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December 12, 2017

Hon. Paul J. McMurdie
Arizona Court of Appeals
c/o kcrestin@appeals.az.gov

Re: *Committee for an Interim Review of
the Child Support Guidelines*

Dear Judge McMurdie:

I recently saw that the Committee made its final recommendations regarding the modification of the Guidelines and that one of those recommendations remains the adoption of the *Mitton* approach for situations with Multiple Children and Different Parenting Plans. I also saw that this recommendation will be presented to the AJC on Thursday.

Because of that, I feel compelled to make another appeal to you and the Committee to avoid the adoption of what is an inequitable method of calculation.

When I provided my written and verbal comments to the Committee in October, I admittedly was not familiar with the process and I made some assumptions that I should not have. In particular, I should have provided my comments to the Committee farther in advance of the public hearing, and those comments should have been far more detailed than they were. At this point, I can at least attempt to remedy the relative lack of data I presented regarding why the *Mitton* approach should not be adopted.

I want to be very clear about my goals and intentions. My first goal is to see the *Mitton* average parenting time approach not be adopted into the Guidelines. My secondary goal is for the incremental increase approach to be adopted.

Additionally, with respect to my motivations, when I was providing my public comments, there was a remark from one of the Committee members about my ability to manipulate the calculation in order to help my client, perhaps suggesting that my involvement on this matter is biased or that I am advocating a particular method of calculation to benefit a client. First, any final formula or approach I advocate regarding the calculation for Multiple Children and Different Parenting Plans is not going to be subject to manipulation. It will set forth, in clear terms, how to accomplish a calculation under this approach. Moreover, my efforts to keep the average parenting time approach out of the Guidelines (and, yes, to have my suggested approach adopted) is not connected to any particular client. Mr. Mitton's child support fate is sealed, I

withdrew from his case, and the trial court followed *Mitton* on remand as it was mandated to do, and his child support was adjusted retroactive to the original order. Moreover, the daughter with whom he had not been exercising parenting time emancipated on October 12, 2017, leaving only the Twins subject to a child support obligation. Mr. Mitton is currently in the process of proceeding on his own to modify child support on his own and his case no longer involves Multiple Children and Different Parenting Plans.

Second, statistically speaking, I am going to be on the “other” side of the case about half of the time. If the incremental increase approach is adopted, I will be fine with outcome of a calculation under that method because the approach is not intended to favor either parent, but to provide a child support calculation that is fair to both parents. In fact, during the time *Mitton* was pending, I used this same methodology in a case in which my client was the obligee, reducing the amount of support my client would have received if we had followed the average parenting time approach.

Likewise, if the average parenting time approach is adopted, I am going to be on the “good” side of that calculation about half of the time and on the “bad” side the other half. However, regardless of what side I am representing, I will not look at the application of the *Mitton* calculation and think that it is fair – beneficial to one side and detrimental the other perhaps – but never fair.

With that said, there is nothing better than actual calculations using the *Mitton* approach to expose its shortcomings. Accordingly, I have attached a spreadsheet titled *Calculations Under Mitton Approach* that I would refer you to at this point. I created this spreadsheet subsequent to the October public comment meeting.

The spreadsheet contains calculations based on various income and parenting time scenarios for families with 2 to 6 children. The incomes used are: (1) Equal (\$5K for Mother and Father), (2) \$10K to Father and \$5K to Mother, and (3) \$25K to Father and \$10/hr. (minimum wage), which give a good representation of income scenarios. For each of the parenting time scenarios, one child lives with either Mother or Father 100% of the time, while the other child(ren) share equal time with both parents. In the last two rows of each scenario, I have also included the calculation of what child support would be if the parties had one fewer child at equal time and then calculated what the difference in support would be if one additional child at equal time were added to the calculation. The intent of the last two rows is to provide a comparison or baseline of what support would look like under a “normal” calculation, which serves to highlight the deficiencies of the *Mitton* approach.

I could add other calculations and comparisons to the spreadsheet to demonstrate the problems of the *Mitton* method, but I had to stop somewhere in the interest of time. I believe that what I have prepared provides compelling evidence, and that it should not require intense analysis to see that the *Mitton* approach should not be adopted.

I have provided a few comments in the spreadsheet itself to focus on a few issues. I could comment on every scenario in the spreadsheet because they all reveal the weakness of *Mitton*, but again, time is of the essence. The comments in the spreadsheet are located in cells M4, M6, M43, and M50.

