

SILENT PARTNER

CHILD SUPPORT OPTIONS

*Introduction: **SILENT PARTNER** is a lawyer-to-lawyer resource for military legal assistance attorneys and civilian lawyers, published by the Military Committee of the American Bar Association's Family Law Section. Please send any comments, corrections and suggestions regarding this pamphlet to the address at the end of this Silent Partner.*

[This infoletter is adapted and revised from Sullivan, "Child Support: Shopping for Options," The Army Lawyer, July 1992.]

A full and fair resolution of all child support issues is one of the most important parts of any domestic relations case. Here are some tips and suggestions on how to fully advise your clients on the basics – monetary amount, medical expenses, health insurance – as well as the more advanced parts of this important topic, such as life insurance, escalator clauses, college costs, dependency exemptions and allocation of child support.

Child Support: Monetary Amount

Little is taught regarding how much child support is *enough*. How do you counsel a client on what to demand, accept or offer for child support? It is important to know how to negotiate a fair result which provides adequate support for the children. It is also important to settle on a fair amount for your client to pay.

How much child support will be paid involves at least three parameters:

- > **Have the parties agreed on a specific amount?**
- > **What sum is due under the state child support guidelines?**
- > **What is the amount due under service regulations?**

Not surprisingly, these three questions almost always yield three different answers.

Assume that you have just finished an interview with Mrs. Clara Smith, the wife of Army Sergeant Elmo Smith. They have just separated from each other and they have two minor children. Before the separation the family was surviving on the \$2,500 per month take-home pay of SGT Smith and the part-time paycheck of Mrs. Smith in the amount of \$1,000 net per month. Mrs. Smith, who has custody of the children, asks you to tell her how much child support she needs to receive. What she really means is how much support the children are to get according to state or service guidelines. While you won't be able to tell her how much child support she needs, or how much she would get in court, you can still help her estimate how much child support she would get in court and, therefore, what is a reasonable settlement for child support.

As a practical matter, you and your client need a baseline. The first step in formulating this guidance would be to help Mrs. Smith fill out a monthly budget or, if one is available, a financial affidavit or disclosure form from the court that lists her income and the expenses for her and the children. With your help she should sit down and figure out the monthly cost living. This should take into account lodging, transportation, groceries, utilities,

clothing and medical expenses, along with other household expenses. In this way, she can see realistically what she and the children need for survival each month. Even if there is only time to find out some basic information, such as the cost of food, clothing, utilities, transportation and housing, it would be of significant value in judging the adequacy of child support under the approaches shown below.

Military Guidelines

Since her husband is in the military, Mrs. Smith should first be advised of the Army's family support requirements. Pull out AR 608-99, which deals with family support in the absence of a court order or an agreement, and tell her what the expected amount is. But make sure you advise that this is simply a starting point, a "default solution" in the absence of a court order or agreement.

State Child Support Guidelines

Suppose that Mrs. Smith and the children will be returning to North Carolina, which is their prior home. Whether or not your client is a military member or dependent, you must be aware of the North Carolina Child Support Guidelines. These are used every day in trials and settlement negotiations across the state. Use of these Guidelines is mandatory in courtroom cases unless specific findings are made by the judge as to why the "guideline amount" of child support would be inequitable.

You can find the North Carolina guidelines at www.supportguidelines.com (as well as any other state's child support guidelines). Most states have either a percentage guideline (e.g., the noncustodial parent pays 17% of his gross pay for one child, 25% for two children, 35% for three, etc.) or an income-shares guideline (which computes child support based on the combined parental incomes of mom and dad, the cost of work-related day care and the premiums for the children's medical insurance).

But what happens if we don't know the other party's income? What if you represent Sergeant Green, whose wife has gone home to her family in Ohio and you don't know her salary at Ohio State University (or Possum County Elementary School)?

First of all, don't take NO for an answer. When in doubt, ask – perhaps your client can get her to disclose her income if it's needed for child support calculations. Maybe you can arrange an exchange of pay information with her attorney.

If "Plan A" doesn't work, find out if the income of the wife is public information already. After all, Ohio State University is a public institution. So is Possum County Elementary School. Many state agencies or state-sponsored entities make public the salary ranges, if not the actual salaries, of their employees.

And third, if all else fails, try using the bracketing approach. To do this, ask your client to estimate for you the bracket into which his wife's income would likely fall. He may indicate, for example, that she's always made between \$8 and \$10 per hour, or that she has earned at least \$2,000 a month and sometimes as much as \$3,500. Use these figures to create a "child support bracket" for your client based on the formula for her state as follows. Insert the lowest amount you estimate she makes, as well as the highest (don't forget overtime!) to come up with a bracket for the child support obligations based on best-case and worst-case scenarios. In this way, you can at least give your client some general benchmarks for the amount of child support he'll be paying.

Regardless of the agreement of the parties, an attorney should calculate the alternative child support amounts (under the guidelines and regulations) and review them with the client to provide full disclosure and candid advice about these options. Being thus advised, the client will always be better informed and more likely to make a reasonable and fair choice in this area. Remember that the requirements of the service guidelines (none in the case of the Air Force) are only temporary support measures in the absence of an agreement or court order.

A couple's agreement as to child support will often be set down in a separation agreement. The law favors such agreements as an amicable way of settling differences out of court. However when there is evidence that the provisions for child support are not fair, reasonable, adequate and necessary, the courts will step in to modify or set

aside such provisions. No agreement of the parties – in any state – can deprive the courts of jurisdiction over the amount of child support. Advise your clients to be fair and realistic, especially in light of what the state guideline amount would be, to avoid the judge’s intervention.

Guideline Variances

A fair and reasonable amount of child support does not have to follow exactly the state guidelines or service regulations to be deemed adequate by the courts or the parties. It should be remembered that state courts and agencies are now required to treat child support guidelines as rebuttable presumptions regarding the adequacy of child support. 42 U.S.C. § 667(b). Specific reasons for deviations from the guidelines should be made a matter of record, especially if the agreement is to be incorporated into a court order or divorce decree at a later date. The amount set by agreement should fairly reflect the parents' ability to pay, their other debts and personal expenses, and the reasonable needs of the child or children. Examples of reasons for variance from child support guidelines include:

1. The special needs of the child, including physical and emotional health needs, educational needs, day-care costs, or needs related to the child's age.
2. Any shared physical custody arrangements or extended or unusual visitation arrangements.
3. A party's other support obligations to a current or former household, including the payment of alimony.
4. A party's extremely low or extremely high income, such that application of the guidelines produces an amount that is clearly too high in relation to the party's own needs or the child's needs.
5. A party's intentional suppression or reduction of income, hidden income, income that should be imputed to a party, or a party's substantial assets.
6. Any support that a party is providing or will be providing other than by periodic money payments, such as lump sum payments, possession of a residence, payment of a mortgage, payment of medical expenses, or provision of health insurance coverage.
7. A party's own special needs, such as unusual medical or other necessary expenses.
8. Any other factor the court finds to be just and proper.

