IN THE SUPREME COURT OF GUAM

DORIS LEON GUERRERO,
Plaintiff-Appellee,

v.

DOUGLAS B. MOYLAN,
Defendant-Appellant.

Supreme Court Case No. CVA01-020
Superior Court Case No. DM0457-97

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on June 17, 2002
Hagåtña, Guam

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[1] Pursuant to Guam Rule of Appellate Procedure 36, the Attorney General participated as *amicus curiae* in these proceedings.

BEFORE: PETER C. SIGUENZA, JR., Chief Justice, JOHN A. MANGLONA, Designated Justice, and RICHARD H. BENSON, Justice *Pro Tempore*.

SIGUENZA, C.J.:

[1] Defendant-Appellant Douglas B. Moylan ("Moylan") appeals from the lower court's order that Moylan pay child support to Plaintiff-Appellee Doris Leon Guerrero ("Leon Guerrero") in the amount of $523.32 per month. Moylan argues that the lower court should not have applied the Guam Child Support Guidelines ("Guidelines") in determining his child support obligation. Moylan further argues that even if the Guidelines could be utilized, the lower court improperly calculated his child support under them. Last, Moylan challenges the effective date of the order and the participation of the Office of the Attorney General ("AG") in lower court proceedings.

[2] We find that the trial court acted within its discretion in utilizing the Guidelines. However, we agree with Moylan and find that the trial court erred in the calculation of his child support. We also find that the trial court erred by ordering, without justification that the child support order be effective from the date the motion was heard and not the date the motion was made. Last, regarding participation by the AG in these proceedings, we find no error.

I.

[3] Moylan and Leon Guerrero divorced on June 13, 1997. The final decree of divorce granted the parties joint and equal legal and physical custody of their two minor children but left the matter of child support unresolved. *See* Appellant's Excerpts of Record, pp. 1-7 (Final Decree of Divorce, Oct. 3, 1997; Interlocutory Judgment of Divorce, Oct. 3, 1997). In the interim, Moylan paid temporary child support in the amount of $1,014.88 per month.

[4] On December 29, 2000, Moylan moved to set permanent child support. The lower court heard the matter on February 7, 2001, and on March 6, 2001, issued its Decision and Order. Pursuant to this decision, Moylan was ordered to pay Leon Guerrero temporary child support in the amount of $523.32

per month. In setting child support, the court added the amount owed in *basic child support* ($1,714.51) to the amount owed in *necessary expenses* ($752.92) to arrive at a total child support obligation of $2,467.43. Moylan was obligated to pay Leon Guerrero 71.25% of that amount or $1,758.04, and Leon Guerrero was obligated to pay Moylan 28.75% of that amount or $709.39. Both of these amounts were adjusted downward by 50% to account for the parties' joint custody arrangement. Moylan was then ordered to pay the difference between his and Leon Guerrero's obligations, which equaled $523.32. Moylan moved to amend the order, and the trial court denied his motion. Moylan now appeals the March 6, 2001 child support order and the denial of his motion to amend.

II.

[5] "An order for child support is a final judgment as to any installment or payment of money which has accrued up to the time either party makes a motion to set aside, alter or modify the order." Title 5 GCA § 34121 (1996). This court has jurisdiction to review all final judgments of the Superior Court, Title 7 GCA § 3107(a) (1994), and therefore has jurisdiction over the instant appeal. *Leon Guerrero v. Moylan*, 2002 Guam 17, ¶ 4.

III.

[6] Moylan attacks the child support order on several different grounds. He argues that the trial court erred in using the Guidelines to calculate child support in a joint and equal custody arrangement. He also believes that the Guidelines are null and void because they are *ultra vires* and because they have not been updated as required by Title 5 GCA § 34118(a) (1996).

[7] Assuming the Guidelines are valid and applicable, Moylan disputes the trial court's calculation of his child support obligation under the Guidelines. First, Moylan argues that the court improperly exceeded the Guidelines' schedule when setting the parties' basic child support obligation amount. Second, Moylan argues that the trial court should not have calculated his child support payments based on his earning

capacity instead of his actual earnings. Last, Moylan asserts that the trial court erred in failing to impute income to Leon Guerrero for her free housing.

[8] Moylan raises two final grounds in his appeal. He believes that the court erred in retroactively applying the child support order to the date the lower court heard the motion instead of the date Moylan brought his motion to set permanent support. He also contends that the AG should have been disqualified from participating in the case due to a conflict of interest.

