

RULES OF THUMB IN DIVORCE CASES AS APPLIED TO CHILD SUPPORT AND MAINTENANCE AWARDS

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Executive Summary: The genesis for this was an article originally drafted by H. Joseph Gitlin which was national in scope. It has been comprehensively updated, etc., by Gunnar J. Gitlin, while at his former firm, Gitlin & Gitlin. He has now changed this article so that it is only geared toward Illinois law. However, he has included substantial research he has done as to maintenance guidelines and included a spreadsheet from maintenance guidelines that he found from Nevada.

Heaven to a lawyer's practice is predictability. We welcomed the child support guidelines because they make awards of child support more predictable. In a family law practice various jurisdictions have guidelines that apply to other areas which are less conventional than the issue of child support (including visitation guidelines and alimony guidelines). Rules of thumb tend to lead to the speedy settlement of cases.

Over the years I have found that my practice has been nearly equally divided between representing men and representing women in matrimonial law proceedings. Since The Gitlin Law Firm practices principally in a relatively small community, Woodstock, Illinois, I find it advantageous to have a consistent settlement formula no matter whom I represent. Because of this, The Gitlin Law Firm has developed its own rules of safe harbor for settlement formulas.

If settlement of a divorce case could be predicted with certainty upon applying a simple formula to the facts of the case, there would be very little need for lawyers. The statutory formulas, however, are not so predictable of a certain result as to eliminate the need for lawyers. Clients continue to need lawyers to be advocates of their position, both in trying and in settling a case.

To best serve the client, the lawyer's settlement advice must be fair and reasonable. In viewing settlement offers in terms of the offer's fairness, settlement offers may be divided into categories: high-fair, fair-fair, fair, and low-fair. The lawyer-advocate should seek settlement for the client which is between high-fair and fair-fair.

The provisions of the Illinois Marriage and Dissolution of Marriage Act (IMDMA), itself, suggest a somewhat predictable settlement formula when § 503 (property), § 504 (maintenance), and §505 (child support) are considered. The statutory scheme is to divide property first, and then to address maintenance and child support.

Rule of Safe Harbor #1: How To Determine Child Support. The starting point for determining an appropriate amount of child support is not the statutory guideline. Instead, the attorney considering settlement first should determine the realistic budgetary needs of the two units (custodial parent and children, and noncustodial parent). This can be determined by having your client prepare a budget for himself or herself and also a projected one for the spouse.

In the usual case where the mother will have custody of the children and she is unemployed, or underemployed (only employed part-time), often she must find full-time employment if she is to adequately meet the reasonable financial needs of herself and the children. For the purposes of temporary child support, a lawyer accepts the custodian's current financial status. To determine an appropriate amount of permanent support, however, the attorney must project the income that likely will be earned by the custodian from full-time employment.

Child support schedules are usually based on the gross or net income of one or both parents. In Illinois divorce proceedings, the child support guidelines are based upon net income. Therefore, the next step is to determine the net income of each party. You should not compute net income on the basis of current paycheck stubs since in most cases the current payroll tax deductions presumes the parties will file a joint tax return. If a divorce judgment will be entered in the current calendar year

the parties cannot file a joint tax return. Usually, the noncustodial parent will file a single return, a return which usually is taxed at a substantially higher rate than a joint return. Therefore, calculate the noncustodial parent's net income on the basis of his filing a single return. In determining the net income of the custodial parent, however, assume that the custodial parent will file a "head of household" return, a return which is usually taxed at a rate comparable to a joint return.

By calculating incomes strictly on the basis of the parties' paycheck stubs, there is the danger of not considering the number of exemptions the employee is taking and of not considering the effect of itemized deductions. Some employees, as a form of forced savings or in anticipation of the divorce ("divorce planning"), take zero exemptions or one exemption for payroll purposes. Claiming zero exemptions results in a smaller net income but a substantial tax refund. In considering the paycheck stub, inquiry should be made as to how many exemptions are being claimed by the employee for the purpose of payroll deductions. Similarly, the lawyer must not ignore the fact that social security withholding may be artificially inflated in the beginning months of the year, as reflected by the pay-stubs, because the maximum amount of income subject social security tax is approximately \$84,900 (for the year 2002).

