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# Calculation of Child Support in Pennsylvania

## I. Introduction

State statutes have traditionally granted wide discretion to trial court judges and domestic relations officers in child support award determinations. Pennsylvania statutes call for the judicial officer to set an amount that is either reasonable and proper,<sup>1</sup> or in line with equitable demands,<sup>2</sup> or at such a rate as the court may direct.<sup>3</sup> This vague language has led to a great deal of litigation. Rules determining the procedure to be used in calculating child support have slowly evolved through the case law to the point that there are now several widely accepted basic propositions; these, however, are often embodied in vague and minimum standards.<sup>4</sup> Pennsylvania courts appear reluctant to follow a consistent pattern of factor analysis. A factor considered of great significance in one county may be given little weight in another and even the method of calculation differs from one county to the next.

The purpose of this comment is to explore the criteria, both discretionary and statutory, that judges apply in making a support calculation.<sup>5</sup> The main factors that will be discussed are the needs of the child, the ability of the parents to pay, the living expenses of the parents, the equalization of the support burden between mother and father in light of the Pennsylvania equal rights amendment,<sup>6</sup> the income of the child, and former agreements between the parents. The lack of any statutory limitation on the amount of the support order further emphasizes the tremendous role that judicial discretion plays in the consideration of the above factors.<sup>7</sup> It should be noted at the outset that the support order is never final. It may be increased or decreased upon reargument before the court when there is a change in circumstances, financial or otherwise.<sup>8</sup>

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1. 18 PA. CONS. STAT. ANN. § 4322(b) (Purdon 1973).

2. PA. STAT. ANN. tit. 48, § 131 (Purdon 1965).

3. PA. STAT. ANN. tit. 62, § 1973 (Purdon 1968); 18 PA. CONS. STAT. ANN. § 4323 (Purdon 1973).

4. S. KATZ, WHEN PARENTS FAIL 10 (1971).

5. This comment will not engage in a detailed statistical analysis but will critically analyze concrete factors considered in support determinations. For a statistical discussion of child support, see Annot., 1 A.L.R.3d 324 (1965); Annot., 1 A.L.R.3d 382 (1965).

6. PA. CONST. art. I, § 28.

7. Commonwealth *ex rel.* Warner v. Warner, 198 Pa. Super. Ct. 124, 181 A.2d 888 (1962). Rarely, however, is the award greater than one-half of the non-custodial parent's net pay. See Smith v. Smith, 52 Wash. 19 (Pa. C.P. 1970).

8. See PA. STAT. ANN. tit. 17, § 263 (Purdon 1962), which provides in part,

This comment will examine the weight that is given to each individual consideration and whether it is consistent with support purposes and theories. Arguments for inclusion or exclusion of particular considerations will be offered, as well as suggestions to better organize child support calculations and make this a more meaningful body of law.

## II. Development of Support Determination Principles

A parental duty to support<sup>9</sup> a minor child<sup>10</sup> is imposed in every state either by statute or under common law.<sup>11</sup> This duty,<sup>12</sup> which arises from the biological relation of parent and child, extends to illegitimate as well as legitimate children.<sup>13</sup> Recently it has been expanded to include adopted children as well.<sup>14</sup>

The Pennsylvania legislature has seen fit to establish the child's right to support in numerous overlapping and redundant statutes,<sup>15</sup> all but one of which allow action only against the father.<sup>16</sup> In construing these

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Any order heretofore or hereafter made by any court of this Commonwealth for support of a wife, child or parent, may be altered, repealed, suspended, increased, or amended, . . . as the case may warrant.

9. Child support has been defined as "the periodic payment of sums of money for the support of a child running for an indeterminate period . . ." *Greene v. Greene*, 71 Misc. 2d 708, 709, 336 N.Y.S.2d 560, 562 (1972).

10. In Pennsylvania the age of majority is now eighteen for litigational purposes, PA. R. CIV. P. 76 (1975), but remains twenty-one for support purposes.

11. Goodman, Oberman, & Wheat, *Rights and Obligations of Child Support*, 7 Sw. U.L. REV. 36 (1975).

12. This obligation has been termed an absolute duty. Commonwealth *ex rel. Mickey v. Mickey*, 220 Pa. Super. Ct. 39, 280 A.2d 417 (1971); Commonwealth *ex rel. Snively v. Snively*, 206 Pa. Super. Ct. 278, 212 A.2d 905 (1965).

13. The United States Supreme Court has ruled that a state statute allowing child support for legitimate, but not for illegitimate, children violates the equal protection clause of the fourteenth amendment. *Gomez v. Perez*, 409 U.S. 535 (1973).

14. Commonwealth *ex rel. Borrow v. Borrow*, 199 Pa. Super. Ct. 592, 185 A.2d 605 (1962). Although the court does not impart a duty on a stepparent to support a stepchild, the court will recognize the child's right to receive support and the parent's right to provide it if the parent so wishes. See notes 101-05 and accompanying text *infra*.

15. For a summary of statutes pertinent to child support in Pennsylvania, see W. SELL & T. WHITE, 2 PENNSYLVANIA KEYSTONE, CHILD SUPPORT (1974).

16. Support statutes applying only to the husband were held constitutional in *Norris v. Norris*, 63 Pa. D. & C.2d 239 (C.P. Phila. 1974).

The father may be ordered to support his child through a quasi-criminal or a civil action, whereas only a civil action may be brought against the mother. The principles of support calculation remain the same regardless of which action is sought.

The quasi-criminal actions are found at 18 PA. CONS. STAT. ANN. § 4322 (Purdon 1973) (allows action for desertion or willful non-support to be brought by a minor under the age of sixteen, or by his mother, against the father) and 18 PA. CONS. STAT. ANN. § 4323 (Purdon 1973) (permits illegitimate child to bring same type action against the father). In both instances a support order and a criminal sanction may be issued, making this remedy the most popular.

PA. STAT. ANN. tit. 48, § 131 (Purdon 1965), permits a civil action against the father. This statute makes provision for child support (and wife support) when the father refuses to provide maintenance without cause. Cases involving a combined award for wife and child will also be discussed in this comment because the principles used to determine the amount of the award are the same as in those solely awarding child support.

PA. STAT. ANN. tit. 62, § 1973 (Purdon 1968) also provides for a civil action and can be used against both the mother and the father:

The husband, wife, child, . . . father, and mother of every indigent person, . . . shall, if of sufficient financial ability, care for and maintain, or financially

statutes, Pennsylvania courts have often stated that the purpose of a support order is to determine a reasonable allowance for the support of children, keeping in mind the property and earning capacity of the parents and the station in life of the parties.<sup>17</sup> This interpretation should have the effect of giving the child's needs top priority. The parents' earnings and their station in life should be secondary considerations used either to raise the award above the level of the child's basic necessities or to lower it to minimize the hardship on the low-income parent.

The determination of parental contribution is a complex matter involving significant psychological, sociological, and economic effects on all parties, particularly since it often must be made after a separation or divorce. Even if the parents' income is adequate to meet the child's needs, the court must determine precisely the amount of the non-custodial parent's contribution. Additional problems arise when the non-custodial parent, usually the father,<sup>18</sup> is unable to comfortably support both himself and his child and yet the custodial parent requires financial aid to care for the child. Unfortunately, the division of the family into two economic units often entails financial hardship. The best a court can hope to do in many situations is to balance the hardship.<sup>19</sup>

Courts have usually tipped the scales in favor of the child whenever possible and have required the parent to make personal sacrifices to furnish the child with the basic needs of life.<sup>20</sup> This policy has been limited, however, by the feeling that the support order should not be used to punish the parent<sup>21</sup> or to confiscate his property.<sup>22</sup> Unlimited awards could stifle the parent's ambition to earn money for his own support<sup>23</sup> and thereby thwart the court's chief objective, which is to protect and advance the welfare of the child.<sup>24</sup>

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assist, such indigent person at such rate as the court of the county, where such indigent person resides shall order or direct.

17. See, e.g., *Commonwealth ex rel. Luongo v. Tillye*, 229 Pa. Super. Ct. 453, 457, 323 A.2d 172, 173 (1974); *Commonwealth ex rel. Larson v. Larson*, 211 Pa. Super. Ct. 30, 34, 234 A.2d 18, 20 (1967).

