

Child Support Guidelines Review Panel
September 24, 2013
10:00 a.m. – 2:00 p.m.
House Room 1, State Capitol

Meeting Minutes

Members Present:

The Honorable A. Ellen White, Chair
Craig M. Burshem, Deputy Commissioner and
Director, Division of Child Support Enforcement
Heather Cooper, Esq.
Reeves W. Mahoney, Esq.
Jennifer Oram-Smith, Esq.
Karen Sampson
The Honorable Wilford Taylor, Jr.
Delegate Vivian E. Watts

Members Not Present:

Amy Atkinson
Hilton W. Graham, II
Delegate G. Manoli Loupassi
Paul McLean
Senator Richard H. Stuart
Delegate Ronald Villanueva
Michael Woods

Staff Members Present:

Alice G. Burlinson, Esq.
Melody C. McKinley
C. Robert Own

I. Welcome

Judge White

Judge White welcomed Panel members to the meeting.

II. Recap of June 17, 2013 meeting

Alice Burlinson

A. Dr. Venohr's pros and cons of medical expenses in the schedules

Ms. Burlinson reviewed *Virginia Child Support Guidelines Review: Including Ordinary Medical Expenses in the Schedule*, which Dr. Venohr prepared at the Panel's request to provide her summary of the pros and cons of having the \$250 medical expenses built into the guideline schedule versus not including them. Dr. Venohr's key points are:

- It is difficult to know what future medical expenses will be because of the Affordable Care Act and changes to Medicaid and CHIP; \$250 will likely not be an accurate amount for out-of-pocket medical expenses.
- The current guidelines have \$100 medical expenses built into the schedule. In 2004, the statutory text was amended to \$250 in expenses, but the actual schedule was not changed to reflect this change.

Ms. Burlinson advised the Panel that the Family Bar Coalition strongly supports keeping the \$250 medical expenses out of the schedule and having parents share all expenses from the first dollar on a *pro rata* basis.

B. Schedules up to \$35,000/month

The current schedule goes up to \$10,000 in combined monthly income. At the Panel's request, Dr. Venohr provided a guideline schedule for combined incomes up to \$35,000 per

month and updated the formula for combined monthly incomes higher than \$35,000 (Schedule E without built-in \$250 medical expenses).

III. Review guideline examples with various schedules

Alice Burlinson

Ms. Burlinson reviewed a powerpoint presentation which compared obligations for parents at various income levels using the existing schedule, Schedule E with \$250 built-in medical expenses, Schedule E without \$250 built-in medical expenses, and Schedule F.

Mr. Burshem pointed out that Schedule E with medical expenses would result in an increase of over 69% for noncustodial parents at the lowest incomes (Example 1 from powerpoint, where mother is on TANF and father is unemployed – father's obligation would go from the statutory \$65 minimum using the current schedule to \$110 using Schedule E with medical expenses or \$107 using Schedule E without medical expenses). Percentage changes are minimal at most incomes but significant at the lowest income levels.

Mr. Burshem also noted that example 5 (slide 6) shows an increase under Schedules E and F, but the increase is still under the 20% of income mark, which research indicates is the threshold for likelihood of payment; obligors are less likely to pay their child support if the obligation exceeds 20% of their income.

IV. Action items for this meeting

All

Decide about \$250 medical costs out of code, leave in

Judge White suggested the Panel address the \$250 medical expenses issue first before choosing a schedule. Judge Taylor made a motion to back out medical expenses from the schedule and remove the \$250 provision. Mr. Burshem seconded.

Delegate Watts said she could not recall why the expenses changed from \$100 to \$250 in 2004; she thought it might have been tied to an average deductible amount. She noted that the Panel needs to be careful that, if the legislature wants the \$250 added back in, the correct schedule is used in the proposed legislation.

Judge White said she believed the initial language was added because there was no provision giving judges authority to order any division of medical expenses.

Delegate Watts asked whether statutory language would need to be added if the built-in expenses are not included. Judge White noted that the \$250 language can simply be deleted from § 20-108.2(D), leaving language that states the parties will split medical expenses in proportion to their gross incomes as used in calculating the support obligation.

Currently, it is presumed that the custodial parent pays the first \$250, but there are practical concerns. Some litigants complain about trying to figure out when the first \$250 has been met, record-keeping difficulties, etc. Mr. Mahoney suggested that removing medical expenses from the schedule and splitting all expenses *pro rata* from the first dollar is less complicated and more democratic.

Mr. Burshem noted that the Family Bar Coalition is in complete agreement that the expenses should be backed out of the schedule. He also said the existing schedule is incorrect because only \$100 in medical expenses is built in, but that statutory language is \$250. Also, with the Affordable Care Act and changes to CHIP/Medicaid, custodial parents may not have any outlay for expenses at all, so the existing \$250 would be incorrect.

Judge Taylor said having all expenses split from the first dollar would be easier to apply and easier for litigants to understand.

Ms. Sampson pointed out that removing the expenses might make it even harder for those custodial parents who already struggle to collect support. Mr. Mahoney said the built-in expenses sound good in theory but in practical terms can be very difficult to execute. He suggested it would be a problem for those custodial parents either way. Mr. Burshem noted noncustodial parents who are not paying their child support are not paying any of the initial \$250 anyway. Judge White pointed out that this is not really a problem at low incomes because children are on Medicaid or CHIP.

