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Devaluing Caregiving in Child Support Calculations: Imputing Income to Custodial Parents Who Stay Home with Children

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Notes

Devaluing Caregiving in Child Support Calculations: Imputing Income to Custodial Parents Who Stay Home with Children

Stanton v. Abbey[1]

I. INTRODUCTION

In *Stanton v. Abbey*, the Missouri Court of Appeals, Eastern District, significantly changed Missouri child support law by holding that, in appropriate circumstances, a trial court may impute income to a custodial parent who stays at home to care for minor children rather than obtaining employment outside the home.[2] The court established a multi-factor test to assist trial courts in determining when imputation of income to a custodial parent is proper.[3] However, the *Stanton* test has not been consistently applied in subsequent Missouri appellate decisions,[4] and the courts of other States have not been uniform in their treatment of the issue.[5] The issue of the propriety of imputing income to a custodial parent is thus ripe for an authoritative determination by the Missouri Supreme Court.

This Note takes the position that *Stanton* was incorrectly decided. *Stanton* represents a dramatic departure from prior Missouri case law, and rests on a highly questionable interpretation of the relevant statutes and court rules.[6] Moreover, *Stanton* implicates the broader national debate on the value of stay-at-home parenting—a decision to impute income to a parent who works full-time caring for children significantly increases the economic costs associated with that decision.[7] When income is imputed to a custodial parent, the law thus expresses a strong preference for paid employment over family care. As a matter of public policy, the law should remain neutral, respect the private choices made by parents concerning their allocation of labor between

1. 874 S.W.2d 493 (Mo. Ct. App. 1994).
2. *Id.* at 499.
3. *Id. See infra* note 188 and accompanying text.
4. *See infra* note 193 and accompanying text.
5. *See infra* notes 130-35 and accompanying text.
6. *See infra* notes 194-200 and accompanying text.
7. *See infra* notes 61, 137-38 and accompanying text.

the household and the marketplace, and not burden the choice to engage in full-time caregiving with additional costs. Finally, imputing income to a custodial parent in many cases deprives the children involved of tangible resources, thus defeating the policy of providing adequate support.[8]

This Note proposes an alternative solution to imputation of income to a custodial parent, in cases where that parent has remarried. Marital/community property concepts should be introduced into the child support calculation, so that the total household income of the custodial parent can be considered in the child support calculation.[9] This alternative has the advantage of realism, in that it more accurately reflects how "second families" operate.[10] Moreover, it demonstrates an equal respect for marketplace employment and full-time child care, consistent with the "partnership" concept of marriage familiar to other areas of the law.[11] The statutory groundwork for this solution appears to have already been laid in Missouri.[12]

II. FACTS AND HOLDING

The marriage of Linda Gail Stanton (Mother) and Elliot Efrem Abbey (Father) was dissolved on May 1, 1990.[13] The divorce decree awarded primary physical and legal custody of the parties' four minor children to Mother and required Father to pay monthly child support of $562.50 per child, a total of $2,250 per month.[14] The parties had substantial incomes: their combined income in 1989 was approximately $185,000.[15]

Mother remarried on January 31, 1992, and her new husband soon accepted a job in the state of California.[16] Mother then initiated the instant action by filing a motion to modify the original decree, seeking permission to move the children to California. Father filed a cross-motion to modify,

8. *See infra* notes 61, 137-38 and accompanying text.

9. *See infra* notes 113-27, 139-43 and accompanying text.

10. *See infra* note 146 and accompanying text.

11. *See infra* notes 113-122, 221 and accompanying text.

12. *See infra* notes 147-50 and accompanying text.

13. *Stanton*, 874 S.W.2d at 494.

14. *Id.* The children were born in 1980, 1982, 1984, and 1987, respectively. *Id.* at 499. In the original decree, Father received periodic temporary custody as well as additional visitation, and each party was given the right to claim two of the children as exemptions for federal income tax purposes. *Id.* Mother was given the option to insure Father's life at her expense. *Id.*

15. *Id.* at 497.

16. *Id.* at 494. Mother's new husband's annual income was approximately $225,000. *Id.* at 497.

consenting to the move, but raising numerous issues including a request for a reduction of his child support obligation.[17]

From 1990 to 1992 Mother, a physician specializing in internal medicine,[18] earned an average annual income of $100,935.[19] She ceased practicing medicine on July 15, 1992, after the move to California.[20] Mother decided to stay at home because it was her first chance to stay home with the children; because she saw a need to help the family make adjustments to the new location; because she had not yet obtained a California medical license; and because she had recently experienced a miscarriage.[21] Mother had, however, enrolled to take the California medical boards and intended to become licensed in that state.[22]

The Circuit Court of St. Louis County[23] entered an order generally in accordance with Father's motion.[24] On the child support issue, the trial court found "a change of circumstances so substantial and continuing" as to justify modification of the prior decree, and reduced Father's monthly support obligation to $308 per child, a total of $1,232 per month.[25] In making the modification, the trial court imputed income to Mother pursuant to Form 14, the Missouri presumed child support calculation worksheet.[26]

The Missouri Court of Appeals, Eastern District,[27] affirmed, holding that the evidence supported the finding of a substantial and continuing change in circumstances,[28] that trial courts have discretion to impute income to an "underemployed or unemployed custodial parent" in "appropriate

17. *Id.* at 494-95.

18. *Id.* at 499. Mother practiced medicine from 1980 until July 15, 1992. *Id.* at 499-500.

19. *Id.* at 498. Mother's expense for a full-time housekeeper during the time she was a single working parent were $1,800 per month. *Id.* at 500. No other details are given regarding her child care arrangements during this period, or during her first marriage.

20. *Id.* at 499-500.

21. *Id.* at 500.

22. *Id.*

23. Michael F. Godfrey, J. *Id.* at 493.

24. *Id.* at 495.

25. *Id.* at 497.

26. *Id.* No detailed description of the trial court's reasoning is provided. *See infra* notes 40-47 and accompanying text, explaining Missouri's child support guidelines and Form 14.

27. Grimm, Presiding Judge. *Id.* at 494.

28. *Id.* at 497. *See infra* notes 151-56 and accompanying text.

circumstances,"[29] and that the trial court did not abuse its discretion in imputing income to Mother on these facts.[30]

III. LEGAL BACKGROUND

A. Context: The Parental Support Obligation

At early common law, the obligation of parents to support their children appears to have been considered a mere moral obligation.[31] During the nineteenth century, however, it gradually attained the status of a legal obligation in American case and statutory law.[32] This legal duty, at least as to fathers, was recognized in Missouri by 1882,[33] and the parental duty of support is now well established in Missouri.[34] However, awards for child support throughout the nineteenth and most of the twentieth centuries were discretionary with the court and often inadequate. Additionally, a custodial mother seeking to enforce the father's obligation faced difficult procedural and enforcement problems.[35] Statutory law gradually replaced the common law

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29. *Id.* at 499. *See infra* notes 157-89 and accompanying text.

30. *Id.* at 499-500. *See infra* notes 189-93 and accompanying text. The Court of Appeals resolved a variety of other matters in this case, involving the finding of a change in circumstances, custody, visitation, and responsibility for payment of insurance premiums. *Id.* at 496-96, 500-02.

31. *See* Donna Schuele, *Origins and Development of the Law of Parental Child Support*, 27 J. FAM. L. 807, 810 & n.7 (1988-89) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Ch. 16 (1871)).

32. *See generally id.* at 807-816 (providing a thorough history of the early development of child support law, with extensive citations to eighteenth and nineteenth century cases and to the contemporary legal literature).

33. *See* In the Matter of Scarritt, 76 Mo. 565, 584 (1882):

> As to any mere article of property, either personal or real, the law permits a man to dispose of it, by gift or contract, as he chooses. Not so of his children. The father owes a duty to nurture, support, educate and protect his child, and the child has the right to call upon him for the discharge of this duty. These obligations and rights are imposed and conferred by the laws of nature; and public policy, for the good of society, will not permit or allow the father to irrevocably divest himself of or to abandon them at his mere will or pleasure.

34. JACK COCHRAN, FAMILY LAW (21 MISSOURI PRACTICE) § 10.2, at 261 (1990); Joan M. Burger, *Child Support and Maintenance, in* 1 MISSOURI FAMILY LAW 14-1, 14-2 (Missouri Bar 4th ed. 1988). *See also* MO. REV. STAT. §§ 452.340 and 568.040 (1994) (child support and criminal nonsupport of children). *Cf.* MO. REV. STAT. §§ 210.110-210.183 (1994) (child abuse and neglect).

35. *See generally* Schuele, *supra* note 31, at 816-839.

as the source of judicial authority for such awards, but the early statutes left courts with great discretion in making awards and typically failed to set forth effective procedures for enforcing the duty of support.[36]

As divorce became increasingly common in the twentieth century, it became clear that divorce often left children (and their custodial parent, usually the mother) in extreme poverty, in many cases dependent upon the government for support.[37] In 1988, Congress responded by enacting the Family Support Act of 1988,[38] requiring every state to develop specific guidelines for calculating presumed child support amounts, as a condition for receiving federal Aid to Families with Dependent Children payments.[39]

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36. *Id.* at 825-26 and nn.67-68. *See also* Peter Leehy, Note, *The Child Support Standards Act and the New York Judiciary: Fortifying the 17 Percent Solution*, 56 BROOK. L. REV. 1299, 1304 & nn.33-35 (1991).

37. Congress recognized the importance of this problem through adoption of the Child Support Enforcement Act as part of the Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2351 (1974) (codified as amended at 42 U.S.C. §§ 651-669 (1988)).

Numerous authors have collected and discussed the statistical data regarding the poverty of children and women following divorce. *See, e.g.*, Leehy, *supra* note 36, at 1305-07; Loretta D. McDonald, Comment, *Child Support Guidelines: Formulas to Protect Our Children from Poverty and the Economic Hardships of Divorce*, 23 CREIGHTON L. REV. 835, 835-38 (1990); Jennifer Clifton Ferguson, Comment, *Missouri Child Support Guidelines*, 57 MO. L. REV. 1301, 1301-02 (1992); Helen Donigan, *Calculating and Documenting Child Support Awards Under Washington Law*, 26 GONZ. L. REV. 13, 16-18 (1990/91); Sally F. Goldfarb, *Child Support Guidelines: A Model for Fair Allocation of Child Care, Medical, and Educational Expenses*, 21 FAM. L.Q. 325, 349 (1987). The disparate effects of divorce on children and on custodial households are discussed in Carol Bruch, *Developing Standards for Child Support Payments: A Critique of Current Practice*, 16 U.C. DAVIS L. REV. 49, 50-54 (1982). *See also* Malcolm Wallop, *The Last Campaign—Child Support and Poverty*, 1983 DET. C.L. REV. 1467.

It has also been observed that the child support reforms of the late 1980s have not entirely resolved the national problem of children's poverty, and the rate of poverty among children has actually risen by more than 40 percent since 1970. Marsha Garrison, *Child Support and Children's Poverty*, 28 FAM. L.Q. 475, 479-483 (1994) (reviewing ANDREA H. BELLER & JOHN W. GRAHAM, THE ECONOMICS OF CHILD SUPPORT (1993) and DONALD J. HERNANDEZ, AMERICA'S CHILDREN: RESOURCES FROM FAMILY GOVERNMENT AND THE ECONOMY (1993)). A variety of reasons for this, and the limitations of what government child support policy can accomplish, are discussed in the remainder of this thoughtful book review.

38. Pub. L. No. 100-485, 102 Stat. 2343 (1988).

39. *Id.* The history leading up to the enactment of this law, and also the earlier Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305, is presented in Leehy, *supra* note 36, at 1301-04. *See also* McDonald, *supra* note 37,

The Missouri General Assembly responded to this mandate by directing the Missouri Supreme Court to promulgate a guideline containing "specific, descriptive, and numeric criteria" for computing the child support obligation.[40] The statute and guidelines create a rebuttable presumption that the amount calculated is the correct amount to be awarded; however, the court may award a different amount upon "a written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case."[41] The General Assembly has set forth by statute the general factors which courts should consider in making an initial child support award.[42] The Missouri Supreme Court, by Rule 88.01,[43]

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at 838-42. By limiting the discretion of trial judges, the guidelines were intended to have the following effects: "(1) to bridge the 'adequacy gap' in child support awards; (2) to improve the consistency of awards ordered; and (3) to improve the efficiency of court award processes." Ferguson, *supra* note 37, at 1302. Various models the states have employed in establishing their presumptive support guidelines have been described in detail by several authors. Ferguson, *supra* note 37, at 1303-06; Goldfarb, *supra* note 37, at 325-330. *See generally* Robert G. Williams, *Guidelines for Setting Levels of Child Support Orders*, 21 FAM. L.Q. 281 (1987); and the series of articles collected in 1 AMERICAN BAR ASSOCIATION, IMPROVING CHILD SUPPORT PRACTICE I-1-422 (1986).

The broader issues raised by limiting judicial discretion by rule are discussed in Carl E. Schneider, *The Tension Between Rules and Discretion in Family Law: A Report and Reflection*, 27 FAM. L.Q. 229 (1993). *See also* Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165 (1986); State *ex rel.* Wilcox v. Strand, 442 N.W.2d 256, 258 (S.D. 1989) (Henderson, J., concurring).

