TESTIMONY TO THE SUBCOMMITTEE ON COURTS OF THE HOUSE JUDICIARY COMMITTEE RE: H.B. 22, SESSION OF 1997 (LIMITING THE NURTURING PARENT DOCTRINE)

March 26, 1997

TO: THE HONORABLE MEMBERS OF THE COMMITTEE:

BACKGROUND

Thank you for the opportunity to testify regarding H.B. 22. My name is Robert E. Rains and I am a Professor at The Dickinson School of Law, where I teach Family Law and am a supervisor of our Family Law Clinic in which supervised students represent indigent clients in various family law matters. I also occasionally teach a course on Comparative and International Family Law in our overseas summer programs. Although I am a member of various professional organizations and task forces, my testimony today reflects only my own views.

MULTI-STATE RESEARCH

With me today is my research assistant, Jennifer Feitelberg, who has been a student in our Family Law Clinic. In preparation for appearing before you this morning, I asked Ms. Feitelberg to attempt to research the approaches taken by the other states on the ultimate issue before you today: whether, for child support purposes, the law should attribute earning capacity to a parent who is staying home to nurture a young or disabled child who is not the child of the other parent to the support proceeding. Ms. Feitelberg has done extensive research on this subject using the various computer systems which are currently available. Attached to my testimony is a chart, labeled Appendix 1, which represents our best effort to set forth the rules in other states, whether they are statutory, court rules or case law. I do

want to sound a cautionary note, however, before you review that document. As you know, the rules in the arena of family law are constantly changing. This is as true in our sister states as it is in Pennsylvania. It is not always possible to state with certainty what the current rule is on a particular family law issue in Pennsylvania, much less in 50 other jurisdictions. This problem is exacerbated by the fact that most other states apparently do not use the phrase "nurturing parent doctrine" which we use in Pennsylvania. Thus, our research may very well have missed relevant rules of law from some other jurisdictions. Nevertheless, I feel reasonably comfortable making the following general observations.

Most, but not all, states recognize some variation of our nurturing parent doctrine. The majority of these states have a multi-factor approach to determine whether the doctrine will be applied in a particular case and how much income will be attributed to a custodial parent.

The specific issue with which you are grappling is one that several other states have addressed, with no uniformity of results. A few states have a rule akin to that in H.B. 22, that one cannot be deemed a nurturing parent as to a child who is not the child of the other parent in the child support litigation. For example, Colorado law states that, "If a parent is voluntarily unemployed or underemployed, child support shall be based on a determination of potential income; except that a determination of potential income shall not be made for a parent who ... is caring for a child under the age of 30 months for whom the parents owe a joint legal responsibility." A 1989 Delaware Supreme Court decision takes a similar, but not absolute, position. "...[W]here a parent is caring for a young child of a relationship other

than between the parents in question, the obligation to secure employment generally will not be waived." (emphasis added.) *Dalton v. Clanton*, 559 A.2d 1197, 1205, n.14 (Del. 1989).

Some states take the view followed by the Superior Court of Pennsylvania. Based on a fact specific inquiry, these states may attribute either no earning capacity or a reduced earning capacity to a parent who is staying home with a young child regardless of who the other parent is. This appears to be the rule in California, Iowa, New Jersey, and South Carolina.

OPPOSITION TO H.B. 22

The different positions of the various states suggest that a cautious approach is appropriate in this area. While there are strong equities on both sides of the question before you, I urge you to reject H.B. 22 for a number of reasons, some of them inter-related. First, H.B. 22 is absolute; it allows for no exceptions regardless of the equities or exigencies of an individual case. Second, in the great majority of cases, absent parents do not really pay half the cost of raising their children. Third, because the vast majority of custodial parents are mothers, H.B. 22 would have an adverse economic effect generally on women. Fourth, in most instances stepfathers are already substantially supporting their stepchildren. Fifth, H.B. 22 would act as a further impediment to marriage or remarriage for single mothers of young children, a group already at high risk of poverty. Sixth, under Pennsylvania law, when the nurturing parent doctrine is not applied to a custodial mother of young children and the law attributes at least minimum wage to her, our courts unfairly do not deduct from this hypothetical income her realistic cost of child care; H.B. 22 would exacerbate this inequity. I will address these points seriatim.

1. H.B. 22 allows no exceptions. While I certainly support the reform effort over the last decade or so to mandate statewide guidelines in order to bring some certainty into child support calculations, this particular area has so many variables that I do not believe it is appropriate to tie the courts' hands in the way that H.B. 22 would do. Today's reality is that many children are raised in extended and multiple relationships. In our clinical work, we see many permutations and combinations of half siblings and step-siblings whose parents form and reform different relationships. At the lower end of the socio-economic spectrum in which our clients live, it is also reality that there is no way to adequately distribute the income of the parents so as to provide for the kind of resources we might all want for our children.

H.B. 22 would forbid the courts from ever applying the nurturing parent doctrine to a parent who is nurturing a child who is not the child of the other parent. We might all agree that it may be irresponsible to have another child when one cannot adequately provide his or her share of support for pre-existing children. However, the law must deal with the reality that sometimes people do exactly that, and H.B. 22 would blind the law to the new obligations that a parent may have unwisely undertaken.

