

Brothers v. Kern, 07 DJDAR 12407, 7/17/2007

This child support case raised a number of issues including imputed interest income, departure from child support based on the statutory guideline, a security deposit for future child support payments and a non-family code issue of whether father's Sixth Amendment right to criminal defense counsel of his choice was violated.

Father in this case is also a defendant in a 2003 multiple capital murder case in which he was ultimately found guilty and sentenced to death. In 1993, he sued the mother of his daughter who was born in 1988 for paternity rights. At the time of his arrest for the murders, Father was subject to a child support order and was current on his payments. He immediately sold his assets for approximately \$150,000 and hired a defense attorney. The funds were put in the attorney's trust account. Subsequent child support payments due were not paid. Department of Child Support Services learned of the liquidation of assets and payment to his attorney and moved to have the child support order modified. Father argued through his attorney that the criminal court had found him indigent and that therefore it had been "judicially established that Mr. Brothers has no means to pay the amounts requested in this proceeding." \$48,823.14 remained in the attorney's client trust account for Father. The trial court imputed 5% interest on the \$150,000 available before Fathers' incarceration finding interest income of \$625 per month and *guideline* child support of \$171 per month. The court then exercised its discretion to depart from guideline citing the child's best interest stating five reasons therefore. It set monthly child support at \$600. Based on that figure, the court ordered Brothers to pay a lump sum of \$21,750 (later reduced to \$17,400 reflecting a credit for a tax refund) for arrearages and a security deposit for future payments due.

The income issues:

Imputed interest income

The appellate court stated "[t]he point of using imputed income to calculate child support is to determine what the obligor *could* have earned if he or she had taken an opportunity to do so instead of taking a course of action that did not result in income." In doing so, they stated that the trial court properly based the imputed interest on the total amount Father had available from the liquidation of his assets rather than the balance that remained in the attorney's client trust account.

Departure from child support based on statutory guideline

The trial court acted within its discretion when it found special circumstances in this case and deviated from the guideline formula of §4055. Those circumstances included “the child’s standard of living could not be sustained if the guideline figure were used, that Father would no longer be contributing support via visitation, and that Fathers’ own standard of living would not be impacted because he was incarcerated.” Sidestepping the question of whether the need to hire defense counsel justified a hardship deduction, the court pointed out that the \$17,400 child support order deducted from the balance in the attorney’s client trust account left sufficient money for his pre-arrest defense – the county was responsible for his post-arrest defense.