

LEGAL FLAWS IN SENATE BILL 1312,

2003 SESSION OF THE GENERAL ASSEMBLY OF VIRGINIA

For many years there has been a conventional standard of child support in family law, which considers the resources and needs of the child, the father, and the mother. And this standard is faintly indicated but can fairly be read into Section 20-108.1 of the Code of Virginia. This conventional standard has been 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 may dictate. We mean the actual costs of raising a child. 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).

Procreation is a joint act and a joint responsibility. Men and women are equal before the law under the 14th Amendment and other constitutional provisions; therefore, both parents have an equal duty to support their children according to their respective means. And so the conventional statutory standard of child support is also demanded by constitutional principle. The seminal case on the constitutional standard of child support is *Conway v. Dana*, 318 Atl. 2d 324 (Pa. 1974), which in turn was approved in principle by the United States Supreme Court in *Orr v. Orr*, 440 U. S. 268 at 273 (1979).

The constitutional standard puts special emphasis on a proper limit in the 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 be increased somewhat if his or her parents enjoy greater wealth, but cannot be measured by an arbitrary percentage of the income of either or both parents where such percentage exceeds

reasonable needs. Married parents cannot 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 with 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). A number of important decisions of the United States Supreme Court acknowledge a domain of family privacy which is protected by the 14th Amendment, and shields reasonable discretion of parents, whether married, single, separated, or divorced, in raising their children, free of governmental intrusion or regulation. See, e. g., *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).

In the Federal Family Support Act of 1988 (42 United States Code, Sections 654, 666-667, implemented by 45 Code of Federal Regulations, Sections 302.33, 302.55, and 302.56) made available grants to the several States for collection of child support, subject to various conditions, as part of an interaction between Congress and the States of the Union often called “cooperative federalism.” Senate Bill 1312 is an attempt to meet those conditions for the Commonwealth of Virginia, by amending Section 20-108.1 of the Code of Virginia.

It has been generally acknowledged that, in a program of cooperative federalism, if a State enacts legislation to meet conditions laid down by Congress for receipt of federal money, administrative approval of such legislation by the federal government is not conclusive on whether such conditions have actually been met, and, if despite such administrative approval, such legislation fails to meet the statutory requirements of Congress, any citizen adversely affected may seek judicial intervention to strike down such legislation under the supremacy clause of the United States Constitution. This situation prevails especially under the Social Security Act, of which the Federal Family Support Act of 1988 is a part. The procedural prerequisites for invoking federal jurisdiction are more

relaxed for this type of litigation so as to allow a class action to enjoin implementation of state laws that do not conform to the demands of Congress. See, e. g., *King v. Smith*, 392 U. S. 309 (1968); *Rosado v. Wyman*, 397 U. S. 397 (1970); *California Department of Human Resources Development v. Java*, 402 U. S. 121 (1971); and *Townsend v. Swank*, 404 U. S. 282 at 286 (1971).

The Federal Family Support Act of 1988 (42 U. S. C., Section 667) provides that States qualifying for federal money must adopt child support guidelines, assisting the judiciary in determining the proper the amount of child support, and that these guidelines must be rebuttable. The underlying regulations (45 C. F. R., Section 302.56) further require that such guidelines be developed from economic data on the cost of raising children.

The Federal Family Support Act of 1988, like any other statute passed by Congress, must be construed, if at all possible, so as not to violate constitutional provisions, and even to avoid constitutional doubts. Thus, if one construction is constitutionally sound, but another is constitutionally prohibited or dubious, the constitutionally proper interpretation shall be adopted, for Congress is presumed to intend legislation in conformity with constitutional principle. See, e. g., *Jones & Laughlin Steel Corp. v. National Labor Relations Board*, 301 U. S. 1 at 30 (1937).

The Federal Family Support Act of 1988, therefore, is properly read to say that child support guidelines must be rebuttable presumptions which fairly tend to indicate awards based on the equal duty of both father and mother to provide for the reasonable needs of their children on an ability-to-pay basis.

The Federal Family Support Act of 1988 must be read in light of other constitutional principles concerning constitutional presumptions, especially those judicially acknowledged in light of the demand of due process under the 14th Amendment.

A statutory presumption must always be liberally rebuttable so that deviation from or setting aside the presumption is allowed whenever it is shown that the presumed facts do not fairly approximate or conform to the proper legal objective. See, e. g., *Vladnis v. Kline*, 312 U. S. 441 at 445-446 (1973). When, therefore, the Federal Family Support Act of 1988 mandates child support guidelines, the Act must be read to require guidelines that are liberally rebuttable as statutory presumptions, whenever it is shown by fair preponderance of the evidence that the presumed award does not reflect the equal duty of both father and mother to provide for the reasonable needs of their children on an ability-to-pay basis.

And a statutory presumption must not be arbitrary. Even if a statutory presumption is rebuttable, there must still be a reasonable relationship between the basic facts and the presumed facts, otherwise such presumption is null and void. See, e. g., *Morgan v. Georgia*, 279 U. S. 1 at 6 (1929); *Western & Atlantic R. R. v. Henderson*, 279 U. S. 629 at 642-644 (1929); and *Leary v. United States*, 395 U. S. 6 at 32-37 (1969). Therefore, in requiring child support guidelines framed from economic data on the cost of raising children, the Federal Family Support Act of 1988 actually demands that child support guidelines be founded upon, not any use of any economic data, but *correct use of authentic economic data* on the cost of raising children.

