by Ronald H. Kauffman

To Catch a Time-sharing Deviation

On November 16, 2011, Floridians woke up to find that their most popular child support deviation and adjustment was gone. This article investigates the missing deviation and adjustment, examines the rare jewel of the child support guidelines — the catch-all exception — and how the case was finally cracked.

Child Support

Calculating child support used to be entirely at the judge's discretion, based on a parent's ability to pay, and the child's needs.[1] Judicial discretion resulted in inconsistent awards, which contributed to delinquent payments.[2] To correct this, in 1984, Congress required all states to establish nonbinding child support guidelines, keeping some judicial discretion in case the guideline amounts proved unjust or inappropriate.[3]

Florida established F.S. §61.30, which follows the income shares model.[4] The guidelines are far from foolproof.[5] They are regressive, so poorer parents pay a larger share of income than wealthier parents. They impose a higher marginal rate on income earned by the poor, which penalizes earning extra money.[6] For high-income parents, the guidelines can award support far exceeding any child's needs.[7] Finally, Florida's guidelines have never been updated, so they are based on the cost of goods as they existed in the 1970s.[8]

Because of these problems, the guidelines expressly provide the amounts can be adjusted upward or downward. Section 61.30(1)(a) allows deviations by up to 5 percent after considering relevant factors.[9] Section 61.30(11)(a) authorizes deviations by more than 5 percent, pursuant to a list of 10 enumerated factors, and one equitable factor — the colloquial "catch-all" exception.[10] Finally, §61.30(11)(b) mandates use of a gross-up calculation of support for substantial time-sharing.[11]

Time-sharing

Florida policy is to see that children have frequent and continuing contact with both parents after they divorce or separate and that parents share in childrearing.[12] The guidelines historically frustrated this policy and, in fact, discouraged time-sharing. For example, they previously did not allow a child support adjustment for substantial time-sharing unless a parent spent at least 40 percent of the overnights with his or her children.[13]

Two households are being maintained for a child after divorce or separation. Parents exercising substantial time-sharing incur their own child rearing expenses when they time-share, and are duplicating payment for items already included in their child support. Without adjustments for substantial time-sharing, parents can be paying twice for a child's expense, making time-sharing prohibitively expensive.[14] Accordingly, in 2008, F.S. Ch. 61 was amended to expand the meaning of substantial time-sharing to include more time-sharing arrangements.[15]

There is also an interrelationship between time-sharing and child support.[16] Parents who frequently time-share tend to pay child support and parents who do not frequently time-share tend not to.[17] In addition to greater compliance in paying support, parents who substantially time-share are also reducing the other parent's expenses.[18]

The Missing Time-sharing Deviation

In *Dept. of Rev. ex rel. Sherman v. Daly*, 74 So. 3d 165 (Fla. 1st DCA 2011), the Department of Revenue appealed a child support order because it contained a deviation for a verbal time-sharing schedule.[19] Florida has an administrative procedure for child support in which an administrative law judge (ALJ) calculates the amount.[20] An ALJ uses the same guidelines as a circuit court judge.[21] *Daly* involved an administrative proceeding.[22]

In *Daly*, both parents testified they shared a roughly 60/40 time-sharing schedule. However, they never put their agreement into writing or had it approved by a court.[23] Notwithstanding the lack of a court-ordered parenting plan, the ALJ authorized a deviation based on the time-sharing schedule the parents testified to.[24] The First District Court of Appeal reversed, holding Florida law prohibited the deviation.

The *Daly* panel noted that the statute requires a parenting plan and rejected the ALJ's time-sharing deviation because the parents' schedule was not *"pursuant to a court authorized parenting plan."*[25] The *Daly* court read §61.30 as requiring deviations only when a parent time-shares pursuant to a court-ordered parenting plan.[26] As no such court order existed in *Daly*, the deviation was not authorized.

