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Recent Amendments to Illinois Child Support Statutes: Income Percentage Guidelines, 19 J. Marshall L. Rev. 207 (1985)

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RECENT AMENDMENTS TO ILLINOIS CHILD SUPPORT STATUTES: INCOME PERCENTAGE GUIDELINES

Recent amendments[1] to Illinois' child support statutes[2] have raised many questions and problems for Illinois family court judges and lawyers. The amendments were apparently intended to bring Illinois into compliance with federal law, which requires all states to establish guidelines for determining child support awards as a prerequisite to receiving federal contributions to Aid to Families With Dependent Children programs.[3] Unfortunately, in its zeal to effectuate the desired compliance, the legislature has instituted changes which are of doubtful constitutionality. The amendments invade constitutionally-protected family choice areas, are unconstitutionally vague, and result in unconstitutional classifications. Moreover, the amendments present serious questions as to judicial application. The legislature's rash action has created needless confusion in a previously well-settled area of Illinois law.

Prior to 1977, while Illinois statutes authorized child support in divorce and separate maintenance proceedings, they did not provide standards to assist a court in determining support amounts. Among the factors courts considered were the child's needs,[4] the parents' available resources,[5] and parental needs and obligations.[6] The 1977

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1. Act of Sept. 12, 1984, P.A., 83-1404, 1984 ILL. LEGIS. SERV. 188 (West).

2. The affected statutes were: ILL. REV. STAT. ch. 23, §§ 10-2 and 10-5 (the Illinois Public Aid Code); ILL. REV. STAT. ch. 40, § 504 (spousal maintenance provision of the Illinois Marriage and Dissolution of Marriage Act); ILL. REV. STAT. ch. 40, § 505 (child support provision of the Illinois Marriage and Dissolution of Marriage Act); ILL. REV. STAT. ch. 40, § 1106 (non-support provision of the Illinois Marriage and Dissolution Act); ILL. REV. STAT. ch. 40, § 1224 (Revised Uniform Reciprocal Enforcement of Support Act); and ILL. REV. STAT. ch. 40, § 1359 (Paternity Act).

3. Act of Aug. 16, 1984, Pub. L. No. 98-378, 98 Stat. 1321 (codified at 42 U.S.C. § 667).

4. *See* Plaster v. Plaster, 67 Ill. 93 (1873) (tender age and health must be considered); Flately v. Flately, 42 Ill. App. 3d 494, 356 N.E.2d 155 (1976) (child's financial resources and educational needs); Needler v. Needler, 131 Ill. App. 2d. 11, 268 N.E.2d 517 (1971) (child's health); Stumpfel v. Stumpfel, 285 Ill. App. 588, 2 N.E.2d 366 (1936) (age, health, mentality and sex of children).

5. *See* Everett v. Everett, 25 Ill. 2d 342, 185 N.E.2d 201 (1962) (available means of parties); James v. James, 14 Ill. 2d 295, 152 N.E.2d 582 (1958) (valuation of husband's interest in corporation); Maupin v. Maupin, 403 Ill. 316, 86 N.E.2d 206 (1950) (existing conditions).

6. Everett v. Everett, 25 Ill. 2d 342, 185 N.E.2d 201 (1962) (accommodating needs of parties and children with resources of parties); Gray v. Gray, 39 Ill. App. 3d 675, 349 N.E.2d 926 (1976) (award of $100 per week excessive in light of father's $160 income); Popeil v. Popeil, 21 Ill. App. 3d 571, 315 N.E.2d 629 (1974) (husband's ad-

Illinois Marriage and Dissolution of Marriage Act[7] (IMDAM) codified those considerations and added additional criteria with which to determine child support amounts. The IMDMA originally mandated that, in setting child support awards, a judge must consider all relevant factors, including five specifically-enumerated considerations:

> (1) the financial resources of the child; (2) the financial resources and needs of the custodial parents; (3) the standard of living the child would have enjoyed had the marriage not been dissolved; (4) the physical and emotional condition of the child and his educational needs; and (5) the financial resources and needs of the noncustodial parent or parents.[8]

Recent amendments to Illinois' child support statutes add mandatory guidelines to determine the amount of child support based on net income percentages and the number of children to be supported. The amendments offer a definition of net income and state percentages of income to be awarded ranging from twenty percent for one child to a maximum of fifty percent for six children.[9] The amendments also make health insurance coverage mandatory and provide that debts owed to private creditors are to be disregarded in setting child support awards.[10] The amendments raise serious due process questions regarding whether the Illinois legislature has interfered with parents' fundamental rights[11] to rear and nurture children as they choose.

