under § 232.11 of this

e notice must list separately s collected from each absent when more than one absent ves support to the family and icate the amount of support which was paid to the family.

by the Office of Management et under control number 0960-

349, May 9, 1985, as amended at 51 Oct. 24, 1986]

Incentive payments to States and al subdivisions.

ve October 1, 1985, in order State to be eligible to receive itive payments under § 304.12 hapter, the State plan shall hat, if one or more political ons of the State participate in of carrying out the activities ne State plan during any ach such subdivision shall be to receive an appropriate any incentive payments made ate for such period, as deter- the State in accordance with of this chapter, taking into ac- e efficiency and effectiveness litical subdivision in carrying ctivities under the State plan.

by the Office of Management et under control number 0960-

649, May 9, 1985; 50 FR 23958, 85, as amended at 51 FR 37731, 86; 54 FR 32309, Aug. 4, 1989]

§ 302.56 Guidelines for setting child support awards.

(a) Effective October 13, 1989, as a condition of approval of its State plan, the State shall establish one set of guidelines by law or by judicial or administrative action for setting and modifying child support award amounts within the State.

(b) The State shall have procedures for making the guidelines available to all persons in the State whose duty it is to set child support award amounts.

(c) The guidelines established under paragraph (a) of this section must at a minimum:

(1) Take into consideration all earnings and income of the absent parent;

(2) Be based on specific descriptive and numeric criteria and result in a computation of the support obligation; and

(3) Provide for the child(ren)'s health care needs, through health insurance coverage or other means.

(d) The State must include a copy of the guidelines in its State plan.

(e) The State must review, and revise, if appropriate, the guidelines established under paragraph (a) of this section at least once every four years to ensure that their application results in the determination of appropriate child support award amounts.

(f) Effective October 13, 1989, the State must provide that there shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of the guidelines established under paragraph (a) of this section is the correct amount of child support to be awarded.

(g) A written finding or specific finding on the record of a judicial or administrative proceeding for the award of child support that the application of the guidelines established under paragraph (a) of this section would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption in that case, as determined under criteria established by the State. Such criteria must take into consideration the best interests of the child. Findings that rebut the guidelines shall state the amount of support that would have been required under the guidelines and include a justification of why the order varies from the guidelines.

(h) As part of the review of a State's guidelines required under paragraph (e) of this section, a State must consider economic data on the cost of raising children and analyze case data, gathered through sampling or other methods, on the application of, and deviations from, the guidelines. The analysis of the data must be used in the State's review of the guidelines to ensure that deviations from the guidelines are limited.

(Approved by the Office of Management and Budget under control number 0960-0385)

[50 FR 19649, May 9, 1985; 50 FR 23958, June 7, 1985, as amended at 51 FR 37731, Oct. 24, 1986; 56 FR 22354, May 15, 1991]

§ 302.57 Procedures for the payment of support through the IV-D agency or other entity.

(a) Effective October 1, 1985, the State may have in effect and use procedures for the payment of support through the State IV-D agency or the entity designated by the State to administer the State's withholding system upon the request of either the absent parent or custodial parent, regardless of whether or not arrearages exist or withholding procedures have been instituted.

(b) If the State opts to establish procedures described in paragraph (a) of this section, the State must:

(1) Monitor all amounts paid and the dates of payments and record them on an individual payment record;

(2) Ensure prompt payment to the custodial parent; and

(3) Require the requesting parent to pay a fee for the cost of providing the service not to exceed $25 annually and not to exceed State costs.

(Approved by the Office of Management and Budget under control number 0960-0385)

[50 FR 19649, May 9, 1985, as amended at 51 FR 37731, Oct. 24, 1986]

§ 302.60 Collection of past-due support from Federal tax refunds.

The State plan shall provide that:

(a) The IV-D agency has in effect procedures necessary to obtain payment of past-due support from Federal tax refunds as set forth in section 464 of the Act, § 303.72 of this chapter, and regulations of the Internal Revenue Service at 26 CFR 304.6402-1; and

(b) The IV-D agency shall take the steps necessary to implement and use these procedures.

(Approved by the Office of Management and Budget under control number 0960-0253)

[47 FR 7428, Feb. 19, 1982]

§ 302.65 Withholding of unemployment compensation.

The State plan shall provide that the requirements of this section are met.

(a) *Definitions.* When used in this section:

Legal process means a writ, order, summons or other similar process in the nature of a garnishment, which is issued by a court of competent jurisdiction or by an authorized official pursuant to an order of such court or pursuant to State or local law.

State employment security agency or *SESA* means the State agency charged with the administration of the State unemployment compensation laws in accordance with title III of the Act.