40. MO. REV. STAT. § 452.340.7 (1994). The development of Missouri's child support guidelines, along with an explanation of their application, is presented in Ferguson, *supra* note 37, at 1306-314. For a comprehensive general overview of Missouri child support law, *see* COCHRAN, *supra* note 34, Chapter 10 (1988 and Supp. 1994); Burger, *supra* note 34, §§ 14.1-14.41 (1988 and Supp. 1991).

41. MO. REV. STAT. § 452.340.8 (1994).

42. MO. REV. STAT. § 452.340.1 (1994) provides:

> In a proceeding for dissolution of marriage, legal separation or child support, the court may order either or both parents owing a duty of support to a child of the marriage to pay an amount reasonable or necessary for his support, including an award retroactive to the date of filing the petition, without regard to marital misconduct, after considering all relevant factors including:
>
> (1) The financial needs and resources of the child;
>
> (2) The financial resources and needs of the parents;
>
> (3) The standard of living the child would have enjoyed had the marriage not been dissolved;

provided that the child support amount calculated by Civil Procedure Form 14[44] shall be presumed the correct amount in every case, effective April 1,

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(4) The physical and emotional condition of the child, and his educational needs.

43. MO. SUP. CT. R. 88.01 provides:

When determining the amount of child support to order, a court or administrative agency shall consider all relevant factors, including:

(a) the financial resources and needs of the child;

(b) the financial resources and needs of the parents;

(c) the standard of living the child would have enjoyed had the marriage not been dissolved;

(d) the physical and emotional condition of the child; and

(e) the educational needs of the child. There is a rebuttable presumption that the amount of child support calculated pursuant to Civil Procedure Form No. 14 is the amount of child support to be awarded in any judicial or administrative proceeding for dissolution of marriage, legal separation, or child support. It is sufficient in a particular case to rebut the presumption that the amount of child support calculated pursuant to Civil Procedure Form No. 14 is correct if the court or administrative agency enters in the case a written finding or a specific finding on the record that the amount so calculated, after consideration of all relevant factors, is unjust or inappropriate.

44. MO. CIV. P. FORM NO. 14 includes a calculation worksheet, instructions for use, and comments. Line 1 of the worksheet is "monthly gross income," and the remainder of the worksheet makes adjustments to that amount and assigns the percentage and amount of support due from each parent. The directions for completion of Line 1 of the worksheet read:

Enter one-twelfth of yearly gross income. Gross income includes income from any source, except as excluded below, and includes but is not limited to income from salaries, wages, overtime compensation, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security benefits, retirement benefits, workers' compensation benefits, unemployment compensation benefits, disability insurance benefits, and spousal support actually received from a person not a party to the order.

For income from rent, royalties, self-employment, proprietorship or a business or joint ownership or a partnership or closely held corporation, "gross income" is defined as gross receipts minus ordinary and necessary expenses required to produce income. The court may exclude from ordinary and necessary expenses amounts for depreciation, investment tax credits, and other noncash reductions of gross receipts. Income, expenses and retained earnings should be reviewed to determine gross income. This amount may differ from a determination of business income for tax purposes.

1990.[45] The General Assembly has also set forth the factors to be considered upon a motion to modify an existing award,[46] and has required the use of Form 14 in those situations as well.[47] Missouri made another significant change in child support policy in 1988, when the General Assembly deleted as a factor to be considered in setting child support awards "the father's primary responsibility for support of his child."[48]

> Income earned from a second job of a sporadic or nonrecurring nature may be included in whole or in part in appropriate circumstances.
> Significant employment-related benefits received by a parent may be counted as income.
> Exclude from gross income the following: aid to families with dependent children (AFDC) payments; medicaid benefits; supplemental security income (SSI) benefits; food stamps; general assistance benefits; other public assistance benefits having eligibility based on income; and child support received for other children. *If either parent is unemployed or underemployed, child support may be calculated in appropriate circumstances based on a determination of potential income. To determine potential income, the court or administrative agency may consider employment potential and probable earnings level based on the parent's recent work history, occupational qualifications, prevailing job opportunities in the community, and whether that parent is custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.*

(emphasis added).

45. MO. SUP. CT. R. 88.01.

46. MO. REV. STAT. § 452.370.1 (1994) provides:

> Except as otherwise provided in subsection 6 of section 452.325, the provisions of any decree respecting maintenance or support may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable. In a proceeding for modification of any child support or maintenance award, the court, in determining whether or not a substantial change in circumstances has occurred, shall consider all financial resources of both parties, including the extent to which the reasonable expenses of either party are, or should be, shared by a spouse or other person with whom he or she cohabits, and the earning capacity of a party who is not employed. If the application of the guidelines and criteria set forth in supreme court rule 88.01 to the financial circumstances of the parties would result in a change of child support from the existing amount by twenty percent or more, then a prima facie showing has been made of a change of circumstances so substantial and continuing as to make the present terms unreasonable.

47. MO. REV. STAT. § 452.370.2 (1994).

48. MO. REV. STAT. § 452.340(1) (1986). An extensive commentary on the 1988 amendment is found in Mathieu Bregande, Comment, *No Longer the Father's Primary Duty to Support: Legal Equality or Economic Disparity Among the Sexes?*, 34 ST.

In the typical child support calculation, the income attributed to a parent is the parent's *actual* income.[49] However, even before adoption of formal child support guidelines, the practice of imputing income to a noncustodial parent had gained widespread acceptance in Missouri and other states.[50] Courts developed this practice, under which a court may impute income to a parent who seeks to reduce his/her child support obligation through voluntary unemployment or underemployment, to further the purpose of providing adequate child support awards.[51] This doctrine, as applied to noncustodial

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LOUIS U. L.J. 133 (1989). Bregande analyzes the social and political reasons why the legislature took this action, and whether the law comports with economic reality. *Id.* at 135-143. The author concluded that Missouri acted prematurely in abolishing the father's primary duty of support:

> The Missouri Legislature's objective is something that cannot be achieved until economic burdens on women are substantially alleviated. Since there can be no legal parity until there is economic parity between the sexes, lawmakers and society-at-large must cling to reality and not misleading statistics, in order to develop sound policies and presumptions concerning the role of spouses.

Id. at 147. *But see* Agnes Pek Dover, Note, *Financial Equality in Marriage and Parenthood: Sharing the Burdens as Well as the Benefits*, 29 CATH. U. L. REV. 733 (1980); Lee Ann Conti, Comment, *Child Support: His, Her, or Their Responsibility?*, 25 DEPAUL L. REV. 707 (1976).

See also Stephen D. Hoyne, Comment, *Child Support in Missouri: The Father's Duty, the Child's Right, and the Mother's Ability to Enforce*, 36 MO. L. REV. 325 (1971) (summarizing and analyzing Missouri child support case law).

49. *See, e.g.*, MO. CIV. P. FORM NO. 14, *supra* note 44, directions for completing worksheet line 1, "Monthly gross income."

50. Laura W. Morgan has collected many cases from around the country on imputing income, illustrating the principles commonly applied and the situations in which income is likely to be imputed, in three articles. *See* Laura W. Morgan, *Imputed Income: 1995 Comprehensive Update*, 7 DIVORCE LITIG. 29 (1995) [hereinafter Morgan, *1995 Update*]; Laura W. Morgan, *Counting What's Not There: Recent Case Law on Imputing Income in Spousal and Child Support Cases*, 4 DIVORCE LITIG. 197 (1992); Laura W. Morgan, *Update: Imputed Income*, 5 DIVORCE LITIG. 206 (1993).

51. The rule has drawn favorable comment from legal writers. *See* Bruch, *supra* note 37, at 61-62 ("[T]here is a well-established support doctrine that imputes earnings, whether or not received, to parents at the level available to them were they to make a good faith effort to earn. This sensible doctrine has seen frequent, effective use when threats to cease or reduce profitable employment have been made in an effort to avoid or minimize support responsibilities."); Leehy, *supra* note 36, at 1336 ("By establishing an income base that accurately reflects the parents' ability to support their children, the courts will advance the goal of providing higher awards.").

It is thus not surprising that the majority of states take the parent's state of mind into account in determining whether to impute income, and a good faith reason for

parents, has been part of Missouri law since at least 1965.[52] The Missouri Court of Appeals, Eastern District, summarized the law with regard to imputing income in the 1994 case of *Jensen v. Jensen*,[53] and the principles have been codified in statutory law[54] and in the instructions for completion of Form 14.[55] While the cases typically do not speak in terms of the custodial/noncustodial parent distinction, it is apparent from a review of the literature that the common law rule developed in an effort to enforce the obligations of noncustodial parents.[56]

Prior to *Stanton*, only one Missouri appellate decision appears to have explicitly considered the issue of imputing income to a *custodial* parent, and

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reducing income will prevent income from being imputed in many states. Morgan, *1995 Update*, *supra* note 50, at 43-47. Interestingly, Morgan cites Missouri cases both for the majority view that state of mind is an important consideration, Morgan, *1995 Update*, *supra* note 50, at 44 (citing *In re* Adoption of J.P.S., 876 S.W.2d 762 (Mo. Ct. App. 1994)), and for the minority view that state of mind is irrelevant, *id.* at 42 (citing Luker v. Luker, 861 S.W.2d 195 (Mo. Ct. App. 1993)).

See also Donigan, *supra* note 37, at 31-34.

52. Weiss v. Weiss, 392 S.W.2d 646, 647 (Mo. Ct. App. 1965).

53. 877 S.W.2d 131, 136 (Mo. Ct. App. 1994) (court may impute income in proper circumstances, especially where reduction in income was voluntary, as where the parent deliberately sought to reduce or hide income to decrease the child support obligation, or did not in good faith attempt to gain employment). The *Jensen* case itself illustrates the highly discretionary nature of the court's ability to impute income even to a noncustodial parent, and how different courts can see the issues differently. In *Jensen*, the court held that the trial court erred in imputing income of $6,000 to father, where father had been fired by his former employer prior to the divorce, and subsequently, with the consent of mother, had opened his own business in the same field. *Id.* at 136-37. "The trial court's imputation of an income three times higher than husband's actual earnings could force him to abandon the business, forfeit the marital assets he received and seek employment elsewhere to meet the awards premised on income he does not receive." *Id.* at 137.

See also Overstreet v. Overstreet, 693 S.W.2d 242, 245-46 (Mo. Ct. App. 1985) (reversing a trial court which refused to impute income to a noncustodial parent); Crooks v. Crooks, 666 S.W.2d 33, 34 (Mo. Ct. App. 1984) (refusing to impute income to noncustodial parent because his unemployment was not voluntary); Ferguson, *supra* note 37, at 1307 & n.72.

See generally COCHRAN, *supra* note 34, § 10.2, and Burger, *supra* note 34, § 14.7.

54. MO. REV. STAT. § 452.370.1, *supra* note 46.

55. MO. CIV. P. FORM NO. 14, *supra* note 44, directions for completion of worksheet line 1, "Monthly gross income."

56. *Stanton*, 874 S.W.2d 493, 497 (1994). *See generally* Morgan, *1995 Update*, *supra* note 50.

the court found that it would be inappropriate to do so.[57] In *Markowski v. Markowski*, the Missouri Court of Appeals, Western District, held that a custodial mother's failure to satisfy the expectation of achieving self-sufficiency was good cause for a downward modification of the father's *maintenance* obligation.[58] The court discussed at some length authority for the "affirmative obligation" of an ex-spouse to attain self-sufficiency.[59] The court found "no proof of any mitigating condition or circumstance justifying the wife's failure to seek or acquire any gainful employment,"[60] but, using strong language, refused to impute income to her for the purposes of child support.

> The matter of child support, however, stands on different ground. . . . no evidence was offered by respondent to show any decrease in the financial needs of the children and no actual resources available for their support beyond those which existed at the time the decree was entered. The duty of appellant to expend efforts at attaining self-sufficiency for herself and a failure to meet that obligation is not a tangible resource of benefit to the children unless and until some income materializes. For obvious, practical reasons, the children's needs must be evaluated in terms of current disposable income, not on expectations. The same reasons which support an adjustment in maintenance to a lethargic spouse do not constitute changed circumstances upon which a reduction in child support may be ordered.[61]

B. The Value of Services in the Home: Denigration and Recognition

Before turning to the key issue presented in *Stanton*—whether full-time child care can reasonably be considered "voluntary unemployment or underemployment"—it is necessary first to consider competing assumptions regarding the value of the work done by full-time homemakers. Because most of these individuals historically have been, and continue to be, women, this subject is inextricably linked to the changing status of women in the law and society.