A. Guidelines applicability

[9] Pursuant to 5 GCA § 34118, the AG promulgated a schedule of child support payments, now set forth in Article 2 of Title 19 of the Guam Administrative Regulations ("GAR"). The authority vested in the AG was limited to formulating guidelines for payments "to be paid by a *non-custodial* parent to a *custodial* parent." 5 GCA § 34118(a) (emphasis added). The first issue before this court focuses on the above language, and whether by its terms, it precludes the application of the Guidelines to a joint and equal custody arrangement. Matters of statutory interpretation are questions of law and reviewed *de novo*. *See Ada v. Guam Tel. Auth.*, 1999 Guam 10, ¶ 10.

[10] A non-custodial parent is defined as "any person who is responsible for the support of a child, and who is absent from the household whether the person's location is known or unknown." Title 5 GCA § 34202(h) (as reenacted by P.L. 25-161:2 (August 31, 2000)). Moylan argues that in a joint and equal custody arrangement, there is no non-custodial parent because both parents are custodial parents. Thus, the Guidelines cannot be applied to him. The lower court disagreed, stating:

> [I]n every shared custody situation, there is always at a given point in time one party who is the custodial parent and another party who is the non-custodial parent. When the time comes for these parties to exchange custody of their children, the custodial parent becomes the non-custodial parent and the non-custodial parent becomes the custodial parent.

Appellant's Excerpts of Record, p. 53 (Decision and Order, March 6, 2001). Thus, the trial court found and the AG agreed, that each parent's status changes when custody is exchanged. When the children are with Leon Guerrero, Moylan is the non-custodial parent; and when the children are with Moylan, Leon Guerrero becomes the non-custodial parent.

[11] The lower court relied on *Erickson v. Erickson*, 978 P.2d 347 (N.M. Ct. App. 1999), wherein one court faced with a shared custody arrangement declared "each parent is, in a sense, both a custodial parent and a non-custodial parent." *Erickson*, 978 P.2d at 352. However, the court's reliance on *Erickson* is misplaced. It is distinguishable from the instant case because *Erickson* involved a split custody arrangement. Each parent had custody of one child and no custody of the other at any given time, and was thus a custodial and non-custodial parent *simultaneously*. In other words, the parent was a custodial parent with respect to the child in his possession and a non-custodial parent with respect to the child not in his possession. No parallel situation exists here, wherein both children are in the custody of only one parent at a time.

[12] More applicable is *Baraby v. Baraby*, 681 N.Y.S.2d 826 (App. Div. 1998), the last in a developing line of New York cases which dealt with the use of child support guidelines in joint custody situations. Like Guam, the language of New York's child support guidelines relies on the distinction between custodial and non-custodial parents. Thus, the position that New York courts have taken in applying its guidelines to shared custody arrangements provides our court with guidance in determining the applicability of Guam's Guidelines in similar situations.

[13] *Baraby* involved a factual situation identical to the one now before us, with the parties sharing joint and equal custody. *Baraby* found that New York's child support guidelines applied to joint and equal custody arrangements, citing to *Bast v. Rossoff*, 635 N.Y.S.2d 453 (Sup. Ct. 1995). In *Bast*, a New York court found that although the guidelines' use of the terms "custodial parent" and "non-custodial parent" did not contemplate joint custody arrangements, the guidelines could be applied to joint custody. *Bast*, 635 N.Y.S.2d at 454. *Baraby* justified this application of the guidelines by stating that it is necessary "to assure that children will realize the maximum benefit of their parents' resources and continue, as near as possible, their preseparation standard of living in each household." *Baraby*, 681 N.Y.S.2d at 827. In calculating child support under the guidelines, the court identified the non-custodial parent as "the parent having the greater pro rata share of the child support obligation . . . ." *Id.*

[14] New York is not the only jurisdiction which holds that guidelines promulgated for sole custody situations can be applied to shared custody cases. Florida addressed the matter in *Simpson v. Simpson*, 680 So. 2d 1085 (Fla. Dist. Ct. App. 1996). Although *Simpson* is distinguishable from the instant matter in that it involved a split custody situation, the reasoning it adopted can be extended to joint custody. The court found that its child support guidelines did not speak to a split custody arrangement. *Simpson*, 680 So. 2d at 1085. When faced with this scenario, the court stated:

> If the guidelines do not cover this circumstance, as both parties and the dissent seem to agree, we think it impossible to contend that there has been an unwarranted deviation from them. A trial court judge cannot logically be accused of deviating from a standard that by its own terms does not purport to apply to the facts. We thus recur to the rule of discretion that governs dissolution of marriage cases.

