

Minority Report of the Massachusetts Child Support Guidelines Task Force, 2008

Prepared by Dr. Ned Holstein, MD, MS

(With partial concurrence by two other Task Force members where specifically indicated)

Introduction The Chief Justice for Administration and Management, Robert A. Mulligan, should be commended for convening this Task Force to review the Guidelines. The Task Force's internal review process was open and transparent, with detailed consideration of the views of all Task Force members. The Task Force has recommended many significant improvements to the Guidelines.

The purpose of this minority report is not to criticize or undermine the Task Force or its members. Rather, within the allowed six pages, this report evaluates the Task Force's recommendations and identifies, based on empirical fact, why certain of them are misguided and warrant reconsideration.

Many of the recommendations of the Task Force should be modified or rejected because they:

- 1) are contrary to the best interests of many children whose parents have separated or divorced,
- 2) are contrary to the large majority of public comments received by the Task Force,
- 3) often treat parents inequitably, and/or
- 4) lack a consistent and appropriate rationale. Thus, no economic model, data or philosophy supports the proposed formula or justifies why some other formula should not be used.

I The recommended child support amounts are excessive and are therefore not in children's best interests. The child support amounts recommended by the Task Force are generally excessive, without a coherent rationale or justification. The guidelines should require payments sufficient for both parents to equitably meet the important needs of their children. Above those levels of support, additional, excessive child support orders impair the payor's parenting and thus have adverse consequences for children that far outweigh the benefits.

The negative effects of excessive child support orders are many. They diminish the standard of living children enjoy in the payor's household. They alienate payors, require them to work excessive hours, and may force them to live far from their children, making parenting time impractical and potentially isolating children from friends and activities during such times. Very excessive child support orders may present payors with the constant threat of incarceration despite the best of intentions. As the calculations in this report show,¹ certain of the Majority recommendations do not reflect these realities of the child's post-divorce² life.

Low-Income Cases A minimum wage payor earns \$16,640 annually. If the recipient has no earnings, the proposed child support order will be \$4,004. After paying income and payroll taxes, the payor will have \$9,978 to live on for the year. At \$832 per month rent, the payor will have no money left. The proposed child support order of \$4,004 is 13% higher than the \$3,546 currently required. The current order is unpayable, and the proposed order is still more unpayable. A payor faced with an unpayable order and the possibility of incarceration may have little choice but to disappear. Children pay the price because they lose the most valuable things the poor payor has to

¹ All calculations in this report are for one child and are based on "available income" as defined in the Guidelines.

² The word "divorce" will be used for convenience to apply to the separation of never-married parents as well as true divorces, unless the context clearly indicates otherwise.

offer: love, nurturance and guidance. Also, the minimum wage outcomes contradict Principle 4 of the Guidelines, “To protect a subsistence level of income of parents at the low end of the income range whether or not they are on public assistance.”

The Majority recommendations contain large child support increases for poor payors compared to the existing Guidelines, especially when the recipient earns more than the payor. For example:

| Available Income | | % Increase in Child Support Amount |
|------------------|-----------|---------------------------------------|
| Payor | Recipient | |
| \$20,000 | \$0 | 13% |
| \$20,000 | \$20,000 | 15% |
| \$20,000 | \$40,000 | 127% (more than doubled) |
| \$20,000 | \$60,000 | 150% (more than doubled) |
| \$25,000 | \$50,000 | 137% (more than doubled) |
| \$25,000 | \$75,000 | 163% (more than doubled) |
| \$25,000 | \$100,000 | 205% (more than tripled) |

The recipient and child cannot survive solely on any amount of child support that an indigent payor might conceivably be able to pay. That is why they are provided with social benefits such as TANF, food stamps, public housing and health care. The child support that an indigent payor can pay is a token compared to the public benefits. The Guidelines simply require poor people to make payments they cannot afford and which make little difference to the recipient relative to the level of public support.

