

Child Support Guidelines Glitch

Floridom has had many inquiries in the last few months complaining that in some cases the customary formula for child support under section 61.30, F.S. comes out less than the substantial shared residence formula under section 61.30(11)b for guidelines amounts. They complain that as they give their clients more overnights, increasing from 72 to 73 (or even as high as 90 in some cases) overnights, the child support amount increases rather than decreases.

This issue has been referred to me for explanation and comes from me personally.

PLEASE NOTE: This problem is in the CHILD SUPPORT GUIDELINES STATUTE AND NOT THE SOFTWARE.

The problem that you might have experienced seems to occur when 2 situations occur:

1. One party has significantly more income than the other (usually one party is low or no income and the other \$4,000 or more).
2. The overnights are between 73 and 90 overnights.

In cases like this, it is not unusual now that the child support number is higher under the shared residence method of calculation than under the customary method. The statute mandates that 61.30(11)b must be used for the calculation once you go past 72 overnights with both parents. It seems unfair and irrational that a parent would have their child support payment to the other parent increased by spending more time with their children.

We have been teaching about this problem in the new guidelines, in our trainings and seminars since July, 2011. Many of these webinars are on line at www.floridom.com and can be downloaded. The upcoming "Alimony is Changing Again 7/1/11" webinar has a section at the end that discusses this issue as well.

There are 3 ways that I have approached this issue in my cases that I suggest to you:

1. I have my client waive the use of the deviation statute and use the lower amount.
2. I take the position that the statute (61.30(11)b, as applied to this situation, is unconstitutional as a violation of due process and equal protection, and the remedy is to apply the lower amount regardless of the number of overnights. I argue that it is irrational for a parent to be required to pay more child support in order to spend more time with a child.

Section 61.13 (2) c. 1 provides that it is the public policy of this state that each minor child has frequent and continuing contact with both parents after the parents separate or the marriage of the parties is dissolved and to encourage parents to share the rights and responsibilities, and joys, of childrearing. The right to custody of a child is a fundamental right as established by the U.S. Supreme Court. The test for determining whether a statute violates substantive due process is whether "it bears a reasonable relationship to a permissive legislative objective and is not discriminatory, arbitrary, or oppressive." [*Ilkanic v. City of Fort Lauderdale*, 705 So.2d 1371, 1372 \(Fla.1998\) \(citing *Lite v. State*, 617 So.2d 1058 \(Fla. 1993\)\)](#). Substantive due process challenges are usually analyzed under the rational basis test. See [*Gardens Country Club, Inc. v. Palm Beach County*, 712 So.2d 398, 404 \(Fla. 4th DCA 1998\)](#). But where a fundamental right such as custody of a child is involved strict scrutiny may apply here.

Even using the lower standard there is no rational basis as to why a parent should have to pay a higher amount of child support in order to have more time with their child. This provision is discriminatory, arbitrary, and oppressive.

3. Another position is that the lower calculation is a basis for deviating from 61.30(11) guidelines under the any other reason deviation provision of 61.30(11)a.

I advised the Family Law Section that this was going to be a problem 5 years ago when the change was proposed and a provision for this was put into a bill, but later was eliminated when the bill did not pass that year. In the quick times of legislative debates it never got dealt with in later year drafts.

I want to make it clear that I am not blaming this problem on the family law section in any way. The bill that brought this change into the law was NOT a Family Law Section Bill. It was a committee bill which was not based upon the Section's proposed child support legislation from the prior year. The bill that passed did not even look remotely like what the legislature initially put forth. It morphed significantly during the session in both good and bad ways.

The Family Law Section was able to tack some of the Section's child support proposals onto the bill, but even then some of these concepts were eviscerated or altered. The cliff at 20% was believed to be a bad idea by the Family Law Section and the Section made this clear to the sponsors and others, but they were not willing to accept our input on this. The bill was going to be passed without the section's support.

When the bill passed with this in it last year, I again advised of the problem but the problem has not been fixed. I agree it needs to be attended to. A parent should not be penalized for spending more time with a child. I am confident that the section will have this item on its legislative agenda this year.