The newsletter
for the
Family Law Section
of the Tennessee
Bar Association

May 2003

Family Practice

Watch for the Alimony 'Fairness' Bill and Help Us Pass This Legislation

by Amy Amundsen, Memphis

Presently in both the House and Senate there is an Alimony bill that strives for fairness in the award of alimony. HB 1480 and SB622.

I will first explain the three sections of the bill and then discuss the three major improvements to the current alimony statute.

Intentions of the General Assembly

The preamble of the bill reflects the General Assembly's position that in marriages there is typically a private arrangement — one party primarily focuses on building the economic strength of the family unit and the other party primarily focuses on nurturing the children. The bill endorses this arrangement in order to foster healthy and productive children in our society.

The bill reiterates that a spouse's contribution as a homemaker is of equal dignity and importance as a contribution as a wage earner. Additionally, this bill recognizes that the economically disadvantaged spouse's standard of living after the divorce should be reasonably comparable to the standard of living enjoyed during the marriage or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

Lastly, the bill reiterates that the preference is to rehabilitate a spouse whenever possible.

Improvements

1. The Alimony bill defines what "to be rehabilitated" means. There have been recent Supreme Court decisions which interpreted "rehabilitation" to mean "rehabilitating to any degree." This bill defines "to be rehabilitated" to mean "to achieve, with reasonable effort, an earning capacity that will permit the economically disadvantaged spouse's standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and equities between the parties."

By defining 'to be rehabilitated,' the legislators provide the courts with the measuring stick to use when considering whether a spouse can be rehabilitated. The question is: Can the spouse be rehabilitated, with reasonable effort, to a level related to the standard of living the parties enjoyed during the marriage or the post-divorce standard of living expected to be available to the other spouse?

a. If a spouse can be rehabilitated, then the court would determine the amount and duration of rehabilitative alimony.

b. If a spouse can be only partially rehabilitated, then the court would be allowed to award both rehabilitative and periodic alimony. (See section 2.)

c. If a spouse cannot be rehabilitated, then the court would award periodic alimony.

2. The Alimony bill allows the court to award both periodic alimony and rehabilitative alimony in cases where a spouse may be only partially rehabilitated. This means that while a spouse has a duty to rehabilitate oneself, that spouse may not be capable of achieving complete rehabilitation. This

continued on page 15

Inside This Issue:

Miles Mason Sr.

From the Chair

This year has been exceptionally successful for the Tennessee Bar Association Family Law Section. Much has been accomplished. Beginning with last summer, **Judge Don Ash** traveled the state for TBA Family Law Section seminars and continued the dialog on the permanent parenting plan law. Online CLE about the new parenting plan law is now available for Family Law Section members and the TBA at large through our website at tba.org. Thanks to **Stuart Wilson-Patton,** the *Family Practice* newsletter has been a great success again this year. We also have a new section committee for adoption practitioners. **Barry Gold,** chair-elect, produced an excellent CLE titled "Family Law Practice Management + Preparing Your Forensic Psychologist and Accountant Experts." Randy Kessler, Esq., from Atlanta, Ga.; Rob Vance, CPA, from Memphis; and Becky Caperton, Ph.D., from Memphis, participated. The seminar was outstanding and received wonderful reviews.

One of our most important success stories within the Family Law Section, and I believe the entire Tennessee Bar Association, was our Family Law Section's Code Commission led by **Mary Francis Lyle,** which advanced two proposed statutory changes. First, **Amy Amundsen** and her Alimony Committee, working with the members of the Family Law Section Code Commission, produced a proposed alimony provision as drafted by Professor **Janet Richards,** University of Memphis Law School, which was very well conceived and written. **Stewart Crane** and **Bob Tuke** wrote and proposed new statutory changes regarding adoption. While mostly administrative in nature, the proposed adoption provisions will make important improvements in adoption law state wide. Both proposed statutory changes were recently approved by the Family Law Section Executive Council and forwarded to the TBA Board of Governors for its consideration. If approved by the Board of Governors, the TBA will endorse and sponsor this legislation. Both proposals were the result of many hours of effort, telephone conferences, email, and coordination by the respective leaders and members of the committees drafting them.

Be sure to attend the Tennessee Bar Association's Annual Convention in Memphis June 11-14. The Family Law Section will have its meeting Friday morning, June 13 at 9 a.m. Then, at 1:45 – 4 p.m, the Family Law Section and Elder Law Section will co-sponsor a CLE seminar titled "Oh No, My Parents are Getting Divorced." We are grateful to **Amy Amundsen** for coordinating this seminar for the benefit of the Family Law Section. At the Family Law Section meeting, we will learn from **Barry Gold** the plans for the 2003-04 TBA year.

None of these successful efforts would have been possible without our section coordinator, **Lynn Pointer.** All year, she has diligently handled requests, many of which have come at the last minute. She has been very patient. In my opinion, the Family Law Section has been a success this year in large part because of **Lynn's** efforts. Without her help and guidance, my job would have been all but impossible.

Never underestimate the Tennessee Bar Association, its influence, or its ability to perform its role in our profession. **Allan Ramsaur,** executive director of the Tennessee Bar Association, has been extremely supportive of the Family Law Section and its efforts. At every turning point, he has been there to provide leadership and support. Without his efforts and those of the staff of the TBA, very few projects would have materialized. The Tennessee Bar Association, as an organization, has worked very hard to provide our section with the resources we needed to improve our profession. We have had access to capital, physical locations, and the staff necessary to communicate, organize, and produce the results that we have had this year.

In addition, never underestimate the friendliness of the TBA staff. The TBA presents a tremendous opportunity for anyone who wants to be involved, and who is committed, to serve in a number of capacities within the structure. The interested lawyer need only call anyone at the TBA, including **Allan Ramsaur** or **Lynn Pointer,** and that lawyer can

continued on page 3

Newsletter Staff:
Lynn Pointer, Sections Coordinator,
lpointer@tnbar.org

Gina Jones, Publications Coordinator,
gjones@tnbar.org

Tennessee Bar Association
221 Fourth Avenue North, Ste 400
Nashville, TN 37219-2198
(615) 383-7421
FAX: (615) 297-8058
www.tba.org

Amendments to Tennessee's Adoption Code

by Robert D. Tuke

Thanks to the initiative of Stewart Crane and the help of an ad hoc committee of adoption practitioners from across the state, including Stewart, Dawn Coppock, Lisa Collins, Kevin Weaver, Mike Jennings, Barry Gold, David Roberts, Bruce Kessler, John Acuff, and yours truly, the General Assembly is likely to enact much-needed amendments to the Adoption Code this session. The amendments are sponsored by Rep. Russ Johnson of Loudon and Sen. Randy McNally of Oak Ridge.

Briefly, the amendments will do the following:

• Amend the definition of "abandonment" to make it clear that abandonment of a child for failure to provide financial support, as a ground for terminating parental rights, must be "willful," in response to the Tennessee Supreme Court decision, *In re Swanson* (1999);

• Extend the statutory validity of home studies for prospective adoptive persons to one year instead of six months. This brings Tennessee's law into conformity with that of most other states and ensures that a home study will not become invalid after six months even if no change in circumstances has occurred;

• Remove the necessity of adoptive parents' consulting the Tennessee Putative Father Registry and the necessity of filing foreign affidavits in readoptions under Tennessee law following foreign adoptions;

• Clarify that adoptive parents can provide food in support of birth parents under Tennessee law and extend the permitted support period after birth from 30 days to 45 days;

• Make clear that the number of days that must pass after the birth of a child before the birth mother may surrender parental rights is 3 *calendar* days;

• Extend from 3 to 10 working days the period of time in which adoptive parents may consult the Putative Father Registry before filing an Adoption Petition;

• Clarify the point in time at which a determination is made whether a biological father is a "legal" father for determining available grounds for termination of parental rights in response to the Tennessee Supreme Court decision in *Jones v. Garrett* (2002); the established time is when an Adoption Petition or Termination Petition is filed;

• Make clear that the jurisdiction of the adoption court supersedes and stays the jurisdiction of other courts with respect to visitation, as well as guardianship and custody;

• Correct two misreferences to the old UCCJA and refer to the present UCCJEA;

• Permit adoptive persons and adoptive parents to obtain certified copies of their final orders of adoption without requiring further court orders necessitated by the sealing of adoption records;

• Require the release of certain non-identifying information to prospective adoptive parents under Tennessee law, so as to avoid the potential application of the federal HIPAA to such situations.

