

**THE FAMILY COURT  
OF THE  
STATE OF DELAWARE**

**ABIGAIL M. LEGROW**  
JUDGE<sup>1</sup>

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January 31, 2018

J--- H-----  
L----- V---  
--- ----- Road  
F-----, DE -----

Jennifer A. Hartnett, Esquire  
P.O. Box 220  
Hockessin, DE 19707

**RE: *H----- and V--- v. V---***  
**File No.: CK16-01125; Petition No.: 16-02340**  
**LETTER DECISION AND ORDER**

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Dear Parties and Counsel,

Petitioners J--- H----- (“Stepfather”) and L----- V--- (“Mother” and collectively with Stepfather, “Petitioners”) filed a petition on behalf of S---- D----- V--- (“Son”) seeking support from Respondent D---- V--- (“Father”) under 13 *Del. C.* § 503, which requires certain family members, including parents, to support “a poor person unable to support himself.” Son, who is Mother’s and Father’s adult biological child, has severe developmental and cognitive delays. Stepfather and Mother provide all Son’s care, aside from occasional respite care and a day program Son attends from 9 a.m. to 3:30 p.m. on weekdays. The issue in this case, simply stated, is whether Father, who has not supported Son financially or with in-kind care since he turned 19, is obligated under Delaware law to support Son financially while he resides with Mother and

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<sup>1</sup> Sitting as Judge by designation under Del. Const. art. IV, § 13(2).

Stepfather and, if so, the amount of that obligation. After evidentiary hearings, briefing, and supplemental submissions, the Court concludes Father statutorily is obligated to provide support.

### ***Factual Background***

These are the facts as I find them after considering the record evidence and the parties' testimony and submissions.

#### **A. Son**

Son is a 22 year old young man diagnosed with severe autism and cognitive impairment.<sup>2</sup> Son's disabilities affect his ability to perform independently most activities of daily living, including basic hygiene, shopping, preparing meals, or washing laundry. Son cannot use a phone, comprehend money, or drive, and he cannot use public transit without assistance. His receptive and expressive language is limited, he cannot read more than 30-40 sight words, and he speaks in an idiosyncratic manner. According to an evaluation performed in 2015, Son's cognitive functioning is moderately delayed in nearly all categories, while his adaptive skills fall in the "extremely low" range.

Although he functions in many respects on the level of a young child, Son is healthy, strong, physically coordinated, and enjoys activities such as swimming, computer work, and art. Son is quite pleasant and happy as a rule, but can become self-

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<sup>2</sup> Pet'rs' Exhibit ("PX") 1.

injurious and aggressive to others, particularly when his routine changes or he becomes upset. The parties agree Son is prone to “elopement,” meaning he may wander off at any time if he is not monitored constantly. Due to Son’s impairment, elopement tendencies, and the risk he may become aggressive when upset, Son cannot be left alone and currently receives one-on-one supervision at all times during the day.

### **B. The parties’ relationship**

Mother and Father divorced in 2006. In connection with their divorce, they signed an ancillary stipulation and order (the “Ancillary Order”) resolving certain matters, including custody and support arrangements for Son and his older brother.<sup>3</sup>

Mother and Father shared custody of the children and Mother paid Father child support.

The Ancillary Order also provided:

In recognition of [Son’s] special needs, and in order to assure and provide for [Son’s] future education and care, the parties agree not to do, or refrain from doing, anything that would adversely affect [Son’s] eligibility for the maximum benefits available to him from any source, including public education, Medicaid, Medicare, Social Security, or any and all other public or private organizations and agencies.<sup>4</sup>

In October 2012, shortly before Son’s 18th birthday, Father advised Mother that he no longer had “the capacity to continue” caring for Son, and Son therefore would be living with Mother full time “effective immediately.”<sup>5</sup> Father refused to support

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<sup>3</sup> Resp’t’s Exhibit (hereinafter “RX”) 3.

<sup>4</sup> RX 3 at ¶ 3.

<sup>5</sup> PX 22.

