# Child Support in High Income Cases

by
Kathleen A. Hogan*‡

## I. Introduction

In the minds of many practitioners and judges, child support has become a very mechanical mathematical calculation since the advent of the mandatory child support guidelines.[1] Attorneys, frequently do not even realize that federal law impacts the computation of child support. However, 42 U.S.C. § 667(b)(2) specifically requires a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award that would result from the application of the child support guidelines is the correct amount of child support to be awarded. To rebut the presumption, the same federal provision requires a written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the state. Given this federal requirement, which may or may not be expressly mirrored in the statutory and/or case law of the particular jurisdiction, the calculation of child support cannot easily be limited to a mathematical formula in cases involving high income.

In cases involving at least one parent with comparatively high income, a number of potentially problematic considerations come into play. They include whether or by what means the child's reasonable needs should be determined, and what relevance those needs have to the ultimate child support award. Particularly with respect to parents who were never married to one another, there is also the question of whether or to what extent a

*‡ Ms. Hogan is a partner in the law firm of McGuane and Hogan, LLP, Denver, Colorado.

[1] The Family Support Act, codified primarily at 42 U.S.C. §§ 666, 667 (1999) requires each state, as a condition of receipt of federal funds for child support enforcement services, to enact mandatory presumptive child support guidelines. *See also* Guidelines For Setting Child Support Awards, 45 C.F.R. § 302.56 (2001).

child support award may properly subsidize the living expenses of the custodial parent. Further, there is the question of whether a child support payment in excess of the child's known needs should be viewed as an appropriate means of saving for the child's future or an inappropriate court mandated transfer of wealth from parent to child.

## II. Child Support Guidelines

In some instances states have adopted child support guidelines that do not have a maximum or cap on the income to which they apply but rather call for a fixed percentage of parental income to be allocated to child support, no matter how high that income may be.[2] More commonly, states have adopted child support guidelines that contain brackets applicable to combined parental income figures up to a maximum monthly amount.[3]

In jurisdictions that have adopted the former approach, high income cases present an issue regarding the appropriateness of deviation from the statutory guidelines. For example, it is certainly debatable whether an automatic award of eleven percent of the parent's gross monthly income would be appropriate regardless of whether that income figure was $10,000 or $100,000.[4]

In the situation where the child support guidelines cut off at a specified income level, two general types of approaches have been used to set child support when the parental income is off the charts. One approach, employed by some courts, is to presume that the child support amount indicated for the highest income level in the tables is correct.[5] To rebut this presumption the parent would have to show that the guideline amount is either inadequate or in excess of the sum needed to meet the child's reasonable needs. A second approach employed by some

---

2 *See, e.g.,* N.M. STAT. ANN. § 44-4-11.1 to 11.6 (Michie 1999); WIS. ADMIN. CODE § 40.03 et. seq. (2001).

3 *See, e.g.*, COLO. REV. STAT. § 14-10-115 (2001); CONN. AGENCIES REGS. § 46b-215a-2a (2001); OR. ADMIN. R. 137-050-0490 (2000).

4 Calculation sample is based upon the New Mexico child support guidelines that appear at N.M. STAT. ANN. § 44-4-11.1 - 11.6 (Michie 1999).

5 *See, e.g.*, In re Van Inwegen, 757 P.2d 1118 (Colo. Ct. App. 1988); Montgomery v. Montgomery, 481 N.W.2d 234 (N.D. 1992); Archer v. Archer, 813 P.2d 1059 (Okla. Ct. App. 1991); Golias v. Golias, 861 S.W.2d 401 (Tex. Ct. App. 1993).

courts is to disregard the guidelines and engage in a factual analysis of the child's needs and the parent's ability to pay. This approach is much like the common law approach that was in effect prior to the advent of the guidelines.[6]

Many states seem to employ a combination of these two approaches. First, those states begin with a presumption that the minimum appropriate child support amount is the figure shown at the highest income bracket under the guidelines. Second, those states engage in a common law analysis, with or without weighing statutory factors, to determine whether the award should differ from the presumptive amount.[7]

