

Reconciling remote learning with imputed income for custodial parents

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Abstract

One of the logical, yet seemingly unanticipated, effects of the COVID-19 pandemic has been the exodus of parents, primarily mothers, from the workplace. An October 2020 Pew study indicates that as many as 30% of parents reduced work hours or left the workforce all together, with a pronounced burden falling on working mothers. This paper examines one possible consequence of voluntary under- or unemployment by these parents: imputed income for the purposes of calculating child support. Forecasters predict that remote learning is now an option schools will likely turn to again to address all sorts of possible problems from environmental disasters to flu outbreaks. Family law practitioners should be prepared to deal with this likelihood, and should be ready to address the possible effects on child support with their clients.

KEYWORDS

child support, COVID, family law, imputed income, remote learning

Key Points for Practitioners

- Many caretakers voluntarily left the workforce to care for children during the COVID-19 pandemic.
- Existing caselaw and statutes in many states impute income for child support purposes for parents who voluntarily leave the workforce or reduce their work hours to care for their children during a pandemic or other crisis.

- Courts should refrain from imputing income to a custodial parent who leaves the workforce or reduces his or her work hours to facilitate the children's remote learning during an exigency; in this type of situation, courts should either use their discretion to deviate from child support guidelines and statutes or, if applicable, not impute income to such a parent pursuant to a “good faith-best interests standard.”
- State legislatures or judicial committees should revise or add rules or statutes adopting the “good faith best interests” standard for guidance to courts considering whether to impute income when a parent voluntarily leaves the workforce or reduces his or her work hours; application of the standard would require imputing income to the custodial parent only if the parent's decision to leave the workforce or reduce work hours was made in bad faith or is not in the children's best interests.

INTRODUCTION

Since March 2020, the United States has adjusted to a new normal. States have modified their laws restricting healthcare coverage of telemedicine¹; our collective lexicon has expanded to include words like “quarantini,”² “maskne,”³ “the rona,”⁴ and “zoom”⁵; and many of us now sing while washing our hands.⁶ While vaccines have led to lifted restrictions, it is unlikely we will ever return to pre-pandemic “normal.” In fact, forecasters are predicting that practices adopted during the COVID-19 pandemic will remain constant and permanent.⁷

Lifestyle shifts due to COVID-19 have included things like job loss,⁸ remote schooling, and remote work; all trends that have persisted affected our lives even after restrictions lifted.⁹ Many of these changes have had

¹FED’N OF STATE MED. BDS., U.S. STATES AND TERRITORIES MODIFYING REQUIREMENTS FOR TELEHEALTH IN RESPONSE TO COVID-19 (last updated Feb. 1, 2021), <https://www.fsmb.org/siteassets/advocacy/pdf/states-waiving-licensure-requirements-for-telehealth-in-response-to-covid-19.pdf>.

²Cocktails consumed to pass the quarantine time.

³Acne caused by constant mask wearing.

⁴A not-so-affectionate term for coronavirus.

⁵As both a noun and adjective.

⁶See Maryn McKenna, *Rigorous Hand-Washing Will Be Part of COVID-19’s New Normal*, WIRE (June 2, 2020, 7:00 AM) <https://www.wired.com/story/rigorous-hand-washing-will-be-part-of-covid-19s-new-normal/>.

⁷See, e.g., Mark Muro, et al., *How COVID-19 Will Change the Nation’s Long-Term Economic Trends, According to Brookings Metro Scholars*, BROOKINGS (Apr. 14, 2020) <https://www.brookings.edu/research/how-covid-19-will-change-the-nations-long-term-economic-trends-brookings-metro/>; Lewis Dartnell, *The COVID-19 Changes That Could Last Long-Term*, BBC: FUTURE (June 29, 2020) <https://www.bbc.com/future/article/20200629-which-lockdown-changes-are-here-to-stay>.

⁸See, e.g., Kim Parker et al., *Economic Fallout From COVID-19 Continues To Hit Lower-Income Americans the Hardest*, PEW RESEARCH CTR. (Sept. 24, 2020), <https://www.pewresearch.org/social-trends/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest>.

⁹See Kate Lister, *Work-At-Home After Covid-19—Our Forecast*, GLOBAL WORKPLACE ANALYTICS (last visited Dec. 28, 2020) <https://globalworkplaceanalytics.com/work-at-home-after-covid-19-our-forecast>. Employers have found that workflow does not necessarily decrease when their employees work from home and that it saves the company money. Of course, not all jobs are able to accommodate remote-work. It is important to note that remote-capable jobs are often those that require more education and provide greater pay, which causes further concerns regarding inequality. See also Kristen Senz, *How Much Will Remote Work Continue After the Pandemic?*, WORKING KNOWLEDGE: BUSINESS RESEARCH FOR BUSINESS LEADERS (Aug. 24, 2020) <https://hbswk.hbs.edu/item/how-much-will-remote-work-continue-after-the-pandemic>; See also Alexander Barti et al., *What Jobs Are Being Done at Home During the COVID-19 Crisis? Evidence from Firm-Level Surveys* (Harvard Business Sch., Working Paper No. 20–138, 2020).

unanticipated effects on daily life, including creating custody and child support situations not previously considered by courts or attorneys.

During COVID-19, many parents who were responsible for paying child support lost their jobs and were unable to pay their support obligations. Others reduced work hours or left jobs in order to care for children due to school closures and the need to manage remote learning from home.

Courts were prepared to deal with the first instance – considering loss of job from layoffs as involuntary, and a reason to temporarily reduce or relieve that party from their financial obligation.¹⁰ Further, this particular circumstance has been addressed by many emergency orders, like Indiana's which provides an avenue for these parents to reduce support payments.¹¹ Job loss is a valid reason for modifying a support order, and my research has not yielded any court decision refusing to decrease a parent's support obligation due to involuntary job loss during the pandemic.¹²

Less clear was how to treat the parent who reduced work hours or left work in order to address school shut-downs and/or remote learning for their children. To date, one state supreme court has affirmed treating this situation as voluntary underemployment that justified imputing income to a parent who was laid off parent and did not seek other employment in order to care for her children at home rather than send them to daycare during the pandemic.¹³

The onset of this pandemic revealed that when schools and daycare centers shut down, parents were largely responsible for becoming the full-time teacher's aide, babysitter, parent, and employee.¹⁴ For solo parents, this reality was particularly daunting.¹⁵ Child support orders have, by and large,¹⁶ never been structured to deal with widespread remote schooling. Statutes and guidelines on how to determine child support vary state-to-state, but none provide information or guidance on what to do during a pandemic.

Until the onset of the COVID-19 pandemic, state child support guidelines and statutes had not contemplated the possibility of remote work and school. Some state courts, such as the Indiana Supreme Court, attempted to quickly address physical custody issues arising during COVID closures by permitting parents to modify existing physical custody orders by agreement.¹⁷ The Supreme Court Order did not extend the same permission for parents to modify child support payments, but instead stated that parents unable to make their support payments should immediately file an emergency petition to modify with the court.¹⁸ Although many parents were compelled to reduce

¹⁰See, e.g., *Burke v. Burke*, 809 N.E.2d 896 (Ind. Ct. App. 2004) (Appellate court affirmed the trial court's refusal to impute income to Father after he was laid off and took a lower-paying job).

¹¹See, e.g., Supreme Court Order NO. 205-MS-238, *supra* note 14.

¹²It is important to note, however, that courts might impute when the parent's poor performance was the reason for termination. However, in several states, this is still a high standard to meet. See e.g., *Miller v. Sugden*, 849 N.E.2d 758 (Ind. Ct. App. 2006) (Appellate court reversed the trial court's decision to impute income because although Father was fired for "serious misconduct," that misconduct did not amount to "intentional deceit.")

¹³However, one case out of Wyoming indicates that courts may treat the decision to reduce hours or leave the workforce to care for children during the COVID exigency as voluntary underemployment. *Snowden v. Jaure*, 495 P.3d 882 (Wyo. 2021). In September 2021, the Wyoming Supreme Court issued its decision in *Snowden v. Jaure*, wherein Mother was laid off in January of 2020 and was unable to quickly find employment due to a downturn in the oil and gas industry and the coronavirus pandemic. *Id.* at 883–84. Mother also did not seek other employment because she did not want her children in daycare during the pandemic. *Id.* The district court imputed income to Mother, and the Supreme Court upheld the decision, citing for support prior caselaw that found imputation of income to a "stay-at-home mother" was proper because she was voluntarily unemployed. *Id.* at 886 (citing *Lauderman v. State, Dep't of Fam. Servs. ex rel. Jen*, 232 P.3d 604, 607 (Wyo. 2010)).