In determining net income, take into account the dependent exemptions claimed by parties who have children. Project which party will claim the children as exemptions, or how the exemptions will be divided, in final settlement. Use that projection to calculate net income. Examine the itemized deductions shown on the parties' previous tax returns to determine who may claim these deductions after the divorce. Usually the largest deductions are interest and real estate taxes paid on the marital residence and state taxes. If it appears that the settlement will give the marital residence to one of the parties, then give those income tax deductions to that party in calculating the party's net income. If the marital residence is to be sold and the other itemized deductions are not significant, give each of the parties the standard deduction (\$4,700 on a single return and \$6,900 on a head of household return) in calculating net incomes. (This is the reason you should not suggest to your client to purchase a new residence during a divorce. Remember, purchasing a new residence will increase the child support payor's net income because of the effect of itemized deductions.)

Determine the net income of the parties by using the income tax returns. To determine the parties' true net incomes examine and analyze deductions on the returns. For example a tax return may show a deduction for depreciation of real estate. While this is a legitimate tax deduction it does not represent money out of pocket and should be added back into the parties' net income in making net income calculations depreciation allowance.

Other items of hidden income which are not revealed by the tax returns can be revealed through the lawyer's client or through discovery. Examine significant employment perks, e.g., the use of a business car, a country club membership, etc. to see if they have an actual cash value. Creative arguments might also be made that perks such as employer provided life insurance are of actual cash value to the employee since these items would cost a substantial amount of money if the premiums came out of the pocket of the employee. With the stock market down for an extended time period, more employers are foregoing offers of stock options. Instead, more employers are offering perks such as company cars, etc., to attract executive employees.

I believe it is important to be able to calculate child support manually. For years I did child support calculations using a spreadsheet I had developed. In the materials I have enclosed a net income calculation worksheet. Now, in each case I do net income calculations using FinPlan. The advantage of using such a program is that it is more accurate. Moreover, more and more judges are beginning to take FinPlan calculations as the gospel. Keep in mind, however, that a FinPlan analysis is only as good as the figures that are used to input.

The next step is to apply the statutory percentage support guidelines. The minimum support guidelines have become more than guidelines. They have become virtually the rule. The areas where there can be creativity in terms of support issues are: 1) the division of child care expenses; 2) the allocation of the children as dependent exemptions; 3) the allocation of non-covered health expenses; and 4) the allocation of expenses such as extra-curricular expenses, expenses for private school.

Rule of Safe Harbor #2a: Deduct Percentage Points from Guidelines for Dual Income Families: A problem in reference to the minimum support guidelines of many states' guidelines, such as the Illinois guidelines, is that they do not consider the dual income family. This is unfortunate, because dual income families are the rule rather than the exception. Proponents of the income sharing formula as adopted in many states' child support guidelines, argue that the approach equalizes the burden of the household separating and allows the children to benefit proportionally from the total resources available to both parents.

The dual income formulas, however, are usually complex. In fact, the California dual income statute was one of the leading statutes making a market for computer software for the computation of child support. My own rule of safe harbor in calculating child support for dual income families is to deduct anywhere from two to five (usually two to three) percentage points from the statutory guidelines if the custodial parent has a significant income. The advantage of this rule of safe harbor is simplicity. Further I have found that it comes close to the same result reached by using the more complex dual income formulas.

Rule of Safe Harbor #2b: Split Custody — Apply Guidelines to Child(ren) in Each Party's Possession: Unfortunately, the support guidelines were not designed for cases in which custody of the children is split between the parties. My rule of thumb in cases in which custody of the children is divided between the parties is to apply the support guidelines to each parent's net income.