Id. at 1086 (citations omitted). Under this approach, the court is free to exercise its discretion and utilize the framework set forth in the guidelines to calculate child support in a shared custody case as long as the resulting child support payments are not arbitrary or unfair. *Id.* However, this would not be the exclusive method available to a judge. The judge would be free to apply whichever method he finds appropriate absent an abuse of discretion, unless that discretion was otherwise limited by statute. *See id.*

[15] Pennsylvania adopted a similar approach. In *Fee v. Fee*, 496 A.2d 793 (Pa. Super. Ct. 1985), a father appealed a child support order on the ground that the court could not use the guidelines to calculate child support in a shared custody arrangement. *Fee*, 496 A.2d at 794. The court found the lower court's use of the guidelines inappropriate, but only because it failed to explain how the guidelines reflected the children's reasonable needs in a shared custody context. *Id.* at 795-96. Thus, if a court elects to apply the guidelines in a shared custody case, it must show that such a framework will provide for the reasonable needs of the children. If application of the guidelines would provide reasonable support, then it appears that Pennsylvania would have allowed for their use in a shared custody setting.

[16] We agree with the approach taken by the above-mentioned courts. The ultimate goal in any child support case is to protect the best interests of the children. Unless otherwise limited by statute, courts are vested with discretion to set child support in the amounts necessary to effectuate that purpose. Like New

York's guidelines, the enabling statute for Guam's Guidelines relied on the distinction between custodial and non-custodial parents, revealing that it did not contemplate shared custody. However, the court may exercise its discretion and use the Guidelines as a framework for setting child support in a shared custody case, as long as application of the Guidelines meets the reasonable needs of the children.

B. Guidelines validity

1. *Ultra vires*

[17] Moylan's second contention is that because provisions of the Guidelines speak to shared custody, the Guidelines exceed the enabling statute and are thereby void. A review of the Guidelines reveals two sections which address shared custody cases. First, 19 GAR § 1203(i) restricts a court's ability to lower child support in shared custody situations without certain findings. Second, 19 GAR § 1203(q) requires that *all* child support awards be made pursuant to the Guidelines. Moylan argues that these provisions exceed the authority conferred in 5 GCA § 34118 wherein the AG is directed to establish a schedule for payments to be paid by a non-custodial parent to a custodial parent; not for parents who share custody.

[18] "It is well established that in exercising its rule-making authority an administrative agency cannot extend the meaning of the statutory language to apply to situations not intended to be embraced within the statute." *Trump-Equitable Fifth Ave. Co. v. Gliedman*, 443 N.E.2d 940, 943 (Ct. App. 1982). In our earlier discussion, we found that the language of 5 GCA § 34118, which relies on the distinction between custodial and non-custodial parents, did not contemplate a shared custody arrangement. *See Bast*, 635 N.Y.S.2d at 454. "A statute which creates an administrative agency and invests it with powers restricts it to the powers granted. The agency has no powers except those mentioned in the statute." *Gouge v. Davis*, 202 P.2d 489, 498 (Or. 1949). While the court possesses the authority to use the Guidelines to calculate child support in joint custody cases, the AG cannot force the court to use the Guidelines in those instances. Thus, the provisions of the Guideline which seek to limit the court's discretion or bind the court to the Guidelines in shared custody cases are *ultra vires* in that they exceed the authority conferred to the AG in section 34118.

2. Failure to update

[19] Section 34118(a) requires the AG to update the Guidelines biannually. This has not been done since the regulations were enacted in 1996. Moylan argues that due to the failure of the AG to update the Guidelines, the Guidelines have expired and are thereby ineffective. We disagree.

[20] Section 34118(e) directly addresses this contention, stating that, "[u]ntil a new schedule is promulgated as required by this section, the schedule previously promulgated by the Director of Public Health and Social Services shall continue to be used in the manner specified by Public Law 18-17 as a guideline in cases where the court deems it relevant." 5 GCA § 34118(e) (1996). Pursuant to this section, the Guidelines shall continue to be valid and effective despite the failure of the AG to provide a biannual update.

[21] We note that section (e) fails to reflect the transfer of authority over child support matters from the Department of Public Health and Social Services to the Office of the Attorney General. However, it would be unreasonable to read section (e) as requiring the re-institution of an older schedule promulgated by the Director of Public Health. Instead, we interpret this provision as seeking only to continue in effect the most recently enacted schedule. Therefore, the Guidelines have not expired, and continue in full force and effect.

C. Exceeding the Guidelines

[22] The payment schedule provided in Title 19 of the Guam Administrative Regulations sets the maximum basic child support obligation for two children at $1,222.50. However, the table also vests in the court discretion to award an additional amount should the parents' combined adjusted gross income exceed $7,500 per month. Here, the parties' combined adjusted gross income totaled $10,518.48. Thus, the lower court applied the statutory percentage of 16.3% to arrive at a basic child support obligation of $1,714.51. Moylan argues on several different grounds that the trial court abused its discretion by exceeding the Guidelines' cap.

