Subcommittee on Children from Other Relationships
Report to the 2011 Child Support Workgroup
April 15, 2011

This subcommittee was one of those formed by the larger Workgroup so that various issues which required ultimate resolution in the Workgroup's final report to the Legislature could be addressed simultaneously. The specific purpose of this subcommittee was to address issues regarding the deviations under the present law [RCW 26.19.075(1)(e)] for children from other relationships (CFOR).

The subcommittee consists of the following members of the 2011 Workgroup: Kris Amblad, Kevin Callaghan, Angela Gerbracht, Ken Levinson, and Ed Pesik. Janet Skreen and Kristie Dimak have attended the meetings as alternates, but have participated fully. Ellen Nolan has provided administrative support from DCS.

We have met together by telephone conference call on March 11, 21, 29 and April 5. We had another meeting planned for April 8, but that was cancelled due to conflicting commitments.

I. The 2007 Workgroup was unable to agree on several key issues, and at least three of these have been carried over to this Workgroup.

With respect to the issue of the appropriate treatment of children from other relationships, the previous subcommittee submitted the following majority recommendations:

> *1. Children Not Before the Court of the noncustodial parent shall be considered, pursuant to the Whole Family Formula, as part of the presumptive calculation (or in an above the line calculation). Judges are to be granted authority to deviate from this formula only under limited circumstances, when application of the formula would leave insufficient funds to meet the basic needs of the children in the receiving household and when taking the totality of the circumstances of both parents, application of the formula would be unjust. The children of the noncustodial parent that may be included in the formula are limited to:*
>
> *a. Children for whom the noncustodial parent has a support ordered obligation;*
>
> *b. Biological children;*
>
> *c. Adopted children;*
>
> *d. Children of the noncustodial parent's current marriage18 residing with the noncustodial parent a majority of the time; and/or*
>
> *e. Children for whom the noncustodial parent can prove by bank records or cancelled checks that he or she is paying reasonable*

child support.

f. Step-children are not to be included in the formula.

g. Application of the Whole Family Formula alone may not serve as the basis for a substantial change in circumstances for a modification of a child support order.

One member of the 2007 subcommittee expressed the reservation that the above recommendation would insufficiently protect the so-called "first-born children" from unreasonable reductions of their support in the future.

Unfortunately, the 2007 Workgroup was unable to reach even this much consensus on the issue. After a great deal more study and discussion, the Final Report of the Workgroup's members felt that as a general rule, the children of both the obligor and the oblige should be looked at in determining the amount of support for the children before the court:

1. Those supporting inclusion of the children of both the parents felt that the noncustodial parent and the custodial parent must be treated "equally" by any consideration of children from other relationships.

a. Those who supported including all children were unable to agree on how the parent's other children should be counted, offering various theories:

i. If there are two children in addition to the child whose support is being set, then the three-child rate should be used.

ii. If the noncustodial parent has one other child and the custodial parent has two, then the custodial parent's children should each count as half of a child so that the three child rate is used in this case as well.

iii. There was one suggestion that we determine the amount of children to be used in deciding what size family column in the economic table by adding the number of children of both parents and then dividing by two.

2. Those who supported including only the children of the noncustodial parent thought that it made more sense because the noncustodial parent's resources had to be stretched to support all of his or her children.

a. One member suggested that any support paid for prior-born children be deducted from the noncustodial parent's income before determining the monthly net income amount on which to set support for the later-born children.

The Workgroup also discussed the issue of whether a child support order was required before you could "count" a child from another relationship – again with no consensus:

1. The 2005 Workgroup had determined that it wasn't necessary that the noncustodial parent actually pay support under an order, as long as there was an ordered obligation.

2. One member suggested that we should count a child for whom the

noncustodial parent is paying "a reasonable amount of support," which would mean that if the noncustodial parent was paying without an order the amount that would have reasonably been ordered, that child should be counted.
3. Some members felt that unless the noncustodial parent was actually paying support under a support order, the child should not be counted.

