



# MICHIGAN FAMILY LAW JOURNAL

STATE BAR OF MICHIGAN FAMILY LAW SECTION

## BABY NEEDS NEW (TAP) SHOES; Using a New Spouse's Economic Resources in Child Support Computations

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When a parent remarries after divorce, the court may consider the new spouse's income in a petition to modify the child support obligation. A line of Michigan cases which pays lip service to the proposition that the new spouse has no responsibility to support a child from the prior marriage has used the new spouse's financial situation to justify the modification of child support orders. Although the weekly support figure recommended by the Guideline has been presumptively correct since October 10, 1990, under certain circumstances the court may still vary from the recommendation. A parent's economically provident remarriage can be a factor justifying the court's departure from the Guideline's recommendation.

In 1987 the Michigan legislature adopted the Michigan Child Support Guideline. Under the Guideline, weekly child support is based upon the net weekly incomes of both the custodial and non-custodial parents. The underlying assumption in this formula is that the needs of the child are related to the parents' aggregate ability to pay. Combining custodial and non-custodial parental net incomes, the Guideline reconstitutes the resources of the former family and the child shares in these parental resources in the form of pre-calculated weekly child support.

Initially, the Guideline was advisory. The court was not obliged to adopt as its support order the amount recommended by the Guideline. Prior to October 10, 1990, the court looked, as it had in the past, to the needs of the child and the

parents' financial ability to provide for those needs to determine the appropriate level of weekly child support. Responding to concerns about related federal mandates in the area of child support enforcement, the Michigan legislature enacted 1990 P.A. 243 (MCLA 552.15(2)).

Since October 10, 1990, the effective date of 1990 P.A. 243, trial courts have been required to order support in the amount determined by the Guideline except when the application of the Guideline would be "unjust or inappropriate". In those cases, the court can order weekly child support higher or lower than that recommended by the Guideline. If the court departs from the recommended Guideline amount, the court must make specific findings. It must state on the record or in writing the following: the recommended Guideline support, how the court's proposed support order would deviate from the support recommended by the Guideline, the value of any property or other support awarded to a parent in lieu of child support, and why the Guideline support recommendation would be unjust or inappropriate. Since October 10, 1990, there has been a rebuttable presumption in favor of setting support at the level recommended by the Guideline.

For child support purposes, "net income" under the Guideline is gross income less appropriate federal, state and city taxes. As a general proposition, few, if any, additional deductions are allowed to reduce a parent's gross income. The Guideline incorporates the statutory

definition of "income" found at MCLA 552.602(c). There, income is defined as any of the following:

(i) commissions, earnings, salaries, wages and other income *due* or *to be due* in the future from his or her employer and successor employers

(ii) any payment *due* or *to be due* in the future from a profit sharing plan, pension plan, insurance contract, annuity, social security, unemployment compensation, supplemental unemployment benefits, and worker's compensation

(iii) any amount of money which is *due* to the payor under a support order as a debt of any other individual, partnership, association, or private or public corporation, the United States or any federal agency, this state or any political subdivision of this state, any other state or political subdivision of another state, or any other legal entity which is indebted to the payor. (italics added)

Also incorporated by reference in the Guideline is the statutory definition of "source of income" found at MCLA 552.602(k). That statute defines "source of income" as an "employer or successor employer or any other individual or entity that *owes* or *will owe* income to the payer". (italics added) To assist the court in recognizing the various permutations of income, the Guideline lists 31 possible sources of income which may be considered for the purposes of child support. This list is not intended to be exhaustive. The Friend of the Court investigator, referee, family law practi-

tioner and trial court are advised that for child support purposes “income” is not limited to that which is taxable as income under the Internal Revenue Code.

Conspicuously absent from this list and from the statutory definition of “income” and “source of income” is any reference to the income of a new spouse of either parent and the even more abstract and elusive concept of the new spouse’s economic impact in the new household. Despite these marked absences, both the new spouse’s income and the economic impact of a new spouse’s resources have become appropriate areas of inquiry.

The first modern Michigan case dealing with the impact of the new spouse’s income on a child support obligation is *Riley v Riley*, 319 Mich 74 (1947). The Michigan Supreme Court held that the remarriage of the custodial parent should not “in any way militate against the children”. It overruled a trial court which had granted the non-custodial parent a reduction in his child support obligation based upon the trial court’s position that the “scale of living” (for the adults as well as the children of the prior marriage) in the custodial parent’s new household should be that which the new spouse and the custodial parent could afford.