During the process of finalizing the bill, we received valuable help from Mary Frances Lyle, Jeff Levy and others on the TBA Family Law Section Code Commission, and we obtained the endorsement of the Board of Governors of the TBA following the recommendation of the TBA Family Law Section executive council. We appreciate their input and support.

Working on the bill also gave us an opportunity to work with new DCS Commissioner Mike Miller and with Mary Walker and Dezanne Russell in the DCS General Counsel's office. We worked out some difficulties DCS had with the bill, and reached an acceptable compromise. We expect to work with them again next year on possible further amendments to the Adoption Code.

Finally, as a result of this team effort, we have formed a new Adoption Committee of the TBA Family Law Section. TBA has also established an Adoption Law e-forum (listserv) on the internet. I would like to extend my personal thanks to everyone whose efforts made all of this possible. ❖

If you would like to volunteer to serve on the TBA Family Law Section's Adoption Committee or if you wish to join the Section's Adoption eforum, please contact TBA's Sections/Committees Coordinator, Lynn Pointer at Lpointer@tnbar.org or call 615-383-7421.

Robert D. Tuke is a member of the law firm of Trauger, Ney & Tuke in Nashville. He is president of the American Academy of Adoption Attorneys and serves on the board of directors of Nashville's Family and Children's Service and the board of directors of Miriam's Promise adoption agency. He received his bachelor's degree from the University of Virginia and his law degree from Vanderbilt University.

From the Chair *continued from page 2*

immediately begin to make an impact.

Finally, never underestimate the seriousness of the lawyers who are committed to improving the profession and the Tennessee Bar Association. They have made many sacrifices this past year and have been involved in many afterhours phone calls, arduous drafting projects, helpful emails, and spirited debates. Lynn Pointer has put in many late nights at the TBA headquarters.

From the large number of phone calls I have received from lawyers and advocates across Tennessee, I have learned that no one is completely satisfied with our judicial system and the current state of family law. Almost everyone agrees we have a long road to travel and a great opportunity to affect positive change for the citizens of Tennessee. **Barry Gold** will effectively advance those efforts next year as Family Law Section chair. Please contact **Lynn Pointer** at Lpointer@tnbar.org if you are interested in volunteering to serve in any capacity within our Family Law Section. ❖

Miles Mason Sr. is chair of the Tennessee Bar Association Family Law Section. He is a member of Crone & Mason PLC, Memphis. His e-mail address is mmason@cronemason.om.

Child Support Guidelines Update

by Stuart Wilson-Patton

The Tennessee Child Support Guidelines Task Force, a joint legislative, judicial and executive branch work group that includes private practitioners and parents, continues to meet on a monthly basis to discuss possible changes to the Tennessee Child Support Guidelines. The Task Force considered several interesting proposals at its April meeting. Such proposals included credits for children living in the obligor's household who are not covered by any support order, adjustments for variations in parenting time, adjustments for travel related visitation expenses, the treatment of child care expenses, and the treatment of medical expenses. No final versions of these proposals are yet available as the Task Force has elected to determine whether to adopt a different guidelines model before finalizing any proposed changes. The Task Force is expected to consider adjustments for high and low income cases in the next few months. The Task Force will circulate any final recommendations to the bench and bar for comment prior to adoption, which could be either by legislation, by administrative rule-making, or by some combination of both. Here is a summary of the proposals considered at the April meeting.

Children in Obligor's Household

The Multi-Family Subcommittee introduced a proposal to allow a credit against an obligor parent's child support obligation for biological or legally adopted children who are living in the parent's household and being directly supported by the parent, but who are not covered by any court order. Credits would be allowed when setting an initial support order and as a defense to a request for an increase in an existing order, but would not be used to decrease an existing order. Further, the credit would not be available if it seriously impaired the ability of the custodian or the child for whom support was being set to maintain minimally adequate housing and to provide other basic necessities, as determined by the court. The proposal would otherwise allow an automatic credit of one-half of the guidelines percentage for the number of such children living in the obligor's home. Upon proof of extreme and severe hardship or that the children's other parent is unable to support the children due to death, incapacity or incarceration, the court could allow the obligor parent a credit of between one-half and all of the guidelines percentage for the number of such children living in the obligor's home. In such cases, the court could consider the total circumstances of both households and their members. The proposal includes a provision for high income cases which tracts the language in *Tenn. Code Ann.* §36-5-101(e)(1)(B). Finally, the proposal includes a new administrative rule that specifically provides that the adoption of any amendment to the guidelines is not a basis for the modification of an existing support order.

Adjustments for Parenting Time

The Subcommittee on Parenting Time proposed that the guidelines be modified to recognize five categories of parenting time, to be defined as follows: (1) slight visitation 0-24 nights; (2) minimum visitation 25-59 nights; (3) standard visitation 60-90 nights; (4) split visitation 91-169 nights, and (5) joint visitation 170 or more nights. Since the current guidelines chart includes a built-in presumption of 80 overnight visits per year as the norm but parenting plans are changing the norm, the subcommittee recommended that the presumption of 80 overnights per year be taken out of the guidelines chart. Thus, the guideline percentages would be raised to reflect no presumption of any visitation. This raises the guidelines percentages to 26 percent for one child, 39 percent for two children, 50 percent for three children, 56 percent for four children and 61 percent for five or more children. Then the subcommittee offered 5 separate guidelines charts — one for each number of children. Each chart has a sliding scale of reduced support awards based on how much visitation the obligor parent exercises. Those parents who have slight parenting time pay 100 percent of the guideline amount. Those parents who are in the other four categories of parenting time get increasing adjustments up to a total of 50 percent of the guidelines amount. For example, those with minimum parenting time get a 10 percent adjustment, those with standard get a 20 percent adjustment, those with split parenting time get a 35 percent adjustment and those with joint parenting time get a 50 percent adjustment.

Travel Related Visitation Expenses

The Key Issues Subcommittee recommended that the judiciary be given clear discretion to make adjustments to the guidelines to account for travel related visitation expenses. In most cases, these expenses would be allocated by the court between the parties based on an equal division of the cost, but taking advantage of any discounts or benefits that either parent may have, such as reduced cost airfare. If either party moves with malicious motives, then that party should bear the entire cost of the travel related visitation expenses. The court would use the standard set forth in *Tenn. Code Ann.* §36-6-108 to determine whether there is a reasonable purpose or a malicious purpose for a party's move.

Child Care Expenses

Since the cost of child care is not addressed in the current guidelines, and that cost can be prohibitive for some parents, because of low income, multiple children or the lack of an available child care provider, the actual out-of-pocket cost of such care would become a basis for an upward deviation. The Key Issues Subcommittee recommended that the actual out-of-pocket cost of quality child care for the primary residential parent made necessary by that parent's employment, job search, work-related education or education leading to financial improvement, be a consideration for an upward deviation from the guidelines. To prevent collusion or abuse

continued on page 6

Proposed Life Insurance Provision for Permanent Parenting Plans

by Miles Mason Sr., Esq.

Last year, Chancellor D.J. Alissandratos, who sits in Shelby County held a seminar that discussed practice in his courtroom. Part of that seminar dealt with life insurance provisions within permanent parenting plans. Chancellor Alissandratos holds the opinion that children of divorcing parents can be considered third party beneficiaries of their parents' representation. As such, counsel for divorcing parents should pay close attention to the life insurance provisions contained within parenting plans.

In Shelby County, our parenting plan form states that life insurance is optional for the parent not paying support, implying that life insurance for the obligor spouse is not optional. Traditionally, judges and chancellors in Shelby County have not questioned the amount of insurance coverage, most often relying upon existing coverage, either through the employer or private policy. Chancellor Alissandratos' main concern has been that the children should be listed as "sole and irrevocable" beneficiaries of the life insurance policies. In fact, he requires the parties to amend the parenting plan form to add that language.