There was another issue addressed by the 2007 Workgroup that was also not resolved and that related to whether the child support guidelines should use the Whole Family Formula as the method for determining the amount of support to be paid when children from other relationships are "counted" in setting support for the children before the court. It would appear from the Final Report that while consensus was achievable in this area, the Workgroup could not take the time out of their schedule to try and agree on the precise formula.

II. The work of the 2011 Subcommittee on Children from Other Relationships.

So far our subcommittee has grappled with the same issues, but we have tried to take a structured approach and first define our terms. Some of the criticisms of past work stems from differing points of view, but it is also true that some of that criticism is related to misunderstanding of the law. So, to the extent that we can clear up confusion over terms, we will have advanced the inquiry.

The term "children from other relationships" is itself confusing, since it is often the case that the children are not literally from "other relationships," especially in the administrative law arena – but it is also occasionally true in the judicial setting as well.

The subcommittee favors the term "Children Not Before the Court" or CNBC and will eventually recommend such a change in terminology to the Workgroup.

Another definitional problem arose when we began discussing the matter of birth order and whether or not those children born after the children before the court (in other words, those children for whom support was presently being set) could ever be a reason to deviate downwards, or whether those "after-born" children could be the basis for a downwards modification of the the support for "prior-born" children.

As we were discussing the issue it became clear that some of our members and others commenting on the issue supposed that the children labeled "prior" were those children born first in time and also the first to have their support established. These members would not want the support for the first-born children ever lowered based on the existence of subsequently-born children.

The most common scenario envisioned by those members might be described in this way: A and B marry, each for the first time, and have child AB. Then A & B divorce and A's support obligation for AB is determined. A begins paying B child support for AB. At some point in time down the road, A marries C and has child AC.

At that point, one of two things can happen (and in the right set of circumstances, they both may happen):

1. A attempts to modify the support obligation for AB, claiming that it should be lower because A now has an additional child to support, or
2. A divorces C and is now facing a support obligation for AC – A asks the court to deviate his support for AC because A has another child for whom he is paying support.

What should the court do? Should AB be entitled to more support than AC because he/she was born earlier? Or should all children regardless of birth order or family membership be entitled to share equally in A's present ability to pay support?

One of our members who is a prosecuting attorney handling child support matters in IV-D cases pointed out from personal experience how the assumptions underlying this view of the issue can be turned around to become less clear:

Assume again that A and B are married with child AB. But, instead of divorcing B and marrying C, A has a relationship with C that results in child AC. A decides to stay with B (with or without B's knowledge of the facts). C, lacking the stability of a stable relationship, applies for public assistance (or otherwise asks for child support enforcement services) and now A is faced with a child support determination for child AC. Child AB is in a completely different position now than he/she was in the first example. Who is first born now? And does it even matter?

When members of the public have made comments, both at the subcommittee and through the Workgroup website, we can see even more clearly the linguistic or semantic confusion that exists. It will come as no surprise to any Workgroup member that these issues are both defined and handled in many different ways in the 50+ different child support jurisdictions in the United States.

The state of Florida has an approach that might help our effort to define more clearly the children Not Before the Court (CNBC) for these issues and perhaps we should adopt the same or similar language for our usage (our subcommittee is continuing to look at this matter and is not yet ready to make any recommendations):

***Prior Children**: these are the children for whom an obligor already has a child support order when a hearing is held to establish support for a different child or children.*

***Existing Children**: these are the children for whom support is being determined in the present hearing.*

***Subsequent Children**: these are the children who are born or adopted (include the possibility of de facto parentage here also) after the support is established for "existing children."*

Many states allow the obligor parent to deduct the child support paid for Prior children from their gross income – and this is true regardless of whether the states use the income shares model or the percent of income (sometimes known as the percent of obligor) model. Others, such as Washington, allow a deviation at the discretion of the court. Only about three states do not allow any type of adjustment in the Existing childrens' support based on Prior children.

