

Child Support Guidelines—A Legal Presumption or Mere Public Policy?[©]

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One issue in particular creates substantial disagreement over what should be the appropriate features of child support guidelines. And that issue is whether such guidelines are legal presumptions designed to assure the correct of amount of child support, or public policy choices designed to achieve a certain distribution of wealth. Child support guidelines are legal presumptions, and not public policy choices. When it is asked, for example, how long an unemployed worker should be eligible for unemployment benefits, a question of public policy arises. And when that determination is made from economic data, budget figures, and fiscal considerations, a public policy choice is made. But once this choice is made, the level of unemployment benefits is not presented in court as presumptive evidence against a litigant. Child support guidelines, however, are used as presumptive evidence in court against a child support obligor. There are stricter standards for legal presumptions than public policy choices.

In order to be legally sound, child support guidelines:

- Must be based on correct use of authentic economic data;
- Must reasonably indicate in most cases an amount of child support due, assuming an equal duty of both father and mother to supply the reasonable needs of their children according to the resources available to each;
- Must be fully and fairly rebuttable as against the equal duty of both parents to supply the reasonable needs of their children according to their respective resources;
- Must not include arbitrary or unfounded assumptions; and
- Must be developed by responsible public authority.

The reports by Policy Studies Inc. and R. Mark Rogers Economic Consulting should be reviewed, keeping these legal principles in mind.

Underlying Legal Principles for Sound Child Support Awards

A. Introduction. Our purpose here will be to lay out general principles in a systematic manner to assist the court in better understanding the motion now pending for determination and modification of child support.

For many years there has been a conventional standard of child support in family law, which turns on right reason, and has never been difficult to apply once the necessary facts of a particular case were gathered. There would no insurmountable problem today if this conventional standard were routinely applied and we had no child support guidelines at all.

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This conventional standard is that *both father and mother have an equal duty to provide for the reasonable needs of their children on an ability-to-pay basis*. By reasonable needs we mean basic needs plus or minus whatever special circumstances dictate, -- i. e., the actual costs of raising a child, not a theoretical sum which is not related to economic reality. And those costs must be shared by both parents according to their resources. The leading case on this interpretation of child support statutes is *Smith v. Smith*, 626 Pac. 2d 342 (Ore. 1981).

The problem now causing no end of trouble arose from the seemingly plausible idea that we needed child support guidelines to assist family courts in determining how much it costs to raise a child and in treating like cases in like manner. The theory was fair enough, but justice was frequently a casualty in the implementation, for guidelines were actually devised in some parts of the country to increase child support which went far beyond the actual needs of the children, to promote exploitation of child support obligors, to create economic incentives for divorce, and to create a child support industry. And even where these guidelines have been designed in good faith, they have not infrequently been put together in economic ignorance. The difficulties vary from one State to another. Some States have better guidelines than others. And some guidelines not only have relatively fewer flaws, but are easier to repair.

B. The Constitutional Standard of Child Support: In order to provide a cogent analysis, we must restate constitutional principles against which the soundness of a particular set of guidelines must be measured. For the conventional standard of child support is also reinforced by principles of fundamental law, which produce a constitutional standard of child support.

Procreation is a joint act and a joint responsibility. Men and women are equal before the law under the guarantee of equal protection in the United States Constitution, particularly as impacted by the 19th Amendment. See, e. g., *Adkins v. Children's Hospital*, 261 U. S. 525 at 552-553 (1923), and *Frontiero v. Richardson*, 411 U. S. 677 at 685 (1973). Particularization of this principle has been necessary especially in the field of family law. In the wake of *Frontiero*, it was held fairly early that there may be no legal preference or presumption in favor of father or mother on the question of child custody, as held in *State ex rel. Watts v. Watts*, 350 N. Y. S. 2d 285 (N. Y. City Fam. Ct. 1975), and *Commonwealth ex rel. Spriggs v. Carlson*, 368 Atl. 2d 635 (Pa. 1977). The leading case on equal protection in the field of family law is *Orr v. Orr*, 440 U. S. 268 (1979), in which it was held that a statute allowing alimony to women, but not to men, is per se unconstitutional, and there are clear suggestions in the opinion of the court (440 U. S. at 273) that the same principle applies to child support. In *Conway v. Dana*, 318 Atl. 2d 324 (Pa. 1974), it was in any event held that both father and mother have an equal duty to pay child support in proportion to their respective means.

The constitutional standard of child support places further emphasis on the proper amount to be awarded. The State's interest is limited to assuring that the reasonable needs of the child are met, in light of his or her social, cultural, economic, or other circumstances. Child support may not be used as a pretext for tax-free alimony or transfer of wealth or social engineering by public authority. The amount ordered may be increased somewhat if the parents of the child enjoy greater wealth, but may not be measured by an arbitrary percentage of the income of either or both parents when such percentage exceeds the reasonable needs of the child. Married parents may not be ordered to use a certain percentage of their income in supporting their children, so long as reasonable needs are met, and the same is true of parents divorced. See, e. g., *Moylan v. Moylan*, 384 N. W. 2d 859 at 866 (Minn. 1984), and *Melzer v. Witzberger*, 480 Atl. 2d 991 at 995 (Pa. 1984). This inherent limit on child support follows from an acknowledged domain of family privacy which is protected by the 14th Amendment, and shield reasonable discretion of parents in raising their children, free of governmental intrusion or regulation, whether the parents are married, single, or divorced. The leading cases on point are *Pierce v.*

Society of Sisters, 268 U. S. 510 (1925); *Wisconsin v. Yoder*, 406 U. S. 205 (1972); and *Troxel v. Granville*, 530 U. S. 57 (2000).