18. Pennsylvania courts still follow the "tender years" doctrine, which dictates that, all other factors being equal, the mother should be awarded custody of a child of tender years. *Commonwealth ex rel. Ackerman v. Ackerman*, 204 Pa. Super. Ct. 403, 205 A.2d 49 (1964). For a case awarding the father custody see *Commonwealth ex rel. Parikh v. Parikh*, 449 Pa. 105, 296 A.2d 625 (1972). See generally, Comment, *Pennsylvania Child Custody: The Tender Years Doctrine—Reason or Excuse?*, 81 DICK. L. REV. 775 (1977).

19. *Sperry v. Sperry*, 29 Som. 228 (Pa. C.P. 1974).

20. *Conway v. Dana*, 456 Pa. 536, 318 A.2d 324 (1974); *Commonwealth ex rel. Ulmer v. Sommerville*, 200 Pa. Super. Ct. 640, 190 A.2d 182 (1963).

A parent should be required to bear the hardship before the child because the parent is usually most responsible for his own plight and has more control over his own situation. This analysis applies equally to the non-custodial and custodial parent and to children of both sexes.

21. E.g., *Commonwealth ex rel. Platt v. Platt*, 229 Pa. Super. Ct. 423, 323 A.2d 29 (1974); *Doelp v. Doelp*, 219 Pa. Super. Ct. 420, 281 A.2d 721 (1971).

22. *Conway v. Dana*, 456 Pa. 536, 318 A.2d 324 (1974); *Commonwealth ex rel. Goichman v. Goichman*, 226 Pa. Super. Ct. 311, 316 A.2d 653 (1973).

23. *Commonwealth v. McNamara*, 57 Schuyl. 168 (Pa. C.P. 1961).

24. *Commonwealth ex rel. Kaplan v. Kaplan*, 236 Pa. Super. Ct. 26, 344 A.2d 578 (1975); *Commonwealth ex rel. Goodman v. Delara*, 219 Pa. Super. Ct. 449, 281 A.2d 751 (1971).

The remainder of this comment will examine the specific factors considered by the court. Since the main purpose of the support order is to “determine a reasonable allowance” for the child, the most logical factor to start the discussion is the child’s needs.

### III. Needs of the Child

In *Commonwealth ex rel. Lippincott v. Lippincott*<sup>25</sup> the court defined the needs of the child as “the basic necessities: food, shelter, clothing, that which the parent is charged to provide by the state, education, and those things which are necessary to maintain the station in life to which the children have been accustomed.”<sup>26</sup> The latter part of this definition distinguishes the support definition of “needs” from the legal concept of necessities. Necessaries are the minimum requirements of the child such as food, shelter and clothing, while the term “needs” includes, in addition, the extra benefits the parents can afford and those that have become a way of life for the children.

One reason for an award exceeding the cost of mere necessities is the desire to maintain the child in the financial position that he occupied before the parents’ separation.<sup>27</sup> Another reason is that if the child loses present obtainable advantages they may be lost forever.<sup>28</sup> Furthermore, it is reasonable to require a parent to support his child in a reasonable manner, on a par with the life style the parent enjoys.

Two methods have been used to transform the child’s needs to a specific dollar figure. The first emphasizes the past life style of the child while the second looks to future estimated costs.

#### A. Past Life Style as a Gauge for the Future

The consideration given to past life style in defining the needs of the child has varied. Some judges will stress this factor almost exclusively, while others discount it.<sup>29</sup> It is most often taken into account in cases in which there is an affluent non-custodial parent who insists that parental responsibility should be limited to providing basic necessities. The prevailing rule is that an affluent father has a legal duty to give his children

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25. 93 Montg. 6 (Pa. C.P. 1970).

26. *Id.* at 8.

27. Florida considers this an important objective. For a thorough discussion of Florida child support calculation, see Stone & White, *A Study of Alimony and Child Support Rulings with Some Recommendations*, 10 FAM. L.Q. 75 (1976).

28. *Commonwealth ex rel. Gitman v. Gitman*, 428 Pa. 387, 237 A.2d 181 (1967).

29. One common pleas judge reasoned that it is the standard of living to which a family becomes accustomed that governs the calculation of a proper support order, consistent, of course, with the parent’s income and assets. *Commonwealth ex rel. Dunkelberger v. Dunkelberger*, 96 Dauph. 357 (Pa. C.P. 1974). Practically all judges will give some consideration to the past life style of the parties. See, e.g., *Conway v. Dana*, 456 Pa. 536, 318 A.2d 324 (1974); *Commonwealth ex rel. Kaplan v. Kaplan*, 236 Pa. Super. Ct. 26, 344 A.2d 578 (1975).

the advantage that his financial status indicates to be reasonable.<sup>30</sup> Justice Musmanno, in *Commonwealth ex rel. Gitman v. Gitman*,<sup>31</sup> graphically articulated this rule:

If the husband-father can afford for himself a caviar-champagne standard of living, it is not justice, nor legal, that the wife should be content with a tent and bread-and-butter menu for herself and brood.<sup>32</sup>

An argument can be made that consideration of the past life styles of the parties involved is harmful to the interests of children from low-income families. Certainly the basic needs of a child from a poor background are the same, or very similar to, those of the child from an affluent background. The past life style of the low income child was most likely very simple and a court may be satisfied if the support award covers only the barest necessities, since this is all the child has ever received. If past life styles were ignored, the low-income child and the high-income child would begin on an equal plain with a standard need allowance that would be raised or lowered depending on the parent's ability to pay. There is little question that consideration of past life style will most benefit the child from wealthy parents. There are limits, of course, to what any child can reasonably assert as its needs despite an enormous income by the parent.<sup>33</sup> It remains in the discretion of the judge to set a reasonable award.

Past life style can be a very useful method of determining the needs of the child if properly applied. The record of past life style will be a good indication of the manner in which the child would have been supported had the parents remained together, and will act, subject to other attenuating factors, as a fair starting point for support calculations.

### *B. Future Expenditures as a Means of Calculation*

A second method courts will employ in determining the financial needs of the child involves the itemization of future expenditures. In *Commonwealth ex rel. Hauptfuhrer v. Hauptfuhrer*<sup>34</sup> the court pointed

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30. *Commonwealth v. Wiener*, 32 Lehigh 251 (Pa. C.P. 1966); *accord*, *Hecht v. Hecht*, 189 Pa. Super. Ct. 276, 150 A.2d 139 (1959). In *Hecht* the Pennsylvania Superior Court listed some advantages that children of wealthy parents should receive. The list of reasonable needs included travel, private lessons in music, drama, swimming, horseback riding and other activities in which the child shows interest and ability, as well as the best medical care, good clothes, a familiarity with good restaurants, good hotels, good shows and good camps. *Id.* at 283, 150 A.2d at 143. Likewise, private schooling has often been deemed a reasonable need, particularly when the parents have provided this type of schooling for the child all his life. *Commonwealth ex rel. Lippincott v. Lippincott*, 93 Montg. 6 (Pa. C.P. 1970). *Accord*, *Commonwealth v. Wiener*, 32 Lehigh 251 (Pa. C.P. 1966). See *Gillespie v. Gillespie*, 47 West. 101, 37 Pa. D. & C.2d 47 (1965) (pre-preparatory school).

31. 428 Pa. 387, 237 A.2d 181 (1967).

32. *Id.* at 394, 237 A.2d at 185.

33. *Commonwealth ex rel. Hauptfuhrer v. Hauptfuhrer*, 226 Pa. Super. Ct. 301, 310 A.2d 672 (1973) (\$800 per week too high even though father had estate worth over \$500,000).

34. *Id.* The custodial wife had submitted a list of future expenditures exceeding \$800 per week. The court rejected this and accepted the father's figure of \$600 per week,

out the deficiencies of this analysis, namely that the list of expenditures will often be inflated and include duplicate costs. The fact that the figures represent future expenses will make their reliability suspect. Also the figures are submitted by the parent who is requesting support money and who has every reason to maximize the estimates and include the same expense in several categories. The past life style method will yield a more reasonable figure since it can readily be substantiated from the past records of the parents and will produce a more accurate picture of just how this family does manage. Future estimated expenditures, however, should not be ignored, particularly when it is sufficiently proven that they will be incurred.