The new spouse in *Riley* enjoyed a modest income. He indirectly benefited from child support paid by the non-custodial parent as those funds contributed toward mutually-shared shelter and transportation expenses. This indirect and unintended benefit to the new spouse of the custodial parent did not relieve the non-custodial parent from his obligation to financially support the children. Economic responsibility for the minor child of the prior marriage remained with the child’s parents.

In *Herman v Herman*, 109 Mich App 107 (1981), the former wife was ordered to pay child support to her former husband who had custody of two of their children. Appealing a trial court’s support order, she argued that it had failed to take into consideration the fact that her former husband had remarried and that his new wife earned \$25,000 a year. Affirming the trial court’s decision, the *Herman* decision reiterated that “the defendant’s new wife has no obliga-

tion to support the children from the defendant’s prior marriage”.

Three months later another Court of Appeals panel reached a different result. In *Beverly v Beverly*, 112 Mich App 657 (1981), the custodial parent had also remarried. The custodial parent’s new spouse was a physician. The new spouse earned approximately \$50,000 a year. The combined income of the new spouse and the custodial parent was approximately \$81,000. Their home was valued at \$120,000. The non-custodial parent, on the other hand, was employed at an annual salary of \$19,000, lived in an apartment, described her debts as “way, way above what I can handle”, and claimed continuing health problems from injuries she sustained in a car accident.

The non-custodial parent petitioned for a modification of her child support obligation. The lower court agreed and relieved her of her child support obligation. The Court of Appeals reversed. A non-custodial parent’s obligation to contribute to the support of the children is not *abrogated* by either an increase in the custodial parent’s income or by a general improvement in the custodial parent’s financial status by virtue of an economically-favorable marriage. Whether the non-custodial parent should be relieved of a child support obligation, in whole or in part, depends primarily upon many factors, including the non-custodial parent’s own financial status, employability, employment, health, and any other circumstance which may bear upon that parent’s earning capacity. Neither a financially fortuitous remarriage by the custodial parent nor the custodial parent’s ability to financially support the children without assistance will entirely relieve the non-custodial parent of the obligation to pay child support.

Then *Beverly* plowed new ground. Paying homage to *Herman* by reiterating that the second wife was under no obligation to support the offspring from the first marriage, *Beverly* invited the lower court to scrutinize what is called the new spouse’s “financial contributions in the new household”. This, the *Beverly* court opined, should be evaluated to determine whether the new spouse’s financial contributions had “alleviated, to some extent at least, the defendant’s support obligations there”. Where *Herman* had stood

for the proposition that a new spouse is under no obligation to support the children of the first marriage, *Beverly* sanctioned a new line of inquiry into a formerly sacrosanct area, namely the new spouse’s financial contributions to the household. While a new spouse may not be forced to directly support the children of the first marriage, *Beverly* reasoned that the married parent might have an increased ability to pay child support in consequence of the new spouse’s contributions.

*Beverly* may shift a greater portion of financial burden in the remarriage to the new spouse. If the new spouse’s resources are viewed as enhancing the parent’s ability to pay and the court increases support on that basis, the court forces the new spouse to subsidize the remarried parent by extracting from the remarried parent more child support than it would have otherwise ordered had the parental incomes been considered.

Coming only three months apart, the different results in these two decisions may be related to the extent to which the new spouse’s resources impacted in each case. In *Herman*, the new spouse earned a modest \$25,000 a year. The new spouse in *Beverly* was a physician earning at least twice that sum. When the discrepancy between the respective household incomes became more pronounced, the Court of Appeals panel in *Beverly* was moved to approve the inclusion of the new spouse’s financial resources, albeit indirectly, in the child support equation. *Beverly* was a significant departure from previous case law which had limited the court’s inquiry into the needs of the child and the parents’ ability to pay.

The Court of Appeals in *Carlston v Carlston*, 182 Mich App 501 (1990), held that the mere fact of a parent’s remarriage will not, in and of itself, support either a reduction or an increase in the non-custodial parent’s child support. It found the idea that remarriage necessarily places a custodial parent in a better financial position and thus capable of meeting a greater share of the child’s monetary needs as “presumptuous”. Not all remarriages are economically fortuitous.

Rejecting a provision in a judgment of divorce which provided for an automatic reduction in child support upon the

custodial parent's remarriage, *Carlston* reminded trial courts in this pre-1990 P.A. 243 case that support should be based upon the child's needs and the parents' ability to pay. Then *Carlston* reaffirmed the direction first taken in *Beverly*. A party's remarriage, said the *Carlston* panel, is but one fact which the court "needs to weigh" to determine the appropriate child support order. When a non-custodial parent's financial position has been enhanced because of a remarriage, *Carlston* suggests that the trial court can increase the remarried parent's share of the child support obligation.