Guideline Practice Pointers

Whenever you write up a separation agreement clause about child support, you should insert a “guideline clause” that includes additional language concerning the child support guidelines just in case the agreement is later incorporated into a court decree of dissolution, separation or divorce. Why? Here’s some background.

First of all, most states require the incorporation of a separation agreement into a divorce decree or allow the parties to do so when the divorce occurs. For more detail on what constitutes incorporation, and what effects it has, see the SILENT PARTNER on separation agreements. As a practical matter, you won’t know at this stage – the drafting or reviewing stage of a separation agreement – whether the agreement will ever make it that far, but you sure want to do your best to make sure it comes through with flying colors (if there is incorporation) rather than it goes down in flames.

Here’s the problem. When an agreement is incorporated into a court order or decree, it becomes the order of the court. The parties are, in effect, asking the court to order them to perform the promises set out in the agreement. When one of those promises is child support, we need to look to state law on *what must go into a child support order*. That’s because this is just what is being entered with the incorporation of the agreement -- an order to pay child support.

All states, pursuant to federal law, require that a court order for child support state whether the amount ordered is in compliance with the state guidelines or at variance. When there is a variance, the order is supposed to state the reasons for this. In New York, for example, the statute (DRL sec. 240 (1-b)) requires that the judge

articulate the reasons for both conformity with the statutory guidelines as well as variances.¹ So when your agreement is offered for incorporation, the judge may inquire into whether it contains terms for child support and, if so, whether the agreement contains the necessary terms about guideline conformity or variance.

If the Agreement Is Silent...

So what will happen if you leave out any reference to guidelines? Well, it's just possible that her honor will ignore this discrepancy and proceed to order the incorporation of the agreement. In fact, it's also possible that neither party will offer the agreement for incorporation at all! But, on the other hand, what if the judge does inquire into whether the agreement is in conformity with the state guidelines for child support and, if not, what the reasons are for nonconformity? There are several possibilities:

- Her honor will have “a few choice words” about JAG attorneys “practicing law without an Ohio bar license” for the selected audience in divorce court in Possum County, Ohio when the divorce case is heard.
- Her honor may then decide that the agreement will have to be rewritten or, perhaps, renegotiated as to child support because there is no reference to the guidelines. She may decline to incorporate it, pending the revision of that child support clause. And you can just imagine how happy your client will be when that's announced. Whether it's Mrs. Smith, for example, who's actually in the courtroom, or SGT Smith, who's far away and still resentful about the amount of support he agreed to pay, you can be sure that you'll have one unhappy client whose memories of the JAG office won't be too fond.
- Or maybe her honor will simply deny the divorce or dismiss the case. The author is aware of one case in Charlottesville in the late 1980's where this happened, based solely on the silence of the agreement (prepared by a judge advocate) regarding guidelines.

In a 1998 New York case,² the court examined a separation agreement that was *not quite* silent on the parties' finances and the guidelines but was certainly vague. The child support clause involved stated:

In this agreement the provisions for child support have been set in a fair amount based on many considerations including the parties' respective finances and other financial provisions of this Agreement and the custodial parent hereby waives her right to seek child support under the Child Support Standards Act.

In response, the New York Supreme Court stated: “[T]he separation agreement in this matter is unenforceable for its failure to conform to the requirements of the Domestic Relations Law.” This statute (cited above) requires a provision for each incorporated separation agreement that states that:

- The parties have been advised of the provisions of this section;
- The child support amount set out in the guidelines would presumptively result in the proper amount of child support to be ordered;
- If the agreement deviates from the basic child support obligation, then it must specify what the basic child support obligation would have been;
- It must state the reasons why that amount was not chosen; and
- These requirements may not be waived by the parties or their attorneys.

¹ *Cassano v. Cassano*, 85 N.Y.2d 649 (1995). See, e.g., Note, “The Child Support Standards Act and the New York Judiciary: Fortifying the 17 Percent Solution,” 56 Brooklyn L.Rev. 1299 (1991).

² *Klein v. Klein*, 676 N.Y.S.2d 69, 246 A.D.2d 195 (1998).

In any event, there will be problems if the agreement doesn't comply with the guideline requirements of state law. For this reason, it's always a good idea to announce the guideline figure and then state the reasons for any variance from this "target amount." Here's what Laura Morgan, author of *Child Support Guidelines: Interpretation and Application* (Aspen Law & Business, 2006), has to say:

Even though an agreement of the parties setting child support is not binding on the court, many states provide that an agreement of the parties is a deviation factor. Moreover, even where an agreement of the parties is not specifically listed as a deviation factor, some state courts have held that the existence of such an agreement may be considered a deviation factor. Thus, while the parties cannot bind a court as to child support, they can certainly influence the court.... The typical process a court must go through in deciding whether to grant a deviation based on an agreement of the parties is described in the District of Columbia guidelines:

If the parties present a consent order, an agreement that is to become an order, or a written agreement that is to be merged in an order, the judicial officer shall examine the child support provisions of the agreement, and compare the child support provisions to the guideline. If the amount of child support agreed upon is outside the range of child support that would be ordered presumptively upon application of the guideline, the judicial officer shall determine if the agreed upon level of child support is fair and just. If the parties are represented by counsel, the judicial officer shall inquire whether the attorney informed the clients of the guideline. If the clients have not been informed of the guideline, the judicial officer shall advise the attorneys to do so. If a party is not represented by an attorney, the judicial officer shall ensure that the party is aware of the child support amount that the court would order presumptively pursuant to the guideline.

Thus, where an agreement of the parties is a deviation factor, the amount in the agreement must be compared to the presumptive child support award under the guidelines so that the court may make the ultimate determination that support as set in the agreement is in the best interests of the child.

There are two typical situations in which a court will deviate from the guidelines based on the agreement of the parties. In the first situation, the parties have agreed to an amount of everyday support that is in excess of the guidelines. For example, the guidelines may provide for support in the amount of \$750 per month, but the parties agree that, given the lifestyle of the parties during the marriage, they wish support to be in the amount of \$900 per month. Courts will generally grant a deviation in this situation, reasoning that parties may contract to provide support in excess of their legal obligations.