One shortcoming remains in both the past record and future listing methods of need determination. Regardless of method used, Pennsylvania courts have not made provision for increasing the amount of the award to account for cost of living increases or changes in the age and needs of the child. It is generally more costly to support a high school teenager than a young child. Courts have accepted this reasoning,<sup>35</sup> yet will still require the custodial parent to go back to court a second and third time to seek an increase. This is a costly and time consuming process for all parties concerned, including the court. Automatic escalator clauses would alleviate this problem but could give rise to due process problems if no hearing is granted to the non-custodial parent.<sup>36</sup> The courts may have to develop a mathematical model<sup>37</sup> into which they could plug figures to produce an award accurately reflecting cost of living increases to make the use of escalator clauses feasible.

In determining the child's needs, it is rarely possible to separate precisely the expenses attributable to the child from those attributable to the custodial parent. For example, it is very difficult to apportion rent or food expense. It is reasonable that all legitimate expenses of the child, but not those of the custodial parent, be shared by the non-custodial parent. For example, if the custodial parent must pay sixty dollars more each month for a two-bedroom apartment than for a one-bedroom one, the non-custodial parent should be required to pay one-half of the extra expense. This type of analysis will help balance the support burden and

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approximately the amount he had been contributing in the past when the family was together.

35. Several courts have recognized that it is more expensive to feed, clothe and educate a child as it grows older. *Hecht v. Hecht*, 189 Pa. Super. Ct. 276, 150 A.2d 139 (1959); *Commonwealth ex rel. Dunkelberger v. Dunkelberger*, 96 Dauph. 357 (Pa. C.P. 1974).

36. A Michigan appeals court in *Stanaway v. Stanaway*, 70 Mich. App. 294, 245 N.W.2d 723 (1976), struck down an automatic escalator clause because it abrogated the statutory requirement for modification of support by petition and focused exclusively on the circumstances of the paying parent while totally ignoring the factors relating to the child's benefit. The clause provided for 6% of adjusted gross income but never less than \$165 per month. These same dangers may exist in Pennsylvania, but careful drafting might avoid them.

37. See notes 148-51 and accompanying text *infra*.

will guard against the injection of alimony concepts into the support determination.<sup>38</sup>

### C. *Special Considerations in the Needs Determination*

1. *Extraordinary Needs of the Child*.—Often a child will have special needs caused by physical inflictions. The non-custodial parent should be required to contribute toward these needs because they are often in the realm of necessities and the resultant benefit to the child greatly outweighs any additional burden placed upon the parent. Since medical expenses are a legal necessary for which a parent will be liable even in the absence of a support order, courts are inclined to include charges for orthodontistry<sup>39</sup> and other special therapy<sup>40</sup> in the award.<sup>41</sup>

The lone exception to this general rule is that future indeterminate expenses will not become part of the award.<sup>42</sup> For example, in *Commonwealth ex rel. Pagel v. Pagel*<sup>43</sup> the mother testified that her child would need hernia, heart, and facial operations as well as a tonsillectomy but was not able to testify as to their cost. The court refused to include these expenses in the award until they were incurred, or at least until the operations were ordered by doctors. Recurring expenses for orthopedic shoes, trusses, and medicine were included, however.<sup>44</sup>

If extraordinary needs are considered reasonable and non-speculative they will usually be taken into account. Because of the lack of litigation in this area, however, it is as yet undetermined whether a court would order a parent to pay for specialized training to develop a child's unique skill or to compensate for a physical handicap. The inclusion of these expenses would be consistent with the philosophy that the court is to act with the best welfare of the child in mind. Certainly such training will aid a child's complete development.

2. *The Adult Child*.—A presumption exists in Pennsylvania that an adult<sup>45</sup> child will not require the support of his parents.<sup>46</sup> This can be

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38. See notes 106-26 and accompanying text *infra*.

39. See, e.g., *Conway v. Dana*, 456 Pa. 536, 318 A.2d 324 (1974) (court awarded \$250 per month plus \$50 a month in orthodontist fees); *Commonwealth ex rel. Halderman v. Halderman*, 230 Pa. Super. Ct. 125, 326 A.2d 908 (1974) (award of \$40 per week plus \$1400 balance due for orthodontist's services).

40. See, e.g., *Commonwealth v. Hoerner*, 168 Pa. Super. Ct. 411, 77 A.2d 641 (1951) (court ordered a generous award for a child who was mentally retarded and needed special and frequent medical care along with speech lessons).

41. *Commonwealth ex rel. Warner v. Warner*, 198 Pa. Super. Ct. 124, 181 A.2d 888 (1962) (court is only ordering what law requires). For a suggestion that a parent should be required to furnish medical insurance for the child, see Goodman, Oberman & Wheat, *Rights and Obligations of Child Support*, 7 Sw. U.L. REV. 36 (1975).

42. *Commonwealth ex rel. Pagel v. Pagel*, 175 Pa. Super. Ct. 32, 100 A.2d 117 (1953). *Contra*, *Commonwealth ex rel. Warner v. Warner*, 198 Pa. Super. Ct. 124, 181 A.2d 888 (1962) (father ordered to pay future medical expenses).

43. 175 Pa. Super. Ct. 32, 100 A.2d 117 (1953).

44. *Id.*

45. See note 10 *supra*.

46. *Commonwealth ex rel. O'Malley v. O'Malley*, 105 Pa. Super. Ct. 232, 161 A. 883 (1932). *Accord*, *Colantoni v. Colantoni*, 220 Pa. Super. Ct. 46, 281 A.2d 662 (1971).



overcome by proving that the adult child is incapable of self support because of a mental or physical infirmity.<sup>47</sup> The burden is on the adult child to refute the presumption.<sup>48</sup>

The major controversy in this area concerns the adult child who attends college.<sup>49</sup> The case law on this issue is unsettled, partly because the age of majority has recently been lowered with the result that most college students are now legally considered adults.<sup>50</sup> Generally parents have no duty to provide college education for their child, no matter how deserving, willing, or able the child may be. If, however, the parent has a sufficient estate, earning capacity, or income to enable him to pay for his child's education without undue hardship<sup>51</sup> courts will usually include college expenses as an element of the support award.<sup>52</sup> This may be true even though the child is capable of supporting himself.<sup>53</sup> The inclusion of college expenses is apparently motivated by the belief that a college education is desirable and almost a necessity by today's standards.<sup>54</sup> This philosophy is coming under fire, however, from judges who realize that a college education does not guarantee employment and that the child's time might better be spent in other endeavors.<sup>55</sup> Considering that the child will most likely have achieved majority status by the time he enters college, the eighteen years during which he has already received support, the availability of college financial aid and part-time jobs,<sup>56</sup> and the overcrowded job market for college graduates, support for the college student may have a dim future.

Although reaching the age of majority will not automatically termi-

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47. *Commonwealth ex rel. O'Malley v. O'Malley*, 105 Pa. Super. Ct. 232, 161 A. 883 (1932) (child too mentally and physically feeble).

48. *Colantoni v. Colantoni*, 220 Pa. Super. Ct. 46, 281 A.2d 662 (1971) (showing that child is in medical school will not meet burden).

49. For a thorough analysis of the problem, see Comment, *The Duty of a Father Under Pennsylvania Law to Support His Child in College*, 18 VILL. L. REV. 243 (1972).

50. For a discussion of problems it has engendered, see Comment, *The Effect of the Change in the Age of Majority on Prior Divorce Decrees Providing for Child Support*, 8 AKRON L. REV. 338 (1975).

51. *Emrick v. Emrick*, 445 Pa. 428, 284 A.2d 682 (1971); *Commonwealth ex rel. Welsh v. Welsh*, 222 Pa. Super. Ct. 585, 296 A.2d 891 (1972).

52. See *Commonwealth ex rel. Schmidt v. Schmidt*, 223 Pa. Super. Ct. 26, 296 A.2d 855 (1972) (father took home \$168 per week and had to pay \$27 per week for his adult student child). The child must show he is willing and able to do college work to receive college support, but this test is easily met. *Commonwealth ex rel. Colligan v. Kass*, 225 Pa. Super. Ct. 299, 303 A.2d 225 (1973).

A New York court, to decrease the financial burden on the non-custodial parent, limited the award for college expenses to the amount required for a child attending a state university even though the child was attending a more expensive private college. *Zuckerberg v. Zuckerberg*, [1976] 2 FAM. L. REP. (BNA) 2472.

53. *Commonwealth ex rel. Schmidt v. Schmidt*, 223 Pa. Super. Ct. 26, 296 A.2d 855 (1972); see *Commonwealth ex rel. Hanerkam v. Hanerkam*, 221 Pa. Super. Ct. 182, 289 A.2d 742 (1972).