Over sixty years ago, the United States Supreme Court recognized that the familial relationship was encompassed within the liberties and privileges guaranteed all persons by the fourteenth amendment. For example, the right of parents to educate their children in whatever manner they chose was held to constitute a fundamental right which deserved constitutional protection from state interference.[12] The Court's examination of state intrusions into other aspects of the family relationship has led to similar results. The Court has determined that the state cannot: mandate that all chil-

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mitted ability to pay).

7. ILL. REV. STAT. ch. 40, § 101.

8. ILL. REV. STAT. ch. 40, § 505 (1983).

9. Act of Sept. 13, 1984, P.A. 83-1404, 1984 ILL. LEGIS. SERV. 188, 194 (West).

10. *Id.* "In cases wherein health/hospitalization insurance coverage is not being furnished to dependents to be covered by the support order, the court shall order such coverage and shall reduce net income by the reasonable cost thereof in determining the minimum amount of support to be ordered." *Id.*

11. Griswold v. Connecticut, 381 U.S. 479, 485 (1965). *See also* Corfield v. Coryell, 4 Wash. C.C. 371 (Cir. Ct. E.D. Pa. 1823).

12. Meyer v. Nebraska, 262 U.S. 390 (1923). *See also* Pierce v. Society of Sister's 268 U.S. 510 (1925) (statute requiring children to attend public schools held unconstitutional as a deprivation of fundamental right of parents to rear and educate their children as they wished); Wisconsin v. Yoder, 466 U.S. 205 (1972) (invalidated Amish parent's conviction for failure to abide by compulsory school attendance law).

dren conceived must be born;[13] forbid inter-racial marriage;[14] deprive a person of the right to procreate;[15] forbid the use of contraceptives by married couples[16] or unmarried individuals;[17] or interfere with a family's living arrangements.[18] The Court has declared that such decisions are constitutionally protected fundamental rights. The Court has also repeatedly held that any attempt to interfere with the exercise of those rights will be strictly scrutinized. Consequently, in order for a state to sustain legislation infringing upon or abridging fundamental rights, it must show a compelling interest.[19]

The imposition of mandatory health insurance coverage and specific percentage support levels represent intrusions into a realm of life which the state cannot enter without a showing of compelling need. Whether or not to provide health insurance and what amount of money a child requires are decisions that parents must be allowed to make without state interference, as those decisions are decisions of conscience much the same as educational choices. Because educational choices are recognized as fundamental, far more basic decisions as to life-sustaining support must also be considered fundamental. The Illinois legislature, while attempting to mitigate marriage dissolution effects, has not shown a compelling need for its action. While the state has an interest in insuring that children are supported and provided necessary medical care, it has failed to show that it has a compelling interest in demanding that some children be supported at a certain level and be guaranteed medical coverage. It has also failed to demonstrate that grave or immediate danger to the state or to the child's health, welfare, or morals exists.[20] It cannot be denied that child support statutes are necessary because some parents fail to provide for their children. The idea that governmental power should supersede parental authority in all cases because some parents neglect their parental duties is, however, repugnant to amer-

13. Roe v. Wade, 410 U.S. 113 (1973) (invalidated Texas statute prohibiting abortions other than for therapeutic purposes as violation of fundamental right of privacy and autonomy to deal with one's own body).

14. Loving v. Virginia, 388 U.S. 1 (1967) (held Virginia anti-miscegenation statute unconstitutional as deprivation of fundamental right to marry).

15. Skinner v. Oklahoma, 316 U.S. 535 (1942) (Oklahoma multiple criminal offender sterilization statute unconstitutional as deprivation of fundamental right to beget children).

16. Griswold v. Connecticut, 381 U.S. 479 (1965).

17. Eisenstadt v. Baird, 405 U.S. 438 (1972) (statute forbidding sale of contraceptives to unmarried persons unconstitutional).

