

Fall Institute
December 8, 2017

MCFM Family Law Year in Review

Recent Case Law + New CSG



Jonathan E. Fields, Esq.
Fields and Dennis, LLP
80 William Street, Ste. 210
Wellesley, MA 02481
jfields@fieldsdennis.com
781-489-6776

FIELDS[™] and DENNIS_{LLP}
Attorneys at Law

Snow v. Snow,

476 Mass.425 (2017)

- Former wife did not pursue her claim for alimony during the divorce and instead sought and obtained alimony award more than **4 years** after judgement
- SJC held that durational limit of general alimony terms starts to run on the date that the alimony was awarded, not on the date of the divorce judgement or on the date temporary alimony was awarded.
- Complaint for Modification or Initial Complaint for Alimony

Leon v. Cormier,

91 Mass. App. Ct. 216 (2017)

- The court held the mother in civil contempt for violating a decision issued by the agreed-upon parent coordinator.
- Language in the parties' separation agreement required they abide by the PC's decisions unless otherwise ruled upon by the court
- In this case, the judge played no role in appointing the PC. The parties agreed on it, specifically naming the PC and agreeing to be bound by the decisions.
- After finding clear evidence that the mother violated a court order, the judge did not abuse her discretion in finding the mother in contempt.

**Leon v. Cormier,
91 Mass. App. Ct. 216 (2017), cont'd**

“[T]he PC’s order did not affect the material terms of the judgment regarding the children’s primary custody and a parent’s right to visitation.”

v.

“Mere alteration of the logistical coordination of visitation”

PC Questions

Order children to see a therapist over objection of parent with shared legal custody?

Order that children to a particular school over objection of parent with shared legal custody?

Are these “material terms” per Leon?

Van Arsdale v. Van Arsdale,

477 Mass. 218 (2017)

- Is it constitutional to apply retroactively the ARA's durational limits to agreements that predated the ARA?
- SJC – Yes. Because the statute does not attach “new legal consequences” to events that happened prior to the ARA's enactment. Durational limits merely created a presumption of termination of alimony that recipient could rebut by showing that deviation from the limits required in the “interests of justice.”

Van Arsdale v. Van Arsdale, 477 Mass. 218 (2017) (Cont'd)

Interest of justice exception requires focus on the “here and now.”

George v. George, 476 Mass. 65 (2016)

Ludwig v. Lamee-Ludwig,

91 Mass.App.Ct. 36 (2017)

- Does income realized from stock options a spouse retained as a result of the *Baccanti* time rule count as income for alimony purposes?
- In this case, it did.

Lessons from *Ludwig*

If you don't want it in, **carve it out**:

“Earned income for purposes of alimony shall not include proceeds realized from RSU’s granted prior to the date of this Agreement and reflected on the parties sworn financial statement submitted herewith.”

Fazio v. Fazio,

91 Mass.App.Ct. 82(2017)

Disproportionate Division of Assets

- Court granted Wife 2/3 of estate.
 - Wife played a more significant role than Husband in “preserving the estate after separation”.
 - Wife *sole* caregiver for much of the marriage

**Fazio v. Fazio,
91 Mass.App.Ct. 82(2017) (cont'd)**

Valuation Timing

All assets valued at time of trial *except* Wife's retirement account which was valued roughly as of date of separation.

Cesso v. Todd

92 Mass.App.Ct. 131(2017)

- Is there attorney-client relationship after notice of withdrawal?
- “a trier of fact could, but need not, find that the relationship continued after July 28, 2008, even if Todd was no longer formally counsel of record in the divorce action”
- “reasonable persons could differ as to the existence of an attorney-client relationship,” so, “this issue must be resolved by the trier of fact”



Lessons from *Cesso*

Be clear that you no longer represent the client and take no action that would seem to contradict that..

Young v. Young

478 Mass. 1 (2017)

The Probate and Family Court Decision

Station during the marriage. PFC characterized as “on an upward trajectory” and “where the parties needs expanded commensurate with the increasingly available income.”

%-based Alimony v. Fixed Amount. PFC stated that due to complexity and changing nature of H’s compensation, it was “reasonable and fair” to award alimony to W in amount of 33% of H’s gross income.



Young v. Young

478 Mass. 1 (2017) (cont'd)

The SJC Decision

Station during the marriage – “amount required to enable her to maintain the standard of living she had at the time of the separation leading up to the divorce **not** the amount required to enable her to maintain the standard of living she would have had in the future if the couple had not divorced.”



Young v. Young
478 Mass. 1 (2017) (cont'd)

Timing of Station: Must it be at separation?

