

IN THE FAMILY COURT OF THE STATE OF DELAWARE

ORDER AMENDING SECTION XVII

DELAWARE CHILD SUPPORT FORMULA

OF THE FAMILY COURT RULES OF CIVIL PROCEDURE

This _____ day of _____, 2010, **IT IS ORDERED THAT:**

1. Section XVII Delaware Child Support Formula shall be replaced as follows:

XVII. DELAWARE CHILD SUPPORT FORMULA

RULE 500. DELAWARE CHILD SUPPORT FORMULA; GENERAL PRINCIPLES

(a) *Rebuttable Presumption.* The Delaware Child Support Formula (the “Formula”) shall serve as a rebuttable presumption for the establishment and modification of child support obligations in the State of Delaware. The Formula shall be rebutted upon a preponderance of the evidence that the results are not in the best interest of the child or are inequitable to the parties. The Formula may be rebutted in whole or in part. Every order rebutting the Formula shall state the reason for the deviation. The Court may decline to adopt any agreement deviating from the Formula that is clearly contrary to the best interest of the child. Any consent order resolving new support or modification of support petitions must reference or have attached a calculation pursuant to the Formula, whether it is one utilized or one from which there is a deviation.

(b) *Review, update and adjustment.* The Delaware Child Support Formula shall be reviewed and updated no less than every four years. The numerical values utilized in the formula will be adjusted every two years utilizing predetermined objective criteria as set forth in Rule 509. The Court will create appropriate forms, tables and instructions to facilitate consistent and accurate application of the Formula.

RULE 501. INCOME ATTRIBUTION

(a) *General.* In determining each parent's ability to pay support the Court considers the health, income and financial circumstances, and earning capacity of each parent, the manner of living to which the parents had been accustomed as a family unit and the general equities inherent in the situation.

(b) *Actual income.* A parent employed full-time in a manner commensurate with his or her training, education and experience shall be presumed to have reached their reasonable earning capacity.

(c) *Attribution.* Unemployment or underemployment either voluntary or due to misconduct or failure to provide sufficient evidence or failure to appear for a hearing or mediation conference may cause income to be attributed. The Court may examine earnings history, employment qualifications and the current job market. The Court may take judicial notice of Department of Labor wage surveys for individual occupations to estimate or corroborate earning capacity. Where no better information exists, a parent may be attributed at least as much income as the other party.

(d) Every parent is presumed to have a minimum earning capacity of the greater of one-half of the statewide median wage for a 40-hour week as reported by the State Department of Labor, or the Federal or State minimum wage, whichever is greatest as determined biannually pursuant to Rule 509.

(e) *Unemployment.* A person who receives unemployment compensation shall be presumed to have been terminated from employment involuntarily and without cause.

(f) *Disability.* When a person has been determined to be eligible for Social Security Disability or Supplemental Security Income (SSI), this determination shall be substantive evidence of a disability. Whether a person has the ability to provide support or to earn additional income shall be determined upon consideration of the nature and extent of the disability, cash and other resources available and the totality of the circumstances. A parent who receives SSI shall not be attributed income or assessed a child support obligation unless the parent has income or an earning capacity independent of their SSI entitlement.

(g) *Earnest re-employment.* Parents who suffer a loss of income either voluntarily or due to their own misconduct may have their support obligation calculated based upon reduced earnings after a reasonable period of time if the parent earnestly seeks to achieve maximum income capacity.

(h) *Incarcerated parents:* Service of a term of incarceration that exceeds or is anticipated to exceed one year may be considered as evidence of a diminished earning capacity unless the individual:

(1) Has independent income, resources or assets with which to pay an obligation of support consistent with their pre-incarceration circumstances; or

(2) Is incarcerated for the nonpayment of child support or for any offense of which his or her dependent child or a child support recipient was a victim.

(i) *Financial report.*

(1) Failure to submit a Financial Report Form pursuant to Rule 16(a) with adequate supporting documentation risks dismissal or an adverse outcome. Adequate supporting documentation commonly includes but is not limited to each parent's most recent tax returns, W-2 Forms, three most recent pay stubs, documentation of payments from Social Security, Unemployment Compensation, Worker's Compensation, a recent physician's statement as to

any claimed disability, and receipts for child care payments and private school costs.

