

Virginia Child Support Guidelines Review Panel

April 27, 2016

10:00 a.m. – 2:00 p.m.

House Room 1, State Capitol

Meeting Minutes

Members Present:

The Honorable Deborah V. Bryan
Craig M. Burshem, Deputy Commissioner
Lawrence (Larry) D. Diehl, Esq.
Carol B. Gravitt, Esq.
Delegate G. Manoli Loupassi
Christine (Christie) E. Marra, Esq.
Christian R. Paasch
Kim-Marie A. Pigott-Brown
The Honorable Edward A. Robbins, Jr.
Karen H. Sampson
Delegate Vivian E. Watts

Members Not Present:

Dennis M. Hottell, Esq.
Russell J. Smith
Senator Glen H. Sturtevant, Jr.

Staff Members Present:

Alice G. Burlinson, Esq.
Melody C. McKinley, Panel Administrator

I. Welcome and Introductions

All

Mr. Burshem advised the Panel that Senator Sturtevant has joined the Panel. He has taken the place of Senator Stuart. Delegate Villanueva is no longer a member, but his replacement has not yet been named. Panel members introduced themselves and provided information about their backgrounds and current positions.

II. Review of Panel's Duties: Va. Code § 20-108.2(H)

Craig Burshem

Mr. Burshem reviewed the Panel's charge as set out in Va. Code § 20-108.2(H). Mr. Burshem noted that the Panel's statutory duty is to determine the adequacy the guidelines for determining appropriate child support obligations by considering current research and economic data on the costs of raising children. The Panel's next report is due to the General Assembly in December 2017.

III. Nomination and Election of Panel Chairperson

Craig Burshem

Ms. Gravitt nominated Mr. Burshem; Mr. Diehl seconded. Mr. Paasch nominated himself; Ms. Sampson seconded. Ms. Sampson nominated Judge Robbins; Delegate Watts and Delegate Loupassi seconded. Panel members voted by secret ballot and chose Judge Robbins as the chairperson. Judge Robbins chaired the remainder of the meeting.

Alice Burlinson gave a PowerPoint presentation outlining various policy issues deferred by the last Panel to the current Panel.

a. Guidelines-Related Issues

1. *Guidelines worksheet: Require that the worksheet be attached to all orders.*

Mediated orders must have the worksheet attached, but there is no requirement that it be attached to all child support orders. Judge Bryan noted that even attorneys do not always provide worksheets with orders. Judge Robbins has had the same experience; in those cases, he sends orders back and asks for the worksheet so that he will know the basis of the obligation amount. He said that guidelines attachment is judge-dependent. Often, *pro se* litigants have no idea how the obligation was calculated. The availability of prior worksheets is also very helpful when modifying obligations. Ms. Pigott-Brown and Mr. Paasch both noted that having the worksheet would be helpful since parties may be nervous or reluctant to say they do not understand the calculation during the hearing.

Mr. Diehl said attaching the worksheet should not be an administrative burden since courts are already running the guidelines. However, the Panel would want to word statutory language so attached worksheets are not required in complicated cases where multiple guidelines must be calculated. Judge Bryan noted that in complex situations, judges may have to run many calculations and sometimes the result is not based on straight math; in these cases, judges must use their discretion and the worksheets may not prove helpful. Judge Robbins noted that attaching guidelines in sole and shared custody cases should cover most situations since they represent the lion's share of the cases.

Judge Bryan runs guidelines from the bench on the computer; however, she notes that several judges do not use a computer on the bench. She agrees that it is important that the parties have the information but points out that there may be some administrative details to work out.