If the trial court is to weigh the economic impact of the fortuitous marriage, it must do so on the basis of competent evidence. Under *Beverly* and *Carlston*, the financial details of the new household become fair game. The parent's income, the new spouse's income, their respective financial contributions to the new household, regularly recurring expenses of that household, and even the joint and individual assets and long term liabilities of the new household are relevant. As these matters are relevant and material to such an inquiry, they are appropriate matters for formal discovery. Once a parent alleges an economically fortuitous remarriage has resulted in increasing the other parent's ability to pay child support, it follows that all of the foregoing are appropriate areas for formal discovery.

An unpublished Court of Appeals decision handed down on May 23, 1991 declined to find a parent's financially improvident remarriage constituted a reduction in that parent's ability to pay. *Shedlock* involved a non-custodial parent's remarriage to a new spouse who did not work outside the home. The payer had also experienced a modest reduction in earnings. The suggestion that remarriage to a non-working spouse represented a deterioration of financial circumstances and, consequently, a reduced ability to pay child support was rejected. Although *Shedlock* implied that where one voluntarily enters into a situation which negatively impacts upon his or her ability to pay, such will not be treated as a bona-fide reduction in that party's ability to pay. Although unpublished and therefore without precedential value, a future panel of the Court of Appeals faced with the same argument is likely to

disallow a request for a reduction in child support by a payer who has voluntarily undertaken additional financial responsibilities.

*Edwards v Edwards*, 192 Mich App 559 (1992), took *Beverly*, *Carlston* and *Shedlock* to their logical conclusion. The reported facts painted the non-custodial parent as a *bon vivant*. He was employed by IBM as a manager. His 1988 gross income was \$91,000. He had remarried. His new spouse was also an IBM manager. She earned approximately \$62,000 a year. They had no children. Their mortgage payment was \$5,000 a month. They owned and drove a Mercedes and a BMW.

In contrast, the custodial parent was employed as a public school teacher. Her gross income was \$41,500. She had \$10 in savings, a heavily mortgaged home, a car loan, and owed money to 12 stores and financial institutions. She was enrolled in a master's degree program as a requirement to maintain her position with the school system. To cover her tuition in that program and to pay for her youngest child's tuition at private school, she had used \$5,500 of her \$6,200 retirement annuity.

She had enrolled the youngest child in parochial school. His tuition and fees were approximately \$2,000 a year. She also paid for his transportation to and from private school. Both children had been enrolled in extracurricular activities involving additional expenses. The oldest child took piano lessons and dance lessons. The youngest child took piano lessons and wanted to take karate lessons. The custodial parent sought an increase in support to "cover only the cost of piano lessons for both children, dance lessons for Michelle and private schooling for Michael".

The trial court ordered an increase in support to cover 75% of the cost of piano lessons, dance lessons and tuition for parochial school. The Court of Appeals found that the trial court had abused its discretion. The increase ordered by the trial court was "insufficient", the pre-1990 P.A. 243 equivalent of "unjust" or "inappropriate". The Court of Appeals reversed and remanded the matter to the trial court for a redetermination of child support in excess of the increase it had originally ordered.

The Court of Appeals noted a "vast disparity" between the non-custodial parent's and the custodial parent's "household income". Citing *Beverly* and *Carlston* as its authority, the court found that the amount of child support recommended by the Guideline (based only on parental net income) was "insufficient". It reached this conclusion on the basis of the disparity between the "household incomes". In *Edwards*, the court abandoned the pretense of examining the new spouse's economic contribution to the household. It looked to the new spouse's income and the lifestyle of the parent and the new spouse to reach its decision.

*Edwards* enlarged the scope of inquiry in *Beverly* and *Carlston* and abandoned another constant in child support calculations. Formerly, the court's inquiry was limited to the "needs" of the child. *Edwards* treated amenities as the appropriate subject matter for an order compelling payment. No logic or rationale was offered for this startling departure from another basic tenet of the traditional child support formula other than the two children were "active teenagers".

