Testimony in Support of Senate Bill 125
Presented by Eric Johnson, Esq.

Before the Senate Judiciary Committee
October 17, 2016

Proposal to Adopt Changes in Child Support laws

Chairman Bacon, Vice Chair Dolan, Ranking Member Thomas, and members of the Senate Judiciary Committee:

Thank you for allowing me to present proponent testimony in favor of Senate Bill 125. I am Eric W. Johnson, OSBA Certified Specialist in Family Relations Law, Vice Chair of the OSBA Family Law Committee, and member of the 2013 and 2017 Child Support Guidelines Advisory Councils. I have maintained in good standing my license to practice law in the State of Ohio since 1995 and have practiced almost exclusively in the field of family law since 2004. I submit this testimony in support of S.B. 125 as a practicing family law attorney in Columbus.

As you are by now aware, Ohio's child support laws have not changed significantly in over a quarter of a century. The basis upon which Ohio's current child support laws are structured is significantly flawed, the figures supporting that flawed methodology are hopelessly outdated, and the collection of actual support money for Ohio's neediest families languishes at an appallingly unacceptable low. Change is long overdue.

While this bill has engendered much thoughtful discussion on a variety of topics, please allow me a few moments to offer some thoughts regarding the issues I believe will most affect the private domestic relations bar.

Parenting Time Adjustment

Perhaps the greatest issues concerning the private bar and the judiciary are two proposals to adjust the child support obligation for the obligor parent when that parent is exercising parenting time with the child or children who are subject to the order. This is reflected in the proposed additions of R.C. §3119.051(A) and R.C. §3119.231.

- The proposed addition of R.C. §3119.051(A) would provide for an automatic 10% downward deviation in child support where "a court has issued or is issuing a court-ordered parenting time order that equals or exceeds ninety overnights per year."

  The rationale behind this is the pervasive belief, among both practitioners and courts, that the current support guidelines have a "built-in" adjustment for parenting time. This has never been the case. In the vast majority of cases, a court will calculate guideline support and issue a child support order in accordance with the guideline worksheet, regardless of whether the obligor parent has been awarded parenting time with the children subject to the order. And while courts can deviate from "guideline support" for various reasons, including "extended" parenting time (*i.e.*, parenting time in excess of a court's standard

parenting time order), surveys taken of representative Ohio county courts and Child Support Enforcement agencies show a sporadic application of deviations to child support orders due to extended parenting time orders (or any other reasons, for that matter).

The current guidelines do not recognize certain costs of raising a child travel with that child. Instead, all of the combined support obligation for a child is shifted into the obligee's household, leaving the obligor to not only pay the support order, but additionally pay for the child's expenses when exercising parenting time. This is a fundamental error, making it more difficult for many obligor parents to meet their obligations and, in some instances, discouraging (or even preventing) the otherwise interested and involved parent from exercising all parenting time to which he or she is entitled.

The reasoning for the 10% approximation for the support adjustment has been adequately addressed in other written and oral testimony before you, as has the explanation for the determination of the ninety (90) overnight threshold before the adjustment kicks in. As importantly, however, it should be noted this threshold will not encourage litigation, as I am unaware of any court whose "standard" parenting time order or orders provide for fewer than 90 overnights of parenting time.

A concern has arisen regarding R.C. §3119.051(B) and the proposal that, "[a]t the request of the obligee, a court may eliminate a previously granted adjustment established under division (A) of this section if the obligor, without just cause, has failed to exercise court-ordered parenting time." This concern has been couched as a due process argument that support obligors will have the 10% adjustment removed by the court simply upon an allegation by the obligee that the 90-day threshold is no longer being met. This concern is unwarranted. A court or party invokes the continuing jurisdiction of a court to modify its child support orders pursuant to Civ.R. 75(J), which provides, in relevant part, "The continuing jurisdiction of the court shall be invoked by motion filed in the original action, notice of which shall be served in the manner provided for the service of process under Civ. R. 4 to 4.6." Thus, the support obligor must be notified and given the opportunity to participate in any proceedings to remove this 10% adjustment.[1]

- Of greater concern to the bar (and, it seems, the judiciary), is the language in S.B. 125 regarding what would be termed "extended parenting time," or, as it has been judicially-defined, parenting time in excess of a court's standard order. Quite often, the argument opposing this provision is couched in the catchy phrase, "trading dollars for days." While such a practice would rightfully be frustrating to practitioners and judges alike, S.B. 125 as currently written does not encourage such an offensive concept.

  R.C. §3119.231 as proposed would require a court to issue findings of fact whenever a "substantial" deviation (beyond the 10% provided by proposed R.C. §3119.051(A)) is not granted. This differs greatly from the initial draft of this legislation as set forth in last session's S.B. 262. That bill <u>mandated</u> the court grant a "substantial" deviation or issue

[1] To be fair to other criticism of proposed R.C. §3119.051(B), the reference to the failure "to exercise court-ordered parenting time" should likely be simply changed to the failure "to exercise court-ordered parenting time <u>that equals or exceeds ninety overnights per year</u>."

findings of fact if it did not, essentially creating a three-tiered system whereby (1) no deviation was automatically granted for parenting time of less than a court's standard order, (2) a 10% deviation was granted when parenting time was ordered between the court's standard order and forty percent (40%) of the overnights, and (3) a substantial deviation was mandatory for parenting time orders exceeding 40% of the overnights. (The court continued to retain *discretion* to deviate from guideline support in scenarios (1) and (2).) S.B. 262's proposed deviation structure did indeed create a true "dollars for days" concern, at least at the 40% overnight "cliff," and was rightly criticized by Ohio's judges and family law practitioners alike.