Daly refused to apply the §61.30(11)(a)(11) catch-all exception. The catch-all exception authorizes a court to make "any *other* adjustment that is needed to achieve an equitable result."[27] The *Daly* panel narrowly interpreted the term "other" in the catch-all section to mean "some grounds not already stated in the statute."[28]

The *Daly* panel also feared that extending the catch-all provision to include time-sharing without a court-ordered parenting plan would conflict with §61.30(11)(a)(10); the permissive deviation factor for under 20 percent of time-sharing. *Daly* reasoned that the legislature authorized time-sharing deviations only when there was a court-ordered parenting plan. Allowing deviations without a court-ordered plan would directly conflict with §61.30(11)(a)(10).

There is a question about the scope of the catch-all exception.[29] *Daly* answers it by limiting its application to cases where a deviation factor is not "already stated in the statute." This narrow construction has the advantage of preventing the catch-all from becoming the exception that swallows the rule.[30] However, *Daly* marks a significant departure from the catch-all provision's construction in earlier child support cases. Some may be left to wonder where the catch-all's construction went in the cases of *Dept. of Rev. ex rel. Marshall v. Smith*, 716 So. 2d 333 (Fla. 2d DCA 1998), and *Speed v. Dept. of Rev. ex rel. Nelson*, 749 So. 2d 510 (Fla. 2d DCA 1999).[31]

The *Speed* and *Smith* Cases

Before calculating any child support obligation, a court must first determine the parents' net income. Pursuant to §61.30(3), net income is determined by subtracting allowable deductions from gross income. Under §61.30(3)(f), one of the allowable deductions is "*court-ordered* support for other children which is actually paid."[32]

Obviously, a deduction for supporting one's children should automatically be denied, unless the support is paid pursuant to court order. However, if the putative father is already married with children, the only way he could qualify for the court-ordered support deduction would be to dissolve his marriage first. This creates a policy conflict, as forcing parents to divorce violates Florida's public policy to preserve families.

In *Smith*, the father and mother had a child out of wedlock.[33] At the time of the child's birth, the father was already married and had two children from his marriage. In calculating the father's child support, the court deducted the support he would have paid had there been a support order for the children of his marriage. The mother appealed, complaining that the guidelines only allow the court-ordered support deduction if there is a court order to pay the support.

While the court recognized the father does not technically pay court-ordered support for his two other children, relying on the catch-all section, the *Smith* panel authorized the deduction anyway, holding: "to only allow him credit for such support if he divorces would be unjust and would also be contrary to the state's interest in preserving the family unit."[34]

In *Speed*, the Department of Revenue filed a paternity action against a father who was then married to another woman.[35] In calculating the father's child support, the trial court failed to credit the father for the funds he was spending on his later-born children of his marriage to the other woman. In reversing, the *Speed* panel found that the father was supporting his other two children, and that limiting the deduction to court-ordered support would be both unjust and contrary to the state's legitimate interest in preserving the family.[36]

In *Hutslar v. Lappin*, 652 So. 2d 432 (Fla. 1st DCA 1995), the mother appealed a trial court's refusal to deduct her support of her three older children from a previous marriage.[37] In allowing the deduction, the same court that decided *Daly*, held the catch-all exception allows a court to deduct her support of her other children even without a court order.

In *Hutslar*, the First District Court of Appeal construed the catch-all section as vesting "*broad discretion* in the trial court to consider a custodial parent's obligation of support to other children, in the calculation of his or her income for purposes of determining that parent's support obligation for the minor child who is the subject of the support action."[38]

It is difficult to reconcile the First District's narrow construction of the catch-all in *Daly*, with its broad application in *Hutslar*. If the legislature requires a court order to credit a parent for time-sharing, how is that different from when it requires a court order to credit a parent for paying support? The broad construction of the catch-all in *Hutslar* created the same statutory conflict within §61.30 that concerned the *Daly* panel. Looking at the Florida policies involved, was the First District saying the policy underlying the court-ordered time-sharing deviation is significantly weaker than the policy attached to the court-ordered support deduction?