The federal data bear this out: about 70% of the total child support arrearages nationwide are owed by people earning less than \$10,000 per year, and 96% is owed by those earning less than \$40,000 per year. Child support debt is almost entirely a problem of poverty. Child support orders for the poor should be lowered, not raised.

Middle-Income Cases Even middle-class payors will have difficulty remaining active parents to their children under the Majority proposals. In this report, “Disposable Income” (DI) is the money left after paying income and payroll taxes, and after paying (or receiving) child support. The Majority proposals create a very large discrepancy in DI for most of the middle class:

| Available Income | | Payor DI as % of Recipient Available Income | Payor DI as % of Recipient DI | Assumed Total Support Needs |
|------------------|-----------|---|-------------------------------------|-----------------------------------|
| Payor | Recipient | | | |
| \$20,000 | \$20,000 | 100% | 46% | \$9,932 |
| \$40,000 | \$20,000 | 200% | 70% | \$14,716 |
| \$40,000 | \$40,000 | 100% | 49% | \$19,032 |
| \$50,000 | \$30,000 | 167% | 62% | \$19,032 |
| \$50,000 | \$50,000 | 100% | 49% | \$22,828 |
| \$60,000 | \$20,000 | 300% | 85% | \$19,032 |
| \$60,000 | \$40,000 | 150% | 63% | \$22,828 |
| \$75,000 | \$75,000 | 100% | 50% | \$31,928 |

In all four examples above in which the payor and recipient earn equal amounts, the payor will have only about half the disposable income of the recipient after taxes and child support transfers. Even a payor who earns three times as much as the recipient will have less disposable income than the recipient. These disparities are brought about by the assumption that one child needs the amount of support seen in the right-hand column,³ amounts that in most cases seem high. Dr. Sarro, an economist on the Task Force, and Mr. Gedeon agree that the proposed child support amounts are too high in many cases.

The proposed increases for most middle class families are large:

| Available Income | | % Increase in Child Support Amount |
|------------------|-----------|---------------------------------------|
| Payor | Recipient | |
| \$40,000 | \$20,000 | 10% |
| \$40,000 | \$40,000 | 60% |
| \$40,000 | \$60,000 | 104% (more than doubled) |
| \$40,000 | \$80,000 | 149% (more than doubled) |
| \$40,000 | \$100,000 | 191% (almost tripled) |
| \$60,000 | \$20,000 | 2% |
| \$60,000 | \$40,000 | 31% |
| \$60,000 | \$60,000 | 60% |
| \$60,000 | \$80,000 | 86% (almost doubled) |
| \$60,000 | \$100,000 | 111% (more than doubled) |

Research links the wellbeing of children to the welfare of both parents. Children do better with an equitable “two condo” solution rather than with one well-appointed home and one shabby home. The combined income of the parents in these examples is sufficient to allow the “two condo” solution, and for the child to be quite well cared for in both homes if the income were distributed equitably. But the proposed Guidelines make shared parenting difficult due to excessive financial demands on the payor; they create custody battles because of the unnecessarily large financial prize attached to winning custody; and they create major disparities in the standard of living of the two post-divorce households (see below).

Standards of Living of Payor and Recipient To some, substantial disparities in the disposable incomes of the two parents are desirable, because the recipient needs the extra money for the child. But at what point are the disparities greater than needed?

Braver and Stockburger⁴ studied this matter quantitatively and concluded “...under current child support guidelines, the majority of CPs [custodial parents] have higher SOLs [standards of living] than their matched NCPs [non-custodial parents], dramatically so in Massachusetts. . .” (bracketed material and emphasis added).

³ Assumed Total Support Needs is the combined support amount under the proposed Guidelines which is to be divided between the two parents in proportion to their available incomes.

⁴ Braver, SL and Stockburger D, Child support guidelines and equal living standards. In, The Law and Economics of Child Support Payments, William S. Comanor (ed), Edward Elgar, Northampton, MA, 2004, pps 91-127.