- (2) Individuals with self-employment income shall include all schedules and forms required to be filed with the tax return with corroborating documentation for significant expense categories and, to the extent that tax returns do not reflect current earnings or income, other reliable documentation of that income (such as recent bank statements).
- (3) Individuals receiving income from a business organization in which they are a partner or significant shareholder also shall include the organization's tax return and supporting schedules and forms, and to the extent that tax returns do not reflect the organization's current earnings or income, other reliable documentation of that income (such as recent bank statements).

RULE 502. NET AVAILABLE INCOME

(a) *Net income.* Net available income for each parent is determined by subtracting taxes, limited deductions and a self support allowance from gross income. The result is discounted further by a designated percentage based upon the number of other children each parent is obligated to support. Obligations are calculated on a monthly basis and all values should be rounded to the nearest whole number. Gross income is organized by its taxable status and may include:

- (1) Salary and wages. This includes salaries, wages, commissions, bonuses, overtime and any other income (other than self-employment income) that is subject to Federal Retirement and/or Medicare taxes. For child support purposes, it also includes all income and benefits identified by an employer as "pre-tax" or other similar designation.
- (2) Self employment. This includes all income earned as an independent contractor and subject to federal self-employment tax.
- (3) Unearned. This includes all other taxable income including but not limited to dividends, severance pay, pensions, interest, trust income, annuities, capital gains, workers' compensation, unemployment compensation, disability insurance benefits, prizes, and alimony or maintenance received.
- (4) Nontaxable. This includes all other income not subject to income taxation such as:
 - (i) Most Social Security Disability (SSD) or retirement benefits and some pension/disability benefits issued by private corporations. Such benefits paid to a child on account of a parent's disability are included in that parent's income but offset the Net Monthly Obligation of that parent as set forth in Rule 506 dollar for dollar. Benefits paid to a child due to the child's own disability are included as income to the household in which it is received.
 - (ii) Military Allowances. Military allowances in addition to pay shall be treated as nontaxable income. However, military clothing allowances shall

be excluded and a servicemember's housing allowance (BAH) shall be limited to the amount which he or she would receive if stationed at Dover Air Force Base.

- (5) Exceptions. Second job income may be disregarded upon consideration of its history, purpose, amount and effect on visitation. Expense reimbursements or in-kind payments received in the course of employment, self-employment, or operation of a business should be counted as income only if they are significant and reduce personal living expenses. However, a cost of living stipend given to an employee as compensation due to assignment to a high cost location will not be included as income as long as it is clearly identified on pay documents.

(b) *Taxes.* Tax liability for child support purposes shall be derived by the income tax withholding tables and other publications distributed by the Internal Revenue Service and Delaware Department of Revenue based upon a single tax status with one (1) exemption regardless of State of residence. The Court may create specialized tax tables to facilitate the calculation of estimated tax liability for child support purposes.

(c) *Deductions.* Allowable Deductions include:

- (1) Medical insurance. Medical insurance premiums (including COBRA payments) paid by either parent and regardless of which persons are covered by the policy are deductible except for any portion of a premium found allocable to a child and included as an element of primary support pursuant to Rule 503(b)(3).
- (2) Pension. All mandatory retirement contributions are deductible. If that amount is less than 3% of gross income, voluntary contributions to a 401(k) or similar IRS approved retirement plan of up to 3% (including mandatory) of gross income also may be deducted.
- (3) Union dues. Average monthly amount paid to any labor organization as a condition of employment is deductible.
- (4) Alimony paid. Alimony required to be paid is an allowable deduction but unless designated otherwise in the award document also must be subtracted from taxable income when calculating Federal and State income tax liability (but not retirement and Medicare taxes).
- (5) Disability insurance. Disability insurance premiums withheld from pay or purchased privately for purposes of income replacement (but not to guarantee credit card, mortgage or other third party obligations) shall be deductible in determining net income available for child support.
- (6) Other. Other mandatory unreimbursed business expenses such as supplies required by the employer to be purchased are deductible.

(d) *Self support allowance.* The Self Support Allowance is the minimum amount of net income necessary for a parent to remain productive in a workplace as set forth in Rule 509.

(e) *Other children.* Each parent's available net income will be diluted in recognition of their duty of support to Other Children, excluding step-children, not of this union either in or out of the household by applying a designated percentage against net income after the subtraction of the self support allowance. Children outside a parent's household should be counted only if there is a court order for support or proof of a pattern of support. The percentage shall be determined as set forth in Rule 509.