So, for Prior children at least, our subcommittee may already have a consensus that may be stated as: Prior children are always to be counted in an above-the-line presumptive manner (as opposed to the present reality in which a "discretionary" deviation is granted for them almost – but not quite - automatically).

(We have not yet tackled the subject of Subsequent children.)

Another definitional task that the subcommittee has worked on is determining who the children are that may be considered as CNBC.

Many states already use a hybrid approach to the issue of determining support when there is evidence that the obligor parent has other children – employing some presumptions and some more discretionary treatments. The subcommittee is currently looking at a system that retains some of the features of the present "deviation for children from other relationships" process but also allows for an "above the line" presumptive calculation for some of the more common and (perhaps) more easily agreed-upon situations. This approach will hopefully reduce the number of deviations granted and increase the **predictability** and **transparency** of the support determination process.

Children who may be considered in addition to those children "before the court" (these are the children defined above as Existing Children)

1. Children born during a marriage (and the presumption of paternity under Chapter 26.26 RCW has not been rebutted),
2. Children who have been adopted,

3. Children born outside a marriage but for whom paternity has been established by either a registered acknowledgment of paternity or a court order, and
4. Children for whom the obligor has been established as a *de facto* parent pursuant to *In Re: Parentage of L.B.*, 155 Wn. 2d 679, 122 P. 3d 161 (2005).

Assuming that we could determine (relatively easy) and agree on (a little less easy) a calculation method, some of these other children could be counted "above the line" for the presumptive support obligation – and thus the support set in consideration of these "other" children would not "deviate" from the standard calculation:

For the "above the line" presumptive calculation:

The children who will be counted are:

1. Children in categories 1, 2, 3, and 4 above who are residing with the obligor (residential children),
2. Children in 1, 2, 3, and 4 above for whom the obligor is paying support pursuant to a child support order (non-residential children).

The children who will not be counted "above the line" include:

Any category 1 – 4 children for whom the obligor is not providing support either through a support order or through co-residence,
(Any stepchildren – *see below*)

For a "below the line" deviation calculation (at the discretion of the court, thus resulting in a deviated child support amount if the standard calculation is raised or lowered):

The children who may be counted are:

1. Category 1 – 4 *non-residential* children for whom the obligor owes current support but is not presently paying or possibly only partially paying.
2. Other non-residential children for whom paternity has not been established but for whom the obligor is providing monetary support.

Both parents before the court or administrative tribunal have the burden of proving by a preponderance of the evidence that their circumstances qualify them for either an above the line presumptive calculation or a below the line

deviation. If a parent's assertion that he or she is providing support (either monetary or residential) for a CNBC is challenged, the court may in its discretion require the parent to provide evidence of their support for the child.

We still need to deal with the issue of "stepchildren" within the definition of CNBC, but at this point we may not have a consensus or even a majority view within our subcommittee. The following language might be useful if we were to adopt the position that stepchildren might be counted in certain limited circumstances, but probably only below the line:

> *Stepchildren residing with the obligor who are not receiving any support from their natural parents, including the obligor's spouse (the biological, adoptive, or de facto parent of the stepchildren).*

What we are also continuing to work on:

We are still also dealing with the issue of how easily "rebuttable" an above the line presumption ought to be:

If an obligor asserts that she/he is paying support for a non-residential child and the obligee contests the truth of that assertion, whose burden is it?

We also have to try and reach consensus on the calculation method to be employed in both above the line and below the line calculations.

We also have to determine whether the obligee's CNBC should be a factor in the support determination.

And we also need to discuss more fully and decide what if any changes should be recommended for Subsequent children and to what extent those children should be considered in both child support establishment and modification cases.

Respectfully submitted,

Edward F. Pesik, Jr.

Note: this report reflects a summary of the subcommittee's activities and discussions and is not intended to be a full report w/ recommendations to the Workgroup. Any errors in these summary representations are the author's and no effort has yet been made to identify any specific majority or minority positions of the subcommittee's members.