



MASSACHUSETTS COUNCIL ON FAMILY MEDIATION, INC.

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VIA e-mail childsupport@jud.state.ma.us
Massachusetts Trial Court
Child Support Guidelines Task Force

To the Task Force:

The Massachusetts Council on Family Mediation, Inc. (“MCFM”), requested input from our members in response to the 2020-2021 Massachusetts Trial Court Child Support Guidelines Task Force’s (“Task Force”) request for comments.

We collected comments from our members, who are experienced family mediators in Massachusetts, via e-mail and in two facilitated Zoom sessions. We have collected and organized these comments in an effort to provide concise and clear feedback to the Task Force from MCFM members. In some places we have summarized multiple comments, and where appropriate we have included individual member comments as noted.

We appreciate the opportunity to be heard on these issues and hope the following comments will help you with your important work. The comments we received from mediators were varied but some common themes emerged. The two major themes were greater accessibility and increased clarity in the guidelines and in the resulting worksheet.

We have further organized the comments into two primary categories: Comments related to the guidelines or formula and Comments related to the Practical Implementation of the guidelines and worksheet.

Comments related to the Guidelines or Formula:

Preamble and principles

Comment 1: What is child support?

The Preamble and Principles to the Guidelines fail to answer a simple and common question asked by many parents about child support: *What is child support for and what does it cover?*

While the Principles outline the purpose of child support in a bulleted format, the list raises more questions than it answers. What are considered “survival needs” vs. “standard of living”? What is a “basic subsistence level?”

Parents would benefit from a clearer definition of child support. For example:

Basic Child Support includes contribution to sufficient basic necessities such as housing, food, transportation, basic medical needs, educational costs, basic entertainment, and clothing. When possible child support should be sufficient to allow these expenditures to be similar in each household (i.e. maintaining a similar “standard of living”).

Basic Child Support does not include medical needs above \$250 per year per child, extracurricular and activity fees, private education, child care, summer camps, or college costs, but contribution to these expenses may be agreed to or ordered by the court when sufficient funds are available.

Comment 2: Not all Parents are Litigants

The Preamble also refers to parents as “litigants” despite the fact that these guidelines apply both to parents who reach agreements, and those who request that the court resolve any disputes. The guidelines should be written in recognition that they guide both parents who are litigating and parents who are working together and file joint petitions with the court. The guidelines should not assume all parents wish to resolve disputes in court, and should further recognize the role of these guidelines in helping parents reach reasonable support agreements outside of a court process.

This is not just an issue of language in the Preamble, but also we ask the Task Force to consider giving more deference to agreements negotiated thoughtfully between parents, as further noted below.

Income Definition

Comment 3: Additional Income Sources

“The definition of income in the CSG does not include gifts. I find it frequent that clients say they are receiving gifts from a parent or grandparent at the \$15,000/yr. limit, and the CSG are silent on this issue. It would be very helpful if the new version would say whether or not these gifts are considered income for purposes of calculating child support.” - Comment from MCFM Member

Comment 4: Self-Employment and other business income

This section of the guidelines encourages a careful review of business income to determine “the level of gross income available to the parent” and reflects the case law that this can differ from taxable income. While the Commentary reference to cases is helpful for lawyers, parents would

be better served with a clearer list of what is includible or excludable from “ordinary and necessary expenses.”

In addition: “there should be a mandatory exchange of financial documents. This was raised in the context of self-employment and other business income. In particular, producing business income tax returns + profit/loss statements that reflect business expenses should be required under the MA CS Guidelines. Section IC acknowledges claimed business deductions must be reasonable and necessary yet payors don't comply with discovery requests and recipients can't truly determine what income is for CS purposes. Rule 410 mandatory disclosure of docs does not cover CS modifications or contempt actions.” - Comment from MCFM Member

Comment 5: Variable Income:

While the income definition includes commissions and bonuses, and case law also indicates the inclusion of vesting deferred compensation (such as RSUs), all of these can vary greatly year to year. Without direction on how to deal with variable income, parents are forced to create plans that require one or the other to take on significant risk of variation, modify often, or serially litigate.