Historically, women have received mixed messages about the importance of the child rearing and homemaking functions: "Their role was important, but not worth economic compensation. Their role was valuable, but not as

57. Markowski v. Markowski, 736 S.W.2d 463, 466 (Mo. Ct. App. 1987).
58. *Id.* at 465-66.
59. *Id.* at 466. *See infra* notes 65-75 and accompanying text.
60. *Id.* at 465.
61. *Id.* at 466.

valuable as their husband's achievements outside the home."[62] In many ways, the caregiving contributions of women appear to have been discounted or entirely taken for granted.[63]

In a thoughtful recent article, Professor Estin has elaborated on many of the issues related to the difficulties which the caregiving role faces in achieving full recognition in the law.[64] Emphasizing the "remarkable disregard for caregiving" in the law,[65] Estin observes that younger families are now "subject to different norms of family life in which self-sufficiency and autonomy are of primary importance."[66] She argues that "as courts have focused greater attention on the goal of financial independence, caregiving values have disappeared,"[67] and that caregiving should be given greater recognition in "the economic management of divorce."[68]

Estin notes that the case law suggests that relatively few maintenance awards are given to facilitate caregiving, although she cites Missouri as an exception to this rule.[69] The majority trend is to reject caregiver

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62. Nanette K. Laughrey, *Uniform Marital Property Act: A Renewed Commitment to the American Family*, 65 NEB. L. REV. 120, 147 (1986). Laughrey reviews the historical assignment of the caregiving role to women, and the economic support role to men, within the marital relationship. *Id.* at 143-50.

See also Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1499-1501 (1983).

63. *See* Bruch, *supra* note 37, at 54, observing that 1960s and 1970s era government estimates of the cost of rearing a child did not place any value on services in the home. "[N]o account was made for the value of personal services performed by family members or for earnings given up while raising children." *Id.* Bruch goes on to observe that estimates of the costs of raising children taken from intact families are of limited usefulness in the post-divorce situation. *Id.* at 59.

64. Ann Laquer Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721 (1993). Professor Estin's article addresses the closely related topic of maintenance/alimony awards for the purpose of supporting the caregiving role.

65. *Id.* at 721.

66. *Id.* at 722.

67. *Id. See also* Laughrey, *supra* note 62, at 148-150.

68. Estin, *supra* note 64, at 722.

69. Estin, *supra* note 64, at 728-33. Estin cites fourteen Missouri appellate decisions, dating from 1977 to 1991, granting caregiver maintenance awards. *Id.* at 729-31 & n.22. In some of these, *e.g.*, Newport v. Newport, 759 S.W.2d 630 (Mo. Ct. App. 1988), the mother-caregiver had a clear ability to be self-supporting, yet the courts awarded "permanent" maintenance. Estin, *supra* note 64, at 730. Estin quotes the *Newport* court as stating the policy that

> When the parties have adopted a lifestyle in which the husband works and the wife has stayed at home to care for small children, and, where it is economically feasible for the wife to continue to do so after dissolution, it

maintenance awards, or to terminate the award when the caregiver will be "retrained" and can begin working outside the home.[70] Estin concludes that where caregiver-support statutes exist, they are seldom given effect, and that in very few states have caregiver support awards been reversed on appeal as insufficient.[71] She concludes that "[f]aced with caregivers who might become self-supporting, judges are increasingly giving priority 'to the goal of making divorced women self-sufficient over the goal of supporting the custodial parent'."[72] She does, however, observe a distinction in the courts' treatment of older and younger homemakers, seeing a more favorable treatment of older homemakers in maintenance awards.[73] The rationales often given for this trend include the benefits conferred on the family over a lifetime, and the "opportunity costs" of caregiving.[74] However, this generosity has not been extended to younger divorcing caregivers. "For younger caregivers, the implicit presumption of an ability to be self-supporting is effectively conclusive, overwhelming all other considerations."[75]

> is appropriate that she not be required to seek employment outside the home.

Estin, *supra* note 64, at 730-31 (quoting 759 S.W.2d at 634-45). Estin concludes that Missouri courts appear "especially solicitous" of mothers of preschool-age children, though they at times award caregiver maintenance to mothers of elementary school-age children as well. Estin, *supra* note 64, at 731. The courts appear to assume that children no longer need a full-time caregiver by the time they reach high school. Estin, *supra* note 64, at 731. However, she notes that "in none of these cases was the amount of maintenance and child support sufficient to support the custodian at a standard of living comparable to that during the marriage." Estin, *supra* note 64, at 735 n.43 (quoting Joan M. Krauskopf, *Maintenance: A Decade of Development*, 50 MO. L. REV. 259, 281-82 (1985)).

Estin notes that these Missouri decisions are an exception to the majority trend, but also cites opinions from Nebraska and Wisconsin with strong language in favor of caregiving. *Id.* at 731-32 & nn.31-37 (citing Morris v. Morris, 268 N.W.2d 431, 434 (Neb. 1978); Hartung v. Hartung, 306 N.W.2d 16 (Wis. 1981)).

70. *Id.* at 728-29, 733 & nn. 38-39.

71. *Id.* at 735 & n.42. Missouri is again noted as an exception to this rule. *Id.*

72. Estin, *supra* note 64, at 737 (quoting LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 185-86 (1985)). *See also* Nancy R. Hauserman, *Homemakers and Divorce: Problems of the Invisible Occupation*, 17 FAM. L.Q. 41, 46-47 (1983).

73. Estin, *supra* note 64, at 738-42.

74. Estin, *supra* note 64, at 738-742,

75. Estin, *supra* note 64, at 743. Estin, not surprisingly, challenges the validity of this distinction. Estin, *supra* note 64, at 744-46. She also presents an elaborate discussion of compensatory- and restitution-based approaches which have been taken to respond the needs of caregivers facing divorce. Estin, *supra* note 64, at 746-67.

In a section of the article entitled "The Disappearance of Family Care," Estin notes that the "devaluation" of family care is surprising, given dominant paradigms in our society placing caregiving "at the heart of family life."[76] This "family value" seems to disappear when the household dissolves, and the norms of self-interest re-emerge.[77] She argues that two "intellectual mistakes" have led to this result. "One mistake is the conclusion that family care exists only in a 'traditional' homemaker/breadwinner marriage, and that families have become obsolete. A second mistake is the assumption that because family care is sustained by love, it has no legal, economic, or political significance."[78]

> Under maintenance laws that emphasize financial need due to an inability to be self-supporting, the claim of a young caregiver, perhaps well educated, with at most a few years' absence from the labor force, is not particularly compelling. With relatively recent credentials and work experience, she is unlikely to be able to cast herself in the role of the needy and dependent spouse.[79]

Focusing on the law's "normative bias" favoring self-reliance, and noting the dramatic change of attitude toward caregiving expressed in court decisions between the 1970s and 1990s,[80] Estin concludes that "[c]hild support guidelines in some jurisdictions now virtually require that both parents of a child will be in the labor force, often as early as the child's second birthday."[81]

She continues with the observation that many depictions of homemakers in our society are so unfavorable as to border on "caricature."[82] She finds a "conceptual generation gap," noting that increased labor force participation by women does "not necessarily mean that caregiving and family life have lost their significance."[83] However, homemakers suffer from the "Invisibility Problem:"[84] "In legal analysis, and in political and economic theory that form its foundation, family care activities are irrelevant—noneconomic,

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As noted above, Estin stresses the existence of "generation gaps" in the treatment of family care decisions. Estin, *supra* note 64, at 768-774.

76. Estin, *supra* note 64, at 767.
77. Estin, *supra* note 64, at 768.
78. Estin, *supra* note 64, at 768.
79. Estin, *supra* note 64, at 769.
80. Estin, *supra* note 64, at 770-71.
81. Estin, *supra* note 64, at 771.
82. Estin, *supra* note 64, at 772.
83. Estin, *supra* note 64, at 773-74.
84. Estin, *supra* note 64, at 774-79.

nonpolitical, and legally unimportant."[85] Caregiving has not been adequately recognized historically, and Estin concludes that it is even less so today.[86] If done properly, household work is often entirely taken for granted.[87]

> Despite its economic, social, and familial importance, the work of caregiving remains invisible to lawyers and judges because the law construes family care as a matter of love and obligation, not a matter of personal choice or arms' length bargaining. This is characteristic of attitudes even within the family, where caregiving is largely invisible. By its very nature, nurturance is supposed to be silent, hidden, selfless, and self-effacing—"something different" from work.[88]

Estin observes that current debate has assigned both "political and moral significance" to private choices concerning caregiving roles, and she finds a "deep social ambivalence" on these questions.[89]

> The polarities of public opinion on family issues make it difficult to affirm the value of caregiving without seeming to reject or denigrate the many other roles women play, and make it equally difficult to affirm the importance of work and financial contribution without seeming to reject the human values of family care.[90]

Estin concludes by arguing for the "rehabilitation" of family care in the law,[91] focusing on the importance of the caregiving role.[92] She comments on research showing the value of family care to children;[93] research indicating some level of "risk" to children associated with being placed in day care;[94] the importance of caregiving to older children;[95] and the difficulties

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85. Estin, *supra* note 64, at 774.

86. Estin, *supra* note 64, at 774-75.

87. Estin, *supra* note 64, at 776-77.

88. Estin, *supra* note 64, at 776. These sentiments echo those expressed in Laughrey, *supra* note 62, at 145-47.

89. Estin, *supra* note 64, at 779.

90. Estin, *supra* note 64, 779.

91. Estin, *supra* note 64, at 781-85. Estin discusses how the roles and tasks of homemakers play out in different family scenarios, including "the permanent homemaker," "temporary homemakers and the Mommy Track," "two job/two career couples," and "single parent caregiving." Estin, *supra* note 64, at 781-91.

92. Estin, *supra* note 64, at 791-802.

93. Estin, *supra* note 64, at 792-93 & nn. 274-80.

94. Estin, *supra* note 64, at 793-95 & nn. 281-83.

95. Estin, *supra* note 64, at 795-96 & nn. 291-94.

and risks faced by women in making life choices.[96] Stressing the need for tolerance and social pluralism in a diverse society, Estin makes the case for maintenance to allow a family which has made a primary caregiving choice to continue.[97]

> A rehabilitation of family care proceeds from three principles. First, although the costs and benefits of caregiving are most evident in households with a "traditional" division of labor, they appear in different forms in virtually every family. Second, the burdens and rewards of family life are not limited in time to the duration of the marriage. Third, what is valuable within a family is not autonomy and self-reliance, but interdependence and support.[98]

In Estin's view, these values require recognition of the caregiver role in all family types.[99]

Of course, Estin's opinions are not universally held. In addition to the devaluation of the caregiving function in the law and "mainstream" society, it has been widely observed that a significant element of the feminist movement has expressed a strong disdain for the traditional housewife's role.[100] Although this view is not universal within the feminist movement,[101] the "equality" model of feminism minimizes a commitment to homemaking as a "lifestyle choice," and tends to view non-financially self-

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96. Estin, *supra* note 64, at 797-99.

97. Estin, *supra* note 64, at 800-02. Estin argues that

> Divorce law is not an appropriate lever for producing change in the nature of family life. There is no social consensus about the wisdom or value of moving toward gender-neutral marriage, in which family care and market labor are equally allocated. Even if most Americans agreed with this as a policy goal, it would be in the greater interests of our society to continue to support family life in all its varied forms.

Estin, *supra* note 64, at 800.

98. Estin, *supra* note 64, at 801.

99. Estin, *supra* note 64, at 802.

100. *See, e.g.*, F. Carolyn Graglia, *The Housewife as Pariah*, 18 HARV. J.L. & PUB. POL'Y 509 (1995).

101. There is a "cultural feminist" perspective, which values caregiving and objects to the practice of viewing housewives as victims. Estin, *supra* note 64, at 743-44 n.76 (citing June Carbone and Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953, 996 (1991)). Estin also describes a "post-feminist" perspective, placing an increased emphasis on caregiving, or at least questioning the absence of a focus on working mothers by the leaders of the women's movement. Estin, *supra* note 64, at 778-79 & nn.216-17.

supporting women as "victims."[102] Feminists have at times endorsed government economic policies disfavoring women who choose to stay home with children.[103]

Some pointed criticisms have been leveled at feminism's devaluation of the homemaker's role. In a recent article, Graglia writes that

> Feminists . . . undertook to re-educate these homemakers by disabusing them of such quaint notions as to their own worth and the value of domesticity. With no forum from which to speak, and perhaps stunned that they needed defense, women surrendered feminine domestic values to masculine work-oriented values, as those who purported to champion women proclaimed the superiority and glamour of market production.[104]

She challenges the feminist viewpoint that market production is somehow more worthy than family care, and also challenges the assumption that women who enter the marketplace are actually better off.[105] She concludes that

> Through its war against the homemaker, feminism has inflicted undeserved injury upon many good women and weakened society by curtailing a female activity that contributes, possibly more than any other, to familial health and stability. Some women reject feminism's message that a mother's personal attention to child-rearing cannot be a full-time, gratifying occupation, but only a sort of improvisation, peripheral to her market activities . . .[106]

Dominant feminist ideology has also been criticized as upscale, and as seeking to "liberate" women by denying their obligations to children.[107] Fox-Genovese contends that the dominant feminist ideology is pertinent only to upscale, "careerist" women, not to the majority of working-class women faced with difficult choices.[108]

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102. Estin, *supra* note 64, at 743-44 n.76 (citing Carbone & Brinig, *supra* note 101, at 996).

103. Graglia, *supra* note 100, at 517; Estin, *supra* note 64, at 778 n.15 (citing Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. CIN. L. REV. 1, 80 (1987)).