Judge Robbins noted that calculating guidelines is a two-step process—first the presumptive guidelines must be run, then a separate guideline must be run if the court is deviating from the presumptive amount. Judge Robbins said there is a form supplement to the court order that provides checkboxes with the deviation factors; this supplement can be used for deviated orders. Ms. Sampson asked if the Panel could review the supplement. Panel staff will provide the form. Mr. Diehl suggested attaching only the worksheet that reflects the final result. Ms. Gravitt said in her work as a substitute judge she usually sees imputed income as the reason for deviation; in those cases, it would be important to attach both worksheets. Mr. Burschem said an alternative might be to go back to an old Division of Child Support Enforcement (DCSE)

form that provided space for both presumptive and deviated guidelines calculations on one page. Panel staff will locate the form and provide it to the Panel for review.

Ms. Marra suggested that the Panel may be able to avoid having to propose legislation by updating DCSE's old form and asking the Supreme Court's forms committee to consider adopting it.

Judge Robbins said that having the guidelines attached would reduce the mystery for parties and allay the perception that judges are arbitrary. Ms. Marra agreed that it would be particularly helpful for *pro se* litigants.

DECISION: Judge Robbins said it appeared that the Panel as a whole was in favor of attaching the presumptive guidelines worksheet at a minimum. The Panel unanimously agreed. Administrative details and form issues can be determined at a later date, but the Panel does wish to pursue this issue.

2. *Shared custody cases: Consider changing the 1.4 multiplier and 90-day threshold*

Ms. Burlinson reviewed research provided to the previous Panel by Jane Venohr, Ph.D., from the Center for Policy Research. Like most states with a formula for shared custody, Virginia uses a cross-credit formula; however, Virginia uses a lower multiplier and a lower overnight threshold than most of those states. Possible adjustments to alleviate the cliff effect include using a 2-tiered formula for timesharing or increasing the multiplier to 1.5 or 1.6.

Mr. Diehl was instrumental in the development of the current formula. He provided the history of the development of the formula and the economic research behind the decision to use the 1.4 multiplier based on increased fixed costs and the 90-day threshold. The 1.4 multiplier ameliorates the cliff effect and provides a modest decrease to the noncustodial parent. The 90-day threshold is slightly more than the "typical" custody arrangement of every other weekend and a couple of weeks in the summer (about 70-80 days); this threshold dramatically decreased the incentive/disincentive that spurred contention between parties under the previous 110-day threshold. Mr. Paasch noted that costs increase on both sides with shared custody and asked why noncustodial parents have to pay more. Mr. Diehl advised that the 1.4 multiplier actually provides a modest decrease for noncustodial parents. He noted that in 24 years of shared custody guidelines, 17 years under the 1.4/90 day method, there has been only one appellate case. It may not be a perfect system, but it appears to have worked well for more than twenty years. Mr. Burschem pointed out that increasing the multiplier to 1.5 or 1.6 creates only a slight difference in obligation amounts.

Ms. Marra expressed more concern about the 90-day trigger, noting that low-income parents may not have access to that information. Delegate Watts asked about factoring in the cost of living in various parts of the state. Mr. Paasch said Utah

recently passed legislation addressing school drop-off and pick-up to avoid issues in high-conflict cases; Judge Bryan said judges do consider those issues when making custody determinations. Mr. Paasch said that if parties are in different states, it may be hard to get to the threshold number of days due to logistics but visitation costs would be higher. Judge Robbins noted that this is a deviation factor and visitation costs can be allocated as part of the order.

Ms. Pigott-Brown asked how the 90-day threshold comes up in court. Judge Bryan says she looks at the previous order, and then asks about the current custody situation before she discusses support amounts. Judge Robbins says unequal power can allow one party to take advantage of the other; these background dynamics are often invisible to the court. He saw frequent conflict between parties when the threshold was 110 days. For judges, the best interest of the child, not money, must drive custody and visitation determinations.

DECISION: The Panel recommends no change to the 1.4 multiplier or the 90-day threshold in shared custody cases.

3. *Complex cases: Add statutory guidance for determining obligations*

Determining obligations in cases with multiple families and various custody arrangements can be very difficult. There is not much case law and no statutory guidance to address these cases. Mr. Diehl said that Dick Byrd had created two scenarios with formulas the Panel may want to consider; however, those are only two scenarios out of many possible variations.