1. Contract limits

[23] Moylan argues that the court was prohibited from exceeding the Guidelines' table based on contract principles. The parties signed a stipulated agreement of divorce, which the court incorporated into

both the Interlocutory Judgment of Divorce and the Final Decree of Divorce. *See* Appellant's Excerpts of Record, pp. 1-7 (Final Decree of Divorce, Oct. 3, 1997; Interlocutory Judgment of Divorce, Oct. 3, 1997). While the agreement did not settle the matter of child support, it stated:

> [C]hild support will be resolved by the parties if possible or the parties may petition the court for determination of the amount of support to be paid by defendant to plaintiff, however, the amount of support shall in any event be based on a *strict application* of the Child Support Guidelines of the Government of Guam, except that the parties mutually agree that each party shall equally contribute to the cost of health insurance of the minor children.

Appellant's Excerpts of Record, p. 5 (Interlocutory Judgment of Divorce, Oct. 3, 1997) (emphasis added). Moylan argues that because the agreement dictated that the Guidelines be strictly applied, the court was stripped of its discretion to deviate from those Guidelines when calculating child support.

[24] While contract principles are applied to settlement agreements, courts are unanimous in concluding that parents cannot by agreement limit or divest a court of its discretion in setting child support. *See*, *e.g.*, *Labass v. Munsee*, 66 Cal. Rptr. 2d 393, 399, 56 Cal. App. 4th 1331, 1341 (Ct. App. 1997); *Straub v. B.M.T.*, 645 N.E.2d 597, 599-600 (Ind. 1994); *Calton v. Calton*, 485 So. 2d 309, 310 (Miss. 1986); *Tammen v. Tammen*, 182 N.W.2d 840, 841-42 (Minn. 1970). A child's right to support from his or her parents is a right belonging to the child, and cannot be contracted away by his or her parents. *Calton*, 485 So. 2d at 310; *Straub*, 645 N.E.2d at 599. Moreover, the primary purpose of the court in setting child support is to protect the welfare of children. *Tammen*, 182 N.Y.2d at 842. An agreement purporting to limit the court's ability to achieve that goal is void as against public policy. *Lusby v. Lusby*, 75 Cal. Rptr. 2d 263, 269, 64 Cal. App. 4th 459, 471 (Ct. App. 1998) ("the court in child support proceedings, to the extent permitted by the child support statutes, must be permitted to exercise the broadest possible discretion in order to achieve equity and fairness in these most sensitive and emotional cases.") (quotation omitted).

[25] The position of courts across the country is clearly contrary to Moylan's contention. The lower court's discretion to exceed the Guidelines' table could not be limited by the parties' agreement to "strictly apply" the Guidelines. This argument is not further buttressed by the fact that the parties' agreement was

incorporated by the court into the final decree. *See LaBass*, 66 Cal. Rptr. 2d at 399, 56 Cal. App. 4th at 1340. Therefore, the lower court did not err by deviating from the Guidelines even if such a deviation was in contravention of the parties' agreement.

2. Contract clause

[26] Moylan also argues that, by deviating from the parties' agreement, the trial court substantially impaired obligations set forth in the contract, thereby committing a constitutional violation. The Contracts clauses of the Organic Act and the U.S. Constitution prohibit the government from enacting any law that impairs the obligation of a contract. 48 U.S.C. 1421b(j); U.S. CONST. art. I, § 10. The prohibition is aimed at the legislative power of the state and not judicial decisions of the court. In order for an act to unconstitutionally impair the obligation of a contract, there needs to be action by the legislature; no decision or action by the court can amount to such a violation. *Cleveland & P.R. Co. v. City of Cleveland*, 235 U.S. 50, 53-54, 35 S. Ct. 21, 22 (1914). Thus, this court disregards Moylan's contention that the lower court's support order amounted to a constitutional violation of the Contracts clause.

3. Failure to make findings

[27] Moylan's final challenge to the court's exceeding of the Guidelines' cap is that the trial court set the basic child support in excess of the schedule without making any finding that the increase was necessary to meet the children's needs. New York has held that "[t]he blind application of the statutory formula to the combined parental income over [the statutory cap] without any express findings of the children's actual needs constitutes an abdication of judicial responsibility and renders meaningless the statutory provisions setting a cap on strict application of the formula." *Chasin v. Chasin*, 582 N.Y.S.2d 512, 514 (App. Div. 1992) (citations omitted). Oregon followed suit, citing to *Chasin* and ruling, "[a]ny decision to set child support above the guidelines cap must, at a minimum, be based primarily on the child's needs." *Stringer v. Brandt*, 877 P.2d 100, 102 (Or. Ct. App. 1994). Alabama adopts a similar position, but adds a second factor for the court's consideration, the parent's ability to pay. *Dyas v. Dyas*, 683 So. 2d 971, 973-74 (Ala. Ct. Civ. App. 1995) ("When the combined adjusted gross income exceeds the uppermost limit of

the child support schedule, the amount of child support awarded must rationally relate to the reasonable and necessary needs of the child . . . *and* must reasonable relate to the obligor's ability to pay for those needs.). *But see Galbis v. Nadal*, 626 A.2d 26, 32 (D.C. Ct. App. 1993) (finding that because the parents' combined gross income exceeded the guidelines, "the court is not so obliged to adhere to the guideline percentages or justify deviations in writing . . . .").

