Child Support Agreements in the Wake of *Holmes*

By Jon T. Ferrier

Fast Facts

Parents' agreements for child support that exceed what is required by the Michigan Child Support Formula (formula) are not inherently objectionable and will be enforced, absent a compelling reason not to enforce.

If the parties agree to deviate from the formula, the grounds for their agreement and the reasons why child support per the formula would be unjust or inappropriate should be spelled out as required by law, MCL 552.605.

Issues concerning future modifiability of a child support agreement that deviates from the formula should be explored and addressed at the time the child support agreement is made to avoid surprises later.

Late in 2008, the Michigan Court of Appeals released *Holmes v Holmes*,[1] holding:

> …because the child support guidelines set forth a parent's minimum support obligation, a voluntarily assumed obligation to pay an amount in excess of the minimum is not inherently objectionable. Therefore, a contract enhancing a parent's child support obligation should be enforced absent a compelling reason to forbear enforcement.[2]

Holmes seemed significant given the doctrine that parents cannot bargain away the rights of children to receive adequate child support.[3] What is "adequate"? Before the Michigan Child Support Formula[4] (formula), "adequate" support was undefined and not uniform among the circuits, but cases addressing agreements for child support often ruled the agreements modifiable in the best interests of the child.

Since "the law presumes that this formula (or 'guideline') sets appropriate levels of support,"[5] parents' agreements for sub-formula support did not bind courts and were modifiable. Until *Holmes,* however, it was not clear that the same principles applied to super-formula support agreements; no cases specifically addressed that issue.

This article compares *Holmes* with child support precedents and contract principles to argue that *Holmes* is not a departure from established precedent or doctrine, but a logical extension of both.

The Facts in *Holmes*

Elizabeth and Richard Holmes divorced in 1996. Their judgment of divorce incorporated a document entitled "Contract," which included child support provisions.[6] The parties agreed to a monthly child support obligation that was the average of "straight" child support and child support calculated under the Shared Economic Responsibility Formula (SERF) then in effect. The parties' contract included an additional provision that Richard would pay 25 percent of his net bonuses until the older of their two children was 18 or through high school, and 15 percent of his net bonuses until the remaining minor child was 18 or graduated. Richard waived the right to assert SERF for 10 years; Elizabeth assented that while Richard exercised agreed parenting time, "same shall be effected in the support calculation." Child support was fixed for one year post-judgment and was to be reviewed only if Richard or Elizabeth received greater compensation than at the time of judgment. Child support would not be reduced unless Richard became unemployed involuntarily or Elizabeth's earnings increased.

Monthly child support was modified several times in succeeding years, but the provisions requiring bonus percentage payments were unchallenged, and Richard paid consistently for 10 years following judgment—in some years, substantial six-figure sums.

Shortly before the 10-year anniversary of judgment, Richard moved for modification, citing the contract and contending that he could now assert the "shared economic concept" because 10 years had passed. He alleged that he had custody 172 days per year, so the court must apply SERF. Elizabeth responded that there were no changed circumstances and the bonus percentage, established contractually, could not be modified.

The trial court referred the motion to the Friend of the Court (FOC). Elizabeth filed a cross-motion to modify child support alleging changed circumstances, including Richard's failure to use all of his parenting time and a decrease in her income. The court referred the matter to a mediator agreeable to the parties for a report and recommendation regarding child support.

The mediator issued his report and recommendations for reduced monthly child support: setting the number of Richard's overnight parenting times, recommending SERF to calculate support, and reducing the bonus percentages to 9.3 percent of net bonuses for two minor children and 6.17 percent for one. The mediator determined these were the same percentages as monthly support was of non-bonus income.

Richard moved to adopt the mediator's recommendations; Elizabeth responded, agreeing to everything but modification of the bonus percentages. The trial court adopted the agreed recommendations and set the bonus percentage issue for evidentiary hearing.

The parties testified regarding their interpretations of the contract's bonus percentage clause. Elizabeth testified that they intended the agreement on percentages to remain in effect until each child turned 18 or graduated. Although Elizabeth agreed that the bonus percentage was child support and that child support is modifiable under Michigan law, she maintained that the parties agreed to nonmodifiable percentages and that this was allowed.

Richard testified that the bonus percentage was intended to be the same percentage as monthly child support obligation was of non-bonus income and that he agreed to pay more than SERF to purchase time with his children and to guarantee that they could stay in their home. He maintained that the contract guaranteed that the percentage would change after 10 years.