54. L. LEVIN, R. LEVIN & R. LEVIN, SUMMARY OF PENNSYLVANIA JURISPRUDENCE, DOMESTIC RELATIONS § 287.1, at 129 (Supp. 1976).

55. See *Commonwealth v. McFeaters*, 54 Wash. 141 (Pa. C.P. 1974).

56. But see *Commonwealth ex rel. Hanerkam v. Hanerkam*, 221 Pa. Super. Ct. 182, 289 A.2d 742 (1972) (potential aid does not negate parent's duty to support).

nate the parent's duty to support,<sup>57</sup> the emancipation of the child, even a minor, by marriage will extinguish the obligation.<sup>58</sup> The rationale for this rule is that the child's obligation to his spouse and children, if any, takes precedence over his duty to labor for his parents, which is often thought to be one of the bases of child support. The marriage of the child thus severs off both the child's obligations to the parents and those of the parents to the child.<sup>59</sup> Public policy might dictate an exception to this absolute rule, though the issue has not been adjudicated. A child who is too physically feeble to support himself should not lose his parental support because of marriage. The parental duty in this instance does not stem from the parent's right to the labors of the child, but exists because the child is unable to provide for himself. There is no reason for the support to end unless it would cause the parents undue hardship.

#### IV. Earnings of Parent—Ability to Pay Versus Living Expenses

##### A. *What Constitutes Income in a Support Determination?*

Once the needs of the child are calculated, it is necessary to determine the parents' ability to meet those needs. This requires a determination of each parent's income. Calculation of income for tax purposes is only a guide and is not binding.<sup>60</sup> Courts prefer to start with the parent's salary and then add any supplemental sources of income. The parent will not be permitted to deflate his available income by subtracting rent, personal living expenses,<sup>61</sup> repayment of loans from which stock was purchased, or insurance premiums.<sup>62</sup>

Insurance policies owned by the parent are considered to be his assets and, therefore, a source of income. Even if the child is the beneficiary, this does not change, because the policies do not meet the child's immediate support needs.<sup>63</sup> Any gifts the parent receives from an

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57. Several states do not allow support for an adult child under any circumstances. *See, e.g.*, *Schmitz v. Schmitz*, 70 Wis. 2d 882, 236 N.W.2d 657 (1975). This may be too harsh a rule unless the state is willing to provide more educational aid. For a national survey of cases on this subject, see Annot., 1 A.L.R.2d 910 (1948).

58. *Commonwealth v. Barnhart*, 12 Adams 33, 20 Pa. Fiduc. 540 (1970).

59. *Commonwealth v. Moore*, 34 Northumb. 7 (Pa. C.P. 1962).

60. *Sperry v. Sperry*, 29 Som. 228 (Pa. C.P. 1974). *Cf. Commonwealth ex rel. Kallen v. Kallen*, 202 Pa. Super. Ct. 500, 198 A.2d 331 (1964) (effect of income tax after the award was a proper consideration); *Hecht v. Hecht*, 189 Pa. Super. Ct. 276, 150 A.2d 139 (1959) (father got deductions for children so award was adjusted accordingly).

61. *Commonwealth ex rel. Williams v. Williams*, 106 Pa. Super. Ct. 415, 162 A. 327 (1932).

Lehigh County publishes a schedule of support payments based upon net income and the number of dependents. Net income is defined as income after normal deductions such as federal income tax, F.I.C.A., state income tax, city wage tax, hospitalization, life insurance, union dues, and retirement fund contributions. LEHIGH COUNTY, FAMILY SUPPORT GUIDELINES (1976). *See note 103 infra*.

62. *Commonwealth ex rel. Williams v. Williams*, 106 Pa. Super. Ct. 415, 162 A. 327 (1932). The repayment of loans and insurance premiums is thought to increase the parent's net worth, not decrease it. *Commonwealth ex rel. Gitman v. Gitman*, 428 Pa. 387, 237 A.2d 181 (1967) (Jones, dissenting).

63. *Id. Contra, Commonwealth ex rel. Haimowitz v. Haimowitz*, 221 Pa. Super. Ct. 364, 292 A.2d 502 (1972).

outside source such as a relative will also be considered as raising his available support monies.<sup>64</sup> Courts have been willing to go to great lengths<sup>65</sup> and make a diligent search for means by which a parent can raise an adequate support payment. They will investigate a parent's stock interest<sup>66</sup> and will even compute a normal return on any of the parent's investments.<sup>67</sup>

1. *Earning Power as a Function of Income*.—The parent's earning power is determined by his cash flow, property, and resources.<sup>68</sup> The rationale for considering earning power in support determinations is that the parent should not be able to disguise his true worth and then claim inability to support his child. This is a meritorious doctrine, but it can be carried to extreme as it was in *Hecht v. Hecht*.<sup>69</sup> The court reasoned that because the father owned a \$20,000 home for his new wife and himself, he could afford to pay \$100 a week in child support even though his net weekly income was only \$225. This reasoning conflicts with the belief that the order should not punish the father by causing him to divide his estate, which is what the father in this situation would have to do. This was not a case of a parent trying to hide his sources of income or purposely depleting his resources in order to avoid support. Without either of these circumstances, the rationale for considering earning power is lost.

The most frequent situation in which earning power is considered occurs when a parent is in control of a closely held corporation that can easily be used to conceal income. Courts have consistently and carefully scrutinized the finances of this type of corporation<sup>70</sup> to determine what portion of the parent's expenses it is absorbing.<sup>71</sup> Depreciation expenses will be added back to his income in some cases<sup>72</sup> on the theory that depreciation does not reduce dollar income. The parent will not be allowed to deduct his rent expense from his available income when that rent is paid to a corporation owned solely by him.<sup>73</sup> Earning power is a proper indicator of true income. The court needs an accurate picture of

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64. *Commonwealth ex rel. Betz v. Betz*, 127 Pa. Super. Ct. 98, 193 A. 338 (1937) (support father received from his own mother allowed him to live luxuriously).

65. *See Commonwealth ex rel. Manos v. Manos*, 61 Del. 295 (Pa. C.P. 1973), in which support payments were granted out of the father's state lottery winnings.

66. *Commonwealth ex rel. Gitman v. Gitman*, 428 Pa. 387, 237 A.2d 181 (1967).

67. *Hecht v. Hecht*, 189 Pa. Super. Ct. 276, 150 A.2d 139 (1959).

68. *Commonwealth ex rel. Dunkelberger v. Dunkelberger*, 96 Dauph. 357 (Pa. C.P. 1974).

69. 189 Pa. Super. Ct. 276, 150 A.2d 139 (1959).

70. *See Commonwealth ex rel. Gitman v. Gitman*, 428 Pa. 387, 237 A.2d 181 (1967) (Jones, J., dissenting).

71. *Id.* In *Smith v. Smith*, 52 Wash. 19 (Pa. C.P. 1970), the court ruled that the expense account of a non-executive employee did not increase his standard of living, contrasting this to the sole proprietor.

72. *See Commonwealth ex rel. Goichman v. Goichman*, 226 Pa. Super. Ct. 311, 316 A.2d 653 (1973); *Sperry v. Sperry*, 29 Som. 228 (Pa. C.P. 1974) (extent depreciation is available for support depends on circumstances).

73. *Commonwealth v. Wiener*, 32 Leh. 251 (Pa. C.P. 1966).

the ability of the parent to support his child. By applying personal expenses to the corporation, the parent would be enabled to live luxuriously before spending any of his taxable income.<sup>74</sup>

A court will not look kindly upon a parent who falsely shows a deflated income. Judicial displeasure was displayed in *Commonwealth ex rel. Betz v. Betz*<sup>75</sup> when the father, an attorney, deducted from his business income transportation expenses incurred while using his mother's car as well as office expenditures. The court responded by adding these expenses back onto his income. Similarly, in *Commonwealth ex rel. Wills v. Bonetti*,<sup>76</sup> the court maintained that a parent cannot escape liability for support by concentrating his resources on the revival of a defunct business. This, in the court's opinion, evidenced bad faith. Only necessary business expenditures can be deducted from income, not mere conveniences.<sup>77</sup> One court has even gone so far as to suggest that support obligations be given priority over genuine business needs if the business would not be significantly harmed.<sup>78</sup>

After the court has considered every conceivable asset and source of income of the parent, the next logical step is to see if he could be earning more.