Cracking the Case

After the 2011 *Daly* decision, a number of parents had their time-sharing deviations and adjustments taken because they lacked court-ordered parenting plans.[39] However, the Sûreté was on the case. First, there was *Dept. of Rev. o/b/o Taylor v. Aluscar*, 82 So. 3d 1165 (Fla. 1st DCA 2012), in which the chief judge of the First District expressed an interest in affirming the time-sharing deviation under the catch-all exception.[40] However, the chief judge was unable to persuade other judges.

During the 2013 regular legislative session, Senate[41] and House bills were introduced, which would have amended §61.30 to expressly recognize "a time-sharing arrangement exercised by agreement of the parties."[42] However, after passing out of Senate and House committees, both bills died.

During the recent 2014 regular legislative session, H.B. 755[43] was passed and amended §61.30. The new bill revises the circumstances in which a court may deviate from the child support guidelines and adjust child support. The bill became effective on May 12, 2014. Since the bill's child support-related amendments are remedial, they apply to all actions pending on May 2014 and thereafter.

As amended, §61.30 now expressly allows a court to deviate from the

child support guidelines based on "[t]he particular parenting plan, a court-ordered time-sharing schedule, or a time-sharing arrangement exercised by agreement of the parties ...."[44] The amendments to §61.30 also mandate that the court adjust the child support amount based on a child's substantial time-sharing with a parent as provided in either a parenting plan, court-ordered time-sharing schedule, or when there is a substantial time-sharing arrangement exercised by agreement of the parents.

The statutory language, "arrangement exercised by agreement of the parties," was intended to be an informal agreement between the parents, either written or verbal, and express or implied.

Some additional tweaking may be appropriate. The amended statute will still provide that "the trier of fact shall order payment of child support which varies from the guideline amount... whenever any of the children are required by *court order* or *mediation agreement* to spend a substantial amount of time with either parent."[45]

Dénouement

Although largely academic after the passage of H.B. 755, it is fair to tally what the actual and anticipated losses from *Daly* were. For starters, *Daly* represented a dangerous step toward a two-tier child support system.[46] Suppose two parents — call them Cary and Grace — had worked out a 60/40 verbal time-sharing arrangement, and appear in court to calculate child support. All courts in Florida apply the same guidelines, so Cary should be on equal footing in any Florida court. However, the support obligations could be wildly different depending on which court Cary was in.

If judicial proceedings were filed, a circuit judge could consider Cary's actual time-sharing and gross-up child support.[47] Prospectively, a circuit judge could not deviate without a parenting plan. However, the court could adopt its own parenting plan, or approve a verbal arrangement, and turn it into a written order.

Administrative proceedings are different. ALJs lack statutory authority to establish parenting plans.[48] If the department files an administrative action against Cary, the ALJ cannot deviate from the guidelines for substantial time-sharing unless a court-approved plan already exists. The ALJ is calculating child support unjustly and undermining the state's interest in continuing post-separation time-sharing.[49]

That is bad, but it gets much worse. A circuit judge could not correct the administrative order unless Cary files a circuit court petition for modification or superseding order. Even then, the circuit judge is limited to modifying child support from the date of the filing of the petition forward. The administrative retroactive award and Cary's arrears would remain enforceable.[50] This was a pattern repeated throughout Florida for almost three years until the statute was amended.

We also lost consistency in child support cases when child support calculations varied depending on which courtroom you were standing in. Recall that the raison d'être of the guidelines was specifically to reduce the risk of inconsistent child support awards because they contributed to delinquent support payments. *Daly* stole some of that consistency.

There is also Florida's policy of encouraging frequent and continuing time-sharing after divorce. Parents substantially time-sharing could have been paying twice for child expenses if their time-sharing was not factored into the support calculation.