Judge Bryan said in these cases judges must run various guidelines and use their discretion to come to a determination. There is no set way of doing this. The Panel could possibly develop some suggestions, but she is not sure the Panel should get into a statutory fix. Perhaps this issue could be discussed at a judicial conference.

Judge Robbins sees this issue particularly when a custodial parent remarries; he or she may have little income, but a lot of resources, while the noncustodial parent is required to pay a substantial amount of his/her income for support. In these cases, deviation factors are helpful and appropriate.

Mr. Burshem said this issue was raised primarily by attorneys who thought guidance might be helpful; however, it would more appropriately be addressed by a different group, such as the Family Bar Coalition. Delegate Watts agreed and said the Panel would not want the legislature to delve into the issue until the Family Bar Coalition, Boyd-Graves Conference, Divorce Specialists, or some other group has come up with suggestions.

DECISION: Mr. Burslem moved to have Panel staff draft a letter asking the Family Bar Coalition to look at this issue. After multiple seconds and a vote, the motion passed unanimously.

Further discussion ensued regarding later-born children. Delegate Watts said a new family should not reduce the obligation for the child from the first family. If the guidelines do not consider the second spouse's income, they should not consider the second family at all. Mr. Paasch agreed and said we should get out of the business of dealing with additional children since it is the parents' personal responsibility to determine whether they are able to afford subsequent children. Mr. Diehl pointed out the public policy that a "first-children come first" policy penalizes later-born children.

Judge Bryan noted that subsequent children alone cannot be the basis for a modification. When parents come to court on a different change in circumstances, however, the court must start with the presumptive guidelines and give credit for later-born children.

Ms. Marra noted that there are many single parents with no second spouse; perhaps household income would be a better consideration than only including a second spouse's income.

Judge Bryan said the entire Virginia statutory scheme in Title 16.1 is based on the best interests of children; this is the foundation of our family law. Children are not to be held accountable for their parents' choices.

Judge Robbins said the Panel needs more discussion on determining how the guidelines account for later-born children. Panel staff will research how other states deal with this issue and will provide information for the Panel to consider at its next meeting.

4. *Deviation factors: Age of children and costs of private school*

Age of children: Virginia's guidelines do not take into account that older children cost more than younger children. The majority of states do not consider age of children; however, a few provide separate guidelines amounts based on age and at least one allows it as a deviation factor. Virginia has limited case law suggesting that courts may take age-related expenses into account in conjunction with the standard-of-living deviation (*Saxon v. Lesueur*, 2013 Va. App. LEXIS 279 (2013) (unpublished)). Mr. Diehl pointed out that generally parents' income increases as children age. When an obligation starts at an early age, expenses/income typically balances out; however, if an obligation starts when a child is older, the cost average assumption does not apply. Mr. Diehl has drafted proposed language for a new deviation factor and will provide it to the Panel for review.

Judge Robbins noted he has never seen a case where a party has asked for a change based on age. Using a percentage option (similar to Kansas, Maine or Washington) as opposed to creating a deviation factor may be preferable since it would avoid having to throw everything into the mix. It would also provide the benefit equally at all economic levels. Delegate Watts and Ms. Marra also prefer the percentage option. Ms. Marra suggests age is a valid consideration for lower-income families as well. Using the percentage method would provide equal access to everyone as *pro se* litigants are not necessarily aware of deviation factors.

Ms. Pigott-Brown asked whether it is accurate that older children cost more since younger children require day care and there are typically not as many financial resources available to help with younger children's needs.

DECISION: The consensus is that the percentage approach would be best if the Panel decides to pursue this issue. Panel staff will review Dr. Venohr's previous research, determine whether the current guidelines take age into account within the schedule, and research whether older children are in fact more expensive than younger children. The Panel will consider this issue further at its next meeting.