2. *Consideration of Earning Capacity.*—When it is evident that a parent could be making more money, and there is no compelling explanation for the discrepancy, courts will not confine themselves to a consideration of actual earnings<sup>79</sup> but will take into account the parent's earning capacity. This factor usually will not be considered unless there is a showing of bad faith on the part of the parent<sup>80</sup> similar to that of the parent who tries to disguise his income in the form of assets. The rationale for this doctrine is that a parent has a duty to provide the children with the best living he can, although one commentator feels this duty should extend only to providing a reasonable standard of living.<sup>81</sup>

Although valid in principle, this analysis may lead to harsh results if improperly applied. Generally the courts have tried to treat all parties fairly. For example, a parent is not allowed to resign his position voluntarily and then claim poverty,<sup>82</sup> even if the reason for the resignation is to

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74. See *Commonwealth ex rel. Goichman v. Goichman*, 226 Pa. Super. Ct. 311, 316 A.2d 653 (1973).

75. 127 Pa. Super. Ct. 98, 193 A. 338 (1937).

76. 190 Pa. Super. Ct. 335, 154 A.2d 404 (1959).

77. *Id.*; *Commonwealth ex rel. Betz v. Betz*, 127 Pa. Super. Ct. 98, 193 A. 338 (1937).

78. *Sperry v. Sperry*, 29 Som. 228 (Pa. C.P. 1974).

79. *Dunkelberger v. Dunkelberger*, 96 Dauph. 357 (Pa. C.P. 1974); *Sperry v. Sperry*, 29 Som. 228 (Pa. C.P. 1974).

80. *Commonwealth ex rel. Kane v. Kane*, 199 Pa. Super. Ct. 489, 185 A.2d 669 (1962).

81. Giacalone, *Guidelines for Child Support After Voluntary Reduction of Income*, [1976] 2 FAM. L. REP. (BNA) 4061.

82. *Commonwealth ex rel. Haley v. Haley*, 199 Pa. Super. Ct. 235, 184 A.2d 155 (1962) (father responsible to extent of earning capacity).

obtain further education.<sup>83</sup> It has also been ruled, however, that a father is not prohibited from leaving the employ of another to go into business for himself even if this results in immediate financial sacrifices for all parties.<sup>84</sup> In *Commonwealth v. Trimble*<sup>85</sup> it was determined that a parent who had been a construction worker but was now receiving unemployment compensation had a net earning capacity of \$7,000 per year. After further determining that the parent had not made a good faith effort to seek employment, the court ordered him to pay \$90 per week for the support of his separated wife and five children.<sup>86</sup> Conversely, this doctrine was applied harshly in *Commonwealth ex rel. Kaplan v. Kaplan*<sup>87</sup> to a custodial mother who was a secretary capable of working in a high-paying, center-city office at \$150 per week but who had accepted a \$90 per week suburban job. The court refused to consider her dislike of the city as a valid reason for her low income and, therefore, reduced the amount of the father's support payments. This worked a hardship upon the child because of a collateral issue. The court was overly concerned with equitably dividing the support burden and placed the interests of the father over the welfare of the child.<sup>88</sup>

Although the earning capacity analysis may entail an onerous restraint on the parent's freedom to choose a profession, it is a necessary evil, particularly since a parent must relinquish a part of his freedom from responsibility when he brings a child into the world. There are, however, those who believe that the parent should be able to reduce his support payments when a change of jobs results in a decrease in salary but an increase in job satisfaction, but only if the child is left with a reasonably comfortable life.<sup>89</sup> This compromise, which ensures that neither the parent nor the child will suffer unduly, is being accepted in Pennsylvania.<sup>90</sup>

If the decrease in the parent's income is involuntary, neither earning capacity<sup>91</sup> nor past earnings will be considered.<sup>92</sup> A contrary holding

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83. *Commonwealth ex rel. Snively v. Snively*, 206 Pa. Super. Ct. 278, 212 A.2d 905 (1965).

84. *Weiser v. Weiser*, 238 Pa. Super. Ct. 488, 362 A.2d 287 (1976).

85. 197 Pa. Super. Ct. 644, 180 A.2d 92 (1962).

86. *Id.*

87. 236 Pa. Super. Ct. 26, 344 A.2d 578 (1975).

88. A better solution may have been to follow the reasoning of the California court in *In re Lungstrom's Marriage*, 43 Cal. App. 3d 848, 118 Cal. Rptr. 202 (1974), in which attorney's fees and costs were charged to the non-custodial parent to protect and advance the child's interest. The court reasoned that the child would be benefited if its custodial parent were relieved of these expenses, leaving more money for the family unit. Applying this to *Kaplan*, the court might reason that despite the mother's refusal to work in a higher paying office, the best interests of the child demand that the father continue his prior payments unless it would work an undue hardship on him.

89. See Giacalone, *Guidelines for Child Support After Voluntary Reduction of Income*, [1976] 2 FAM. L. REP. (BNA) 4061.

90. See *Weiser v. Weiser*, 238 Pa. Super. Ct. 488, 362 A.2d 287 (1976); *Shaffran v. Shaffran*, 92 Montg. 339 (Pa. C.P.), *aff'd*, 217 Pa. Super. Ct. 856, 270 A.2d 251 (1970).

91. *Costello v. LeNoir*, 462 Pa. 36, 337 A.2d 866 (1975). In this case the father had previously earned between \$8,000 and \$20,000 per year. He had recently lost his job because

would violate the basic tenet that support orders are not intended to punish the parent. A parent who is laid off or injured and unable to find work should not be ordered to pay an amount that he cannot afford, for this would further add to his difficulties and might cause him to flee the jurisdiction, leaving the child without support.<sup>93</sup>

*B. Living Expenses of the Parents, Including Second Families, as a Reduction of the Award*

After the court has fully considered what the exact amount of the parent's income is, or should be, and has determined the needs of the child, it must consider whether the available income minus the amount of support will leave a satisfactory sum for the parent. Some courts will subtract the parent's living expenses from his income prior to making a support award.<sup>94</sup> Whatever mathematical procedure is used, the result must be to leave the non-custodial parent with a reasonable allowance for living expenses<sup>95</sup> while providing the child with its legal necessities.<sup>96</sup> Parental expenses that are usually, although not necessarily,<sup>97</sup> taken into account include the cost of food, housing, medical and dental care, transportation, clothing, insurance, taxes, and debts. The non-custodial parent can minimize the support award by using ingenuity in calculating and proving the amount of his living expenses.<sup>98</sup>

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of an accident and was currently receiving public assistance payments of \$149 per month. In this situation the court determined that past earnings had no bearing on present income or ability to support.

92. *See id.* (parent's ability to support his children to be determined as of the time that support payments are sought).

93. To facilitate interstate enforcement of support orders Pennsylvania has adopted the Revised Uniform Reciprocal Enforcement of Support Act, PA. STAT. ANN. tit. 62, §§ 2043-1 to 2043-42 (Purdon Supp. 1976-77).

94. *See, e.g., Commonwealth ex rel. Buonocore v. Buonocore*, 235 Pa. Super. Ct. 66, 340 A.2d 579 (1975).

95. *Commonwealth ex rel. Goichman v. Goichman*, 226 Pa. Super. Ct. 311, 316 A.2d 653 (1973).

96. *See Conway v. Dana*, 456 Pa. 536, 318 A.2d 324 (1974).

97. *See Commonwealth ex rel. Gitman v. Gitman*, 428 Pa. 387, 237 A.2d 181 (1967) (payment of debt increases net worth).

98. *See Sperry v. Sperry*, 29 Som. 228 (Pa. C.P. 1974). The court considered the fact that one parent lived in the family's home while the other had to rent an apartment, and adjusted the award accordingly.

One New York court included in the father's living expenses the \$400 per month that it cost him to fly his two children to his home in New York from Florida, where they lived with their mother. *Sandra B. v. Charles B.*, 85 Misc. 2d 633, 380 N.Y.S.2d 861 (1976). The court chose to subtract the \$400 plane expense from the \$750 per month award because the mother, who had been granted custody in New York, had taken the children to Florida without good reason, thereby depriving the father of visitation rights. While the court professed to consider the interests of the children in their father's companionship and guidance, the children were deprived of financial support because of an act by one parent against the other. The court's motive may have been a desire to punish the mother, an idea alien to child support. This decision was also unusual in that it subtracted the entire transportation expense from the support award rather than attributing a portion of it to the father.