A quote from *Slagel v. Wessels*, 314 Ill.App.3d 330, 247 Ill.Dec. 765, 732 N.E.2d 720 (4th Dist. 2000), addressed the split custody issue:

The guidelines are a useful method of insuring that child support is set in an amount that is reasonable and necessary. Section 505, however, does not provide comprehensive rules for every conceivable situation. It is recognized that there are times when it will be improper for the trial court to apply the guidelines. For example, in "split custody" cases, where each parent is the custodian of at least one of the parties' children, section 505's guidelines are not necessarily applicable. *In re Marriage of Demattia*, 302 Ill.App.3d 390, 393, 706 N.E.2d 67, 69 (1999). [GDR 99-22].

IRMO Steadman, 283 Ill.App.3d 703, 219 Ill.Dec. 258, 670 N.E.2d 1146 (3d Dist. 1996) held that where custody of children is divided between the husband and wife, the statutory guidelines do not apply and the trial court in such circumstances need not make specific findings of the reasons for its deviation from the guidelines. *Steadman* ruled, "When parties to a dissolution of marriage settlement agreement, as in the instant action, agree to divide the custody of their children, there are no specific guidelines to follow."

The Illinois case to follow my rule of thumb is in split custody cases is *IRMO Seymour*, 206 Ill.App.3d 506, 152 Ill.Dec. 27, 565 N.E.2d 269 (2nd Dist. 1990). The trial court decision in this case was by judge Hutchinson (now Justice Hutchinson). During the time I practiced in front of her, I found her to be an outstanding trial judge. She wrote a 20 page memo of opinion in the *Seymour* case. I follow the rule of thumb per the *Seymour* rather than a more arbitrary rule of thumb used in *IRMO Flemming* (143 Ill.App.3d 592, 493 N.E.2d 666 (1986)). In *Flemming* the appellate court affirmed the trial court's approach of ordering the father to pay half the guideline amount for two children when custody of the children was split. The father was ordered to pay support of 12.5% of his net income. In my comment to a *Gitlin on Divorce Report* of a later decision which involved the topic of support in split custody cases, *IRMO White*, 204 Ill.App.3d 579, 149 Ill.Dec. 691, 561 N.E.2d 1387 (4th Dist. 1990), I stated:

The formula that was approved by the appellate court in *Flemming* would not consider the net income of the mother. It is suggested that an equitable rule of thumb in divided custody situations would be to first determine the child support obligation of each party according to the guidelines and then offset the lesser obligation against the greater. If so, Mr. White would be required to pay \$328 child support to the mother [rather than the amount he was ordered to pay — \$580 per month.

Rule of Safe Harbor #3: Maintenance Should be Calculated Based on "Lifestyle" Amounts. While there are guidelines in child support cases, few states have guidelines relating to alimony awards. There are temporary support guidelines in several states including Arkansas, Colorado, New Mexico, Pennsylvania. Additionally, there are maintenance guidelines in Santa Clara, California which are considered in other areas of the state. There are also guidelines in Washtenaw County Michigan, Johnson County, Kansas, Maricopa County, Arizona and Fairfax County, Virginia. Finally, Nevada has comprehensive maintenance guidelines. [note](#)

Although Section 504 of the Illinois Marriage and Dissolution of Marriage Act does not prescribe minimum guidelines for maintenance, maintenance per the lifestyle of the parties can be calculated. The calculation is more difficult, however, where there is also an award of child support.

Determining, on a statutory basis, whether a spouse is entitled to maintenance is relatively simple. Although no special attention is drawn to this factor in the statute, as a matter of fact, the length of the marriage is usually the single most important factor considered by the court in making a maintenance determination.

The first statutory factor in determining qualification for maintenance is whether the spouse has sufficient property to provide for her reasonable needs. For example, in a case in which I was recently involved, there were no financially dependent children. We determined that the lifestyle needs (see discussion below) of the spouses were \$28,000 each per year. We projected that the wife, by investing the liquid assets from the distribution of assets conservatively, could generate an income of \$35,000 per year. The property award, therefore, was sufficient to meet her reasonable needs, and give her a surplus income to reinvest and thus an award of maintenance would not have been appropriate. (In this case the division of marital property was tipped in the wife's favor.)