In other words, even after paying the expenses of children, Massachusetts recipients already have a “dramatically” higher standard of living in most cases than payors. The Majority recommendations would make this discrepancy worse. Braver and Stockburger’s method can be used to calculate the relative standards of living (SOLs) of the two parents. Assuming one child, that both parents have housing for the child, and that the payor provides 20% of the parenting time, the following results are obtained under the Majority proposals.

| Available Income | | Payor DI | Payor SOL | Assumed |
|------------------|-----------|-------------------------|--------------------------|------------------------|
| Payor | Recipient | as % of Recipient DI | as % of Recipient SOL | Total Support Needs |
| \$20,000 | \$20,000 | 46% | 54% | \$9,932 |
| \$25,000 | \$25,000 | 45% | 52% | \$12,480 |
| \$50,000 | \$50,000 | 49% | 57% | \$22,828 |
| \$75,000 | \$75,000 | 50% | 59% | \$31,928 |
| \$100,000 | \$100,000 | 52% | 61% | \$40,092 |

In other words, middle class payors who earn the same as recipients will have a standard of living only slightly better than half that of the recipients, even after recipients pay for most of the expenses of children. This means payors will need to earn about three times as much as recipients to have a standard of living comparable to that of the recipients in most cases under the proposed Guidelines.

If these imbalances were necessary for the wellbeing of the child, they would be justified. But they are created by assumed total needs for one child from \$9,932 to \$40,092 per year (divided between the two parents in proportion to their incomes). In many cases, this is more than common sense suggests is needed. Needless creating or exacerbating significant disparities in living standards between recipients and payors is unsound public policy. Dr. Sarro agrees.

Children of Wealthy Families The most extreme case under the Majority recommendations would be a payor earning \$250,000 per year and a recipient with no income. The child support order in that case would be \$47,580. It is very hard to imagine what compelling interest the Commonwealth has in ordering support at this high level. Other high-income cases lead to child support orders which Dr. Sarro and Mr. Gedeon also agree are too high in some cases. If there were a compelling state interest in supporting children at that level, why are not married parents at these levels of income required by law to spend similar amounts on their children?

Payors earning more than the Guidelines cover are entitled to predictability, one of the main reasons guidelines are promulgated. Child support for wealthy families should be capped at a reasonable level, and exceeded only by showing special needs of the child or by agreement of the parties.

Second Families and Stepfamilies The Guidelines instruct the Court not to decrease a child support order based on the needs of a second family. This causes serious disparities when the parents re-partner, which most do. Consider two families, each with one child and available incomes of \$50,000 per year. In each case, the sole breadwinner is the father. The only difference is that the payor in the second family pays child support to the first family for the child. The after-tax, after-child-support disposable income of the payor family would be \$27,787, while that of the

recipient family would be \$52,747, or almost double the resources of the payor family, even though both families start with the same income and have one child to support.

Stepparents are very concerned about the present Guidelines, and will be more so if the Majority recommendations are adopted, as these disparities will increase. Stepparents were well represented at the public hearings, indicating that the Guidelines ignore the wellbeing of their own children.

Government Estimates of the Costs of Raising Children How do the proposed Guidelines compare to available measures of a child’s needs? The U.S. Department of Agriculture (USDA) publishes “Family Expenditures on Children.” In a 2000 report circulated to the Massachusetts bar associations and the Trial Court, financial analyst David Weden calculated the USDA-based expenditures in intact families for one child at three levels of family income. These amounts (adjusted for inflation in the first two columns below using changes in the Consumer Price Index) can be compared to the assumed financial needs of one child under the proposed Guidelines:

| Combined Parental Income | USDA Expenditures for One Child | Assumed Total Support Needs |
|-----------------------------|---------------------------------------|-----------------------------------|
| \$29,669 | \$10,806 | \$7,384 |
| \$63,330 | \$14,567 | \$15,444 |
| \$119,874 | \$20,720 | \$26,624 |

The first two columns relate to expenditures on children in *intact* families. The child expenditures must certainly be less in divorced families, where the costs of maintaining two households are greater. Therefore, the proposed Guidelines should call for significantly *less* support than the federal data. Yet in two out of three scenarios, the proposed Guidelines call for *more* support than suggested by federal data. The disparity in the \$119,874 case is large, and becomes more so at still higher levels of income. The low income scenario is the only one in which the proposed support level is less than the federal data suggest it should be. This is a bow to reality, since a payor earning \$29,669 could not pay \$10,806 child support.