In Pennsylvania support payments may be reduced during the period that the child spends with the non-custodial parent, but may not be eliminated entirely because certain custodial expenses are constant. *Commonwealth ex rel. O'Hey v. McCurdy*, 199 Pa. Super. Ct. 115, 184 A.2d 291 (1962).

An unresolved complication in the calculation of parental expenses arises when a divorced parent remarries and takes on additional dependents. Remarriage will not relieve either parent of the duty of support,<sup>99</sup> but courts take varying views on whether or not the acquisition of a second family is a valid reason for reducing support payments. Illinois, for instance, takes the view that the obligation to support a new family is secondary to the obligation to support children of a first marriage.<sup>100</sup> Pennsylvania took a similar stance in *Commonwealth ex rel. Pacell v. Rouse*.<sup>101</sup> The court would not allow the fact that a father had three children by a second marriage to interfere with its determination that \$150 per month was inadequate to support his four children by a previous marriage.

The courts will not, however, ignore the reality that additional dependents also deserve support from the parent and will reduce the available income a parent has to support his first children. In *Commonwealth ex rel. Jennings v. Jennings*<sup>102</sup> the court refused to increase a support award to make it commensurate with a parent's increased earnings because the parent now had five stepchildren to support by a second marriage. It may be that the underlying rationale in this case was that the children were receiving adequate support and the increase was not crucial. Nevertheless, the court should have taken into account the support available for the stepchildren from the natural non-custodial parent. The duty to support one's natural child never ceases despite divorce and remarriage.

The obligation to support a second family should not be made secondary to the obligation to support the children of a prior marriage, absent an equalizing factor such as available support from the natural non-custodial parent of the second family. The new dependents deserve the same degree of support as those of the first household. Although the first children may receive reduced support payments because the parent voluntarily chose to take on additional burdens,<sup>103</sup> any hardship these

99. See *Scar's Estate*, 313 Pa. 415, 169 A. 776 (1934).

100. *Daniels v. Daniels*, 38 Ill. App. 3d 697, 348 N.E.2d 259 (1976).

101. 214 Pa. Super. Ct. 741, 251 A.2d 808 (1969).

102. 57 Del. 198 (Pa. C.P. 1969).

103. Lehigh County distributes support payment schedules that provide for equal payment to all dependents of a wage-earning parent. A wife counts as two dependents. Part of this schedule is reproduced below from LEHIGH COUNTY, FAMILY SUPPORT GUIDELINES (1976).

Weekly Net Income	Dependents					
	One	Two	Three	Four	Five	Six or More
\$120	\$24	\$35	\$ 50	\$ 55	\$ 60	\$ 60
\$180	\$36	\$54	\$ 72	\$ 87	\$ 93	\$ 97
\$250	\$50	\$75	\$100	\$120	\$130	\$135

If a father has two children by a first marriage and two by a second marriage, he has six dependents, including two for his present wife. If his income is \$180.00 per week he would

children must suffer is secondary to the need for equal treatment of all dependents and the right of the parent to remarry. Judicial discretion must inevitably play a large role in this situation.

Another parental expense issue in the "second family" field may arise if the parent's new spouse has separate income. Counsel for the child will want this spouse's additional income considered because it raises the amount the non-custodial parent will be able to contribute. The Pennsylvania law on this issue is that if a father remarries, the new wife is not required to support minor children of the father's first marriage, and the separate assets or earnings of the second wife should not be considered as an element of the father's financial resources in computing the amount of support ordered for his minor children.<sup>104</sup>

It is generally accepted, however, that the second wife's income will be examined to see what she contributes toward family expenses to arrive at a true determination of the father's ability to pay support.<sup>105</sup> For instance, if a non-custodial parent claims his rent expense is \$200 per month, the court will examine the family's financial records to see what portion of that expense the parent's working spouse should be defraying. Since the parent's share of the living expenses will be considerably less if he lives with a working spouse than if he lives alone, the court should rightly take this into account as it would any joint assets of the new couple that would increase the parent's ability to pay.

Once the income and expenses of each parent have been separately established and the needs of the child have been determined, the court must apportion among the parents responsibility to meet those needs.

## V. Equalizing the Parental Burden

Pennsylvania child support law has undergone a significant change over the last few years. Formerly, the father had the primary duty to support his minor children;<sup>106</sup> the income or financial resources of the mother were treated only as attendant circumstances.<sup>107</sup> The passage of the equal rights amendment<sup>108</sup> to the Pennsylvania Constitution made this

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be ordered to pay two-sixths of \$97.00 or \$32.33 per week to his first two children. If he had not remarried he would be ordered to pay \$54.00 for these same two children. The court, however, does retain discretion to handle extenuating circumstances. *See Whybra v. Gustafson*, 2 Mich. App. 516, 140 N.W.2d 760 (1966) (judge should not blindly follow any support payment schedule in abdication of his duty to exercise judicial discretion).

104. *Commonwealth ex rel. Travitzky v. Travitzky*, 230 Pa. Super. Ct. 435, 326 A.2d 883 (1974). *Accord*, *Commonwealth ex rel. Marshall v. Ebbert*, 212 Pa. Super. Ct. 553, 243 A.2d 143 (1968) (father's legal wife not liable for support of his illegitimate children).

105. *Commonwealth ex rel. Travitzky v. Travitzky*, 230 Pa. Super. Ct. 435, 326 A.2d 883 (1974). *Accord*, *Commonwealth ex rel. Marshall v. Ebbert*, 212 Pa. Super. Ct. 553, 243 A.2d 143 (1968).

106. *Commonwealth ex rel. Bortz v. Norris*, 184 Pa. Super. Ct. 594, 135 A.2d 771 (1957).

107. *Commonwealth ex rel. Yeats v. Yeats*, 168 Pa. Super. Ct. 550, 79 A.2d 793 (1951).

108. The new amendment reads:

Prohibition Against Denial or Abridgement of Equality of Rights Because of



rule a vestige of the past.<sup>109</sup> Support of the children is now the mutual responsibility of the mother and the father.<sup>110</sup> Both are required to share in the support to the extent of their financial capacity and ability,<sup>111</sup> and both of their incomes must be considered before a support award is made.<sup>112</sup>

There are few exceptions to this rule. In fact, failure to consider the mother's income and assets<sup>113</sup> may constitute reversible error even if the mother has custody.<sup>114</sup> But equality of obligation does not necessarily mean equality of monetary contribution by the spouses.<sup>115</sup> Their contribution may vary according to their respective capacities and abilities to make provisions for the child.<sup>116</sup>

The simplest method of determining their contributions is to apply strict mathematical analysis. This was done effectively in *Commonwealth ex rel. Buonocore v. Buonocore*.<sup>117</sup> The court accepted all figures given by the parents as to the amount of their earnings, the amount spent on the child, and the amount each spent on personal living expenses. It then ordered the non-custodial mother to pay the father a percentage of the support that matched her percentage of the parents' total income. Since there was no question as to the figures used for calculation and no special problems arose, the simple mathematical analysis was easily applied; unfortunately, this can rarely be so because of the multitude of complex considerations that usually enter into a support determination.

Generally, the more one earns, the more one should contribute toward support. The term "support" need not, however, be perceived as strictly monetary. As demonstrated in the following section, there may be certain cases in which the non-custodial parent should contribute the *financial* support while the custodial parent provides the *home* support and services that go along with this responsibility.

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Sex. Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.

PA. CONST. art. I, § 28. For a complete discussion of the effect of the amendment, see Comment, *The Support Law and the Equal Rights Amendment in Pennsylvania*, 77 DICK. L. REV. 254 (1973).

109. *Conway v. Dana*, 456 Pa. 536, 318 A.2d 324 (1974), noted in 10 TULSA L.J. 485 (1975).

110. *Conway v. Dana*, 456 Pa. 536, 540, 318 A.2d 324, 326 (1974); *Commonwealth ex rel. Travitzky v. Travitzky*, 230 Pa. Super. Ct. 435, 326 A.2d 883 (1974).

111. *Conway v. Dana*, 456 Pa. 536, 540, 318 A.2d 324, 326 (1974); *Commonwealth ex rel. Buonocore v. Buonocore*, 235 Pa. Super. Ct. 66, 69, 340 A.2d 579, 581 (1975).

