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## Freeing custody issues from finances

In last month's Modern Family column, Karen Pinkert-Lieb wrote Aug. 6 about the recent decision allowing non-custodial parents to get child support. Before that decision, non-custodial parents just assumed they would be paying, rather than receiving, child support.

As we see increased litigation in trial courts resulting from this decision and as we face the prospect of dealing with a new maintenance statute that will have effects on child support calculations, it reminded me of the custody fights waged in part because possession of children equates with either receiving or not paying child support. This means that practitioners who want to deliver value to clients in the form of keeping litigation limited to issues that truly require, it needs to be more creative and help clients be more open to other solutions.

While courts are charged with adjudicating matters of child custody independent of matters of child support, that principal is seldom the reality in litigated cases. Although we have child support guidelines courts are bound to use to calculate a figure, nothing in those guidelines gives courts guidance on how to, or whether to make adjustments when parents share residential time equally or close to equally.

There is precedent stating that child support is not limited to the children's direct expenses, like clothing, grooming and activities, but there is a dearth of decisional law to guide courts on how indirect costs such as operating a household are properly allocated to children in deciding child support.

If a non-custodial parent may receive child support, why is

there no discussion of the non-custodial parent's financial needs to have proper accommodations for the children who would be with that parent a significant amount of the time? Arguably, neither parent has a greater need than the other for appropriate space to comfortably house the children when the children are with that parent. Whether the children are in their bedrooms three or four nights out of every 14 or seven nights out of every 14, the household overhead remains the same.

For parties with children where one party is entitled to maintenance, the passage of Senate Bill 3231 recently signed by the governor to take effect on Jan. 1 requires that courts first calculate maintenance before child support. The child support calculation includes a deduction for paying maintenance in calculating net income. This will have the practical effect of reducing child support since the maintenance-paying parent's net income is lower.

This may be an opportunity to remove the indirect expenses of

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the parent receiving maintenance, like housing, from the child support equation. Simply account for them in the maintenance determination. The court deducts maintenance for child support purposes so the payor benefits. There is then nothing to be gained by a parent seeking more time with children to reduce his or her child support obligation.

### MODERN FAMILY



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If parents cooperate and share information about children's direct costs, the parents can allocate those costs between them so neither feels like he or she is supporting the other parent's household in addition to his or her own. Funding direct expenses can be done in keeping with the methodology of the new statute that first calculates maintenance and then calculates child support, taking the cost of maintenance into consideration.

The easiest calculus would allocate the direct expenses in proportion to each parent's respective gross incomes adjusted by the maintenance paid and received. If, however, the parents are in substantially different income tax brackets, that could be considered as a basis for deviation.

If the parents allocate the children's direct costs, and one of them is absorbing more of those costs than the other, then allocating the dependency deductions favoring that parent would be in order. One could allow that parent to deduct more than half

of the children every year or to let that parent deduct for the child or children in two out of every three years to achieve a sense of fairness. Too often, arguments over things like tax exemptions for children cost more than the value to the paying parent and create ill will between parents trying to figure out how to plan for their children.

For families where parents' earnings will be the major source of college funding, the parents could agree to deduct annual college education savings contributions in calculating net income for purposes of child support. Of course, there must be enough for basic needs first.

Most parents say they have no objection to supporting their children as long as the support is fair and not a windfall to the other parent.

Rather than taking for granted that a parent's only alternative is to use the child support structure stated in the Marriage and Dissolution of Marriage Act, practitioners should find out from both parents what they think are important and fair to consider in developing support numbers. Agreements regarding child custody and support are more easily reached when custody plays no role in the support calculus and when each parent's feelings are used to develop an approach.

Whatever approach is used should ultimately be clearly reflected in the parties' agreement for legal separation or marital settlement agreement, to ensure that a court looking at the numbers in any future proceeding will have a clear road map for the parties' assumptions and methods for determining support.

Thoughtful consideration of other alternatives can yield solutions that may work more effectively than statutory guidelines.