H.B. 22 is an absolute prohibition on the courts applying the nurturing parent doctrine to such a parent no matter how exigent her circumstances or how the equities would weigh in any given situation. In its decisions on the nurturing parent doctrine, the Pennsylvania Superior Court has consistently said that it should not be automatically applied. A review of all the Superior Court's decisions in this area indicates that the Court has approved a case-by-case analysis of the situations to determine applicability. Thus, in *Kelly v. Kelly*, 633

A.2d 218 (1993) and *Depp v. Holland*, 636 A.2d 204 (1994), the Superior Court denied nurturing parent status under the particular facts of those two cases. You should only vote for H.B. 22 if you believe that the courts must always impute income to a parent nurturing a child by a new relationship, no matter what the situation she confronts nor how unrealistic the expectation that she work outside the home. Let me give you a couple of examples.

Example #1. Let us assume a married middle-class couple with one child, in which both parents work. The parents get divorced and the single child remains with the mother. She remarries another middle-class man. When her child of the first marriage is three or four years old, she has a child from the second marriage who unfortunately is born with Down's Syndrome. The new baby's physical and mental condition requires her to give up her employment and stay at home, possibly for the indefinite future. Do we want to prohibit the courts from assessing the first father's child support responsibilities for his child based upon her real need to stay at home with his child?

Example #2. Take a lower income couple that is not married and has a baby. As soon as the baby is born (or sooner), the father departs and the woman goes on the program that used to be known as AFDC (Aid to Families with Dependent Children), but has now been renamed TANF (Temporary Assistance for Needy Families). Because the state has now terminated the welfare "pass-through" program, all of the money which the father pays in child support goes to reimburse the government for the public assistance which is being provided at taxpayer expense to his child. When that child turns five, the mother has a second baby by another man. The father of the five-year-old now goes to court seeking a reduction of his child support based upon the theory that the mother now has an earning

capacity. Ask yourselves two questions. What is the real earning capacity of a single mother of a five-year-old and an infant who has limited job skills? If the court is required to reduce the first father's payments for child support because it cannot deem the mother to be a nurturing parent under H.B. 22, who is the real party of interest which loses money? I suggest to you that the real loser in that situation would be the state and federal governments which provide the welfare money which is supporting his child.

2. Child support by absent parents already does not cover half of the real costs of raising children. The U.S. Census Bureau confirms what those of us working in the field know. Child support paid by absent parents does not begin to cover the cost of child rearing. In a 1995 report entitled "Child Support for Custodial Mothers and Fathers: 1991," Current Population Reports, Consumer Income, Series P60-187, the Census Bureau reported:

> On average, child support comprised 17 (±2) percent of total money income received by custodial mothers receiving child support in 1991, compared to 7 (±5) percent of custodial fathers' total money income.

In most, but not all, instances, H.B. 22 would act to decrease payments from absent parent to custodial parent, meaning that the absent parent would be paying even less of the true economic cost of child rearing. (This is leaving aside the economic cost to the nurturing parent of staying at home.)

3. Most custodial parents are women. Although recent years have certainly seen an increase in the absolute number and percentage of men obtaining primary physical custody, nevertheless, most children raised by single parents live with their mothers. Appendix 2, attached to my testimony, is a chart entitled, "Living Arrangements of Children Under 18 Years Old, by Selected Characteristics of Parents: 1994" from the 1995 Statistical

Abstract of the United States. As of March 1994, 16,334,000 children lived with their mother only, as compared to 2,257,000 living with their father only. While the number living with their father only is certainly significant, in most instances the child support obligation flows from father to mother. Additionally, common experience tells us, and my own professional experience confirms, that an even higher proportion of very young children living in single parent households reside with their mothers. Moreover, if you review this chart carefully, you will see that the disparity is even greater at the lower economic levels where the custodial parent will be unable to provide a child with many of the things most of us take for granted. [This is consistent with other data indicating that after divorce, women experience a 27 percent decline in their standard of living whereas men have a 10 percent increase in their standard of living. Peterson, "A Re-evaluation of the Economic Consequences of Divorce," American Sociological Review, June 1996.] Thus by and large, H.B. 22 would have a negative economic impact on single mothers and their children, particularly poorer ones.

4. Stepfathers are already paying a lot of the bill. Based on available statistical information and common experience, we know that stepfathers normally end up subsidizing their wives' prior children (to whom they generally have no legal duty or rights). A man who marries a woman with children who expects not to support those children at all, either directly or indirectly, is surely kidding himself. We know that child support actually received is a small percentage of the cost of raising children. If a single mother marries or remarries, in most cases her husband's income will be used (along with her income, if any) for housing, food, clothing and other basic needs that will benefit her child brought to the

marriage. If she now has a child by her new marriage, whom she stays home to nurture, and H.B. 22 is enacted, the stepfather will end up paying an even higher percentage of the real support for the prior child or children, to the detriment of all children in the household.

5. H.B. 22 will be an impediment to the single mother's marriage or remarriage. Particularly for single mothers of child-bearing age, H.B. 22 would act as an impediment to remarriage. We know that single-motherhood is highly correlated with poverty and that a man who marries a single mother almost invariably uses some of his income to support her minor children. We also know that many men in this situation will naturally want to have children by their wives. H.B. 22 will mean that the woman and her new husband will be punished by a further diminution of already inadequate child support if they have a baby whom she stays home to nurture. This can hardly be conducive to remarriage.

6. Attributing a salary to a nurturing mother without deducting the reasonable cost of child care is artificial and inequitable. Pennsylvania law does not deduct the reasonable cost of child care from wages attributed to a stay-at-home parent. Thus, consider again a mother of a five-year-old from her first marriage who now has a new-born by her second husband. If H.B. 22 is enacted, the courts will presumably have to attribute at least minimum wage to her. Unless she is lucky enough to have free child care with someone to whom she can really entrust her newborn, she would have to pay the cost of childcare. But our rules do not deduct the cost of such theoretical child care when attributing income (as opposed to the child care expense provisions for actual child care in the Support Guidelines.)