Parents die. Children of deceased parents will need support. It makes financial and legal sense for jurists to impose that legal obligation on the parents. Chancellor Alissandratos also believes that there needs to be a built-in verification procedure. Unfortunately, it is not unusual for parents to agree to provide life insurance for the benefit of the children and then not follow through.

With all this in mind, I began to draft a proposed permanent parenting plan provision for life insurance that could provide both parents with specific directions, guidelines, and obligations to obtain life insurance and/or assist with the verification of life insurance coverage. I began by reviewing an article written by Kathleen A. McCarthy, Esq. of Tucson, Ariz. She has written an excellent article about life insurance, limiting substitute policies, verification, and enforcement. McCarthy's article provides proposed provisions for settlement agreements in divorce, which I used with my first draft. After I prepared the initial draft, Larry Brooks, a State Farm insurance agent in Memphis, reviewed the proposed language and offered important and substantive suggestions. Chancellor Alissandratos believes that it is important for life insurance agents and human resource professionals to approve of any proposed language, making certain the document will have its intended effect.

Please review the following proposed life insurance provisions. The numbered paragraphs relate to Shelby County's permanent parenting plan. If you have any comments, concerns, or criticisms, please email them to me at mmason@cronemason.com or fax them to me at 901-529-1432. Please let me know whether you consent to your comments being published in the next edition of the *Family Practice* newsletter. All comments will be forwarded to Chancellor D.J. Alissandratos and Judge Don Ash. Your time and effort are appreciated. This is a very important function of the Tennessee Bar Association Family Law Section. By working together, we have made and continue to make a difference in our profession and our clients' lives.

1.7 LIFE INSURANCE. *(Optional for parent not paying child support.)*

1.7.1 *(Mark one or both)*

[ ] Father shall insure his own life in the minimum amount of $_____, whole or term, which may not decrease in face amount except upon order of the Court.

[ ] Mother shall insure her own life in the minimum amount of $_____, whole or term, which may not decrease in face amount except upon order of the Court.

1.7.2 (a) Coverage. The life insurance policy(ies) listed in Paragraph 1.7.1 will name the minor child(ren) as sole and irrevocable beneficiary(ies). The insured shall also designate *(Mark one)* [ ] Mother [ ] Father [ ] Other: _____ as guardian(s) over these funds for the benefit of the child(ren). The choice of secondary beneficiary(ies) will be left to the owner of the policy, and if the type of policy chosen is whole life, the owner may retain control of the investment portion of the policy. The purposes of this obligation include ensuring payment of outstanding child support, providing for the general welfare and support for the child(ren) following the untimely death of the insured(s), and providing assistance with post-secondary education, if such is agreed. The life insurance coverage shall be maintained until [ ] child support is no longer owed [ ] the college education obligation(s) set forth in Paragraph 3.4 below are complete. The insurance policy(ies) shall be with _____ company, policy number _____.

(b) Proof and Notice. Each insured shall provide proof of continuing coverage to the other parent within thirty (30) days following entry of the Final Decree of Divorce and by May 15th of each year thereafter. Each insured shall immediately notify each life insurance company in writing, or in any other documented form acceptable to the particular insurance company, that (1) in the event of default of the premium payment, the insurance company shall notify the other party of the default and give the other party an opportunity to pay the premium which is in default in order to

continued on page 6

Life Insurance Provision for Permanent Parenting Plans *continued from page 5*

keep the policy current, that (2) the insurance company is to notify the other party in the event of any application for change of beneficiary or coverage at the time said application is made, and that (3) any and all federal or state privacy law requirements are waived with respect to the other parent for purposes of compliance with this Life Insurance provision only. Each insured shall execute any required authorization acceptable to each insurance company so that the other parent may obtain appropriate proof and documentation directly from each insurance company to confirm the existence of the coverage, to obtain a copy of the policy, to obtain a copy of the declaration of benefits page, to obtain information on current beneficiary status, and to obtain a copy of any other document that confirms compliance with this Life Insurance provision. Further, each insured shall notify the other parent in writing by certified mail of (1) any application for change of beneficiary; (2) any default of any premium that the insured is required to pay prior to its cancellation, said notice to be given in no event more than fifteen (15) days after said payment is due; and (3) any change in limits or coverage.

(c) Substitute Policy. Nothing in this Life Insurance provision shall preclude an insured from obtaining substitute insurance coverage as long as the policy is rated A- or better by A.M. Best or A- or better by Standard & Poor's and the insured gives thirty (30) days prior notice to the other parent regarding the intended change. If a substituted policy is employer-provided or, if for any reason, a life insurance policy comes within the ambit of ERISA, then these provisions entered herein as an Order are deemed sufficient as a QDRO and the Court will retain jurisdiction to make amendments to ensure its acceptability as a QDRO.

(d) Default. In the event an insured defaults on any premium he or she is required to pay under this paragraph and the other spouse makes such payment, the insured shall immediately reimburse the other spouse for said payment and any additional costs related thereto. Further, this obligation for life insurance may be enforceable by civil and/or criminal contempt to the extent allowed by Tennessee law.

(e) Encumbrance of Policy. The insured shall not in any way encumber said policy(ies) so as to defeat or affect the minor child(ren)'s or the other spouse's rights under this Life Insurance provision.

(f) Non-compliance. In the event an insurance company fails to comply with these provisions, the insured must either secure compliance or obtain substitute life insurance coverage with a life insurance company which will comply with the terms of this Life Insurance provision. Upon reasonable notice and hearing, a prevailing party bringing a petition to compel compliance with this Life Insurance provision shall be awarded attorney's fees pursuant to Tennessee Code Annotated § 36-5-103(c), discretionary costs, and both pre-judgment and post-judgment interest.

1.7.3 Other provisions regarding life insurance:

_____
_____
_____
_____
_____
_____ ❖

Miles Mason Sr. is chair of the Tennessee Bar Association Family Law Section. He is a member of Crone & Mason PLC, Memphis. His e-mail address is mmason@cronemason.om.

Child Support Guidelines Update *continued from page 4*

of this provision, the child care provider should be appropriately licensed, instead of merely being a relative or a friend.

Medical Expenses

Current federal law contains a presumption that the obligor parent will provide health insurance for the children if he is employed. Federal law does not address the treatment of deductibles, out-of pocket expenses, co-payments, uncovered costs or the relative cost of insurance to each parent. The Key Issues Subcommittee recommended leaving the federal presumption in place, but allowing the court to consider the relative cost for each parent to provide health insurance for the children, deductibles, out-of-pocket expenses, co-payments, uncovered costs, and the circumstances of the case in allocating the medical expenses between the parties on an equitable basis.

If you have any comments about these proposals or would like to obtain copies of the minutes of the Task Force Meetings, please contact Connie Wilkes, Legal Assistant, Office of the General Counsel, Department of Human Services, Citizens Plaza Building, 400 Deadrick Street, Nashville, TN 37248. Ms. Wilkes can also be reached at: (615) 313-4731 or conswella.r.wilkes@state.tn.us ❖

Wilson-Patton is a senior counsel for the Tennessee Attorney General's Office. He is a 1986 honors graduate of the University of Tennessee College of Law. He is a member of the TBA Family Law Code Commission and of the TBA Family Law Section's Executive Council.

The Constitutionality of Child Support Guidelines

Part 1

by Laura W. Morgan, Family Law Consulting

On Feb. 27, 2002, the Hon. Dane Perkins of the Superior Court of Atkinson County, Ga., issued a sweeping decision in the case of *Georgia Department of Human Resources ex rel. Reddick v. Sweat*, declaring the Georgia Child Support Guidelines void and unconstitutional as a violation of due process, equal protection, the right of privacy (the right of parents to raise their children as they see fit), and a violation of the Georgia constitution that prohibits the taking of property.

This decision was ill-conceived and ill-reasoned. It misstates the law and misquotes the economic studies on which the guidelines are based in order to set up a strawman to knock down. It miscites and misquotes cases from other states as well.

This article will review the current case law addressing the constitutionality of child support guidelines across the country.