104. Graglia, *supra* note 100, at 516.

105. Graglia, *supra* note 100, at 517-19 ("Why is it worthy, even ecstatic, to be a lawyer who ends marriages, or a politician who reforms society, or a social worker who repairs broken families, but not worthy to try to raise a family not in need of repair and preserve and cultivate a marriage that does not dissolve?").

106. Graglia, *supra* note 100, at 521.

107. Elizabeth Fox-Genovese, *Feminism, Children and the Family*, 18 HARV. J.L. & PUB. POL'Y 503, 504-08 (1995).

108. *Id.* at 505-07. *Cf.* the comment of Burger, *supra* note 34, § 14.14, on the limitations of the use of statutory guidelines for child support purposes: "Most divorce

One point on which there is apparent consensus is that a fundamental problem encountered in seeking to recognize the value of the caregiving role is the difficulty of establishing a market value for the childrearing and household functions provided by homemakers.[109] Significant difficulties are encountered in quantifying both the value of the services provided by such persons,[110] and the costs they incur personally by choosing to provide them.[111] However, there is agreement that both the value and the costs are

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litigants have incomes which are at best barely adequate to supply their necessities when the family is living as a single unit."

109. *See generally* Olsen, *supra* note 62, at 1499-1501 (developing the thesis that the sharp ideological dichotomy between the family and the marketplace has had a profound effect on people's perspectives). Olsen comments that reforms intended to improve the lot of women often also foster individual selfishness, while reforms encouraging "altruistic behavior" within the family tend to reinforce traditional sex hierarchy. Thus, no single reform is likely to be adequate "for creating democratic, sharing relationships among people." Olsen, *supra* note 62, at 1560-61.

On a less theoretical level, Hauserman, *supra* note 72, at 41-43 & nn.6-10, cites studies on the number of hours devoted to household work, and the types of tasks involved. "Clearly, the 43 million women in the labor force and the 40 million homemakers are both involved in 'work.' The obvious difference remains—the homemakers do not receive an income." Hauserman, *supra* note 72, at 43. Since there is no marketplace for the homemaker's services, they are not typically measured as a part of family income. Hauserman, *supra* note 72, at 43.

Karen Czapanskiy, *Giving Credit Where Credit is Due*, *in* WOMEN'S LEGAL DEFENSE FUND, CRITICAL ISSUES, CRITICAL CHOICES: SPECIAL TOPICS IN CHILD SUPPORT GUIDELINES DEVELOPMENT 141 (1986), argues for the recognition of the noneconomic contributions of the custodial parent in developing child support guidelines. *Id.* at 142. She states that "traditional" strict "gender-based divisions of labor" are no longer accepted, and that both parents are capable of earning money, and of providing nurturance to children. *Id.* However, the parent who provides "a disproportionate share of the nurturance" faces economic disadvantages, and practical job difficulties. *Id.* at 144-45. She concludes that whether the custodial parent is the father or the mother, that parent bears the bulk of the nurturing burden, and argues for child support guidelines that explicitly take the nurturing responsibility into account. *Id.* at 148-51.

See also Elizabeth R. Tyndall, Note, *Homemaker Services and the Elective Share: Out of the Kitchen and Into the Money*, 52 MO. L. REV. 697, 713 & nn.82-87 (1987).

110. *See* Hauserman, *supra* note 72, at 41-43; Czapanskiy, *supra* note 109, at 143-44; Richard A. Posner, *Conservative Feminism*, 1989 U. CHI. LEGAL F. 191, 192 n.4.

111. *See* Estin, *supra* note 64, at 746-52. Estin notes that the financial costs of caregiving include both the long-term costs associated with the failure to develop a career, and the short-term costs of lost income from employment. Estin, *supra* note 64, at 747. While it is difficult to quantify the opportunity costs of homemaking, or "to allocate the parties' earning differential among its different causes," she contends that the opportunity costs of caregiving fall disproportionately on women due to

differential opportunities in the labor market. Estin, *supra* note 64, at 751-52.

For a similar argument, with attempts to calculate the dollar value of the opportunity costs of foregone employment, *see* Czapanskiy, *supra* note 109, at 144-46. *See also* Isabel V. Sawhill, *Developing Normative Standards for Child-Support Payments*, *in* 1 AMERICAN BAR ASSOCIATION, IMPROVING CHILD SUPPORT PRACTICE I-119, I-127-38 (1986).

The problems associated with attempts to place a market value on the value of a homemakers' services may be most vividly illustrated in the context of the tort claim for wrongful death. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 952-53 & n.87 (5th ed. 1984). Prosser observes that

> Where pecuniary loss to survivors is still the ostensible market standard for recovery, the decedent who is not in the labor market has presented a special problem, since the person is not making direct money contributions to survivors, and there is certainly no direct pecuniary loss. Yet it has almost always seemed unjust to say that a child, or nonworking wife or mother, or an aged person is worth nothing to the survivors, and juries have at times rendered substantial verdicts in such cases. A leading decision of the Michigan Court many years ago held that the "pecuniary value" of a child must include such intangibles as contributions to family life, and apparently, that there need be no deduction for the cost of rearing the child. Though not all courts have accepted this last point, there is very broad agreement that the recovery should include damages for the loss of society and companionship, which, as already noted, may be substantial. The insistence, however, that such intangibles are in some manner "pecuniary" losses, coupled with the approval of large verdicts for such items, may invite the jury to leave its respect for the administration of justice at the courthouse door. Whether that is true or not, the "pecuniary" standard seems to permit or encourage wildly erratic verdicts because some juries take the term literally while others accept the tacit invitation to make an award for bereavement, and it might be better to drop the pecuniary loss requirement altogether.

Id. at 953-53.

Despite the "wildly erratic verdicts" referred to by Prosser, it appears that wrongful death awards continue to be larger, on average, for employed wives than for homemakers. Estin, *supra* note 64, at 774 n.197 (citing Gail D. Cox, *Juries Place Less Value on Homemakers*, NAT'L L.J., Sept. 14, 1992, at 1, 38-39).

Various authors have contended that homemakers are routinely undervalued in wrongful death verdicts. In an early article, Thomas F. Lambert, Jr., *How Much is a Good Wife Worth?*, 41 B.U. L. REV. 328 (1961), Lambert criticized the tendency of courts to award small verdicts in wrongful death verdicts for homemakers, and praised the decision in Legare v. United States, 195 F. Supp. 557 (S.D. Fla. 1961), in which the trial judge upheld a verdict of $125,000 in such a case. *Id.* at 328-335. Lambert also reviewed several other decisions awarding substantial verdicts in such cases. *Id.*

A more recent article notes the increasing use of expert testimony to establish the value of a homemaker's services. George V. Launey, *Late 'Good Wife' Revisited:*

substantial, and that women often invest more human capital into the marriage relationship and stand to lose more from divorce.[112]

Despite the various difficulties which impede achieving legal recognition of the caregiving role, the law has given homemakers increasing recognition, and consequently concrete benefits, in some areas. Much of this progress has been based on the emerging "partnership" concept of marriage.[113] An eloquent statement of this doctrine has been offered by Justice Beryl Levine of the Supreme Court of North Dakota:[114]

> Marriage is now commonly perceived as an economic partnership, in which each partner assumes a variety of duties, acceptable to each other, whether or not conforming to traditional expectations. . . . Indeed, "working women," *i.e.*, those employed outside the home, and home-bound child-caring fathers are but some of the permutations that we see in these marital relationships. So, if a married couple, *i.e.*, the partnership, decides that mother will stay home to perform child-care, father-care, home-care, community-care, etc., while father will earn an income from employment outside the home, the integrity of the partnership remains the same. There

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Appraisal of Housewife's Services, 29 RES GESTAE 306 (1985). The author notes the difficulty of not having an established market for a housewife's services, and employs a statistical approach to quantify the wrongful death verdict value of a hypothetical housewife with two children at between $460,000 and $765,000. *Id.* at 306, 308. However, Launey notes that this figure purports to estimate only the value of services which could be purchased in the market:

> The methodology presented is only relevant for appraising the economic aspects of a housewife/mother's role. The approach overlooks completely the non-economic aspects such as companionship, love and affection, and consortium.
>
> If one can place a dollar value on these non-economic contributions, it would exist over and above the measurable economic appraisal of the work itself. Also, if the housewife were employed in the labor market outside of the home, a conventional appraisal of her market salary would be added to the estimates of the present value of her housewifely services.

Id at 309.

112. *See generally* Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; or, "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267 (1987); Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855 (1988). *See also* Czapanskiy, *supra* note 109, at 142-149.

113. *See generally* Laughrey, *supra* note 62, at 121-131; Joan M. Krauskopf & Rhonda C. Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L. J. 558, 586-600 (1974). *See also* Leehy, *supra* note 36, at 1342-45.

114. Spilovoy v. Spilovoy, 488 N.W.2d 873, 878-79 (N.D. 1992) (Levine, J., concurring specially) (citations omitted).

> is no less an economic partnership than when both parents work outside the home. Ordinarily, in a marriage of some duration, equal value is attributable to each party's contributions to the marital enterprise. . . . The labor of child-care, home-care and all other care thus constitutes "value." Consequently . . . the mother's use of the living quarters is not one that is without "charge" or one that is for "less than customary charge." The mother "pays for" her living quarters with her contribution of labor, as does the father. Whether we view the value of the labor expended in fulfilling household duties as a setoff against the rent or whether we view it as a payment for rent thereby removing it from the "no-charge" definition of in-kind income [as set forth in North Dakota child support guidelines], I am not sure. But I am sure that the [child support] guideline must not be interpreted to demean the valuable contribution of labor made by at-home, child caring and/or spouse caring spouses.[115]

The "partnership" concept was adopted by the drafters of the Uniform Marital Property Act (UMPA), which seeks to govern property rights during the marriage (replacing the common law separate property system with a statute incorporating many community property principles), but not to govern the division of property upon death or divorce.[116] In an article arguing for the adoption of the UMPA by the states,[117] Professor Laughrey contends that the partnership principles embodied in the UMPA recognize the importance of the homemaker/caregiver role in the family, and gives families the freedom to decide how to allocate work.[118]

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115. *Id.*

116. Laughrey, *supra* note 62, at 132-33.

117. Laughrey, *supra* note 62, at 150-160.

118. Laughrey, *supra* note 62, at 148-150. Laughrey writes:

> At one time the second-class status of the nurturing role did not substantially affect family stability. Women had to assume that role by virtue of law and social pressures. As women learn to make choices, it is now necessary for the law to reinforce the importance of nurturing. It is not in the best interest of society for women to discard their values in order to succeed in a male-dominated culture. For women this would be the ultimate loss of identity, and society would lose a different but valuable perspective. The "female" values must receive increased recognition by the whole society. They can no longer be the basis of discriminatory treatment. If our legal and social institutions continue to punish individuals who assume the role of nurturer, both men and women will be discouraged from performing these tasks. It is no longer enough for jurists to talk about how important the family is. It is now necessary that the laws be changed to insure that neither spouse suffers economically because they have performed caregiving functions.

Laughrey, *supra* note 62, at 150.

While historically partnership concepts enjoyed some success in the law of divorce with respect to alimony/maintenance awards, the trend in the law has been to move away from caregiver maintenance awards toward an ideal of self-sufficiency.[119] However, partnership concepts have found a warmer reception in the law of equitable distribution of property upon divorce.[120] It has been argued forcefully, however, that the homemakers' role has been consistently undervalued for this purpose and that equal property division may not be adequate to support the ex-spouse in the absence of maintenance.[121] While partnership concepts have apparently not made great inroads in the law of child support, the argument has been advanced that a spouse's noneconomic contributions should be explicitly considered in setting child support obligations as well.[122]

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119. *See supra* notes 65-81 and accompanying text. Estin, *supra* note 64, at 727-28 discusses the historical acceptance of the importance of "caregiving" as an alimony issue. She further observes the adoption in several states of the Uniform Marriage and Divorce Act approach which explicitly includes as a factor in maintenance considerations whether the party seeking maintenance is the custodian of a child "whose condition or circumstances make it appropriate that the custodian *not be required to seek employment outside the home*." Laughrey, *supra* note 62, at 727 & n.15. Missouri is one of the states which has adopted this language. Laughrey, *supra* note 62, at 727 n.16 (citing MO. REV. STAT. § 453.335.1(2) (Supp. 1991)).

120. Laughrey, *supra* note 62, at 130-31, notes that the Uniform Marriage and Divorce Act, while not widely adopted, has had a great influence on the states through its provision explicitly directing the court to take into account "the contributions made by a homemaker in acquisition of marital property. The basic premise of the UMDA was that marriage is a partnership that accumulates property. When that partnership dissolves, each partner is entitled to a share of the property." Laughrey, *supra* note 62, at 131. At the time Laughrey wrote in 1986, she reported that judges in all but one of the 42 common-law property states had power to distribute property upon divorce regardless of title. Laughrey, *supra* note 62, at 131 (citing Freed & Walker, *Family Law in the Fifty States: An Overview*, 18 FAM. L.Q. 369, 392 (1985)).

See also Estin, *supra* note 64, at 746-767 (discussing equitable division of property upon divorce and the various theoretical rationales advanced for this practice).