The suggestion that child support in high income cases should be calculated by some sort of mathematical extrapolation is one that appeals to many child support litigants because of the comparatively high awards which would be obtained. However, suggestions that a purely mathematical extrapolation approach should be employed have generally not been well received.[8] Among other things, a mechanical extrapolation approach is inconsistent with studies indicating that the percentage of parental income expended on the child declines as the income increases, notwithstanding that the total sum of money spent on the child may increase with parental income.[9] The results of such studies are reflected in the guideline tables of the various states in which the support amount as a percentage of combined income decreases at the upper levels of parental income.[10] Nevertheless a

---

6 *See, e.g.*, St. John v. St. John, 628 So.2d 883 (Ala. Civ. App. 1993); Bagley v. Bagley, 632 A.2d 229 (Md. Ct. Spec. App. 1993); Calabrese v. Calabrese, 670 A.2d 1161 (Pa. Super. 1996).

7 *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-215b; CONN. AGENCIES REGS. § 46b-215a-2(a). *See also*, Gregory M. Bartlett, *Setting Child Support for the Low Income and High Income Families in Kentucky,* 25 N. KY. L. REV. 281 (1998).

8 *See, e.g.*, In re Marriage of Van Inwegen, 757 P.2d 1118 (Colo. Ct. App. 1988); Battersby v. Battersby, 590 A.2d 427 (Conn. 1991); Preis v. Preis, 631 So. 2d 1349 (La. Ct. App. 1994); Ball v. Peterson, 912 P. 2d 1006 (Utah Ct. App. 1996). *See also* Bonds v. Bonds, 72 Cal. App. 4th 94 (1999), (upholding the court's decision fixing child support for two children at $10,000 per child per month, although the guideline calculation would have produced an award of about $67,000 per month).

9 *See generally*, Robert G. Williams, *Guidelines for Setting Levels of Child Support Orders* 31 FAM. L.Q. 281, 286-89 (1987).

10 *Id. See, e.g.*, COLO. REV. STAT. § 14-10-115 (2001).

competing study has been cited to suggest that the guidelines are flawed in setting support for the children of high income parents. The suggestion is that the underlying economic data fails to reflect all child related expenditures in upper income families including principal on homes, savings, and trusts for the benefit of children.[11] The proponents of such studies conclude that a declining percentage of parental income devoted to child support does not accomplish the goal of assuring that parents devote the same percentage of income to a child after a break up as they would have before.[12]

## III. Reasonable Needs

Without question, a parent whose income is beyond the guideline tables has the ability to provide for the basic needs for his or her child. The real issue in such cases is what amount, if any, beyond the cost of basic necessities, is "reasonable and necessary" as support for the child.[13] There is little room for dispute that when a parent has the ability to pay a large amount of support, the determination of a child's needs can be generous.[14] Nevertheless, two types of questions remain: how lavish should the child's lifestyle be, and can payments be required that have no relation to the child's known or presently anticipated needs. These types of considerations have led to what is sometimes colloquially known as "The Three Pony Rule" i.e., no child needs three ponies. This "rule" humorously summarizes the many concerns with the seemingly exorbitant child support demands or calculations that abound in cases involving high income payors.

---

11 Laura W. Morgan, *Child Support and the High Income Parent: The Uses and Misuses of the Good Fortune Trust*, FLA. B. J. 102 (1998).

12 NANCY POLIKOFF, LOOKING FOR POLICY CHOICES WITHIN AN ECONOMIC METHODOLOGY: A CRITIQUE OF THE INCOME SHARES MODEL, ESSENTIAL OF CHILD SUPPORT GUIDELINES DEVELOPMENT: ECONOMIC ISSUES AND POLICY CONSIDERATIONS (1987).