Son financially after his 18th birthday, but ultimately was ordered to pay \$750 a month to Mother for the 12 months between Son's 18th and 19th birthdays.<sup>6</sup>

After Father's child support obligation under 13 *Del. C.* § 501(d) ended, he ceased paying any support for Son. Other than the proceedings in this case, Father has not seen Son since he turned 18 and has not provided any other form of support for Son since that time, despite Mother's requests that he do so.<sup>7</sup>

### **C. The Court of Chancery guardianship**

As his 18th birthday approached, Mother filed a petition in the Court of Chancery to be appointed Son's guardian. Mother invited Father to serve as co-guardian, but Father declined.<sup>8</sup> On December 7, 2012, the Court of Chancery appointed Mother and Stepfather guardians of Son's person and property. Father consented to the guardianship.

### **D. Son's present care arrangements**

At this time, Son is unable to work in a traditional job and is unable to be anywhere unsupervised. Son previously was removed from at least one supported work environment because of his behavior. Until July 2016, Son attended a public school program. His individualized education program ("IEP") included both school and bus

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<sup>6</sup> PX 14, 15.

<sup>7</sup> See PX 23-26.

<sup>8</sup> PX 22.

safety plans to address Son's aggression and self-injurious behavior. It is unlikely Son ever will be able to support himself through employment.

When he aged out of his public school program, Son began an adult day program through ----- . The program begins at 9 a.m. and ends at 3:30 p.m., for a total of 6.5 hours. Son is provided a one-on-one support person while he attends his day program. When the program ends, which is before Mother and Stepfather's work days end, a DART bus picks Son up and transports him to a caregiver's home. The caregiver, whom Mother and Stepfather privately pay \$12 an hour, is trained to care for people with autism. This after care costs approximately \$500 a month. Mother picks Son up on her way home from work.

For the remainder of his waking hours, Mother and Stepfather provide all Son's care. When they are unable to care for Son due to commitments outside the home, Son's brother or maternal grandparents often provide care. When those caregivers are unavailable, Mother and Stepfather utilize respite care at a cost of approximately \$12 an hour. The record shows that in the last several years, Mother and Stepfather have utilized respite care occasionally in the evenings and for five to ten vacation days a year.<sup>9</sup> Mother and Stepfather have used less respite care since July 2016, when Son's eligibility for subsidized respite care through the Delaware Autism Program ended. Mother also testified that Son's grandparents' ability to care for Son increasingly is

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<sup>9</sup> Pet'rs' Aff. dated October 11, 2017 at ¶¶ 6-12 and Ex. A.

limited as they age, particularly given Son's strength, elopement tendencies, and the risk he may become aggressive.

Mother testified Son's basic monthly expenses total \$1,159.00, including rent, food, board, utilities, insurance, clothing, haircuts, and entertainment. Although these figures slightly exceed the figures Mother and Stepfather provided to the Court of Chancery in 2012 in connection with the guardianship petition, they are neither excessive nor inconsistent with basic increases in costs over time. In addition to those ordinary expenses, Son incurred \$2,095 for dental surgery and \$1,504 for paratransit tickets in the past year.<sup>10</sup>

Son currently receives approximately \$735 a month in Supplemental Security Income ("SSI") and also qualifies for Medicaid benefits, which Mother supplements through her employer-sponsored health insurance, for which she pays a co-pay of \$51 a month.

Because of his idiosyncratic behaviors, unpredictable reactions to changes in routine, and safety issues, Mother and Stepfather rarely take Son out in public, including to stores and restaurants. When Mother and Stepfather wish to go out, whether to run errands or enjoy entertainment, they must utilize family members or respite care so Son appropriately is supervised.

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<sup>10</sup> In March 2017, the Delaware Division of Developmental Disabilities Services began paying for Son's paratransit tickets, so this is not an ongoing expense.

In August or September 2016, a spot in a group home unexpectedly opened and was offered to Son. Mother and Stepfather, Son's court-appointed guardians, ultimately declined the spot, concluding it was not in Son's best interests to transition to a group home at that time. According to the testimony, this was the only group home spot offered to Son at any time.

#### **E. Mother's and Father's respective incomes**

Until July 29, 2016, Father earned approximately 38% of Mother's and Father's combined incomes. On July 29, 2016, Mother's position changed and her salary increased. Since that date, Father has earned approximately 30% of Mother's and Father's combined incomes. Both Mother and Father have post-graduate degrees, are employed full-time, and own their own homes.