18. Moore v. East Cleveland, 431 U.S. 494 (1977) (ordinance limiting dwelling occupancy to closely related individuals unconstitutional as invasion of fundamental right of family choice).

19. Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (state interest must outweigh right infringed).

20. *Id.*

ican tradition.[21]

In addition to the serious substantive due process questions, the amendments raise procedural due process questions because the legislation lacks coherent or sufficient standards for judicial application.[22] The absence of such standards creates the danger that judges will arbitrarily apply the law, imposing upon citizens their own personal values rather than those intended by the legislature.[23] The amendments create a myriad of ambiguities and fail to provide standards for judicial application. The legislature, in enacting child support guidelines, merely added the percentage guidelines to the existing statutory provisions which set forth specific criteria for determining support. This creates ambiguity as to whether the court should first consider the stated criteria of need, ability to pay, and the financial resources of the child and the obligor parent, before applying the guidelines or whether it should ignore the former factors and set support by following the guidelines alone. Similar ambiguity is raised by the statute's direction to use standard tax to arrive at net income. No legislative definition of standard tax is provided. Further, no direction is given as to whether net income is to be determined by scrutinizing both parties' incomes or whether only the obligor spouse's income is to be considered. Blatant facial inconsistency is created since the statutes first mandate that a judge must consider all relevant factors, which presumably includes personal debt; they then direct a judge to disregard debt in determining the child support amount. These statutes are unquestionably so indefinite, uncertain, and puzzling that persons of ordinary intelligence must necessarily guess as to their meaning and differ as to their application; they therefore transcend procedural due process.[24]

The amendments also raise equal protection questions. The fourteenth amendment guarantees all persons equal protection of the law. While states must necessarily draw distinctions between individuals, they cannot create disparate classes without sufficient reason. The Supreme Court has traditionally applied a two-tier system to scrutinize equal protection questions: the rational basis test[25] and strict scrutiny. The Court has employed the rational basis test in

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21. Parham v. J.R., 442 U.S. 584, 603 (1979) (formal adversary hearing not required when parents seek to commit a child to a state mental institution because some parents might abuse the right to commit children).

22. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).

23. Bellotti v. Baird, 443 U.S. 622, 644 n.24(1979).

24. *See* Connally v. General Construction Co., 269 U.S. 385, 391 (1926) (Boshuizen v. Thompson & Taylor Co., 360 Ill. 160, 195 N.E. 625 (1935) (striking down section of Occupational Diseases Act because statutory language was vague and indefinite).

25. Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (legislation must have a reasonable relationship to state's purpose). *See generally Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1187-93 (1980).

most areas. Where suspect classes[26] or fundamental rights are involved, however, the strict scrutiny standard has been applied.[27] The fundamental rights branch of equal protection mandates that the state may not deny a certain group access to fundamental rights[28] nor can it unduly burden a particular group in the exercise of those rights.[29] Thus, if fundamental rights are denied or burdened, the state must articulate a compelling reason for its action.

The amended Illinois child support statutes now provide that unwed parents,[30] divorced parents[31] and parents who are not supporting their children, though married,[32] must supply health insurance coverage and stated percentages of income for their children. The percentage standards and mandatory health insurance provisions do not apply to parents who are married and providing support. The inequality resulting from the amended statutes cannot be viewed as merely fortuitous. The states now mandate that certain classes of parents provide health insurance coverage and pay a certain income percentage to support their children, while married parents are left free to decide whether to provide them with health insurance coverage and to choose the income percentage they wish to expend on their children. Clearly, this is an arbitrary classification denying certain parents their fundamental right of choice as to how to provide for their children. Further, because the parents have exercised their fundamental right to bear children, they are being unduly burdened by these statutorily-created obligations. Finally, if some children have a fundamental right to support from their parents, then all children must be treated equally. To mandate that some children must be provided with a specified income percentage and mandatory health insurance while denying other children the same guarantees is an unreasonable and arbitrary classification which should not pass scrutiny even under a rational basis test. If the legislature's purpose was to place all children and all parents in a similar position, then health insurance coverage and support levels must be imposed on all parents.[33]

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26. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

27. Zablocki v. Redhail, 434 U.S. 374 (1978) (Wisconsin statute held unconstitutional following strict scrutiny analysis when it forbid persons having child support arrearages to remarry).