Judge White asked for a vote on Judge Taylor's motion. The Panel voted unanimously not to include built-in medical expenses in the guideline schedule and to remove the \$250 provision.

Discuss need for new statutory language regarding presumptive minimum

Based on the Panel's decision regarding medical expenses, the schedule options are E without medical expenses or F. Judge White noted that courts need the ability to address those at the lowest incomes since schedule E without medical expenses eliminates the current \$65 statutory minimum obligation. Mr. Burshem noted that this is a very significant change from the existing guidelines at the lowest income. He suggested considering a way to allow judges to look at the totality of the circumstances and make a decision about whether to order the statutory minimum. Judges need a way to address ability to pay, particularly in light of the U.S. Supreme Court's decision in *Turner v. Rogers*.

Mr. Burshem provided data from the Division of Child Support Enforcement which shows that the Division has over 20,000 cases with a \$65 minimum order. Of those, over 90% have some arrears and 63% have arrears greater than or equal to 12 months. Increasing the minimum from \$65 to \$107 (for 1 child, using schedule E without medical expenses) constitutes a 64% increase; there is no other increase close to this percentage anywhere else in the proposed guidelines. This will result in significantly larger arrearages for those at the lowest incomes. If noncustodial parents are not paying \$65 per month now, they will not pay \$110. This big a jump will only drive more noncustodial parents into the underground economy. Mr. Burshem said the purpose of the guidelines is to set an obligation based on economics, not as a punishment. He suggested focusing on realistic orders and noted it is better to have a lower order that gets paid rather than a higher order than does not. Mr. Mahoney agreed that the new guidelines would increase the amount for the lowest incomes, but the obligation will not get paid.

Mr. Burshem suggested adding language to § 20-108.2 allowing judges discretion, after hearing evidence, to order lower than the statutory minimum for obligors whose gross income is equal to or less than 150% of the federal poverty level, provided doing so will not create an obligation which seriously impairs the custodial parent's ability to maintain adequate housing and provide other basic necessities for the child. Judge White suggested adding that the evidence should show there is no ability to pay the presumptive statutory minimum.

Delegate Watts agreed but said the legislative intent should clearly emphasize that parents have an obligation to support their children. Judicial discretion should be guided by and based on this legislative intent. This provision should not be for people are able to work but choose not to.

Mr. Mahoney agreed that the statutory language needs to include a strong statement regarding parents' legal obligation to support their children. He also pointed out that in his pro bono work,

he sees people on Medicaid and food stamps with no home and no job – coming up with \$65 is impossible for them. Those are the types of cases where judicial discretion would be helpful.

The Panel discussed adding to the beginning of § 20-108.2 language from *Kelley v. Kelley* (248 Va. 295) regarding parents' duty to support their children.

Mr. Burshem made a motion to add the language from *Kelley* and the language regarding judicial discretion to § 20-108.2 Ms. Cooper seconded. The Panel voted unanimously to adopt the motion.

Choose a schedule

Ms. Oram-Smith moved that the Panel choose Schedule E without medical expenses built into the schedule. Ms. Sampson seconded. The Panel voted unanimously to do so.

Summary of Panel decisions:

1. Exclude \$250 medical expenses from guidelines.
2. Add statutory language (1) stating both parents owe a duty of support to their children and (2) giving judges discretion to order an obligation below the statutory minimum under specific circumstances if doing so will not seriously impair the custodial parent's ability to provide housing and other necessities for the child.
3. Propose Schedule E without medical expenses built in.

V. Next steps

Alice Burlinson

- Dr. Venohr will draft a report, which will be the primary addendum to the report Panel staff drafts for submission to the General Assembly in December 2013.
- Panel staff will draft the report and proposed statutory language. Ms. Burlinson noted that placeholder legislation has already been drafted; staff will drop in schedule E without medical expenses, remove references to the \$65 minimum, and add the new language voted on by the Panel.
- Panel staff will circulate the report and proposed language to the Panel.

VI. Next meeting – November 21, 2013

Alice Burlinson

If members can review and respond to the report and language via email, the Panel may not need to meet in November.

VII. Administrative issues

Alice Burlinson

- Emails to the Panel
Ms. Burlinson provided the emails received by the Panel from April 18, 2013 through August 30, 2013. She reported that the Panel has received a total of 103 emails, all of which received a response. Sixty were about specific Division cases and were referred to the appropriate office; forty-three were about general topics.
- Travel vouchers
Please give signed travel vouchers to Ms. Burlinson.

VIII. Adjourn

Judge White

The Panel adjourned at 11:53 p.m.

Action Items for Staff:

- Post the following items on the Panel's website:
 - Dr. Venohr's Schedule E without medical expenses (up to \$35,000) and report on including or omitting medical expenses from the schedule
 - Powerpoint presentation with guideline examples
 - Other handouts from the meeting: Schedule F, proposed language
 - E-mails to the Panel since June 14, 2013
 - Minutes, upon approval of Panel
- Ask Dr. Venohr to draft her final report based on the Panel's decisions.
- Draft proposed legislation and circulate it to the Panel by the end of October for review and comment.
- Draft the proposed report for the General Assembly and circulate it to the Panel by the end of October for review and comment. The report is due to the General Assembly in December 2013.