

**GUIDELINE CHILD SUPPORT AND DEVIATION
THEREFROM**

Presented: Timothy M. Daw

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Schiller, DuCanto & Fleck

Chicago
200 North La Salle Street
30th Floor
Chicago, IL. 60601

Wheaton
311 S. County Farm Rd.
Suite G
Wheaton, IL. 60187

Lake Forest
207 East Westminister
Suite 300
Lake Forest, IL 60045

Introduction

Prior to 1981, when Charles J. Fleck, Esq. was the presiding Judge of the Domestic Relations Division of Cook County, concern arose as to the inconsistency of the Judges in setting child support. In an effort to promote consistency, Judge Fleck developed guidelines to be used by the Judges in the division. These were in fact mere "guidelines" to be considered in normal cases specifically for what was then considered to middle income America (the vast majority of the cases within the system).

There was some concern that the rote application of these guidelines would remove from the judiciary its ability to fashion the appropriate relief in exercising its considerable discretion. These guidelines became criticized for this reason.

However, the need for consistency eventually won the day. With minor exceptions, these guidelines were adopted into law and over the evolutionary process of the law were the predecessors to the current guidelines codified in 750 ILCS 5/505. The case of *Boris v. Blaisdell*, 142 Ill.App.3d 1034, 1038-40 Ill.Dec. 186, 189-90 492 N.E2d 622, 625 (1st Dist. 1986) explains the legislative history. Under the statute which has also evolved, a court is required to determine what guideline support would be. 750 ILCS 5/505 (a)(1), mandates the use of the guidelines and 505(a)(2) provides the court the ability to deviate only if there is a specific finding that the deviation is appropriate.

Unlike the informal guidelines utilized in Cook County prior of 1982, the current guidelines are mandatory subject to possible deviation. The considerations for deviation are broad and in the final analysis provide considerable discretion provided (1) the application of the guideline amount is determined; and (2) of deviation is found appropriate; and (3) the basis for such deviation is clearly stated by the Court.

The starting place is therefore the statute. The relevant portions for purposes of this discussion of 750 ILCS 5/505 are as follows:

Statute

“(a) In a proceeding for dissolution of marriage, legal separation, declaration of invalidity of marriage, a proceeding for child support following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, a proceeding for modification of a previous order for child support under Section 510 of this Act, or any proceeding authorized under Section

501 or 601 of this Act, the court may order either or both parents owing a duty of support to a child of the marriage to pay an amount reasonable and necessary for his support, without regard to marital misconduct. The duty of support owed to a child includes the obligation to provide for the reasonable and necessary physical, mental and emotional health needs of the child. For purposes of this Section, the term "child" shall include any child under age 18 and any child under age 19 who is still attending high school.

(1) The Court shall determine the minimum amount of support by using the following guidelines:

Number of Children	Percent of Supporting Party's Net Income
1	20%
2	28%
3	32%
4	40%
5	45%
6 or more	50%

(2) The above guidelines shall be applied in each case unless the court makes a finding that application of the guidelines would be inappropriate, after considering the best interests of the child in light of evidence including but not limited to one or more of the following relevant factors:

- (a) the financial resources and needs of the child;
- (b) the financial resources and needs of the custodial parent;
- (c) the standard of living the child would have enjoyed had the marriage not been dissolved;
- (d) the physical and emotional condition of the child, and his educational needs; and
- (e) the financial resources and needs of the non-custodial parent.

If the court deviates from the guidelines, the court's finding shall state the amount of support that would have been required under the guidelines, if determinable. The court shall include the reason or reasons for the variance from the guidelines.

(3) "Net income" is defined as the total of all income from all sources, minus the following deductions:

- (a) Federal income tax (properly calculated withholding or estimated payments);
- (b) State income tax (properly calculated withholding or estimated payments);
- (c) Social Security (FICA payments);
- (d) Mandatory retirement contributions required by law or as a condition of employment;

(e) Union dues;
(f) Dependent and individual health/hospitalization insurance premiums;
(g) Prior obligations of support or maintenance actually paid pursuant to a court order;
(h) Expenditures for repayment of debts that represent reasonable and necessary expenses for the production of income, medical expenditures necessary to preserve life or health, reasonable expenditures for the benefit of the child and the other parent, exclusive of gifts. The court shall reduce net income in determining the minimum amount of support to be ordered only for the period that such payments are due and shall enter an order containing provisions for its self-executing modification upon termination of such payment period.