#### **F. Procedural background**

On January 27, 2016, Mother and Stepfather filed on Son's behalf a Petition for Support of a Poor Person pursuant to 13 *Del. C.* § 503 (the "Petition"), seeking support from Father. Father moved to dismiss the Petition, which the Family Court denied. In its decision denying the motion to dismiss, the Family Court rejected Father's argument that Son is not poor because he is supported entirely by Mother and Father and therefore not in danger of becoming a public charge. The Court reasoned the voluntary support provided by one parent does not relieve the other parent of a statutory duty.<sup>11</sup> The

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<sup>11</sup> CK16-01125, Letter Decision and Order at 2-3 (Del. Fam. Ct. Aug. 10, 2016).

Court also held Section 503 does not require a person to utilize public assistance before a support obligation is triggered. The Family Court also denied Father's bid to dismiss the Petition on the basis that Mother waived any support claim by signing the Ancillary Order. The Court concluded the language of the Ancillary Order did not support a finding of waiver and, in any event, Mother and Father could not contract away Son's statutory rights.

Father then answered the Petition and filed crossclaims against Mother and Stepfather. Shortly thereafter, the Delaware Supreme Court appointed the undersigned to sit by designation to resolve the Petition. Father's crossclaims were resolved by the parties' stipulation dated September 30, 2016.<sup>12</sup> The Court held an evidentiary hearing on the Petition and received testimony and evidence from both sides. The Court also held a separate hearing to meet Son. Finally, the parties filed proposed findings of facts and conclusions of law and responded to the Court's request for supplemental information regarding respite care.

### *Analysis*

Petitioners, Mother and Stepfather, contend Son is a poor person under 13 *Del. C.* § 503 because his monthly expenses are approximately \$8,000 while his monthly income is roughly \$735. Petitioners calculate Son's monthly expenses based on his basic household expenses outline above, plus Petitioners' calculation of what one-on-

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<sup>12</sup> D.I. 14.



one care would cost if they did not provide it. That is, Petitioners contend that, other than the care provided to Son during his ----- program, Son requires round-the-clock supervision. Although Mother and Stepfather provide the vast majority of that care without charge, they argue Son otherwise would have to pay for that care at a cost of \$12 an hour. Petitioners do not, however, seek to impose a support obligation on Father based on that figure. Rather, Petitioners argue Father previously was ordered to pay \$750 a month to support Son, Father's income and Son's expenses have increased since that time, and the \$750 figure is one the Court already has determined Father can pay. Petitioners argue this figure is consistent with the factors the Court must consider in setting a support award.

Father employs a scattershot approach to resist any obligation to support Son. First, Father argues Son is not poor because his SSI income more than meets his expenses. To maintain this argument, Father disputes that the room and board Petitioners charge is an expense attributable to Son, pointing out that Mother and Father's other adult son lives with Mother and does not pay room or board, despite being gainfully employed. Similarly, Father argues that Son's health insurance is paid by Mother and therefore is not Son's expense. Father even disputes classifying as Son's expense the after care costs Mother and Stepfather pay so Son receives care while they work. Second, Father argues Mother and Stepfather should not be permitted to pursue support payments because (i) they already utilize public funds to care for Son, when the purpose of Section 503 is to avoid reliance on State resources; and (ii) they

created Son's care needs by declining placement in the group home. Third, Father argues the child support obligation imposed by the Family Court before Son turned 19 is not an appropriate proxy for any support obligation under Section 503, contending there is no support for the conclusion that an adult poor person is entitled to share in his parents' standard of living. Because much of the child support obligation ordered by the Court comprised a standard of living adjustment, Father argues that figure cannot be considered by the Court.

**I. The parties are required to support Son under Section 503.**

The initial question before the Court is whether the parties are required to support Son under the language of Section 503. If the Court concludes Son qualifies for support under the terms of the statute, the Court then must determine whether the affirmative defenses Father raises have merit and, if not, the extent of the support obligation.