13 *Compare* In re Marriage of Sewell, 817 P.2d 594 (Colo. Ct. App. 1991) and Stringer v. Brandt, 877 P. 2d 100 (Or. Ct. App. 1994) *with* In re Tukker M. O., 544 N.W. 2d 417 (Wis. 1996). The two former cases disapproved attempts to require child support payments in excess of the child's established needs, while the latter case ordered that the difference between the child's needs and the ordered monthly support amount be paid into a trust for the child's future use.

14 Kalter v. Kalter, 399 N.W. 2d 455, 458 (Mich. Ct. App. 1986).

In many instances appellate courts have disapproved child support awards that exceeded what could be deemed to be the child's reasonable needs. Those courts which have articulated the rationale for their decisions generally have cited at least one of three reasons: 1) such support constitutes the distribution of the obligor parent's estate; 2) such support provides an inappropriate windfall to the child; 3) such support may also infringe upon a parent's right to direct the lifestyle of his or her children.[15]

As a number of courts have observed, even though high income individuals may have comparatively lavish lifestyles, only a limited sum can be spent on a standard of living, and at some point income becomes directed less towards "needs" and more towards savings or investments and thus becomes part of an individual's estate.[16] However, the fact that a parent's "lifestyle" may include the accumulation of wealth does not necessarily mean that the child has a similar entitlement nor that the parent's wealth should be transferred to the child under the guise of child support. As a result, a number of courts have indicated that support which goes beyond the reasonable needs of a child is no longer support, but an improper distribution of the obligor parent's estate.[17] For example, the court in *Heins v. Heins*[18] indicated that the purpose of child support is not to provide for the accumulation of capital by children but is to provide for their reasonable needs. Similarly, the court in *Anonymous v. Anonymous*[19] found that child support in excess of $6,000 per month was a disguised distribution of the obligor's estate. As some commentators have noted, a parent, whether divorced or not, has the right to disinherit a child. Arguably, a child support award that amounted to a transfer of wealth to the child would effec-

---

15 LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION, §4.07[B][2] (1996); CARLTON D. STANSBURY, DEVIATING FROM CHILD SUPPORT PERCENTAGES IN HIGH INCOME CASES, §1.7, (1997).

16 Ford v. Ford, 600 A.2d 25, 30 (Del. 1991).

17 Anonymous v. Anonymous, 617 So.2d 694 (Ala. Civ. App. 1993); Ford v. Ford, 600 A.2d 25, 30 (Del. 1991); Richardson v. Richardson, 808 P.2d 1279 (Haw. Ct. App. 1991); In re Marriage of Bush, 547 N.E.2d 590 (Ill. App. Ct. 1989); Heins v. Heins, 783 S.W.2d 481 (Mo. Ct. App. 1990); Harmon v. Harmon, 578 N.Y.S.2d 897 (1992).

18 783 S.W.2d 481 (Mo. Ct. App. 1990).

19 617 So.2d 694 (Ala. Civ. App. 1993).

tively rob the parent of this right, and provide the child with an *inter vivos* distribution of the parent's estate.[20]

A number of courts have also pointed out that a child support award in excess of the child's reasonable needs, even where those needs reflect a high standard of living, provides an inappropriate windfall to the child and/or the custodial parent.[21] As the court in *Rodriguez v. Rodriguez*[22] pointed out, an award of support above the child's reasonable needs and solely because the obligor has great income would amount to a *de facto* alimony award. Similarly, in *In re Marriage of Lee*[23] the court indicated that the straight application of the statutory percentage would not be allowed where it yielded a support amount substantially in excess of the child's stated needs. The potential disparity between a parent's income and a child's needs was pointed out vividly in the Oregon case of *Stringer v. Stringer*.[24] In that case the father had a gross monthly income of $39,000 while the testimony reflected that the child's needs were less than $600 per month. The *Stringer* court declined an award in excess of the child's reasonable needs.

This consideration may not seem particularly significant in cases in which the allocation of funds between alimony and child support may be largely one of tax considerations. However, the concern becomes far more significant in situations where the custodial parent's eligibility to receive alimony is limited under local law or non-existent, as in the case of parents who were never married to one another.[25]

---

20 *But see* Miller v. Schou, 616 So.2d 436, 437 (Fla. 1993) (offering dicta in a child support case that suggests that children have some right to their parents' wealth).