Another benchmark of the costs of raising children is the amount paid by the Commonwealth to foster parents for the support of foster children. The basic maintenance payment plus clothing, birthday and holiday allowances for a young foster child in Massachusetts amounts to \$116 per week. Under the proposed Guidelines, divorced parents whose combined income is \$24,388 also have a combined support requirement of \$116 per week, to be divided between them in proportion to their incomes. Any divorced couple whose combined income exceeds \$24,388 would be required to expend more on their child than the Commonwealth believes is adequate for foster children.

II The Majority Report Does Not Adequately Reflect Public Opinion About Child Support
 There have been thirteen public hearings on child support since 2000. About 80 percent of those who testified at the hearings were payors of child support or relatives of payors. About ten percent were attorneys employed by legal aid agencies or advocacy organizations. And about five to ten percent were miscellaneous others, including a few recipients of child support.

The Majority Report fails to distinguish between the testimony of the lay public and that of the attorneys. All thirteen hearings were alike in that hundreds of lay members of the public overwhelmingly testified that the Guidelines are too high and should be lowered, not raised. Only a handful of lay members of the public testified that the child support orders were too low.

III Specific Recommendations

Overall, the proposed child support amounts should be decreased for poor, middle class, and “near-wealthy” families, with due regard to the needs of the child. Dr. Sarro concurs for some cases. For wealthy families, there needs to be a reasonable cap on the dollar amount of child support, a cap that could be exceeded if there were a finding of special needs or if the parents agreed.

Guidelines should further encourage shared parenting in those cases where the total income of the parties is sufficient to allow it. Dr. Sarro concurs. The child support order should be pro-rated according to parenting time, as is done in New Jersey, California, and many other states.

The Guidelines should encourage the equal treatment of all children. This often will mean decreases in child support orders to first families when there are second families.

The Guidelines should incorporate a true self support reserve for poor payors. There is no point in creating unpayable child support orders leading to uncollectible arrearages and fugitive parents.

No other state except Hawaii continues child support to age 23. Child support should be de minimus after high school, unless special needs exist.

Any child support order on behalf of a child for whom an order exists to pay for higher education should be de minimus unless the child is still living in the home during the academic year.

Married parents do not have a legal duty to provide for the post-secondary education of their children. Therefore, principles of non-discrimination suggest that any such amounts under the Guidelines should be limited. Dr. Sarro concurs. For instance, the order could be limited to the cost of in-state tuition at the University of Massachusetts.

When earnings from overtime and/or a second job are included in the child support calculation, it often locks the payor into working overtime/second job indefinitely. This is often inhumane and makes parenting difficult. The proposed Guidelines exempt some overtime/second jobs from consideration, a big improvement. A further exemption is needed for cases in which the recipient is not fully employed, if the children are of school age. In those cases in which overtime/second job income is still subject to the child support formula, this requirement should be dropped once the regular-time earnings of the parties have increased to the pre-order level of income.

Attributing income to a payor who is unable to earn the attributed amount often may cause financial distress or incarceration. The Guidelines should encourage restraint. Dr. Sarro concurs.

The recipient is not held to any legally enforceable standard of performance other than the avoidance of gross neglect or abuse of the child. The Guidelines should indicate the amount of the total child support which the recipient is expected to spend on behalf of the child, and should also make a statement about the kinds of expenses which the recipient is expected to cover.