**A. Section 503's Scope**

Section 503 imposes a support obligation on the spouse, parents, and children of a poor person:

Except as expressly provided in §§ 501 and 502 of this title, the duty to support a poor person unable to support himself/herself rests upon the spouse, parents, or children, in that order, subject to § 504 of this title as to expenses described therein. If the relation prior in order shall not be able, the next in order shall be liable, and several relations of the same order shall, if able, contribute according to their means.

The purpose of Section 503 “is to make designated relatives liable for an indigent’s support to avoid the use of public funds.”<sup>13</sup> As this Court explained in its decision denying Father’s motion to dismiss the petition, the question to be answered in deciding if Section 503 applies is whether, absent any support from a relative, a person can avoid using state assistance.

The question that must be answered in applying Section 503 is not whether a poor person is currently being supported by one parent sufficient to protect the state’s treasury. The question is whether a poor person, without any support from either parent, can avoid state assistance. If he or she cannot, the duty is triggered as to both parents, who are equally situated as to priority, with the extent of the duty determine only after a trial.<sup>14</sup>

#### **B. Son is a poor person who is unable to support himself**

Although Section 503 does not define “poor person,” it seems reasonable that the federal poverty guidelines serve, at a minimum, as one guidepost the Court may consider in applying the statute. Under those guidelines, Son is indigent. He qualifies for SSI and Medicaid. Son’s only income, other than minimal interest earned on savings bonds, is \$735 a month in SSI.

Father does not directly dispute that Son is unable to support himself through gainful employment or otherwise. Other than obliquely pointing out that Son’s IEP identifies supported employment as a goal, Father cannot point to anything in the record to dispute Mother’s testimony that Son’s cognitive limitations, behavior, and possible

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<sup>13</sup> *Helen B.M. v. Samuel F.D.*, 479 A.2d 852, 855 (Del. Fam. Ct. 1984).

<sup>14</sup> CK 16-01125, Letter Decision and Order at 3 (Del. Fam. Ct. Aug. 10, 2016).

aggression make the prospect of Son supporting himself through employment a near impossibility.

Father, however, argues Son's expenses do not exceed the income and other support he receives from public assistance. As an initial matter, this is irrelevant, in that the inquiry under Section 503 is whether a person is able to support himself *without* utilizing public assistance. Even if the Court considered Son's SSI income, Medicaid eligibility, and the other public assistance he currently receives, Son's expenses and care needs greatly exceed his income.

Putting aside the voluntary care Mother and Stepfather supply Son, his basic household expenses exceed his income. The Court rejects Father's contention that the rent, board, and health insurance premiums listed by Petitioners are not Son's expenses. The fact that Mother and Stepfather do not charge Son's brother for similar household expenses does not alter the fact that Son stays in the home, contributes to the utility and other household expenses, and therefore a fair portion of those expenses may be attributed to him.<sup>15</sup> Father has not shown Son could live elsewhere for a lower amount without utilizing public assistance. As to expenses for Son's after care and respite care, those costs properly are attributed to Son. Father offered no proof, other than his own conjecture, that Son can be unsupervised for any notable period of time. The Court

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<sup>15</sup> In addition, there are many logical reasons Mother and Stepfather may not charge Mother's and Father's other adult child for household expenses, including that he helps care for Son, saving costs that otherwise would be incurred for respite care.

finds that Son needs constant supervision and the costs incurred for that supervision properly are treated as Son's expenses.

Viewing the record as a whole, Son's status as a poor person unable to care for himself would be even more obvious were it not for Mother and Stepfather's care of Son. But for that care, Son would have to utilize public assistance or pay out-of-pocket for round-the-clock supervision, meal preparation, and personal care. The likely cost of that care would exceed Son's monthly income 10-fold. This Court already has rejected Father's argument that Son is not a poor person because of the voluntary care provided by one parent. That decision is the law of the case. Accordingly, Son is a poor person who is unable to support himself under Section 503.

## **II. Father's defenses do not relieve him of his support obligation.**

Father argues, in somewhat contradictory fashion, that he is excused from supporting Son because (1) Mother and Stepfather voluntarily care for Son, removing the need for additional support, (2) Son already accepts some public assistance, including SSI and Medicaid, or (3) Mother and Stepfather turned down the group home spot for Son, thereby creating the need for continued private care. None of these arguments relieves Father of his support obligation under Section 503.