¹⁴See *Infra* Part III. However, if you live in a resource-rich area and have about \$13,000 per semester per child to spend on private pod education, you may be less affected by these issues. See David Zweig, *The Rise of the Pod Students*, N.Y. TIMES, Aug. 2, 2020, at MB 1. Available online under the name \$25,000 Pod Schools: How Well-to-Do Children Will Weather the Pandemic at <https://www.nytimes.com/2020/07/30/nyregion/pod-schools-hastings-on-hudson.html>.

¹⁵According to the Pew Research Center, twenty-three percent of American children live with a solo parent. Stephanie Kramer, *U.S. Has World's Highest Rate of Children Living in Single-Parent Households*, PEW RESEARCH CTR. (Dec. 12, 2019) <https://www.pewresearch.org/fact-tank/2019/12/12/u-s-children-more-likely-than-children-in-other-countries-to-live-with-just-one-parent/>.

¹⁶Some family law firms and practitioners in states with frequent hurricanes do include provisions regarding custody and support in the case of a hurricane. Discussed further in in Part V.

¹⁷Indiana Supreme Court Order NO. 205-MS-238, IN THE MATTER OF CUSTODY, PARENTING TIME, AND CHILD SUPPORT DURING THE 2019 NOVEL CORONAVIRUS (COVID-19) PANDEMIC, March 31, 2020.

The Court also notes that COVID and stay-at-home orders are not valid reasons for preventing individuals from exercising parenting time.

¹⁸*Id.*

hours or leave jobs to facilitate their children's remote schooling, the order provides no guidance for if or how to modify child support in those circumstances.¹⁹

In general, when one parent is considered voluntarily under- or unemployed, trial courts will often impute potential income to that parent.²⁰ Imputing income has the effect of treating that parent as though they have more income than they actually do; when that parent is the custodial parent it will likely decrease the support obligation of the other (non-custodial) parent. The original, and still most cited, purpose of imputing income is to dissuade parents from working less or taking lower wage jobs in order to avoid child support payments.²¹ However, courts have struggled with whether and how to impute income to parents that reduce hours in order to care for their children. While states vary on how to address this, many impute potential income to the custodial parent in these circumstances.²² Because courts have imputed income to caregivers in the past, similar framework could cause courts to impute income to parents who had to reduce hours when daycare centers and schools went remote due to COVID-19.²³

Prior to the COVID-19 pandemic, several academics had questioned the general fairness of imputing income²⁴ and examined various methods used by different state courts.²⁵ Since March of 2020, articles have been released and several are in the works discussing the effect COVID has had on parents, primarily mothers, who have dropped out of the US workforce at an alarming rate.²⁶ Furthermore, the required use of remote learning driven by the COVID-19 pandemic has led to predictions that online schooling platforms will be used to address various emergencies.²⁷ Despite this research, to my knowledge, nothing has yet been written about whether parents leaving the workforce to facilitate remote learning might be later subjected to imputed income.

This paper addresses this potential outcome, and further argues that to impute income in these circumstances effectively thwarts the income shares model of calculating child support (discussed below) and is ultimately detrimental to the children. This paper also addresses how clients, practitioners, and trial courts could plan for future situations of remote learning and to ensure the custodial parents are not placed in greater financial vulnerability because they are considered “voluntarily” under- or unemployed.

Part II of this Article discusses how child support is calculated in many states, how childcare affects those calculations, and the effect of voluntary under- or unemployment on child support.²⁸ Part II also examines the various ways state courts decide to impute income to parents who are voluntarily under- or unemployed for the purpose of childcare.²⁹

Part III examines the impact remote learning has had on parents’ employment status and productivity.³⁰ Part IV discusses various ways in which remote learning is predicted to continue.³¹

Finally, Part V puts forth various ways that caregivers, family law practitioners, and courts might plan for future remote learning situations. This includes discussions regarding how separated parents might work together, provisions that could be included in settlement agreements, and possible actions that could be taken by state courts and governing bodies.³²

¹⁹*Id.*

²⁰See *infra* Part II (a).

²¹*Id.*

²²See *infra* Part II(c).

²³Actual information on whether trial courts are doing this is not yet widely available. In Indiana, Courts usually impute income to the custodial parent because someone in their household is making enough to allow the parent to do so, e.g., a new spouse. Research has not been done regarding whether a parent cannot work during COVID-19 to care for a child with special needs or who have increased health risks.

²⁴See, e.g., Lewis Becker, *Spousal and Child Support and the “Voluntary Reduction of Income” doctrine*, 29 *Connect. Law Review* 647, 648 (1997); Karl A.W. Demarce, *Devaluing Caregiving in Child Support Calculations: Imputing Income to Custodial Parents who Stay Home with Children*, 61 *Mo. L. Rev.* 429 (1996); Ann Laquer Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 *N.C. L. Rev.* 721 (1993);

²⁵See, e.g., LAURA W. MORGAN, *CHILD SUPPORT GUIDELINES INTERPRETATION & APPLICATION*, (2d ed. Supp. 2021).

²⁶See, e.g., Laurel Elder & Steven Greene, *A Recipe for Madness: Parenthood in the Era of Covid-19*, *SOCIAL SCIENCE QUARTERLY* (Mar. 21, 2021); Deborah A. Widiss, *Work and Caregiving during COVID-19*, in *WORK LAW UNDER COVID-19* (Sachin S. Pandya & Jeffrey M. Hirsch ed., 2021).

²⁷See *infra* Part IV.

²⁸See *infra* Part II(A).

²⁹See *infra* Part II(B).

³⁰See *infra* Part III.

³¹See *infra* Part IV.

³²See *infra* Part V.

VALUING CHILDCARE AND STATE VARIATIONS ON IMPUTING INCOME

In 1989, the federal government exercised their spending power, conditioning funding for states that established uniform procedures for awarding, modifying, and enforcing child support in family law and related cases.³³ The desire was to promote fair and equitable treatment of parties in these cases and to reduce the public burden that occurs when parents refuse to pay support obligations.

While most states provide worksheets to determine calculation of income and child support, methods vary regarding how to value and apply childcare costs to child support obligations. This is particularly true regarding the value of parental childcare.

Calculating child support

Most states award child support based on an income shares model, which pools income from both households, determines how much income goes to the children, then proportionally allocates that total.³⁴ This model is based on the theory that children should maintain the same standard of living as if the parents were still together, and that each parent should contribute proportionally.³⁵ Thus, child support attempts to equalize the resources available to the children, regardless of which parent is caring for them at that moment. An increase or decrease in child support should be thought of as equalizing the amount of money each parent needs to equitably provide for the children.

Voluntary under- or unemployment is also considered by trial courts when determining child support. “Imputed income” is the potential income assigned to a parent when the court determines they are voluntarily under- or unemployed.³⁶ Support guidelines and statutes either require imputation or give trial courts discretion to impute where one parent has voluntarily quit working, reduced their hours, or changed jobs to one with less pay.³⁷

The imputed amount is designed to reflect the earning capacity of that parent if they were fully employed.³⁸ If a parent has been unemployed for a long time or does not have any special qualifications, many courts will presumptively impute minimum wage onto that parent.³⁹ Effectively, imputing income onto one parent usually increases that parent's child support obligation and/or lessens the child support obligation of the other parent.

For example, the Indiana Child Support Guidelines state that potential income is imputed to a parent when that parent is capable of earning more, and imputing is necessary to discourage parents from taking a lower paying job to avoid paying child support.⁴⁰ Imputing also equalizes support obligations when one parent remarries and chooses not to be employed.⁴¹ However, even when a parent has no training, little work experience, or has remained home as the primary caregiver, trial courts often presume that parent is capable of earning at least minimum wage, and will impute such to that parent.⁴²

In many “intact,” two-parent American households, we accept that each parent's childcare contributions can look different. It is common for one parent to reduce hours or stop working to care for the children, and this is

³³45 CFR § 302.56 (2016).

³⁴See *Child Support Guideline Models*, NAT'L CONF. ST. LEGIS. (last updated July 7, 2020) <https://www.ncsl.org/research/human-services/guideline-models-by-state.aspx>.

³⁵See *id.*

³⁶See *How Do Courts Calculate Child Support?*, INDIANA LEGAL SERVICES, INC. (last updated May 4, 2012) <https://www.indianalegalservices.org/node/110/how-do-courts-calculate-child-support>.

³⁷For explanations on various styles and policies adopted by courts to impute income, see David W. Griffin, *Earning Capacity and Imputing Income for Child Support Calculations: A Survey of Law and Outline of Practice Tips*, 26 J. OF AM. ACAD. OF MATRIMONIAL LAW. 365, 393–94 (2014); Catherine Moseley Clark, *Imputing Parental Income in Child Support Determinations: What Price for a Child's Best Interests*, 49 CATHOLIC UNIVERSITY L. R. 167, 183–89 (2000).