Without adjustments or deviations for significant time-sharing, some parents found themselves unable to afford seeing their children. This undermined Florida policy and exacerbated the single-parent home problem. H.B. 755 solved this immediate problem. However, it shouldn't have taken years of legislative effort to make that correction. If it takes a thief to catch a thief, courts should re-examine the application of the catch-all exception to resolve similar problems.❑

[1] *See, e.g., Peak v. Peak,* 411 So. 2d 325, 328 (Fla. 4th DCA 1982) (holding "child support rests primarily in the discretion of the trial judge...").

[2] *See generally* Laura W. Morgan, *Child Support Guidelines: Interpretation and Application* §1.01, ASPEN L. & BUS. (Supp. 2000).

[3] *See, e.g.,* 42 U.S.C. §667(b)(2) ("There shall be a rebuttable presumption ... that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding ... that the application of the guidelines would be unjust or inappropriate in a particular case ... shall be sufficient to rebut the presumption in that case.").

[4] The income shares model requires parents to share in child expenses proportionate to their incomes. Support is calculated by reference to tables showing a basic support obligation for combined incomes. Tables are based on the estimated costs of raising a child, excluding health insurance, child care, and extraordinary medical expenses in an intact family.

[5] A few accusations are leveled in the guidelines. *See* Fla. H.R., Future of Florida's Families Comm., *Child Support Guidelines* (Feb. 2006), *available at* http://www.myfloridahouse.gov/sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=2260&Session=2006&DocumentType=Reports&FileName=Final%20Report%20-%20Child%20Support%20Guidelines.pdf. (finding there is no clear explanation of the meaning of "rebuttable presumption"; Florida law may result in child support being terminated while a child is still in high school; and that there is no statutory guidance related to the guidelines review mandated by the federal government, among other findings).

[6] *See* Thomas S. McCaleb, *et al., Review and Update of Florida's Child Support Guidelines: Report to the Florida Legislature* 51 (Mar. 5, 2004), *available at* http://www.dshs.wa.gov/pdf/esa/dcs/2004fsu.pdf. (The marginal rate is the percentage increase in child support when income increases. Marginal rates decline from a high of about 95 percent for poor parents to a low of about 5 percent for the wealthiest. Suppose a parent earns an extra $100 of net monthly income, then how much of that extra $100 does a parent pay in child support? A parent with one child who earns $650 in net monthly income would pay $90 of that additional $100 as child support, keeping only $10 of it. However, a parent whose net monthly income is $800 would pay $23 in additional child support and retain $77).

[7] *Finley v. Scott,* 707 So. 2d 1112, 1114 (Fla. 1998).

[8] Rana Holtz & Thomas J. Sasser, *Child Support Myths and Truths: Exploring the Assumptions Underlying Florida's Statutory Guidelines,* 73 FLA. B. J. 58 (Oct. 1999). An excellent article on Florida's child support guidelines observing that Florida's schedules were based on the 1972-73 Consumer Expenditures Survey, a nationwide sample of intact families. No divorced families were surveyed, and the estimates were based on two-parent households in which the wife was employed at least part-time.

[9] FLA. STAT. §61.30(1)(a) (2011) (enumerating factors, including the needs of the child or children, age, station in life, standard of living, and the financial status and ability of each parent).

[10] FLA. STAT. §61.30(11)(a)(1)-(11) (2013).

[11] FLA. STAT. §61.30(11)(b)(1)-(8) (2013). In a gross-up calculation, support is calculated for each parent. The respective obligations are then multiplied by 1.5 to account for maintaining two homes for the child and weighted by the amount of time-sharing between parents. The difference between the two parents' obligations, with an adjustment for childcare and health insurance, is the amount paid by the parent with the higher obligation to the parent with the lower obligation; *see also* McCaleb, *Review and Update of Florida's Child Support Guidelines: Report to the Florida Legislature* at app. 3–2.

[12] *See* FLA. STAT. §61.13(2)(c)(1) (2013).