In the second situation, the parties have agreed that the amount of everyday support is less than the guidelines, but the support obligor will, in addition, pay for support that is not required by the guidelines. For example, the obligor may agree to pay for private school expenses or future college expenses, or the support obligor will directly pay for support that is already assumed in the guidelines. Again, the courts will almost always grant a deviation in this situation, this time reasoning that the best interests of the child will be served by a support agreement that may provide a little less money now in exchange for more support in another form. For example, in Walsh v. Walsh, 333 Md. 492, 635 A.2d 1340 (1994), pursuant to the agreement of the parties, the father made the mortgage payments. The appellate court held that where one parent agrees to pay, as part of an agreement, "something that would ordinarily be part of the other parent's expenditures for child support," then deviation below the guidelines is appropriate. [footnotes omitted]

Morgan, *Child Support Guidelines: Interpretation and Application*, 2006, §409.

Assuming we have established the advisability, if not the necessity, of stating guideline information in the separation agreement, the next question might be "How do I prepare such a clause?" The wording might read as follows:

The parties have been advised of the applicability of the child support guidelines, that they will presumptively result in the proper amount of child support, and that the parties may knowingly and voluntarily waive the application of the child support guidelines. They have also been advised that the guideline amount for child support is about \$___ per month for the ___ children, based on the following factors: husband's gross monthly income of X, wife's gross monthly income of Y, work-related day care of Z and [state information on medical insurance premium cost for the children, such as: *no medical insurance premium for the child since TRICARE is available through husband's service in the U.S. Army*]. The parties have agreed to waive the application of the guidelines and have agreed to the sum of \$435 per month for child support due the other promises and covenants set out in this agreement and also due to the following reasons: [state in detail other reasons here, such as-- *Husband is paying \$300/mo. for wife's car, and wife will be living at her parent's home after the separation.*].

Make sure that the clause lists in detail the reasons for this waiver. Do not engage in generalities here, or the amount may be overturned or refused enforcement, as shown in the *Klein* case above.

The above paragraph is a sample clause based on the approach used in an "income shares" state (such as North Carolina), where the above four items are needed to determine child support under the guidelines. On the other hand, in a state where the noncustodial parent pays a percentage of his gross pay for one child, a different percentage for two, and so on, you need only reference the husband's gross pay in this clause as the premise upon which the guideline figure is based.

More Practice Pointers

The parties should also be counseled about compliance with the terms of their child support agreement. Federal law now requires that all states enact laws that make past-due installments (under a court order) into a judgment by operation of law. 42 U.S.C. §666(a)(9). This is particularly important when a separation agreement may be incorporated into a decree or order, or when the instrument to be negotiated is a consent order or a confession of judgment. Court-ordered support obligations are entitled to full faith and credit and generally cannot be modified retroactively.

Be alert for separation agreements providing for no child support. These are sometimes found in connection with a provision for no visitation for the noncustodial parent. This is one area in which the courts will not hesitate to set aside the provisions of a separation agreement, even if it has been knowingly and voluntarily executed by both parents with their eyes wide open. Invariably one of the parties changes his or her mind and requests child support (or visitation rights) from the other. When faced with such a clause, the courts will usually render an opinion which points to the absence of the child as a signatory to the agreement, states that the child support or visitation is a right of the child (not of the parent), and indicates that the courts always have the inherent power to provide for the welfare and best interest of minor children. It is a wise idea to discourage use of such worthless language in separation agreements, rather than allowing it to be inserted with the likelihood that one or both of the parents will think it is valid and rely on it in planning their futures.

Allocation of Child Support

You should also consult with your client, when there is more than one child, on the issue of what happens to child support when one or more of the children are no longer eligible for support. How should the remaining child support be allocated?

As a procedural matter, child support set out in an unincorporated separation agreement can be modified by the agreement of the parties in an amendment to the agreement. When the support is set out in a court order or an incorporated separation agreement, then a motion in court is necessary. In either case, the child support is usually recalculated using the current guidelines and the current financial information for the parents. What happens in the interim, however, while the parties are exchanging financial data, is the reason for confronting the issue of allocation of child support. It can take weeks and sometimes months to convince the other side to part with income information to allow recalculation of the child support under the current guidelines. An allocation clause for the

purpose of setting child support on a temporary basis while this is pending would help to avoid a further contentious issue for the parties.

The attorney for the noncustodial parent will almost always want to insist on an allocation clause, since it is the key to modification of child support when the circumstances of one child change. This would occur, for example, when one of the children leaves the custodial parent, either to live with the other parent or to reside elsewhere. Another such circumstance is when the termination date (usually age 18) for child support occurs. In either of these situations, the noncustodial parent needs to know what the new amount of child support will be. And a separation agreement merely setting out "\$500 per month for the minor children" does not really give any guidance to the paying parent.

When the clause does not specify the amount on a per-child basis, many parents will simply divide the total amount by the number of children in order to come up with an approximate figure for each child. While this may be mathematically logical, it does not conform to the law in most states. In North Carolina, for example, the child support in the above example would probably remain at \$500 until all of the children had attained majority, since the support figure was set out for the minor children.³ When the amount is set out in a court order, of course, the paying party should file a motion in court asking for a clarification and/or reduction as to the amount of child support to be paid for the remaining child or children.⁴ The courts generally do not allow the noncustodial parent to determine unilaterally how much child support is attributable to each child and then reduce his payments by that amount without the benefit of a court order.⁵

From the standpoint of the custodial parent, it is obvious that an unallocated amount of child support is best. This will keep child support at the highest level for the longest time. If a compromise is necessary, it is usually a good idea to divide the child support amounts unevenly so as to accomplish a de facto increase in child support when one child attains age 18 or is beyond the limit for child support, since that is the single most predictable event that will change the amount of child support. In the above example, involving \$500 per month as the child support amount for two children, this could be divided into \$300 for the younger child and \$200 for the older child. Thus when the older child's support is no longer required, the child support would effectively increase for the younger child; instead of receiving \$250 a month for the younger child, the custodial parent would be receiving \$300 per month for that child.

Escalator Clauses

Occasionally a question will arise on recalculation of future child support to take into account the increased future income of one or both of the parties or the effect of inflation on dollars paid for child support.⁶ There are basically four types of escalator clauses that can be used. It is essential that the client fully understand the impact of such a clause in a decree or separation agreement.

The first type of escalator clause is based on the net or "take-home" pay of the noncustodial parent. The theory behind this clause is that, as the actual earnings of this parent increase, his or her child support should also go up. In general this is probably a good idea, but it has its drawbacks--some of which are not so obvious.

The first problem is that "net pay" is not easily defined and is subject to a good deal of manipulation. If Sergeant Smith wants to increase his monthly net pay, for example, he need only add a few more withholding

³ There is a presumption in North Carolina against the proportional reduction of child support when one child attains majority. *Gilmore v. Gilmore*, 42 N.C. App. 560, 257 S.E.2d 116 (1979). A motion to modify should ordinarily be denied as to separation agreements and consent orders when it involves a child's attainment of majority and the allocation of previously undivided child support. *Hershey v. Hershey*, 57 N.C. Spp. 692, 292 S.E.2d 141 (1982).