³⁸For example, if a court is presented with evidence that a parent is a nurse who has the ability to work full time, but is only employed for 20 hours per week, the court may use its discretion and impute the parent's potential full-time salary.

³⁹See, e.g., IND. CHILD SUPP. G. 2, COMMENTARY (INDIANA RULES OF COURT, 1989).

⁴⁰*Id.* at G. 3(A)(c), COMMENTARY.

⁴¹*Id.*

⁴²*Id.* That said, courts are far less likely to impute income in situations where the parties agreed to one parent's reduction of work hours before the dissolution in order to care for the children.

particularly common when there are younger children. Meanwhile, the other parent contributes more financially to support the family. Due largely to continuing stereotypes and pay gaps⁴³ in heterosexual relationships, women tend to reduce hours while men continue to further careers.⁴⁴ When parents that have followed this division of labor separate or divorce, courts have trouble weighing the fairness of caregiving issues: should the financial burden remain entirely on one party when the parents do not agree? If so, for how long should that last? And how do we calculate the value of parental childcare?

Childcare expenses and imputing income to caregiving parents

All states include a method for accounting for out-of-pocket childcare expenses. These expenses are usually associated with daycare costs or babysitters and are accounted for in one of three ways.⁴⁵ First, many states include a line item for “childcare expenses” on child support worksheets, meaning the obligation is prorated between the parties.⁴⁶ Second, some states reduce each parent's gross income by the amount they contribute to childcare, then calculate child support based on the reduced income.⁴⁷ Finally, some states permit courts to deviate from the calculated support amount based on payments to external childcare providers.⁴⁸

Valuing parental care is more difficult to consider. Courts have attempted to address this by valuing the time each parent spends with the children. Some states calculate the average number of hours spent, while others calculate the number of overnights each parent has with the children per year.⁴⁹ Valuing child support based on the amount of time each parent spends with the children is designed to compensate for everyday expenses of having the children like food or gas. The more time a parent has with the children, the less they will owe or more they will receive in child support.

This method for valuing time spent with the children does not adequately address if and how courts should impute income to a parent who has reduced work hours in response to remote school options, particularly when that parent retains primary physical custody. Generally, trial courts have treated earning capacity of separating parents as a “specific intent” action, meaning income was imputed when the party reduce income with the intent to avoid support payments.⁵⁰ Recently, however, earning capacity is treated as “a more generalized determination of whether the parent has, by action or inaction, caused a circumstance the consequence of which is that the parent is not earning at or near capacity.”⁵¹

Critics of this shift argue that imputing income imposes further economic hardship on custodial parents. University of Iowa Law Professor Ann Estin argues that imputing income to caregiving parents fails to appropriately recognize and account for the financial benefit provided, preferencing market income over caregiving.⁵² Estin further argues this

⁴³See Jessica Millii, et al., *The Impact of Equal Pay on Poverty and the Economy*, INST. FOR WOMEN'S POLICY RESEARCH (April 2017), <https://iwpr.org/wp-content/uploads/2020/09/C455.pdf>. The document analyzes data taken over the course of two years (2014–2016). Even after account for educational background and hours worked, sixty percent of women (and sixty-five percent of working, single mothers) would earn more if they were paid as their male counterparts.

⁴⁴See Kim Parker, *Women more than men adjust their careers for family life*, PEW RESEARCH CTR. (Oct. 1, 2015), <https://www.pewresearch.org/fact-tank/2015/10/01/women-more-than-men-adjust-their-careers-for-family-life/>. The Pew research survey indicated that forty two percent of mothers have reduced hours, taken significant time off of work, turned down a promotion, or quit a job to care for either children or another family member, while only twenty-eight percent of fathers have similarly reduced hours. Importantly, the survey also indicates an overwhelming majority of parents who reduced hours (ninety-four percent) to care for family are happy with their choice.

⁴⁵See LAURA W. MORGAN, *CHILD SUPPORT GUIDELINES INTERPRETATION & APPLICATION*, Appendix B (2d ed. Supp. 2021).

⁴⁶*Id.* Indiana follows this model.

⁴⁷*Id.*

⁴⁸*Id.*

⁴⁹Hourly support is calculated by the average number of hours per week, multiplied by the number of weeks the parent exercises parenting time per year, then divided by the total by the number of hours in a year (8,760). This yields a percentage of custody, which informs the amount of support. See Christine Funk, *How to Calculate Custody Percentage*, LEGALZOOM (last visited Feb. 1, 2021) <https://info.legalzoom.com/article/how-calculate-custody-percentage>.

⁵⁰Griffin, *supra* note 37, at 393-94.

⁵¹*Id.*

⁵²Ann Laquer Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721 (1993).

method indicates courts prefer that divorced, caregiving spouses quickly become self-reliant, which is a misplaced goal compared to promoting strong bonds between children and caregivers.⁵³

Further, imputing income to caregiving parents could be harming the parent and children more than courts realize by placing already financially vulnerable parents in precarious situations. Much evidence indicates that post-divorce custodial spouses (primarily women) suffer financially, because they continue to have primary custody and maintain the same familial responsibilities, but also need to find and maintain a job.⁵⁴ Meanwhile, evidence indicates non-custodial spouses (primarily men) benefit financially from separation and divorce because they can succeed in careers unencumbered by the stresses of being a primary custodian.⁵⁵ In heterosexual relationships, women reduce hours or leave the workplace all together to provide childcare at much higher frequency than men.⁵⁶ Imputing income to those caregivers post-divorce may reflect valuing economic contributions to families (the role dominated by men) over caregiving contributions to families (the role still dominated by women), all while creating greater financial strain on the caregiving parent.⁵⁷

Courts address multiple considerations in making a decision to impute income to a caregiver parent. Courts must consider the desires of all parties to reduce hours and be more present for their children. What occurs when both parents want to reduce hours or leave their jobs in order to care for the children? Relatedly, courts are concerned with balancing “good faith” with “best interests of the children.”⁵⁸ While a parent’s reduction in employment could be motivated by pure intentions, the fact remains that the children must be adequately financially supported.⁵⁹ This concern extends beyond how to treat custodial parents. Trial courts regularly must balance a parent’s interest in reducing income for reasons like going back to school or for personal satisfaction with the child’s financial needs.⁶⁰

States differ greatly regarding if and how they value caregiving when calculating child support. Unsurprisingly, parents with reduced work schedules, due to childcare, fare better in states that directly address the issue in their child support guidelines or statutes.⁶¹ However, where the guidelines and statutes are silent, trial courts seem to assume they are compelled to impute income to stay-at-home parents or those with reduced hours.⁶²

Good faith-best interests standard

Some states will not impute income to caregiving parents who are voluntarily under or unemployed in good faith and when the financial needs of the children are met.⁶³ “Good faith” just requires the Court to determine the intent of the under or unemployed parent, particularly whether they are attempting to avoid their support and care obligations, and often asks courts to consider several other factors regarding caregiving.⁶⁴

Minnesota, California, and Virginia have adopted this model. In 2006, the Virginia Legislature modified the statute requiring mandatory income imputation in cases of voluntary reduction of hours to a permissive statute.⁶⁵

⁵³*Id.*

⁵⁴Cyn Haueter, Note, “I Cannot Afford to Leave Him” *Divorcing a Spouse with Superior Financial Resources*, 31 *HASTINGS WOMEN’S L.J.* 237, 239 (2020).

⁵⁵*Id.* at 239-240.

⁵⁶See Press Release, U.S. Department of Labor, Employment Characteristics of Families News Release—2019, Bureau of Labor Statistics, (Tues, Apr. 21, 2020 10AM), https://www.bls.gov/news.release/archives/famee_04212020.htm. Data from the DOL indicates that in 2019, married women with children under eighteen were far more likely to be working part time or not working compared to their male counterparts.

⁵⁷See Pamela Laufer-Ukeles, *Selective Recognitions of Gender Difference in the Law: Revaluing the Caretaker Role*, 31 *HARV. J. OF L. & GENDER* 1 (2008).

⁵⁸Marcia Zug, *Your Money or Your Life: Indian Parents and Child Support Modifications*, 29 *J. OF THE AM. ACAD. OF MATRIMONIAL LAW* 409, 412-414 (2017).

⁵⁹*Little v. Little*, 975 P.2d 108, 112 (Arizona 1999).

⁶⁰Lewis Becker, *Spousal and Child Support and the “Voluntary Reduction of Income” doctrine*, 29 *Connect. Law Review* 647, 648 (1997).