My rule of safe harbor focuses on the sixth factor set forth in the IMDMA — the standard of living established during the marriage, i.e., the economic lifestyle of the parties during the marriage.

The first step in the maintenance formula is to determine the parties' **gross** incomes per their most recent tax returns. The returns should indicate the incomes of both parties. If the parties have been separated for a substantial length of time, their lifestyle should be determined by looking to the tax returns for the time they most recently lived together. You should not use the tax returns for the purpose of determining net income, however. This is because the lifestyle amount is an optimal amount.

Instead of using the tax returns, I determine the net income using the gross income for the appropriate period (or using an income averaging approach). Then, determine the net income. Such a calculation is necessary because the first calculation most likely was based upon the parties filing a joint income tax return. Following the divorce, however, the parties no longer may file a joint return, but instead a party will file either a single return, or a head of household return. Because the tax owed on a single return is usually substantially higher than that owed for the same income on a joint return, the net income of a party following a divorce may be significantly less than that received during the marriage. In the likely event the projected combined net incomes of the parties is less than their combined net incomes as shown by their most recent tax returns, the projected combined net incomes is divided by two and the resulting sum is assumed to be the measure of each party's economic lifestyle during the marriage.

If there are no financially dependent children the amount of maintenance can be readily calculated. For example, if the total family net income, as shown per the parties' tax return is \$120,000, I would assume that the lifestyle needs of each party during the marriage required the expenditure of \$60,000. Of course, I realize my assumption does not account for the fact that two in one household can live more cheaply than two in separate households, but as a rule of safe harbor in determining the lifestyle this assumption is adequate and practical.

However, if there are children, deduct the amount presumed to be for the children. I will usually determine this amount from the child support guidelines. It will also include amounts spent for college. Assume for purposes of illustration that the total family net income properly calculated is \$120,000.

This amount resulted from husband's net income of \$100,000 and wife's net income of \$20,000. After deducting amounts spent on the children in the amount of \$20,000 (based on the support guidelines for one child in a hypothetical case), the total lifestyle of the parties is \$100,000. Half this amount is \$50,000 (to be spent on each party). Next, determine the projected income from the recipient. Often, this will increase post-divorce based upon new employment, etc. Also, this amount may increase based upon assets allocated to the recipient which are income producing. Assume a rate of return on assets subject to investment at a market rate of interest. Then the post-divorce income of the recipient from the figure which represents half the total lifestyle. In this hypothetical situation, the wife would have to receive \$30,000 maintenance to put her at the lifestyle established during the marriage. In addition, an adjustment should be made to the amount of maintenance on account of the taxability of the maintenance payments to the recipient and the deductibility of the maintenance payments by the payor.

Keep in mind, however, that the lifestyle figure is one which is generally an optimal figure, that is, a figure which applies in long term marriage cases. If you are looking for a maintenance formula that may be fair in a given case, see my attachment regarding the Nevada formula. I found the formula gave slightly too little weight to the length of the marriage. The key factors in the Nevada formula are somewhat similar to the factors I found as significant in my spreadsheet as to significant statistics in reported maintenance cases. They are:

- The years of the marriage;
- Whether support is being paid (there is a deduction for payment of support);
- The education of the recipient (less than graduate school).
- The income differential;
- Any disability or work impairment of the recipient including whether the recipient is staying at home to care for young children.
- The age of the recipient (over age 30).

Rule of Safe Harbor #3.A.: Length of Maintenance Measured by Time Required for Spouse to be Rehabilitated. Calculating the length of the maintenance payments does not lend itself to any easy formula. If it can be reasonably and fairly accurately predicted that the maintenance recipient will within a certain time, through employment, be brought up to the lifestyle amount, the maintenance should be for that length of time and then terminated.

If it is uncertain that the maintenance receiving spouse will be financially rehabilitated at any fixed point the trend in Illinois is to set maintenance for review by the court at a certain date in the future. A reading of appellate court opinions indicates that the most popular time for review is five years after the maintenance is awarded.

