Memo to Child Support Commission
November 29, 2021

I. TERMINOLOGY

There is a problem with inconsistent terminology, leading to some uncertainty as to what is, and is not, being assumed or referenced in other sections, including the words "base," "basic needs," "schedule," and "guidelines."

I suggest uniform references. For example, 425.100 speaks of "guidelines" but 425.140 speaks of a "schedule," leading some judges to believe that there are multiple steps for "adjustments" for various factors, including income differences between parties, which some judges then consider at multiple points in arriving at an actual child support award.

This is easily resolved by rigorously reviewing and making uniform and specific the language used in each section, specifying that the formula produces a guideline schedule, that "adjustments" are to the guideline schedule amount, and using the reference "guideline schedule" in all places where the schedule, as opposed to the entire regulatory scheme, is the intended reference.

II. ORDER OF REGULATIONS AND CALCULATIONS

The other basic problem is that the order of the regulations creates confusion among courts and lawyers as to what is to be calculated, in what order, leading to inconsistent interpretation and results among similarly-situated people.

This could most simply be rectified by reorganization of the order of steps, which should lead to consistent interpretation of how to perform calculations across a range of fact patterns. For example, a phrase could be added to 425.100, or possibly 425.140, specifying that child support should be calculated *after* other transfers of funds, such as alimony, between the same parties in a given case.

As was done in the NRCP 16.2 drafting, it may be fruitful to open with the "escape clauses" for *non*-application of the guideline schedule (stipulations and low income obligors), then moving to the guideline schedule, adjustments to that schedule, and then to sums calculated outside or in addition to guideline schedule sums. Using the existing section numbers:

425.005-425.040 Definitions
425.110 Stipulations to vary from guideline schedule
425.145 Child support per low income schedule rather than guideline schedule
425.115 Child support per guideline schedule if no stipulation, per types of custody
425.120 Determining gross monthly income (as modified above)
425.140 Guideline schedule for determining base child support
425.100 Order to be based on earnings, income and other ability to pay, may be adjusted

425.150 Adjustments per specific needs of child
425.135 Medical support (***if*** this is an add-on to guideline support; otherwise move it into adjustments)
425.130 Cost of Child care (***if*** this is an add-on to guideline support; otherwise move it into adjustments)
425.125 Factors for imputing income, if appropriate
425.155 Review and adjustment if obligor incarcerated
425.170 Modification or adjustment requires changed circumstances
425.160 Termination or modification when child reaches certain age
425.165 Notice required in order pertaining to more than one child

III. IMPUTATION OF INCOME

There is confusion in some courts about income imputation and its relation to remarriage of an obligor with reliance on a new spouse's income. Some courts are imputing income to the unemployed parent in accordance with that parent's own presumed or established earning capacity. Others are treating some or all of the unemployed parent's *new spouse's* income as income for the guideline schedule computation, apparently based on their reading of 425.150(f).

This could be resolved by taking the first subsection of 425.125, and adding it to the end of 425.120, with guidance that imputing income refers to the obligor parent personally (a proposed alteration of 425.150(f) is addressed separately). The "without good cause" limiter for under-employment should be eliminated, because an obligor may have a *very* good reason (such as irrelevance of personal earnings based on remarriage) but still appropriately have income imputed. Suggested re-phrasing:

> If after taking evidence, the court determines that an obligor is underemployed or unemployed, the court may impute income to the obligor in accordance with the earning capacity of that obligor.[1]

The proposed rephrasing should also solve the retirement aspect of modification motions relating to a reduction in income upon retirement, since earning capacity is necessarily reduced when someone actually retires after reaching "normal retirement age."[2]

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[1] As discussed at length in the 1996 Report of the Child Support Statute Review Committee, "In the hypothetical situation in which an obligor parent has ceased work because of the financial arrangements in a second marriage, it is the income capacity of the parent, and not some derivation of the new spouse's income, that should provide the basis for the support award to be imposed on the parent."

[2] The topic of "normal retirement age" is more technical and complicated than discussed here; for a recap of the issues involved, see Marshal Willick, *Alimony at Twilight: Spousal Support When a Party is at or Near Retirement Age* (Legal Education Institute, Aspen, Colorado, 2006), posted at https://www.willicklawgroup.com/spousal-support-alimony/.