[28] In this instance, the trial court did not make any factual findings to support setting the basic child support obligation beyond the Guidelines' cap. The court simply referred to statutory policy without showing a corresponding need for an increase in child support to benefit the children. Specifically, the court stated:

> [I]t would be consistent with the purposes of the Guidelines to increase the basic support obligation. . . . The court finds this to be in furtherance of the guidelines that support be provided consistent with the parties ability to pay and consistent with the purpose of the guidelines that maximum support amount established under the schedules is a base amount and it is not intended to be a cap or a ceiling.

Appellant's Excerpts of Record, p. 69 (Decision and Order, March 6, 2001).

[29] While we recognize that the court is not bound to apply the Guidelines, its election to use the Guidelines as a framework for setting child support demands that deviations from the Guidelines be supported by findings. These findings must be more than a simple recitation by the court of relevant statutory factors; the court must relate those factors to the specific facts in the case before it. *Gluckman v. Qua*, 687 N.Y.S.2d 460, 462-63 (App. Div. 1999). The court must show how the figure it is using reflects the reasonable needs of these particular children in these particular circumstances. The court in this instance failed to makes such findings. Therefore, we find that it abused its discretion in setting the parties' basic child support obligation at $1,714.51.

D. Earning capacity

[30] The trial court calculated Moylan's child support obligation using his previous salary as counsel for the Twenty-Fifth Guam Legislature, which was approximately $98,000.00, instead of the income he currently earns as a partner in a private law firm, which is around $70,000.00. Moylan argues that it was

improper for the trial court to impute an income of almost $30,000.00 to him for a good faith change of employment. The lower court has discretion to impute income to a parent based on his or her earning capacity. *See* 19 GAR § 1203(5). Thus, we review the trial court's use of Moylan's earning capacity for an abuse of discretion. *Padilla v. Padilla*, 45 Cal. Rptr. 2d 555, 557, 38 Cal. App. 4th 1212, 1216 (Ct. App. 1995).

1. Voluntariness

[31] Moylan first argues that use of his earning capacity is inappropriate because his change of employment was involuntary. Moylan's appointment as legislative counsel automatically expired by operation of law when the term for the 25th Guam Legislature ended. Standing Rules for the 25th Guam Legislature § 22.09.25 ("All appointments to positions in [the 25th Guam Legislature] shall *automatically* expire on January 2, 2001 . . . ."). This technically may have rendered Moylan's change of employment involuntary, thereby making the use of Moylan's earning capacity to calculate child support inappropriate. However, "labels can be deceiving and are not always determinative as to whether one acted in good faith." *In re Marriage of Barnard*, 669 N.E.2d 726,730 (Ill. Ct. App. 1996). "[A] change in employment which may outwardly appear to be involuntary may, in reality, be voluntary and treated accordingly." *Id.* at 731.

[32] In determining whether a parent has the opportunity to work, the court must determine whether there is a "substantial likelihood that a party could, with reasonable effort, apply his or her education, skills and training to produce income." *Cohen v. Cohen*, 76 Cal. Rptr. 866, 871, 65 Cal. App. 4th 923, 930 (Ct. App. 1998). Although Moylan's position was technically terminated at the end of the legislative term, he failed to take any steps to retain or seek reappointment with the incoming legislative body. Moylan argues that given the financial distress of the government and change in make-up of the legislature, his continued employment with the legislature was speculative at best. Thus, he seems to be asserting that any effort to acquire his previous position would have been futile and that he had no opportunity to earn such an income.

[33] However, Moylan also revealed an unwillingness to continue his legislative employment. Willingness to obtain employment generating a higher income is shown by good faith efforts, due diligence, and meaningful attempts to secure employment. *Padilla*, 45 Cal. Rptr. 2d at 558, 38 Cal. App. 4th at 1218. Here, Moylan made no effort to retain his employment with the Twenty-Sixth Guam Legislature, but instead justified his leaving the government position for work in the private sector. He argued that work in a private firm would allow him to spend significantly more time with his children, build equity and security in a law practice, and improve his overall quality of life. His unwillingness to continue his legislative employment supports the lower court's finding that Moylan's change of employment was voluntary.