* * *

(4) If the net income cannot be determined because of default or any other reason, the court shall order support in an amount considered reasonable in the particular case. The final order in all cases shall state the support level in dollar amounts. However, if the court finds that the child support amount cannot be expressed exclusively as a dollar amount because all or a portion of the payor's net income is uncertain as to source, time of payment, or amount, the court may order a percentage amount of support in addition to a specific dollar amount and enter such other orders as may be necessary to determine and enforce, on a timely basis, the applicable support ordered.

(5) If (i) the non-custodial parent was properly served with a request for discovery of financial information relating to the non-custodial parent's ability to provide child support, (ii) the non-custodial parent failed to comply with the request, despite having been ordered to do so by the court, and (iii) the non-custodial parent is not present at the hearing to determine support despite having received proper notice, then any relevant financial information concerning the non-custodial parent's ability to provide child support that was obtained pursuant to subpoena and proper notice shall be admitted into evidence without the need to establish any further foundation for its admission.”

Because of the discretion allowed in the statute, case law interpreting the statute is still very important in determining whether deviation is appropriate.

Case law

The obligation to provide support for a child is a joint and several obligation of both the father and the mother. *In Re The Marriage of Schuster*, 224 Ill.App.3d 958, 974, 167 Ill.Dec.

73, 85, 586 N.E. 2d 12345, 1357 (2nd Dist. 1992); *see also In Re the Marriage of Sweet*, 316 Ill.App.3d 101, 108, 249 Ill.Dec. 212, 218, 735 N.E.2d 1037, 1043 (2nd Dist. 2000); *In Re The Marriage of Singletary*, 293 Ill.App.3d 25, 38, 227 Ill.Dec. 598, 607, 687 N.E. 2d 1080, 1089 (1st Dist. 1997); *In Re The Marriage of Rogliano*, 198 Ill.App. 3d 409, 413, 144 Ill.Dec. 595, 601, 555 N.E.2d 1114, 1120 (5th Dist. 1990). One of the first important decisions in the development of existing law was *Bush v. Turner*, 191 Ill.App.3d 249, 138 Ill.Dec. 423, 547 N.E. 2d 590 (4th Dist. 1989). In the case, the parents were both physicians with one (1) four (4) year old child. While the guidelines were used, the Appellate Court in reversing the trial court the Appellate Court noted:

“However, a reasonable basis exists where both parties have more than enough income to provide for a child, and an award of 20% of the non-custodial parent’s income exceeds the bounds of anything the child can reasonably need or desire. Certainly, there will be instances where high child support figures will be warranted...The Act was not intended to create windfalls but, rather, adequate support payments for the upbringing of the children...”

Id. at 260-61, 138 Ill.Dec. at 429-30, 547 N.E. 2d at 596-97.

In determining child support, the “...utility of the statutory guidelines decreases as incomes of the parties increase.” *Department of Public Air Ex. Rel. Nale v. Nale*, 294 Ill.App.3d 747, 754. 229 Ill.Dec. 5, 10, 690 N.E.2d 1052, 1057 (4th Dist. 1998). Indeed, in the seminal case of *In Re The Marriage of Scafuri*, 203 Ill.App.3d 385, 149 Ill.Dec 124, 561 N.E.2d 402 (2nd Dist. 1990), the Appellate Court in the Second District specifically addressed this issue:

“One commentator has expressed the view that the support schedules contained in the statute have less utility as the net income of the parties increases because the schedules are premised upon percentages related to average child-rearing expenses. (See K. Levin, *The Use (and Abuse) of Child Support Schedules in Illinois*, 71 Ill.B.J. 314 (1983).) We agree with this assessment. When dealing with above average incomes, the specific facts of the case become more critical in determining whether the guidelines should be adhered to.

* * *

...While we cannot be certain from this passage that the court intended a portion of the child support to be ersatz maintenance for Pamela, we note that any such practice would be improper Child Support is for the support of the children, and maintenance is for the support of the spouse." *Id.* at 392-93, 149 Ill.Dec. at 128-29, 561 N.E.2d at 406-07.