Several states do provide for this realistic deduction from attributed income. I have attached to my testimony, as Appendix 3, a 1994 opinion of the Montana Supreme Court, *In*

re Marriage of Noel, in which that Court ruled that a mother who stayed home to care for children by a new relationship would have income imputed to her, but, significantly, the Court indicated that it would then reduce the imputed income by the cost of reasonable child care expenses for the children had she in fact been employed. The Indiana Child Support Guidelines likewise factor in the cost of child care, especially if the custodial parent has no significant skills or education. If you feel that you must legislate in this area, I urge you to consider a similar approach.

* * *

I acknowledge that there are some situations where reasonable people could find that it is inequitable to apply the nurturing parent doctrine so as in effect to require one person to subsidize another person's child. Our current case law allows for flexibility to address those situations. While none of us may agree with each and every decision of the courts in this area, nevertheless I suggest that it is the better part of valor to allow the courts to continue the discretionary approach which has thus far been approved by the Superior Court. Thus I am opposed to H.B. 22. Thank you.

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State	Statutes/Rules of Court	Case Law
Alabama	**Alabama Rules of Supreme Court 32** The court may, in its discretion, take into account the presence of a young or physically or mentally disabled child necessitating the parent's need to stay in the home and therefore the inability to work.	**NO AUTHORITY FOUND**
Alaska	**Alaska Rules of Civil Procedure 90.3** The court may calculate child support based on a determination of the potential income of a parent who voluntarily is unemployed or underemployed. A determination of potential income may not be made for a parent who is physically or mentally incapacitated, or who is caring for a child under two years of age to whom the parents owe a joint legal responsibility. Potential income will be based upon the parent's work history, qualifications and job opportunities. The court also may impute potential income for non-income or low income producing assets.	**NO AUTHORITY FOUND**
Arizona	**Arizona Supreme Court Order 96-27(4)(e)** The court may decline to attribute income to either parent. Examples of cases in which it may be inappropriate to attribute income include, but are not limited to, the following: 1. A parent is physically or mentally disabled, 2. A parent is engaged in reasonable career or occupational training to establish basic skills or reasonably calculated to enhance earning capacity, 3. Unusual emotional or physical needs of a natural or adopted child require that parent's presence in the home, or 4. The parent is a current recipient of aid to families with dependent children.	**NO AUTHORITY FOUND**
Arkansas	**NO AUTHORITY FOUND**	**NO AUTHORITY FOUND**

State	Statutes/Rules of Court	Case Law
California	**California Family Code §4057.5** The income of the obligee parent's subsequent spouse or non-marital partner shall not be considered when determining or modifying child support, except in an extraordinary case where excluding that income would lead to extreme and severe hardship to any child subject to the child support award, in which case the court shall also consider whether including that income would lead to extreme and severe hardship to any child supported by the obligee or by the obligee's subsequent spouse or non-marital partner. **(b)** For purposes of this section, an extraordinary case may include a parent who voluntarily or intentionally quits work or reduces income, or who intentionally remains unemployed or underemployed and relies on a subsequent spouse's income.	**Touchstone v. Touchstone, 267 Cal.Rptr. 777 (1990)** Mother also claims the trial court erred in imputing $1,000 per month income to her. We agree that this conclusion on the part of the trial court cannot be supported. More importantly, however, the youth of Mother's new family reasonably prevented her from entering the job market. A trial court may base support awards upon earning capacity rather than actual earnings only when it is shown that the lack of earnings results from intentional avoidance of responsibilities. We know of no authority for the proposition that a decision to increase one's family equates to avoidance of support obligations. The authorities permitting substitution of "capacity" for actual earnings all reflect situations of irresponsible conduct in derogation of family obligations. The increase of family obligations by the having of additional children, without highly unusual circumstances not present here, surely cannot be deemed an irresponsible parental act.
Colorado	**Colorado Revised Statute 14-10-115 (III)(b)(I)** If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income; except that a determination of potential income shall not be made for a parent who is physically or mentally incapacitated or is caring for a child under the age of thirty months for whom the parents owe a joint legal responsibility.	**NO AUTHORITY FOUND**
Connecticut	**NO AUTHORITY FOUND**	**NO AUTHORITY FOUND**

State	Statutes/Rules of Court	Case Law
Delaware	**NO AUTHORITY FOUND**	**Dalton v. Clanton, 559 A.2d 1197 (1989)** "A parent will be excused from making a financial contribution only if he or she is physically or mentally incapacitated or is caring for a very young child for whom the parents owe a joint legal responsibility. Thus, where a parent is caring for a young child of a relationship other than that between the parents in question, the obligation to secure employment will generally not be waived." (citing *The Delaware Child Support Formula: Study and Evaluation, Report to the 132nd General Assembly*, Family Court of the State of Delaware, at 4-5 (April 15, 1984))
Florida	**Florida Civil Practice and Procedure §61.30(14)(b)** Income shall be imputed to an unemployed or underemployed parent when such employment or underemployment is found to be voluntary on that parent's part, absent physical or mental incapacity or other circumstances over which the parent has no control... However the court may refuse to impute income to a primary residential parent if the court finds it necessary for the parent to stay home with the child.	**NO AUTHORITY FOUND**
Georgia	**NO AUTHORITY FOUND**	**NO AUTHORITY FOUND**
Hawaii	**H.R.S. §576D-7(9)** If any obligee parent (with a school age child or children in school), who is mentally and physically able to work, remains at home and does not work, thirty (or less) hours of weekly earnings at the minimum wage may be imputed to that parent's income.	**NO AUTHORITY FOUND**