Following hearing, the court was not persuaded by Elizabeth's argument that the bonus percentage was a contractual, negotiated term and thus nonmodifiable. The trial court acknowledged approval of agreements to pay college expenses, or bonus amounts, when part of the property section of a divorce judgment and if there was specific language prohibiting modification, but the court found no such clarifying language in the contract. The court found changed circumstances; ruled the bonus percentages modifiable, like monthly support; found the judgment's terms allowed modification; and adopted the recommended percentages.

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In its review of governing child support principles, the *Holmes* Court understood that agreements for zero or negligible child support were void as against public policy.

The Appeal

After identifying appropriate standards of review, the Court of Appeals addressed whether the trial court properly found that changed circumstances justified modification of support. Elizabeth had alleged changed circumstances in her cross-motion for modification, but argued on appeal that the trial court erred in failing to conduct an evidentiary hearing demonstrating changed circumstances. The Court affirmed the trial court on this issue, observing that:

> A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court.[7]

Next, the Court analyzed governing child support principles and found that the trial court is required by law[8] to enter child support orders per the formula. Deviation from the formula is allowed if the court determines that application of the formula is unjust or inappropriate and the court sets forth in writing or on the record the formula amount; how the support deviates from the formula; the value of property or other support awarded instead of the payment of child support, if applicable; and the reasons why application of the formula would be unjust or inappropriate in the case. The law further provides:

> Subsection (2) does not prohibit the court from entering a child support order that is agreed to by the parties and that deviates from the child support formula, if the requirements of subsection (2) are met.[9]

The Court then reviewed caselaw construing the circuit court's obligation to set support per the formula, citing *Ghidotti v Barber*[10] and *Burba v Burba*[11] (after remand).

The Court continued by considering cases involving child support agreements, focusing on *Johns v Johns*[12] and *Ballard v Ballard*.[13] These cases involved agreements for zero or minimal child support. In contrast, the Court discussed *Ovaitt v Ovaitt*[14] and *Aussie v Aussie*.[15]

In *Johns* and *Ballard,* both pre-formula "pre-deviation" cases, the Court voided agreements for minimal or zero support. In *Ovaitt* and *Aussie,* however, the Court ruled that agreements to pay for a child's post-majority college expenses are enforceable, observing that relieving obligors of agreements they had no intent to perform would play fast and loose with the court and the parties and result in chaos if such agreements were not enforced.

Applying statutory and caselaw child support principles, the Court concluded that *Holmes* was distinguishable from *Johns* and *Ballard* and squarely alongside *Ovaitt* and *Aussie*. In holding that if a parent voluntarily agrees to super-formula support and such an agreement is not inherently objectionable, *Holmes* has drawn a clear distinction between such an agreement and the kind found in *Johns* and *Ballard*. The difference between the *Holmes* situation and the *Ballard-Johns* line of cases is that the latter cases' agreements were inherently objectionable. Thus, all child support agreements are not equal; agreements for sub-formula support are more strictly scrutinized than agreements for super-formula support.

The Court reviewed Richard's compromises in obligating himself to super-formula support and concluded that the compromises involved presumptively nonmodifiable bonus percentages, but not nonmodifiable monthly child support. Since there was specific language in the contract allowing modification of monthly support but no provision allowing bonus percentage modification, the Court concluded that the two types of support could be treated differently.

The Court then addressed governing contract principles because of the parties' contract, observing that a contract must be interpreted according to its plain and ordinary meaning;[16] post-hoc judicial determinations of reasonableness are precluded as a basis on which courts may refuse to enforce unambiguous contractual provisions;[17] and "the principle of freedom to contract does not permit a party *unilaterally* to alter the original contract."[18]

Judgments entered pursuant to the parties' agreements are in the nature of a contract, *Gramer v Gramer*[19] and *In re Lobaina Estate*.[20] Under this line of cases, the Court reviewed the trial court's power to enforce agreed provisions it lacked jurisdiction to order, such as for life insurance covering the parties' children.

Applying these principles, the *Holmes* Court found the contract language clear and unambiguous: the provision allowing review of support after one year applied to monthly child support, not the bonus percentage; contracts are read as a whole, with specific terms governing general; and the bonus percentages, by the contract's terms, were to remain in effect until each minor child's majority or graduation.

The Court found that the apparent congruence of the bonus percentage and monthly support percentage was merely coincidental; the percentages varied over the years as Richard's income and bonuses varied.

The Court also concluded that the absence of language prohibiting modification of the percentages did not render the provision unenforceable, and that no specific waiver of modifiability is required to enforce or refuse to modify an agreement for super-formula support. Conversely, the Court concluded that the lack of language allowing modification of bonus percentages, in contrast to monthly support, supports the conclusion that the parties intended the bonus percentage provision to be nonmodifiable.