RULE 503. PRIMARY SUPPORT NEED

(a) *Primary share.* Each parent's Net Available income will be expressed as a percentage to be known as the Primary Share of the parents' combined Net Available income. The percentage will be derived on case by case basis by dividing each parent's Net Available income by their combined Net Available income. This is to allow the children's primary support needs to be equitably allocated between the parents and to facilitate the sharing of extraordinary medical expenses.

(b) *Primary support.* Each parent's Primary Support Obligation is determined by multiplying their Primary Share percentage by sum of all of the elements of the children's primary support need. The elements of the primary support need are:

- (1) Primary support allowance. As set forth in Rule 509, the Formula includes uniform allowances representing the minimum amount necessary to meet the basic needs of one, two, three and four children households (plus an amount for each additional child of the union), and for households where one or more children reside in shared equal placement.
- (2) Child care. The Formula facilitates the equitable allocation of all expenses incurred for the care and supervision of the children of this union by either parent required for the parent to work. No hypothetical or attributed child care costs are permitted. Cancelled checks, childcare contracts, receipts and other instruments created in the usual course of business shall be admissible in addition to the testimony of the parties to prove childcare expenses.
- (3) Health insurance premiums. Health insurance premiums allocable to dependent children of the union may be included as an element of primary support as follows:
 - (i) The amount of a premium allocable to dependent children shall be the difference between the premium for the parent alone and for the parent and his or her children. If the difference cannot be determined by the evidence given, the entire amount shall remain a deduction from income.
 - (ii) Coverage acquired through a stepparent's employment may be considered but only to the extent the increased premium provides coverage for the parties' dependent children and not the stepparent's own children. If the difference cannot be determined by the evidence given, no consideration will be given to the expense.

- (iii) The proportion allocable to the children of a particular union shall be the number of children of the union divided by the parent's total number of dependent children.
 - (4) Other primary expenses. The special needs of some children require parents to regularly incur other expenses including, as permitted by subsection (c), private school.
- (c) *Private school.* Private or parochial school expenses shall only be included as a primary expense where:
- (1) The parties have adequate financial resources, and
 - (2) After consideration of the general equities of the particular case including consideration of whether:
 - (i) The parents previously agreed to pay for their child(ren)'s attendance in private school; or
 - (ii) The child has special needs that cannot be accommodated in a public school setting; or
 - (iii) Immediate family history indicates that the child likely would have attended private or parochial school but for the parties' separation.
- (d) *Shared equal placement.* Shared Equal placement (at least 175 overnights annually in each household) is established by order of the court, by written agreement, or in the absence of any order or written agreement by other evidence. Additionally,
- (1) Each child is counted as one half in each household;
 - (2) The Court shall establish additional primary support allowances to accommodate any such partial allocation of placement;
 - (3) Any modification of an order based upon a change between primary and shared equal placement must be proven by court order or written agreement or, in the absence thereof, by clear and convincing evidence.
 - (4) Upon a showing that a parent is not adequately contributing to shared incidental expenses, the Court may impose any appropriate sanction, including but not limited to finding that the support formula is rebutted or imposing a current support obligation against the offending parent as if the child resided primarily with the other parent.

RULE 504. STANDARD OF LIVING ADJUSTMENT (SOLA)

After satisfying the parents' own and the children's primary needs, the Standard of Living Adjustment (SOLA) allows each child to share in each parent's economic well being to simulate what the child would have enjoyed if the parents lived as a single family unit. SOLA is determined by subtracting each parent's Primary Support Obligation from their respective Net Available Income and multiplying the result by a designated percentage based upon the number of children of the union as set forth in Rule 509.

RULE 505. CREDITS AND THE NET MONTHLY OBLIGATION

(a) *Gross obligation.* Each parent's Gross Obligation is the sum of the individual's Primary Support Obligation (Rule 503(b)) and Standard of Living Adjustment (Rule 504).

(b) *Credits.* Each parent shall retain from their Gross Obligation:

- (1) Primary Support Allowance for the children of this union in their primary or shared placement; and
- (2) Child care, private school or other primary expenses claimed by the parent as allowed by Rule 503(b) or (c); and
- (3) Per capita share of the parents' combined SOLA obligation for the children of this union in each parent's primary or shared placement; and
- (4) Parenting Time Adjustment as set forth in Rule 505(c), if applicable.

