CHILD SUPPORT-WHICH PARENT RECEIVES IT AND WHEN?

In many divorce cases, the issue of child support used to be straight forward since there is a statute that sets forth guidelines for the setting of child support. Historically, the guidelines were designed to apply to average wage earners in a traditional household where one parent was designated the primary residential parent with whom the children spent the majority of their time and the other parent was designated the non-residential parent with whom the children spent less of their time. The non-residential parent (usually the bread winner) paid child support to the residential parent (often the stay at home or lesser employed parent) in a set amount based on the guidelines.

In recent years, however, the traditional family setting is evolving and what was once considered less traditional alternatives, such as equal or shared parenting time, are now becoming acceptable resolutions. As a result, the issue of child support is becoming less straight forward and the following types of questions are being raised:

Q: If both parents have equal parenting time, should one spouse have to pay child support to the other?

Q: How much more parenting time does one parent need to have over the other parent to either ensure that they will receive child support or protect them from having to pay child support to the other parent?

Q: If the higher earning spouse has more time with the children than the lower earning spouse, could the lower earning spouse be required to pay child support to his or her former spouse?

Changing familial dynamics and a recent Illinois case have caused even seasoned divorce practitioners to rethink the once simple issue of child support.

In the 2013 case of *In re Marriage of Turk*, 2013 IL App (1st) 122486, parents of two young children divorced in 2005 and agreed that the father would pay unallocated maintenance and child support to the mother, who had primary residential custody of both children. Three years later, the father filed an emergency motion for a change in custody and requested a termination of child support. Eventually the father was awarded custody of the parties' two children. Under the new arrangement, the older child saw his mother weekly for dinner and the younger child saw his mother one-half the time.

Although the court reduced the father's support obligation, it did not abate child support, notwithstanding that the father now had custody of the children. The court found the following factors significant: the mother still had substantial parenting time with the younger child and hopefully her time with the older child would increase; there was a large disparity between the parties' respective incomes and standard of living; both parents have a duty to support the children; and the non-custodial parent incurs regular, necessary and reasonable expenses for the children during his or her parenting time. Nowhere in the child support statute is there a statement that the non-custodial parent is the payor of support and can never be the recipient. However, the situations where this can occur are very limited: the primary breadwinner is the primary residential parent and the other spouse, even after any maintenance rights, is still in need of financial assistance to provide for the children while they are in his or her care.

Perhaps now the answers to the questions enumerated above should be:

A: Maybe.

A: Who knows?

A: Maybe.

Some judges are skeptical to a request for shared parenting, suspecting the request is motivated by the potential to diminish a support obligation or increase a chance to receive support.

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When a client who has not traditionally stayed at home tells me that he or she wants equal parenting time, I ask many questions to evaluate their historical parenting practices. I tend to investigate whether something has recently changed in their spouse's life such that their spouse's traditional parenting role should now come into question (i.e., substance abuse or mental illness). In my experience, every case is unique and it is incumbent on divorce lawyers to determine what their client actually wants and to advocate for what is best for the family.

Time will determine whether the situation in *Turk* was isolated to the particular facts of that case or if its holding becomes widespread. However, these concerns certainly should be making both people going through a divorce, and their lawyers, rethink the issues surrounding child support and recognize that this is no longer a clear cut issue.

HARD CASES MAKE BAD LAW *(Continued from cover)*

Parents should be careful about eliminating requirements that they be found to have the ability to pay for an education before being ordered to do so. The unpredictable financial events of recent years have made what was once unthinkable prospect a stark reality, namely that parents who had every intention of paying for college could not afford the expense. There is often pressure on parent(s) with financial means at the time of divorce to remove the "ability to pay" condition. Once removed, the "ability to pay" condition can't provide the intended safety net for the parent who suffers an unexpected financial reverse.

To protect against a parent becoming a guarantor for college, specify the type of the institution a child may attend and whether the contribution is limited to the cost of an in-state education or whether it may include private school or out-of-state tuition. Parents are always free to do more than what a court order requires, but once an obligation is ordered, they must show unforeseeable and/or changed circumstances to change the obligation.

Parents with young children might be better off agreeing that if they have the wherewithal to pay, they will allow the court to make a determination in accord with the statutory factors. This will help avoid having a commitment they can't pay for or an undeserving child.