State	Statutes/Rules of Court	Case Law
Idaho	**Idaho Rules of Civil Procedure Rule 6(c)(1)** If a parent is voluntarily unemployed or underemployed, child support shall be based on gross potential income, except that potential income should not be included for a parent that is physically or mentally incapacitated... Ordinarily, a parent shall not be deemed underemployed if the parent is caring for a child not more than 6 months of age.	**NO AUTHORITY FOUND**
Illinois	**NO AUTHORITY FOUND**	**NO AUTHORITY FOUND**
Indiana	**Child support guidelines Title 34 Guideline 3 2(1)** When a custodial parent with young children at home has no significant skills or education and is unemployed, he or she may not be capable of entering the work force and earing enough to even cover the cost of child care. Hence, it may be inappropriate to attribute any potential income to that parent... It is not the intention of the Guidelines to force all custodial parents into the work force. Therefore, discretion must be exercised on an individual case basis to determine if it is fair under the circumstances to attribute potential income to a particular non-working or underemployed custodial parent. The need for a custodial parent to contribute to the financial support of a child must be carefully balanced against the need for the parent's full-time presence in the home.	**NO AUTHORITY FOUND**
Iowa	**NO AUTHORITY FOUND**	**In Re Bonnette, 492 N.W.2d 717 (Iowa Ct. App. 1992)** Wages will not be imputed to custodial parent staying home with child of second marriage and two older children by first marriage. The court does not want to penalize the mother for staying home.
Kansas	**NO AUTHORITY FOUND**	**NO AUTHORITY FOUND**

State	Statutes/Rules of Court	Case Law
Kentucky	**Kentucky Statute §403.212(2)(d)** If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income, except that a determination of potential income shall not be made for a parent who is physically or mentally incapacitated or is caring for a very young child, age three (3) or younger, for whom the parents owe a joint legal responsibility.	**NO AUTHORITY FOUND**
Louisiana	**Louisiana Revised Statute 9 LA RA §315.9** If a party is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of his or her income earning potential, unless the party is physically or mentally incapacitated, or is caring for a child of the parties under the age of five years. The amount of the basic child support obligation obtained by use of this Section shall not exceed that amount which the party paying support would have owed had no determination of the other party's earning potential been made.	**NO AUTHORITY FOUND**
Maine	**19-A M.R.S.A. §2001(5)(D)** In absence of evidence in the record to the contrary, a party that is personally providing primary care for a child under the age of 3 years is deemed not available for employment. The court shall consider anticipated child care and other work-related expenses in determining whether to impute income, or how much income to impute, to a party providing primary care to a child between the ages of 3 and 12 years.	**NO AUTHORITY FOUND**
Maryland	**Maryland Family Law Code §12-204(2)(ii)** A determination of potential income may not be made for a parent who: **(i)** is unable to work because of a physical or mental disability; or **(ii)** is caring for a child under the age of 2 years for whom the parents are jointly and severally responsible	**NO AUTHORITY FOUND**

Mass	**Guideline II-H** If the court makes a determination that either or both parties is earning substantially less than he or she could through reasonable effort, the court may consider potential earning capacity rather than actual earnings. In making this determination, the court shall take into consideration the education, training, and past employment history of the party. These standards are intended to be applied where a finding has been made that the party is capable of working and is unemployed, working part-time or is working a job, trade, or profession other than that for which he/she has been trained. This determination is not intended to apply to a custodial parent with children who are under the age of six living in the home.	**Canning v. Juskalian, 597 N.E.2d 1074 (Mass. Ct. App. 1992)** While a weighing of general policy considerations makes the question extremely close, we believe that the objectives and text of the guidelines tilt the balance in favor of holding that the words "custodial parent with children" do not encompass the children of a subsequent marriage.
Michigan	**NO AUTHORITY FOUND**	**NO AUTHORITY FOUND**
Minnesota	**M.S.A. § 518.551 Subd5b.(d)** If the court finds that a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of imputed income. A parent is not considered voluntarily unemployed or underemployed upon a showing by the parent that the unemployment or underemployment: (1) is temporary and will ultimately lead to an increase in income; or (2) represents a bona fide career change that outweighs the adverse effect of that parent's diminished income on the child.	**NO AUTHORITY FOUND**
Mississippi	**NO AUTHORITY FOUND**	**NO AUTHORITY FOUND**
Missouri	**NO AUTHORITY FOUND**	**Stanton v. Abbey, 874 S.W.2d 493 (MO. App. E.D. 1994)** Imputing wages to unemployed custodial mother was not an abuse of discretion. [N.B. Mother was a physician who had worked during marriage to first husband averaging $100,000 a year, and all the children were now in school.]