⁶¹For more information, see LAURA W. MORGAN, *CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION*, § 5.05 Voluntary vs. Involuntary Act (2d ed. Supp. 2021). Morgan extensively discusses imputed income in various circumstances (beyond caregiver status) and provides expanded case citations.

⁶²*Id.*

⁶³*Id.*

⁶⁴*Id.*

⁶⁵See *Murphy v. Murphy*, 779 S.E.2d 236, 586-590 (Va. Ct. App. 2015) for a comprehensive review of pre-2006 caselaw and how Code § 20-1081 (B) changed.

The statute now provides several circumstances wherein trial courts may impute income to a parent and requires that a decision to impute be “evaluated with consideration of the good faith and reasonableness of employment decisions made by the party ...”⁶⁶ In *Murphy v. Murphy*, a Mother changed her work schedule to spend more time with her child after the divorce, which led to a salary decrease from \$175,000 to \$110,000 per year.⁶⁷ Father, a public school teacher, sought to maintain his current child support by imputing the \$175,000 to Mother. The Virginia Court of Appeals upheld the trial court’s decision to not impute income to Mother because the trial judge properly considered that it was in the child’s best interests for Mother to be more available for Child’s upbringing, and Mother’s salary was still a “generous income.”⁶⁸ Therefore, Mother’s decision comported with Virginia’s “good faith and reasonableness” standard.⁶⁹

Circuit courts often equally consider the parent’s reasons for reducing income and the adequacy of resources available to the children. Minnesota’s statute regarding imputing income for childcare provides specifically that “[c]ourts should consider several factors before deciding to impute income to a caregiving parent, like the childcare arrangements before support action, the caregiver’s qualifications, the costs associated with caregiving, and child’s needs.”⁷⁰ In *Garcia v. Garcia*, the Minnesota Appellate Court affirmed a decision imputing income to Father who was making \$80,000 per year as a teacher, but took a job making \$30,000 per year as a security guard.⁷¹ Father argued imputation was improper because his move was not done to avoid child support; he claimed that this was evidenced by the fact that he had taken the job five years prior.⁷² The Appellate Court affirmed the trial court’s decision, noting that while Father’s decision to change careers may have been in good faith, the voluntary reduction of income did not outweigh the adverse effects his diminished income had on his children.⁷³

The caregiving-only-for-young-children standard

A particularly common method among states is to refrain from imputing income to caregiving parents if the child is still particularly young. Some state guidelines and statutes provide for a “young child,” while other states set a specific age limit.⁷⁴

Indiana’s Child Support Guidelines state that when “imputing income, it is not the intent of the guidelines to require the custodian of small children to have income imputed to him or her.”⁷⁵ Similarly, in Pennsylvania, courts will consider the age and needs of the children before imputing income to the caregiving parent, but case

⁶⁶*Id.* at 591 (citing Va. Code § 20-1081(B)(3)).

⁶⁷*Id.* at 584-585.

⁶⁸*Id.* at 592-93.

⁶⁹*Id.*

⁷⁰MINN. STAT. § 518A.32(5) (2019).

⁷¹*Garcia v. Garcia*, No. 27-FA-16-5621, 2020 WL 4743463 at *1 (Min. Ct App. Aug. 12, 2020).

⁷²*Id.* at *2-3.

⁷³*Id.*

⁷⁴*Morgan, supra* note 25.

⁷⁵Child Support Rules and Guidelines. Guidelines § 3(A)(c)(1) (draft amendments Apr. 2, 2019) (Indiana Rules of Court 2020) (commentary) (“When a custodial parent with young children at home has no significant skills or education and is unemployed, he or she may not be capable of entering the work force and earning enough to even cover the cost of child care. Hence, it may be inappropriate to attribute any potential income to that parent. It is not the intention of the Guidelines to force all custodial parents into the work force. Therefore, discretion must be exercised on an individual case basis to determine if it is fair under the circumstances to attribute potential income to a particular nonworking or underemployed custodial parent. The need for a custodial parent to contribute to the financial support of a child must be carefully balanced against the need for the parent’s full time presence in the home. (1) When a custodial parent with young children at home has no significant skills or education and is unemployed, he or she may not be capable of entering the work force and earning enough to even cover the cost of child care. Hence, it may be inappropriate to attribute any potential income to that parent. It is not the intention of the Guidelines to force all custodial parents into the work force. Therefore, discretion must be exercised on an individual case basis to determine if it is fair under the circumstances to attribute potential income to a particular nonworking or underemployed custodial parent. The need for a custodial parent to contribute to the financial support of a child must be carefully balanced against the need for the parent’s full-time presence in the home” (emphasis added). This language is a relatively recent addition to the guidelines. Until 2019, Indiana’s guidelines required imputing at least minimum wage, minus the expected cost of childcare. See courts.in.gov, INDIANA RULES OF COURT: CHILD SUPPORT RULES AND GUIDELINES (Apr. 2, 2019), <https://www.in.gov/courts/files/rules-proposed-2019-child-support-guidelines.pdf>.

law indicates application of this “nurturing parent doctrine” is very limited.⁷⁶ For states that rely on specific ages, the range is from 2 years old to about 6 years old.⁷⁷

While refusing to impute income up to a child’s specific age provides trial courts with a bright-line rule, these age limits are often well before children are in school full-time, if they are in school at all.⁷⁸ Furthermore, bright-line rules often leave courts without the ability to make fact-based determinations.⁷⁹ For example, in *Lambert v. Lambert*, Mother asked maternal grandparents to care for her two young children. Mother was unemployed and tested positive for cocaine, so the Court granted the maternal grandparents custody of the children. The Court also ordered Mother to pay some child support to maternal grandparents for the children and calculated her potential income by imputing full-time minimum wage.⁸⁰ The Appellate Court reversed, finding that Mother had since had two more children who were under the age of three, and Kentucky statute does not permit imputing income to caregivers of children under the age of three.⁸¹

“Voluntary act” standard

In states where child support guidelines or statutes do not provide guidance on how to consider caregiving status with regard to child support, most courts follow common law rules and impute income on a case-by-case basis. However, unless the circumstances are extreme, most courts have determined that a reduction of hours for an employed parent is a “voluntary” act and subjected to imputed income.

Washington’s imputation statute currently provides that courts must impute income when the parent is voluntarily under or unemployed based on many factors, none of which are relevant to caregiving status.⁸² These courts have routinely upheld that if one parent was providing full-time childcare during the marriage, income is not imputed if that parent remains unemployed.⁸³ However, parents who held jobs prior to the dissolution and subsequently reduced hours tend to have income imputed to them.⁸⁴

Similarly, New Jersey trial courts currently determine whether to impute income to caregiving parents on a case-by-case basis and consider factors like the childcare alternatives available to the parent or the ages and needs

⁷⁶A.M. v. M.C., No. 1574 WDA 2018, 2019 WL 3628830, at *7 (Pa. Super. Ct. 2019) (Pennsylvania’s nurturing parent doctrine is a common law product, and provides that courts consider the age of children, availability of other caregivers to assist the parent in caring for the children, adequacy of financial resources, and the parent’s desires.) A.M. v. M.C., 2019 WL 3628830 at *7 (Sup. Ct. Pa. 2019) (Mother of young children wished to stay home to care for them and presented evidence that the cost of childcare would likely exceed her earning ability as a teacher. Further, she stayed at home to care for the children when married to ex-husband. Court denied, stating she did not sufficiently prove all elements of the doctrine) (citing *Reinert v. Reinert*, 926 A.2d 539, 543 (Pa. Super. 2007)).

⁷⁷Two years old: ALASKA STAT. ANN. § 90.3(a)(4)(West 2020); COLO. REV. STAT. ANN. § 14-10-115 (West 2021). Three years old: KY. REV. STAT. ANN. § 403.212 (2)(d) (West 2020); N.C. CHILD SUPPORT GUIDELINES § 3 (2019 ADMIN. OFFICE OF THE COURTS, 2019). Five years old: LA. REV. STAT. ANN. § 9:315.11 (2020). Six years old: N.M. STAT. ANN. § 40-4-11.1(C)(1) (2020).

⁷⁸Several statutes listed in *supra* note 77 impute only up to ages two, three, or four. Many children may attend state-sponsored Kindergarten at age five, but not all states are required to provide full-day kindergarten (and some states do not require districts to provide any full- or part-time kindergarten). See *Types of state and district requirements for kindergarten entrance and attendance, waivers and exemptions for kindergarten entrance, by state*: 2018, NAT’L CTR. FOR EDUC. STATISTICS (last visited Apr. 4, 2021) [https://nces.ed.gov/programs/statereform/tab5_3.asp#:~:text=Children%20must%20be%205%20years,of%20the%20current%20school%20year.&text=Districts%20must%20offer%20either%20full%20day%20or%20half%20day%20kindergarten.&text=Children%20enrolled%20in%20preschool%20programs,of%20compulsory%20school%20attendance%20age](https://nces.ed.gov/programs/statereform/tab5_3.asp#:~:text=Children%20must%20be%205%20years,of%20the%20current%20school%20year.&text=Districts%20must%20offer%20either%20full%20day%20or%20half%20day%20kindergarten.&text=Children%20enrolled%20in%20preschool%20programs,of%20compulsory%20school%20attendance%20age.).