I. Federal Mandate as Unconstitutional

In *Childrens and Parents Rights Association of Ohio Inc. v. Sullivan,*[1] the court considered an argument that the federal statutes and regulations governing child support, i.e., the requirement that all states enact child support guidelines, are unconstitutional. The plaintiffs first asserted that the federal mandate allowed the states too great a role in determining child support. Since the federal government has taken the role of enforcing child support through AFDC, the federal government could not delegate that same authority to the states. In the alternative, the plaintiffs asserted that the federal government is overly involved in child support determinations, a matter that should be left to the states. The court easily disposed of all arguments. First, valid federal policies may be executed with state cooperation. The Constitution does not require that all welfare programs be either completely federally administered, or completely left to the states. Rather, the Supreme Court has recognized that the AFDC program is based on a scheme of cooperative federalism.[2] Second, relevant authority teaches us that the federal government may, in the exercise of its spending power, require that states adhere to certain rules as a condition to receiving federal funds. The spending power is limited only by the requirement that it be in pursuit of the general welfare. The child support regulations enacted by the Department of Health and Human Services passed constitutional muster on all points, because the adequate support of children was clearly in pursuit of the general welfare.

II. Method of Enactment by State as Unconstitutional (Violation of Separation of Powers)

A. Enactment by Court Order

Where guidelines were enacted by court order or decision, the guidelines were challenged as a violation of separation of powers. These challenges posit the argument that judges are improperly making substantive rules of law, a function of the legislative branch.

Some constitutional challenges have come from the very judiciary enacting the child support guideline. For example, in 1989, the Maine Supreme Court issued its guidelines by a four to seven vote after being directed by the state legislature to enact child support guidelines. The statement of nonconcurrence stated:

> At the legislature's direction, the Court has set out upon a path it has never previously taken. Today the Court writes law in a context divorced from the decision of any particular case and in an area not involving the customary work day rules of court like procedure, evidence, and lawyer/judge discipline. The Child Support Guidelines involve difficult and abstract questions of policy that the people's elected representatives, not this Court, should decide. At the very least, an executive agency should promulgate such rules according to standards set by the legislature.[3]

Maine subsequently enacted its child support guidelines by legislative act.[4]

Similarly, Alaska adopted its guidelines by court rule. One justice dissented, stating that the new court rule purported to establish substantive rules of law governing support awards. Citing the Alaska Constitution,[5] the dissent claimed the court was empowered to make rules of law only in actual cases, in the administration of the courts, and in matters of practice and procedure.[6] The same constitutional argument was raised when Arkansas adopted its child support guidelines by order of the Supreme Court, when one justice declared that the legislature had unconstitutionally delegated the authority to legislate to the court.[7] In both Alaska and Arkansas, however, the majority of the court declared that the legislation authorizing the court to promulgate child support guidelines must be presumed to be constitutional; any challenge must come from party litigants.

The same arguments were raised by private litigants in Arizona.[8] In that case, the court disposed of the constitutional argument by declaring, "The guidelines are merely that,

continued on page 8

 continued from page 7

guidelines. They are to assist the trial courts of Arizona in applying the factors set forth in the statute."[9] Because the guidelines operate as a presumption, they are merely "procedural" in nature, and not a substantive rule of law. Thus, promulgation of the guidelines were within the court's rule-making ability. The courts of Alaska,[10] Delaware,[11] the District of Columbia,[12] and Ohio,[13] also agreed that promulgation of child support guidelines were within the court's rule-making powers.[14] The courts must, however, adhere to proper procedure in exercising their rule-making powers.[15]

B. Enactment by Legislature

Where the guidelines were enacted by the legislature, some litigants have argued that such action encroached on judicial discretion.

In *Boris v. Blaisdell,*[16] the father argued that the Illinois child support guidelines violate the separation of powers requirement of the Illinois Constitution. The court disposed of this argument by characterizing the child support guidelines as involving the application of substantive law. Thus, the enactment of child support guidelines could no more be an incursion into the power of the judiciary than the prior law establishing child support awards pursuant to certain enumerated factors.[17]

C. Enactment by Administrative Regulation

Finally, where the guidelines were adopted by administrative regulation, the constitutional challenge was based on the argument that the administrative agency enacting the child support guidelines must do so in accordance with the state's version of the Uniform Administrative Procedures Act. Failure to do so will render the guidelines infirm. This argument was successful in *Illies v. Illies.*[18] In that case, the court held that the North Dakota Department of Human Services is an administrative agency subject to the strictures of the state's Administrative Agencies Practice Act. The regulations were subsequently re-promulgated in accordance with the act.

III. Application of State Guidelines as Violation of Due Process

Some litigants have argued that the application of child support guidelines in their particular case constitutes a violation of due process. In *Schenek v. Schenek*,[19] the father argued that the child support guidelines violated due process because the state guidelines contain provisions not required by the federal legislation. The court held that the guidelines passed constitutional muster, because the court has the authority to deviate in the appropriate circumstances. Thus, as long as the guidelines are equitably applied and provide for discretion to suit the particular circumstances of each case, they are not constitutionally infirm.

The court in *Boris v. Blaisdell,*[20] reached the same conclusion. Because no irrebuttable presumption operates, but rather the guidelines create a fully rebuttable presumption of applicability, the guidelines are constitutional in their operation.[21]

IV. Application of State Guidelines as Violation of Equal Protection

The various states' child support guidelines have come under a variety of equal protection attacks. For example, in *In re Marriage of Dade,*[22] the father challenged the child support guidelines on the grounds that the guidelines allowed consideration of income of the spouse of the noncustodial parent, but not the income of the spouse of the custodial parent. The court held that this was a misreading of the statute; both spouses' incomes could be considered in the appropriate circumstances. Thus, the guidelines were not a denial of equal protection.[23]

In *Coghill v. Coghill,*[24] the court also rejected an equal protection claim. In that case, the father argued that Alaska's child support guidelines, which consider only the income of the noncustodial parent, violated equal protection. The father was essentially arguing that the Percentage of Income Model was unconstitutional.[25] The court responded to this argument by declaring that equal protection has never required that differently situated persons be treated the same way. Because the custodial and noncustodial parents are not similarly situated, they may be treated differently. Moreover, the interest a parent is seeking to protect is an economic interest. The government needs only a rational basis to enact legislation touching on these interests. The equal protection argument must therefore fail.[26]

In *P.O.P.S. v. Gardner,*[27] a group called "Parents Opposed to Punitive Support" challenged the Washington guidelines as violative of the equal protection rights of children living in the noncustodial parent's household. The group claimed that children living with the noncustodial parent were denied equal protection, because their support was determined after, and thus necessarily on a smaller basis than, the support of prior child. The court disagreed, and held that because the schedule explicitly permitted the court to consider children from the noncustodial household, the children's equal protection rights were not violated. Moreover, the 14th amendment does not mandate the rigid policy prescriptions urged by P.O.P.S.[28]

Two more recent cases did find a violation of equal protection, but under very specific circumstances, and the whole guidelines were not declared infirm, just a particular application. In *Orange County v. Ivanesco,*[29] the court held that *Cal. Fam. Code* §4071.5 is unconstitutional, because it deprives a trial court the discretion to consider an obligor's expenses for a child living with him or her if the children for whom support is being determined are AFDC recipients. If the children are not AFDC recipients, then the court can consider the obligor's expenses for a children living with him or her. Such a distinction, the court held, was a violation of equal protection serving no rational basis.

In *Gallaher v. Elam,*[30] a slip opinion by the Tennessee Court of Appeals, the court found that the specific provision of the Tennessee child support guidelines that does not

allow an obligor to deduct from income the support paid for children not covered by the order, or allow the court to deviate for those children, violates the equal protection clause. The court found that the "first families first" bias inherent in the guidelines was a violation of equal protection. The court noted the decision in dissent in *Feltman v. Feltman*, but failed to note *Stewart v. Winfrey*, or *Martinez v. Martinez* (note 28). The court concluded that the guidelines were unconstitutional because "the state has no business discriminating between children based solely on the fact of divorce, [and] there is no legitimate state purpose in requiring a parent to allocate his or her income more to one child than another."