112. See *Costello v. LeNoir*, 462 Pa. 36, 337 A.2d 866 (1975); *Conway v. Dana*, 456 Pa. 536, 318 A.2d 324 (1974).

113. This analysis was carried one step further in *Sperry v. Sperry*, 29 Som. 228 (Pa. C.P. 1974), in which the court postulated that when the father is unable to bear the entire support burden a custodial non-working mother's potential earning ability should be considered.

114. *Kaper v. Kaper*, 227 Pa. Super. Ct. 377, 323 A.2d 222 (1974).

115. *Sperry v. Sperry*, 29 Som. 228 (Pa. C.P. 1974).

116. *Costello v. LeNoir*, 462 Pa. 36, 337 A.2d 866 (1975); *Sperry v. Sperry*, 29 Som. 228 (Pa. C.P. 1974).

117. *Commonwealth ex rel. Buonocore v. Buonocore*, 62 Del. 198 (Pa. C.P.), *aff'd*, 235 Pa. Super. Ct. 66, 340 A.2d 579 (1975).

## A. Custodial Care as an Equalizer

The equalization of the support burden between custodial and non-custodial parent is a difficult endeavor because each has unique responsibilities to the child. Custodial care is a need of the child that, unquestionably, the custodial parent fulfills to a greater extent than the other parent. When the custodial parent provides housing, cooks food, washes clothing, and performs many other mundane services for the child, this to some extent satisfies the mutual support obligation.<sup>118</sup> The non-custodial parent will therefore be ordered to make a monetary contribution to balance the burden.<sup>119</sup>

This analysis works well when the custodial parent is self-supporting. A more complicated problem arises when a custodial mother is not working and financial exigencies have not required her to do so. As the court stated in dictum in *White v. White*,<sup>120</sup> "A mother has a moral, if not legal right to choose to remain home with minor children and provide a home with the constant presence of a parental figure."<sup>121</sup> This right is conditioned, however, on the father's ability to bear the entire financial support burden.<sup>122</sup> Under these circumstances, even if the mother has an earning capacity and is able to work, she will not be considered as a potential source of child support. The twenty-four hour custodial service that the custodial parent provides may well be worth thousands of dollars per year. To equalize the burden the non-custodial parent should be required to make an equal monetary contribution. It is inevitable, however, that some of this money will be used for the mother's support, a concept alien to Pennsylvania divorce law.<sup>123</sup> In actuality, the mother would be the equivalent of a full-time live-in employee and the father would be her sole means of support.<sup>124</sup>

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118. *Fall v. Fontenot*, 307 So. 2d 779 (La. App. 1975); see *Hecht v. Hecht*, 189 Pa. Super. Ct. 276, 150 A.2d 139 (1959). These services have monetary value and if not provided by the custodial parent would have to be paid for, thereby raising the expenses of the child.

119. See *Hecht v. Hecht*, 189 Pa. Super. Ct. 276, 150 A.2d 139 (1959). In *Hecht* the mother worked while the children were in school.

A Louisiana court has included the reasonable cost of child care for children of a working custodial mother as a child support expense when the children are pre-school age. *Naughton v. Naughton*, 304 So. 2d 679 (La. App. 1974).

120. 226 Pa. Super. Ct. 499, 313 A.2d 776 (1973).

121. *Id.* n.4. *Accord*, *Sperry v. Sperry*, 29 Som. 228 (Pa. C.P. (1974) (the unique right of the mother to remain home is certain to be questioned under the equal rights amendment).

122. *Sperry v. Sperry*, 29 Som. 228 (Pa. C.P. 1974).

123. *Commonwealth ex rel. Platt v. Platt*, 227 Pa. Super. Ct. 423, 425, 323 A.2d 29, 30 (1974).

124. A Maryland court has recently decided that it is reasonable to include expenses for house payment, home repairs, the family food bill, and transportation costs in a support order against the father and for the custodial mother and her two children. Part of these expenses are necessarily the mother's. The court made it clear this was not alimony but was only child support:

The mere fact that the wife has waived alimony . . . does not take away . . . from the children the right to be maintained in the manner that they were maintained prior to the divorce, and of necessity if you've got two young children and they've got to have a mother's care and [it's] not required that she work, . . . and the children are going to benefit from her care. An allowance has to be made

## B. *Child Support or Alimony?*

The inclusion of the custodial parent's expenses in a child support award raises two questions. The first, peculiar to Pennsylvania, is how to distinguish this type of award from an alimony payment. The only apparent justification for failing to distinguish between the two is that the mother's care is essential to the children's welfare and should, therefore, be subsidized by the non-custodial father. The second question is whether it is fair to the father to camouflage alimony payments in this manner, particularly in view of the equal rights amendment in Pennsylvania. The father should not have to provide extensive support of this type when the mother is able to work unless the child has severe emotional problems or otherwise requires full-time parental attention. The availability of child care services for the working parent further militates against a finding that the mother has a right to remain home.

Decisions like *White*<sup>125</sup> and *Hecht v. Hecht*<sup>126</sup> suggest that Pennsylvania may be close to permitting alimony payments in the guise of child support. This approach should be rejected. Although the father should be required to support his children in the style to which they are accustomed, he should not have to provide for the mother through a child support order. This would negate the no-alimony rule in Pennsylvania.

Equalizing the parental burden will normally be the last stage the court goes through in its support calculation. The child's needs, the income of the parent, and the equalization of the burden will be considered in all cases. There are two additional and important factors that occasionally must be examined in fixing the amount of the award: the child's sources of income and prior agreements between the parents.

## VI. Other Possible Considerations

### A. *The Child's Income*

The employability of a minor child is usually not a factor in determining the parental duty of support.<sup>127</sup> A parent will not be relieved of this duty even if the child quits school and works to help support the family because the parent's irresponsibility cannot be allowed to prolong the interruption of his child's education.<sup>128</sup> The parental duty is virtually absolute in this respect.<sup>129</sup>

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within the maintenance and support money to them to take care of someone, whether it's the natural mother or someone else, to look after them. If that someone is going to look after them and live in, they're going to have to have clothing on their back, going to have to have food and going to have to have lodging. It's as simple as that.

Halle v. Halle, 25 Md. App. 350, 354, 333 A.2d 360, 362 (1975) (quoting from lower court's colloquy with counsel).

125. 226 Pa. Super. Ct. 499, 313 A.2d 776 (1973).

126. 189 Pa. Super. Ct. 276, 150 A.2d 139 (1959).

127. *White v. White*, 226 Pa. Super. Ct. 499 n.5, 313 A.2d 776 n.5 (1973). See *Commonwealth v. Trimble*, 197 Pa. Super. Ct. 644, 180 A.2d 92 (1962).

128. *Commonwealth v. Trimble*, 197 Pa. Super. Ct. 644, 180 A.2d 92 (1962).

129. *White v. White*, 226 Pa. Super. Ct. 499 n.5, 313 A.2d 776 n.5 (1973).

1. *The College Child*.—One court<sup>130</sup> listed the child's income as a major consideration in its child support calculation. The child in this case was a college student, however, and the income of college children is usually taken into account in reducing a support award.<sup>131</sup> Although it seems fair to reduce the parental burden in this situation, the decision may have the effect of discouraging children from finding jobs while in school. This result would be prevented if courts also considered the earning capacity of the non-working student.<sup>132</sup> All students receiving child support would thus have an incentive to help defray their college expenses.

2. *Trust Fund Income*.—The fact that a child has independent sources of support is generally no defense to a support action against a parent.<sup>133</sup> Pennsylvania courts have developed three exceptions to this rule to account for trust funds set up for the child, whether by the parent or by someone else. Income from the child's trust funds will be considered if the parent's ability to meet support obligations is minimal,<sup>134</sup> if the trust fund is set up expressly for the support and education of the children regardless of the parent's ability to support,<sup>135</sup> or if the child is a college student.<sup>136</sup> This last situation is an extension of the court's philosophy of considering all sources of income of the college child. These exceptions are consistent with the purpose of child support, which is to provide for the legitimate needs of the child. If the child has means of his own, the parents should to some degree be relieved of his financial burden. Independent responsibility on the part of the children should be encouraged at any age. A related problem is encountered when a non-parental relative contributes occasionally to the child's support. The non-custodial parent will argue that this represents income to the child and should reduce the support payments. The child support determination should be based, however, only on resources of those legally responsible for the child's support. Gratuitous contributions from other sources<sup>137</sup> are not sufficient-

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130. Commonwealth *ex rel.* Iversen v. Hortman, 97 Montg. 400 (Pa. C.P. 1974).