(c) *Parenting time adjustment.* When a Court Order or written agreement establishes or confirms that a child spends an average of more than 109 but less than 175 annual overnights in the household of the parent from whom support is sought, that parent shall be entitled to retain a percentage of the primary support allowance allocable to that child and combined SOLA and shall be known as the Parenting Time Adjustment. The percentage is 10% for 110 to 132 overnights, 20% for 133 to 150, 30% for 151 to 164, and 40% for 165 to 174. Additionally:

- (1) If the actual practice of the parties deviates from the written schedule, the appropriate remedy is to first apply for a modification of the contact schedule. However, modest fluctuations between contact schedule and actual visitation practices will not prompt any adjustments or rebuttal of the Formula.
- (2) No parent may claim a Parenting Time Adjustment in excess of his or her individual SOLA obligation.
- (3) Where the residential arrangement is complex with children in different ranges, then the percentages should be averaged.

RULE 506. MINIMUM ORDERS AND SELF-SUPPORT ALLOWANCE PROTECTION

(a) *Minimum orders.* No person shall be assessed a support obligation of less than 25% of the primary support allowance (rounded to the nearest multiple of ten and adjusted biannually pursuant to Rule 509) for the number of children for whom support is sought except:

- (1) This limitation shall not apply where children reside in shared (at least 175 overnights in each household) or split (at least one child of the union with primary residence in each household) placement.
- (2) A disabled person with actual income of less than the self-support allowance may be assessed a lesser obligation upon consideration of the nature and

extent of the disability, cash and other resources available, and the totality of the circumstances.

(b) Except incident to subsection (a) of this rule, no person should be required to substantially invade his or her primary support allowance to satisfy a current support obligation. When a parent supports children in multiple households, that parent's obligation shall not exceed the parent's net available income multiplied by the percentage utilized in the applicable Adjustment for the Support of Other Children as determined by Rule 509(d).

RULE 507. MEDICAL SUPPORT

(a) *Available, affordable and accessible health insurance.* One or both parents shall be ordered to acquire private health insurance when it is available through employment, reasonable in cost and accessible to the child. Whether health insurance available to a parent other than through employment is reasonable in cost and should be acquired or maintained will be determined on a case by case basis.

(1) Reasonable cost. In the context of establishing or modifying a child support obligation health insurance is reasonable in cost if:

- (i) The premium to cover both the parent and the parent's dependent children does not exceed ten percent (10%) of the parent's gross income; and
- (ii) After inclusion of the insurance premium in the child support formula, the parents' combined net income pursuant to Rule 502 is sufficient to provide all primary expenses exclusive of private school tuition.

(2) Continuing duty to acquire insurance. If affordable coverage is not available at the time of the order or whenever coverage lapses, each parent shall be ordered to acquire coverage that becomes available if the cost to cover both the parent and the parent's dependent children does not exceed ten percent (10%) of the parent's gross income.

(3) Accessibility. Health insurance is accessible to a child if it covers medical services within a reasonable distance from the child's primary residence.

(4) Termination. Once a parent has been ordered to acquire or maintain a specific policy of insurance, the parent shall continue the coverage despite changes in cost or accessibility until further order of the Court or written consent of the opposing party, or the State of Delaware if the child is a Medicaid recipient.

(5) Specialized coverage. Whether either parent is required to acquire or maintain dental, vision or other specialized coverage shall be determined on a case-by-case basis. A National Medical Support Notice or medical support attachment shall not include specialized coverage unless expressly ordered.

(b) *Cash medical support.* Except as provided herein, every order for current support shall be presumed to include annual cash medical support of \$350. Accordingly, the support recipient is responsible for the first \$350 of healthcare expenses for the

children under the order not reimbursed by insurance, including but not limited to medical, dental, orthodontic, vision, and psychological counseling costs incurred by either parent each calendar year.

(1) Incurred. For purposes of this rule, “incurred” shall be the date the medical service was provided, except that in the event a parent contracts to pay orthodontic or other long-term treatment services over a period of time the date each periodic payment is due under the contract shall be deemed to be the date the expense was actually “incurred.”

(2) Additional cash medical support. Any additional healthcare expenses over \$350 each calendar year shall be divided by the parents according to their respective Primary Shares as established pursuant to Rule 503(a). The \$350 threshold is not applicable to shared or split placement circumstances.