The solution for many parents in mediation is to work out self-modifying provisions on all or portions of the income. Additional guidance in this area could help parents determine appropriate approaches to these types of variable income, other than returning to court. For example, typical mediation provisions call for payment of the variable income when received—such as a provision that a certain percentage of the Additional Compensation should be paid within a certain number of days of receipt. Guidance would be helpful as to how to arrive at that percentage

Comment 6: Imputation of Income / Attribution of Income:

The updates in 2017/2018 that added clarity to these sections were and are appreciated, especially the clear distinction between imputing and attributing income.

With respect to the attribution of income, there is often a significant cost to “proving” availability of work. It could reduce litigation if there was a minimum presumed attribution of income for parents with $\frac{1}{3}$ of parenting time or less (or with children above a certain age) at minimum wage for a reasonable number of hours per week.

Factors to be considered in setting the child support order

Comment 7: Relationship to Alimony:

A number of our members expressed concern that alimony v. child support calculation results can sometimes occur that are counterintuitive. For example, an economically dependent spouse with no children could receive more support as alimony than an economically dependent spouse (or unmarried parent) with multiple children would receive from child support, or if child support and/or alimony are calculated separately.

While we acknowledge that this Task Force is not tasked with changing or interpreting the alimony statute, parents could use greater guidance on how to decide when to apply alimony principles of family need v. child support only or child support first principles. It's not sufficient to simply acknowledge the federal tax law change and how that relates to the alimony and child support interplay. Parents need guidance on when to look at combined family need and what appropriate limits on that might be, and how it might appropriately differ from child support only, or alimony only cases.

One MCFM Member suggested the following solution:

“For so long as the Alimony Reform Act (ARA) states that no funds calculated for CSG purposes may be “double counted” for ARA calculations, I suggest that the revised CSGs state a presumption that in alimony AND child support cases, alimony will be calculated FIRST, and the resulting (i.e., alimony adjusted) incomes of the parents would then be applied for CSG calculations.”

Comment 8: Minimum & Maximum Levels

The highest number of comments received from MCFM members related to the presumption limit of \$250,000 combined available income, especially in light of the alimony tax deduction change.

These are some of the comments received from members:

“The revised CSG should EITHER: (my preference) be universal, i.e., apply to ALL gross annual parental income for all parents (thus abolishing the current \$250K “cap”), OR state specific formula(s) to calculate CS above the existing or “new” cap(s).”

“Is it time to consider raising the \$250K limit captured by the Worksheet calculation.”

“It would be extremely helpful to provide specific guidance about how to handle the income that exceeds what is captured by the calculation.”

“I would like to see specifics on how to calculate the discretionary additional support for the income over \$4808.”

Comment 9: Parenting Time:

The inclusion of this principle in the guidelines is commendable and should stay: “These guidelines recognize that children should enjoy parenting time with both parents to the greatest extent possible consistent with the children’s best interest.”

In keeping with that principle, the guidelines should encourage flexibility in the calculation of support to keep from encouraging parents to litigate parenting time to drive child support differences. In some cases, especially with higher earning parents, the distinction between an approximately equal calculation and a $\frac{2}{3}$ parenting time calculation is significant. Consider an example:

Parent A has nine out of every fourteen overnights (approximately 64% or almost $\frac{2}{3}$) and earns \$90,000 per year. Parent B agreed to five out of every fourteen overnights while seeking better housing during the parenting transition and hopes to get to approximately equally parenting time when finding permanent housing. Parent B earns \$40,000 per year.

In a $\frac{2}{3}$ parenting time calculation Parent B **pays** child support to Parent A of \$146 per week (with 1 child and no other deductible expenses).