What about station that fluctuates up and down?

Young v. Young

478 Mass. 1 (2017) (cont'd)

SJC Decision

% - based Alimony Award: PFC rationale inadequate. There need to be “special circumstances” for court to order %-based alimony. These don’t have to “extraordinary circumstances.”

Calabria v. Calabria

91 Mass.App.Ct. 763 (2017)

Court ordered Father to pay *increased child support* for a period prior to the date Mother filed complaint for modification.

Father appealed, arguing GL 119A s. 13(a): Child support judgments not subject to retroactive modification except for any period during which a complaint for modification is pending

Separation agreement – “Parties agree to modify...” support upon change of employment ... “and said modification to be retroactive to the change of employment or salary date.”



Calabria v. Calabria

91 Mass.App.Ct. 763 (2017) (cont'd)

Appeals Court aff'd PFC – retroactive modification to a date prior to the filing is ok.

Rationale:

- Not about reducing arrearages, but increasing income.
- Consistent with CSG -- children shall be maintained to extent possible from resources of both parents.
- Mother's delay in filing attributable to father's failure to provide financial information
- Their SA permitted it



Lizardo v. Ortega

91 Mass.App.Ct. 687(2017)

Trial court erred in ordering father to pay his child support arrearage from a retroactive lump sum distribution of SSDI benefits

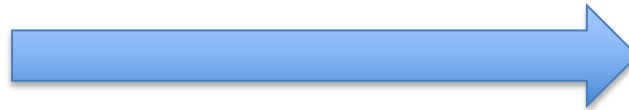
This violated Federal law, Consumer Credit Protection Act, 15 USC s.1673(b) which limits garnishment to 65% of the net (“disposable earnings”)



Emery v. Sturtevant,

91 Mass.App.Ct. 502(2017)

- “It is neither reasonable nor fair to expect the husband, after he has engaged in an extensive job search in his field of expertise and has secured employment commensurate with his training and experience, to continue his job search efforts indefinitely to avoid the risk of income attribution.”



FIELDS ^{and} DENNIS_{LLP}
Attorneys at Law

**Emery v. Sturtevant,
91 Mass.App.Ct. 502 (2017) (Cont'd)**

Finding as to Reasonable Efforts to secure
employment

The House Tax Bill

HR 1, Sec. 1309

Alimony no longer tax deductible.

Applies to:

- Any divorce or separation instrument executed after 12/31/17.
- Any divorce or separation instrument executed on or before such date and modified after such date if the modification expressly provides that the amendments herein expressly apply to such modification.



CHILD SUPPORT GUIDELINES

A Review of the new guidelines eff. September 15, 2017

FIELDS^{and} DENNIS_{LLP}

Attorneys at Law

PREAMBLE (p. 2)

Commentary indicates reasoning and intent/can be used to resolve questions of interpretation or application.

Incremental cost of raising a child – Child Support is not family support.

PRINCIPLES (p. 3)

Meeting the child's survival needs in the first instance, but, to the extent either parent enjoys a higher standard of living, allowing the child to enjoy that higher standard. *(Compare to alimony standard)*

Recognizing that deviations should be used when appropriate to tailor a child support order to the unique circumstances of a particular family.

INCOME DEFINITION (pp. 3-8)

A. SOURCES OF INCOME (pp. 3-5)

10. Non Means Tested Veteran's Benefits
(p. 4)

C. SELF-EMPLOYMENT AND OTHER BUSINESS INCOME (p. 5)

Business Income to be carefully reviewed

What is the appropriate level of income available for support? This may be different than taxable income.

C. SELF-EMPLOYMENT AND OTHER BUSINESS INCOME (cont'd)

Business Deduction: Reasonable and necessary for the production of income

But not all business deductions –

Depreciation: usually not included in business expenses for support purposes

C. SELF-EMPLOYMENT AND OTHER BUSINESS INCOME (cont'd)

Retained Earnings (Undistributed Income)
(p. 7 in Commentary)

J.S. v. C.C., 454 Mass. 652, 662-63 (2009)

C. SELF-EMPLOYMENT AND OTHER BUSINESS INCOME (cont'd)

Income from real property husband received in divorce and to which wife waived all right title and interest. (p. 7 in Commentary)

Fehrm-Cappuccino v. Cappuccino, 90 Mass. App. Ct. 525 (2016)

C. SELF-EMPLOYMENT AND OTHER BUSINESS INCOME (cont'd)

Imputation of Income (p. 6)

Income may be imputed when there are actual resources available to the parent that are not reported for tax purposes.

Perks, in-kind, monies received by a parent if significant and reduces personal expenses.