21 *See, e.g.*, In re Marriage of Van Inwegen, 757 P.2d 1118 (Colo. Ct. App.1988); In re Marriage of Harmon, 568 N.E.2d 948 (Ill. App. Ct. 1991); Bush v. Turner, 547 N.E.2d 590 (Ill. App. Ct. 1989); Hubert v. Hubert, 465 N.W.2d 252 (Wis. Ct. App. 1991).

22 834 S.W.2d 369 (Tex. Ct. App. 1992).

23 615 N.E.2d 1314 (Ill. App. Ct. 1993).

24 877 P.2d 100 (Or. Ct. App. 1994).

25 Finley v. Scott, 707 So.2d 1111 (Fla. 1998), for example, discusses the appropriate amount to be paid by a professional basketball player for the support of a child he fathered out of wedlock. The decision touches on a potential method for addressing the concern that hefty child support payments may be diverted to benefit the custodial parent and other members of the household for whom the payor has no support obligation.

A support award that is based upon the financial means of the parent rather than the demonstrated needs of the child may also deprive the payor parent of a role in deciding the child's lifestyle. As the court indicated in *Harmon v. Harmon*[26] an award that was not based on express findings of the child's actual needs would trespass upon the right of parents to make lifestyle choices for their children. As that court noted "although entitled to support in accordance with the pre-separation standard, a child is not a partner in the marital relationship entitled to a 'piece of the action.'"[27] Indeed, it has been suggested that determinations as to the child's appropriate lifestyle are not purely mathematical determinations to be arrived at by application of child support guidelines but more properly issues of parental decision making, particularly where parents have joint legal custody and therefore should have equal input into decisions as to the manner in which the child is reared.[28] Such a consideration may carry significant weight in the event that the parties' spending habits during the marriage reflected expenditure patterns that were modest in comparison with the available income. However, a concern that the child not be "spoiled" by lavish spending on his or her behalf is less likely to be credible if the parent's frugality is newly acquired.

The process of establishing an appropriate child support level based upon the "reasonable needs" of the child may begin with proof of such things as food, clothing and educational expenses. Elements such as private school tuition, private lessons, and cultural, social and/or recreational activities are also subject to documentation.

A child of wealthy parents might also reasonably expect to live in a large home, be transported in a late model car, attend live concerts, plays or sporting events and enjoy foreign travel or luxury vacations, country club memberships and the like. Inclusion of these types of items can become more problematic. While such things certainly may be a reflection of the lifestyle that the child would have enjoyed had the relationship not been dissolved, the enjoyment of some of these benefits necessarily extends to the custodial parent and cannot be limited only to the

---

26 578 N.Y.S. 2d 897 (1992).

27 *Id.* at 904.

28 *See* Bartlett, *supra* note 7, at 303.

child. While that concern does not make consideration of these types of expenses necessarily inappropriate, it certainly highlights the types of objections frequently raised by the prospective child support payor. In some jurisdictions this concern has been addressed by an indication that a proper use of child support includes improvement to the overall standard of living in the child's residence.[29] In other states the response is unknown or less clear cut.[30]

The process of proving the reasonable support needs of a dependent child of a wealthy parent can become more problematic where the circumstances offer no family history established during an intact marriage. Such a situation may arise where the obligor parent's wealth is newly acquired after a dissolution such as the case with lottery winners or other windfall recipients. There is a similar lack of "family history" from which to discern the child's expected lifestyle when the parents were never married to one another, particularly if the child is the result of a one night stand or a very short term relationship.