[13] *See* McCaleb, *Review and Update of Florida's Child Support Guidelines: Report to the Florida Legislature* at 55 (finding that the "failure to provide a credit for visitation of less than 40 percent is a disincentive for regular visitation with the noncustodial parent"); *see also* FLA. STAT. §61.30(11)(a)(10) (2007) ("The court *may* adjust the minimum child support award ...based upon the...particular shared parental arrangement, such as where the child spends a significant amount of time *but less than 40 percent* of the overnights, with the noncustodial parent ...") (emphasis added). However, the statute did not contain a formula for actually calculating this deviation.

[14] *See* McCaleb, *Review and Update of Florida's Child Support Guidelines: Report to the Florida Legislature* at 55.

[15] *See, e.g.,* FLA. STAT. §61.30(11)(b)(10) (2003) (providing that whenever a particular shared parental arrangement provides that each child spend a substantial amount of time with each parent, the court shall adjust any award of child support, "substantial amount of time" defined as the noncustodial parent exercises visitation at least 40 percent of the overnights of the year).

[16] There is a debate between advocacy groups, but research supports the argument that child support and access are interrelated. *See, e.g.,* Jonathan R. Veurn, *Interrelation of Child Support, Visitation, and Hours of Work,* U.S. DEPT. OF LABOR, MONTHLY LABOR REVIEW 47 (June 1992), *available at* http://www.bls.gov/mlr/1992/06/art4full.pdf. (finding that payments of child support are positively related to frequency of visitation, and this positive association persists even after controlling for a number of demographic factors used to predict payment and visitation).

[17] *See* U.S. Dept. Health and Human Serv., *Child Access and Visitation Programs: Participant Outcomes* 9 (Jan. 2006), *available at* http://www.acf.hhs.gov/sites/default/files/ocse/dcl_07_15a.pdf. (citing U.S. Census Bureau statistics showing 77.1 percent of those with joint custody or visitation rights paid at least some child support, compared with 55.8 percent of their counterparts without visitation rights or joint custody).

[18] *See, e.g.,* FLA. STAT. §61.30(11)(g) (1999) (authorizing a deviation based on "[t]he particular shared parental arrangement, such as where the children spend a substantial amount of their time with the secondary residential parent *thereby reducing the financial expenditures incurred by the primary residential parent...*") (emphasis added).

[19] *Dept. of Rev. ex rel. Sherman v. Daly*, 74 So. 3d 165 (Fla. 1st DCA 2011).

[20] *See generally* FLA. STAT. §409.2563 (2013). The administrative process has been criticized for taking longer, producing less orders than expected, and costing more than judicial hearings; *see generally* Florida Legislature, Office of Program Policy Analysis & Government Accountability, *Department Process Changes Resulted in Fewer Administrative Child Support Orders Than Expected,* Report No. 08-48 (Aug. 2008), *available at* http://www.oppaga.state.fl.us/Summary.aspx?reportNum=08-48.

[21] *See* FLA. STAT. §409.2563(5)(a) (2011).

[22] *See Daly,* 74 So. 3d at 166.

[23] *Id.* at 167.

[24] *Id.*

[25] *Id.* (emphasis original).

[26] *Id.*

[27] FLA. STAT. §61.30(11)(a)(11) (2011) (emphasis original) ("Any other adjustment that is needed to achieve an equitable result which may include, but not be limited to, a reasonable and necessary existing expense or debt. Such expense or debt may include, but is not limited to, a reasonable and necessary expense or debt that the parties jointly incurred during the marriage.").

[28] *Daly,* 74 So. 3d at 168.

[29] *See* Morgan, *Child Support Guidelines: Interpretation and Application* §1.01 at 4-23, ASPEN L. & BUS. (Supp. 2000).

[30] Although not discussed in *Daly,* catch-all exceptions are limited by the canon of ejusdem generis. *Daly* implies that if the catch-all were given its broadest meaning, the specifically enumerated time-sharing adjustments in the statute would become superfluous.

