

Georgia Statute Review Committee Meeting
May 24, 2018
Minutes

Present:

Committee Members:

Judge Shawn LaGrua, Chair
Judge Amanda Baxter
Judge Michael Key, Commission Chair
Judge Emory Palmer
Stephen Harris, DCSS
Judge Lisa Jones

Pat Buonodono, Staff

Elaine Johnson Staff

Invitees:

Jill Travis, Legislative Council

Guests:

Byron Cuthbert, DCSS
Jason Naunas, OAG
Tyler Mashburn, AOC
Laurie Anderson + 2 interns, Atlanta Legal Aid
Adam Medlin (on phone)
William Slear
Ryan Bradley, DCSS
Ashley Sills, DCSS

Minutes from 9/22/2017 meeting – one correction on page 2, 1st paragraph – “supplements” should be “addenda” suggested by Elaine Johnson. Minutes approved as corrected.

Old Business:

Our bill passed – SB 427. Attached to DCSS bill that enacted changes to statute required by Federal Rule.

Elaine, Bruce and Pat have been going around the state doing training about changes to the law in 2017 and 2018, and on the online calculator. Our language is that multiple worksheets are no longer mandatory, but are permissible with a two-year time limit, so that if something is going to change in the foreseeable future, then you can use the multiple worksheets.

Pat sent notice to the “All Judges” list serv, but apparently the list serv doesn’t get much activity. Better to send out through council directors.

Final rule provisions included in the bill: Obligations of court to look into obligor's earnings, income, ability to pay. Court must also consider basic subsistence needs of parents and needs of the child. As to imputed income, where there was no reliable evidence of income, it was previously mandatory to impute income at 40 hours/week at minimum wage. It now says the court "may" impute income, and doesn't say anything about minimum wage or hours per week. More specifics: assets, residence, employment history, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers; record of seeking work and the local job market, the availability of employers willing to hire the parent, prevailing earnings level in the local community. Also, if a parent is incarcerated, the court "shall not assume an ability for earning capacity based on pre-incarceration wages or other previous income, but may be imputed based on income and assets currently available to that parent." Finally, a finding of willful or voluntary unemployment or underemployment shall not be made if the parent is incarcerated.

Previously, Medicaid and PeachCare for Kids could not be used to satisfy the requirement to provide health insurance for the children; now it is allowed. However, the parents may still be ordered to obtain private insurance when it is possible to do so.

NCP's expenses may be considered as a deviation - DHS was encouraging use of nonspecific deviation, but we are advocating and training on use of the low income deviation as this is its very purpose.

Judge Baxter struggles with the questions (B, C, and D on Schedule E of the worksheet), because with these restrictions she is not sure how they should be answered when the amount cannot truly be in the best interest of the child. Stephen Harris responded that the federal narrative behind this is their focus on getting support to the children at the time that it's due rather than as arrears, and they feel that deviations that place a child support amount at the level where the noncustodial parent is likely to pay; that amount as a current, ongoing child support obligation is in the best interest of the child, rather than awaiting payment of arrears which may not happen until the child is emancipated. "Because the kid will actually get the money," said Judge Baxter. She thinks there will be challenges from the language in the worksheet for those who are actually writing that. The Court of Appeals just came out with a case that was remanded because of those 3 questions.

Judge LaGrua asked Jill if we could look at the question to see if there's a way to comply with the statute yet makes the question easier to answer? Judge Baxter says if she has a noncustodial parent who is receiving \$700 in social security and that's their only income for the month, and she sets a \$25 or \$50 child support amount and I have to answer "is it in the best interest of the child?" - I usually respond that at least that child gets something. Judge LaGrua - can we look at the language in the worksheet, and still comply with the statute but make it a little bit easier for judges to honestly answer those questions. Elaine: the language comes directly from the statute. Hasn't been changed because the statute hasn't changed.

Judge Key - philosophically, it's hard to imagine it's in the child's best interest to deviate downward, but in fact it is - if it's the higher amount, dad can't pay, if it's the deviated amount, he can pay. That's better for the child. Judge Baxter - but when it asks if the custodial parent is able to maintain minimally

adequate housing, and I just did a \$25 order - I hate filling it out and then to see the Court of Appeals reverse a superior court judge about those questions.

Judge Key - in practice, most of the divorces we have, the families barely made it with joint income. When we look at financial affidavits, it's clear that both parties are under water trying to make ends meet on their own.

Discussion of the case - it was a higher income, split custody, interstate, trial court didn't explain in the three questions why you did what you did. Judge Baxter said all of her cases were low income. She is happy to share some worksheets so we can discuss how she should answer those questions, given the facts of the case.