Unemployment compensation means any compensation payable under State unemployment compensation law (including amounts payable in accordance with agreements under any Federal unemployment compensation law). It includes extended benefits, unemployment compensation for Federal employees, unemployment compensation for ex-servicemen, trade readjustment allowances, disaster unemployment assistance, and payments under the Redwood National Park Expansion Act.

(b) *Agreement.* The State IV-D agency shall enter into a written agreement with the SESA in its State for the purpose of withholding unemployment compensation from individuals with unmet support obligations being enforced by the IV-D agency. The IV-D agency shall agree only to a withholding program that it expects to be cost-effective and to reimburse-

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FILED

JUN 2 4 1993

CLERK OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1993 Term

No. 21544

KAREN P. ZALESKI, NOW KNOWN AS KAREN P. HEIN,
Plaintiff Below, Appellant,

v.

ROBERT J. ZALESKI,
Defendant Below, Appellee

Appeal from the Circuit Court of Ohio County
Honorable W. Craig Broadwater, Judge
Civil Action No. 86-C-145(B)

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: May 4, 1993
Filed: June 24, 1993

Arch W. Riley
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Wheeling, West Virginia
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This Opinion was delivered PER CURIAM.

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SYLLABUS BY THE COURT

"When a family law master or a circuit court enters an order awarding or modifying child support, the amount of the child support shall be in accordance with the established state guidelines, set forth in 6 W.Va. Code of State Rules §§ 78-16-1 to 78-16-20 (1988), unless the master or the court sets forth, in writing, specific reasons for not following the guidelines in the particular case involved. W.Va. Code, 48A-2-8(a), as amended." Syllabus, Holley v. Holley, 181 W.Va. 396, 382 S.E.2d 590 (1989).

Per Curiam:

This is an appeal by Karen P. Zaleski from an order of the Circuit Court of Ohio County which reduced a child support award made to her by a family law master. The appellant contends that in reducing the child support award from $5,104.75 a month to $3,300.00 a month, the circuit court erred. After reviewing the record and the questions presented, this Court agrees. Accordingly, the judgment of the Circuit Court of Ohio County is reversed.

The appellant, Karen P. Zaleski, now Karen P. Hein, and Robert J. Zaleski, an orthopedic surgeon, were divorced on July 6, 1988. At the time of the divorce, the parties had three infant children, and the circuit court, in granting the divorce, placed the children in the custody of the appellant. The circuit court also ordered Robert J. Zaleski to pay $2,500.00 per month child support for eleven months.

Almost immediately after entry of the original order, Robert J. Zaleski filed a petition to modify the child support award, and the matter was referred to a family law master.

The family law master rendered a report on the modification petition on June 22, 1989. In that report, he ruled that only $6,000.00 of Robert J. Zaleski's monthly income should be subjected to the child support calculation. The imposition of the $6,000.00 cap on income subject to the calculation had the effect of modifying the original child support award from $2,500.00 per month to $2,445.00 per month.[1]

On August 31, 1989, the Circuit Court of Ohio County affirmed the family law master's findings and affirmed the modification of the child support payable.

On August 27, 1989, the appellant married Albert Carl Hein and moved with the three children to Mr. Hein's residence located in Arnold, Maryland. To prepare the house to accommodate the appellant and the three children, Mr. Hein incurred substantial renovation expenses.

After moving to Maryland, the appellant obtained work on a part-time basis and also worked at obtaining a Master's in

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[1]Legal authority for subjecting no more than $6,000.00 of monthly income to the child support formula is found in 6 W.Va.C.S.R. § 78-16-7.2.2, which is discussed in the body of the opinion. As indicated in Bettinger v. Bettinger, which is also discussed in the body of the opinion, the Rule does not require a family law master to consider only the first $6,000.00 of monthly income in setting child support. In spite of the use of the word "cap" in some of the literature relating to the calculation of child support, it does not, in effect, "cap" the amount which may be considered at $6,000.00 per month. Rather, it allows a master or court, in the exercise of sound discretion, and after considering various factors discussed in the body of this case, to limit the amount of monthly income subject to the formula where the discretionary income of one of the support obligors exceeds $6,000.00 per month.

Business Administration degree at Loyola University in Baltimore, Maryland. She received the MBA degree in May, 1990.

In January, 1991, the appellant began temporary full-time work as assistant to the president of the University of Maryland at a salary of $25,000.00 per year.

As a result of the alterations in her life, the appellant, on May 15, 1991, petitioned the Circuit Court of Ohio County to amend the child support award for her children.