However, if Parent B can increase their parenting time to approximately equal (only 2 more overnights in a 14-day period), they would then **receive** \$191 per week.

This is a swing of \$337 per week from one household to the other and is likely the difference in Parent B affording the housing that allows for an approximately equal parenting time, especially in some parts of the Commonwealth where housing may far exceed the costs in other parts of the Commonwealth

This type of scenario suggests a few possible improvements to the existing guidelines:

Possibility 1: Provide greater recognition in the formula for parents with $\frac{1}{3}$ of the time or more who have lower income than the other parent, in order to allow for comparable housing. When a parent has weekend only time or less than $\frac{1}{3}$ then the traditionally termed “physical custodial parent” has a greater need for that support. However, $\frac{1}{3}$ of the time or more requires sufficient housing for both parents and the formula in the scenario above both fails to recognize that reality and encourages litigation because of the significant potential gain (by Parent B) and loss (to Parent A) if they shift to an “approximately equal” parenting plan.

Possibility 2: Provide and encourage greater flexibility and deviation for in between “approximately equal” and $\frac{2}{3}$ parenting time formulas. The guidelines specifically indicate “Where parenting time is substantially less than one-third for the parent who is not the residential parent, the Court may consider deviation by an upward adjustment to the amount calculated under the guidelines worksheet.” The guidelines should also state similarly and explicitly that where parenting time is in between one-third and approximately equal, the Court may consider deviation by a downward adjustment to the amount calculated under the guidelines worksheet. While the averaging calculation from the 2013 guidelines was itself problematic, including the deviation language would provide and encourage flexibility without further complicating the calculations.

Similarly, an MCFM member raised another situation not addressed in the current worksheet:

“The worksheet does not provide a calculation for the situation when 1 child lives primarily with 1 parent and another with each 50/50. Including this would be extremely helpful as it is not an uncommon situation.”

Comment 10: Child Care Costs & Health Insurance Costs

When parents agree to divide child care costs, the presumption of a proportional adjustment on

the worksheet is actually counterintuitive because it reapportions an already agreed upon division of cost. This section could be improved by indicating that these costs can be apportioned by agreement of the parents, and in such instance a reasonable deviation would be to exclude them from the proportional adjustment. Given the potentially high impact of these expenses, the Task Force could also encourage the court to consider apportioning these expenses (when income allows) essentially off the worksheet, when they exceed a certain amount (or percentage of income).

Otherwise, the presumptive apportionment saddles one parent with a greater cost of child care and health insurance not for any logical reason other than being the parent who started paying it, or whose employer offers a better option.

At the very least this should be considered an allowed deviation when parents make their own reasonable choices about how these expenses should be apportioned, and they should not be forced to include them in the guidelines worksheet which then creates a presumptive reapportionment.

Comment 11: Post-Secondary Education Expenses

Many parents want their children to have the responsibility of paying some percentage of college. While the children cannot be bound to do so by the guidelines, the parents should be able to limit their own liability for this expense by agreement. The Guidelines could clarify that an additional factor to be considered in the calculation of appropriate contribution to college expenses is the prior agreements and discussions of the parents relating to the balance of parent and child responsibility for college expenses, especially if saving choices were made during the child's minority based on those agreements. If parents relied on one plan and made savings choices based on that, evidence of those agreements or choices should be a factor in determining appropriate contributions.

Comment 12: HSA/FSA contributions as they relate to Health Care Coverage and Uninsured medical and dental / vision expenses

When a parent has access to an HSA for FSA it is often because their health care coverage has a higher deductible. The increase in uninsured medical expenses is often borne by both parties and this is not necessarily apportioned in the same way as the health care coverage expense which is included directly in the formula. The Guidelines should mention the availability of pre-tax medical contributions by one or both parents as a factor in determining the appropriate division of health care coverage costs and uninsured medical and dental/vision expenses.