State	Statutes/Rules of Court	Case Law
Montana	**MT R CSG Rule 46.30.1513(2)(c)&(d)** **(c)** Whenever income is imputed to an unemployed parent who is providing in-home care for the child whom support is being calculated, and if that parent would be required to incur child care expenses if employed at the imputed level, then the imputed income should be reduced by the reasonable value of the parent's child care service. **(d)** Income should not be imputed if any of the following conditions exist: **(i)** The reasonable costs of day care for the parties dependent children will offset, in whole or in substantial part, the amount of income the custodial parent can earn; **(iv)** unusual emotional and/or physical needs of the child require the custodial parent's presence in the home.	In re Marriage of Noel, **875 P.2d 258 (Mont. Sup. Ct. 1994)** Mother who stays home to care for children by new relationship will have income imputed to her, less reasonable child care expenses for those children, had she been employed.
Nebraska	**NO AUTHORITY FOUND**	Muller v. Muller, **524 N.W.2d 78 (Neb. Ct. App. 1994)** The fact that a custodial parent is not ordered to remit a monthly dollar amount does not release her from the obligation to contribute to the support of the children. Earning capacity of each parent, and not merely the actual income, is to be considered in determining child support. The custodial parent who stays home with the parties' two children and a child of a new marriage is not relieved of her support duty, and wages will be imputed.
Nevada	**NO AUTHORITY FOUND**	**NO AUTHORITY FOUND**

State	Statutes/Rules of Court	Case Law
New Hampshire	**N.H R.S.A. §458-C:1(I)** The custodial parent shall share responsibility for economic support of the children, irrespective of any non-custodial parent's child support order. **N.H. R.S.A. §458-C:2(VI)(b)** The income of either parent's current spouse shall not be considered as gross income to the parent unless the parent resigns from employment or is voluntarily unemployed, in which case the income of the spouse shall be imputed to the parent to the extent that the parent had earned income in his or her usual employment.	**NO AUTHORITY FOUND**
New Jersey	**NO AUTHORITY FOUND**	**Thomas v. Thomas, 589 A.2d. 1372 (N.J. Superior Ct. 1991)** Court gives deference to the custodial parent who wishes to stay home and raise children. In this case, the court relieved the custodial parent's support obligation even though she was staying home with children of a subsequent marriage.
New Mexico	**New Mexico Statute §40-4-11.1(C)(1)** Income need not be imputed to the primary custodial parent actively caring for a child of the parties who is under the age of six or disabled. If income is imputed, a reasonable child care expense may be imputed. The gross income of a parent means only the income and earnings of that parent and not the income of subsequent spouses, notwithstanding the community nature of both incomes after remarriage.	**NO AUTHORITY FOUND**
New York	**NO AUTHORITY FOUND**	**NO AUTHORITY FOUND**
North Carolina	**NO AUTHORITY FOUND**	**Schroader v. Schroader, 463 S.E.2d 790 (1995)** Under the 1991 version of the North Carolina Child Support Guidelines, even if the court determines that a parent is voluntarily unemployed or underemployed, the court is vested with discretion regarding whether or not to impute income.

State	Statutes/Rules of Court	Case Law
North Dakota	**NO AUTHORITY FOUND**	**Spilovoy v. Spilovoy, 488 N.W. 2d 873 (1992)** Minimum wage net income would not be imputed to former wife, who had chosen to remain unemployed and instead take care of a child of her remarriage, for purposes of determining wife's child support obligation under the child support guidelines. If a minimum wage income should be imputed to a child support obligor under these circumstances, that argument is best made to the agency promulgating the guidelines, and, if failing there, to the Legislature.
Ohio	**NO AUTHORITY FOUND**	**Harris v. Harris, 1987 WL 17705 (Ct. App. Lawerence County)** Court refused to apply nurturing parent doctrine to the mother who was staying home with a child of a subsequent marriage. The court held that by excusing a parent from his or her obligation to support a child from a previous marriage whenever he or she chooses to stay home with young children from a subsequent marriage, would leave many children without parental support and thus would be against public policy.
Oklahoma	**NO AUTHORITY FOUND**	**NO AUTHORITY FOUND**
Oregon	**Oregon Administrative Rules 137-50-330** The amount of child support to be paid as determined in subsections 1(a) through (h) of this rule is presumed to be the correct amount. this presumption may be rebutted by a finding that the amount is unjust or inappropriate based on the criteria set forth in paragraphs (A) though (P) of this subsection. (H) The desirability of the custodial parent remaining in the home as a full-time parent or working less than full-time to fulfill the role of parent and homemaker. (incorporated in ORS §25.280)	**In the Matter of the Marriage of Hopkins, 768 P.2d 436 (OR Ct. App. 1988)** The court imputed part time wages to a parent who voluntarily reduced wages in order to be home for the children of a previous and subsequent marriage. [N.B. Both kids were teenagers]

State	Statutes/Rules of Court	Case Law
Pennsylvania		**Frankenfield v. Fesser, 672 A.2d 1347 (1996)** Allows mother to stay home with child of subsequent marriage and not have wages imputed to her. Application of nurturing parent doctrine.
Rhode Island	**NO AUTHORITY FOUND**	**NO AUTHORITY FOUND**
South Carolina	**NO AUTHORITY FOUND**	**Smith v. DeLaney, 334 S.E.2d. 821 (S.C. Ct. App. 1985)** The mother at the time of the remand hearing had the care and responsibility of three young children and was expecting a fourth child. She had no income or other substantial assets. We hold that the court's finding that she should contribute financially to their support from the proceeds of sale is clearly erroneous and against the preponderance of the evidence. It appears the court gave no value whatsoever to the mother's investment of her time and service in caring for the young children. We find that the mother is unable to contribute financially to the children's support and that the father has the means to provide support for their financial support.
South Dakota	**SD ST § 25-7-6.4** Except in cases of physical or mental disability, it shall be presumed for the purposes of determination of child support that a parent is capable of being employed at the minimum wage and his child support obligation shall be computed at a rate not less than full-time employment at the state minimum wage. Evidence to rebut this presumption may be presented by either parent.	**NO AUTHORITY FOUND**
Tennessee	**NO AUTHORITY FOUND**	**Watts v. Watts, 1991 WL 93780 (Tenn App.)** No justification for increasing child support payments because custodial mother wants to stay home with new family. The case is not clear if she had another child with her new husband or is raising the children of her previous marriage.