2. Balancing test

[34] Moylan also argues that the court erred in using his earning capacity because his change of employment was done in good faith. Despite the voluntariness of Moylan's departure from the Guam legislature, the lower court expressly found that Moylan did not act in bad faith. Appellant's Excerpts of Record, p. 64 (Decision and Order, March 6, 2001). Many jurisdictions require a finding of bad faith on the part of a parent prior to using that parent's earning capacity instead of actual earnings in setting child support. *Williams v. Williams*, 202 Cal. Rptr. 10, 14, 155 Cal. App. 3d 57, 62 (Ct. App. 1984) (*superceded by statute on other grounds*, *Romero v. Romero*, 122 Cal. Rptr. 2d 220, 99 Cal. App. 4th 1436 (Ct. App. 2002)) ("[A]pplication of the ability to earn standard is limited. The standard is not imposed unless there is some conduct by the supporting spouse indicating deliberate behavior designed to avoid his financial responsibilities to his children."); *DuBois v. DuBois*, 956 S.W.2d 607, 610 (Tex. Ct. App. 1997) ("[T]here must be evidence that the parent reduced his income for the purpose of decreasing his child support payments."); *In re Marriage of Barnard*, 669 N.E.2d 726,729 (Ill. Ct. App. 1996) ("A voluntary change in employment which results in diminished financial status may constitute a substantial change in circumstances if undertaken in good faith."). Requiring a showing of bad faith before imputing income benefits a supporting parent by recognizing that there are times when a parent changes employment to his immediate detriment in order to reap long term economic gain. *Fogel v. Fogel*, 168 N.W.2d 275,

277 (Neb. 1969); *Kowski v. Kowski*, 463 N.E.2d 840, 844 (Ill. Ct. App. 1984). Furthermore, "refus[ing] to recognize a change in occupation or employment as a basis for modification would force the defendant to be frozen in his present employment." *Fogel*, 168 N.W.2d at 278; *Kowski*, 463 N.E.2d at 844.

[35] However, the lower court chose instead to apply a balancing test developing in several jurisdictions, and relied heavily on the Supreme Court of Arizona's decision in *Little v. Little*, 975 P.2d 108 (Ariz. 1999). The *Little* court examined the flaws inherent in the good faith test, particularly "its focus on the parent's motivation for leaving employment rather than upon the parent's responsibility to his or her children and the effect of the parent's decision on the best interest of the children." *Little*, 975 P.2d at 112. Finding that the good faith test did not comport with public policy, wherein the paramount factor in setting or modifying child support should be the financial impact of the decision on the child, the court rejected the good faith test and opted instead to use a balancing test. *Id.* Under the balancing test, a court looks first at the impact a change of employment will have on the children. *Id.*; *see also Zorn v. Zorn*, 828 P.2d 481, 482 (Or. Ct. App. 1992). Then, the court considers the overall reasonableness of a parent's decision, looking at both the nature and reasons for the change. *Little*, 975 P.2d at 112. We find the trial court employed a sound approach.

[36] Applying this test, the trial court found that in Moylan's case, spending more time with his children was not a good reason to leave his employment with the legislature because they were no longer of preschool age and were only in Moylan's custody half of the time. Appellant's Excerpts of Record, p. 63 (Decision and Order, March 6, 2001). Moreover, the court found that Moylan failed to take into consideration the needs and lifestyles of his children before changing jobs. Appellant's Excerpts of Record, p. 65 (Decision and Order, March 6, 2001). Based on these considerations, the court held that Moylan's change of employment was unreasonable and thereby attributed to him his previous income.

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[37] The lower court made no specific findings as to the detriment the children would suffer as a result of their father's approximately $30,000.00 decrease in pay, the paramount consideration under the balancing test. Furthermore, the court did not address all of Moylan's reasons for changing jobs, such as building future equity in a firm and securing a position that lasts longer than two years. These considerations may render Moylan's decision to leave the legislature more reasonable. A parent ought to be able to pursue employment opportunities for the purpose of increasing future earning capacity and occupational fulfillment as long as that pursuit does not unreasonably compromise that parent's ability to provide support for his children. The trial court in this instance failed to address a fundamental issue - how specifically did Moylan's change of employment impact the financial well being of his children. The court cannot determine the reasonableness of Moylan's change in employment without one side of the balance. Thus, the lower court abused its discretion by imputing income to Moylan without making any findings as to the detrimental impact that would be suffered by his children as a result of his change of employment.

E. Free housing

[38] Moylan contends that the trial court erred in failing to include as gross income the value of free housing to Leon Guerrero. He argues that living rent free constitutes a gift, and is therefore income under 19 GAR § 1203(a)(1). The trial court declined to attribute such income to Leon Guerrero because Moylan failed to provide authority in support of his position.