121. Hauserman, *supra* note 72, at 47-53.

122. Leehy, *supra* note 36, at 1342-50. Leehy contends that "[t]here exists in family law . . . an intrinsic link between noneconomic contributions in the context of both equitable distribution and child support." Leehy, *supra* note 36, at 1345 (analyzing New York law). He finds it "incongruous" that courts give so much less weight to noneconomic contributions in setting the child support obligation. Leehy, *supra* note 36, at 1346-49. Leehy concludes that an increased flow of funds to the custodial parent from the noncustodial resulting from this approach is consistent with the purposes of the New York child support statute. "Judicial failure to carefully consider similar parental contributions to the child's welfare would be inconsistent and unfair." Leehy, *supra* note 36, at 1350.

"Partnership" concepts of marriage have also influenced the law of decedents' estates through the widespread adoption of spousal elective share statutes.[123] Common law dower came to be seen as inadequate in that it typically did not provide sufficient income to a surviving widow, it provided only a life estate in the property the widow received, and it made possible effective disinheritance of the surviving spouse.[124] Elective share statutes sought to remedy this situation by entitling a surviving spouse to outright ownership of a guaranteed share of the decedent spouse's estate, regardless of the state of title or of the provisions of the will, thus guaranteeing some measure of financial recognition to a homemaker's contributions to the marital

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See also Goldfarb, *supra* note 37, at 339 (finding it "inconsistent to reimburse a custodial parent in whole or in part for the expense of paid child care while denying her any financial recognition for the value of the care she herself provides"); Czapanskiy, *supra* note 109, at 142-51.

But see Estin, *supra* note 64, at 791 & n.272, offering a point of view which counters part of the force of this argument. "Caring for children often fulfills deep human needs for caregivers themselves." Estin, *supra* note 64, at 791.

> To look at responsibility for children only as a burden to be allocated is to miss the primary significance of children and parenthood in many adult lives. *See* LOUIS GENEVIE & EVA MARGOLIES, THE MOTHERHOOD REPORT: HOW WOMEN FEEL ABOUT BEING MOTHERS (1987). The pleasures of caregiving have become a common topic for newspaper columnists. *See, e.g.*, PHYLLIS CHESLER, WITH CHILD: A DIARY OF MOTHERHOOD (1979) (providing a daily journal of pregnancy and first year of parenthood); BOB GREENE, GOOD MORNING MERRY SUNSHINE (1984) (describing the first year of parenthood in daily journal form); Anna Quindlen, *Mother's Choice*, MS., Feb. 1988, at 55. The same deep pleasure in parenthood is depicted even in those first person accounts that emphasize the hectic and pressured quality of life for parents with multiple roles. *E.g.*, Sara Davidson, *Having It All*, ESQUIRE, June 1984, at 54, 60 ("All my time is spent on three things: baby, work, and keeping the marriage going. I find I can handle two beautifully . . . But three pushes me to the edge.").

Id. at 791 n.272. The power of this perspective is reinforced by the common sense observation, that many parents fight over child custody *because* they want the opportunity to be involved in caregiving, and to experience the deep personal rewards which go with it. *See generally* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 99-114, 267-271 (1992).

123. *See* Laughrey, *supra* note 62, at 127-28 & nn.38-43; Tyndall, *supra* note 109, at 698-99 & nn.10-17; Diane M. Lloyd, Comment, *New Hope for the Survivor: The Changes in the Usufruct of the Surviving Spouse*, 28 LOY. L. REV. 1095, 1097-98 and nn.17-21 (1982).

124. Laughrey, *supra* note 62, at 127-28; Tyndall, *supra* note 109, at 699.

wealth.[125] Missouri adopted a broad view of the partnership concept of marriage in the case of *Estate of Leve v. Leve*,[126] "the first case in the nation to hold that homemaking services may constitute a full consideration when calculating the deceased's augmented estate" under a Uniform Probate Code-type statute.[127]

The worth which the law places on a caregiver's services assumes immediate relevance in the context of the decision whether to impute income to a caregiver spouse who works full-time in the home. The casual observer might conclude that by imputing income to a caregiving parent, the judge is recognizing the economic value of such work. However, the reverse is true: imputation of income treats caregiving as the equivalent of voluntary unemployment, and imposes a direct economic cost on the caregiver and child by reducing the child support obligation of the noncustodial parent.

If caregiving is indeed seen as an inappropriate, or less productive, role in modern society, courts will be more inclined to impute against the caregiver spouse income that she could have earned in the marketplace. However, if a full-time caregiving role is considered both worthy and economically valuable, courts will be unlikely to find the full-time caregiver "voluntarily unemployed or underemployed." The next sub-section considers the stance taken toward this issue in a number of states, and an alternative approach which would permit courts to give recognition to the caregiving role, while still making a realistic accounting of the total income available to a remarried custodial parent.

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125. Laughrey, *supra* note 62, at 127-28.

126. 704 S.W.2d 263 (Mo. Ct. App. 1986) (noted in Tyndall, *supra* note 109).

127. Tyndall, *supra* note 109, at 697. Tyndall writes that "*Leve* holds that homemaking services may be considered as contribution in money's worth toward the acquisition of jointly held property for the purpose of valuing the decedent's estate from which the surviving spouse may take an elective share." Tyndall, *supra* note 109, at 697. "The *Leve* holding states the proposition that homemaking services are worth valuing in the context of probate law. This holding is consistent with developments in family law, which recognize the value of the homemaker's contribution to the marital partnership." Tyndall, *supra* note 109, at 710. Tyndall notes that the *Leve* holding can increase the amount of property that a surviving spouse-homemaker may elect to take against the will. Tyndall, *supra* note 109, at 710-11. "The *Leve* holding equalizes the positions of each spouse in relation to the other, in that both spouses receive credit for their contribution toward the acquisition of joint property, regardless whether the contribution was in money or money's worth." Tyndall, *supra* note 109, at 711. However, Tyndall recognizes that the *Leve* holding creates new questions. "[L]acking empirical means to value homemaking services, probate courts are left to borrow family law concepts in determining the worth of a spouse's contribution as a homemaker." Tyndall, *supra* note 109, at 713.

C. *Imputing Income to a Custodial Parent-Caregiver*

The subject of imputation of income to a custodial parent for the purposes of child support calculations has not yet attracted a great deal of interest in the legal scholarly literature,[128] and decisions from other states addressing the subject are far from uniform. State statutes and other rules governing child support often do not clearly address the issue of whether imputation of income to a custodial parent is proper.[129] However, some general patterns emerge from a review of the case law.

The majority of decisions appear to reflect the broader family law trend of according trial judges broad discretion to make decisions based on the totality of the circumstances in each case.[130] Numerous decisions of this type can be found, both permitting and refusing to permit imputation of income to a caregiver-parent, depending on the factual settings.[131] A

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128. The topic is, however, beginning to draw attention in the practitioners' literature. *See* the articles by Morgan, *supra* note 50. *See also Family Law Note, Applying State Child Support Guidelines to Military Compensation,* ARMY LAW., Nov. 1991, at 40, 42 (alerting military lawyers to the possibilities of using this doctrine to reduce a noncustodial parent's child support obligation).

129. *See* Morgan, *1995 Update*, *supra* note 50, at 30-31 (reviewing the language of numerous state child support statutes concerning determination of income). These statutes frequently employ broad terms like "earning capacity," "voluntarily unemployed or underemployed," "potential income," or "voluntarily impoverished," but do not provide guidance as to whether full-time caregivers are to be considered within these categories. *See also* Leehy, *supra* note 36, at 1331-32 (re New York law: "The statute makes no specific reference to imputing income to an able custodial parent who refuses to work.")

See, e.g., MO. REV. STAT. § 452.370.1, *supra* note 46; MO. CIV. P. FORM NO. 14 , Directions for Completion, Worksheet line 1, *supra* note 44. *But see* VA. CODE ANN. § 20.108.1(B)(3) (West Supp. 1992) (cited in Morgan, *1995 Update*, *supra* note 50, at 30-31) (the court shall consider "imputed income to a party who is voluntarily unemployed or voluntarily under employed; provided that income may not be imputed to the custodial parent when a child is not in school, child care services are not available and the cost of such child care services are not included in the computation"); LA. REV. STAT. ANN. § 315.9 (West 1991) (cited in Morgan, *1995 Update*, *supra* note 50, at 40) (removing a custodial parent caring for a child of the parties under the age of five years from the class of persons who may be considered "voluntarily unemployed or underemployed"); Stowe v. Stowe, 617 So. 2d 161, 163 (La. Ct. App. 1993) (strictly applying Louisiana exception).

130. *See generally* Schneider, *supra* note 39.

131. Cases taking this "totality of the circumstances" approach, and imputing income to the caregiver-parent include Canning v. Juskalian, 597 N.E.2d 1074, 1076-79 (Mass. App. Ct. 1992) (interpreting Massachusetts child support guidelines as providing express support for imputing income to a custodial parent, and refusing to

construe an exception for "a custodial parent with children who are under the age of six living in the home" to include the child of the custodial parent's subsequent marriage); *In re* Marriage of Gebhardt, 783 P.2d 400, 404 (Mont. 1989); *In re* Marriage of Beyer, 789 P.2d 468, 469 (Colo. Ct. App. 1989); Brody v. Brody, 432 S.E.2d 20, 21-23 (Va. Ct. App. 1993) (cited in Morgan, *1995 Update, supra* note 50, at 40) (placing burden of proof that income should not be imputed on custodial mother who left employment to stay at home with children); Sledge v. Sledge, 630 So. 2d 461, 462 (Ala. Civ. App. 1993) (cited in Morgan, *1995 Update, supra* note 50, at 40) (deferring to trial court's evaluation of the facts); Marshall v. Marshall, 596 So. 2d 675, 675 (Fla. Dist. Ct. App. 1991) (cited in Morgan, *1995 Update, supra* note 50, at 40); Gertcher v. Gertcher, 620 A.2d 454, 454 (N.J. Super. Ct. Ch. Div. 1992) (cited in Morgan, *1995 Update, supra* note 50, at 40); Guskjolen v. Guskjolen, 499 N.W.2d 126, 128-29 (N.D. 1993) (cited in Morgan, *1995 Update, supra* note 50, at 40) (income may be imputed to noncustodial parent who voluntarily left employment to care for child of subsequent marriage); Muller v. Muller, 524 N.W.2d 78, 82-86 (Neb. Ct. App. 1994) (cited in Morgan, *1995 Update, supra* note 50, at 40) (same). *Cf.* the earlier decision of Mears v. Mears, 213 N.W.2d 511, 516 (Iowa 1973) (cited in Morgan, *1995 Update, supra* note 50, at 47) (refusing to find a change in circumstances warranting and increase in child support payments after custodial parent remarried and assumed full-time housewife duties).

Cases refusing to impute income to a custodial parent under a "totality of the circumstances" analysis include Stredny v. Gray, 510 A.2d 359, 362-65 (Pa. Super. Ct. 1986) (using strong language indicating a preference against imputing income to a custodial parent); Singleton v. Waties, 616 A.2d 644, 647 (Pa. Super. Ct. 1992) (same); Hesidenz v. Carbin, 512 A.2d 707, 710 (Pa. Super Ct. 1986) (same); Spilovoy v. Spilovoy, 488 N.W.2d 873, 878 (N.D. 1992) (noting lack of clear legislative guidance in the matter); Herron v. Herron, No. 1824-93-1, 1994 WL 115841 (Va. Ct. App. Apr. 5, 1994); State *ex rel.* Wilcox v. Strand, 442 N.W.2d 256, 257-58 (S.D. 1989); Doyle v. Doyle, 579 So. 2d 651, 653 (Ala. Civ. App. 1991); Goldman v. Goldman, 554 N.E.2d 860, 862-65 (Mass. App. Ct. 1990) (cited in Morgan, *1995 Update, supra* note 50, at 47) (reversing trial court); Rock v. Rock, 587 A.2d 1133, 1142 (Md. Ct. Spec. App. 1991) (cited in Morgan, *1995 Update, supra* note 50, at 47); Cressend v. Cressend, 514 So. 2d 225, 226-27 (La. Ct. App. 1987) (cited in Morgan, *1995 Update, supra* note 50, at 40); *In re* Marriage of Pote, 847 P.2d 246, 247-48 (Colo. Ct. App. 1993) (cited in Morgan, *1995 Update, supra* note 50, at 40); *In re* Marriage of Cress, 850 P.2d 383, 384-85 (Or. Ct. App. 1993) (cited in Morgan, *1995 Update, supra* note 50, at 40); Barr v. Barr, 514 So. 2d 4, 4-5 (Fla. Dist. Ct. App. 1987) (Wentworth, J., concurring).

See also Caskey v. Pratt, 540 So. 2d 253, 254 (Fla. Dist. Ct. App. 1989) (citing statute giving court discretion not to impute income to custodial parent where court finds it "necessary" for parent to stay home with child).

The unsettled nature of the law in this area is illustrated by presence of opinions from different panels or divisions of the same appellate court, taking differing approaches to this issue. The most striking divergence is that between Thomas v. Thomas, 589 A.2d 1373, 1374 (N.J. Super. Ct. Ch. Div. 1991) (refusing to impute

minority view refuses to permit imputation of income in these cases, as a matter of law.[132] Another minority permits imputation only upon a showing of "bad faith" by the custodial parent.[133] At the other end of the spectrum, there appears to be a minority view which almost automatically imputes income to a custodial parent, at least where that parent has voluntarily left an

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income to custodial parent as a matter of law), and Gertcher v. Gertcher, *supra*.