V. Other Constitutional Challenges to State Guidelines

In what has to be the most novel challenge to a state's child support guidelines, the father in *Hunt v. Hunt*[31] contended that the court's order requiring him to pay child support under the state's guidelines violated his first amendment rights of free exercise of religion. In particular, the father claimed that he could not, consistent with his faith, work outside the community and earn money to meet his support obligation as determined by the court. The court disposed of this argument, holding that the parental obligation of support is a compelling state interest for purposes of determining whether a parent can be forced to pay child support even though it burdens his religious beliefs.

In another novel constitutional challenge, in *Shrivastava v. Mates*[32] the father challenged the application of the child support guidelines in his particular case because he and the wife had entered into a contract regarding the support of the children prior to the enactment of the guidelines. Specifically, he argued that application of the guidelines in his case would impair the obligation of the contract in violation of the Contract Clause of the United States Constitution. The court disposed of the argument, holding that while the application of the guidelines might operate as an impairment of the contractual relationship between the mother and father, the guidelines further a significant and legitimate public purpose. Moreover, even before the guidelines were enacted, the parties could not by contract bind a court to a particular amount of child support, so there really was no contract impaired.[33]

Other novel constitutional attacks, e.g., unconstitutionally vague,[34] unconstitutional interference with property rights,[35] and unconstitutional enactment of ex post facto law,[36] have also failed. ❖

Notes

1. 787 F. Supp. 724 (N.D. Ohio, 1991), and its companion case at 787 F. Supp. 738 (N.D. Ohio, 1992).

2. *King v. Smith,* 392 U.S. 309 (1968).

3. 3 Admin. Order No. SJC-13, Maine Sup. Jud. Ct. (1989) (Roberts, J., Glassman, J., Hornby, J., noncurcurrence).

4. Me. Rev. Stat. Ann. tit. 19, §§ 311 to 320.

5. Alaska Constitution, art. IV, §§ 1, 15.

6. *Alaska Civ. R.* 90.3 (1989) (Burke, J., dissenting).

7. *In re Guidelines for Child Support Enforcement,* 301 Ark. 627, 784 S.W.2d 589 (1990) (Hickman, J., dissenting).

8. *Schenek v. Schenek,* 161 Ariz. 580, 780 P.2d 413 (Ct. App. 1989).

9. 780 P.2d at 414.

10. *Coghill v. Coghill,* 836 P.2d 921 (Alaska 1992).

11. *Dalton v. Clanton,* 559 A.2d 1197 (Del. 1989).

12. *Fitzgerald v. Fitzgerald,* 566 A.2d 719 (D.C. 1989). It should be noted that while the appellate court upheld the superior court's authority to promulgate child support guidelines under its rule-making authority, the appellate court held that in the present instance, the superior court could only adopt rules that did not conflict with existing substantive law. In the present case, the child support guidelines did conflict with substantive law, and were thus invalid. Subsequently, the D.C. Council enacted as permanent legislation a new child support guideline, specifically providing that a child support order shall not be deemed invalid on the sole basis that the order was issued pursuant to the Superior Court rule. *See A.S. v. District of Columbia* ex rel. B.R., 593 A.2d 646 (D.C. 1991) (upholding order issued under previous Superior Court rules).

13. *Lynch v. Lynch,* 1989 Westlaw 146613 (Ohio Ct. App. 1989); *Surman v. Surman,* 1989 Ohio App. Lexis 2558 (1989).

14. *See Mistretta v. United States,* 488 U.S. 361, 109 S. Ct. 647 (1989) (federal sentencing guidelines do not violate constitutional separation of powers).

15. *See Blackston v. State of Alabama,* 30 F.3d 117 (11th Cir. 1995) (where Supreme Court Advisory Committee on Child Support Guidelines refused group of noncustodial fathers to tape-record the Committee's meetings, such actions violated the noncustodial fathers' first amendment rights).

16. 142 Ill. App. 1034, 492 N.E.2d 622 (1986).

17. *Accord A.S. v. District of Columbia ex rel.* B.R., 593 A.2d 646 (D.C. 1991); *In re Marriage of Cook,* 147 Ill. App. 3d 134, 497 N.E.2d 1029 (1986); *Pauling v. Pauling,* 837 P.2d 1073 (Wyo. 1992). *See also Sharp v. Sharp,* 422 S.W.2d 443 (S.D. 1988).

18. 462 N.W.2d 878 (N.D. 1990). *Accord Eklund v. Eklund,* 538 N.W.2d 182 (N.D. 1995). *Cf. Iowa ex rel. Allee v. Gocha,* 555 N.W.2d 683 (Iowa 1996) (statute authorizing state agency to prepare child support orders and present them to district court for summary approval does not violate separation of powers doctrine, because it does not limit court's substantive inquiry into support orders); *Chastain v. Chastain,* 932 S.W.2d 396 (Mo. 1996) (state agency's power to modify judicial support order where collection is assigned to Title IV-D agency is not unconstitutional); *Nelson v. Nelson,* 547 N.W.2d 741 (N.D. 1996) (regulations concerning imputation of income were not beyond rule-making authority of agency); *Surerus v. Matuska,* 548 N.W.2d 384 (N.D. 1996) (adoption of child support guidelines by administrative regulation permitting imputation of income did not exceed rule-making authority of Department of Human Services).

19. 161 Ariz. 580, 780 P.2d 413 (Ct. App. 1989).

20. 142 Ill. App. 1034, 492 N.E.2d 622 (1986).

21. *Accord P.O.P.S. v. Gardner,* 998 F.2d 764 (9th Cir. 1993) (discussing Washington state guidelines, court held that guidelines do not violate procedural due process rights of divorcing parents, even if schedule does not enable parents to show that individualized costs of care for their children differed from assumptions underlying table); *Coghill v. Coghill,* 836 P.2d 921 (Alaska 1992); *Elliott v. Williams,* 631 So. 2d 1020 (Ala. Civ. App. 1993) (enactment of child support guidelines does not remove court's discretion, and thus Supreme Court's enactment of guidelines does not violate Alabama Constitution); *A.S. v. District of Columbia* ex rel. B.R., 593 A.2d 646 (D.C. App. 1991); *In re Marriage of Cook,* 147 Ill. App. 134, 497 N.E.2d 1029 (1986); *In re Marriage of Soden,* 251 Kan. 225, 834 P.2d 358 (1992);

continued on page 15

Divorce Planning: A unique and rewarding specialty practice

by Steven J. Silver

Our financial planning firm is an independent firm, working with clients who are seeking comprehensive financial plans. We are not obligated to any particular products; rather, our loyalty is to our clients alone. Each plan is customized to the individual, based on their goals for life.

For some time, I had noticed advertisements in various financial journals for The Institute for Certified Divorce Planners. The more I saw the ad, the more my interest was peaked. Our firm had assisted quite a number of clients going through divorce. Some went through the process with positive experiences, others did not. With statistical data indicating that one in every two marriages ends in divorce,[1] our firm decided that one of us should be specialized in the divorce planning field.

Some financial planners might argue that being an experienced practitioner is enough. But our firm saw advantage in training that was highly specialized: certification would provide a more comprehensive knowledge of divorce issues and a clearer understanding of all the legal aspects of divorce. Further, certification would distinguish an individual with the public from financial planners who holds themselves out as a *divorce specialist* when there is no evidence to support it. Drawing on these conclusions, I enrolled in The Institute for Certified Divorce Planners in October of 1999.

The Institute requires five days of course work followed by a half day exam. It was an interesting week and I came away with considerably more information than I might have had otherwise, and also convinced that this specialty was right for me. I looked forward to developing it into a focused part of my practice.

Setting Up Practice

When I began specializing in divorce planning, my hope was to be able to work with both husband and wife at the same time, similar to that of a mediator. I saw this as ideal in that there should be no sense of anything being held back and each one hearing directly from me, at the same time, what was fair and equitable and why. I soon discovered, however, that often the room filled with tension and less was accomplished, rather than more. I will still meet with both parties, if they request that, but I no longer encourage it.