Finally, the Court ruled it does not matter whether the bonus percentage provision is found in the judgment's child support or property division sections; the same rules apply wherever the term is placed.

Child Support Agreements, Post-*Holmes*

Did *Holmes* break new ground, or is it the logical extension of precedent and application of law? Consideration of the following cases suggests that the latter is correct and that *Holmes,* albeit somewhat elliptically, applies established law.

In *Calley v Calley,*[21] the Court held that a difference between current child support and the amount recommended by the FOC (which must recommend formula support) may be sufficient changed circumstances justifying support modification.

Calley's rule was refined in *Sharp v Talsma,*[22] in which the Court held that *Calley* does not mandate support modification when current support differs from formula support, if changed circumstances are foreseeable.

In *Sharp,* the parties had two minor children. They agreed that the mother would have custody of the older child and the father would have custody of the younger child. The father agreed to pay the mother periodic child support for the older child until majority or graduation, but thereafter the mother would have no obligation to pay support for the younger child in the father's custody. Nonetheless, after the older child's majority, the father moved for support from the mother, citing *Calley* as authority, since zero support differed from formula.

The Court rejected the father's argument. Both parties could foresee their children attaining majority; when the older child did, it was not an unforeseen changed circumstance justifying modification of the agreement.

In *Olson v Olson,*[23] although addressing income imputation issues, the Court enforced a child support agreement without reference to the formula, denying the payer temporary relief from the obligation he had requested because he wanted to return to school. He argued that advancing from a medical technologist's to a physician's assistant's salary would result in greater support. The Court recognized that the payer was not prohibited from pursuing higher education, but concluded that he could not do so at the expense of child support. The payer's voluntary reduction of income while in school was not a proper changed circumstance justifying modification of the agreement.

In *Eddie v Eddie,*[24] the Court ruled that the trial court must apply the SERF provisions of the formula if the required overnight parenting time is exercised, or deviate properly.

In *Reed v Reed,*[25] the Court echoed foreseeability considerations from *Sharp* and cited to *Kuziemko v Kuziemko,*[26] concluding that the changed circumstances in the case were foreseeable by the parties and therefore did not justify modification of a prenuptial agreement. The Court further observed that:

> A prenuptial agreement may be voided (1) when obtained through fraud, duress, mistake, or misrepresentation or nondisclosure of material fact, (2) if it was unconscionable when executed, or (3) when the facts and circumstances are so changed since the agreement was executed that its enforcement would be unfair and unreasonable.[27]

Recently, the Court noted in *Foster v Noffsinger*[28] that *Holmes* clarified that an agreement for super-formula support must be enforced regardless of label as property division or child support

Practice Tips

- If deviating, follow MCL 552.605(2) and (3). *Holmes* recognized that the trial court and the parties had not properly deviated from the Michigan Child Support Formula earlier in the case, but the Court ignored it, since the deviation created super-formula support. The Court seemed to find that statutory deviation requirements are intended to provide stricter scrutiny of sub-formula agreements than super-formula ones. Nonetheless, the parties and court are best served when deviation grounds are specified in writing or on the record. Furthermore, the FOC is required to petition the court for modification of support when the FOC determines it necessary unless "[t]he court previously determined that application of the formula was unjust or inappropriate and the office determines that the facts of the case and the reasons for and amount of the prior deviation remain unchanged."[31] That is, when child support deviates from the formula, the FOC need not request modification if the reasons for deviation remained unchanged—another reason to place the grounds for deviation on the record.
- When deviation was improper but occurred anyway, as in *Holmes,* consider *Kosch v Kosch*[32] when addressing modification of deviant support. *Kosch* affirmed deviant modification, using the same rationale as used in the original deviation, in deciding a modification motion.
- Consider *Kalter v Kalter*'s[33] observation: "[a]t some point, too much money can be bad for a child."[34] *Kalter* considered the impact of the payer's support obligation on his ability to care for the children when in his care, concluding that excessive support could discourage parenting time or the payer's provision of extras for the children.
- Consider a modifiability waiver related to child support when appropriate.

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if the provision is contractual, freely negotiated, and unambiguous. In so concluding, the Court determined that enforcement is not dependent on the label of the provision. However, the opinion does not view *Holmes* as requiring enforcement of all agreements for super-formula support. *Holmes* stopped short of requiring enforcement or nonmodification of any such agreements, holding only that such contracts "should be enforced absent a compelling reason to forbear enforcement."[29]

Finally, in *Van Laar v Rozema,*[30] the Court concluded that including in the provisions the clause "until further order of the court" concerning duration of the obligation vested the trial court with authority to modify an otherwise nonmodifiable agreement (under paternity law) for support.