First, as explained above, the Family Court already rejected the argument that one parent's voluntary and complete support of a poor person relieves the other parent of his support obligation. To the extent Father continues to press that argument after trial, it is unavailing in that (1) the Court's decision on the motion to dismiss is law of

the case, and (2) nothing in the language of Section 503 requires one parent to abandon supporting a child in order to trigger the other parent's support obligation. The fact that Mother and Stepfather have shouldered Son's care entirely, rather than see him become a ward of the State, does not act as a defense under Section 503. The record evidence is clear that, without that support, Son would rely solely on public assistance.

Similarly, the fact that Son already utilizes some public assistance does not nullify Section 503. That Section requires a poor person's relations to "contribute" to the support of a poor person according to the obligor's means. In other words, the plain language of the statute contemplates an amount of support that will "contribute" to, not necessarily satisfy, the poor person's obligations. In my view, although the purpose of the statute is to avoid the use of public funds, the statute contemplates that some public funds may be necessary if a poor person's relations are unable fully to support them. In this case, if Son privately paid for all his expenses and care needs, it is likely neither party – alone or jointly – could satisfy those obligations. Mother and Stepfather's acceptance of some public assistance on Son's behalf does not, as Father suggests, amount to unclean hands or excuse Father's obligations under Section 503. Petitioners demonstrated that, absent support under Section 503, Son would utilize substantially more public benefits.

Finally, Mother's and Stepfather's decision to decline the group home placement for Son is not relevant for purposes of determining the fact or extent of Father's support obligation. This is true for a number of independent reasons. First, and most

fundamentally, the analysis under Section 503 considers whether a person is “poor” and unable to support themselves without public benefits, not whether there are public benefits available that, if utilized, adequately would support the person. Second, there is no factual support for Father’s argument that Mother and Stepfather created or caused Father’s support obligation by declining the group home placement, just as there is no support for Father’s implication that Mother and Stepfather somehow seek to profit from Son.

The evidence in the record regarding the group home placement is that only one opening has been offered, Son’s court-appointed guardians – charged with acting in his best interests – determined it was not a good time to transition him to such a placement, and they therefore declined the spot. Father performed no investigation, and has no personal knowledge, regarding the group home or Son’s capacity to transition to such placement at the current time, and Father therefore created no record support for his suggestion that Mother and Stepfather did not sufficiently investigate the opening. To conclude Mother and Stepfather declined the spot in order to perpetuate<sup>16</sup> Father’s support obligation would overlook the substantial costs, in both time and money, that Petitioners imposed on themselves by making that decision. In other words, there is

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<sup>16</sup> The Petition was filed in January 2016. The group home spot was not offered until August or September 2016. Under any set of facts, Father’s support obligation predated the group home placement being offered.

simply nothing in the record from which the Court could determine that Petitioners' decision was not made in good faith to further Son's best interests.

Third, Father's argument would require the Court to interpret the statute in a manner that places an obligor's interest in minimizing their support obligation before a fiduciary's determination of a person with a disability's best interests. That is, Father's position suggests that a caregiver must utilize any available public assistance before relying on statutory familial support, and the failure to do so constitutes a waiver of the right to support, regardless of whether a particular form of public assistance is in the best interests of the person for whom support is sought. That argument requires little rejoinder, except to note it is entirely inconsistent with the purpose of Section 503 and finds no support in the language of the statute.

### **III. Calculation of Support Obligation**

Having concluded Father has a support obligation under Section 503, the question remains how that obligation should be calculated. Although neither party expressly advocated application of the *Melson* formula, which is the presumptive standard used to establish child support obligations for minor children, Mother argues the Court should order Father to pay \$750 a month, using the child support obligation previously calculated under *Melson* as a proxy for Section 503. In the one case touching on the issue, the Delaware Supreme Court declined to decide whether *Melson*



applied to petitions for support under Section 503.<sup>17</sup> Although neither party expressly seeks its application, I conclude the *Melson* formula accounts for the necessary factors the Court must consider under Sections 503 and 514, and therefore that formula should apply in calculating Section 503 support unless the presumption of applicability is rebutted.