⁷⁹*Lambert v. Lambert*, 475 S.W.3d 646, 648-49 (Ky. Ct. App. 2015).

⁸⁰*Id.* at 653.

⁸¹*Id.* at 653-54.

⁸²WASH. REV. CODE ANN. § 26.19.071(6) (LexisNexis 2020).

⁸³See, e.g., *Matter of Marriage of Kaplan*, 421 P.3d 1046, 1056 (Wash. Ct. App. 2018) (Trial court abused its discretion when imputing \$2,714 per month to mother, thus reducing her \$10,000 monthly support award, when she remained home during the marriage to care for the children and support Father’s career).

⁸⁴See *Clark v. Clark*, 200 Wash. App. 1071, 10,171 (Wash Ct. App. 2017) (appellate court found trial court appropriately imputed income to unemployed father, who worked part-time during the marriage to care for the children, and he no longer had a job because he worked maintaining the business side of his wife’s veterinary practice) (citing *In re Marriage of Wright*, 896 P.2d 735, 737 (Wash. Ct. App. 1995) (Trial court did not abuse its discretion when imputing income to caregiving mother, who was a nurse for the Navy, and reduced her hours from full-time to part time to care for the couple’s five children, all under the age of twelve.)).

of the children.⁸⁵ However, it appears New Jersey courts will impute at least some income to caregivers, unless the circumstances are particularly extreme. In *L.G. v. L.G.*, the Appellate Court reversed the Trial Court's determination that imputing income to a long-time stay-at-home mother was unwarranted. Mother stayed home to care for the couple's 16-year-old daughter, who was homeschooled due to her ADHD, Occupational Defiance Disorder, and anxiety.⁸⁶ The Court determined that, while Mother needed to be home with her daughter sometimes, there was no indication in the trial record that Mother was unable to find a remote job, providing at least part-time work.⁸⁷

It is not yet clear how courts will treat reducing hours or leaving jobs to care for children during COVID. What is clear, however, is that remote schooling due to COVID disrupted employment, to the point where many parents reduced hours or stopped working to accommodate "Zoom School."⁸⁸

IMPACT OF REMOTE LEARNING ON PARENTS' EMPLOYMENT STATUS AND PRODUCTIVITY

Remote learning and the general closure of schools, daycares, and after school programs impacted many parent's work productivity and employment status.⁸⁹ An October 2020 Pew study indicates that as many as 30% of parents reduced work hours and around 13% turned down a promotion or large project.⁹⁰ Some polling indicates that COVID forced more than 700,000 parents with children under the age of five out of the workforce.⁹¹ While COVID has revealed our nation's shortages in childcare, it has also highlighted a major gender discrepancy.

Children's needs during COVID have fallen heavily on mothers, and even more so on women of color, since shutdowns began.⁹² In April of 2020, the female labor force in the United States dipped below 55% for the first time since 1986⁹³ and the unemployment rate for women hit double digits for the first time since 1948.⁹⁴ This trend continued into the 2020–2021 school year. Between August and September 2020, a little over a million people dropped out of the labor force; 865,000 of them were women.⁹⁵ This trend is not slowing down; each quarterly Census Bureau report continues to show a growing trend. In December 2020, women lost 156,000 jobs, while men gained 16,000 jobs.⁹⁶ A recent report comparing January 2020 and January 2021 indicates that the labor force in 2021 was

⁸⁵See, e.g., *L.G. v. L.G.*, No. A-5057-18 T1, 2020 WL 4036765 at *2-3 (N.J. Super. Ct. App. Div., July 17, 2020).

⁸⁶*Id.* at *3.

⁸⁷*Id.* at *4.

⁸⁸See *infra*, section IV.

⁸⁹Emily Paisner, *Back-to-School 2020: care.com Survey Reveals What's Really on the Minds of Working Parents*, CARE@WORK (Aug. 6, 2020, 8:31 AM), <https://workplace.care.com/workingparentssurvey> (Regarding an online survey of 1,000 parents with children under fifteen years old revealed that seventy-three percent were making major changes in professional lives to accommodate lack of childcare and remote schooling).

⁹⁰Ruth Igielnik, *A Rising Share of Working Parents in the U.S. say It's Been Difficult to Handle Child Care During the Pandemic*, PEW RESEARCH CTR. (Jan. 26, 2021), <https://www.pewresearch.org/fact-tank/2021/01/26/a-rising-share-of-working-parents-in-the-u-s-say-its-been-difficult-to-handle-child-care-during-the-pandemic/>.

⁹¹Rasheed Malik, *Saving Childcare Means Preserving Jobs and Supporting Working Families and Small Businesses*, CTR. FOR AM. PROGRESS (Jan. 13, 2021), <https://www.americanprogress.org/issues/early-childhood/news/2021/01/13/494450/saving-child-care-means-preserving-jobs-supporting-working-families-small-businesses/> (citing the Bureau of Labor Statistics).

⁹²See Jessica Gross, *America's Mothers are in Crisis*, N.Y. TIMES (Apr. 4, 2021) <https://www.nytimes.com/2021/02/04/parenting/working-moms-mental-health-coronavirus.html>.

⁹³Roberta Kaplan & Rachel Tuchman, *INSIGHT: #TimesUp During COVID-19-Private Sector's Role in Mitigating Gender Equality Crisis*, BLOOMBERG LAW (Sept. 3, 2020), <https://news.bloomberglaw.com/daily-labor-report/insight-timesup-during-covid-19-private-sectors-role-in-mitigating-gender-equality-crisis>.

⁹⁴*July Jobs Report: A Women's Recession*, TIME'S UP (Aug. 10, 2020), <https://timesupfoundation.org/july-jobs-report-a-womens-recession/>. This large percentage is partly due to the fact that sixty percent of all jobs held by women are in the informal service industry, like childcare, home nursing, home care workers. These jobs have limited workplace protections are not likely covered by the FFCRA. See Kaplan, *supra* note 104.

⁹⁵Claire Ewing-Nelson, *Four Time More Women Than Men Dropped Out of the Labor Force in September*, NATIONAL WOMEN'S LAW CENTER (Oct. 2020), <https://nwl.org/wp-content/uploads/2020/10/september-jobs-fs1.pdf>; See also Meghan McCarty Carino, *1 in 5 parents quit job or took leave to deal with remote school*, MARKETPLACE-EDISON RESEARCH (Oct. 23, 2020), <https://www.marketplace.org/2020/10/23/remote-school-online-learning-parents-quit-jobs-take-leave-of-absence/> (Families often take this route because women still earn less than men, so it makes more financial sense for women in heterosexual households to leave).

⁹⁶News Release Bureau of Labor Statistics: *The Employment Situation, U.S. DEPT OF LABOR* (Dec. 2021), <https://www.bls.gov/news.release/pdf/empst.pdf>.

down 1.6 million mothers.⁹⁷ In fact, the United States is seeing an exodus of women from the job market at a higher rate than men for the first time in 6 years.⁹⁸

There is no doubt that there are several issues highlighted by these numbers. First, involuntary layoffs are impacting many women at a higher rate than men; 60% of all positions held by women are in the service industry, which experienced more layoffs than any other labor industry.⁹⁹ The Census Bureau also indicates that mothers are far more likely to work in service or other jobs that were more impacted by the pandemic.¹⁰⁰ Second, the American Time Use Survey, which has been conducted by the Census Bureau for decades, indicates that, generally, women continue to carry a greater burden of unpaid domestic chores and child rearing.¹⁰¹

Evidence indicates that it is primarily mothers who have reduced hours or left the labor force to care for children during school shutdowns,¹⁰² and that “women are far more likely than men to disrupt their work days to meet their children's needs ...”¹⁰³ Furthermore, emerging evidence indicates that the group experiencing the sharpest drop in employment is single mothers.¹⁰⁴ As of November 2020, single, unpartnered fathers saw a four point decrease in employment, while single, unpartnered mothers saw a nine point decrease.¹⁰⁵

Regardless of gender, many parents found it necessary to reduce hours or quit due to the extreme impact remote schooling has had on their lives and routines. Since the onslaught of remote schooling, parents are expected to take over as “teacher,” making sure their children are appropriately focused and attentive during lessons, managing online platforms for their children and overseeing homework.¹⁰⁶ For many parents, this new role as teacher/aide to their child's education has made it difficult, if not impossible, to maintain their full-time employment.¹⁰⁷ This dilemma has left parents concerned about job security and possible penalties for prioritizing childcare responsibilities.¹⁰⁸

Collectively, we as a country seem to believe that COVID is temporary; that this era of stay-at-home orders, quarantine, work-from-home, and remote learning is almost over. While vaccines provide hope to slow the climbing

⁹⁷Misty L. Heggeness, et al., *Tracking Job Losses for Mothers of School-Age Children During a Health Crisis*, U.S. CENSUS BUREAU (Mar. 3, 2021), <https://www.census.gov/library/stories/2021/03/moms-work-and-the-pandemic.html>.