State	Statutes/Rules of Court	Case Law
Texas	**V.T.C.A., Family Code §154.123(b)** In determining whether application of the guidelines would be unjust or inappropriate under the circumstances, the court shall consider evidence of all relevant factors including: **(1)** the age and needs of the child; **(5)** the amount of the obligee's net resources, including the earning potential of the obligee if the actual income of the obligee is significantly less than what the obligee could earn because the obligee is intentionally unemployed or underemployed and including an increase or decrease in the income of the obligee or income that may be attributed to the property and assets of the obligee; **(6)** child care expenses incurred by either party in order to maintain gainful employment.	**NO AUTHORITY FOUND**
Utah	**UT ST §78-45-7.5(7)(a)** Income may not be imputed to a parent unless the parent stipulates to the amount imputed or a hearing is held and a finding made that the parent is voluntarily unemployed or underemployed. **UT ST §78-45-7.5(7)(d)** Income may not be imputed if any of the following conditions exist: **(i)** the reasonable costs of child care for the parents' minor children approach or equal the amount of income the custodial parent can earn; **(iv)** unusual emotional or physical needs of a child require the custodial parent's presence in the home.	**NO AUTHORITY FOUND**
Vermont	**15 V.S.A. §653(5)(A)** Gross income shall include: **(iii)** the potential income of a parent who is voluntarily unemployed or underemployed **unless:** **(c)** employment or underemployment of the parent is in the best interest of the child.	**NO AUTHORITY FOUND**

State	Statutes/Rules of Court	Case Law
Virginia	**VA ST § 20-108.1(3)** The finding that rebuts the guidelines shall state the amount of the support that would have been required under the guidelines, shall give a justification of why the order varies from the guidelines, and shall be determined by relevant evidence pertaining to the following factors affecting the obligation, the ability of each party to provide child support, and the best interests of the child: **3.** Imputed income to a party who is voluntarily unemployed or voluntarily underemployed; 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.	**Brody v. Brody, 432 S.E.2d 20 (VA Ct. App. 1993)** Custodial mother could not avoid imputed income merely by leaving job to say home and take care of children from a subsequent marriage.
Washington	**NO AUTHORITY FOUND**	**In Re Marriage of Jonas, 788 P.2d 12 (Wash. App. 1990)** The court found that a custodial mother who chooses to stay home with children will not shield a parent from a child support obligation.
West Virginia	**W.V. ST § 48A-1A-3(1)** Income shall not be attributed to an obligor who is unemployed or underemployed or is otherwise working below full earning capacity if any of the following conditions exist: (1) The parent is providing care required by the children to whom the parties owe a joint legal responsibility for support, and such children are of preschool age or are handicapped or otherwise in a situation requiring particular care by the parent.	
Wisconsin	**NO AUTHORITY FOUND**	**Roberts v. Roberts, 496 N.W.2d 210 (Ct. App. 1992).** Mother had an obligation to support her children from first marriage despite her voluntary choice to remain at home with a child from a subsequent marriage.

State	Statutes/Rules of Court	Case Law
Wyoming	**Wyoming 20-6-302** In any case where the court has deviated from the presumptive child support, the reasons therefore shall be specifically set forth fully in the order or decree. In determining whether to deviate from the presumptive child support established by W.S. 20-6-304, the court shall consider the following factors: **(xi)** Whether either parent is voluntarily unemployed or underemployed. In such case the child support shall be computed based upon the potential earning capacity (imputed income) of the unemployed or underemployed parent. In making that determination, the court shall consider: **(C)** The presence of children of the marriage in the parent's home and its impact on the earnings of that parent; **(G)** Whether the parent is realistically able to earn imputed income.	**NO AUTHORITY FOUND**

No. 78. Living Arrangements of Children Under 18 Years Old, by Selected Characteristic of Parent: 1994

[In thousands. As of March. Covers only those persons under 18 years old who are living with one or both parents. Characteristics are shown for the householder or reference person in married-couple situations. See also headnote, table 73]