Cost of Private School: Deviation factors do not specifically address private school expenses, but there are general deviation factors that can be used. Mr. Diehl pointed out there is well-developed case law allowing courts to set higher obligations based on certain criteria if there is a demonstrated need for a child to attend private school and the parent has the ability to pay. He has drafted proposed language for a specific deviation factor.

Judge Robbins cautioned that introducing legislation may open a Pandora's box; proposed language can be altered during the process to the extent that it is unrecognizable or produces an unintended result. If the purpose of proposing legislation is simply to restate case law, it may not be worth the risk.

DECISION: Issued tabled.

5. *Cost of living in various parts of the state*

Federal law requires that the guidelines apply uniformly throughout the state. Judge Bryan asked if location can be considered as a deviation factor. Ms. Burlinson noted that TANF benefits vary by locale, but according to Ms. Marra, the regions may not be accurate. It would be extremely complicated to factor location-specific numbers into the guidelines. In addition, would the custodial parent's location or the noncustodial parent's location be used as the basis and how would shared custody in different areas of the state be addressed?

Judge Robbins asked if “one set” means we must use the same numbers across the state or if we can build in other numbers. Mr. Burshem said that Panel staff would ask the federal Office of Child Support Enforcement (OCSE) for guidance.

DECISION: The Panel will discuss further at its next meeting.

b. Issues Not Directly Related to the Guidelines

Based upon the Panel’s charge set out at Va. Code § 20-108.2(H), members determined it would not be appropriate to consider the non-guidelines-related issues deferred by the previous Panel (adding language to juvenile court orders, changing effective dates, civil contempt, and driver’s license suspension and reinstatement).

c. Additional Suggestions

Mr. Paasch advised that William Comanor, Ph.D., professor at the University of California, has offered to speak to the Panel at no cost to provide information about his recent study, *The Monetary Cost of Raising Children*. Mr. Burshem noted that Dr. Comanor has not been heavily involved in child support work and no states have adopted his guidelines approach. He asked whether Dr. Comanor’s discussion would address the issues the Panel has decided to pursue or whether he would be discussing the entire guidelines schedule. Judge Robbins noted that the Panel has several issues to pursue and should focus on those issues at this time. Ms. Gravitt asked that members be able to review the study before deciding whether Dr. Comanor would be invited to speak. Mr. Paasch agreed to send the study to members.

V. Next Steps All

The Panel will consider research and conduct further discussion on attaching the guidelines worksheet to all child support orders, accounting for later-born children in the calculating the support obligation, proposing a percentage variation in the guidelines based on age of children, and considering guidelines issues in various parts of the state based on OCSE guidance.

VI. New Business All

None at this time.

VII. Administrative Items All

- a. Panel emails from August 1, 2015 through April 15, 2016: Panel members were provided with a list of all emails sent to the Panel and response dates from staff.
- b. Schedule future meetings: Panel staff will coordinate possible dates with Judge Robbins for a September meeting and send a Doodle survey to Panel members.

- c. Travel vouchers: Mileage and parking costs will be reimbursed. Samples, forms and postage-paid envelopes were provided.
- d. Questions: None.

VIII. Adjourn

The Panel adjourned at 1:56 p.m.

Action Items for Staff:

- Post the following items on the Panel's website:
 - Minutes, upon approval of Panel
 - PowerPoint presentation
 - Panel emails from August 1, 2015 through April 15, 2016
- Provide the following information to Panel:
 - Form DC-639: Child Support Guidelines Exception Supplement to Order for Support
 - Previous DCSE guidelines calculation form with space for both presumptive and deviated obligation calculations
 - Proposed letter to Family Bar Coalition requesting that the Coalition consider proposing guidance for calculating obligations in complex cases
 - Research on how other states' guidelines contemplate later-born children
 - Information on whether the current guidelines account for children's ages and whether older children are more expensive than younger children
 - Guidance from OCSE on using one set of guidelines throughout the state
- Coordinate possible September meeting dates with Judge Robbins and send Doodle survey to Panel members to select date.