The last of the cases to deal with the impact of remarriage on child support appeared eight months after the *Edwards* decision. In *Lutz v Lutz*, the Court of Appeals, citing *Edwards*, *Beverly* and *Carlston*, held that a custodial parent's remarriage to a man with "substantial assets" constituted a material change in circumstance which justified a reduction in the non-custodial parent's child support. In this unpublished decision, an antenuptial agreement between the new spouse and the custodial parent disclosed that the new spouse had more than \$2 million in assets at the time of the marriage. The custodial parent was not employed at any time after the divorce. The non-custodial parent had a weekly income of \$375 and sought a reduction in child support.

The new spouse's financial circumstances were held to have affirmatively affected the custodial parent's "household income". The plaintiff's financial position had improved by virtue of her marriage. As an incident of the custodial parent's remarriage to a multi-millionaire, the children were provided housing, utilities, food and transportation. This indirect subsidy was considered to be an appropriate factor when calculating the

proper child support. *Lutz* is distinguishable from *Riley* in that the reduction in child support from the non-custodial parent in *Lutz* imposed no additional burden on the new spouse. In *Lutz*, the new spouse voluntarily provided the economic support to the children and the children's needs were amply provided for without significant contribution from the non-custodial parent.

While all of these decisions deal with petitions or circumstances pre-dating the operative date of 1990 P.A. 243, this line of cases will likely guide courts in their review of post-1990 P.A. 243 petitions for increases or decreases in child support when one or both of the parents of the children have remarried. Trial courts may depart from the Guideline amount when the recommended amount appears "unjust" or "inappropriate". *Beverly, Carlston, Edwards* and *Lutz* may be read as authorizing the court to treat the new spouse's income as income to the remarried parent, at least for the purposes of justifying the court's rejection of the Guideline recommendation and implementation of weekly child support at variance with the Guidelines.

Before *Beverly, Carlston, Edwards* and *Lutz*, a new spouse had been assured that the remarriage would not directly or indirectly impose upon the new spouse the obligation to support a child from another marriage. After *Beverly, Carlston, Edwards* and *Lutz*, a new spouse may be indirectly made to support the offspring from a prior marriage by subsidizing the parent. When a court orders the remarried parent to pay a greater share of child support because of the new spouse's income, it may disturb the pattern of financial contribution from each spouse in the new household by shifting to the new spouse a greater portion of the economic burden of the new household. In these reported decisions, the consequences of this shift in the economic burden do not appear to have been significant.

These cases suggest that the court can and will use the income and financial resources of a non-custodial parent's new spouse as a basis for finding the Guideline amount unjust or inappropriate when the following circumstances are present: 1) the new spouse's resources have a significant positive impact upon the lifestyle of the non-custodial spouse; 2)

the aggregate income of the new spouse and non-custodial parent is greater than the income of the custodial parent; and 3) the non-custodial parent enjoys a more opulent lifestyle than the custodial parent and the children of the former marriage. In such cases, the court has departed from the Guideline recommendation and increased the non-custodial parent's child support obligation to cover the cost of amenities. Tap dancing, piano lessons, karate lessons, private religious schooling, and other educational or extracurricular activities have been treated as appropriate and legitimate expenses which should be secured by child support orders.

These cases also suggest that the economic resources of the custodial parent's new spouse will impact on child support determinations when 1) the new spouse's resources have a significant positive impact on the lifestyle of the custodial parent, 2) there is a pronounced disparity between the aggregate income of the custodial parent and the new spouse and that of the non-custodial parent, and 3) the children's actual needs are less than the support recommended by the Guideline because the new spouse voluntarily or incidentally provides food, shelter or transportation to the children.

Remarkably absent from all of these decisions is a thoughtful discussion of the economic and emotional impact on the innocent new spouse. As formal discovery procedures are invoked to discover the new spouse's resources, income, or financial impact on the new household, the relationship between the new spouse, the parent and the children may be expected to take on a different complexion. The new spouse will be inexorably drawn into controversy between the parents as an unwilling participant. One who might have been otherwise inclined to urge a parent to be generous in providing amenities for the child (if for no other reason than to compete with the other household), may be converted into an active, hostile combatant. In many cases, the bitterness occasioned by such invasive inquires may outweigh any direct economic benefit to the children.

The matter is ripe for a thoughtful, well-reasoned opinion which will carefully examine all competing concerns. The trial courts and family law practi-

tioners should be given guidance on appropriate discovery in these cases. The court must continue to guard against abusive and retaliatory discovery practices, particularly toward the new spouse who is not a party to the proceeding. Finally, some serious thought must be given to the value of preserving the needs-of-the-child and parents'-ability-to-pay formula for child support or whether the trial courts should be encouraged to continue in the direction taken by *Beverly, Carlston, Lutz* and *Edwards*.

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