CHARACTERISTIC OF PARENT	ALL RACES [1]				WHITE				BLACK				HISPANIC [2]			
	Total	Living with—			Total	Living with—			Total	Living with—			Total	Living with—		
		Both parents	Mother only	Father only		Both parents	Mother only	Father only		Both parents	Mother only	Father only		Both parents	Mother only	Father only
Children under 18 years old	66,674	48,084	16,334	2,257	53,200	41,766	9,724	1,710	10,106	3,722	5,967	417	9,041	6,022	2,646	373
Age:																
15 to 24 years old	4,011	1,475	2,362	174	2,708	1,295	1,276	135	1,133	118	994	22	777	337	376	64
25 to 29 years old	8,350	4,905	3,113	333	6,202	4,171	1,794	237	1,779	497	1,207	76	1,560	932	568	60
30 to 34 years old	14,654	10,120	4,039	495	11,431	8,875	2,223	333	2,580	780	1,663	137	2,183	1,415	682	87
35 to 39 years old	16,925	12,854	3,542	529	14,019	11,326	2,268	424	2,018	817	1,123	78	1,899	1,287	536	76
40 to 44 years old	12,514	10,130	2,020	363	10,441	8,817	1,320	304	1,404	749	611	43	1,474	1,155	281	38
45 to 54 years old	8,947	7,502	1,155	291	7,449	6,431	797	221	952	587	310	54	973	748	184	41
55 to 64 years old	1,077	923	90	64	799	710	41	49	208	153	49	8	164	140	18	5
65 years old and over	196	175	14	8	153	142	5	7	31	21	9	1	10	6	-	3
Educational attainment:																
Less than 9th grade	4,117	2,932	1,015	170	3,481	2,546	810	126	268	116	126	26	2,716	1,967	653	96
9th to 12th grade, no diploma	7,948	4,010	3,563	375	5,464	3,373	1,791	299	2,085	405	1,618	62	1,951	1,083	789	79
High school graduate [3]	21,659	14,789	5,993	877	16,740	12,685	3,416	640	4,140	1,534	2,404	202	2,252	1,427	716	108
Some college, no degree or associate degree	17,757	12,754	4,438	565	14,296	11,146	2,725	424	2,689	1,049	1,543	96	1,513	1,032	405	76
Bachelor's degree	9,832	8,714	954	164	8,500	7,701	673	126	692	441	225	26	398	336	57	5
Graduate or professional degree	5,362	4,886	371	105	4,719	4,315	309	95	232	177	51	5	211	176	26	9
Employment status: [4]																
In the civilian labor force	54,878	42,848	10,113	1,917	45,451	37,678	6,291	1,482	6,826	3,012	3,469	345	6,699	5,129	1,252	318
Employed	51,127	40,806	8,616	1,705	42,977	36,035	5,615	1,328	5,736	2,739	2,692	304	6,042	4,710	1,057	275
Both parents employed	27,284	27,284	(X)	(X)	23,933	23,933	(X)	(X)	2,021	2,021	(X)	(X)	2,322	2,322	(X)	(X)
Unemployed	3,751	2,042	1,496	212	2,473	1,643	676	154	1,090	273	777	40	657	419	195	44
Not in the labor force	10,796	4,269	6,202	325	7,008	3,364	3,422	222	3,102	543	2,490	69	2,251	802	1,394	55
Family income:																
Under $5,000	3,651	664	2,775	212	2,049	492	1,414	143	1,426	106	1,261	60	666	164	461	42
$5,000 to $9,999	5,607	1,415	3,980	212	3,375	1,102	2,127	146	1,980	195	1,737	48	1,207	398	781	28
$10,000 to $14,999	4,870	2,261	2,355	253	3,371	1,885	1,304	180	1,170	199	916	55	1,242	741	438	63
$15,000 to $24,999	9,579	5,971	3,022	586	7,320	4,988	1,884	448	1,767	626	1,038	103	2,094	1,482	500	112
$25,000 to $29,999	4,603	3,490	896	217	3,762	3,010	585	166	629	316	270	42	791	665	99	28
$30,000 to $39,999	8,790	6,949	1,542	300	7,282	5,943	1,085	254	1,092	659	408	25	1,143	906	191	45
$40,000 to $49,999	7,655	6,788	646	220	6,694	6,059	468	167	682	480	156	46	678	575	76	27
$50,000 and over	21,921	20,546	1,118	257	19,349	18,288	857	204	1,357	1,140	181	36	1,221	1,090	103	27
Tenure: [5]																
Owned	41,506	35,035	5,366	1,105	36,136	31,348	3,863	925	3,589	2,156	1,289	125	3,523	2,897	510	116
Rented	25,168	13,049	10,968	1,152	17,064	10,418	5,861	785	6,537	1,566	4,678	293	5,518	3,125	2,137	257

- Represents or rounds to zero. X Not applicable. [1] Includes other races, not shown separately. [2] Persons of Hispanic origin may be of any race. [3] Includes equivalency. [4] Excludes children whose parent is in the Armed Forces. [5] Refers to the tenure of the householder (who may or may not be the child's parent).

Source: U.S. Bureau of the Census, unpublished data.

875 P.2d 358
(Cite as: 265 Mont. 249, 875 P.2d 358)

In re the MARRIAGE OF Tom E. NOEL, Petitioner and Respondent,
and
Brenda S. Noel, Respondent and Appellant.

No. 94-030.
Supreme Court of Montana.
Submitted on Briefs May 5, 1994.
Decided June 7, 1994.

Dissolution of marriage action was filed. The District Court, Flathead County, Eleventh Judicial District, Michael H. Keedy, J., ordered mother to pay **child** support to father, and mother appealed. The Supreme Court, Turnage, C.J., held that in calculating **child** support obligations of mother, who was **unemployed,** district court abused its discretion in failing to deduct from mother's **imputed** income mother's **child** care expenses for **children** born after termination of her relationship with husband.

Reversed and remanded.

[1] PARENT AND CHILD k3.3(10)
285k3.3(10)
Supreme Court's standard of review of ruling establishing child support obligation is whether district court abused its discretion; however, district court must apply its discretion in realistic manner, taking into account actual situation of parties.

[2] DIVORCE k306
134k306
In calculating **child** support obligations of mother, who was **unemployed,** district court abused its discretion in failing to deduct from mother's **imputed** income mother's **child** care expenses for **children** born after termination of her relationship with husband; mother needed someone to care for **children** who lived with her in order to work, and there were no relatives or other people available to assume full-time care of **children.**

***250 **358** James B. Wheelis, Montana Legal Services Ass'n, Kalispell, for respondent and appellant.

Gregory E. Paskell, Kalispell, for petitioner and respondent.

Amy Pfeifer, Dept. of Social and Rehabilitation Services, Helena, for amicus curiae.

TURNAGE, Chief Justice.