[31] *See, e.g., Ogando v. Munoz,* 962 So. 2d 957, 958 (Fla. 3d DCA 2007) (finding FLA. STAT. §61.30(11)(a)(11) allows a court to "adjust the minimum child support award, or either or both parents' share of the minimum child support award ... to achieve an equitable result"); *see Flanagan v. Flanagan,* 673 So. 2d 894, 895-96 (Fla. 2d DCA 1996).

[32] FLA. STAT. §61.30(3)(f) (emphasis added) (Net income is obtained by subtracting allowable deductions from gross income. Allowable deductions shall include "(f) [c]ourt-ordered support for other children which is actually paid.").

[33] *Dept. of Rev. ex rel. Marshall v. Smith,* 716 So. 2d 333 (Fla. 2d DCA 1998).

[34] *Id.* at 335.

[35] *Speed v. Dept. of Rev. ex rel. Nelson,* 749 So. 2d 510 (Fla. 2d DCA 1999).

[36] *Id.* at 511.

[37] *Hutslar v. Lappin,* 652 So. 2d 432 (Fla. 1st DCA 1995).

[38] *Id.* at 434 (emphasis added).

[39] *See, e.g., Dept. of Rev. v. Hibbert,* 81 So. 3d 643 (Fla. 1st DCA 2012); *Dept. of Rev. v. Koehler,* 77 So. 3d 253 (Fla. 1st DCA 2012); *Dept. of Rev. v. Ingrim,* 81 So. 3d 643 (Fla. 1st DCA 2012); *Dept. of Rev. v. Mayweather,* 84 So. 3d 454 (Fla. 1st DCA 2012); *Dept. of Rev. v. Hunt,* 83 So. 3d 1014 (Fla. 1st DCA 2012); *Dept. of Rev. v. Veach,* 83 So. 3d 1015 (Fla. 1st DCA 2012).

[40] *See Dept. of Rev. o/b/o Taylor v. Aluscar,* 82 So. 3d 1165 (Fla. 1st DCA 2012) (stating "If we were writing on a clean slate I would vote to affirm, and to approve the ALJ's interpretation of section 61.30(11)(a)11, Florida Statutes (2011), in the present case.") (Benton, C.J., concurring).

[41] Fla. S.B 1210, 2013 Legis. Reg. Sess. 1 (Feb. 26, 2013).

[42] Fla. H.B 905, 2013 Legis. Reg. Sess. 1 (Feb. 19, 2013); *see* Fla. H.R. Jud., CS/CS/HB 905 (2013) Staff Analysis (Apr. 11, 2013), *available at* http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h0905e.APC.DOCX&DocumentType=Analysis&BillNumber=0905&Session=2013.

[43] The Senate companion bill was Fla. S.B 104, 2014 Legis. Reg. Sess. 1 (Jan. 30, 2014). S.B. 104 was laid on table on April 24, 2014, when H.B. 755 passed. Fla. S., CS/SB 104: Family Law, *available at* http://www.flsenate.gov/Session/Bill/2014/0104. For the sake of clarity, only H.B. 755 will be discussed.

[44] FLA. STAT. §61.30(11)(b) (2014) (effective July 1, 2014).

[45] FLA. STAT. §61.30(1)(a) (2014).

[46] *See* Fla. H.R., Jud. Oversight, H.B. 1689 (2002) Final Analysis (July 29, 2002), *available at* http://www.japc.state.fl.us/publications/SummariesAnalyses/2002/HB16891stENG.pdf.

[47] *See* FLA. FAM. L. R. P. 12.491(b) (limiting a support enforcement hearing officer's duties).

[48] *See* FLA. STAT. §409.2563(2)(b) (2013).

[49] *See* FLA. STAT. §409.2563(2) (2013) (authorizing ALJs to make findings of fact necessary for a proper determination of a parent's support obligation).

[50] *See* FLA. STAT. §409.2563(10)(c) (2013) (generally providing that a circuit court may enter an order prospectively changing the support obligations established in an administrative support order, but any unpaid support owed under the superseded administrative support order may not be retroactively modified by the circuit court, except as provided by §61.14(1)(a)).

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