Judge Baxter was going to send the case to Judge LaGrua so she could send it to staff to look at. We can look at rewording B, C and D on the worksheet to see if we can do so and keep it in accordance with the statute. This would be a question for Statute Review Committee.

Stephen: SB 427 goes into effect on July 1, except for one provision dealing with the CS annual maintenance fee, which is October 1st.

New Business -

First thing is that Stephen has gotten a promotion, so Byron will replace him on the Committee. I was looking at our sign in sheet; we are always just on the cusp of having a quorum. Our representatives don't come and I don't think that Beth Beskin is officially on this Committee. Judge LaGrua appointed Representative Beskin to the committee.

Stephen - question from DCSS attorney re adoption assistance - should it be counted as income. Basically, adoption assistance consists of payments under Title IVE of the SSA, where a family adopts a child with special needs or developmental disabilities. They are entitled to these monthly adoption payments; it's not a means tested program. The question is whether those payments should be included as income. So if the parents who adopted the child are now divorcing, and maybe the CP is going to be receiving the entire adoption assistance benefit, which can amount to several hundred dollars per month, should they be required to list it as income for purposes of calculating child support. 19-6-15(f)(2) deals with exclusions from income, and this does not fall into any of the designated categories since it's not means tested or foster care payments, etc. So the question came to DCSS as to what to do with them. They spoke with the AG's office about it, and found a case in AZ, Hamblin v. Hamblin, AZ Court of Appeals, 203 AZ 342 (2002) - court makes very well reasoned arguments both for and against whether these should be counted as income for child support. That court basically came to three conclusions: that the subsidy is intended as a direct assistance to an adopted child with special needs and therefore should not be considered in determining support between the divorcing parents; the court reasoned that the subsidy should be treated as money due to the child similar to how foster care payments are treated; and the difference between these payments and social security disability payments, which are similar because those are payments that go to the child but the NCP is credited as if they are paying that; the disability payments are meant to replace the NCP's lost income due to the

disability, and this is not what adoption assistance does. Stephen believes these are good reasons not to consider the adoption assistance payments as income; however, our statute is clear that everything is income that is not specifically excluded, so the proposal is to add adoption assistance payments as an exclusion under 19-6-15(f)(2). Suggests adding a line: "Adoption assistance payments made pursuant to Title IVE of the Social Security Act" or something along those lines.

Judge Baxter - Sometimes people get the adoption assistance for a lot of years for multiple children, and it's a lot of money. Judge LaGrua - I'm recently aware of the rules or the statute say "based on means." Agency is not basing it on means, they are giving it in every case. Jill said, in this exclusion there are four categories, and one is means tested - but foster care doesn't come under means tested. Stephen - the adoption assistance program is not means tested. It's specifically not allowed to be under IVE.

Judge Baxter just had a case where there was adoption assistance, and it was not means tested and the children did not have special needs. This is a lot of money - it's a windfall for the custodial parent in certain situations. Judge Key - there's more than one category; special needs children are entitled, but so are children of a certain age, minorities, sibling groups. I understand when it's a special needs child and it costs more to meet that child's needs. Discussion of adding it as a specific deviation. Need more information from DFCS. Judge Jones said we are going to create a case by case legal argument re whether special needs exist.

Pat: The next thing on the agenda - excluding alimony between parents from the guidelines now that alimony will no longer have tax benefits or consequences. I don't know that it's appropriate to exclude alimony because one party is still getting more income and one party is now paying out one of their income. What we need to do is define what gets handled which way. If it's between the parties to this case, then it should be handled in one way, perhaps as income/adjustment to income/deviation; if it's alimony from a previous marriage it should be included as income if received and as a deviation if paid. I think we need to specify because of the jury charge problem that Judge Leonard brought to us. Judge Key - it's going to be interesting how this plays out in the courtroom with Sup. Court judges setting alimony in cases - you may expect to see lower or fewer alimony awards. Judge LaGrua asked if we should let it play out and see what happens? Judge Key believes the factors for making the award won't change, but the amount will be lower. Pat - should we clarify the statute so that when they're trying to write a jury instruction about alimony, they know whether they're talking about alimony between these two parties or alimony to or from a former spouse? These need to be more clearly defined if they can't write a jury charge based on what our statute currently says. And that's what judge Leonard, who is on the Jury Charge Committee, has asked us to consider. Judge Key - let's ask Katie Connell and her friends on the FLS.

"Child Support Update from GA Family Law Reform"? Wayne Slear (visitor) provided this report and spoke to the Committee about issues of concern to him and his group. Concerns: makeup of the Commission, which is completely up to the Governor; Adam Medlin (on phone) participated. Jason Naunas responded. Drawn out conversation. Does the statute serve its intended purpose? Judge Key suggested they speak with their legislators. Parenting time adjustment or formula?