If the maintenance receiving spouse will not be employed, or will not be employed full-time, because of health problems, age, or lack of employment skills, maintenance should be permanent.

Rule of Safe Harbor #4.: Consider Income Tax Consequences of a Maintenance Award. Take the example where the husband is a high wage earner and therefore in an effective 35% tax category, whereas the wife's income is such that she is in the second to lowest tax category, 15%. The income tax savings to both parties by paying the wife maintenance, is 20% (35% less 15%). Assume that this 20% results in a tax savings to the husband of \$15,000. In negotiations it might be urged, in behalf of

the wife, that the \$15,000 tax savings should be shared by the parties, rather than going exclusively to the husband. The same scenario applies to considering whether to propose an award of unallocated child support and maintenance. I call the difference between the brackets "bracket arbitrage."

Rule of Safe Harbor #5: Lump Sum Maintenance Payment Should be Discounted for Present Cash Value.

Assume it has been agreed that the wife should have maintenance which nets her of \$1000 per month for three years. Over the three years the payments should total \$36,000.

Subsequently, however, the parties further agree that the maintenance will be paid to the wife in a lump sum at the time the judgment of dissolution of marriage is entered. In representing the maintenance payor, the lump sum payment should be discounted from \$36,000 to a lesser sum on account of the greater value of a present cash payment as opposed to the lesser value of payments in the same total amount spread over three years time. A discount for a present cash payment is the application of the saying that "A bird in hand is worth two in the bush". In understanding the rationale for discounting for a present cash payment, you should keep in mind that the recipient of the \$36,000 lump sum can invest the money immediately and earn interest on the investment over the three year period. If invested at 9% the profit would be almost \$10,000.

In determining the amount of the lump sum, keep in mind that the total amount of the maintenance payments does not accurately indicate either the net amount received or the out-of-pocket expense. Because the recipient of maintenance pays taxes on the maintenance she receives, she nets less than the face amount. Similarly the payor of maintenance can deduct the maintenance payments for income tax purposes. Consequently the actual out-of-pocket expense to the payor is less than the face amount. Also note that in virtually every case the out-of-pocket expense to the payor will be less than the net amount received. For example, it likely would cost the payor only \$2,600 to provide the recipient with \$3,000 net. Thus, the parties should negotiate as to whether lump sum is based upon the net to the recipient, the out-of-pocket expense to the payor, or some middle ground.

The present value of payments over time can be readily calculated using a business-type pocket calculator. I previously used a HP 12-C calculator which was a financial calculator using reverse polish logic. Now I use a present value calculator that I downloaded by my version of a PalmPilot — a "Treo." The present value calculation requires the setting of a discount rate, that is the rate of interest which likely would be earned by the investment. For the sake of uniformity, I use a conservative interest rate -- the long term (20 year) U.S. Treasury Coupon Bond Yield.

Rule of Safe Harbor #6.: Maintenance Where There is also Child Support. Under these circumstances the calculation of the amount of maintenance is more complex since in fixing the lifestyle amount for maintenance, a determination first must be made as to the portion of the parties' income which was actually spent, and will be spent, for the children.

In a contested trial when proofs are presented as to the financial needs of the children experience demonstrates that it is virtually impossible to come to a fair apportionment of the children's part of such expenses as housing, purchase of automobiles, etc. Case law has rejected a per capita division of such expenses, especially in reference to an owned residence, since the children are not entitled to share in the equity build up of the asset. The formula for determining the expenses of the children, of necessity, must be somewhat arbitrary.

If there are dual incomes and the incomes are nearly equal, or the lesser income is nevertheless significant, a workable formula is to apply the statutory percentage figure for the support of the children to the total net incomes of both parties and assume that the resultant figure represents expenditures for the children.

If the income of the custodial parent is not significant, in most instances the amount of child support suggested by the statutory minimum guidelines does not fully meet the child's support needs. An arbitrary formula is to multiply the statutory child support by one-third (on perhaps a higher percentage) to determine the expenditures which will be made for the children. Thus, for example, if child support is set at \$100 per week, the assumption is that it takes \$133 to actually support the child.