[39] This court has before it no record as to the manner in which Moylan raised this issue below or how Moylan argued his position before the trial court. Moylan cites in his brief to "page 4, footnote 7," an apparent reference to a record from the court below, but he fails to identify or provide the document to which he is citing. Appellant's Opening Brief, p. 41. In our review, we are left only with the lower court's statement that, "[t]he Defendant has provided no authority for this proposition and thus the Court will deny that request." Appellant's Excerpts of Record, p. 68 (Decision and Order, March 6, 2001).

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[40] Relying on the lower court's brief statement and its use of the term "authority," we can only infer that the lower court found Moylan failed to establish a sufficient legal basis to attribute free housing as income. Thus, the issue before the trial court, whether free housing may be classified as income, is a question of law and reviewed *de novo.*

[41] The Guidelines state that gross income *may include* gifts, but do not further specify what items constitute a gift. *See* 19 G.A.R. § 1203(a)(1). Guam is among those jurisdictions wherein gifts *may* be included in a parent's gross income, but it is left to the court to determine whether an item is a gift and whether to include that gift in a parent's gross income.[2]

[42] Maryland has a statute similar to Guam's wherein a parent's actual income is defined as "income from any source," and gifts are listed as an item that may be included. *Petrini v. Petrini*, 648 A.2d 1016, 1019-20 (Md. 1994). The *Petrini* court affirmed the lower court's finding that rent-free housing could constitute a gift and thus gross income for purposes of calculating child support. *Id. 1*021-22. According to this court's rationale:

> [I]f a parent is relieved of some of these [basic living] expenses through outside contributions, it may be appropriate under certain circumstances to increase the parent's actual income to account for such contributions. Manifestly, these benefits may have the effect of freeing up other income that may not have otherwise been available to pay a child support award.

Id. at 1021. The court also noted that there are several considerations the trial judge may take into account in deciding whether to include a gift as income, such as a parent's actual ability to pay the child support award, any lack of liquidity or marketability of a party's assets, the fact that the parent's take-home income is not an accurate reflection of his or her actual standard of living, and whether either party is voluntarily impoverished. *Id.* at 1020; *see also Barnier v. Wells*, 476 N.W.2d 795, 797 (Minn. Ct. App. 1991)

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[2] There are several jurisdictions which adhere to the position that the principal amount of gifts should not be considered as income. However, unlike Guam, the statutes in these jurisdictions do not appear to expressly list gifts as an item which the court may consider gross income. For example, in Alaska, the child support statute defines annual income as income from all sources minus certain deductions. The Alaskan Supreme Court, in *Nass v. Seaton*, 904 P.2d 412, 416 (Alaska 1995), found that pursuant to this statute, the principal amount of gifts cannot be considered income for purposes of calculating child support. *Nass*, 904 P.2d at 416. "[A]ny other approach blurs the easily administered and well-established historical distinction between gifts and earned income." *Id.*

(finding the regular receipt of a gift from a dependable source may render a gift income for purposes of determining a parent's child support obligation).

[43] Clearly, there is legal authority to support Moylan's position that the court may impute income to Leon Guerrero for her free housing. *Petrini* serves as an example of when free housing may constitute a gift, and pursuant to 19 GAR § 1203(a)(1), a gift may be included as income. Therefore, we remand this issue to the lower court so that it may apply its discretion and determine whether the facts of this case warrant such an attribution of income.

F. Order effective

[44] Next, Moylan challenges the effective date of the child support order. Moylan filed his motion for modification on December 29, 2000 and the matter was set for hearing on February 7, 2001. When the court issued its decision, it stated, "The motion was heard by the Court on February 7, thus the court will make the order of support retroactive to the monthly support due in February, 2001." Appellant's Excerpts of Record, pp. 74-75 (Decision and Order, March 6, 2001). Moylan argues that the court should have ordered his child support payments retroactive to the date he filed his motion for modification.

[45] Modification of a child support order may take effect any time after the filing of the motion to modify. *See* Title 5 GCA § 34121 (1996). Setting the effective date is left to the discretion of the trial court, and thus we review such a determination for an abuse of discretion. *Harris v. Harris*, 714 A.2d 626, 633 (Vt. 1998). It was within the lower court's discretion to order the modified child support amount be retroactive to the date of the hearing instead of the date Moylan filed his motion to modify. The issue is whether the court had to justify using the hearing date instead of the filing date.