The remaining sections of existing 425.125 (factors for calculating underemployment) could be repositioned much lower in the regulations, as detail for *how* to do such a calculation if imputation is determined to be necessary.

IV. ADJUSTMENTS

The suggested phrasing changes are in accordance with the comments by the several Commission members who indicated the intention to tie all adjustments to specific needs of a particular child, as opposed to a general and nebulous "equitable" award based on income disparity of the parties or some other consideration, and that "ability to pay" refers to *reduction* in awards based on the possibility that an obligor would not be able to meet the guideline schedule obligation because of some other legitimate expense (this was the "rent vs. Lamborghini" discussion), not a reference to *increases* in guideline schedule support on the basis that an individual obligor is capable of paying an amount greater than produced by the schedule.

V. ALIMONY

The alimony problem is more nuanced than most litigators have seen. In a single case, alimony and child support could be paid by the same obligor to the same obligee, or could flow in opposite directions.

The existing regulations include alimony received by a child support obligor as income; they do not include in the guideline schedule any reduction in "gross income" of an obligor for alimony paid by that obligor to either the obligee of that child support, or to any third party.[3] Existing regulations leave any such consideration to the general "support of others" adjustment factor.

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[3] Mathematically, using the simple scenario of one child, an obligor with $3,000 per month income, an obligee with $2,000 per month income, and a $300 per month alimony award, child support without consideration of alimony would be $480. Adding alimony to the income of the recipient (the current regulation) on these facts has no direct effect on this calculation.

However, also reducing the gross income of the obligor by the alimony paid would reduce child support from $480 to $432, reducing the total paid to the recipient in combined alimony and child support from $780 per month to $732.

If there are two children (one in each household) and a *Wright v. Osburn* offset, using the same base facts, the current guideline schedule produces $112 in child support. Also reducing the gross income of the obligor by the alimony paid would reduce child support to $64, reducing the total paid to the recipient in combined alimony and child support from $412 to $364.

In other words, since the current guideline schedule only directly considers alimony ***received***, there is no direct "alimony effect" if the recipient is the primary custodian, but there is a significant impact if there is joint or split custody, since that makes the alimony recipient also a child support obligor. Altering the regulations to deduct alimony paid from an obligor's gross income would reduce child support in every case involving alimony.

The various alimony possibilities are related to the multi-family problem.[4] A child support obligor, or obligee, or both, could be paying or receiving either child support or alimony payments from third parties. Outlining the possibilities produces a minimum of nine possible scenarios.

In practice, the "first mortgage" approach (i.e., subtracting pre-existing child support obligations from income before establishing any new order) appears to be in use in most courts either directly or indirectly, at least for pre-existing *child support* orders, and is probably "fairest"[5] – the question is whether to provide for it explicitly in the regulations in place of or in addition to the more general "support of others" adjustment factor, and whether, if so, it should be restricted to pre-existing child support orders or also consider prior alimony orders.[6]

This boils down to a policy question of whether greater uniformity or discretion is intended; any attempt to add it to the regulations should explicitly consider every combination of facts of either party paying or receiving alimony, between the parents, or to or from third parties.

VI. MISCELLANEOUS

Our review revealed a few typos and other minor grammatical and punctuation items, which are indicated on the proposed revisions.

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[4] I.e., how to take into consideration, or not, child support to or from third parties to the case immediately before the court. The existing regulations partially address the matter by excluding from gross income any child support received, while having a "support of others" adjustment factor.

[5] *See*, *e.g.*, Legal Note Vol. 32 (Dec. 28, 2010), posted at https://www.willicklawgroup.com/vol-32-how-to-calculate-child-support-with-multiple-families/. As detailed in that article, the case law includes the counter-intuitive result of reversing decisions in which a court actually explained how and why it was adjusting support, while affirming unexplained adjustments.

[6] Notably, explicitly providing for a "first mortgage" approach to child support, in which support owed under an earlier obligation is *not* reduced by an obligor's acquisition of a later support obligation, but support obligations for subsequent children structurally reduce available income by the amount *existing* support obligations, rather than leaving it as a discretionary factor, was recommended by the 1985 Governor's Commission that led to our child support statutes, and by the 1992 and 1996 Child Support Statute Review Committee. That approach is built into the Wisconsin child support guidelines, on which Nevada's child support laws were based.