Child support is not intended to provide the child with an extravagant lifestyle (*In Re The Marriage of Harmon*, 210 Ill.App.3d 92, 97, 154 Ill.Dec. 727, 730, 568 N.E.2d 948, 951 (2nd Dist. 1991)) or a "windfall" to the recipient parent. *Department of Public Air Ex. Rel. Nale v. Nale*, 294 Ill.App.3d 747, 754, 229 Ill.Dec. 5, 10, 690 N.E.2d 1052, 1057 (4th Dist. 1998); *In Re The Marriage of Singleteary*, 293 Ill.App.3d 25, 38, 227 Ill.Dec. 598, 607, 687 N.E.2d 1080, 1089 (1st Dist. 1997); *In Re the Marriage of Charles*, 284 Ill.App.3d 339, 347, 219 Ill.Dec. 742, 748, 672 N.E.2d 57, 63 (4th Dist. 1996); and *In Re the Marriage of Lee*, 246 Ill.App.3d 628, 644, 186 Ill.Dec. 257, 269, 615 N.E.2d 1314, 1326 (4th Dist. 1993).

In the recent case of *In Re Keon C*, 344 Ill.App.3d 1137, 279 Ill.Dec. 674, 800 N.E. 2d 1257 (4th Dist. 2003) has been argued to stand for the proposition that when dealing with high wage earners, the application of the guidelines is appropriate. Clearly the court statutorily must consider what the guideline support would be and if requested, then consider deviation. In *Keon C.*, a paternity action involving a professional athlete, the father, mother and child lived together for a period of time. When support was set in fact the trial court deviated downwards from guidelines ordering \$8,500 per month in child support. *Id.* at 1143, 279 Ill.Dec. at 679-80, 800 N.E. 2d at 1262-63. The decision to deviate downward was found to not be an abuse of discretion. *Id.* at 1146, 279 Ill.Dec. at 681, 800 N.E.2d at 1264. Support was not guideline support as is frequently agreed.

Child support is not, however, limited to the shown needs of a child or the children. *Lee* at 643, 186 Ill.Dec. at 269, 615 N.E.2d at 1326; *VanKampen* at 769, 124 Ill.Dec. at 7, 612 N.E.2d at 883; *Singleteary* at 36, 227 Ill.Dec. at 606, 687 N.E.2d at 1088; *Seafuri* at 39, 149 Ill.Dec. at 128, 561 N.E.2d at 406.

If either party is seeking deviation from the guidelines, it is the burden upon the party seeking deviation to provide the necessary proof warranting deviation. *Rogliano* at 411, 144 Ill.Dec. at 599, 555 N.E. 2d at 1118; *VanKampen* at 169, 184 Ill.Dec. at 8, 612 N.E. 2d at 804; *Harmon* at 96, 154 Ill.Dec. at 730, 568 N.E. 2d at 951. Pursuant to the statute, the failure of the Court to specify a reason for deviation is reversible (750 ILCS 5/505(a)(2)) (*Charles* at 347, 219 Ill.Dec. at 748, 672 N.E.2d at 63).

Specific Topics

1. Unemployment

When dealing with unemployment, the majority of the reported cases involve modification pleadings. The principals involved also apply pre-decree. One of the core issues is whether the alleged change in employment (unemployment) is voluntary or fortuitous (involuntary). Prior to the enactment of the Illinois Marriage and Dissolution of Marriage Act, support was modifiable "...as shall appear reasonable and necessary." (Ill.Rev.Stat. 1975, ch. 40, par. 19). While not explicitly part of the statute, the common law interpretation of this statute drew a distinction between voluntary acts causing the alleged necessity for modification verses involuntary or fortuitous circumstances allegedly warranting such relief. A voluntary act generally resulted in a refusal by the Court to allow for modification. *Shellene v. Shellene*, 52 Ill.App.3d 889, 896-91, 10 Ill.Dec. 667, 668, 368 N.E.2d 153, 154 (2nd Dist. 1977) citing *Blowitz*

v. Blowitz (1966), 75 Ill.App.2d 386, 391, 211 N.E.2d 160, 163; *Boman v. Bowman* (1973), 11 Ill.App.3d 719, 298 N.E.2d 339).

The difference pre and post decree is that post decree modification proceedings involve a two (2) stage process. The first stage involves a determination as to whether a “substantial change in circumstances” has occurred warranting modification pursuant to 750 ILCS 5/510. Only if the “substantial change in circumstances” is found to exist, is the Court then empowered to modify support applying 750 ILCS 5/505 *de novo*.