## IV. Newly Acquired Wealth

In the case of newly acquired wealth, the child may have unmet needs. In addition, there may be improvements to the child's lifestyle that would be appropriate and beneficial if funds were available. Further, the obligor's actions in upgrading his own lifestyle or providing assistance to extended family members may suggest a measure by which an appropriate increase in child support could be gauged.[31] In the case of unmarried parents, it may also be particularly relevant to examine the standard of living the payor enjoys as well as the types of expenses he or she pays for other children. For example, a child support calculation of the child's needs that included a monthly expense for a body guard was determined to be appropriate where the obligor pro-

---

29 CAL. FAM. CODE § 4053 (f) (West 1993).

30 *Bartlett*, *supra*, note 7, at 305. Judge Gregory Bartlett suggests that an economist could establish the portion of such expenses attributable to the dependent child as opposed to the custodial parent.

31 In re Marriage of Bohn, 8 P.3d 539 (Colo. Ct. App. 2000). The court in that case approved a child support order which was twice the amount which the mother had testified was necessary for the child's needs in a modification proceeding which took place after the father won the lottery.

vided a body guard for himself and for other children he had fathered.[32] Finally it has been suggested that the standard of living a child maintained with the parents during the marriage is only one factor for a court to consider and should not lock the child into a single standard of living until emancipation, particularly where one parent has enjoyed good fortune after the divorce.[33]

The popular press is replete with stories of musicians, actors, entertainers, or professional athletes who have fathered children out of wedlock often after only a brief acquaintance with the child's mother. Many wealthy individuals outside the public eye also find themselves in similar circumstances. In such cases there will be no prior joint lifestyle for the court to examine in determining the lifestyle that might reasonably have been expected for the child. Similarly, there will generally be no basis for any claim that the father has any ongoing duty to support the mother or subsidize her lifestyle. Presumably in such cases the standard for establishing support will primarily rest upon the reasonable needs of the child.

From the payor's standpoint, it may be useful to stipulate to an ability to pay any reasonable child support award.[34] For example, actor Emilio Estevez entered into such a stipulation in a proceeding in which his former girlfriend was seeking an upward modification of child support.[35] The benefit of such an approach for the payor is that it may eliminate the necessity of producing voluminous documents and records relating to his financial situation while at the same time forcing the court and the child support claimant away from any automatic percentage calculation and toward a focus on the child's needs. However, at least two cautionary notes should be kept in mind. First, a payor who later claims that the resulting order is too high may be foreclosed from claiming that it is disproportionate in light of his income. Second, there may be some jurisdictions in which a child support calculation based upon the income of each parent is a mandatory

---

32 In re Gonzalez, 993 S.W.2d 147 (Tex. Ct. App. 1999).

33 In re Marriage of Nimmo, 891 P.2d 1002, 1007 (Colo. 1995).

34 Such an approach was adopted in *Branch v. Jackson*, 629 A.2d 170 (Pa. Super. Ct. 1993), where the father was a major league baseball player reportedly netting $75,000 per month.

35 Estevez v. Superior Court, 22 Cal. App. 4th 423 (1994).

prerequisite order, without exception and without regard to the income level involved. In these instances, such a stipulation may not be possible.

## V. Trusts

When the child support payor enjoys an extremely high income, it is sometimes suggested that a "good fortune" trust should be employed or some other device should be used to secure for the child's future needs by payments from the obligor which are not necessary to fund the child's immediate living expenses.[36] Such an approach may be urged as a means for ensuring the availability of funds for future but unforseen wants or expenses. However, it is also argued that such an approach is nothing more than a "backdoor" way of funding post-majority expenses that cannot directly be the subject of a child support order. With respect to professional athletes whose years of high earnings may be very brief, such approaches have also been suggested as a means of protecting the child against a "riches to rags" lifestyle that may result if the support order runs in direct parallel to the payor's earnings.[37]

A "good fortune" trust must be distinguished from other trust vehicles that are sometimes utilized to fund or secure the payment of periodic child support. For example, in *In re Gonzalez*[38] a wealthy father was required to make a lump sum payment into a trust with the amount to represent the present value of the monthly child support obligation from the date of payment until the child's majority. In that case, the funds were to be distributed to the custodial parent in the same fashion as if the father were making monthly child support payments and any funds that remained in the trust until the child reached the age of majority would revert to the father.[39] By contrast, a "good fortune" trust

---

36 *See* Laura W. Morgan, *Child Support and the Anomalous Cases of the High Income and Low Income Parent: The Need To Reconsider What Constitutes "Support" in the American and Canadian Child Support Guideline Models*, 13 CAN. J. FAM. L. 161, 194 (1996).