Upon receiving certification from the Institute for Certified Divorce Planners, you have ongoing access to the Institute's staff. I have not taken much advantage of that offering in the past, but I plan to change that and begin using them more as a resource. I began developing my divorce planning practice rather slowly; I wanted to define my practice based on what I learned early on from clients. There was advantage to that, but now that I have formed the foundation and am comfortable with the decisions I've made about the divorce planning part of my practice, I intend to take full advantage of the Institute. Attending annual meetings and staying in touch throughout the year is the best way to keep me up-to-date on divorce planning issues, especially on those areas that I do not deal with on a regular basis. This year's January meeting had a session on *Collaborative Law* that I found especially interesting and encouraging, in that all individuals involved (spouses, children, representing attorneys for both sides, therapists, etc.) come together to finalize divorce decisions. Additionally, both attorneys agree if resolution cannot be made at this meeting, they will not represent clients in court, thereby capping off the fees due them by respective parties. Collaborative law is intended to encourage clients to bring things to conclusion.

Immediately upon graduation, I joined the Memphis Bar Association (MBA) as an associate member. By so doing, I would become better able to understand the legal system and what my clients might come to expect. Attending regular meetings would also provide me a good networking opportunity.

My expectations on the importance of membership with the MBA were met and identified the section on Family Law to be the area most beneficial to me. I attend that group's meetings as well. Through the involvement with Family Law meetings, I have gotten to know several attorneys who appear to conduct their businesses in the same manner I do: the clients' interests come first, all else follows. Anytime similarities in business practice are found to be in synch, comfort levels immediately become greater.

Working with attorneys has proved to be a favorable alliance. Our different roles are clearly defined and work well together and I have had good feedback from those attorneys with which I've worked. It has been my pleasure to work with those who are very concerned about their clients and less concerned about the revenue generated them.

If a client comes to me by way of the client's attorney, then I receive my information from the attorney. I take the client's information and turn that into graphs of the client's financial position. Then, with the other side's proposal (provided me by the same attorney) I am able to show if there are any shortcomings. This information provides a clear, concise, and pictorial description of the proposal, thereby making it very easy to see if the proposed settlement is appropriate. In the event it isn't, the weaknesses are so clearly defined the client can see where amendments are needed for equitability and fairness.

I will also recommend to attorneys those issues that should be reconsidered, issues that may not have been thought through well enough. The one matter most commonly requiring more consideration is that of the tax ramifications of various alternatives.

Lessons Learned

Although the Institute for Certified Divorce Planners recommends against providing opportunity for a client to tell their side of the divorce, I prompt my clients to talk about the divorce as much as is their wish. I understand the wisdom of the Institute's advice, but I have found that it helps the client to air his or her grievances — to let off some steam, so to speak. It helps, because sometimes they feel no one is listening — just sending bills. That only aids in victim mentality.

One client who needed to talk said she found it difficult to move forward unless she could "breathe" again. Telling her story helped her to do that. I don't involve myself beyond listening and I always make sure clients understand that I am not a counselor, and that although I will be happy to listen, my job remains to present information that is fair and equitable, based on the couple's assets and present and future needs.

The first time I understood the value of listening to a client's story was with a client who had become quite beaten down psychologically. She asked if she could tell me about the impact the marriage had had on her. I agreed as long as she understood I couldn't help beyond listening, as I was not a counselor. She spoke in a passive voice, demonstrating absolutely no tonal inflections, nor emotion for at least two hours. She thanked me for listening and said it had helped just to get it all out in the open. I came away from that meeting feeling especially sad for her life and grateful that I had had the time and the patience to hear her story. It meant something to me to feel I had helped her by listening.

Still another client put it this way: "Emotion is tied up with all the financial stuff, and I feel that your office is an emotionally safe place to come. I believe most women experience a 'fear factor' with divorce. We want to see that there is light at the end of the tunnel, but we need help in dealing with that." This came from a divorce planning client who stayed on as a client after the divorce for more comprehensive financial planning.

The client continued: "By furthering the relationship with you as my overall financial adviser, I can make a choice about when I feel safe taking over control of my financial matters. I realize I need to be in a less emotional state to feel the confidence necessary and that has been a tremendous help when I am dealing with the fear factor that overshadows everything."

Some clients stay on, some do not. That is entirely up to them. I do not, in any way, solicit their future business. I believe the first move should be made by the client, as I have performed what was originally contracted with me to do and there is no obligation beyond that.

Another lesson l learned right away was that all the financial number crunching is great if you are working with an analytic, but pictures and simple explanations go a long way and with less confusion for others. More people than not work from visual understanding — they will comprehend best by what they see, rather than what they hear. When I see a client's eyes glaze over, I know it is time to get visual.

Cases

Perhaps the most interesting case I have handled was that of a 60-year-old lady, married for 40+ years, no formal education, and no work experience. She finally found the strength to walk away from an abusive marriage and now has more money than she needs and doesn't have any idea how to enjoy herself. She is seeing a counselor from time to time and she continues to request meetings with me to be sure she is adhering to the financial goals she set for herself.

"I have found that it helps the client to air his or her grievances — to let off some steam, so to speak."

A case that was fraught with problems was that of two individuals whose professions dealt with finances on a day-to-day basis. Here were two analytics who couldn't agree to the method of calculation to use. One spouse wanted very much for the two of them to come together, but it just couldn't be brought about. I thought the settlement proposed by my client was quite fair, however the spouse did not. There was strong disagreement all the way through, causing the case to go on longer than is usually necessary. Had I known of the potential for conflict early on, I am sure I could have moved everything along more quickly. My client was the more emotional of the two and this was a bit of a surprise because my client was the husband. This case taught me that I need to examine each situation more carefully at onset for probable conflicts. Hopefully, by more intensive review with the client, we can immediately sort out "hopes" from likelihood.

The most difficult cases I've had are those with A-type husbands and completely subservient wives. Whatever the husband offers or says, the wife accepts. She doesn't fight for herself and doesn't question any decisions that he makes; she just accepts what he wants and agreeably signs as he wishes. It is extremely frustrating to equip an individual with "what is fair" and then see it go unheeded. It is equally frustrating to work with a person who hasn't the least concern for the other's welfare and takes pride in "having it all." I often wonder how such a person can consciously deal with being like that.

Confusion with Roles

On occasion, I have been asked how my services differ from that of a mediator. I believe the major differences can be summed up as follows: The Certified Divorce Planner's primary role is to inform clients how to equitably divide assets, whereas the mediator's primary role is to assist in negotiation between the two divorcing parties. Though this brief description does not fully describe what either professional does, it is a clear and succinct way to quickly define the two roles.

continued on page 13

A Guide to Child Support Enforcement and Military Personnel

Part 1

by Major Michael Boehman, Judge Advocate General School, U.S. Army

I. Finding the Soldier

A. Locating members of the Armed Forces can be difficult, and even more so without their social security number. Always try to get a social security number whenever you have any contact with military obligors and all putative fathers (they may join the military after you talk to them).

B. The simplest location method involves the nearest resource. The local recruiter may be able to provide the member's duty station if (s)he enlisted locally within a year or so. The recruiter's cooperation may be encouraged as a matter of good public relations.

C. Nearly every installation has a central locator office for assigned personnel. Once you discover the duty station, use this service by calling the installation locator (the number is available through the installation's information operator), giving member's name and social security number. You will get his/her military unit address. This allows you to correspond with the member (including using registered or certified mail and return receipt service) and the commander.

D. Another resource is the legal assistance attorneys. They are authorized to assist spouses and legitimate children (and in some cases even children born out of wedlock) obtain a member's unit address. Any authorized client may consult with any legal assistance attorney (e.g., an Army spouse can receive help from a Navy attorney). Most large bases have legal assistance offices.

E. Members usually leave a copy of reassignment orders at the old unit when they depart; whenever you have occasion to write a commander, always ask to be advised of the member's next duty station if he has been reassigned.

F. If all else fails, use the Worldwide Military Locator services: see addresses and sample inquiry at Appendix A.

- Information available: member's military address. Contact the U.S. Post Office or the postal officer at the nearest military installation for assistance in determining geographic locations of APO or FPO addresses.
- You need to provide member's name and social security number.
- Records may run 60-90 days behind reassignments, most of which occur in the summer. Avoid using during May through October if possible.