⁴ See, e.g., *Berrier v. Berrier*, 67 N.C. App. 498, 313 S.E.2d 616 (1984); *Tilley v. Tilley*, 30 N.C. App. 581, 227 S.E.2d 640 (1976).

⁵ See, e.g., *Craig v. Craig*, 103 N.C. App. 615, 406 S.E.2d 656 (1991); *Brower v. Brower*, 75 N.C. App. 425, 331 S.E.2d 170 (1988); *Gates v. Gates*, 69 N.C. App. 421, 317 S.E.2d 402 (1984).

⁶ The effect of inflation on child support is well recognized. Courts have even taken judicial recognition of the effect of dollar depreciation on support awards. *Walker v. Walker*, 63 N.C.644, 306 S.E.2d 485 (1983); *Broughton v. Broughton*, 58 N.C. App. 778, 294 S.E.2d 772 (1982).

allowances on his W-4 form in order to bring home more pay at the end of the month. None of this, of course, changes the actual tax results that appear on April 15 of next year, but it does highlight the importance of defining net pay and describing how it will be calculated. The best way to calculate net pay is by examining the federal (and state) tax returns of an individual after the end of the calendar year. By subtracting all taxes due from adjusted gross income, one can readily determine net pay. Thus an exchange of tax returns will be necessitated by a "net pay escalator clause." An exchange of monthly pay stubs will not be enough.

Ordinarily this might not be a problem. Pause and consider, however, the situation that might occur if the payor of child support were to remarry. Would his new wife want her income disclosed to the ex-wife? This will occur when joint tax returns are disclosed. How will this affect his new marriage? Is there any way of avoiding this exchange of returns?

When confronted with this unpleasant consequence, many potential support payors revert to the "gross escalator clause." Such a clause triggers child support increases based on gross income increases on the part of the noncustodial parent. Insofar as wage or salary income is concerned, these are shown on one's W-2 Form, so an exchange of tax returns is not necessary.

Thus the use of a gross escalator clause may avoid one major problem, the disclosure of a current spouse's income. A new problem, however, is created in the process--what is gross income? Is it all wage or salary income, as shown only on W-2 Forms? What about passive income, such as dividends and interest? What about earned income that is shown on Form 1099? What about income from a rental property? There is no single answer to these inquiries. A good drafter will realize the difficulties inherent in describing "gross income" and will pay close attention to the wording in a gross escalator clause, ensuring that the client has sufficient input to know what is expected of him or her as to reporting income and calculating child support increases.

The third possibility is the use of an objective and neutral index to determine the cost of inflation. Since inflation affects both parties equally, at least in theory, the "Consumer Price Index" might be a good way of recalculating child support annually to take into account the price that inflation exacts from everyone.⁷ Should this approach be taken, it is essential that a specific consumer price index be identified and adopted.⁸ There is really no such thing as "THE Consumer Price Index." There are several indices maintained by the U.S. Department of Labor's Bureau of Labor Statistics. There are, for example, "Wage-Earner" and "Urban" lists. There are different indices for various regions of the country. With regional offices across the United States, the Bureau is an excellent resource for the legal assistance attorney faced with a question concerning the indexing of child support based on such a statistical entity. One can obtain information from the Bureau of Labor Statistics, U.S. Department of Labor at www.bls.gov. Be sure that the clause is drafted with sufficient specificity to survive a later court challenge for vagueness. Only when a specific index is identified with reasonable clarity will the parties be assured of knowing how to recalculate child support in the future.

A fourth and final mechanism for indexing child support is the flat-rate escalator. This is the simplest of all the standards for escalator clauses. Basically the parties decide between themselves what is a fair rate of increase in child support per year to be paid, usually with reference to the anticipated rate of inflation or the expected increase in wages on behalf of one or both parents. This figure--say, 5%--is then applied annually to the previous year's level of child support in order to compute the new amount. It may not be "perfectly fair," since it follows neither inflation nor the incomes of the parents, but at least it is "perfectly simple" to apply.

⁷ For an overview of cases in this area, see Brown, "Exercising Care When Drafting COLAs," 7 FAIR\$HARE No. 1 at 9 (January 1987); Brown, "Rough Justice in Automatic Support Adjustments," 5 FAIR\$HARE No. 5 at 5 (May 1985); and Krause, "Automatic Cost of Living Adjustment Clauses," 1 FAIR\$HARE No. 4 at 3 (April 1981).

⁸ For practical guidelines in drafting these clauses, see Merrill and Robertson, "The Consumer Price Index and Child Support Proceedings, The LAMPlighter (Am. Bar Assn. Standing Committee on Legal Assistance for Military Personnel, Vol. 2, No. 1 at 5 (Summer, 1990); "Sample Clause: Consumer Price Index Clause for Agreements," The Matrimonial Strategist Vol. IV, No. 8 at 5 (Summer, 1986); and Blair, "Arguing Escalator Clauses," The Matrimonial Strategist Vol. I, No. 2, at 2 (March, 1983).

Throughout this discussion of escalator clauses, it must be remembered that increases will usually be late in occurring, that is, they will ordinarily take place more than a year after the "triggering event" occurs. For example, if Staff Sergeant Smith's pay goes up (due to promotion, longevity, or another reason) from \$2,600 per month to \$2,800 per month, the former Mrs. Smith will not realize the full benefit from a recalculated increase under her gross wage escalator clause until about a year later when W-2 forms are exchanged.

The same is also true with CPI (Consumer Price Index) escalator clauses. If in August of a given year the parties search the Internet for the Bureau of Labor Statistics figures for the specific CPI they have adopted in their escalator clause, they will probably find the May CPI figures. The figures for May, which are probably the most recent available, only reflect the change in the CPI between June of the previous year and May of the current year. Thus in this case, the actual adjustment will be more than a year off-base.

A further consideration is whether escalators can go down as well as up. Most child support recipients want to receive increases only, not decreases. Most child support recipients are less financially secure than are the payors of child support. It is very likely that a child support recipient would insist on a basic minimal level of child support as an absolute "floor" in escalator adjustments. If this is so, it is also reasonable to expect that the other party, the noncustodial parent, should expect and extract as a promise the equivalent "child support ceiling," that is, a total monthly or annual amount which represents a "cap" on child support increases.

Finally, the parties must be told how and when to recalculate child support. The simpler the escalator clause, the easier this will be to accomplish. One should not be surprised to find many child support payers routinely ignoring escalator clause recomputations for several years in a row. Only an optimistic or naive attorney would imagine that the noncustodial parent would look forward eagerly to the next redetermination (read "increase") of his child support obligations. Such clauses are frequently signed in haste. They are often regretted, ignored or attacked after the realization sets in that "everyone else pays a flat amount of child support, but mine is always going up!"