37 Thomas Quinlen, *Using Child Support Trusts to Prepare Both Father and Child for Life After Professional Sports*, 2 VAND. J. ENT. L. & PRAC., 108 (2000).

38 993 S.W.2d 147 (Tex. Ct. App. 1999).

39 *Id*. at 60.

arrangement generally requires a monthly payment by the obligor of an amount deemed to represent the child's reasonable needs plus a payment of an additional sum into a trust to be held for future purposes.[40]

Wide variations exist in the acceptability or utilization of such trusts. For example, in *Finley v. Scott*[41] child support was set at $5,000 per month; $2,000, representing the child's reasonable needs was to be paid to the custodial parent, and $3,000 was to be paid into a trust.[42] The court indicated that use of the trust would eliminate the concern that funds would be utilized by the custodial parent for her own purposes.

A small number of other reported decisions also reflect the use of a trust or other custodial account to hold funds paid in excess of the child's immediate needs.[43] In response to the claim that a trust for higher education or other future needs impermissibly amounts to child support beyond the age of majority, one court drew a fine distinction between payments made after majority, and payments made while the child was a minor that merely resulted in benefits after majority.[44] The Court concluded that it was only the benefits and not the payments that would continue beyond the age of majority, and the trust payments in excess of the child's current needs were upheld. A further refinement has been suggested by one court whereby any excess funds remaining in the trust at the end of the term covered by the support order will revert not to the child, but to the payor.[45] Particularly where the high earning parent is a professional athlete or involved in another occupation where the high earning years may be very brief, a persuasive argument can be made for collecting excess payments during high earning years as a cushion for the child against the time that the parent's fortunes

---

40 *See, e.g.,* Rojas v. Mitchell, 50 Cal. App. 4th 1445 (1996); Finley v. Scott, 707 So.2d 1111 (Fla. 1998).

41 707 So.2d 1111 (Fla. 1998).

42 According to the decision, strict application of the guidelines would have resulted in an award of $10,000. *Id.*

43 *See, e.g.,* Nash v. Malle, 846 S.W.2d 803 (Tenn. 1993); Lee v. Askew, No. 02A01-9805-JV-00133, 1999 WL 142389, 1999 Tenn. App. LEXIS 290 (Tenn. Ct. App. 1999).

44 *Nash*, 846 S.W.2d 803.

45 *Lee*, 1999 WL 142389, 1999 Tenn. App. LEXIS 290.

may decline.[46] However, such an approach has not been widely addressed in reported decisions to date. In addition, variations in the state specific terms or interpretations of child support provisions have even led to differing approaches being applied to different offspring of the same father. For example, a high earning professional athlete had to create a trust for the benefit of a child he fathered who resided in New York.[47] By a quirk of geography, another child of the same father resided in Ohio where the court held that the creation of a good fortune trust was beyond the authority of the court.[48]

## VI. Conclusion

If consistency and even handed treatment are seen as appropriate goals in connection with the establishment of child support obligations, the time is ripe for a more studied and congruous approach to the determination of child support in high income cases. Until that happens, attorneys and litigants must expect to see wide variations in approach and result.

---

46 Quinlen, *supra* note 37.

47 *In re* J.T. (K.D.), 16 FAM. LAW REP. 1046 (N.Y. Fam. Ct. 1989). A part of each monthly support payment was designated for the child's future needs and placed in an account requiring the signatures of both parents for withdrawal.

48 Frazer v. Daniels, 1197 WL 78604 (Ohio App. 1st Dist., Feb. 26, 1997).