(c) *Contribution and reimbursement.* An action for contribution to or reimbursement for a medical expense for a child may be brought at any time after the medical expense is actually incurred. However, any right of reimbursement will be presumed to have been waived unless a petition for reimbursement is filed with the Court by December 31 of the second year following the date the expense was incurred. This presumption may be rebutted for good cause shown.

RULE 508. MODIFICATION

Any petition for child support modification filed within two and one-half years of the last determination of current support must allege with particularity a substantial change of circumstances not caused by the petitioner's voluntary or wrongful conduct except as described in Rule 501(g). Furthermore:

(a) Incarceration is not a ground for modification of a current support obligation last calculated within the last two and one-half years.

(b) No modification will be ordered unless the new calculation produces a change of more than 10%.

(c) Beyond two and one-half years, neither the “particularity” nor the “10%” requirement applies.

(d) An obligation may be adjusted upwards or downwards without regard to who filed the petition.

RULE 509. NUMERICAL VALUES

(a) *Basis and adjustment.* The numerical values utilized in the Delaware Child Support Formula shall be derived from the Consumer Expenditure Survey (CEX) as published annually by the United States Department of Labor. The values shall be adjusted automatically in January of every odd numbered year. Specifically, 120% of the three-year average annual expenditures for food (F), clothing (C), shelter (S) and utilities (U) of all surveyed single parent households (“FCSU”) shall constitute the minimum basic need for a one parent two-child household from which the Formula's allowances and percentages will be extrapolated. The applicable CEX surveys shall

be the three most recent surveys available immediately preceding the adjustment. The Court may adopt mechanisms to simplify and expedite the biannual adjustment.

(b) (1) Variables. The following variables are applicable to the equations utilized in subsections (b)(2) through (b)(6):

a = number of adults in the household (for child support purposes, this is always “1”)

c = the number of children in the household minus “1”.

s = proportion of basic expenditures attributable to shelter and utilities (shelter and utilities divided by food, clothing, shelter and utilities)

f = proportion of basic expenditures attributable to food and clothing (food and clothing divided by food, clothing, shelter and utilities)

.65 = economies of scale (sharing resources, buying in bulk, hand-me-downs etc.)

(2) Self support. The self-support allowance is determined by dividing the FCSU by the following equation:

$$((a + (s + .16) + 2*(f - .11))^{.65})$$

(3) One child primary. The primary support allowance for one child is determined multiplying the self-support allowance by the following:

$$((a + (s + .16))^{.65} - 1)$$

(4) Two child primary. The primary support allowance for two children is determined by subtracting the self-support allowance from the FCSU.

(5) Three child primary. The primary support allowance for three children is determined by multiplying the self-support allowance by the following:

$$((a + (s + .16) + c*(2*(f - .11)))^{.65} - 1)$$

(6) Each additional child. The primary support allowance for each additional child is determined by calculating the primary support allowance for six children as in subsection (4), subtracting the result by the primary allowance for three children, and then dividing by 3.

(7) All allowances shall be rounded to the nearest multiple of ten.

(c) SOLA. The percentages to be utilized in calculating the Standard of Living Adjustment (SOLA) shall be determined by taking ninety percent (90%) of the applicable Primary Support Allowance and dividing it by the sum of the whole Primary Support Allowance and two times the Self Support Allowance. The result shall be rounded to the nearest 2-digit percentage. The percentages applicable to households of more than three children shall be expressed in the manner described in subsection (b)(6).

(d) *Adjustment for the support of other children.* The percentages to be utilized in the adjustment for the support of other dependent children shall be two times the self support allowance divided by the sum of two times the self support allowance and the

primary support allowance applicable to the number of children who qualify for the credit. The result shall be rounded to the nearest 2-digit percentage. However the credit shall never exceed the percentage applicable to three other children.

2. This amendment shall be effective after 30 days notice to members of the Bar but not before January 1, 2011.

BY THE COURT:

Chandlee Johnson Kuhn
Chief Judge

Jay H. Conner
Judge

William N. Nicholas
Judge

Mark D. Buckworth
Judge

Aida Waserstein
Judge

Kenneth M. Millman
Judge

William J. Walls, Jr.
Judge

William L. Chapman, Jr.
Judge

Barbara D. Crowell
Judge

Peter B. Jones
Judge

Mardi F. Pyott
Judge

John E. Henriksen
Judge

Robert B. Coonin
Judge

Arlene Minus Coppadge
Judge

Michael K. Newell
Judge

Alan N. Cooper
Judge

Joelle P. Hitch
Judge