Comment 13: Families with multiple children

The percentage raise for multiple children and the presumption limit to five children is unrealistic given the cost of raising larger families. This is especially true in the disparity between households that can be created in higher income families. To account for this, the formula could be adjusted to reflect a higher multi-child multiplier at higher income levels.

Deviation

In addition to deviation related comments in the more specific sections above:

Comment 14: Additional Deviation Factors:

Outlined above, MCFM members have suggested that additional deviation factors should include:

- Parenting time in between “approximately equal” and $\frac{2}{3}$;
- Agreement to apportion health care coverage or child care costs separately;

In addition, a deviation should be allowed when parents agree or the court determines that there is a substantial benefit to the children in being able to stay in their current residence for a reasonable period of time, either to reduce the stress of transitions, complete school in one location, or maintain a standard of living.

Similarly, some members proposed allowing deviation for a specified period of time, indicating at the outset by agreement or a finding of the court, that a deviation factor is only expected to apply for a specific period of time and then recalculation and modification would be appropriate.

Comment 15: Deviation due to Agreement of the Parents:

Multiple MCFM members expressed concern that Judges were often refusing to approve agreements that deviated from the guidelines for reasons considered sufficient by the parents. Members expressed appreciation at the Deviation form currently provided by the court in helping parents identify the specific reasons they might be deviating and easily communicate that to the court.

Clarifying further some of the various reasons parents might deviate (as outlined above) could reduce these occurrences. In addition, clarifying the standard the court should use to override the parents when the parents testify under oath that they believe a deviation is “fair and reasonable” should be limited to the court making a finding that the parents agreement is not in the best interest of the child, i.e. a higher standard than the Judge simply disagreeing with the parent’s definition of “fair and reasonable”. One member suggested wording that presumption as follows:

“I propose that the task force make a clear statement that the CSGs will apply “absent a signed and notarized agreement by the parents that is acceptable to the court.” The twin goals: acknowledge that parents in agreement are the best experts on their family’s financial circumstances, and to encourage parents to propose CSG deviations in unique situations.”

Comments related to the Practical Implementation of the guidelines and worksheet:

Comment 16: Accessibility of Language:

In general, the guidelines are written referencing legal terms and presume a high level of sophistication. They are not written for the average person to read in full, understand, and apply

to their own situation. The guidelines should be more accessible and answer the primary questions that parents have.

Since much of the legal definition and commentary is necessary to guide the courts when disputes arise, a simplified summary document should be created to help guide parents who are trying to reach agreement, want simple answers, and don't intend to litigate. This could be in the form of a short (2 page) instruction sheet, or FAQ.

Comment 17: Accessible Form:

The Child Support Guidelines Worksheet Form was only recently made available in a webform (not needing to download it and have a PDF reader). This is an excellent and important development for accessibility, and crucial for parents who may be trying to calculate child support from a smart mobile device (which is how many people now access the internet).

The Worksheet form when updated should also be available in both this interactive webform and interactive PDF.

Comment 18: Testing and Comment Period:

In order to prevent the form issues that occurred in 2017, the Task Force should release any proposed updates for a comment period allowing for the discovery and correction of any inconsistencies or issues prior to finalizing.

Final Comments:

MCFM and its members acknowledge and appreciate the hard work of the Task Force members in balancing many varied interests. We hope these comments are helpful in expanding the Task Force's awareness of how parents who chose to mediate rather than litigate are impacted by these guidelines and how their interests can be served as well.

Thank you specifically to the following MCFM Members who participated in MCFM's meetings and submitted comments: John Fiske, Janet Wiseman, Les Wallerstein, Fran Whyman, Carol Lynn May, Susan Klebanoff, Judy Kaplan, Vicki Shemin, Laura Unflat, Miriam Kosowsky, Halee Burg, Sara Barnes, Larri Tonelli Parker, and Justin Kelsey.

Sincerely,



Justin L. Kelsey
President, MCFM

- Approved by the MCFM Board of Directors-