In summary, the Federal Family Support Act of 1988, read in conformity with the 14th Amendment, requires the Commonwealth of Virginia to adopt child support guidelines, amounting to statutory presumptions which are liberally rebuttable whenever the fair preponderance of the evidence shows that a presumed award does not reflect the equal duty of father and mother to provide for the reasonable needs of their children on an ability-to-pay basis. Such guidelines must be based upon correct use of authentic economic data on the cost of raising children so that, in any event, such guidelines will not be arbitrary, and the

presumed award will be fairly related to the proper legal objective of child support. Moreover, if guidelines do not meet these requirements, the Commonwealth may be sued in federal court by class action, including all individuals prejudiced. Under 42 United States Code, Sections 1983 and 1988(b), a full battery of legal and equitable remedies will be available to the class action plaintiffs, including an award of all costs in bringing suit and attorneys' fees. Therefore, it behooves the General Assembly of Virginia to make sure that any bill on child support guidelines meets these requirements of the Federal Family Support Act of 1988, construed in light of the United States Constitution.

Unfortunately, Senate File 1312 does not meet these requirements. In order to appreciate why, some straight economic analysis is required. Such analysis has been supplied by R. Mark Rogers, an economist with a consulting firm in Griffin, Georgia, who served with the Federal Reserve Bank of Atlanta for nineteen years. Mr. Rogers is a nationally recognized for his work on the cost of raising children, having published in the *Family Law Quarterly* and under other respectable circumstances. It is possible to develop child support guidelines which meet all the requirements of the Federal Family Support Act of 1988, construed in light of the 14th Amendment. But the guidelines in Senate Bill 1312 do not meet statutory and constitutional muster, because, although rebuttable, they are founded upon false assumptions which are arbitrary and uneconomic. Mr. Rogers has identified these false assumptions. They may be restated as follows:

-- The principal fault is that child costs are reckoned per capita, for housing, transportation, and certain other items for one of two children, and for all items for three or more children. In other words, if the house mortgage is \$700 per month for the home of a single parent, and custody of two children requires renovations, to finance which a second mortgage is needed, thus making the total payment on both mortgages \$900 per month, the additional, marginal, and true cost is \$100 for

each child or \$200 for both per month, not \$300 for each or \$600 for both per month. The guidelines proposed in Senate Bill 1312 assume that child cost is \$600 for both children for month. Not long before the Federal Family Support Act of 1988 was enacted by Congress, the United States Department of Health and Human Services sought advice on child support guidelines, and the economists consulted advised, “Unfortunately, the per capital (average cost) procedure has little merit. The most obvious problem is that it does not really correspond to expenditures on children.” This fact, without more, grossly inflates the presumed award, and makes the guidelines subject to attack in court, because, as statutory presumptions, the basic facts are not fairly related to the proper legal objective of child support, and thus violate both the due process clause of the 14th Amendment and the regulations on the kind of guidelines required under the Federal Family Support Act of 1988;

-- Moreover, the guidelines proposed in Senate Bill 1312 assume that sometimes very substantial child-related tax benefits, amounting to some thousands of dollars be year, are not a resource to the parent enjoying them, and this false assumption gives us guidelines which produce grossly inflated awards, again opening the door to attack in litigation because the basic facts are not reasonably related to the presumed facts. Suppose that child-related tax benefits allotted to the custodial parent amount to \$7000 in a given tax year. That amount is thus available to the custodial parent to pay the cost of raising the children, and the child-related tax benefits are, after all, intended to accomplish exactly that purpose. Such benefits are a resource to the custodial parent, and reduce the amount which the noncustodial parent should pay. The non-custodial parent is entitled to cost offset, otherwise his or her child support payment will be too high as measured by the equal duty of both parents to provide for the reasonable needs of their children on an ability-to-pay basis;

-- The guidelines proposed by Senate Bill 1312 use intact-family data to calculate child support. Divorce often increases the basic self-support costs of the parents. There might be, for example, two rent payments or two mortgage payments for parents divorced, but only one for parents still living together. This change in costs, when it occurs, also tends to alter the proportion of resources available to each parent for support of the children. The reasonable needs of the children must be satisfied in any event; but, when intact-family data are used, the proportion of resources available to each parent is often skewed from economic reality, usually to the disadvantage of the non-custodial parent. It is claimed that these guidelines attempt to make up for this injustice by way of a so-called "second household discount," but in fact, due to arbitrary design of the discount schedule, no adequate discount is available for most obligors. And because of such inappropriate use of intact-family data, not fairly offset by second household discounts, the guidelines proposed by Senate Bill 1312 will often suggest a presumed award that is not fairly related to the proper legal objective of child support; and

-- The guidelines proposed by Senate Bill 1312 are said to assume that non-custodial parents incur costs for 60 to 90 days of parenting time each year, and is given automatic consideration for those expenses; but, in fact, the underlying cost tables assume that the custodial parent incurs all costs of child rearing 100% of the time, which is more often than not untrue, and tends to inflate child support awards significantly beyond what they should be.

Therefore, if Senate Bill 1312 is adopted, the Commonwealth of Virginia may as well plan on prolonged, difficult, and expensive litigation in federal court, which, eventually, will result in a decree adjudging the guidelines proposed null and void, as contrary to the Federal Family Support Act of 1988 construed in light of the 14th Amendment. If that occurs, as seems likely, the consequence will

be a great waste of judicial time and resources, because such a decree will require relitigation of many cases which, but for the guidelines, would have been properly resolved upon consideration of the reasonable needs of the children involved and the ability of parents to pay their fair share of support to meet those needs. And, before such a decree is handed down, non-custodial parents will be ordered to pay excessive child support, causing them to suffer grave injustice and needless hardship.

Senate Bill 1312 is irredeemable, should be tabled, and legislation based on correct use of authentic economic data ought to be attempted.

January 5, 2004

John Remington Graham
of the Minnesota Bar (#3664X)