132. Thomas v. Thomas, 589 A.2d 137, 137 (N.J. Super. Ct. Ch. Div. 1991). The court there refused to impute income to a *noncustodial* parent, who was staying at home to care for the two young children of her new marriage. *Id.* The court used strong language:

> Here, defendant is not engaged in the job market because she is fulfilling a unique and important role in providing a nurturing environment for her extremely young children. In this regard, it is important to note that plaintiff is *not* unemployed. She is employed on a full-time basis as a care giver to her young children. This employment is, however, not compensated monetarily. Moreover, plaintiff's decision to remain at home with her two-month old and three-year old sons is entitled to great deference. While the costs and benefits of such a decision to stay at home may be fairly debated, no court should overrule a parent's decision in that regard or punish the decision by the imposition of a monetary award.

Id. The court invoked federal constitutional rationales for its decision, calling imputation of income in this situation "an impermissible intrusion into an area typically considered beyond the State's reach." *Id.* (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972); Parham v. J.R., 442 U.S. 584, 602-03 (1979)).

> In short, employment as a mother and caregiver is different in quality from voluntary unemployment. While the latter does not excuse an obligation to support children monetarily, the former does. To rule otherwise would, in effect, determine that monetary contributions to children living with another is more important than providing care to children in the obligor's custody. I am not prepared to do so.

Id. *See also* Atkinson v. Atkinson, 616 A.2d 22, 23-24 (Pa. Super. Ct. 1992) (appearing to make rule that income should not be imputed to custodial parent absolute under "nurturing parent doctrine"). *But see id.* at 24-25 (Del Sole, J., dissenting) (arguing for discretion).

133. Cases of this type include Keplinger v. Keplinger, 839 S.W.2d 566, 568 (Ky. Ct. App. 1992) (reversing trial court); *In re* Marriage of Keown, 587 N.E.2d 644, 648 (Ill. App. Ct. 1992) (cited in Morgan, *1995 Update*, *supra* note 50, at 47); McDonald v. Taylor, 415 S.E.2d 81, 85 (N.C. Ct. App. 1992) (cited in Morgan, *1995 Update*, *supra* note 50, at 47).

employment situation to stay home with children.[134] Other relevant distinctions have also been suggested.[135]

Only two law review articles have directly addressed the topic of imputing income to a custodial parent. Professor Nickerson expresses concerns about the validity of determining "voluntary underemployment or unemployment" in this context,[136] and Professors Nickerson and Donigan both comment on the financial difficulties which application of the doctrine can create for custodial parents and children, especially where the courts do not compensate the custodial parent for the additional costs of child care

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134. *In re* Jonas, 788 P.2d 12, 13 (Wash. Ct. App. 1990) (cited in Morgan, *1995 Update, supra* note 50, at 47) (reversing a trial court which refused to impute income to a custodial mother who chose to stay at home to care for her children: "No matter how legitimate their reasons . . . each [parent] is accountable for earnings foregone in making the choice to be unemployed. Although their reasons are different, their status is the same: each is unemployed for personal, albeit legitimate, reasons. The trial court erred in refusing to determine and consider [mother's]earning capacity."); Roberts v. Roberts, 496 N.W.2d 210, 211-13 (Wis. Ct. App. 1992) (cited in Morgan, *1995 Update, supra* note 50, at 40); *In re* Marriage of Noel, 875 P.2d 358, 359-60 (Mont. 1994) (income must be imputed to custodial parent at least at minimum wage less cost of child care, even where no recent work history, higher education, or vocational training); Greene v. Greene, 634 So. 2d 1286, 1289 (La. Ct. App. 1994).

135. Morgan suggests that courts are more likely to find "voluntary unemployment" where the parent is staying at home to care for children of a subsequent marriage, as opposed to children of the parties; and that courts are more inclined to find a good-faith reason for reducing income where the children being cared for are disabled, or very young. Morgan, *1995 Update, supra* note 50, at 40, 47.

136. Peter H. Nickerson, *The Washington State Child Support Schedule: Judicial Discretion and Deviations from the Standard Calculation*, 26 GONZ. L. REV. 71, 78-80 (1990/91). Nickerson argues for an offset of child care expenses, if income is imputed to the custodial parent:

> The determination of voluntary underemployment or unemployment, and the estimation of the income which should be available, are very difficult. This becomes even more so in the case of a custodial parent who could have more income but decides to stay home, earns less or nothing, and takes care of the children. If income is going to be imputed to such a parent, so should the child care expenses. This is because child care would be necessary to substitute for the parent's care. The expense of this sort of care can be considerable, especially if more than one child is involved. Furthermore, the problem does not go away when children reach school age because of the necessity of after-school care.

Id. at 78-79. For a decision applying an offset of child care expenses against income imputed to the custodial parent, *see In re* Marriage of Noel, 875 P.2d 358, 359-60 (Mont. 1994).

required by labor force participation.[137] Nickerson concluded that "[e]xtreme care should be taken to avoid situations where imputing income causes either a parent or the children to be at or near the poverty level, or results in support payments that leave the children eligible for AFDC payments from the state."[138]

D. Another Possibility: A Marital/Community Property Approach to Child Support Calculations

If one accepts the proposition that it is improper, under ordinary circumstances, to impute income to a custodial parent who stays home with children, there remains the issue of how to take into account the income actually available to a caregiving custodial parent who has remarried following the divorce.[139] Applying the principles of the "partnership" concept of

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137. Nickerson uses the Washington case of *In re* Marriage of Sacco, 784 P.2d 1266 (Wash. 1990) to illustrate the problem. Nickerson, *supra* note 136, at 79-80. In *Sacco*, the court imputed income to the custodial mother, who was working fifteen hours per week at a child-care job, but made no additional award for child care. Nickerson, *supra* note 136, at 79. Nickerson observes that this result forces Ms. Sacco to choose among undesirable options: she is essentially forced to rely on her ex-mother-in-law for child care (thereby limiting her ability to relocate for employment opportunities), or to go on welfare. Nickerson, *supra* note 136, at 79. Moreover, had the court imputed day care costs at the same time it imputed income to Ms. Sacco, Mr. Sacco would actually have ended up paying a *larger* child support award than he would if no income had been imputed at all. Nickerson, *supra* note 136, at 79.

Donigan also reaches the conclusion that if income is to be imputed against the caregiving parent, the court should consider the cost of day care required for the parent to work outside the home. Donigan, *supra* note 37, at 31-34. She observes that it is unclear whether the court should consider the costs of day care where children from another relationship are also involved. Donigan, *supra* note 37, at 34. "In some instances, if the parent who is unemployed does not have an ability to earn a high income, it could be more expensive for both parents if the parent obtained outside employment and a day care obligation resulted." Donigan, *supra* note 37, at 34 n.139. Donigan cites the case of *In re* Marriage of Nolte, 236 Cal. Rptr. 706 (1987), where a California trial court which had refused to impute income to an unemployed custodial mother with no employment history was affirmed. Donigan, *supra* note 37, at 33 n.130. Imputing income in that case would have reduced the father's child support obligation, but not have increased the minimal support available to the child, and the court found imputation of income not in the child's best interests. *Id.*

138. Nickerson, *supra* note 136, at 80.

139. Recall that these are the actual facts of *Stanton*. *See supra* note 16 and accompanying text. *See infra* note 203, concerning unusual situations where imputing income might be appropriate.

marriage, it is possible to impute to the custodial parent one-half of the *marital* income of the custodial parent and the new spouse.

While this approach does not appear to have been widely adopted, the principles are not hard to grasp. As Professor Donigan explains,

> Shared living arrangements can include cohabitation, remarriage, or even residence sharing where costs are shared . . . [S]hared living arrangements can reduce the parent's expenses, thereby increasing ability to pay. The resources available to the cohabitant are relevant to the inquiry of the parent's ability to pay. Although the cohabitant may not have a duty to support the child, the court may consider the parent's decision of how to manage the resources available to that parent. Under Washington case law, the court may consider the new community resources of a parent who remarries, at least in so far as it affects the parent's ability to pay.[140]

Donigan notes that a community/marital property approach to calculating income for child support purposes may operate by attributing one-half of the total marital income to the custodial spouse,[141] or may consider the higher

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140. Donigan, *supra* note 37, at 51-52. Donigan qualifies this statement with the observation that, under Washington case law, "the court may not be able to impute income to the parent on the basis of the new spouse's earnings." Donigan, *supra* note 37, at 52 n.240.

Bregande notes that California has moved in this direction, explicitly taking into account a custodial parent's new spouse's or cohabitant's income in setting child support obligations, and applauds this development. Bregande, *supra* note 48, at 143-44. Bregande observes Missouri's movement in this direction, MO. REV. STAT. § 452.370.1, *see supra* note 46, and he encourages incorporation of similar language into § 452.340. Bregande, *supra* note 48, at 144-46.

141. Donigan reports that one Wisconsin trial court actually implemented this approach. Donigan, *supra* note 37, at 61. Under this method, "if parent A and [subsequent] spouse Y earned $1,500 and $3,000 per month for a total of $4,500, the income for A and Y would be half of that or $2,250." Donigan, *supra* note 37, at 61. However, the Wisconsin Supreme Court reversed the trial court for its use of this approach in the case of Abitz v. Abitz, 455 N.W.2d 609 (Wis. 1990), holding that the parent's gross income must be calculated as though the parent were single. *Id.*

However, *Abitz* preserved the discretion of the trial courts to consider a subsequent spouse's income. The court held, as a matter of statutory interpretation, that marital property principles were not applicable to child support awards. However, the court concluded by observing that "no restraints are otherwise placed upon the circuit court's discretion on revision of a child support order to adjust a percentage calculation in light of the parties' earning capacities and total economic circumstances as we have defined them herein." *Id.* at 618. "Total economic circumstances" include the subsequent spouse's income. *Id.* at 615. According to the court, "[t]he distinction between the setting and the satisfaction of a child support award keeps a circuit court's review of total economic circumstances properly unrestricted by considerations that

of either the custodial parent's income or one-half of the community income.[142] In another variation, one court appears to have considered a subsequent spouse's income in determining the *share* of the total support obligation for which each parent was responsible, but not to change the *amount* of the child support obligation.[143]

Ferguson has observed that Missouri's child support guidelines are not particularly responsive to the situations and needs of increasingly common multiple family situations, and has urged Missouri to move in this direction:

> The prevalence of multiple families requires accommodating rules. If guidelines are to create not only adequate, consistent and efficient orders, but also equitable ones, they must be responsive to the needs of subsequent families. Missouri could address this need by including the income of subsequent spouses in the guideline calculation of parental income.[144]

Much of the resistance to this type of reform is likely to be grounded in the historical refusal to give stepparents an affirmative legal duty of support for their stepchildren.[145] To formally recognize a marital/community property approach to child support obligation would openly create such a duty, since the court would directly apply the subsequent spouse's income to the support of the children. However, persuasive arguments have been made that this step would be proper, and that it would amount to only a legal recognition of existing realities: "Reality and common sense say that the parent gives priority to the children with whom he or she lives, regardless of whether they are natural or stepchildren."[146]

A colorable argument can be advanced that the necessary authority already exists in Missouri law for courts to take this step. Missouri's stepparent support statute, on its face, appears to prevent courts from taking

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might otherwise be made of marital property definitions of income." *Id.*

142. This latter option is highly vulnerable to criticism, as discriminatory against stepparents. Donigan, *supra* note 37, at 60-61. Donigan does not report any jurisdictions where such an approach has been implemented.

143. Donigan, *supra* note 37, at 61-62.

144. Ferguson, *supra* note 37, at 1318-19.

145. R. Michael Redman, *The Support of Children in Blended Families: A Call for Change*, 25 FAM. L.Q. 83, 83, 92-94 (1991).