Yet, while 750 ILCS 5/510 appears to be different from a pre-decree determination of child support involving unemployment or under-employment, the considerations and the law are strikingly similar. The key cases in this area are *In Re The Marriage of Schuster*, 224 Ill.App.3d 958, 167 Ill.Dec. 73, 224 Ill.App.3d 958 (2nd Dist. 1992) and *In Re The Marriage of Rogliano*, 198 Ill.App.3d 404, 144 Ill.Dec. 595, 555 N.E.2d 1114 (5th Dist. 1990). In *Rogliano*, the non-custodial parent was a physician who voluntarily left a medical practice because of alleged dissatisfaction in the operation of the practice. This also coincided with his spouse’s filing for divorce. At the time of the issuance of the temporary order of support including child support, the physician remained unemployed allegedly because of a non-compete agreement with the prior medical practice. Yet, without income, the physician continued to have and maintain a lifestyle. With little or no income, the court still imposed a child support obligation. The physician appealed the entry of the temporary order as well as the final order when he was employed. The Appellate Court affirmed the trial Court’s temporary order focusing on the physician’s use of his estate and own expenses as opposed to his spouses’ lack of income and inability to have a comparable life style. *Rogliano* at 410-411, 144 Ill.Dec. at 598-00, 555 N.E.2d at 1117-18.

In the *Schuster* case, the non-custodial parent prior to the divorce had a degree and worked as an engineer, had a law degree and had become self-employed as a trader by the agreement of the parties. The custodial parent had been the primary wage earner. As a result of years of little or no income from the non-custodial parent as well as additional marital issues, the custodial parent filed for divorce. At the time of trial, the non-custodial parent sought maintenance and to be relieved of any child support obligation. The trial court denied the maintenance claim and instead awarded a disproportional division of the marital property. The Appellate Court affirmed noting that “self-imposed” poverty cannot be allowed to serve as the basis of a claim of maintenance. *Schuster* at 970, 167 Ill.Dec. at 82, 586 N.E.2d at 1354. As it related to child support, the trial court imputed \$70,000 per year to the non-custodial parent as income based upon his historic earnings when he did work during the marriage. Because the parties’ initially agreed to the non-custodial parent’s decision to become a trader which resulted in his not earning any significant income, his voluntary decision was “in good faith”. In examining the “good faith” issue, the court recognized that the test of “good faith” under the law was whether a person voluntarily changing his or her employment being “prompted by a desire to evade financial responsibility for supporting the children...” *Schuster* at 973, 167 Ill.Dec. at 84, 586 N.E.2d at 1356. Because the career change was at least initially agreed, the Appellate Court found that it was in “good faith” and reversed and remanded the child support issue based upon the imputation of income, *Schuster* at 974, 167 Ill.Dec. at 84, 586 N.E.2d at 1356. However, the Appellate Court rejected the non-custodial parent’s claim to be alleviated from any child support obligation. *Schuster* at 975, 167 Ill.Dec. at 85, 586, N.E.2d at 1357. The Appellate Court emphasized that both parents had an obligation to provide support and that the non-custodial parent “...was neither unemployed nor unemployable and fully capable of

contributing to the support of his children.” *Id.* The child support issue was therefore remanded. The focus was income earning ability as opposed to actual income earned or the lack thereof even if the reduction in income was “in good faith”. This philosophy of focusing on “earning ability” verses “actual earnings” even if the change in income is voluntary and “in good faith” also applies to modification proceedings. In *Re The Marriage of Adams* 348 Ill.App.3d 340, 284 Ill.Dec. 124, 809 N.E.2d 246 (3rd Dist. 2004), the non-custodial parent sought modification of child support based upon his unemployment. The Appellate Court did not focus on whether the unemployment was “in good faith”. Based upon the non-custodial parent’s prior employment which he left for greater opportunities abroad (where his girl friend lived), the Appellate Court affirmed the trial Court’s increase in support based upon income earnings ability “...based upon the level commensurate with the earning potential...” *Adams* at 344, 284 Ill.Dec. at 127, 809 N.E.2d at 249. In *Re The Marriage of Van Ness*, 136 Ill.App.3d 185, 90 Ill.Dec. 766, 482 N.E.2d 1049 (4th Dist. 1985) the non-custodial parent was a seasonal worker and had periods of unemployment. The Appellate Court affirmed the trial court’s child support award based upon ability. *Van Ness* at 190, 70 Ill.Dec. at 769, 482 N.E.2d at 1052. In *Re The Marriage of Maczko*, 263 Ill.App.3d 991, 201 Ill.Dec. 127, 636 N.E.2d 559 (1st Dist. 1992) the non-custodial parent’s voluntary change of employment leading to a decrease in income was rejected by the trial court as being not “in good faith” and child support was ordered based upon historic income. The non-custodial parent asserted medical reasons for his voluntary action. No contrary evidence was submitted. The Appellate Court reversed and remanded ordering the trial court to “...calculate the amount of child support (based on current income), not his previous amount of income”. *Maczko* at 995, 201 Ill.Dec. at 131, 636 N.E.2d at 563. A “good faith” voluntary change was also found to exist in *In Re the Marriage of Stone*, 155 Ill.App.3d 62, 107