⁹⁸Courtney Conley, CNBC, *More than 860,000 women dropped out of the labor force in September, according to new report*, CNBC MAKE IT (Oct. 2, 2020) <https://www.cnbc.com/2020/10/02/865000-women-dropped-out-of-the-labor-force-in-september-2020.html>.

⁹⁹See Thomas Franck, *Here are the industries suffering the biggest job losses in an initial look at coronavirus impact*, CNBC (Apr. 3, 2020 at 10:34 AM) <https://www.cnbc.com/2020/04/03/this-chart-shows-which-industries-saw-big-job-losses-in-march-2020.html> (citing Supplemental data measuring the effects of the coronavirus (COVID-19) pandemic on the labor market, U.S. BUREAU OF LABOR STATISTICS (Dec. 21, 2021), <https://www.bls.gov/cps/effects-of-the-coronavirus-covid-19-pandemic.htm>).

¹⁰⁰See Heggeness, *supra* note 97.

¹⁰¹See, e.g., American Time Use Survey – May to December 2019 and 2020 Results, U.S. BUREAU OF LABOR STATISTICS (last modified July 22, 2021) <https://www.bls.gov/news.release/atus.nr0.htm>. See also *Charts by Topic: Household activities*, U.S. BUREAU OF LABOR STATISTICS (last modified Dec. 20, 2016), <https://www.bls.gov/tus/charts/household.htm> (for readable charts regarding time use from 2015–2016).

¹⁰²Jessica Dickler, *21% of parents had to reduce work hours because of remote school: survey*, CNBC (Sept. 1, 2020, 8:00 AM) <https://www.cnbc.com/2020/09/01/21percent-of-parents-had-to-reduce-work-hours-because-of-remote-school-survey.html>. (However, it is important to note that some emerging research indicates that reduction in hours, as opposed to voluntarily leaving jobs, might be more proportionate across gender lines. The Pew Center has reported that both fathers and mothers reduced their hours at about the same rate since the fall school year). See also Rakesh Kochhar, *Fewer Mothers and Fathers in U.S. are Working Due to COVID-19 Downturn; Those at Work Have Cut Hours*, PEW RESEARCH CENTER (Oct. 22, 2020) <https://www.pewresearch.org/fact-tank/2020/10/22/fewer-mothers-and-fathers-in-u-s-are-working-due-to-covid-19-downturn-those-at-work-have-cut-hours/>.

¹⁰³Deborah A. Widiss, *Work and Caregiving during COVID-19*, in *WORK LAW UNDER COVID-19* (Sachin S. Pandya and Jeffrey M. Hirsch eds. 2020) (citing Gema Zamarró & Maria J. Prados, *Gender Differences in Couples' Division of Childcare, Work and Mental Health during COVID-19* (Leonard D. Schaeffer Ctr. for Health Policy & Econ., Working Paper No. 2020-003) (available https://cesr.usc.edu/documents/WP_2020_003.pdf).

¹⁰⁴Amanda Barroso & Rakesh Kochhar, *In the Pandemic, the Share of Unpartnered Moms at Work Fell More Sharply Than Among Other Parents*, PEW RESEARCH CTR. (Nov. 24, 2020) <https://www.pewresearch.org/fact-tank/2020/11/24/in-the-pandemic-the-share-of-unpartnered-moms-at-work-fell-more-sharply-than-among-other-parents/>.

¹⁰⁵*Id.* The racial difference was also marked, as black and Hispanic single mothers saw a ten point decrease compared to white single mothers, who saw a six point decrease.

¹⁰⁶See Jessica Grose, *The Primal Scream*, N.Y. TIMES (last visited Feb. 4, 2020), <https://www.nytimes.com/interactive/2021/02/04/parenting/working-moms-coronavirus.html> (Discussing “The Primal Scream” is a collection of articles and stories focused around working mothers during COVID. Several articles detail individual stores on balancing their jobs and children's education).

¹⁰⁷Megan Leonhardt, *Parents Struggle with remote learning while working from home: “I'm constantly failing”*, CNBC (Sept. 17, 2020, 8:30 AM), <https://www.cnbc.com/2020/09/17/remote-learning-why-parents-feel-theyre-failing-with-back-to-school-from-home.html>.

¹⁰⁸*The Impact of Covid-19 on Working Parents*, CATALYST (Sept. 29, 2020), <https://www.catalyst.org/research/impact-covid-working-parents/> (This is particularly true for mothers, who claimed they hide their caregiving struggles and responsibilities from colleagues).

death toll and continuing health problems the disease causes, research and forecasting indicates that the effects of COVID on lifestyle, work, and schooling are here to stay.

COVID LIFESTYLE CHANGES WILL PERSIST AND ARE LIKELY TO INCLUDE REMOTE LEARNING

Even after this pandemic recedes, remote learning is a tool likely to be used again, whether necessitated by other possible pandemics, localized health outbreaks, or even in responding to natural disasters. In fact, research indicates that the original COVID-19 pandemic will not be the last pandemic requiring stay-at-home orders or quarantine.¹⁰⁹

Future pandemics are almost certain, even if they do not cause worldwide shutdowns.¹¹⁰ Localized outbreaks are far more likely.¹¹¹ Other natural disasters can have similar disruptions to school and family life. In 2019, wildfires closed schools for more days than in any year prior in the United States, and this trend appears to be increasing every year.¹¹² Climate change has increased the frequency of natural disasters in recent years, and correlated school closures are similarly increasing in frequency.¹¹³

Now that schools have acquired the tools to operate completely remotely, these tools are viable options for these and other emergencies.¹¹⁴ In fact, some primary and secondary schools are planning on using these tools in the wake of natural disasters.¹¹⁵ Schools are likely to rely on technology learning and using Zoom as a possible backup plan, supplementing in person instruction.¹¹⁶

Parents too may prefer to keep online options available. Should parents continue using private remote schooling after in person, public schooling again becomes an option, we would expect to see courts treat the decision similarly to private school education. In Indiana, courts generally do not force parents to split the cost of private education unless there is a settlement agreement to that effect or both parents clearly have the financial ability, and the Court finds that it is in the child's best interest.¹¹⁷

While questions regarding who pays tuition is likely covered by existing private school case law and guidelines, courts may still need to determine imputing income based on voluntary under and unemployment.

¹⁰⁹Apuzzo, et al., *As Coronavirus Mutates, the World Stumbles Again to Respond*, N.Y. TIMES, Jan. 9, 2021, at A1.

¹¹⁰Ed Yong, *America Should Prepare for a Double Pandemic*, THE ATLANTIC (July 15, 2020), <https://www.theatlantic.com/health/archive/2020/07/double-pandemic-covid-flu/614152/>.

¹¹¹*Id.*

¹¹²See Diana Lambert, *California schools closed for unprecedented number of days due to fire, power outages*, EdSource (Nov. 5, 2019), <https://edsources.org/2019/california-schools-closed-for-unprecedented-number-of-days-due-to-fire-power-outages/619488>.

¹¹³For an in-depth analysis on the correlation between school closures and climate change, see Camille Poujaud, *The Impact of Natural Disasters on school Closure* (December 2019) (unpublished Master's thesis, Purdue University) file:///C:/Users/arbri/Downloads/The%20impact%20of%20natural%20disasters%20on%20school%20closure.pdf.

¹¹⁴See, e.g., Jed Pressgrove, *States Prioritized Broadband as COVID-19 Took Hold*, GOVERNMENTTECHNOLOGY (Dec. 2020), <https://www.govtech.com/network/States-Prioritized-Broadband-as-COVID-19-Took-Hold.html>; *Trump Administration Invests \$544,000 in High-Speed Broadband in Rural New York*, USDA (Oct. 29, 2020), <https://www.usda.gov/media/press-releases/2020/10/29/trump-administration-invests-544000-high-speed-broadband-rural-new> (Stating evidence that the federal government are finally prioritizing broadband infrastructure to poor and rural American, a lack of which has made remote learning difficult. While it may take some time to implement, COVID pushed this prioritization quickly).