146. *See generally* Redman, *supra* note 145. Judge Redman argues in persuasive and practical terms for the adoption of a legal stepparental duty of support, focusing on the realities of life in the multiple family situation. He recognizes, however, that there is opposition to such a reform. *See, e.g.*, Bruch, *supra* note 37, at 60-61. *See also* Donigan, *supra* note 37, at 59 ("Using a stepparent's income to determine the parent's support obligation can create a disincentive for a parent's remarriage.").

this step.[147] However, the relevant language was enacted in 1977.[148] In 1982, the General Assembly appears to have reconsidered the matter, incorporating the following language into Mo. Rev. Stat. § 452.370, governing modification of child support awards:

> In a proceeding for modification of any child support or maintenance award, the court, in determining whether or not a substantial change in circumstances has occurred, shall consider all financial resources of both parties, *including the extent to which the reasonable expenses of either party are, or should be, shared by a spouse or other person with whom he or she cohabits*, and the earning capacity of a party who is not employed.[149]

To the extent the two statutes conflict, the later must be presumed to control. It does not require a strained reading of the statute to conclude that the "reasonable expenses of either party" are likely to include expenses of the household, including those incurred in rearing children. Thus, to the extent that it is "reasonable" for a husband and wife to function as an economic partnership, sharing in both the wealth and the expenses of the household, the stepparent support statute's bar on consideration of the subsequent spouse's income in child support calculations[150] may no longer be "good law." If so,

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147. The stepparent support statute, MO. REV. STAT. § 453.400 (1994), provides in relevant part:

> 1. A stepparent shall support his or her stepchild to the same extent that a natural or adoptive parent is required to support his or her child so long as the stepchild is living in the same home as the stepparent. However, nothing in this section shall be construed as abrogating or in any way diminishing the duty a parent otherwise would have to provide child support, and no court shall consider the income of a stepparent, or the amount actually provided for a stepchild by a stepparent, in determining the amount of child support to be paid by a natural or adoptive parent.
>
> 2. A natural or adoptive parent shall be liable to a stepparent for the sum of money expended by a stepparent for the support of a stepchild when that sum of money was expended because of the neglect or refusal of the natural or adoptive parent to pay any part of or all of the court-ordered amount of support.
>
> 3. This section shall not abrogate or diminish the common law right which a stepparent may possess to recover from a natural or adoptive parent the expense of providing necessaries for a stepchild in the absence of a court order for child support determining the amount of support to be paid by a natural or adoptive parent.

148. *Id.*

149. MO. REV. STAT. § 452.370.1 (1994) (emphasis added).

150. MO. REV. STAT. § 453.400.1 (1994).

there is no statutory bar to adoption by the courts of a marital/community property approach to child support calculations in Missouri.

IV. THE INSTANT DECISION

In the instant case, Mother first argued on appeal that there was no evidence of a change in the parties' financial circumstances sufficient to warrant modification of child support.[151] The court relied on Mo. Rev. Stat. § 452.370.1,[152] which together with Rule 88.01,[153] governs modification of child support awards, in disposing of this argument. The court observed that Mother's husband's "income alone is more than father and mother previously earned together," and that this is a relevant factor under § 452.370.1.[154] Moreover, the statute directs the court to consider "the earning capacity of a party who is not employed;" given the trial court's finding that Mother's average earnings for the previous three years was $100,935, the court held that the trial court properly considered Mother's earning capacity in determining that a "change in circumstances" had occurred.[155] The court concluded that, taking into account Mother's earning capacity and Mother's present husband's income, there was no error in the trial court's finding of a "substantial and continuing change in circumstances."[156]

Mother then argued the primary issue, contending that the trial court erred in imputing income to her pursuant to Form 14.[157] "She assert[ed] that in calculating child support, income may not be imputed to a custodial parent who chooses to stay home with minor children of the marriage."[158]

The court began its analysis by observing that Missouri courts had previously imputed income in two situations: "where *noncustodial* parents failed to use their best efforts to secure employment to meet a child support obligation,"[159] and "where a lethargic spouse receives *maintenance*."[160]

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151. *Stanton*, 874 S.W.2d at 497.

152. *See supra* note 46.

153. *See supra* note 43.

154. *Stanton*, 874 S.W.2d at 497.

155. *Id.*

156. *Id.*

157. *Id. See supra* note 44.

158. *Stanton*, 874 S.W.2d at 497.

159. *Id.* (citing Overstreet v. Overstreet, 693 S.W.2d 242, 246 (Mo. Ct. App. 1985)).

160. *Id.* (citing Oldfield v. Oldfield, 767 S.W.2d 134, 136 (Mo. Ct. App. 1989)).

The court noted that Missouri courts had never imputed income to a custodial parent who chose to stay home to care for minor children.[161]

The court found it significant that while historically, the father had been assigned the primary legal duty of support for children, the legislature had repealed the father's primary responsibility of support as a factor to be considered in establishing child support awards in 1988; and the current version of Mo. Rev. Stat. § 452.340 does not mention the "father's primary responsibility."[162] The court further observed that "this shift in responsibility is reflected in Rule 88.01 and Form 14. These require the trial court to consider the income of both the custodial and noncustodial parent."[163]

The court further emphasized the directions for use of Form 14, worksheet line 1, which provide that "If either parent is unemployed or underemployed, child support may be calculated *in appropriate circumstances* based on a determination of potential income."[164] The court must consider "whether [the unemployed or underemployed] parent is custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home."[165] However, no particular result is mandated as a result of this consideration.[166]

The court recognized that only one previous Missouri case, *Markowski v. Markowski*,[167] had discussed imputing income to a custodial parent.[168] There, the appellate court upheld elimination of the ex-wife's maintenance award, but reversed the trial court's reduction of child support with the observation that income imputed to a custodial parent is not a tangible resource for the children.[169] The court then distinguished *Markowski* on its facts, observing that in the earlier case, mother had not worked for nine years, and started a business after the dissolution, in which she lost money the first

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161. *Id.*

162. *Id.* at 497-98; *see supra* notes 42, 49 and accompanying text.

163. *Stanton*, 874 S.W.2d at 498.

164. *Id.* (emphasis court's); *see supra* note 44.

165. *Stanton*, 874 S.W.2d at 498; *see supra* note 44.

166. *Stanton*, 874 S.W.2d at 498. (referring to King v. King, 865 S.W.2d 403, 405 (Mo. Ct. App. 1993)).

167. 736 S.W.2d 463 (Mo. Ct. App. 1987). *See supra* notes 57-61 and accompanying text.

168. *Stanton*, 874 S.W.2d at 498.

169. *Id.* (citing *Markowski*, 736 S.W.2d at 465-66, and quoting the language used by the court there with regard to imputing income to a custodial parent for child support purposes). *See supra* notes 57-61 and accompanying text for the language of *Markowski*.

three years.[170] "There is no indication that mother had gainful employment from 1979 to the time father's motion to modify was heard in November, 1986."[171] The court further noted that Missouri Revised Statute § 452.340 (1986) (repealed 1988) at that time still placed primary responsibility for child support on the father, although recognizing that *Markowski* did not mention that statute in its opinion.[172] Contrasting *Markowski* with the instant case, the court noted Mother's work history, her earnings, and her having been "gainfully employed" through the birth of her four children.[173]

The court then turned to an examination of the practice in other states regarding whether a trial court may impute income to a custodial parent.[174] Citing *Canning v. Juskalian*,[175] the court noted that in Massachusetts, the trial court may consider the potential earning capacity of the party, taking into consideration "the education, training, and past employment history of the party."[176] However, the guidelines there do not "apply to a custodial parent with children who are under the age of six living in the home."[177] *Canning* noted that imputing income should be approached with "realistic caution," and recognized the presence of factors both favoring and disfavoring imputation of income.[178]

The court also discussed *Stredny v. Gray*,[179] where a Pennsylvania court recognized that "the child care contributions of an unemployed, nurturing parent are important, and [their court had] stated that an unemployed, nurturing parent should not be expected to find employment to advance a

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170. *Stanton*, 874 S.W.2d at 498.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 498-99.

175. 597 N.E.2d 1074, 1077 (Mass. App. Ct. 1992).

176. *Stanton*, 874 S.W.2d at 498 (citing *Canning*, 597 N.E.2d at 1077).

177. *Id.*

178. *Id.* at 498-99 (citing *Canning*, 597 N.E.2d at 1077 nn.8 & 9). Factors identified by the *Canning* court as favoring non-attribution of income included and cited in the instant decision included "(1) giving priority to the 'nurturing parent' doctrine, (2) not punishing children for their parents' actions, (3) avoiding the creation of economic disincentives to remarriage and the rearing of children, and (4) recognizing that the income generated by attribution is often fictional, and therefore, of no benefit to the children." Factors cited as favoring attribution included "(1) minimizing the economic impact of family breakup on children by discouraging parental unemployment or underemployment, and (2) recognizing that staying at home to care for children may constitute volitional unemployment." *Canning*, 597 N.E.2d at 1077 n.9.

179. 510 A.2d 359, 363 (Pa. Super. Ct. 1986).

child's economic welfare at the expense o the child's emotional welfare."[180] The court there refused to impute income to the mother.[181] The instant court stressed the facts present in that case, in which the parties' child was attending a school for emotionally disturbed children, and mother had a three and one-half year-old child by her present husband.[182]

Finally, the court considered some "pertinent" comments from the New Jersey case of *Thomas v. Thomas*,[183] where the mother was caring for the two children of the parties, ages 11 and 7, and for her children by her present husband, ages 3 and two months.[184] *Thomas* noted that imputing income was permitted, but not required.[185] "The [*Thomas*] court further observed, '[I]t is important to note that [mother] is *not* unemployed. She is employed on a full-time basis as a care giver to her young children. This employment is, however, not compensated monetarily.'"[186]

Based on its review of these authorities, the court concluded that trial courts have discretion to impute income to an unemployed or underemployed custodial parent, emphasizing that such imputing should occur only in "appropriate circumstances."[187] While noting that "appropriate circumstances" vary on a case-by-case basis, the court stated that the factors previously mentioned in the opinion should be considered, along with the following:

> (1) the age, maturity, health, and number of children in the home; (2) the custodial parent's employment history, including recency of employment and earnings, as well as the availability of suitable employment; (3) the age and health of the custodial parent; (4) the availability of appropriate child-care givers; (5) the relationship between the expense of child-care givers and the net income the custodial parent would receive; (6) the cost, if any, for transportation, suitable clothing, and other items required for the custodial parent to have the imputed employment; (7) the custodial parent's motivation or reasons for being at home; and (8) the adequacy of available resources if the custodial parent remains at home.[188]

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180. *Stanton*, 874 S.W.2d at 499 (citing *Stredny*, 510 A.2d at 363).

181. *Id.*

182. *Id.* The court mentioned as presenting a similar situation the Colorado case of *In re* Marriage of Pote, 847 P.2d 246 (Colo. Ct. App. 1993), in which it was held that the trial court erred in imputing income on a full-time basis to a mother of a four-year-old child with Down's syndrome. *Id.*

183. 589 A.2d 1372, 1373 (N.J. Super. Ct. Ch. Div. 1991).

184. *Stanton*, 874 S.W.2d at 499 (citing *Thomas*, 589 A.2d at 1373).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

Applying the factors, the court noted the children's ages, good health, and good school records.[189] The court stressed that Mother was "a highly trained physician, with an internal medicine specialty," and noted her past earnings and intention to obtain a California medical license.[190] The court further observed that "while a single parent in St. Louis, mother had a full time housekeeper at a cost of $1,800 per month. It is clear that from a financial view, mother's potential income greatly exceeds the financial expenses she would incur in working."[191] The court reviewed Mother's stated reasons for staying home, and observed that the adequacy of available resources was not a significant issue in this case, regardless of whether Mother stayed home.[192] Based on the "totality of the record," the court held that there was no abuse of discretion by the trial court in imputing income to Mother on these facts.[193]

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189. *Id.*

190. *Id.* at 499-500.

191. *Id.* at 500.

192. *Id. See supra* notes 15-16 and accompanying text.

193. *Stanton*, 874 S.W.2d at 500. The full impact of *Stanton* on Missouri child support practice is not yet clear. No clear pattern emerges in the four subsequent Missouri cases which have addressed the issue of imputing income to a custodial parent.

In Adelman v. Adelman, 878 S.W.2d 871 (Mo. Ct. App. 1994), a different panel of the Missouri Court of Appeals, Eastern District, without referring to *Stanton*, refused to impute income to a custodial mother where, although she was trained as a radiological technician, she had been out of the job market for ten years, she had a medical condition which would have made it dangerous for her to work, and the three minor children had seizure disorders which made additional supervision appropriate. *Id.* at 872, 874-75. The court relied on MO. REV. STAT. § 452.335, concerning maintenance awards, indicating maintenance is appropriate where the spouse seeking maintenance "is unable to support himself through appropriate employment *or is the custodian of a child* whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home."
Id. at 873 (emphasis court's).

In *re* Marriage of Braun, 887 S.W.2d 776 (Mo. Ct. App. 1994), a different panel of the Missouri Court of Appeals, Eastern District, without referring to *Stanton*, upheld a trial court which refused to impute income to a custodial mother where mother had stayed home throughout the eight-year marriage, was given custody of three young children, and prior to the marriage had worked only at "minimum wage jobs which she held for a short time." *Id.* at 778-79.

In Jones v. Jones, 903 S.W.2d 277 (Mo. Ct. App. 1995), the Missouri Court of Appeals, Western District, while not reaching the issue of imputing income to a custodial mother, cited *Stanton* and suggested strongly in dicta that imputing income would be proper. *Id.* at 284. There the custodial mother, a licensed nurse who had not worked outside the home since the birth of the first of three children in 1984, moved with her new husband to South Carolina (where she was not licensed); the

V. COMMENT

The practice of imputing income to a custodial parent who chooses to stay at home with minor children raises questions going to the heart of our legal and societal values. To conclude that a parent who chooses to stay at home with children is "voluntarily unemployed or underemployed," a court must implicitly find a parent's work in the home to be of lesser worth than employment in the marketplace, or that it is not work at all. The *Stanton* court's decision to rewrite the law of child support in Missouri to allow this practice was unnecessary and unjustified. While *Stanton* may not seem a bad result on its facts, a similar result could have been reached equitably without opening the door to imputation of income to custodial parents in other situations.