Where there is child support and there also is to be maintenance, the next step in the formula is to deduct from the total net incomes of the parties the amount which has been calculated to represent the expenditures for the children. The remaining sum is then divided by two to determine the lifestyles of the parties. Next the projected net income of the maintenance recipient, if any, is deducted from half of the lifestyle amount to determine the amount of the maintenance obligation.

Rule of Safe Harbor #7.: Total Support and Maintenance Obligation Should Not be More Than 50% of Net Income. The child support guidelines of Sec. 505 stop at 50% of net income. This is for six or more children. The fact is that most judges and lawyers, even before statutory child support guidelines were passed, would seldom obligate a party to pay more than 50% of net income for support, whether it was for straight child support, child support and maintenance, or the award included the college education expenses of the children. There is a good reason for this rule of safe harbor. Despite the fact that the recipient may well need more than 50% of the obligor's net income to maintain her or himself, and the children, the fact is that going over 50% usually causes more problems than it solves. A support obligor who feels totally financially strapped loses motivation to be financially productive and thus may become substantially in arrears in the obligation, or may simply drop out of sight.

Calculations based on lifestyle amounts are the ideal and follow the statutory prescription. Reality, however, may be another thing. Reality is what the other side will accept, or what the judge will order. Experience, therefore, suggests an additional rule of safe harbor: unless there are more than three financially dependent children (and this includes college expenses) the combined child support and maintenance should not be more than 45% of the obligor's net income. My other rule of thumb is that unless there are more than four financially dependent children, child support and maintenance should not be more than 50% of the payor's net income. My rule of thumb is that in no event should child support and maintenance be more than 55% of the payor's net income. These rules of thumb are also somewhat consistent with the Federal statutory scheme as to orders for withholding. Keep in mind that the Federal Consumer Protection Act comes into play as regarding orders or notices to withhold income for support. Under Federal law the maximum amount permitted to be withheld is 50% of a figure they refer to as the "aggregate disposable weekly income" if the payor is not supporting other dependents. It is 60% if the payor is supporting other dependents. According to my rule of thumb, the total expenses paid including expenses such as child care should not exceed 60% of the payor's net income — even in cases with very large families.

While a practical support ceiling of the obligor's net income is a good rule of safe harbor, there are legitimate exceptions to it. In a Second Appellate District case the court of appeals affirmed an award amounting to approximately 65% of net income to the wife and children, plus approximately 70% of

the parties' marital property. From a reading of the opinion it seems like a fair, although generous, award. *IRMO Hanson*, 170 Ill.App.3d 298, 120 Ill.Dec. 665, 524 N.E.2d 695 (2d Dist. 1988), *Gitlin on Divorce Reports*, No. 88-51. It is noteworthy that in my review of reported appellate court decisions involving significant property and maintenance awards, there was only one case in which the percentage of support and maintenance was significant in excess of 50%. In that case, under-reporting of income was suspected.

Rule of Safe Harbor #8.: College Education. Because of the escalating costs of college education it is unwise to fix the college education obligation in terms of specific dollars. This may be true even when the child is about to enter college.

Especially when children are young at the time of the divorce, a good rule of safe harbor is to select a certain school as a standard for determining the parental financial obligation for college expenses. Thus, for example, the parents may decide at this time that the University of Illinois, Champaign-Urbana campus, would be affordable to them. Their agreement might therefore provide that the parental obligation for college education, no matter in what proportions it is shared, will not exceed the educational costs of a certain school at the time a child enters college. In this formula the University of Illinois is not being preselected as the school the child will attend; instead, the naming of a particular school as a financial standard merely limits the parental financial obligation for educational costs to those being charged at a certain school.

Another rule of thumb regarding payment of college expenses is that a child should be responsible for some portion of his or her educational expenses. This portion generally ranges between 15% and 25%. The child's portion can be met by obtaining loans for which the child would be responsible.