131. See Commonwealth *ex rel.* Platt v. Platt, 227 Pa. Super. Ct. 423, 323 A.2d 29 (1974); Doelp v. Doelp, 219 Pa. Super. Ct. 420, 281 A.2d 721 (1971); Commonwealth *ex rel.* Iversen v. Hortman, 97 Montg. 400 (Pa. C.P. 1974).

132. The earning capacity of the adult student child should be his capacity to earn as a full-time student rather than a full-time laborer.

133. Commonwealth *ex rel.* Byrne v. Byrne, 212 Pa. Super. Ct. 566, 243 A.2d 196 (1968); Commonwealth *ex rel.* Polk v. Polk, 12 Adams 161 (Pa. C.P. 1971).

134. Commonwealth *ex rel.* Goichman v. Goichman, 226 Pa. Super. Ct. 311, 316 A.2d 653 (1973) (trust fund income both added to parent's income and subtracted from child's needs. See Commonwealth *ex rel.* Iversen v. Hortman, 97 Montg. 400 (Pa. C.P. 1974).

135. Doelp v. Doelp, 219 Pa. Super. Ct. 420, 281 A.2d 721 (1971).

136. Commonwealth *ex rel.* Schlesinger v. Schlesinger, 231 Pa. Super. Ct. 284, 331 A.2d 694 (1974).

137. Carole K. v. Arnold K., 85 Misc. 2d 643, 380 N.Y.S.2d 593 (1976). See Conway v. Dana, 456 Pa. 536, 318 A.2d 324 (1974); Commonwealth *ex rel.* Prelec v. Prelec, 179 Pa. Super. Ct. 422, 115 A.2d 847 (1955).

ly reliable to be considered.<sup>138</sup> There is no guarantee that they will be continued in the future.

### B. *Prior Agreements Between the Parents*

Another possible problem area is the effect of former agreements by the parents. A parent cannot contract away the rights of the minor child to adequate support from the non-custodial parent, irrespective of the legality of the agreement as between the parents.<sup>139</sup> Public policy<sup>140</sup> requires that the support of children not be jeopardized by inter-parental accommodation. A contract made by the parents with respect to support payments is valid and may be considered,<sup>141</sup> but nothing in the contract will preclude the court from making an independent determination of the child's needs.<sup>142</sup> A court-ordered award in excess of the amount called for in the agreement will not affect any other provision of the agreement.<sup>143</sup> Conversely, contractual provisions for support greater than the court would otherwise have ordered must be honored.

One parent's previous restraint in negotiating for child support does not relieve a legally responsible parent of the duty to support his child in a reasonable manner.<sup>144</sup> Even the violation of court custody orders by one of the parents will not absolve the other from support payments,<sup>145</sup> because support and custody are separate and distinct concerns.<sup>146</sup> The parent's duty to support the child is absolute.<sup>147</sup> Nothing the other parent does, whether it be a violation of a former agreement or of a court order, will relieve that duty.

## VII. An Econometric Model

A study of Florida child support cases has led to an innovative suggestion by one commentator that could be used in Pennsylvania to remove the calculation of support awards from the discretion of the trial judge.<sup>148</sup> The study showed a lack of consistency in factor analysis from

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138. See *Commonwealth ex rel. Prelec v. Prelec*, 179 Pa. Super. Ct. 422, 115 A.2d 847 (1955). But see *Commonwealth ex rel O'Hey v. McCurdy*, 199 Pa. Super. Ct. 115, 184 A.2d 291 (1962) (grandfather's contribution affects social status and mode of living of parties).

139. See, e.g., *Mallinger v. Mallinger*, 197 Pa. Super. Ct. 34, 175 A.2d 890 (1961); *Bupp v. Bupp*, 13 Adams 164 (Pa. C.P. 1972).

140. L. LEVIN, R. LEVIN & R. LEVIN, SUMMARY OF PENNSYLVANIA JURISPRUDENCE, DOMESTIC RELATIONS § 291, at 216 (1954).

141. A parent should, however, direct the court's attention to prior financial arrangements for support if it is advantageous to do so. A prior agreement may, for example, be a good indication of the family's past life style.

142. *Clark v. Clark*, 55 West. 191, 64 Pa. D. & C.2d 286 (1973).

143. *Id.*

144. *Commonwealth ex rel. Prelec v. Prelec*, 179 Pa. Super. Ct. 422, 115 A.2d 847 (1955).

145. *Commonwealth ex rel. Chila v. Chila*, 226 Pa. Super. Ct. 336, 313 A.2d 339 (1973); *Commonwealth v. Mexal*, 201 Pa. Super. Ct. 457, 193 A.2d 680 (1963).

146. *Commonwealth ex rel. Posnansky v. Posnansky*, 210 Pa. Super. Ct. 280, 232 A.2d 73 (1967).

147. *Commonwealth v. Mexal*, 201 Pa. Super. Ct. 457, 193 A.2d 680 (1963).

148. Stone & White, *A Study of Alimony and Child Support Rulings with Some Recommendations*, 10 FAM. L.Q. 75 (1976).

one county to the next. This inconsistency spawned the suggestion that a team of specialists, including an economist, econometrician, statistician, psychologist, attorney, clergyman, counselor, and personal finance expert, develop an econometric model to be used by the state for child support determinations.<sup>149</sup> Such a mathematical model with a predetermined stress on each factor would ensure equitable treatment in every case, would relieve the judge of his discretionary burden, and would reduce the number of appeals.<sup>150</sup> The only time-consuming process left would be the verification of the accuracy of the figures plugged into the formula.<sup>151</sup>

The suggestion has merit and deserves further study, but it may offend those who oppose strictly mechanical determinations. The model must be flexible enough to account for all conceivable factors, an admittedly difficult task. Because of this it might be advantageous to allow the judge some discretion in unusual circumstances, but at least there would be a point of reference from which to work.

### VIII. Conclusion

The Pennsylvania system of child support is marked by a lack of consistency and direction. In this facet of the law, which is based in large measure on economic and mathematical analyses, tables of statistics and calculation formulas should be developed to assure equitable treatment of all parties. In this light the econometric model has much to offer. But, as noted previously, the subject will require further study before it can gain full acceptance. The vesting of unbridled discretion in trial court judges has made and continues to make this an unstructured area of the law. If judicial discretion is to remain unchecked there should be a consistent theme running through the consideration of each support factor.

Simple mathematical tables could be used strictly as a reference point, with emphasis placed upon the child's best interests in evaluating

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149. *Id.* at 83.

150. *Id.* at 84.

151. The proposed child support model was stated as follows:  
 $x_1 = B_0 + B_2x_2 + B_3x_3 + B_4x_4 + B_5x_5 + B_6x_6 + B_7x_7 + B_8x_8 + B_9x_9 + B_{10}x_{10}$ .  
 Beta<sub>0</sub> (B<sub>0</sub>) represents the intercept of the multiple regression equation and Betas 2 through 10 represent the slopes of the dependent variables on the respective independent variables. In other words, the Betas are used as statistical tools for assigning proper statistical weight to the inputs needed to determine the amount of the child support payments. The variables used in the model are as follows:

- x<sub>1</sub> = Child Support Payments
- x<sub>2</sub> = Estimated Financial Needs of Wife
- x<sub>3</sub> = Estimated Financial Needs of Husband
- x<sub>4</sub> = Total Assets
- x<sub>5</sub> = Total Liabilities
- x<sub>6</sub> = Number of Dependent Children
- x<sub>7</sub> = Ages of Dependent Children
- x<sub>8</sub> = Net Income of Husband
- x<sub>9</sub> = Net Income of Wife
- x<sub>10</sub> = Duration of Marriage

*Id.* at 78.

the weight to be given each factor. In this way parties coming into court would have an idea of the basis upon which the decision will be made. Decisions would be streamlined and made simpler to justify. With the expanding areas of equalization of the parental and custodial care expense, courts will need a principle by which to resolve conflicts among support considerations. The child's best interests, considered effectively in child custody cases, can fulfill a major part of this need by settling calculatory impasses in favor of the child rather than pitting parent against parent.

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