As I stated in October, the *Mitton* average parenting time approach does not equitably apportion the Total Child Support Award between the two households. That becomes apparent when reviewing the spreadsheet calculations. This stems from the fact that the approach applies the same fictional parenting time credit to all of the children, regardless of how many parenting days they actually spend with a particular parent. This problem is exacerbated by the parenting time credit percentages set forth in the Guidelines, as they do not follow a straight line function of parenting days to parenting time credit. For example, while 50/50 parenting time equates to a 50% parenting time credit, 60/40 parenting time only provides a 30.7% credit.

The net effect of all this is that the household with the additional child has a disproportionately large allocation of the Total Child Support Obligation, while the other household is allocated a disproportionately small portion. This pattern occurs whether the additional child lives primarily with the higher wage earner or the lower wage earner. In either case, one of the households is going to suffer.

When I discussed this issue with the Committee, we focused fairly exclusively on the *Mitton* facts, wherein the Father earns about 63% of the income and Mother earns about 37%. Although I demonstrated how little support Father is left with in his household under *Mitton*, that did not seem to be an issue for the Committee. There was even one member of the Committee who remarked that because Father makes more money than Mother, he could afford to pay her the greater amount because he would still have more money to pay for support in this own household. This argument completely ignores the concept at the core of the Income Shares Model of determining the Total Child Support Award and allocating the responsibility of that Award based on the parties' respective incomes; absent a deviation, the proportionate share *is* the amount of child support to be paid by the parties and assuming that either parent will pay more because they have more – even if it exceeds their proportionate share – is contrary to the basic premise of the Guidelines themselves.

Perhaps the Committee would have felt differently about *Mitton* if I had focused on how it cuts against the poorer parent, as well.

For instance, consider one of scenarios I highlighted in the spreadsheet: 4 children, Father earns \$25,000 per month, Mother earns minimum wage (\$10 per hour). If three of the children are at equal time and the fourth child lives full time with Father, Mother would only have \$807.07 in support available in her household and Father would have \$2,382.93 available in his household. While this disparity between the parents is startling, **under *Mitton*, Mother would have less in her household for support of the 3 children at equal time than if the parties only shared custody of 1 child at equal time (\$872)!** (As a comparison, under the incremental increase method, Mother would have \$1,428.00 available in her household under this scenario, over \$600 more per month than under the *Mitton* approach. The allocation of support under this method is about 55% to Father and 45% to Mother, as opposed to approximately 75/25 under *Mitton*.) In addition, if the fourth child lives instead with Mother full time, the allocation of child support would be reversed: Father would have \$807.07 available for support in his household and Mother would have \$2,382.93. In other words, even though both households share equal parenting time with 3 children the child support, whichever household has the fourth child will end up with \$1,575.86 more in child support resources than the other household.

This type of anomalous result occurs through the Guidelines, so while I say they are “anomalous,” these types of calculations are actually typical of what is found in the application of *Mitton*.

The next scenario is: 6 children (5 equal time with both parents and 1 child that lives full time with Father), Father and Mother both earn \$5,000 per month. In this type of situation with so many children being shared equally between the parties, it would be expected that the addition of one more child full time with Father would not result in a particularly large change in support. However, that is not the case. In this situation, **Father would have \$1,807.34 in support available in his household and Mother would have \$800.66.** Therefore, Mother would have over \$1,000 less in support available in her household because Father cares for one additional child full time. (The incremental increase approach would provide Father with \$1,408.50 in his household and \$1,199.50 in Mother’s household, a 54/46 split, as opposed to a 69/31 split under *Mitton*.) Switch the 6th child from Father to Mother, and the allocation of the child support flips, with Mother having \$1,807.34 in her household and Father having \$800.66. This wide swing in support also does not make sense when considering that the difference between the total child support obligation between 5 children and 6 children is \$209.

When the parties have equal incomes (\$5,000 each), the spreadsheet does not include separate calculations for both Mother and Father having the additional child full time in the household. I have only calculated it based on Mother having the full-time child. Of course, because the parties’ incomes are the same, the calculation would be identical for Father if the full-time child lived in his household. Therefore, under the first scenario in the spreadsheet, the outcome is equally applicable to the Mother or the Father. That scenario is: 2 children, Father earns \$5,000 per month, Mother earns \$5,000 per month. If one of the children is full time with both parents and the other child is full time with Father, **Mother would have only \$270.96 in support available in her household (after paying Father \$570.54 per month) and Father would have \$1,412.04 in his household.** In comparison, if the parties only had one child and shared equal time with that child, each parent would have \$590.50 per month in their respective household for the care of the child. Therefore, adding the second child and applying *Mitton* reduces the amount of support Mother has in her household for the child with equal time with Mother by more than half ($\$590.50 - \$270.96 = \$319.54$ reduction). (In contrast, the incremental increase approach would allocate \$590.50 in support to Mother’s household and \$1,092.50 to Father’s household, a 65/35 allocation, as opposed to *Mitton*’s 84/16 allocation.)