Father disputes application of the *Melson* formula and use of his child support obligation as a proxy for a Section 503 support obligation. Father argues that, even if he has a support obligation under Section 503, most of the expenses Petitioners cite are not truly Son's obligations and, if anything, Son's expenses exceed his income by less than \$100 a month. As noted above in Section I, the Court rejects Father's attempt to shift Son's expenses to Petitioners. Father also contends use of a *Melson* calculation is not appropriate because a large portion of the child support figure represents a standard of living adjustment ("SOLA"), which Father asserts should not apply to Section 503 calculations.

Father's argument that an adult poor person should not presumptively share in a parent's standard of living is not unreasonable. A reasoned argument could be made that the purpose and language of Section 503 sufficiently is distinct from minor child support such that the SOLA should not apply. Read as a whole, however, Title 13, Chapter 5 does not support that conclusion. That is, 13 *Del. C.* § 514 sets forth the

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<sup>17</sup> See *Dalton v. Clanton*, 559 A.2d 1197 (Del. 1989).

factors the Court must consider in calculating a statutory support obligation. Section 514 states:

In determining the amount of support due to one to whom the duty of support has been found to be owing, the court, among other things, shall consider:

- (1) The health, relative economic condition, financial circumstance, income, including the wages, and earning capacity of the parties, including the children;
- (2) The manner of living to which the parties have been accustomed when they were living under the same roof;
- (3) The general equities inherent in the situation.

Section 514 applies to Section 503 support obligations and expressly refers to the parties' "manner of living" as a factor the Court must consider.

The Delaware Supreme Court has concluded that the *Melson* formula, including the SOLA, is consistent with "the letter and spirit" of Section 514 and that the SOLA is responsive and attributable to the factors set forth in Section 514.<sup>18</sup> Although application of the *Melson* formula may be rebutted upon a showing that its use in a particular case would be inequitable, there is no such showing here. In fact, as Mother points out, the *Melson* formula underestimates Son's expenses, which are substantially higher than a typical minor child's expenses. Nevertheless, because *Melson* both considers the required factors under Section 514 and takes account for the parties' ability to pay, as required by Section 503, I conclude its application is the best available

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<sup>18</sup> *Shuba v. Div. of Child Support Enforcement ex rel. Reese*, 564 A.2d 1084 (Del. 1989). *See also Dalton v. Clanton*, 559 A.2d 1197, 1211 (Del. 1989).

formula to apply in this case. The parties have offered no alternative calculation that takes into account the required elements of Sections 503 and 514.

I, however, agree with Father that the child support obligation he previously paid is not necessarily a fair proxy for his Section 503 support obligation. As Petitioners acknowledge, that figure was calculated based on an income ratio that has changed. Several of the other factors contained in the formula also may have changed. Accordingly, a new *Melson* calculation must be performed. The record does not contain sufficient information for the Court to perform its own calculation.

Finally, there remains an issue of the back support Father owes. Petitioners seek support dating back to 2014, when Father ceased paying child support under 13 *Del. C. § 501*. The Petition, however, was not filed until January 2016. There is nothing in the record indicating Father knew before that time (or substantially before that time) that he owed a support obligation under the law. In view of the fact that there is little case law interpreting Section 503, it is fair to conclude that it is not frequently used or well known. Considering the “general equities inherent in the situation,” as required by Section 514, and Petitioners’ failure to pursue support in a more timely manner, I conclude Father owes support dating back to the date the Petition was filed, but not before that time.

### ***Conclusion***

The parties shall confer in an attempt to agree upon application of the *Melson* formula in this case<sup>19</sup> and to decide how the support obligation shall be paid so as to avoid reducing Son's current public benefits and thereby increasing his expenses. To the extent areas of disagreement remain regarding application of the formula or the manner of payment, those disagreements should be submitted to the Court within 30 days of the date of this order by way of letters from the parties. Otherwise, Petitioners shall submit a proposed form of order within 30 days reflecting the amount of Father's support obligation and how that obligation shall be paid. If the parties require an extension of this time period, please contact my chambers.

Very truly yours,

/Abigail M. LeGrow/

Abigail M. LeGrow, Judge

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<sup>19</sup> The calculations should take into account the change in Mother's and Father's respective incomes after June 2016. That is, Father's back support obligation until June 2016 should be calculated using the parties' incomes during that time period.