Another concern is how to get the increase. If current child support is done by garnishment, your client may have to go back to court every year for a new garnishment amount.

As a general rule, avoid child support escalators in favor of flat amounts of child support which, hopefully, will be paid on time in the full amount. Some states, such as North Carolina, do not allow the use of escalator clauses in court orders for child support (even consent orders) or in incorporated agreements.⁹

Medical Care--A Hidden Factor

Clients need to be informed about much more than the "cash amount" of child support. Most child support cases involve at least two other factors--medical insurance and uncovered health care expenses.

Medical insurance covers most, but not all, of the cost of medical problems. At the outset it is vital to find out whether the nonmilitary parent has private medical insurance covering the children and what is covered. A typical policy may have an annual deductible amount of \$250, cover 80% of most medical expenses and exclude entirely such items as elective surgery, routine physical examinations and dental work.

Military dependents are entitled to medical treatment at military hospitals and use TRICARE health insurance for civilian health care providers. TRICARE covers a portion of allowable medical expenses. There is an annual deductible amount [per person and per family] for sponsors with a pay grade of E-4 and below, and a different amount for those above this grade. For more detailed information, contact the TRICARE office at the nearest base or go to the TRICARE website, <http://www.tricare.osd.mil/>

⁹ See, e.g., Snipes v. Snipes, 454 S.E.2d 864 (N.C.App. 1995). The same rule applies for alimony. Barham v. Barham, 487 S.E.2d 774 (N.C.App. 1997).

Within the military, dental insurance is also available. Dental insurance is a voluntary election that the military member may choose, with the resulting premiums deducted from the member's pay. A provision that the military member will provide medical insurance may not be sufficient to ensure that dental insurance is also provided. If dental insurance is intended, it should be specifically mentioned. You can go to <http://www.deltadental.com> for information on the current military dental insurance plan.

There are several alternatives for health care coverage language:

- One option for parents who are both working is to have each parent maintain insurance. This provides "double coverage" (through TRICARE and a less expensive employer-sponsored plan) and reduces uncovered medical expenses to an insignificant amount. When this option is used, the private plan must be used first since TRICARE is always considered the secondary carrier.
- Another alternative is to have the noncustodial parent maintain medical coverage (either through TRICARE or private insurance) while both parents split the uncovered portion equally. The advantage of this option is that it puts part of the financial burden on the custodial parent--who is the one most likely to "take the child to the emergency room with the sniffles," according to the complaints of some noncustodial parents. If there is a wide disparity of incomes between the parents, consider dividing the medical expenses in the ratio of the incomes, such as 80:20.
- A third approach involves concerns the payment of normal and of extraordinary unreimbursed amounts on behalf of the child. In case of a catastrophe, it would appear that the party earning more income should be liable for excess payments. Where the father earns more than the mother, such a clause might state that medical insurance would be maintained by the mother, that the uncovered part would be paid by the mother up to an annual ceiling of \$300, and that the father will pay any uncovered expense in excess of this amount.
- If you're concerned that the custodial parent may never receive those reimbursements from the noncustodial parent, who at various times is thousands of miles away, ask the judge to listen to your client's testimony regarding medical expenses for the kids for the last year or two, what was covered, what was out-of-pocket. Then argue to the judge that, due to the distance presently – and the distance in the future after a couple of PCS moves – the judge's intentions regarding prompt payment for medical expenses for the children would be best met by including in the monthly child support an additional amount based on the proper share for the noncustodial parent of those average monthly uncovered medical expenses. If you're not in front of a judge, then consider drafting an agreement clause which accomplishes this.

A Problem of Definitions

What are these "uncovered health care expenses?" Depending on the policy language, the finances of the parents and the needs of the children, they might include prescription drugs, psychological counseling, dental checkups, orthodontia, eyeglasses, routine physical examinations and cosmetic surgery.

Not all of these costs can be readily foreseen. And it is just as difficult to decide whether to "spell it out" or leave it to the parents (or the judge) to work out who pays for what. A custodial mother, for example, may be wise not to specify what "uncovered health care costs" means if doing so would jeopardize an otherwise fair and generous order or agreement. A noncustodial father, on the other hand, might want to exclude specifically the areas of orthodontia and elective health care procedures from "uncovered expense" treatment. Or he might want to share in the co-payments so long as he is consulted in advance and agrees to the medical or dental procedures. If he requests this, then the mother should insist on a clause which states that the father will not unreasonably refuse such procedures and will act in good faith. The attorney must also pay particular attention to the benefits presently provided by the medical insurance, since some of these items may be already covered.

The Need for Deadlines

A final word is necessary about when payments are due. It is important to include a clear statement of how soon reimbursement is required from the noncustodial parent. There is no "right" answer or choice here--just the importance of choosing a due date instead of leaving this unspecified and therefore unenforceable. A sample clause might provide that:

- *[Mother] shall provide [Father] with a bill or statement for health care or treatment of a child within seven days of said care or treatment.*
- *[Father] shall pay any uncovered portion directly to the health care provider (or to [Mother] if she has already paid this amount) within seven days of his receipt of the bill or statement.*
- *[Father] shall immediately submit the bill to his insurance carrier for payment.*
- *If [Mother] has already paid the entire bill, [Father] shall reimburse her in full within seven days after he receives the bill or statement from her.*
- *If the health care provider is not yet paid and is to be reimbursed, [Father] shall either make the health care provider the payee for the insurance check, or else he shall promptly pay the health care provider upon receipt of the insurance check.*
- *The bill or statement provided to the [Father] shall include a description of the child's treatment, prognosis or diagnosis, as well as whether the health care provider has applied directly to the medical insurance carrier for coverage or payment.*

Life Insurance

In case one of the parents dies while child support or college expenses are still due, it is a wise idea to use a life insurance clause to provide for the payment of insurance proceeds as a substitute for child support. Since both of the parents are legally responsible for the support of the children, it makes sense to have this provision apply to both parents, not just the noncustodial parent who is responsible for paying child support.

The first issue with life insurance is to calculate the amount of coverage to be provided. If the parents do not want to agree on a set figure--albeit an arbitrary one--for the face amount of each policy, then the attorney should start by making an estimate of how much child support would be due and owing from the noncustodial parent if he were to die immediately after the signing of the agreement or decree. By calculating yearly totals of child support for each child that would be due for the remainder of the term of the child support (including college expense if applicable) provisions, the attorney can come up with a figure which is the sum of all annual child support installments. To be more mathematically accurate, this sum should be reduced to present value (because of the future investment potential of money "in hand" right now), but it should also be adjusted upwards for future inflation. In a rough way, these adjustments may cancel each other out. The remaining figure, the sum of all future child support payments, is a fair starting point for the face value of each policy. It represents the maximum foreseeable exposure of a parent if child support stops because of the death of the other party.