Holmes connects the dots between these cases and the cases it cites. In finding the Holmeses' support contract not inherently objectionable, the Court uses an alternate term to apply the long-standing contract principle that unconscionable or against-public-policy contracts are not enforced. In its review of governing child support principles, the *Holmes* Court understood that agreements for zero or negligible child support were void as against public policy. Agreements for payments akin to child support—like payment of college expenses for adult children—which could not be ordered absent agreement, had not been found inherently objectionable. Consistent with the *Ovaitt* and *Aussie* line of cases, such agreements were enforceable under general contract principles.

Thus, agreements for sub-formula support may be treated differently from agreements for super-formula support because the agreements are essentially different: inadequate support agreements are bad, and unenforceable, because they deprive children of their needs; agreements for excess child support are good, and enforceable, because more money is better. *Holmes* is revealed not as an outlier, but a logical extension of both the cases reviewed by the Court and the cases referenced herein.

The Road Ahead?

Some unanswered questions raised by *Holmes* are presented for the reader's consternation and bafflement:

- Is an agreed, super-formula deviation modifiable for an *increase*?
- Are sub-formula deviations *always* voidable? (*Sharp*?)
- Is super-formula support *ever* "inherently objectionable"?
- How far do contract principles extend in domestic relations cases?

Stay tuned; we may someday know the answers! ■

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FOOTNOTES

1. *Holmes v Holmes,* 281 Mich App 575; 760 NW2d 300 (2008).
2. *Id.* at 592.
3. See, e.g., *Cochran v Buffone,* 137 Mich App 761; 359 NW2d 557 (1984).
4. 2008 Michigan Child Support Formula (MCSF), effective October 1, 2008, available at <http://courts.michigan.gov/scao/resources/publications/manuals/focb/2008MCSFmanual.pdf> (accessed May 29, 2010).
5. MCSF 1.01(B).
6. *Holmes,* 281 Mich App at 577.
7. *Id.* at 587–588.
8. MCL 552.605(2).
9. MCL 552.605(3).
10. *Ghidotti v Barber,* 459 Mich 189; 586 NW2d 883 (1998).
11. *Burba v Burba,* 461 Mich 637; 610 NW2d 873 (2000).
12. *Johns v Johns,* 178 Mich App 101; 443 NW2d 446 (1989).
13. *Ballard v Ballard,* 40 Mich App 37; 198 NW2d 451 (1972).
14. *Ovaitt v Ovaitt,* 43 Mich App 628; 204 NW2d 753 (1972).
15. *Aussie v Aussie,* 182 Mich App 454; 452 NW2d 859 (1990).
16. *St. Paul Fire & Marine Ins Co v Ingall,* 228 Mich App 101, 107; 577 NW2d 188 (1998).
17. *Rory v Continental Ins Co,* 473 Mich 457, 461; 703 NW2d 23 (2005).
18. *Quality Products & Concepts Co v Nagel Precision, Inc,* 469 Mich 362, 364; 666 NW2d 251 (2003).
19. *Gramer v Gramer,* 207 Mich App 123; 523 NW2d 861 (1994).
20. *In re Lobaina Estate,* 267 Mich App 415; 705 NW2d 34 (2005).
21. *Calley v Calley,* 197 Mich App 380; 496 NW2d 305 (1992).
22. *Sharp v Talsma,* 202 Mich App 262; 507 NW2d 840 (1993).
23. *Olson v Olson,* 189 Mich App 620; 473 NW2d 722 (1991).
24. *Eddie v Eddie,* 201 Mich App 509; 506 NW2d 591 (1993).
25. *Reed v Reed,* 265 Mich App 131; 693 NW2d 895 (2005).
26. *Kuziemko v Kuziemko,* unpublished opinion per curiam of the Court of Appeals, issued December 4, 2001 (Docket No. 212377).
27. *Reed,* 265 Mich App at 142–143.
28. *Foster v Noffsinger,* unpublished opinion per curiam of the Court of Appeals, issued October 13, 2009 (Docket No. 291704).
29. *Holmes,* 281 Mich App at 592.
30. *Van Laar v Rozema,* 94 Mich App 619; 288 NW2d 677 (1980).
31. MCL 552.517(4)(b).
32. *Kosch v Kosch,* 233 Mich App 346; 592 NW2d 434 (1999).
33. *Kalter v Kalter,* 155 Mich App 99; 399 NW2d 455 (1986).
34. *Id.* at 105.