¹¹⁵See Aubri Juhasz, *How Louisiana Schools Are Doing After Hurricane Laura*, NPR: EDUCATION (Sept. 27, 2020, 7:42AM) <https://www.npr.org/2020/09/27/917424886/how-louisiana-schools-are-doing-after-hurricane-laura> (Discussing how a middle school principal indicates his school planned students would be able to use Zoom for a couple of weeks if the school's infrastructure was knocked out. This method did not work, however, because most of the students' internet access had also been destroyed by Hurricane Laura).

¹¹⁶Douglas N. Harris, *How will COVID-19 change our schools in the long run*, BROOKINGS (Apr. 24, 2020), <https://www.brookings.edu/blog/brown-center-chalkboard/2020/04/24/how-will-covid-19-change-our-schools-in-the-long-run/>. See, also Kara Arundel, *3 COVID-19 education trends set to persist post-pandemic*, K-12 DIVE (Oct. 19, 2020), <https://www.k12dive.com/news/education-trends-to-continue-post-pandemic/586911/>; Rebecca Smith, *What Does Virtual Learning Mean For Snow Days?*, NPR: NATIONAL (Dec. 9, 2020), <https://www.npr.org/2020/12/09/944528424/what-does-virtual-learning-mean-for-snow-days>.

¹¹⁷See, e.g., *Ashworth v. Ehrgott*, 934 N.E.2d 152 (Ind. Ct. App. 2010) (Discussing the trial court's order for father to pay half of his child's private elementary school education in absence of an agreement by the parties or agreement evidenced by child's previous attendance in private school was an abuse of discretion and reversed by the appellate court).

CONNECTING THE TWO: HOW TO RECONCILE REMOTE LEARNING WITH IMPUTED INCOME FOR CUSTODIAL PARENTS

While imputing income to custodial parents is appropriate in many situations, it should not be used when a parent reduces hours to accommodate their children's remote learning, and there are adequate resources between the parents to facilitate this. Imputing income in this circumstance merely leaves children with fewer resources during uncertain times.

Remote schooling has already caused many parents to reduce hours or leave their jobs at an alarming rate. By imputing income to these parents, courts will deprive them of resources desperately needed to effectively care for children. Further, the Census Bureau data discussed above indicates that mothers are foregoing work at a much higher rate than fathers when childcare is no longer available. To impute income on mothers in this situation will only further push them down the economic ladder. In situations of prolonged remote learning, custodial parents should be able to, in good faith, petition to modify child support without being punished by imputed income.

When a parent will need to reduce hours to accommodate a child in remote school, cooperative parents, family practitioners, the courts, and legislatures all have a range of options for addressing the child support calculation and the question of imputing income.

The cooperative co-parents and short-term remote school

In these situations of remote school changes to parenting and work arrangements, cooperative parents have solutions available to them to adjust support. The cooperative co-parents are ideal clients and parties in a separation. In theory, cooperative parties would not need a court to intervene if remote schooling were to go into effect, but this only works during very short periods of remote schooling. Yet, we have seen how quickly remote schooling can cause a drastic shift in a parent's work obligation and physical custody of the children, and the possibility of short-term natural disasters on quarantine requirements.

For example, several schools in California have shut down for 1 to 2 weeks at a time due to nearby wildfires and the toxic smoke they create.¹¹⁸ However, remote school is now a viable alternative in these situations. If parents are able to work together and cooperate, it is possible they could come to a short-term agreement regarding what is best for the children.

In these short-term situations, parties would agree on a payment system that focuses on the needs of the children, considering requirements of remote schooling and the effect on the custodial parent's role during this time. This method avoids conflict so long as the parents already have a positive co-parenting relationship with each other.¹¹⁹ The major benefit to this for cooperating parents is that if they agree, there is no reason to seek judicial intervention or an emergency modification.

However, this method only works well for very temporary or short-term situations. In most states, an oral agreement to modify child support cannot be enforced by the court at a later time.¹²⁰ This means that an oral agreement by parents to alter child support is not enforceable, unless it is reduced to writing, signed, filed, and approved by the court. Usually, child support modification is only retroactive to the date of filing the request, but some courts may consider retroactive modification if there is a complete change in custody.¹²¹ Furthermore, if this continues for a

¹¹⁸See, e.g., Ricardo Cano, *School closures from California wildfires this week have kept more than a million kids home*, Cal Matters (Nov. 15, <https://calmatters.org/environment/2018/11/school-closures-california-wildfires-1-million-students/>)

¹¹⁹Many studies have shown that conflict flowing from litigations is far more detrimental to children than a divorce. See, e.g., Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 William Mitchell L. Rev. 495 (2001); John H. Grych, *Interparental Conflict as a Risk Factor for Child Maladjustment: Implications for the Development of Prevention Programs*, 43 FAM. CT. REV. 97 (2005).

¹²⁰See, e.g., *Nilf v. Martin*, 686 N.E.2d 116, 117-18 (Ind. 1997)(remaining the primary authority).

¹²¹See Ind. Child Supp. G. 4, Commentary (Discussing how courts may consider retroactively modifying prior to the date of filing if there has been a substantial shift in custody). See also *Whited v. Whited*, 859 N.E.2d 657 (Ind. 2007).

longer period of time and one parent actually contributes less to child support, the parent who pays a lower amount than was originally ordered will have their tax refund intercepted. This means that an oral modification for any change in child support or custody that goes beyond a couple of weeks is not a viable or smart solution. When the reality of remote schooling starts moving from weeks to months, even cooperative parents will need to work with attorneys to implement a new support and custody agreement that more closely reflects reality.

Including remote learning provisions in modification or settlement agreements

Family law practitioners are usually experienced enough to know when parents will cooperate and when tensions are too great to expect cooperation. Clients experiencing greater conflict or those facing a much longer remote schooling period will need to seek modification of child support through attorneys, hopefully by mediation or agreement. Furthermore, family law practitioners should consider including provisions in settlement agreements regarding how the parties will address future instances of remote learning.

First, the classic example of when parents would need to seek modification of child support due to remote learning is when the parent with primary physical custody of the children reduces hours or leaves work to accommodate remote schooling. If a custodial parent leaves a job or reduced hours and child support is not increased, the parent's lost income is effectively being imputed to her. If parents anticipate a prolonged period of remote schooling, they would ideally work with their attorneys and file a modified support agreement with the court.

However, the situation causing remote schooling may also alter the parent's work dynamics requiring alterations to custody and support beyond just increasing child support payments. During the COVID-19 pandemic, parents would not have easily predicted who would be in the best position to have primary custody during remote schooling. Some parents decide it is better for the non-custodial parent to care for the children during this time because that parent's work schedule is more flexible or the same situation causing the remote schooling also caused that parent to be laid off.

Given the likelihood that remote learning will remain a reality, family law practitioners should consider the possibility of remote learning when drafting separation or settlement agreements. In fact, is not uncommon for family law practitioners in hurricane-heavy areas to include emergency custody or parenting plan provisions in settlement agreements.¹²² Firms and family law attorneys who advocate including hurricane-related emergency provisions claim they are a helpful guide to parents in stressful situations, and remind parents that the main objectives are the safety and wellbeing of the children and excellent communication and cooperation between the parents.¹²³ A similar provision could be included in settlement agreements addressing how custody and support will be determined if schools close or go remote in an emergency.

Such a provision could include an agreement that parties will do their best to work together; that they will determine which parent is in the best position to be the care primarily for the children during remote schooling; and agree not to seek to impute income to the parent facilitating remote schooling in child support modification. The provision could include an understanding that the custodial parent may require increased financial support if the children's remote schooling requires a reduction in that parent's work hours.¹²⁴ The agreement could then state that if the parents are unable to come to a consensus on the best course of action, they will try to mediate an agreement before litigating the issue.

What follows is an example of such an agreement that could be included in a settlement agreement.

¹²²Sandra Bonfiglio, *Why You Should Consider Including Natural Disaster-Related Custody Provisions in your Parenting Plan*, SANDRA BONFIGLIO, P.A. (Oct 30, 2019), <https://www.sandrabonfiglio.com/why-you-should-consider-including-natural-disaster-related-custody-provisions-in-your-parenting-plan/>.

¹²³Jeff Schreiber, *Custody & Visitation in the Face of a Looming Storm*, LOWCOUNTRY DIVORCE & FAMILY LAW, (Sept. 10, 2018), <https://www.lowcountrydivorceandfamilylaw.com/child-custody-visitation-looming-storm/> (Stating that "Now is NOT the time to score points for litigation").