A further rule of thumb I use is to reserve the issue except in two circumstances: 1) the prospective payor is a very high wage earning and there is a clear ability to pay; 2) the child or children are within a year (or perhaps two) of college. Generally, there are simply too many circumstances which can change in the intervening years. Keep in mind that you can reserve the issue generally as to the percentage allocation while setting forth certain constraints — a benchmark school, maintaining certain grades, etc.

Rule of Safe Harbor #9.: Health Care Expenses. The clause most frequently seen in marital settlement agreements addressing the health care expenses of the children has the custodial parent paying for all of the children's "ordinary" health care expenses and requiring the non-custodial parent to pay all "extraordinary" health care expenses and to carry health insurance. While this type of provision is easy to draft, it leads to arguments as to what are ordinary and extraordinary expenses. The formula which should be followed in addressing health care expenses should be specifically tailored to the coverage of the health insurance policy.

Rule of Safe Harbor #10.: Health and College Education Expenses in Ratio to Gross Incomes. In terms of dollars, health care expenses and college education expenses may turn out to be high ticket items and therefore should be shared by the parties in accordance with their ability to contribute. For example health insurance coverage may pay only 80% of the cost of a certain health care expense, but the remaining 20% may amount to thousands of dollars. A further example is the fact that many policies of health insurance have a certain lifetime dollar limit for psychiatric treatment, e.g., \$50,000.

If the lifetime limitation is exhausted, the remaining balance for the psychiatric treatment could be substantial. Such extraordinary expenses should be shared by the parties.

An easy and apparently fair way to apportion these expenses between the parties might be in ratio to their net incomes. The problem with such a formula is adequately defining net income as there can be a great deal of fudging when tax calculating net income from gross income. For example deductions for depreciation, depletion allowances, other tax shelters, etc. may not actually represent money out of pocket, but they reduce, on paper, one's net income. For this reason my formula is to share such extraordinary expenses in reference to the gross incomes, or adjusted gross incomes, of the parties as is shown on their respective tax returns in the year the extraordinary expense is incurred.

The problem with the above formula, however, is that one of the spouses (and usually because of a fortunate remarriage) may become unemployed, or underemployed. To anticipate this possibility the marital settlement agreement should provide that if there is an extraordinary expense (e.g. college or health care) which is to be shared by the parties, and one of the spouses is not employed full-time, or a certain minimum hours per week, then the unemployed, or underemployed, spouse would be liable for the extraordinary expense in accordance with his or her gross income as of the last year of full-time employment. The above, however, would not apply in the event of involuntary loss of employment, such as involuntary discharge from employment, unemployment because of ill health, etc. It would apply, however, if the unemployment were on account of remarriage, or having a child.

If the parents are to share in the children's college education expenses, the above formulas as to gross incomes and voluntary unemployment can be applied.

CONCLUSION: Rules of safe harbor and settlement formulas prove helpful to attorneys in settling cases because the widespread use of such guides leads to fairly predictable results. The concern with rules of safe harbor, and most settlement formulas, including the child support guidelines, is their arbitrariness, as such guides by necessity must lend themselves to application to a wide spectrum of cases. Consequently, if a particular case, or some facet of it, has unusual underlying facts, or exceptional circumstances, the rule of safe harbor, or formula, may not lead to a fair result. The best settlements result from a careful investigation of the facts and the application of creativity to unique circumstances. Given their limitations, rules of safe harbor nevertheless often give the attorney a starting point from which to begin worthwhile settlement negotiations.

* While at Gitlin & Gitlin, we first used the term "rule of thumb" for the original article. In updating the article, we had opted for the use of the term "rule of safe harbor" believing the term was more politically sensitive. This came from our mistaken belief that the derivation was based on an English common law rule that a man could discipline his wife by striking her with a stick, but the stick could be no thicker than his thumb. My research indicates that the term comes from the use of the thumb for rough measurements and that it is a myth that the term comes from a so called common law "rule of thumb."

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