C. Statutory guidelines adopted by the several States: In order to capture conditional grants of Congress to promote child support collections under the Federal Family Support Act of 1988 (42 United States Code, Sections 654, 666, and 667, implemented by 45 Code of Federal Regulations, Sections 302.33, 302.55, and 302.56), all States of the Union adopted guidelines for the determination of child support for all obligators.

For a moment let us consider the nature of such guidelines. The most striking feature is that they amount to *statutory presumptions* which ordain that, given certain basic facts about the resources of the parents and the number of children, a certain amount of child support suggested by the guidelines is presumed by law to be the correct amount that should be paid by one parent to the other. The amount suggested can be rebutted by the evidence introduced in a particular case. But in the absence of such evidence, the amount presumed is the amount ordered.

In any event, these guidelines must conform to a significant body of jurisprudence on the characteristics of *statutory presumptions*, expounded in the twin cases of *Manley v. Georgia*, 279 U. S. 1 at 6 (1920), and *Western & Atlantic R. R. v. Henderson*, 279 U. S. 629 at 642-644 (1929). The underlying principle in both cases was thus stated in identical language: "*A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the 14th Amendment.*"

In any event, two rules have been shaped to govern *statutory presumptions* both in criminal prosecutions and in civil litigation. The first rule is that there must be a reasonable relationship between the basic facts and the presumed facts. See *Leary v. United States*, 395 U. S. 6 at 32-37 (1969). The second rule is that a *statutory presumption* must always be fully and fairly rebuttable. See *Vlandis v. Kline*, 412 U. S. 441 at 446-447 (1973). If a presumption is ill-founded, it is to that extent unconstitutional even if rebuttable. If a presumption is irrebuttable to correct injustice in particular cases, it remains to that extent unconstitutional even if otherwise reasonable as a generality.

And child support guidelines, as *statutory presumptions*, must always be read in conformity with guarantees of equal protection, family privacy, and due process in the 14th Amendment, and more generally in keeping with the principle that, if legislation can be fairly read in different ways, one constitutionally sound and the other constitutionally invalid or dubious, the constitutionally sound interpretation should be adopted, notwithstanding legislative history and all other considerations. See, e. g., *Jones & Laughlin Steel Corporation v. National Labor Relations Board*, 301 U. S. 1 at 30 (1937).

It will, therefore, be necessary to review the key provisions of the Federal Family Support Act of 1988.

Two provisions are of key importance:

The first is 42 United States Code, Section 667, which reads,

"(a) Each States, as a condition for having its State plan approved under this part, must establish guidelines for child support award amounts within the State. The guidelines may be established by law or by judicial or administrative action, and shall be reviewed at least once every four years to ensure that their application results in the determination of appropriate award amounts.

"(b)(1) The guidelines established pursuant to subsection (a) of this section shall be available to all judges or other officials who have the power to determine child support awards within the State.

"(b)(2) There shall be a rebuttable presumption, in any judicial proceeding 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 a specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under the criteria established by the State, shall be sufficient to rebut the presumption in that case."

The other is 45 Code of Federal Regulations, Section 302.56(h), which reads as follows: "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 must be used in the State's review of the guidelines to ensure that deviations are limited."

Read in light of the guarantees of equal protection and family privacy the United States Constitution, an award is "appropriate" within the meaning of 42 United States Code, Section 667(a), not by meeting a purely subjective standard, but by meeting an objective legal standard which is shaped by conventional definition and constitutional principle, -- the equal duty of both father and mother to supply the reasonable needs of their children in proportion to their respective means.

Again read in light of the guarantee of due process in the 14th Amendment, the Family Support Act of 1988 requires that child support guidelines be well founded in fact, that they be fully rebuttable when individual situations require deviation, and that they be based on correct use of authentic economic data. The importance of correct use of authentic economic data is brought out by the *Federal Register*, Vol. 56, No. 94, May 15, 1991, p. 22348, where it says that "any legitimate view of guidelines would include analysis of case data on the application of the guidelines, as well as analysis of current economic data on costs of raising children."

Contrary to what is commonly assumed, therefore, the Federal Family Support Act of 1988 read in light of conventional standards and constitutional principles does not authorize or countenance the creation of child support guidelines to accomplish the objectives of "public policy" developed by legislators or bureaucrats. All social and political agendas must be set aside, and the entire focus must be upon correct use of authentic economic data to achieve a best generalized estimate of what an obligor's monthly payment should be, based on his or her equal duty to provide for the reasonable needs of the children in proportion to his or her share of the total resources of both parents.