28. *Id.* at 383.

29. Shapiro v. Thompson, 394 U.S. 618, 634 (1969). *See generally, Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1192 (1980).

30. ILL. REV. STAT. ch. 40, § 1359 (Paternity Act) as amended by P.A. 83-1404.

31. ILL. REV. STAT. ch. 40, § 505, as amended by P.A. 83-1404 (child support in dissolution of marriage cases).

32. ILL. REV. STAT. ch. 40, § 1107 as amended by P.A. 83-1404 (non-support).

33. The equal protection questions go far beyond those raised in Kujawinski v. Kujawinski, 71 Ill. 2d 563, 376 N.E.2d 1382 (1978), where the Illinois Supreme Court ruled on the IMDMA's constitutionality. The court held that the IMDMA was not

Yet another arbitrary classification has been created by the specified income percentages. The state has articulated no reason, much less a compelling reason, for dictating that one child requires twenty percent of a parent's income while each of six children requires approximately eight percent. It appears that the legislature merely arbitrarily and capriciously chose the figures without regard to need or result. Because certain children are favored and certain parents burdened by this legislation, the amendments are unconstitutional as violative of equal protection guarantees.

Of primary concern to Illinois family lawyers is the manner in which judges will apply the amended statutes. Foremost among their concerns is whether the factors formerly used to determine support awards will continue to be considered. The paramount fear is that judges will look only to the guidelines and arbitrarily determine support awards by considering only the non-custodial parent's net income. Another great concern is the direction to disregard private debt, which is in direct conflict with precedent[34] and with the statute's mandate to consider all relevant factors. Because these vague and indefinite amendments give judges little direction as to application, it is not difficult to foresee that chaos will reign in Illinois family courts.

Another area of concern to lawyers is how judges will apply the statute's direction to award support based on net income. It is a special concern for those clients whose earnings consist primarily of commissions, or seasonal workers whose incomes fluctuate drastically. The spectre of yearly litigation looms over such parties as it is unclear whether courts are to seasonally re-examine income or whether a percentage rather than a given amount is to be ordered. It would appear that an order containing a stated percentage might be inappropriate in light of the fact that Illinois statutes mandate that an amount be ordered.[35] A final area of concern is that judges might

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unconstitutional although it did, in practice, result in some inequality because it could be construed to require divorced parents to contribute to a child's higher education. 71 Ill. 2d at 571, 376 N.E.2d at 1390. The *Kujawinski* court did not, however, use the strict scrutiny standard of review required in cases involving fundamental rights; rather, it used the "reasonable relationship" standard most often employed in examining economic legislation.

34. *In re* Marriage of Block, 110 Ill. App. 3d 864, 441 N.E.2d 1283 (1982) (marital debts, as well as assets, must be equitably apportioned). *See also In re* Marriage of Simmons, 101 Ill. App. 3d 645, 428 N.E.2d 1032 (1981) (where debts exceed assets, equitable division must be made by court); Gan v. Gan, 83 Ill. App. 3d 265, 404 N.E.2d 306 (1980) (court considered all debts even though husband only ordered to pay one); Petit v. Petit, 85 Ill. App. 3d 280, 406 N.E.2d 899 (1980) (abuse of discretion to award forty percent of husband's income to wife, where husband had debts).

35. *See, e.g.*, Watson v. Watson, 28 Ill. App. 3d 320, 328 N.E.2d 600 (1975) (total financial condition of parties, including debt, must be considered in making child support awards). The supreme courts of Georgia and Arizona have taken the position that a percentage is not tantamount to an amount, and have remanded orders stating

apply amended paragraph 504,[36] which provides for *Lester*-type[37] support, a once popular combined spousal maintenance and child support award virtually eliminated by the Federal Tax Reform Act of 1984.[38] It is conceded by most attorneys that barring further I.R.S. clarification, such combined awards must be avoided to prevent adverse tax ramifications. If judges were to make such awards, catastrophic consequences might result for some clients.

The Illinois legislature must immediately take action to remedy the potential havoc created by its ill-advised and poorly drafted amendments. Allowing this unconstitutional legislation a place within a well-drafted statute which is designed to mitigate the effects of a dissolution of marriage, only serves to exacerbate a situation that most parties already consider traumatic. The amendments must be repealed.