G. Special Problem: Home Addresses.

- Difficulty — the Privacy Act, 5 U.S.C. § 552a.
- Access to this information may be possible via the Freedom of Information Act, 5 U.S.C. § 552.
- Request the information from the installation personnel officer where the member is assigned; see the sample letter at Appendix B.
- Federal Parent Locator Service may also be a source for this information. The DoD Locator Service is operational. It is accessed through the Federal Parent Locator Service and provides home addresses for most service members. (Unit addresses will be released for certain categories of service members, i.e., those stationed overseas). This locator service is DoD-wide; therefore, knowing the particular service is not necessary.

Appendix A

1. Addresses for Worldwide Locator Services (for member's military address)

Army Active Duty: Army Worldwide Locator , USAEREC, 8899 E. 56th Street, Indianapolis, IN 46249, (703) 325-3732

Navy: Navy Personnel Command, (Pers 312), 5720 Integrity Drive, Millington, TN 38055-3120, (901) 874-3388

Coast Guard: Commander (MPC-53), U.S. Coast Guard, 2100 2nd St. SW, Washington DC 20593, (202) 267-1340

Army Reserve/Retired: Commander, ARPERCEN, 9700 Page Blvd., St. Louis, MO 63132, (314) 538-3777

Air Force: Headquarters, AFMPC/RMIQL, 550 C St. West, Suite 50, Randolph AFB, TX 78150, (210) 652-5774/5775/6377

Marine Corps: Headquarters, U.S.M.C., Code MMSB-10, 2008 Elliot Rd., Rm. 201, Quantico, VA 22134, (703) 784-3942

Note: Civilian requesters, including state and local officials and agents, must submit requests in writing, preferably on office letterhead. Appendix B is a sample letter requesting a member's home address.

2. Sample Letter to Locator Services

[Your agency or office letterhead]

[Locator Address from above list]

Re: SGT John Jones, SSN: 123-45-6789

Dear Sir or Madam:

Please advise me of the military unit and duty station address for the referenced individual, whom I believe to be an active duty member of the [Army, Navy, etc.]. The information should be sent to my attention at the letterhead address. Alternatively, a telephonic response is acceptable. My office phone number is (000) 123-4567.

This request is made in my official capacity as a child support enforcement agent for [county, state, etc.]. Since we are a public agency, I request that the normal fee for this information be waived. If you need any further information regarding this request, please call me.

Sincerely,

•••

Appendix B

Request for Home Address

[Your office or agency letterhead]

Commander, Fort Blank
Attn: Military Personnel Officer
Fort Blank, CA 98765-4321
Re: SGT John Jones, SSN: 123-45-6789
Dear Sir or Madam:

This request is submitted pursuant to the Freedom of Information Act. I request to be advised of the named member's home address. Since I am the head of a [state] [county] governmental agency engaged in a civil and/or criminal law enforcement activity in this matter, as authorized by state law, I believe that the requested disclosure constitutes a routine use of this information from the member's personnel records.

Additionally, I believe this information is generally releasable in this case under FOIA, notwithstanding the Privacy Act. I am acting in my capacity as the head of a public law enforcement agency on a matter involving the establishment and enforcement of this member's child support obligation, and I require a home address to fully discharge my responsibilities under state law. The public interest in disclosure to achieve child support enforcement outweighs the member's privacy interests, and therefore release would not constitute an unreasonable invasion of privacy.

The information is sought by a public agency; it will not be used for commercial purposes or for anyone's commercial gain. In view of this fact, and since the search should not require more than 2 hours and fewer than 100 pages are being requested, I assume there will be no chargeable search and reproduction fees. If fees must be assessed, however, please notify me so I can make appropriate arrangements.

I certify that I am authorized by law to collect this information. Please send your response to my attention at the letterhead address. If you need any further information in order to process this request, please call me at (area code) number.

Sincerely,
District Attorney

[This letter should be signed by the director of a law enforcement agency]

For Army Retirees send letter to: U.S. Army Community and Family Support Center, Retired and Veterans Affairs Division, ATTN: DACF-IS-RV, Alexandria, VA 22331-0522 ❖

Part II of this article will appear in the next issue of *Family Practice.*

Major Michael Boehman is an instructor in Family Law at the Judge Advocate General School in Charlottesville, Virginia.

Divorce Planning *continued from page 11*

Marketing

Word of mouth remains the best marketer there is, but I have also found a very high value to be that of advertising, if it is in the right place. In that my practice has focused on women, I chose to run an ad in a monthly magazine that is provided in the greater Memphis area. Aptly named *Memphis Women's Magazine,* the publication is monthly and distributes about 30,000 magazines. There are subscriptions available, but the primary routing is via places women frequent: grocery stores, health complexes, hair salons, physicians' offices, etc., and at no cost. Within two months, a client had come to me by way of advertising in the *Memphis Women's Magazine* and they continue to come. It is definitely money well spent.

Speaking to women's groups is another ideal place to explain about divorce planning services and how my role is different than that of an attorney or mediator or counselor. Women ask questions — that's good! In fact the primary reason I've focused my practice with women is because their egos don't get in the way. They don't mind asking for help and they seem to be more open to bringing all information to the table right away.

Looking Forward

The thing that has held my interest is the uniqueness of each case; nothing has occurred repeatedly. There is certainly no pleasure in seeing the turmoil and high pitched emotions that absorbs both sides, but there is reward in helping someone through a difficult phase of his or her life. I like to think I am helping these clients become stronger and more able to understand their financial position. With understanding, clients can know for themselves whether a settlement is fair. Just as the old adage says, knowledge is power.

I plan to direct more and more of my practice to divorce planning. I am quite comfortable now with my work and have seen both the need and benefit to working with individuals going through divorce.

And Further …

One thing I would suggest to anyone considering entering the field of divorced planning would be this: Get into it for the right reason. While there is money to be made, people in this situation want an ear … they need empathy. If that is not your style, this will show.

Judges and attorneys know if they are financially savvy or not. In many cases, I am bringing something that they can appreciate, something that will assist them in presenting comprehensive financial data.

Finally, although I advocate listening to clients' emotional stories, I have also learned I can't give away my time. I am very specific on the front end on how I work and what is expected of them. ❖

Note

1. Wilson, Carol Ann, *The Financial Guide to Divorce Settlement: Helping Your Clients Make Sound Financial Decisions,* Year 2000.

Steve Silver is co-founder and vice president of Wealth Strategies Group Inc. in Cordova. He holds the designations of Certified Divorce Planner, Certified Financial Planner, and Chartered Life Underwriter. Silver is a graduate of the University of Tennessee and has been in the financial planning business for more than 17 years. He can be reached at (901) 473-9000.

Social Security Income & Child Support

by Amy Amundsen

Income withholding orders against Social Security retirement income or disability income can be used to collect child support, alimony and attorney fees.

Section 207 of the Social Security Act (42 U.S.C. 407) protects Social Security benefits from assignment, levy, or garnishment. However, the law provides for three exemptions:

1) An Internal Revenue Service levy to collect unpaid federal taxes;
2) Garnishment to enforce child support and/or alimony obligations; and
3) Reimbursement to the states for interim assistance to Supplemental Security Income recipients.

On Jan. 1, 1975, Congress passed the "Consent by the United States to Income Withholding, Garnishment, and Similar Proceedings for Enforcement of Child Support and Alimony Obligations" act. Section 459 of the Social Security Act (42 U.S.C. 659) defines both child support and alimony as follows:

(i)(3) CHILD SUPPORT — The term "child support" when used in reference to the legal obligations of an individual to provide such support, means amounts required to be paid under a judgment, decree or order, whether temporary, final or subject to modification, issued by a court or an administrative agency of competent jurisdiction, for the support and maintenance of a child, … which provides for monetary support, health care, arrearages or reimbursement, and which may include other related costs and fees, interest and penalties, income withholding, attorney's fees and other relief.

(i)(4) ALIMONY — The term "alimony," when used in reference to the legal obligation of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (former spouse) of the individual, and (subject to and in accordance to state law) includes separate maintenance, alimony pendente lite, maintenance, and spousal support, and includes attorney's fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable state law by a court of competent jurisdiction.

Can children of a disabled person receive Social Security benefits?

If the obligor qualifies for Social Security disability benefits, the children may also qualify to receive benefits on the obligor's record. An eligible child can be a biological child, adopted child, or step child. To qualify as a child, the child:

a. be unmarried, and
b. -under the age of 18 years; or
-18-19 years and a full time student in high school; or
-18 years or older and have a disability that started before age 22.

