

## COURTS

# When figuring child support, all finances are in play

Rhode Island's Supreme Court overrules a previous Family Court decision

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PROVIDENCE — In an opinion in which it excoriates the conduct of one of the state's longest-serving jurists, the Rhode Island Supreme Court has ruled that a parent's entire income — not just what is taxed by the Internal Revenue Service — must be included when figuring how much a parent should have to pay in child-support.

The court, in a unanimous decision, ruled that Family Court General Magistrate John J. O'Brien Jr. erred in excluding military entitlements and bonuses, as well as rental income, in calculating how much a Rhode Island National Guardsman owes in support to the mother of the 5-year-old daughter he fathered in an extramarital affair.

The decision, authored by Justice Maureen McKenna

Goldberg, chided O'Brien for conducting much of the discussion about the case without a stenographer in chambers, "leading to a confusing and incomplete record." Although many judges conduct off-the-record conferences, "we consistently have condemned this practice," Goldberg wrote.

The court also was highly critical of O'Brien — who's sat on the Family Court since 1974 — for making improper remarks about the mother's daycare provider whom he said he would not permit to testify — or make the father of the child pay for — based on representations about her immigration status. The father alleged that she was being paid under the table and not reporting her income to the IRS.

"We know of no law or court rule that requires a witness to prove his or her legal status or compliance with federal tax laws as a condition precedent to testifying in our courts," the high court said. Former Chief Judge Jere-

miah S. Jeremiah Jr. affirmed O'Brien's rulings on the military pay and child-care issues. The Supreme Court said he erred in doing so.

**The parties** in the case are Cesar Tamayo, who in 2005 fathered a child with Paula Arroyo. The couple, from Pawtucket, never married. Tamayo is wed to someone else.

In 2007, Tamayo filed a petition seeking to establish custody, visitation and child support. In a counterclaim, Arroyo sought sole custody of their daughter, medical insurance, child support, plus reimbursement for past and future daycare.

Tamayo works as a civilian military technician for the National Guard and is also in the National Guard Reserve for which he gets extra pay, a little more than \$400 a month. In addition to his base salary he received a one-time \$4,131 bonus in 2007 and regular "lo-

cality adjustment payments," the equivalent of a housing allowance, over \$13,000 per year. There was also evidence that he received \$1,350 per month in rental income though he claimed in a 2006 tax return that he suffered a loss of nearly \$18,000 from the properties he owned.

Arroyo testified about her daughter's daycare expenses and tried to have her childcare provider testify. But when Tamayo "suggested that defendant's daycare provider might have been paid in cash — which was unreported income — and that she may be in the United States illegally, the magistrate refused to allow the witness to testify without first producing immigration documents and tax returns," said Goldberg.

"There's no way [Tamayo is] paying someone who is not reporting income and [who is] receiving it under the table," O'Brien declared.

Goldberg said that "when

the witness failed to return to court with these documents," the magistrate drew an inference that she was "cheating the government." He therefore refused to order the father to reimburse the mother for past or future daycare expenses [which Tamayo said his wife and mother could provide for free.]

This was "a clear abuse of discretion," Goldberg wrote.

Karen Auclair Oliveira, the lawyer for the child's mother, said in an interview that her client works as a \$432-a-week certified nursing assistant and currently pays \$160 a week for daycare. She now uses a licensed daycare provider, Oliveira said.

Tamayo originally paid the mother \$300 a month in support but has voluntarily upped that to \$480 a month, Oliveira said. The court never set an exact amount that he's required to pay so part of the reason the case is being sent back to O'Brien is for him to

determine a set amount.

The new amount will be retroactive to March 2007 and will have to include partial reimbursement for past daycare if it's found to be reasonable, future daycare and military entitlement and bonus pay.

The state's Office of Child Support Services (OCSS) filed a friend-of-the-court brief in the matter, urging the Supreme Court to overturn's O'Brien. Child support should be based "not just on the income of the parents but their financial resources," wrote Frank DiBiase, chief legal counsel for OCSS.

Upholding O'Brien would "create inequities in future cases," DiBiase said. Other appellate courts in the US that have considered the military allowance issue in recent years have ruled that it should be counted as parental income when calculating child support.

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