This dissolution of marriage was filed in the District Court of the Eleventh Judicial District, Flathead County. The parties submitted to the court a property settlement agreement which did not require the mother to pay child support for the child of the marriage, who was in the father's custody. The court refused to accept the agreement and ordered the mother to pay child support to the father in the amount of $33 per month. She appeals. We reverse and remand.

The issue is whether the District Court abused its discretion in applying the Montana Child Support Guidelines when it declined to deduct child care costs allowed by Rule 46.30.1516(3), ARM, from income imputed to the mother under Rule 46.30.1513, ARM.

The parties were married in 1986 and had one child. They separated in 1989. Between the parties' separation and the date of dissolution, the mother had two children by another man. At the time of the dissolution hearings, she was expecting a third child from that relationship.

The parties arrived at a property settlement agreement which awarded custody of their son to the father. When the parties submitted the agreement to the District Court, the court declined to approve it because the agreement did not require the mother to pay **child** support. The court stated, "I don't approve of property settlement agreements where minor **children** are involved, as here, that provide for no support from a **non-custodial parent** who is able-bodied and making babies."

At a subsequent hearing, the mother testified that she had been sporadically employed at minimum **wage** jobs since finishing high school. She was **unemployed** and had been receiving AFDC payments at the time of the hearing. She testified that the father of her ****359** youngest **children,** with whom she and the **children** lived, was a college student who worked during the summers as a firefighter.

In calculating the mother's **child** support obligation, the court **imputed** income to the mother at minimum **wage,** pursuant to Rule 46.30.1513, ARM. It ruled that the reference in Rule 46.30.1513(2)(c), ARM, to deductible **child** care costs included only those costs for ***251** children of the marriage or the relationship in question, rather than for **children** produced after the termination of that relationship. Then, the court treated as discretionary the provision of Rule 46.30.1516, ARM, allowing a deduction from income for **child** care expenses. The result of the court's calculations was a $33 per month **child** support obligation for the mother.

Did the District Court abuse its discretion in applying the Montana **Child** Support Guidelines when it declined to deduct **child** care costs allowed by Rule 46.30.1516(3), ARM, from income **imputed** to the mother under Rule 46.30.1513, ARM?

The Montana **Child** Support Guidelines, which are published in the Administrative Rules of Montana at Title 46, Chapter 30, subchapter 15, are promulgated by the Department of Social and Rehabilitation Services pursuant to s 40-5-209, MCA. The Guidelines establish detailed standards for calculating **child** support obligations. The standards, generally stated, require each **parent** to contribute **child** support in an amount proportionate to that **parent's** share of the combined resources of both **parents,** after specific allowable deductions have been made from each **parent's** gross income.

In this case, the mother was not employed outside the home. Rule 40.30.1513, ARM, sets forth the procedure for **imputing** income to an **unemployed parent:** (1) "**Imputed** income" means income not actually earned by a **parent,** but which may be attributed to the **parent** because the **parent** is **voluntarily unemployed,** is not working full-time when full-time work is available, or the **parent** is intentionally working below his or her ability or capacity to earn income. (2) Income may be **imputed** according to one of two methods as appropriate: (a) Determine employment potential and probable net earnings level based on the **parent's** recent work history, occupational qualifications, and prevailing job opportunities and earnings level in the community. If there is no recent work history, and no higher education or vocational training, income may be **imputed** at the minimum **wage** level.

. . . . .

(c) Whenever income is **imputed** to an **unemployed parent** who is providing in- home care for the **child** for whom support is being calculated, and if that **parent** would be required to incur **child** care expenses if employed at the **imputed** level, then the **imputed** ***252** income should be reduced by the reasonable value of the **parent's child** care service. The court **imputed** income to the mother at a minimum **wage** rate. It refused to allow the moher a deduction for **child** care expenses under subsection (2)(c) above, reasoning that subsection (2)(c) applied only to **children** of the marriage.

Rule 46.30.1516, ARM, Determination of Net Income, provides at subsection (3): Reasonable expenses for items such as **child** care or in-home nursing care for the **parent's** legal dependents other than those for whom support is being determined, which are actually incurred and which are necessary to allow the **parent** to work, less federal tax credits, if any, may be deducted from gross income. The court "cho[se] to deny a deduction" to the mother for **child** care costs, ruling that such a deduction is discretionary.

[1][2] Our standard of review of a ruling establishing a **child** support obligation is whether the district court abused its discretion. In re Marriage of Weed (1992), 254 Mont. 162, 165, 836 P.2d 591, 593. However, a district court must apply its discretion in a realistic manner, taking into account the actual situation of the parties. In re Marriage of Gebhardt (1989), 240 Mont. 165, 172, 783 P.2d 400, 404. Here, we conclude that the court abused its discretion.

****360** The District Court's decision does not realistically reflect the mother's income earning ability. It is apparent that, in order to work, the mother would need someone to care for

the **children** who live with her. She testified that there were no relatives or other people available to assume full-time care of the **children.**

If income is to be **imputed** to the mother, then a deduction for necessary **child** care expenses is clearly allowable under Rule 46.30.1516(3), ARM. We hold that, in this case, a deduction for **child** care expenses should have been allowed.

As suggested in the amicus curiae brief filed in this matter by the **Child** Support Enforcement Division, it appears that a portion of the mother's **child** care cost may be assignable to the father of those **children,** as his responsibility. Evidence on this point should be considered on remand.

Reversed and remanded for further proceedings in conformity with this Opinion.

HUNT, HARRISON, TRIEWEILER and NELSON, JJ., concur.

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