As the years go on, assuming no substantial change in the children's needs and living expenses, this sum (as the face amount of life insurance) could be reduced gradually to account for the decreasing number of years during which child support should be paid. Life insurance policies with a reducing death benefit are commercially available, but it may not be worth the time and effort to shop for such a policy when negotiating a life insurance clause. Instead of trying to find a policy which will constantly pay the lowest amount of substitute child support necessary, it would be a far better idea to provide any "excess" directly to the child upon attainment of majority, termination of college studies or at some other appropriate date.

Such provisions for life insurance are commonly funded or secured by "owned" policies which belong to the premium payor and build up cash value or equity (whole life or universal life policies), ones which belong to the payor but build up no cash value (term life insurance), and ones which have no equity/cash value and do not belong to the person who pays the premiums (group life policies). It is important to remember this when drafting a clause that attempts to ensure that the premium payor will not inadvertently or intentionally change the beneficiary to a new spouse, for example, in lieu of the beneficiary stated in the agreement. How will the other party ever know

whether the intended beneficiary remains as such when the policy and all incidents of ownership remain elsewhere--with the payor or his employer? How can one prevent the payor from signing an agreement containing a life insurance clause and then immediately breaching it by designating a new beneficiary?

The answer is through ownership of the policy. Except in the case of group life insurance policies (including SGLI), most insurance companies allow a collateral assignment of ownership of the policy to a person other than the premium payor. It is important to remember that the owner of the policy is the one who designates the current beneficiary and who must consent to any proposed change in beneficiary. The owner must be informed by the company of any attempts to cancel the policy, and must also be advised as to nonpayment of premiums that would have the effect of canceling coverage. Finally the owner is the only one who, with life insurance that has cash value, can borrow against the policy. Since these are the very things which ought to be withdrawn from the premium payor--the power to borrow against the policy, cancel it or change the beneficiary--it makes sense to agree on cross-transfer of ownership of the insurance policies, that is, each parent is the owner of the other's insurance policy or policies for the duration of the terms of child support and/or college expenses. Ownership of the policies can revert back to the original owner after the support terms have been satisfied. This transfer of ownership has the effect of protecting each parent, preserving their promises and putting temptation out of the way.

SGLI is the exception. A 1981 Supreme Court case, Ridgway v. Ridgway,¹⁰ states that a servicemember may choose whichever life insurance beneficiary he desires, regardless of court orders or separations agreements. Do not rely on SGLI as the method of funding a child support death benefit. Protect your client by ensuring that there's other life insurance owned by the non-custodial parent.

The choice of beneficiary is clearly an important one. While the simplest choice would be to have the parents name each other as beneficiary, there is a danger in this. So long as the other parent is named "with no strings attached," he or she will be free to spend the money in any manner possible. Some spouses have actually gone so far as to suggest that the surviving parent would probably go on a wild vacation or a spending spree upon the death of the insured parent! Be that as it may, few survivors of a divorce want to name the other party as an outright insurance beneficiary.

After casting this alternative aside, some parents will suggest that the child be named as beneficiary. This might appear attractive at first blush, since the child is the intended recipient of the money from the life insurance policy. However, upon closer examination, this solution fails for several reasons.

First of all, most parents intend that the money from an insurance policy be used for the regular, day-to-day expenses of the child as a substitute for the child support which would have otherwise been paid. Many states, however, will not allow proceeds payable to a minor child to be used in this manner. The surviving parent will, of course, have to obtain letters of guardianship in order to be able to receive the money from the insurance company.

Such guardianship letters make the surviving spouse accountable to the clerk of court or the judge of probate court for how the money is used. Often the laws of a state will require that the money be held in trust for the child until she or he attains majority. Occasionally state law will allow the guardian to request an interim allocation of the proceeds for some large emergency expense, such as a medical procedure, which the guardian cannot afford. Outside of this limited exception, however, there are usually statutory impediments to the routine disbursement of insurance proceeds for ordinary living expenses (health, education and support) of the minor child.

A further complication is the requirement for disbursement of these funds to the child as soon as she or he attains majority. Few parents would want a child to receive such a large amount of money at age 18 or 21; they usually want the money held in trust for the child until she or he is of suitable age, discretion and maturity to manage or spend the money wisely. A common disbursement provision might allow the payment of half the funds to a child at age 25 and the remainder at age 30.

¹⁰ 454 U.S. 46, 102 S. Ct. 49 (1981)

All of these considerations point to the creation of a trust for the child, rather than naming the other parent or the child as beneficiary under the life insurance policy. Such a trust would provide that the trustee (ordinarily the surviving parent) could use the insurance proceeds for the health, education and welfare of the minor child. A regular monthly allowance, for example, would be permissible to cover the child's share of lodging, heat and electricity, telephone and other utilities, transportation and schooling. Additional provision could be made for one-time allocations for major expenses--the purchase of a car or the payment of major medical bills. The language in the trust should be sufficiently broad to allow for attendance at a private school and completion of at least an undergraduate college degree. Eventual disbursement provisions should also be inserted. If there are two or more children, the trust should specify whether the proceeds will be held in separate trusts from the outset or will be maintained in a unitary trust with individual portions split off as each child attains the specified age of disbursement.

Allocating the Dependency Exemption

Ever since the Tax Reform Act of 1984, a separated parent with custody of a minor child for more than half of the year is entitled to claim the dependency exemption for the child in the absence of an agreement to the contrary.¹¹ When there is a transfer of the dependency exemption, this may be done by separation agreement, by court order or by attaching Treasury Form 8332 (signed by the custodial parent) to one's federal tax return. Such a transfer agreement must be in writing.

As of the 2005 tax year, the dependency exemption is \$3,200, listed on one's tax return as a deduction from income, although that is not the actual value of the exemption. For a person in the 15% federal tax bracket, for example, the exemption would be worth roughly \$3,200 times 15%, or about \$480. For one who is in the 28% federal tax bracket, the dependency exemption would be worth \$896. Both of these figures are approximate federal tax equivalents on a yearly basis; the applicable state tax amount should be added when the custodial parent is subject to state income taxes.

It should also be remembered that there is also a child tax credit that "follows the exemption," that is, it belongs to the parent who is entitled to claim the dependency exemption for that child. The figure is currently \$1000. The discussion below, while focusing on the exemption, is meant to include the tax credit as well.

When a legal assistance attorney is representing the custodial parent, the best course of action is not to mention the dependency exemption at all. As a general rule, custodial parents do not like to lose money, and giving away the dependency exemption is one way to do just that. Also the child support guidelines usually are based on the assumption that the custodial parent is able to claim the dependency exemption; if this didn't apply, the court might need to consider a variance from the guideline amount.