S.B. 125 recognizes the flaws of its predecessor and eliminates the expected battle to obtain a magical number of overnights, a battle that would often have been motivated on one side, the other, or both by anything but the best interests of the affected children. Instead, proposed R.C. §3119.231 provides, "If court-ordered parenting time is equal to or exceeds one hundred forty-seven overnights per year, the court shall consider a substantial deviation. If the court does not grant a substantial deviation from that amount, it shall specify in the order the facts that are the basis for the court's decision."

This language requires only that a court "consider" a substantial[2] deviation in child support when a parent will be exercising approximately 40% of the overnights with the children. It does not require a deviation or impose on a court's discretion to deny an additional deviation. A court may fairly determine a further deviation is not in the best interests of the children. The proposed language merely requires a court to explain, to the highly-involved and interested parent, why a deviation is inappropriate even where that parent is exercising substantial, quality parenting time with the children.

What would a fight over 145 overnights versus 150 overnights get you? At best, only an explanation regarding why an additional child support deviation is not appropriate. And remember a court, pursuant to existing R.C. §3119.22, always retains the discretion to grant a deviation under any circumstances and according to any of the sixteen factors enumerated in R.C. §3119.23, including the amount of extended parenting time. A parent has the same exact rights to argue for, and the court has the same exact obligation to consider, a deviation whether or not that parent is exercising parenting time of 147 nights or greater.

Increase in the Basic Child Support Schedule

This committee has been repeatedly reminded the child support guidelines have not been updated in over a quarter of a century. The antiquated support schedule (the "table") contained in current R.C. §3119.021 is not only based on inaccurate data pertaining to the cost of raising children and contemplates an unworkable self-support reserve, its cap of combined household income at $150,000 is no longer manageable considering 2017 incomes.

[2] As others have pointed out, the term "substantial" is undefined, opening the door for further conflict and perhaps requiring the development of a judicially-created meaning that would occur over the course of a few years and appellate court cases. I would simply propose this term be changed to require consideration of an "additional" deviation.

Currently, if the parents' combined incomes exceed $150,000 per year, the court or child support enforcement agency must determine the obligor's support obligation on a case-by-case basis. Though the amount of support ordered shall not be less than that imposed by the guidelines (absent a finding supporting a downward deviation), the court or agency is provided little guidance in setting a support order other than to "consider the needs and the standard of living of the children who are the subject of the child support order and of the parents." As you might imagine, this creates a substantial disparity in orders across the state that are based on very similar fact patterns.

Few of us need further information than provided by our memories to know times were quite different back when the current support table was created. A combined household income of $150,000 was substantial and generally anomalous back then. That is not so much the case now. According to figures provided by the U.S. Census, median incomes for Ohio families in 1989 were as follows:

Married-couple with children:

- Including earnings of wives:[3] $50,613
- Excluding earnings of wives: $38,124

Male householder with children, no spouse: $34,646
Female householder with children, no spouse: $17,651

By 2016, those figures had significantly increased. Median incomes for similar Ohio households last year were:

Family households:

- Married-couple: $87,057

Female householder, no husband present: $41,027
Male householder, no wife present $58,051

These figures show the median income for Ohio families with married parents increased approximately 48% in the years since the child support table was last published. Figures for single-mother and single-father households increased approximately 132% and 68%, respectively. Yet our flawed and inaccurate table has not budged during this time. No longer can a combined family income of $150,000 or more be considered unusual in light of these increases in earnings. In 1989, that cap represented almost three times the median income of a married, two-parent family. Now it is merely 1.7 times that income amount.

Nevertheless, Ohio's courts and agencies are forced to "wing it" when it comes to setting support amounts for combined incomes of more than $150,000. This often results in a default to ordering support as calculated by the child support worksheet—thus perhaps providing less support than necessary—or causes substantial disparity and unpredictability in orders that are currently created

[3] The Census Bureau's term, not mine. Did I mention times were different back then? (All terms used are those provided by the Bureau.)

on a case-by-case basis across the eighty-eight courts and agencies in Ohio. S.B. 125 addresses this issue, providing more appropriate and predictable support orders throughout the state.

Conclusion

Thank you for permitting me to offer this written testimony in support of S.B. 125. Passage of this bill will create long-overdue changes to Ohio's child support system, allowing for increased collection of support orders, more manageable (and therefore collectible) payments for low-income obligors, correction of the flawed figures and calculations that have been in place for decades, greater accuracy and predictability in child support orders, and increased recognition of an obligor parent's true role in parenting. As such, I encourage this Committee to act favorably upon this bill.

Regrettably, other obligations will prohibit me from appearing in person to offer additional oral testimony or to answer questions, but I remain available to answer questions at any time should this Committee have any for me.

Eric W. Johnson | OS.B.A Certified Specialist in Family Relations Law

Sowald Sowald Anderson
Hawley & Johnson

400 South Fifth Street • Suite 101 • Columbus, OH 43215
(614) 464-1877 • Fax: (614) 464-2035
ejohnson@sowaldlaw.com • www.sowaldlaw.com