¹²⁴This also avoids the requirement that requests for support modification must be based on a 20% change in the amount of support paid. (The percentage varies state-by-state). However, note that some states, like Washington, include in statute that "Agreement of the parties is not itself adequate reason to deviate." WASH. REV. CODE ANN. § 26.19.075 (2020).

Remote schooling in the case of a bona fide emergency.

In the event that (child's) K-12 schools are closed or move to remote learning for more than one week, parents agree to work together to determine the best custody arrangement for the children and the best child support arrangement for their care. If one parent moves to modify child support, the parents agree that not to ask the court to impute income if a parent reduces hours or ceases employment to facilitate (child's) remote schooling.

The parents agree that either parent may file a motion immediately with the court because support modification is based on the filing date. However, the parents agree to work together to determine if a parent will reduce hours to accommodate the children's remote schooling. If they are unable to come to an agreement, they will attempt to mediate the dispute before going to hearing on a motion, even an emergency motion, filed with the court.¹²⁵

This solution has limitations. A provision in a settlement agreement cannot possibly account for all circumstances causing remote-schooling or conflicts that parents will have. Circumstances surrounding the settlement agreement are bound to change over time, and parties may no longer have the same custodial or support roles, be working the same jobs, live in the same areas, or even have the same relationship when the need for remote learning arises. Therefore, it is always possible these disputes will end up in court.

Courts should consider deviating from child support guidelines or adopting the good faith-best interests standard

Trial courts should refrain from imputing income to custodial parents who reduce hours due to remote learning. The courts could either use their discretion to deviate from child support guidelines and statutes or, if feasible, adopt the Good Faith-Best Interests standard when deciding whether to impute income to parents facilitating remote learning.

Adopting an entirely new standard is not usually a simple option for most trial courts; these standards are sometimes written in statute, administrative rule, or agency guideline. While the bodies in charge of adopting these standards should implement the Good Faith-Best Interest standard in these situations, trial court judges also frequently have the ability to deviate for good cause.

Many statutes or guidelines provide trial courts broad discretion to deviate for many reasons, including to support the children's educational needs¹²⁶ or even providing a "catchall" to promote fairness and justice.¹²⁷ Deviation from statute or guidelines should be permitted when primary and secondary school children are learning remotely in order to avoid the effect of imputing income to the custodial parent.

If possible, however, adopting a new standard in these cases may be preferable to deviating from the guidelines. As stated, most state courts do not have the authority or confidence to adopt new standards. Child support statutes and guidelines are created differently in each state, but updates and revisions are usually left to a governing body, either a legislature or judicial committee.¹²⁸ Revising and adding a rule or statute that changes the standard to be "Good Faith Best Interests" in these situations is the best option for courts. This standard requires imputing income

¹²⁵This is by no means a perfect "remote learning" clause and does not likely address all issues or disputes that could arise regarding imputing income during remote learning.

¹²⁶See, e.g., S.D. CODIFIED LAWS § 25-7-6.10(3) (2020).

¹²⁷See, e.g., OHIO REV. CODE ANN. § 3119.22 (2019).

¹²⁸In Indiana, the Support Guidelines are drafted by the Judicial Administration Committee and the Board of the Judicial Conference of Indiana, presented to the Domestic Relations Committee of the Judicial Conference of Indiana, and adopted by the Indiana Supreme Court. See Ind. Child Supp. G., Support Rule 1.

to the custodial parent only if the decision to reduce hours was made in bad faith or that decision was not in the child's best interests.¹²⁹

As stated in section II(B)(i), this standard is used by several states when deciding whether to generally impute income to a parent.¹³⁰ For example, California's family code states that “[t]he court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children, taking into consideration the overall welfare and developmental needs of the children, and the time that parent spends with the children.”¹³¹ Applying this law, California courts have determined that no income is imputed to caregiving parents unless the imputation benefits the children.¹³²

Similarly, in Virginia, the legislature modified state code regarding voluntary under and unemployment to state that, “any consideration of imputed income based on a change in a party's employment shall be evaluated with consideration of the good faith and reasonableness of employment decisions made by the party”¹³³ Thus, a voluntary reduction in hours and income will not be imputed onto a caregiving parent if the reduction was in good faith.¹³⁴

Of course, there are some foreseeable problems with courts adopting this standard. First, there is the question regarding what to do about parents who have income imputed to them due to childcare needs before remote schooling and various childcare closures start. Should courts stop imputing income to those parents during the remote schooling period? If courts are forced to switch between standards due to an emergency, the originally imputed income could be wiped out, thereby drastically increasing the obligor's obligation.

Next, if remote schooling lasts for a particularly long time and is no longer an “emergency,” states still have similar policy-based concerns regarding imputed income that kept them from adopting a Good Faith-Best Interests standard in the first place. Courts are still concerned about the self-sufficient parent and how to balance a child's need of financial resources versus full-time parenting.

Impact of possible public financing to mitigate these problems

Much uncertainty regarding imputed income due to remote learning could be alleviated by a more robust public financing system. If public financing allowed for employees with children to take paid leave during periods of remote schooling, the “under-employed” parent would not lose income and would not be subject to imputation.

During the COVID-19 pandemic, the United States attempted to alleviate hardship by passing the Families First Coronavirus Response Act (FFCRA). This legislation required employers with fewer than 500 employees to provide employees with paid sick leave or expanded family or medical leave due to COVID-19.¹³⁵ However, the FFCRA required that employers provide only 80 h of paid leave and mandated that such paid leave would last and lasted only until December 2020, indicating the incredibly optimistic view that COVID-19 would last a short time.¹³⁶

Furthermore, the required pay under the FFCRA was far less for parents who took leave for childcare purposes. Employees who were unable to work due to illness or quarantine received full pay, while those unable to work in order to care for children were not paid for the first 10 days, and then only received two thirds pay for up to 10 weeks.¹³⁷

¹²⁹This note is not proposing the “Good Faith-BIC” standard be adopted to determine all imputed income.

¹³⁰See LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION, VOLUNTARY VS. INVOLUNTARY ACT, FN 87 (2d ed. Supp. 2021).

¹³¹CAL. FAMILY CODE § 4058(b) (West 2020).

¹³²*In re Marriage of Ficke*, 157 Cal. Rptr. 3d 870, 877 (2013).

¹³³VA. CODE ANN. § 20-108.1(B)(3) (West 2020).

¹³⁴See, e.g., *Murphy v. Murphy*, 779 S.E.2d 236 (VA Ct. App. 2015) (Mother voluntarily reduced income from \$170,000 to \$110,000 in order to spend more time with her children. The court determined this decision was not made in bad faith and did not impute income to Mother).

¹³⁵Families First Coronavirus Response Act, PUB. L. NO. 116-127, 134 Stat. 178 (2020).

¹³⁶*Id.*

¹³⁷*Id.* at § 102(a)(1)(F). Furthermore, employers with fewer than fifty employees are exempted from providing for caregiving employees under the act if it would endanger the viability of the business.

Similarly, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) provided parents who left jobs due to closure of schools and childcare access to unemployment insurance.¹³⁸ Access to unemployment for these purposes was only available under the CARES act and expired in December 2020.¹³⁹

CONCLUSION

The overwhelming majority of parents agree that remote schooling is “hell.”¹⁴⁰ Families are financially strapped, mental health issues are clearly problematic,¹⁴¹ and many parents are fluctuating between chaos,¹⁴² drowning, and perseverance.¹⁴³ Furthermore, many are facing these battles as solo parents. Refusing to impute income to caregiving parents during remote learning will not fix all of these issues, but it may lift a small weight.

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¹³⁸Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 132 Stat. 281 § 2102(a)(3)(A)(ii)(dd) (2020).

¹³⁹*Id.*

¹⁴⁰Erin Richards, 'This is hell': Parents and Kids Hate Online Learning, But They Could Face More Of It, USA TODAY (Jun. 29, 2020) <https://www.usatoday.com/story/news/education/2020/06/29/back-to-school-reopen-online-classes/3251324001/>.

¹⁴¹Pooja Lakshmin, *How Society Has Turned Its Back On Mothers: This Isn't Just About Burnout, It's About Betrayal*, N.Y. TIMES: THE PRIMAL SCREAM (Feb. 4, 2021) <https://www.nytimes.com/2021/02/04/parenting/working-mom-burnout-coronavirus.html>.

¹⁴²Jessica Bennett, *Three American Mothers, On The Brink*, N.Y. TIMES: THE PRIMAL SCREAM (Feb. 4, 2021) <https://www.nytimes.com/interactive/2021/02/04/parenting/covid-pandemic-mothers-primal-scream.html>.

¹⁴³*Id.*