Each qualified child may receive a monthly payment up to one-half of the obligor's full disability income. However, the limit paid to the children depends on the amount of the obligor's benefit and the number of family members who qualify on the obligor's record.

Therefore, it is important for the parent to file for the children's Social Security benefits immediately after the obligor qualifies for benefits. Otherwise, the children may lose that benefit.

As practitioners, we must first obtain a support order that reflects that an income assignment shall be issued against the obligor's Social Security income. The support order must then be sent to the local Social Security Administration office for implementation. ❖

Amy Amundsen practices in Memphis with the firm of Rice, Amundsen & Caperton and is certified by the Tennessee Supreme Court in Family law and as a Rule 31 mediator. She chairs the Alimony Committee of the TBA Family Law Section.

Alimony Fairness Bill *continued from page 1*

bill will permit the court to have discretion and control over a spouse's efforts in achieving rehabilitation and in obtaining a reasonable lifestyle for that spouse. Many times spouses go back to school to rehabilitate themselves and have to drop out of school because they can not pay their monthly living expenses. This bill allows the court to award both periodic alimony (money to assist in monthly expenses) and rehabilitative alimony (money to assist in educating the spouse) and later modify the amounts of each.

3. The Alimony bill provides for a fourth type of alimony — Transitional Alimony. Transitional alimony is the "closing-in money" that a court may award when, although rehabilitative alimony is not necessary, the economically disadvantaged spouse needs assistance to adjust to the economic consequences of a divorce, legal separation or other proceeding where spousal support may be awarded, such as a petition for an order of protection. This alimony would be awarded in those situations when a spouse already has a degree and is working, yet the other spouse's income is much greater than the other spouse's income. Transitional alimony would provide that spouse with 'closing in money' to enable that spouse to closely approach the former economic position. The difference between this type of alimony and periodic alimony is that transitional alimony is not modifiable, but is deductible by the payor for tax purposes because it terminates upon the death of the recipient.

Please support this bill and contact your legislators to encourage them to vote for this bill.

Incidentally, this legislation has the unanimous backing of our Family Law Section Code Commission and the Family Law Section Executive Council, the TBA and the Domestic Relations Committee of the Judicial Conference. ❖

Amy Amundsen practices in Memphis with the firm of Rice, Amundsen & Caperton and is certified by the Tennessee Supreme Court in Family law and as a Rule 31 mediator. She chairs the Alimony Committee of the TBA Family Law Section.

The Constitutionality of Child Support Guidelines *continued from page 9*

Esber v. Esber, 63 Ohio App. 3d 394, 519 N.E.2d 222 (1989) (guidelines do not violate due process rights of noncustodial father's new wife by considering her income in determining income available to father); *Hur v. Virginia Department of Social Services, Division of Child Support Enforcement ex rel. Klopp,* 13 Va. App. 54, 409 S.E.2d 454 (1991); *Raz v. Brown,* 213 Wis. 2d 296, 570 N.W.2d 605 (Ct. App. 1997).

22. 230 Cal. App. 3d 621, 281 Cal. Rptr. 609 (1991).

23. *Accord Wheaton-Dunberger v. Dunberger,* 137 N.H. 504, 629 A.2d 812 (1993) (father claimed that the guidelines violated the equal protection clause because the court designated him as the "obligor" parent, even though both the mother and father had joint physical custody; court disposed of this argument, holding that the father was designated the obligor because he had vastly superior financial resources; if the mother had greater resources, she'd be the obligor); *Hur v. Virginia Department of Social Services, Division of Child Support Enforcement ex rel. Klopp*, 13 Va. App. 54, 409 S.E.2d 454 (1991).

24. 836 P.2d 921 (Alaska 1992).

25. *See* § 1.03[b][3] of Laura W. Morgan, *Child Support Guidelines: Interpretation and Application* regarding the percentage of income model.

26. *Accord In re Marriage of Cook,* 147 Ill. App. 134, 497 N.E.2d 1029 (1986); *Reeves v. Reeves,* 584 N.E.2d 589 (Ind. Ct. App. 1992); *In re Marriage of Rudish,* 472 N.W.2d 277 (Iowa 1991); *Eklund v. Eklund,* 538 N.W.2d 182 (N.D. 1995); *see also Cole v. Cole,* 70 Ohio App. 3d 188, 590 N.E.2d 862 (1990) (child support guidelines do not violate equal protection of incarcerated parent by not suspending payment of child support while parent is in jail).

27. 998 F.2d 764 (9th Cir. 1993).

28. *See also Stewart v. Winfrey,* 308 Ark. 277, 824 S.W.2d 373 (1991) (child support guidelines do not violate equal protection of other children of parents by according preference for prior born children, as guidelines consider other children as deviation factor); *Martinez v. Martinez,* 282 N.J. Super. 332, 660 A.2d 13 (Ch. Div. 1995) (child of first marriage was not denied equal protection by consideration of father's children of second marriage under guidelines); *State ex rel. Osborn (Mumau) v. Hill, 25 Fam. L. Rep.* (BNA) 1205 (Ohio Ct. App. Feb. 9, 1999) (statutory provision that allows a deduction from gross income for ordinary and necessary business expenses of self-employed individuals does not amount to unconstitutional discrimination in violation of the equal protection clause against those who are not self-employed); *Feltman v. Feltman,* 434 N.W.2d 590 (S.D. 1989) (child support guideline statute does not violate equal protection rights of children of second marriage by giving child support priority to children of first marriage).

29. 67 Cal. App. 4th 328, 78 Cal. Rptr. 2d 886 (1998).

30. 2002 WL 121610 (Tenn. Ct. App. Jan. 29, 2002).

31. 162 Vt. 423, 648 A.2d 843 (1994).

32. 93 Md. App. 320, 612 A.2d 313 (1992).

33. *Accord Childrens and Parents Rights Association Inc. v. Sullivan,* 787 F. Supp. 724, 736 (N.D. Ohio, 1991) (noncustodial parents' claim that child support laws violated contract clause of constitution and the prohibition against ex post facto laws border on the frivolous); *Pauling v. Pauling,* 837 P.2d 1073 (Wyo. 1992) (child support guidelines do not violate contract clause of Wyoming constitution).

34. *Garrod v. Garrod,* 590 N.E.2d 163 (Ind. Ct. App. 1992).

35. *In re Marriage of Armstrong*, 831 P.2d 501 (Colo. Ct. App. 1992). *See also Stewart v. Stewart,* 866 S.W.2d 154 (Mo. Ct. App. 1993) (in concurring/dissenting opinion, court raised "spectre of 13th Amendment" in forcing one's spouse to accept whatever employment is available).

36. *Childrens and Parents Rights Association Inc. v. Sullivan,* 787 F. Supp. 724 (N.D. Ohio, 1991).

Part II of this article will appear in the next issue of *Family Practice.*

Laura W. Morgan owns and operates Family Law Consulting in Charlottesville, Virginia, and is the Chair of the Child Support Committee of the Family Law Section of the American Bar Association.

TENNESSEE BAR ASSOCIATION

Family Practice

221 Fourth Avenue North, Suite 400
Nashville, TN 37219-2198

Playing soon in MEMPHIS

Plan now to attend the 122nd Annual TBA Convention * June 11-14

Join us at center stage for the hottest event of the summer — the 122nd Annual Tennessee Bar Association Convention in Memphis, June 11 – 14.

Compelling speakers, challenging programs and plenty of networking opportunities make this the one event Tennessee attorneys won't want to miss. It also promises fun for the entire family, with a trip to see the pandas at the Memphis Zoo and more planned for the four-day convention. Just take a look at all we have in store for you.

Don't miss our CLE program at convention, co-sponsored by the TBA's Family Law and Elder Law Sections:

"OH NO, MY PARENTS ARE GETTING DIVORCED!"

This seminar offers insight into the unexpected situations that develop when divorce comes into play in Elder Law.

Friday, June 13,
Memphis, The Peabody,
1:45 - 5 p.m.,
2 general CLE credits

To register for convention, go to
https://www.tba.org/conv2003
or call 800-899-6993