C. SELF-EMPLOYMENT AND OTHER BUSINESS INCOME (cont'd)

Attribution of Income (p. 6)

The Court shall consider the age, number, needs and care of the children covered by the child support order. The Court shall also consider the specific circumstances of the parent to the extent known and presented to the Court, included but not limited to, the assets, residence, education, training, job skills, literacy, criminal record, and other employment barriers, age, health, past employment, and earnings history...as well as the parent's record of seeking work, and the availability of employment at the attributed income level, the availability of employers willing to hire the parent, and the relevant prevailing earnings level in the local community.

II. FACTORS TO BE CONSIDERED IN SETTING THE CHILD SUPPORT ORDER (p. 8)

A. RELATIONSHIP TO ALIMONY OR SEPARATE MAINTENANCE PAYMENTS (pp. 8-9)

- Courts should consider unallocated order to leverage tax advantages where appropriate --- *i.e.* higher income tax bracket payor to lower income tax bracket payor.
- Parties responsible for tax analysis.

II. FACTORS TO BE CONSIDERED IN SETTING THE CHILD SUPPORT ORDER (cont'd)

The relationship between alimony and child support remained an issue during this review as it was during the 2012 review. When assuming an alimony order, “the court shall exclude from its income calculation gross income which the court has already considered for setting a child support order.” G.L. 208, section 53(c)(2). However, the converse is not stated in the statute. (p. 14, Commentary)

II. FACTORS TO BE CONSIDERED IN SETTING THE CHILD SUPPORT ORDER (cont'd)

C. MINIMUM AND MAXIMUM LEVELS

- increased from \$18.46 to \$25.00 per week
- kept CSG applicability to combined \$250,000
- still silent on overage

II. FACTORS TO BE CONSIDERED IN SETTING THE CHILD SUPPORT ORDER (cont'd)

D. PARENTING TIME (pp. 9-10)

- Approximately $\frac{1}{3}$ – $\frac{2}{3}$
- Approximately 50/50
- If the non-custodial parent has *substantially* less than $\frac{1}{3}$ of the time with the child(ren), then the court may consider an upward deviation.

II. FACTORS TO BE CONSIDERED IN SETTING THE CHILD SUPPORT ORDER (cont'd)

E. CHILD CARE COSTS (p. 10)

Concerns:

- significant cost of child care
- 2013 CSG algorithm not sensitive enough

II. FACTORS TO BE CONSIDERED IN SETTING THE CHILD SUPPORT ORDER (cont'd)

F. CHILD SUPPORT FOR CHILDREN BETWEEN THE AGES OF 18 AND 23 (pp. 10-11)

The law. Statute – post-18 support is discretionary (G.L. c.208 s.28).

The practice.

Almost always awarded (or continued).

Not always reduced – and, if so, not consistently.

CSG 2017:

Presumptive reduction 18 or finish high school, per Table B



II. FACTORS TO BE CONSIDERED IN SETTING THE CHILD SUPPORT ORDER (cont'd)

G. CONTRIBUTION TO POST-SECONDARY EDUCATIONAL EXPENSES (p. 11)

The law. Contribution to college is NOT PRESUMPTIVE –it is subject to court discretion. (G.L. c.208 s.28). Massachusetts is radical in the sense that the judge even has the discretion to order parents to pay for college.

The problem. College costs have gone up exponentially since the statute was written in 1974 -- over 250% as adjusted for inflation.



II. FACTORS TO BE CONSIDERED IN SETTING THE CHILD SUPPORT ORDER (cont'd)

G. CONTRIBUTION TO POST-SECONDARY EDUCATIONAL EXPENSES (cont'd)

CSG 2017 – Presumption that parent's financial obligation is limited to 50% UMass Amherst
In-state resident costs, mandatory fees, tuition, room and board

DOES NOT APPLY TO:

Parents who are financially able to pay educational expenses using assets or other resources

Children already enrolled in college.

II. FACTORS TO BE CONSIDERED IN SETTING THE CHILD SUPPORT ORDER (cont'd)

H. HEALTH CARE COVERAGE (pp. 11-12)

Concerns (similar to concerns about child care):

- significant cost of health care
- 2013 CSG algorithm not sensitive enough

III. MODIFICATION (pp. 18-19)

- Inconsistency with the Child Support Guidelines, health insurance, material change in circumstances.
- Modification of order that deviated from the Child Support Guidelines.

IV. DEVIATION (pp. 19-20)

Application of the Guidelines would result in a gross disparity in the standard of living between the two households such that one household is left with an unreasonably low percentage of the combined available income.