To reach its holding, *Stanton* disregarded precedent and engaged in a questionable interpretation of the statutes and court rules governing child support. The court's effort to distinguish *Markowski* on its facts is unconvincing. Rather than being decided on its facts, *Markowski* stood for the proposition that it simply is not appropriate to impute income to a custodial parent for purposes of child support, on the ground that the income thus imputed was of no tangible benefit to the child(ren).[194]

In addition, Mo. Rev. Stat. § 452.370.1,[195] Rule 88.01,[196] and Form 14[197] do not necessarily have the impact ascribed to them by the court. The directions for completing Form 14, Worksheet line 1 provides that "[i]f either

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move did not achieve an economic advantage for either of them, but was based largely on a desire to distance herself from the children's father. *Id.* at 279-84.

In Woolsey v. Woolsey, 904 S.W.2d 95 (Mo. Ct. App. 1995), another different panel of the Missouri Court of Appeals, Eastern District, cited the *Stanton* multi-factor test, but deferred to a trial court which had refused to impute income of more than $1,000 per month to a custodial mother who had custody of one fourteen-year-old child, was trained as a speech pathologist, but had not worked outside the home since 1980. *Id.* at 99-100. The court observed that "[i]n a marriage where the wife relies on the husband for monetary support, and is out of the marketplace, thereby injuring her marketable skills, this type of reliance may warrant an award of maintenance." *Id.* at 99.

The Missouri Court of Appeals, Southern District, does not appear to have yet addressed the issue. (*But see* Cooper v. Cooper, 893 S.W.2d 839, 841-42 (Mo. Ct. App. 1995) (declining to review trial court's failure to impute income to mother with custody of a one-year-old child on *res judicata* grounds)). No cases on point have yet been decided by the Missouri Supreme Court.

194. *See supra* notes 57-61 and accompanying text.

195. *See supra* note 46.

196. *See supra* note 43.

197. *See supra* note 44.

parent is unemployed or underemployed, child support may be calculated in appropriate circumstances based on a determination of potential income."[198] While *Stanton* read this as "requir[ing]" the court to consider the income of both the custodial and noncustodial parent,[199] a more natural reading of the form in light of settled legal principles would have required the opposite result.

Prior to *Stanton*, no Missouri court had ever imputed income to a custodial parent.[200] "Statutes should be construed in the light of the common law rules in force at the time of their passage . . . , and in a way that synchronizes their meaning with existing common law."[201] Construing the rules[202] in light of the common law, it would appear that "either parent" more probably refers to "*either* the father or the mother," rather than to "*both* the custodial and noncustodial parent." Moreover, "appropriate circumstances" and "voluntarily unemployed or underemployed" would be construed, virtually *per se*, not to apply to a custodial parent staying home with children.[203]

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198. MO. CIV. P. FORM NO. 14, Directions for Completion of Form 14, Worksheet line 1.

199. *Stanton*, 874 S.W.2d at 498.

200. *Id.* at 497.

201. Bishop v. Cummines, 870 S.W.2d 922, 924 (Mo. Ct. App. 1994) (citations omitted).

202. The Missouri Supreme Court's rulemaking authority is found in MO. CONST. Art. V, § 5, and MO. REV. STAT. § 477.010 (1994). "Supreme court rules govern over contradictory statutes in procedural matters unless the General Assembly specifically annuls or amends the rules in a bill limited to that purpose." Ostermueller v. Potter, 868 S.W.2d 110, 111 (Mo. 1993) (en banc). "The rules of construction are the same for supreme court rules and legislative enactments." State v. Windmiller, 579 S.W.2d 730, 732 (Mo. Ct. App. 1979).

203. The *Stanton* decision places Missouri among the jurisdictions which permit trial courts to decide whether to impute income to a custodial parent based on a case-by-case analysis of the "totality of the circumstances." *See supra* notes 130-35 and accompanying text. Such a posture denigrates the importance of the caregiving role, by forcing a caregiver-parent to justify to the court why he/she should not be penalized for making a full-time commitment to family care.

Although the presumption against imputing income to a custodial parent who is engaged in full-time caregiving should be very strong, I am not willing to argue for an absolute rule to this effect. Family courts need some measure of discretion, in order to respond to the unique situations with which they are presented. *See generally* Schneider, *supra* note 39. It is possible to hypothesize a custodial parent who has reduced income entirely for "bad faith" reasons, where the facts may indicate that the parent is not in fact engaging in the caregiving function. The principal point is that full-time caregiving itself should never be considered a "bad-faith" motivation for reducing earned income.

There is *no* unequivocal evidence on the face of the statute or of the supreme court rule indicating an intent to overrule the common law on this point.[204]

It is also far from clear that the General Assembly's repeal of the "father's primary duty to support" had the effect implied by *Stanton* of making proper the imputation of income to a custodial parent. The mother is not the custodial parent in all cases.[205] While repeal of the father's primary duty of support might logically mandate the conclusion that income could be imputed in appropriate circumstances to a noncustodial parent, *whether male or female*,[206] it does not follow that custodial and noncustodial parents are similarly situated, or that imputation of income to a custodial parent is required.

Stanton is also vulnerable to criticism on broader grounds of public policy. A judicial determination that a parent staying at home with minor children is "voluntarily unemployed or underemployed" carries with it a powerful value judgment about the relative worth of different roles in our society. Such a determination, in addition to denigrating the hard work of those who raise children, ignores the eloquent pleas for recognition of the caregiving role made by commentators in the field such as Estin and Laughrey.[207] Moreover, it is inconsistent with the progress the law has made toward recognizing the value of the caregiving function in such diverse areas as wrongful death,[208] equitable property distribution upon divorce,[209] and the law of decedents' estates.[210]

If the doctor/mother in the instant case is truly "underemployed," then the law has concluded that it is more valuable in our society to be a doctor than a full-time parent.[211] This questionable proposition cannot be tested

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204. The argument that the common law was overruled is even weaker considering Missouri's history of providing caregiver maintenance awards where small children are involved. *See supra* notes 69-71 and accompanying text.

205. *See generally* LYDIA SCOON-ROGERS & GORDON H. LESTER, U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, CHILD SUPPORT FOR CUSTODIAL MOTHERS AND FATHERS (1991) (providing recent statistics on child custody and support).

206. *See In re* Marriage of Garrison, 846 S.W.2d 771, 776 (Mo. Ct. App. 1993) (appearing to interpret the statute as extending the duty of support to both noncustodial mothers and fathers).

207. *See supra* notes 91-99, 118 and accompanying text.

208. *See supra* note 111.

209. *See supra* notes 120-21 and accompanying text.

210. *See supra* notes 123-27 and accompanying text.

211. *Stanton*, with its emphasis on what the custodial mother could potentially have earned in the workplace, in comparison to her monetary costs for full-time child care, and its emphasis on child care costs and availability in the multi-factor test, contains an implicit suggestion that whenever the custodial parent can realize a net financial gain by working outside the home rather than in it, he/she should do so, all

empirically, and such a judgment, if it is to be made at all, should come only from the clear command of the legislative branch. The common law of Missouri, and present statutes and court rules, do not require it.[212]

One ground on which a court could rest the decision to impute income to a custodial parent is that the child support award is supposed to reflect, in part, "the standard of living the child would have enjoyed had the marriage not been dissolved,"[213] and that child support policies should thus encourage both parents to earn at least as much as they had prior to the dissolution. This goal might seem to require imputation of income to a custodial parent with a substantial past earnings history, as was the case in *Stanton*. However, to apply this factor so strictly ignores the real value to children of the caregiving function, and also requires the court to engage in speculation as to what would have occurred had the marriage not been dissolved.

In the *Stanton* scenario, it is possible that if the first marriage had remained intact, Mother would have stayed in her medical practice and continued to produce earnings comparable to the prior few years. However, it is also possible that she might have decided to stay home with the four children anyway, or to voluntarily reduce her income by volunteering her medical skills for the poor or for international religious missions. Such actions are widely considered laudable in our society. Had she made such a decision, the cost of the reduced income would have been spread over the entire family unit—Mother, Father, and the children. It certainly may not be argued that Father could have compelled her to stay in her prior job if she was miserably unhappy with it, or even if she simply was ready for a change. Implying such a power of one marital partner over the other does not comport with our modern understanding of marriage.

While the "standard of living had the marriage not been dissolved" factor may have appropriate application to a parent who in "bad faith" reduces his/her income to evade a child support obligation, it is inequitable to apply

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other factors being equal. *See Stanton*, 874 S.W.2d at 499-500. This viewpoint ignores the noneconomic, yet valuable, contributions to the family made by a full-time caregiver.

212. The relevant statutes and court rules, on their face, appear to be sufficiently broadly written to *permit* imputation of income to custodial parents. *See supra* notes 42-44. However, this result is not explicitly *required*, and both conventional principles of statutory interpretation and considerations of public policy advise against reaching it.

213. MO. SUP. CT. R. 88.01(c). The difficulties in determining "the standard of living the child would have enjoyed had the marriage not been dissolved" and in setting child support accordingly, and the tendency of courts to interpret this, at a minimum, to preserve the pre-dissolution standard of living, are discussed in Leehy, *supra* note 36, at 1322-30. *But see* Bruch, *supra* note 37, at 63-64, arguing that such judicial predictions about the future are necessary and justified.

it to a parent who makes the worthy choice to devote full-time efforts to the household and children. Courts should acknowledge that "standard of living" is a multi-faceted concept, and that full-time caregiving involves not merely financial costs, but also substantial tangible benefits, to the children.

Even if the importance of the caregiving role is fully appreciated, the thesis that income should not be imputed to a custodial parent who stays home with children can be attacked on the ground that it ignores the real *benefits* a custodial parent obtains from caregiving and regular interaction with children.[214] However, this argument ignores an important reality of the world of work. *Many* people, not only full-time caregivers, find great satisfaction in their careers.[215] However, it is unlikely that serious proposals would be made to impute additional income to a doctor, carpenter, or plant manager on the basis of the substantial, unquantifiable rewards which such persons may obtain from their careers. To penalize only caregivers for the intangible benefits of productive work perpetuates unhelpful stereotypes about the value about work in the home in relation to work in the marketplace. Work is work, regardless of the setting in which it occurs.[216]

Despite all of the foregoing, the conclusion seems inescapable that *Stanton* is not a bad result on its facts. The children who were the subjects of the action were living in a household with an annual income of $225,000 at the time of the motion to modify.[217] Clearly, *Stanton* does not present the typical situation in which a great financial stress is imposed on the parties as the result of a dissolution.[218]

It *was* appropriate to impute income to Mother in *Stanton*, but not for the reasons elaborated by the court. The court could have reached a similar result by imputing to Mother one-half of the income of her present household,

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214. *See supra* note 122.

215. It is widely observed that many women who are not financially forced to enter the labor force do so anyway, precisely because of the greater satisfaction they believe can be obtained through employment outside the home.

216. The caregiving parent is fully employed, with zero earned income. Zero is thus the appropriate amount to be entered on the "monthly gross income" line of Form 14. *See supra* note 44.

217. *Stanton*, 874 S.W.2d at 497.

218. Imputing income to a custodial parent is clearly least justifiable as a matter of policy where doing so will impoverish the children in his/her care, by substantially reducing the noncustodial parent's obligation. *See supra* notes 137-38 and accompanying text. As the *Markowski* court noted, income imputed to a custodial parent is not a tangible resource to the children. 736 S.W.2d at 466. *See supra* note 61.

thereby avoiding the need to implicitly devalue the caregiving function she was performing.[219]

In situations like the instant case, where one or both of the parents have remarried, adoption of a community/marital property approach to computing income for child support calculations[220] would both uphold the ideals of the "partnership" concept of marriage and comport with the practical realities of allocation of resources in subsequent-marriage households.[221] To the extent Missouri courts may not be able to explicitly adopt such an approach,[222] the General Assembly should provide authorization to do so. In the meantime, given the broad statutory language,[223] courts should be able to reach similar results by considering the effect of the total income of the new household on the parent's total financial situation.[224]

Upholding the values of caregiving requires careful, conscious attention to the impacts of legal rules and presumptions. The case of imputing income to a custodial parent-caregiver presents a dramatic example of a policy choice to either recognize, or denigrate, the importance of the caregiving role. "Our most difficult task may also be the simplest: to affirm that family life is still a matter of deep personal importance and valid legal concern."[225]

KARL A.W. DEMARCE

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219. While noting the relevance of Mother's present husband's income to the issue of finding a "change in circumstances," the *Stanton* court did not rest its imputation of income on that basis. *Stanton*, 874 S.W.2d at 497-500.

220. *See supra* notes 139-43 and accompanying text. This Note recommends the approach of taking the total marital income, and imputing one-half of that amount to the parent subject to the action, as the approach which best upholds the "partnership" conception of marriage and which best comports with the practical realities of use of resources in subsequent-marriage households.

221. *See generally* Laughrey, *supra* note 62; Redman, *supra* note 145.

222. *See supra* notes 147-50 and accompanying text.

223. MO. REV. STAT. § 452.370.1. *See supra* note 46.

224. *See supra* note 141.

225. Estin, *supra* note 64, at 803.