When representing the noncustodial parent, however, the legal assistance attorney should be sensitive to this economic issue and should attempt to obtain the other side's agreement on transfer of the dependency exemption to the noncustodial parent. In most divorces, the noncustodial parent is the parent earning more income. Thus he or she is the one who needs the dependency exemption more. With skillful negotiations it may be possible to get the custodial parent to agree to give away the dependency exemption in order to preserve an otherwise satisfactory settlement to her or him.

If the custodial parent will not give the dependency exemption to the noncustodial parent, then it is time to discuss *purchasing* it. The cost of purchase is usually the additional income taxes imposed on the custodial parent as a result of not having a child's dependency exemption. This can be monetarized fairly easily. The rough calculations, based on tax bracket alone, are outlined above. To be more precise, the attorney should prepare two tax returns for the custodial parent, one without the dependency exemption for the child and one including it. The difference in taxes will be the annual amount she or he loses by relinquishing the dependency exemption.

¹¹ I.R.S. Code § 152(e)

Suppose, for example, that the custodial parent will have to pay \$600 more in federal taxes if she does not have the dependency exemption for her daughter. Ignoring state taxes, this means that she should receive \$50 per month ($\$600 \div 12$ months) more in child support from the noncustodial parent in order to adjust and equalize her economic position for having given up the dependency exemption for one child. This is what is meant by "purchasing the dependency exemption" -- the noncustodial parent pays an additional amount of child support to offset the increased tax burden on the custodial parent who has relinquished the dependency exemption.

Another way to do this would be to have the parties agree to an exchange of tax returns about a month or so before April 15. The custodial parent would prepare her returns (state and federal) as if she were claiming all the children's dependency exemptions, and she would then turn this over to the noncustodial parent. He would then prepare similar returns for her, using exactly the same information but with however many dependency exemptions transferred over to him. He would then return the completed new forms, along with a check for the difference in taxes, thus "making whole" the custodial parent as to any increase in taxes that she would have to pay for "losing" one or more dependency exemptions.

Note also that dependency exemption does not have to be transferred for all children on a permanent basis. It could be transferred in alternating years to the noncustodial parent. And if there is more than one child, the parents could allocate the dependency exemptions between both parents. If this is done, it is usually in a client's best interest financially to have the dependency exemption for the younger child since it will be available for a greater number of years.

Another issue that arises in representing custodial parents is whether the transfer should be complete or conditional. It is usually contemplated that, in transferring the dependency exemption to the noncustodial parent, that parent will remain current and in compliance regarding all aspects of child support payable under the decree or separation agreement. Few custodial parents want to transfer the dependency exemption, only to have the noncustodial parent breach other terms of the agreement or order. For that reason, it is a wise idea to make a conditional transfer of the dependency exemption. The transfer may, for example, be conditioned on the other parent's being in full compliance as to any terms of child support (including college expenses, medical insurance and uncovered health care expenses) by December 31 of each year. This would be a prior condition to the custodial parent's execution of Form 8332 each January.

College Expenses

For many children today, college is not a luxury--it is a necessity. With more parents able to afford college due to increased military pay, rising standards of living and financial aid programs, it makes sense to consider college expenses as part of a child support settlement strategy. About a third of the states allow college expenses as part of child support or else require child support to be paid up to age 21, which covers most of the college years.

A threshold issue to be decided is how to pay for college. Here are the alternatives:

- The most popular option is "pay as you go." This obligates the parents to contribute to a child's college expenses as the expenses come due.
- Another option is to set aside the money on a regular "installment plan" basis, with one or both parents contributing to a fund or an account in a way that can be monitored by each and is not subject to unilateral withdrawal (such as a joint account). This is usually difficult if the parties are "strapped for cash" as a result of the settlement, the child support and, if included, the payments for alimony.
- And a third option is to set aside the money now so that no one has to worry about the other party's "pulling his weight" in compliance with the agreement. This may not be possible if there is no "extra cash" available at the settlement, such as a savings account or an investment that is not spoken for and that the parties are willing to dedicate to college expenses.

How Long, What's Covered?

The parties need to decide how long the obligation will last. A common college-expense clause provides for four years of undergraduate education for a child. The four-year period can be consecutive or cumulative. An obligation extending for eight semesters would undoubtedly accomplish the same result.

Occasionally children take longer than four years to complete college. For reasons due to everything from illness to "taking a year off," five years might be a more realistic target to consider for length of the obligation. As another alternative, the time could be extended until an age deadline, such as a child's 23rd birthday, so as to make provision for skipping a semester, working for a school term, or other reasons to extend the obligation. The parties should also decide whether the child's attendance shall be on a full-time basis or whether part-time attendance is permissible.

The next concern is what items shall be covered by a college-expense clause. The usual expenses covered include room, board, books, tuition and fees. Of course if a child resides at home some adjustment would be required to the provision for room and board. Consideration must also be given to who pays for the child's expenses during the summertime. Occasionally, parents also agree on a stipulated amount of spending money per month or per semester, or an amount of travel money if the school is not located in the vicinity of the custodial parent's home.

It is also important to be specific as to what obligations must be met. Avoid clauses that require a parent "to help with college expenses if he is able to do so," or which state that a parent "will assist with college expenses in a fair and reasonable manner." Such vague promises are unenforceable.¹²

Once the parties have decided on the above conditions, there are still two issues left. The first of these is performance or qualification terms. Usually the parties will want to specify some required level of the child's performance for the school and credentials for the program in which he or she is enrolled. A good example of this would be a requirement that the child shall at all times maintain a "C" average in pursuit of a generally recognized degree at a duly accredited institution. The reason for such a provision is that, for example, few parents want to pay for a child who is constantly flunking courses toward a degree in "Applied Surfing Technology" at an institution named "Joe's Community College and Pool Hall."

The last issue is *money*. How much money will be spent and by whom? The parties need to agree whether one parent will assume sole responsibility for higher education or whether the parties will divide the cost of college attendance between them. Whenever one party alone must pay college expenses, that party's attorney should always insist on some form of "cap" or maximum amount that is payable. In lieu of a specific monetary amount, this clause could state, for example, that "The husband shall not be required to pay an amount greater than the in-state tuition rate at the state university or public-supported college nearest the residence of the child at time of entrance." The reason for this limitation is that, even with well-meaning parents who are anxious to send their child to school, no one wants a college-expense obligation which involves unknown and possibly unaffordable college expenses. Although today's military pay rates are higher than ever, few military parents can afford the tuition of, say, Duke University or Harvard. It is in everyone's best interest to keep costs controlled and predictable. Note that such a restrictive clause does not bar the child's attendance at Harvard or Duke. That is still allowed; the clause only limits the financial obligations of the parent (or parents) who must foot the bill.