Consider also this scenario from the spreadsheet that is similar to the facts in *Mitton*: 3 children, Father earns \$10,000 per month, Mother earns \$5,000 (approximately the same income percentages as *Mitton*). If 2 of the children are full time with both parents and the third child is full time with Father, **Mother would have only \$470.15 in support available in her household (after paying Father \$333.52 per month) and Father would have \$1,940.85 in his household.** Again, a disparity of almost \$1,500 between the households is troubling enough, but **Mother would also have \$262.85 less in support available in her household for the support of 2 children at equal time than if the parties shared equal custody of only 1 child (\$733).** (In comparison, under the incremental increase method, Mother would have \$1,041.50 available in her household under this scenario, more than double what is available under the *Mitton* approach, and Father would have \$1,369.50. The allocation of support under this method is 57% to Father and 43% to Mother, as opposed to approximately 80/20 under *Mitton*.)

I could provide more examples of the unfairness of the *Mitton* calculation from any of the scenarios in the spreadsheet. There was no need to cherry-pick from just the unfair outcomes. They all result in an unfair outcome. As I stated above, the calculation will always favor one parent, but it will never be fair.

I will assume for the sake of this note that you are willing to accept the argument that the *Mitton* approach should not be adopted into the Guidelines. If that is the case, at a minimum I would encourage you to inform the AJC that after further consideration of the *Mitton* approach and the anomalous results that would result from its adoption, the AJC should not adopt that aspect of the interim recommendations. At this point, it would be better to continue to function without specific guidance in the Guidelines for Multiple Children/Different Parenting Plan scenarios than to be stuck with *Mitton* (and continually having to argue to argue for a deviation from the Guidelines).

I would also be happy to have you endorse the incremental increase approach on Thursday, as well. However, I am a realist and recognize that adopting *Mitton* is one thing, but then adopting a completely different approach is a different animal. So, I recognize that if the incremental increase approach is to be adopted, it will not be this week.

I also recognize that you and the other judges are looking for an approach that can be applied simply. I have not closely studied this issue yet, but the retired judge I referred to in my email suggested we may be able to create another parenting time/parenting credit table that would be easily applicable to Multiple Children/Different Parenting Plan situations. Alternatively, I am confident that the Child Support Calculator can be revised to address these cases. Therefore, I would encourage you and the Committee to allow some further research on this issue, rather than move forward with *Mitton* at this time.

However, in the end, I think we need to put a premium on accuracy over expedience. While I understand that 85% of litigants are unrepresented and the simpler the approach to addressing these situations the better, I cannot accept that as an adequate justification to adopt what I – and others – consider to be a flawed methodology. Moreover, I do not believe that my proposed method of calculating child support is really any more complicated than calculating a “normal” child support obligation. If we asked unrepresented parties to apply the Guidelines to a child support calculation and did not provide them a calculator, I estimate that maybe 5% of all the calculations would be done correctly (and my 5% may be generous). On some versions specialization exam for Family Law, there has been a section for the attorney to calculate child support by hand, and even some of those attorneys taking that test have struggled. Because the Guidelines are complicated, we have developed tools to assist in the calculation of support, both web-based and via Excel spreadsheet. Therefore, those run-of-the-mill calculations seem easy, but they are only easy because they have been automated. The only reason why the incremental increase approach seems more complicated is because there is not yet a tool that can be used to apply it. But after that tool or simplified method of its application is created, calculating child support for Multiple Children/Different Parenting Plan situations will be no more difficult than a typical parenting time situation, and simplicity and accuracy will coexist.

Finally, it has been my intention since the October public meeting to address, in writing, the criticisms and comments made by the Committee members regarding the incremental

increase approach. In fact, I was going to provide those comments in this document. However, I think it best to save those explanations for another day and focus keeping the *Mitton* approach out of the Guidelines. (Believe me, as an attorney, it pains me not to provide my counterpoints to the critiques of the incremental increase approach. It may simply prove too much to bear and I'll end up sending them next week.)

I appreciate you taking the time to consider what I have presented. I hope it is of help to you. Ultimately, I know we are on the same team and we are both trying to find the best solutions to the problems before us.

Sincerely,

/s/ Glenn D. Halterman

Glenn D. Halterman

Enclosure

cc: Mr. David K. Byers

Ms. Kathy Sekardi