[46] In *Boone v. Boone*, 960 P.2d 579 (Alaska 998), the Supreme Court of Alaska required its lower court to make such a justification. Its rules permitted retroactive application of a support order from the date the motion was served on the opposing party.[3] Like Guam's statute, the text of Alaska's rule

[3] Although Alaska's statute is distinguishable in that it relies on the date of *service* rather than the date of *filing*, for purpose of our analysis, this is a distinction without a difference. *Boone*, 960 P.2d at 585 n.8.

expressed no preference or presumption that modification become effective on the date of service, nor did it limit that lower court's discretion in selecting a later date. *Boone*, 960 P.2d at 585. However, the court in *Bonne* established a preference for the earlier date and imposed upon lower courts the requirement that they make findings before selecting any later effective date. *Id.* The reasoning was that "[d]elays in resolving such disputes should not disadvantage parties entitled to relief." *Id.* In addition, "[t]he needs of the children, upon which the court focuses in determining whether a substantial change of circumstance has occurred, are examined as of the date the petition is filed." *Id.* (*citing Kruse v. Kruse*, 464 N.E.2d 934, 939 (Ind. Ct. App. 1984)).

[47] The reasoning of *Boone* is persuasive. As recognized by the Indiana Court of Appeals, granting modification from later dates "detracts from the purposes of the changed circumstances rule and serves to encourage and benefit dilatory tactics." *Kruse*, 464 N.E.2d at 939. Moreover, a motion to modify child support indicates that a change in circumstances has occurred at the time the petition is filed. Thus, it is reasonable for a court to establish a preference that orders granting modification be made effective from that date. Therefore, we find that the trial court abused its discretion by failing to justify making the child support order retroactively apply to February 2001 instead of December 2000.

G. AG disqualified

[48] Moylan's final argument is that the trial court erred by allowing the AG to participate in the proceedings based on an apparent conflict of interest. Specifically, Assistant Attorney General Kathryn Montague ("Montague"), who had previously represented Leon Guerrero while in private practice, was permitted to appear in the lower court on behalf of the AG. Moylan asserts that such appearances by Montague violated Guam Rules of Professional Conduct ("GRPC") 1.7, 1.9, and 1.11. Moreover, Montague's failure to separate herself from the rest of the AG's office imputed that disqualification on the entire office. Therefore, the AG should have been disqualified from participating in any of the lower court proceedings.

[49] GRPC 1.7 and 1.9 both address an attorney's conflict of interest, and prohibit an attorney from representing a client whose interests are adverse to the interests of another former or current client. Initially, this court may question whether Moylan has standing to assert a conflict of interest and disqualify opposing counsel. Some jurisdictions find that without an attorney-client relationship or some other relationship imposing a duty of confidentiality, a party has no standing to bring a motion to disqualify based on a conflict of interest. *DCH Health Services Corp. v. Waite*, 115 Cal. Rptr. 2d 847, 850, 95 Cal. App. 4th 829, 833 (Ct. App. 2002); *Johnson v. Prime Bank*, 464 S.E.2d 24, 26 (Ga. Ct. App. 1995). However, irrespective of standing, GRPC 1.7 and 1.9 are not applicable in the matter before us. The interests of Leon Guerrero, Montague's former client, and the interests of the AG's office, are not directly adverse to one another, and so there is no conflict.

[50] GRPC 1.11 addresses Montague's transfer from the private sector to a public office. Section (c) prohibits successive government and private employment. The concern in these situations is the sacrifice of the public interest for private gain. Prosecutors cannot be permitted to utilize their public office to benefit their private clients.

[51] However, "a violation of professional ethics rules does not alone trigger disqualification, rather, a trial judge should primarily assess the possibility of prejudice at trial that might result from the attorney's unethical act." *Papanicolaou v. Chase Manhattan Bank*, 720 F. Supp. 1080, 1083 (S.D.N.Y. 1989) (internal citations omitted). We find no showing of prejudice to Moylan as a result of Montague's prior appearances; they appear to be few and preliminary in nature. We also find no showing that the AG's office in its entirety was compromised. Therefore, we find no abuse of discretion by the lower court in refusing to disqualify the AG from these proceedings.

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IV.

[52] The Guidelines as a whole are valid and can be applied to joint and equal custody arrangements. However, sections 1203(i) and 1203(q) of the Guidelines are *ultra vires* in that they attempt to bind the court's discretion with respect to shared custody.

[53] In calculating the parties' child support obligations, the lower court committed three different errors. First, the lower court set the basic child support obligation at $1,714.51 without making a corresponding finding of need on the part of the children. Second, the lower court imputed income to Moylan without showing how Moylan's change of employment detrimentally affected his children. Last, the lower court found there was no legal authority for it to consider attributing income to Leon Guerrero for her free housing.

[54] However, the lower court did not abuse its discretion in refusing to disqualify the AG from participating in further proceedings.

[55] Therefore, the matter is **REVERSED** and **REMANDED** for further findings consistent with this opinion and for the recalculation of child support.