Do we want to gather a task group or subcommittee? In the initial bill, back in 2005, there was a provision, and a change was made. Difficulty was in determining what constitutes a day. DCSS is not allowed to consider parenting time; if included in the order, it could become a problem in enforcement. Does Committee want to look at this? Suggestion to send to Shannon Weathers to seek input from Judges. Per Judge Key, it is one of the duties of the Commission to study.

Per Chair, Judge LaGrua, we will have a public comments time at the end of the meeting.

Two remaining items from report. Child care expenses v. the child dependent care tax credit: Child care expenses may now be taken out of the worksheet, so we don't believe that's something that is really as pressing; it's up to the parties and the court, but work related child care doesn't have to be included in the worksheet anymore so it is less of an issue.

Duration of child support: suggestion was it stop at age 18 and not continue, because according to this report there can be a situation where a child is kept in school by the custodial parent for purposes of continuing child support for an extra year. However, Pat has spoken to some folks on some school boards, and several people involved in school systems and they said they lose federal funding. If they have a child who is passing, then they pass and they're done. If they continue on, it's because they need to repeat their senior year.

Pat added one thing at G - right now, the discretionary language about up to age 20 if still enrolled in secondary school? Should we make that the law in every case? It's hard for employers to know when they can stop child support withholding. Because they have to figure out if it stops when the child is 18 or if it graduates when the child is 20. Judge LaGrua asked if this would create a constitutional issue. Are you differentiating - if you make it mandatory language rather than discretionary - legally your duty as a parent is over. All in agreement that it is likely not constitutional, or violates law.

Next item: Pat - should grants and scholarships be listed as exempt from income for purposes of calculating child support? This came from a call I received from a parent who is receiving a scholarship, and her soon to be ex-husband was insisting it be included as income. Judge Baxter said the aforementioned appellate case addresses this issue and she will send me the info. Tabled until we can look at case.

Pat - Do we want to say anything in the statute about the Child Support Addendum? It's different in every county, we get questions about how to fill it out, but it doesn't have anything to do with our statute. Not required by statute or superior court rule, except in domestic violence cases. I understand why judges wanted the supplement when we first went to the shared income model. The statute says everything has to be in the order, but instead they are doing the addendum and incorporating that. It would make more sense to just have everything in the order. Elaine stated that they saw a lot of divorce decrees that did not name the children in the decree, settlement agreement, or addendum. They made reference to the child support worksheet, which was the only place where the children were identified. Judge Palmer stated that when cases are settled, he gets a lot of forms; sometimes they do an addendum, they include a parenting plan. He signs it so he doesn't have to redo it himself. If he does the order he does not do an addendum. It's more of an education issue. Should we ask to our judges,

get their opinions, on whether they want to keep the addendum? Include with what we send Shannon. It was developed for DV cases and spread like wildfire, but not every county uses them.

IDO statute keeps coming back to us because employers will not terminate withholding without an order. Will the committee consider a provision of the statute that says an employer may terminate withholding of current support with evidence of the child's age and/or graduation from high school, and exclude DCSS cases from that? Judge LaGrua - companies will still want an order. What if, when the case is within two years of a child aging out, a judge will sign an order with a date certain? If it's not going to happen, the CP would have to modify anyway. Sign an order terminating withholding. Per Judge Key - anticipate date of graduation and when child support will end - make that the last month of child support, and sign an order when child support order is issued terminating income withholding. It only stops income withholding, not the child support obligation. A CP can present another IDO to presiding judge at any time. Judge Key said when this is going to happen within 2 years. I asked if that is going to be a limitation. Judge LaGrua - when you have a 14 year old and you know that at age 18, they're going to graduate from high school, make the withholding terminate one month after. So say it would end June 30th of that year. And they can go back to court if things don't go that way. Order should say "unless otherwise modified by this court." Lawyers can do this now, but we're going to have to train them. Companies won't understand, but legal departments will. Ask FLS to instruct attorneys to submit these orders to judges for signature at the same time as the IDO. Then the NCP can give the order to employers at the appropriate time. Elaine and Pat will be attending an employers symposium with DCSS, and will raise this issue there.

Public Comments:

(Limit to 2 minutes)

Wayne Slear - talking about a case of a child with special needs still attending school. Pat advised child may remain in school until age 21, even if they have met the requirements to graduate. Judge Baxter said the child may be allowed to walk with the graduates, but doesn't get a diploma because they haven't yet met the requirements - IEP accommodates the child's abilities and has to allow the child to remain in school and that child will never receive a "general ed" diploma. These are students with significant disabilities. This pertains to one specific case, doesn't mean there aren't more.

No other new business.

Scheduled next meetings for 9/21/2018 and 11/16/18.