Ill.Dec. 747, 507 N.E.2d 900 (4th Dist. 1987) allowing for child support based on current income verses historic higher income. *Stone* at 77, 107 Ill.Dec. at 756, 507 N.E.2d at 909.

As in pre-decree cases as highlighted above, in post-decree modification proceedings voluntary reduction in income may serve as a basis for the modification if the voluntary act or actions are in “good faith”. *In Re The Marriage of Sweet* at 106, 249 Ill.Dec. at 217, 735 N.E.2d at 1042; *In Re The Marriage of Dall*, 212 Ill.App.3d 85, 95, 155 Ill.Dec. 520, 526, 569 N.E.2d 1131, 1137 (5th Dist. 1991); *In Re The Marriage of Stephenson*, 121 Ill.App.3d 698, 700, 701, 77 Ill.Dec. 142, 144 460 N.E.2d 1, 3 (5th Dist. 1984); *In Re The Marriage of Imlay*, 251 Ill.App.3d 138, 142, 190 Ill.Dec. 539, 542, 621 N.E. 992, 994 (4th Dist. 1993); *In Re The Marriage of Barnard*, 283 Ill.App.3d 366, 369, 218 Ill.Dec. 583, 586, 669 N.E.2d 726, 729 (4th Dist. 1996). Again, the primary focus of the Court in evaluating “good faith” is the intent of the payor and whether he or she is motivated to evade his or her support responsibilities.

Whether the circumstances are truly voluntary or involuntary are a matter of fact as opposed to a label. In the case of *In Re The Marriage of Barnard*, 283 Ill.App.3d 366, 218 N.E.2d 583, 669 N.E.2d 726 (4th Dist. 1996), the former husband resigned from his law firm and started his own law practice as a result of the actions of his former spouse and her new husband. While the resignation was technically voluntary, the Court found the circumstance warranted a determination that it was involuntary:

“(The former spouse) places great emphasis on the distinction between “voluntary” and “involuntary” change of employment. However, these labels can be deceiving and are not always determinative as to whether one acted in good faith.”¹

In the case of *In Re The Marriage of Imlay*, 251 Ill.App.3d 138, 190 Ill.Dec. 539, 621 N.E.2d 539 (4th Dist. 1993). The issue was the former husband's request to modify the provisions requiring him to contribute to the payment of college educational expenses. The former husband's position was terminated because he received a DUI which, in turn, resulted in his inability to perform his job. The trial court found and the Appellate Court affirmed that because his conduct "...caused his termination...", this was not the basis for modification; his circumstances were deemed "voluntary". *Imlay* at 142, 190 Ill.Dec. at 541, 621 N.E.2d at 994.

2. Unreported Income

"Income" for purposes of child support determination (750 ILCS 5/505) is not synonymous with income for Internal Revenue Service purposes. *In Re The Marriage of Rogers*, 213 Ill.2d 129, 137, 289 Ill.Dec. 610, 614, 820 N.E.2d 386, 390 (2004) (loans from parents which are not repaid but are used to pay expenses qualified as "income" for inclusion in child support). At the same time funds required to be disclosed which are not actually received or used can be excluded from "income" for child support purposes. *In Re The Marriage of Freesen*, 275 Ill.App.3d 97, 104, 211 Ill.Dec. 761, 766, 655 N.E.2d 1144, 1149 (passive income is not to be included in child support calculation); *In Re The Marriage of Harmon*, 210 Ill.App.3d 92, 96, 154 Ill.Dec. 727, 729-30, 568 N.E.2d 948, 950-51 (2nd Dist. 1991). The Court's are increasingly looking at cash from (what someone uses to pay their expenses) as opposed to what is properly defined as "income" for IRS purposes.

The emerging focus on "cash flow" is not unique to divorce. The focus on "cash flow" and "lifestyle" are common inquiries for the IRS in cases being reviewed for possible under-declared or improperly declared income. The questions become two fold: (1) how much cash flow is being expended versus what is being declared; and/or (2) how are the parties living versus