A hearing was conducted on the motion to modify the child support award by a family law master on August 20, 1991. On February 10, 1992, the law master, after examining the evidence developed at the hearing, filed a report and recommended decision with the Circuit Court of Ohio County. In the report, the law master noted that Dr. Zaleski's annual income had increased from $211,300.00 in 1988 to $232,562.00 in 1989 to $371,437.00 in 1990. The master found that, based upon the testimony of Dr. Zaleski, there would appear to be no realistic expectation of a diminution of income. The master concluded:

> I find that it is appropriate to consider Dr. Zaleski's net monthly income at $22,000.00 as he earned in 1990, and as no realistic expectation of diminution of income is anticipated.
>
> I further find that based upon her education and employment experience, Mrs. Hein would be able to obtain employment netting approximately $2,000.00 per month.

After noting that Dr. Zaleski should be given credit for monthly expenses in the amount of approximately $8,000.00, the family law master proceeded to find:

> Based upon the foregoing findings, I further find that Dr. Zaleski has $14,000.00 available for child support calculation under the Melson Formula and to which no cap should apply and to which no further offset should be made . . .
>
> Calculating the Melson Formula under the foregoing findings, I find that child support should be set in the amount of $5,104.75 per month, according to the child support calculation which is attached hereto and to be deemed a part hereof.

On February 24, 1992, Robert J. Zaleski petitioned the circuit court to review the master's findings. The court granted the petition and, after reviewing the evidence, reduced the master's recommended award of $5,104.75 per month for eleven months to $3,300.00 per month for eleven months. In reducing the award, the court stated:

> The Court concludes that the Family Law Master erred in the calculation of the Melson formula, failing to apply the maximum income cap as provided by 6 WVCSR 78-16.2.6, and in the calculation of the parties' child support expenses . . . . However, the Court is also of the opinion that given this Court's last order on the issue of child support being in 1986, an increase of child support is warranted. The Court concludes that, given the information submitted at the hearing, the monthly child support for each child should be $1,100 per month for a total of $3,300.00.

On appeal, the appellant claims that because the family law master's determination of Robert J. Zaleski's child support obligation under the formula was based upon substantial evidence on the record as a whole and did not involve an abuse of discretion, the circuit court erred by reducing the master's support award.

The appellant also claims that the family law master correctly used the "SOLA" or "standard of living adjustment" percentages of the formula in determining the child support obligation, and because the master's award was consistent with the level of living the children would enjoy if living with both parents, the circuit court erred and abused its discretion when it reduced the support award from $5,104.75 to $3,300.00 per month without proper explanation.

As explained in Holley v. Holley, 181 W.Va. 396, 382 S.E.2d 590 (1989), West Virginia's child support guidelines (the so-called Melson Formula) were adopted as the result of the passage of federal law which became effective on October 1, 1987, and which required each state to establish guidelines for determining the amount of child support awards. 42 U.S.C. § 667 (Supp. IV 1986). As indicated in Holley v. Holley, the federal legislation allowed the states to establish the guidelines either by statute of by judicial or administrative action.

In anticipation of the federal requirement, the West Virginia Legislature enacted W.Va. Code, 48A-2-8(a), which required the director of the Child Advocate Office within the West Virginia Department of Human Services to establish by legislative rule guidelines for child support award amounts.

As initially written, W.Va. Code, 48A-2-8(a), provided:

> Such guidelines shall be followed by the children's advocate, the family law master and the circuit court unless, in each instance, the advocate, master or judge sets forth, in writing reasons for not following the guidelines in the particular case involved.

The Legislature in 1989 amended W.Va. Code, 48A-2-8, to provide that:

> There shall be a rebuttable presumption, in any proceeding before a family law master or circuit court judge for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption in that case.

In Holley v. Holley, Id., this Court addressed the question of whether the West Virginia Legislature, in the original version of W.Va. Code, 48A-2-8(a), mandated that, in every instance, child support be set strictly according to the guidelines promulgated pursuant to the statute. In addressing that question, the Court, since it confronted a case which arose before the amendment to the Code section became effective, relied upon the language of W.Va. Code, 48A-2-8(a), as originally enacted. The Court, however, in note 4, indicated that the language had been amended and that the amendment in no way limited the decision in the Holley case.

In Holley v. Holley, Id., the Court essentially found that under ordinary circumstances, child support in West Virginia should be calculated in accordance with the rules set forth in the guidelines. The Court, however, indicated that under appropriate circumstances, a different child support could be made. In the single syllabus of the Holley case, the Court stated:

> When a family law master or a circuit court enters an order awarding or modifying child support, the amount of the child support shall be in accordance with the established state guidelines, set forth in 6 W.Va. Code of State Rules §§ 78-16-1 to 78-16-20 (1988), unless the master or the court sets forth, in writing, specific reasons for not following the guidelines in the particular case involved. W.Va. Code, 48A-2-8(a), as amended.

In this Court's view, the rationale of the Holley decision still is persuasive in this State, even though W.Va. Code, 48A-2-8, has been amended.