Barring repeal, the amendments should be made merely advisory. If advisory, Illinois child support determination could return to the careful consideration it was afforded prior to the guideline enactment. Judges would then, once again, be allowed to consider all relevant factors, rather than merely given the opportunity to look at a chart.[39] As one judge remarked about these amendments, "If the legislature wants mathematical precision, it should just install computers in the courtroom."[40] Pending repeal or amendment, Illinois

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only a percentage. *See* Newsome v. Newsome, 237 Ga. 221 (1976) and Brevick v. Brevick, 129 Ariz. 51 (1981).

36. ILL. REV. STAT. ch. 40, § 504(b) (1983).

37. *Lester*-type support is an unallocated sum paid for combined maintenance and child support. It is fully deductible to the husband and taxable to the wife. The advantages created by such an arrangement traditionally encouraged larger awards because the husband's ordinarily higher income was benefited by the deduction. Commissioner v. Lester, 366 U.S. 299 (1961).

38. The Tax Reform Act of 1984, P.L. 98-369, _ Stat. 793. Under the Tax Reform Act, if payments that would otherwise qualify as alimony or separate maintenance payments are to be reduced upon the happening of a contingency, such as the child attaining a specified age, or the child's death, marriage or leaving school, the amount of reduction will be treated as child support. It will then be non-deductible to the payor and non-taxable to the payee. Similarly, if any payment will be reduced at a time which can clearly be associated with such a contingency, even though not specifically stated, the amount of reduction will receive similar treatment. Temp. Regs. Dom. Rel. Tax Ref. Act, 1984 I.F.L.R. 242.

39. Illinois courts have held use of guidelines an abuse of discretion in the past, stating that the trial courts cannot ignore the statutory considerations of section 505. *In re* Marriage of Brophy, 96 Ill. App. 3d 1108, 1112, 421 N.E.2d 1308, 1312 (1981). The *Brophy* court disapproved of the trial court's reliance on a normal or standard rate of child support based on a percentage of the supporting parent's income. The court noted that the use of a support chart violates the requirement to determine child support by accommodating the needs of the children with the available means of the parties. *See also In re* Marriage of Rundle, 107 Ill. App. 3d 880, 438 N.E.2d 229 (1982) (substitution of predetermined schedule is trial court error).

40. Address by the Hon. Robert A. Cox, Presiding Judge, Domestic Relations Division, Eighteenth Judicial Circuit, DuPage County, Illinois, speaking at DuPage County Bar Association Marital Law Seminar, Jan. 12, 1985.

courts must re-examine the now-amended IMDMA's constitutionality, employing the strict scrutiny standard of review required when fundamental rights are infringed.

ADDENDUM

Prior to publication, the Illinois Legislature passed legislation which further amends the Illinois child support statutes. Senate Bill 91,[41] currently awaiting Governor James Thompson's signature, appears to answer some of the questions raised. The bill deletes the mandatory health insurance provision and provides that the court may order health insurance only if the child can be added to an existing policy at reasonable cost. The bill also provides for debt consideration in certain circumstances, but only until such debt is retired. The question of combined support and maintenance has been alleviated entirely, as the bill removes the guidelines from paragraph 504.[42] The percentage guidelines, however, remain intact in paragraph 505.[43] The bill provides that the court shall determine child support by using the guidelines. It then states that the court may deviate from the guidelines after considering all relevant factors, including the original IMDMA considerations.[44] Confusion arises from the fact that the "supporting party's"[45] net income is to be determinative of the amount. Who the "supporting party" is, however, is not specified, but it appears that it may be both parents because the original introductory language of paragraph 505[46] states that the court may order either or both parents to pay child support. While the legislature has taken corrective action in deleting the mandatory insurance provision, it has not gone far enough. The due process and equal protection questions remain unanswered.

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41. Senate Bill 091, 84th General Assembly, 1985-86. Passed both houses July 29, 1985.
42. ILL. REV. STAT., ch. 40 § 504 (1985).
43. *Id.*
44. *See supra* note 8.
45. Senate Bill 091, 84th General Assembly, 1985-86 amending ILL. REV. STAT. ch. 40, § 505 (1983).
46. ILL. REV. STAT. ch. 40. § 505 (1985).