Frequently the parents will decide to divide the college costs between themselves. At this point, the lawyer must figure out what is a fair division. Although an equal division would sound logical and equitable, this might not be the case if there is a wide gap between the parties' incomes. If the father makes twice as much as the mother, it might be better to have the father paying two-thirds of the college costs and the mother paying one-third.

One word of caution is in order at this point. There is sometimes a temptation on the part of attorneys or clients to put off the actual allocation of expenses (by means of incomes) until the time of college entrance. This is not a wise idea. If for example the college clause states that the parties will pay their share of the college costs in

¹² See, e.g., Rosen v. Rosen, 413 S.E.2d 6 (N.C.App. 1992).

proportion to their respective gross incomes as of the time the child enters college, it may provide a strong incentive for either of the parents to drop out of the work force at that time. No parent should be able to profit by his or her own wrongdoing. Since stopping work just before the child's freshman year would have the effect of saddling the other parent with 100% of the child's college expenses, this type of clause should be avoided. Although the income of the parties at the child's entrance into college may be different from today, today's incomes at least provide a known and predictable way of dividing college expenses on a pro-rata basis.

Reduction of Child Support for Visitation

In general, the exercise of visitation rights does not give rise to a right to reduced payment of child support. Unless the agreement or decree specifies so, the noncustodial parent is not entitled to any decrease in child support during those times each year when he has extended visitation with a child. By agreement, however, the parties may choose to make such an arrangement, either as an incentive to visitation by the noncustodial parent or as a tacit recognition that he will have substantially higher expenses during the period of extended visitation, and this will be matched by lower expenses on the part of the noncustodial parent for these times.

In the usual case, it doesn't make sense to eliminate child support entirely for a four-week period during the summer when the father has the child living with him. During these weeks, the mother is unable to eliminate the additional embedded costs that are attributable to having a child in her custody, such as an extra bedroom, the additional furniture or clothing that must be purchased by her, the increased utility expense for the extra space involved, and so on. A reasonable compromise is to reduce child support by, say, one-half for each one-month period during which the noncustodial parent has the child living with him. Such an approach recognizes the fixed costs that are associated with custody of a child and yet also pays deference to those individual costs of a noncustodial parent that will increase during the times the child is with him for an extended period.

Pay close attention to the child support guidelines, however, if you represent the custodial parent in this situation. Most of the child support guidelines have specific provisions for reduced child support in the event of extended visitation over the course of a year.

If child support is paid by garnishment, then the custodial parent will need to reimburse the other parent after the visitation occurs. Make sure you set a deadline for reimbursement, such as "no later than 30 days after the visitation."

Termination of Child Support

Specific events should be recognized by the parents as terminating child support. Among these are the death of a child, the child's emancipation (by marriage, entry into military service or otherwise), attainment of majority, graduation from high school and the child's moving away from the custodial parent.

The child's death or legal emancipation should always be explicitly stated as absolute terminating events. When neither of these have occurred, the decree or settlement instrument will usually state that child support terminates upon the child's attainment of majority. This can vary among the states between 18 and 21.

Sometimes the state law will also contain a "savings provision" which specifies that, for example, child support may continue while the child is still in high school if he or she is over 18 but not yet 20 years of age. Some states also provide for the court's discretion in continuing child support beyond 18 and into college. If the child attains age 18 but is incapable of self-support, consideration should also be given to a clause which provides for a fair allocation for future expenses for the child between the parents, taking into account whether or not the state law requires a parent to provide for an incapacitated child who is over 18.¹³

¹³ North Carolina, for example, does not require such support. North Carolina, for example, does not require such support. Yates v. Dowless, 93 N.C.App. 787, 379 S.E.2d 79 (1989), aff'd per curiam 325 N.C. 703, 386 S.E.2d 200 (1999).

Care should be taken in drafting clauses that *eliminate* child support if the child moves away from the home of the custodial parent. Such moves may be temporary or permanent. While few would dispute the propriety of terminating child support to the custodial parent when the child takes up permanent residence elsewhere, it is sometimes difficult to say when the child has made a "permanent" change of residence. The drafting attorney may occasionally want to create a bright-line distinction, such as termination of child support after the child has been *absent for thirty or more consecutive days* from the custodial parent's home. At other times, it may be advisable to choose a more vague standard, such as termination when the child has chosen to *live elsewhere indefinitely*. Since there is no simple answer, it is essential for the legal assistance attorney to recognize the issue, raise questions and discuss problems with the client in order to obtain a mutually agreeable solution that can be drafted into enforceable language.

Conclusion

When all is said and done, there is a great deal more to child support than meets the eye. A close examination of the child support issues outlined in this article, coupled with such local CLE training as is available (or affordable) will give legal assistance attorneys a key to solving most child support problems. The checklist which follows gives a quick overview of the most important aspects of child support negotiations and alternatives.

* * *

CHECKLIST FOR CHILD SUPPORT OPTIONS

MONETARY/CASH AMOUNT

- *Check state child support guidelines
- *Check service regulations (for military families)
- *Allocate among children? [**Always** when representing the noncustodial parent]
- *Escalator clause? With/without a "cap" to limit the amount of support?
 - net pay escalator
 - gross pay escalator
 - CPI escalator
 - flat-rate escalator

HEALTH CARE INSURANCE

- *TRICARE (for military families)
- *Private insurance

UNCOVERED HEALTH CARE EXPENSES (UHCE)

- *Portion paid by noncustodial parent--
 - all
 - half
 - other fraction
 - excess over stated amount
- *Define UHCE or leave unspecified?
- *Payment due when? To whom?

LIFE INSURANCE

- *Amount of coverage
- *On both parents or just noncustodial one?
- *Transfer of ownership of policy?
- *Choice of beneficiary--
 - other parent
 - child/children
 - trust

DEPENDENCY EXEMPTION

- *Allocate or leave out?
- *Give away or trade for increase in child support?
- *Permanent or annual transfer?
- *Complete transfer, or conditioned on faithful compliance with child support obligations?

COLLEGE EXPENSES

- *Length of obligation
- *Items to be covered--
 - room and board
 - books
 - tuition
 - fees
 - other (specify)
- *Conditioned on--
 - child's performance in school?
 - pursuit of generally recognized degree?
 - at an accredited institution?
 - undergraduate college? Trade school?
- *Portion paid by noncustodial parent--
 - all
 - half
 - other fraction
 - specific amount

REDUCTION OF CHILD SUPPORT FOR EXTENDED VISITATION

TERMINATION OF CHILD SUPPORT

- *Include death or emancipation (by marriage, military service, etc.) or child's moving away from custodial parent
- *Other qualifying events--
 - age of majority
 - high school termination
 - college termination

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