In Bettinger v. Bettinger, 183 W.Va. 528, 396 S.E.2d 709 (1990), the Court examined the child support formula further. The Court noted that "[u]nder the child support formula, there are two calculations for child support. The first calculation is to determine the primary child support, which essentially covers the basic needs of the children." The Court explained that the second calculation was called the "SOLA" or "standard of living adjustment" and "[t]he SOLA calculation is then [after the calculation of the primary child support] made based on defined percentages for the number of children." Bettinger v. Bettinger, Id. at 540, 396 S.E.2d 709 at 720.

The specific question in the Bettinger case was whether it was mandatory for a trial court to use the child support formula in calculating the "SOLA." In addressing the question, the Court noted that the "SOLA" provisions of the child support guidelines, 6 W.Va.C.S.R. § 78-16-2.7.2, provided:

> If the discretionary income of either support obligor exceeds six thousand dollars per month, or if the combined discretionary income of both support obligors exceeds eight thousand dollars per month, the court or master may not apply the percentages set forth in this section. Under such circumstances, the court shall equitably determine the SOLA support obligation so as to avoid a windfall to either support obligor or hardship on either support obligor, and shall be cognizant of the fact that an excessive amount of SOLA support may not be in the best interests of the child or children.

The Court, in examining this language, found that while nothing in it authorized a family law master or circuit court to abandon the guideline requirements with regard to the primary support obligation calculation regardless of the discretionary income of the support obligors, it did use discretionary language with regard to the application of the guidelines to the calculation of the "SOLA" where the income of the support obligors exceeded the stated amount. The Court concluded:

> It seems clear that 6 W.Va.C.S.R. § 78-16-2.7.2 of the child support guidelines allows a family law master or circuit court, in the exercise of sound discretion, to apply less than the full SOLA percentages for child support if one support obligor has a discretionary income above $6,000 a month or both support obligors have a combined discretionary income of $8,000 per month.

Bettinger v. Bettinger, Id. at 540, 396 S.E.2d at 721.

The Court warned, however, that the decision to abandon the child support guidelines in calculating the "SOLA" should not be taken lightly when the obligors' incomes exceeded the stated amount. The Court indicated that the discretion to abandon the guidelines in calculating the "SOLA" where the income was above the stated levels was a limited discretion:

> A decision not to follow the SOLA percentages must be undertaken in light of the legislative preference in W.Va. Code 48A-2-8(b) (1989), which is that child support should be keyed to "the level of living which such children would enjoy if they were living in a household with both parents present."

Bettinger v. Bettinger, Id. at 540, 396 S.E.2d at 721.

The guidelines themselves impose another restriction upon the abandonment of the guidelines in the calculation of the "SOLA." That is, that where the incomes of the support obligors are above the stated amounts and the law master or court determines to abandon the guidelines, ". . . the court shall equitably determine the SOLA support obligation so as to avoid a windfall to either support obligor or a hardship on either support obligor . . . ." 6 W.Va.C.S.R. § 78-16-2.7.2.

In the present case, the family law master essentially determined that the guidelines should be fully followed in calculating the "SOLA," even though the discretionary income of Robert J. Zaleski exceeded $6,000.00 per month. He concluded that deviation from the guidelines would not afford the children the same level of living that they would enjoy if they were living in a household with both parents present. This decision was clearly proper in line with the holding in Bettinger v. Bettinger, Id., and clearly showed an understanding of the legislative preference that child support should be set so as to afford the standard of living that the children would have if both parents were present.

The circuit court, as previously noted, ruled that the family law master erred in not deviating from the guidelines in calculating the "SOLA" and in not "capping" the discretionary income of Robert J. Zaleski subject to the"SOLA" calculation at $6,000.00 per month.

It is rather clear that there is a very marked discrepancy in the discretionary income of the obligor parties. Robert J. Zaleski was found to have a net income of approximately

$22,000.00 a month and a discretionary income of $14,000.00 per month. It is clear that the move to Maryland has imposed large expenses on the appellant, and with child support of $3,300.00 per month, it does not appear that his children will have a "level of living which such children would enjoy if they were living in a household with both parents present."

In this Court's view, the family law master's decision more appropriately accomplished the purposes of the child support criteria, and his decision to follow the guidelines in the calculation of the "SOLA" was in accordance with the underlying considerations set forth in Bettinger v. Bettinger, Id. His determination also equitably established the "SOLA" support obligation so as to avoid a windfall to Robert J. Zaleski or a hardship on the appellant.

In light of the circumstances of the case, this Court concludes that the amount of child support established by the family law master was appropriate and that the circuit court erred in reversing and modifying the family law master's decision.

The judgment of the Circuit Court of Ohio County is, therefore, reversed, and this case is remanded with directions that the circuit court award the appellant child support in accordance with the family law master's recommendation.

Reversed and remanded
with directions.