McLACHLAN, J., concurring. As attractive as the dissent's liberation from the principles of the child support and arrearage guidelines (guidelines)[1] may be for the family bench and bar in cases where the net income of the parties exceeds the amount set forth in the schedule of basic child support obligations (schedule), I find the reasoning of the plurality opinion's adherence to the principles of the guidelines persuasive.[2] I, therefore, join the plurality. I also note that applying only the statutory standard of General Statutes § 46b-84 (d)[3] when the schedule is exceeded, in my view, provides a stronger case for reversing the trial court here. See *Bornemann* v. *Bornemann*, 245 Conn. 508, 531, 752 A.2d 978 (1998) ("judicial review of a trial court's exercise of its broad discretion in domestic relations cases is limited to the questions of whether the [trial] court *correctly applied the law* and could reasonably have concluded as it did" [emphasis added; internal quotation marks omitted]). Section 46b-84 (d) requires the court to consider the needs of the children and the respective abilities of *both* parents to meet those needs. The dissent attempts—unpersuasively in my view—to find unmet needs of the children due to their economic station, which must be met by wildly fluctuating payments from their father, the defendant, Frank A. Maturo, to their mother, the plaintiff, Laura E. Maturo, in amounts likely to be in the tens or even hundreds of thousands of dollars. The dissent does not, however, address the obligation of the plaintiff, the children's other parent, to contribute financially to those needs.[4]

I write separately, however, because I believe this case well demonstrates the problems inherent in using net income to determine alimony and child support payments. The statutes authorizing such payments specify neither gross nor net income. General Statutes § 46b-61 merely authorizes the court to award "support of any minor child" without any standard.[5] Similarly, § 46b-84 (a) provides that, after the entry of a decree of legal separation or divorce, the parents shall maintain their children "according to their respected abilities," and § 46b-84 (d) provides in relevant part that the court consider in making its award "the age, health, station, occupation, earning capacity, amount and sources of income . . . of each of the parents . . . ."[6] With respect to alimony, General Statutes § 46b-82 (a) provides in relevant part that the court consider the "amount and sources of income . . . ."[7]

This court and other courts in our state have repeatedly indicated that "[i]t is well settled that a court must base child support and alimony orders on the available net income of the parties, not gross income." *Morris* v. *Morris*, 262 Conn. 299, 306, 811 A.2d 1283 (2003);

Auerbach v. *Auerbach*, 113 Conn. App. 318, 338, 966 A.2d 292, cert. denied, 292 Conn. 901, 971 A.2d 40 (2009); see also *Fahy* v. *Fahy*, 227 Conn. 505, 517, 630 A.2d 1328 (1993) (standard for determining alimony is net income, not gross income); *Collette* v. *Collette*, 177 Conn. 465, 469, 418 A.2d 891 (1979) (same); *Tobey* v. *Tobey*, 165 Conn. 742, 747, 345 A.2d 21 (1974) ("Gross earnings is not a criterion for awards of alimony. It is the net income, which is available to the defendant, which the court must consider."); *Heard* v. *Heard*, 116 Conn. 632, 634, 166 A. 67 (1933) (net income used to determine alimony); *Ludgin* v. *McGowan*, 64 Conn. App. 355, 358–59, 780 A.2d 198 (2001) (reversing trial court's financial orders when court relied on parties gross rather than net income); *Febbroriello* v. *Febbroriello*, 21 Conn. App. 200, 202, 572 A.2d 1032 (1990) (trial court must base periodic alimony and child support orders on available net income); *Kaplin* v. *Kaplin*, 1 Conn. Sup. 175, 174, 551 A.2d 775 (1935) (modifying alimony based on defendant's net income).

Although this is stated as a settled principle of Connecticut law, gross income rather than net income apparently has been used in fashioning support awards in numerous cases, and these orders have been upheld. For example, recently the Appellate Court stated that the mere reference to gross income in entering financial orders may not be determinative. *Hughes* v. *Hughes*, 95 Conn. App. 200, 206, 895 A.2d 274 (2006). In an obvious effort to sustain a trial court's order based on gross income, the Appellate Court, quoting from the trial court, reasoned that the trial court "list[ed] the gross earnings of the plaintiff to illustrate the capability and ability he has displayed and the pay he has received for his efforts. Since his earned income fluctuates from year to year, the court will provide for a formula for the periodic alimony and child support. Each party has submitted a proposal in this respect in their proposed orders." (Internal quotation marks omitted.) Id. The Appellate Court continued: "Indeed, the plaintiff's proposed orders . . . suggest an unallocated alimony and child support order on the basis of his gross annual cash compensation from employment. The court further noted the gross and net values of the plaintiff's most recent cash bonus. Throughout its decision, the court made frequent reference to the parties' financial affidavits. The court also considered the tax returns, which disclosed not only the plaintiff's gross income, but also his total tax liability and, thus, his net disposable income. The court had before it ample evidence from which it could determine the plaintiff's net income and the respective financial needs and abilities of each party." Id., 206–207. This is not the only case in which the Appellate Court has carefully scrutinized the totality of the trial court's award in order to uphold an order that may have appeared to be based solely on gross income because of other information in the record with

respect to the parties' net incomes. See, e.g., *Kelman* v. *Kelman*, 86 Conn. App. 120, 123–24, 860 A.2d 292 (2004), cert. denied, 273 Conn. 911, 870 A.2d 1079 (2005).

Indeed, it is quite common for parties entering into agreements settling dissolution cases to provide for payments of alimony based on the gross income of the payor. See, e.g., *Issler* v. *Issler*, 250 Conn. 226, 229, 737 A.2d 383 (1999); *Signore* v. *Signore*, 110 Conn. App. 126, 127–28, 954 A.2d 245 (2008). This is because alimony is deductible from the income of the payor and taxable to the payee. See *Fahy* v. *Fahy*, supra, 227 Conn. 516 n.6. If the alimony is ordered paid out of net income, the true net is arguably impossible to determine because the alimony when paid results in additional deduction to the payor, reducing the tax liability and increasing the net income. In order to determine an award based upon the payor's true net income an almost endless number of calculations and recalculations would be required.[8]

The most significant problem with using net income is calculating the true net income. Net income requires a determination of the correct amount of deductions, including federal, state and local income taxes, which can be difficult to calculate and even more difficult to verify without knowing all of an individual's deductions. In contrast, gross income from all sources is much more easily and accurately determined. Gross income generally includes income from all sources earned and unearned, taxable and nontaxable. Although I recognize that determining child support on the basis of gross income, rather than net income, would require a revision of the guidelines, there are many states that use gross income to calculate child support and merely use lower percentage figures for support than those used in Connecticut.[9]

The method used by the trial court in this case to provide for the escalator payments demonstrates the folly and difficulty of requiring that these orders be based solely upon the net income of the payor. Accordingly, I would revisit this "settled" principle because it is impractical to apply and, significantly, is not required by statute. Instead, I would allow trial courts the discretion to use gross income in all support determinations.[10]

[1] As the plurality explains; see part I A of the plurality opinion; the legislature created a commission to oversee the establishment of the guidelines. See General Statutes § 46b-215 (a).

[2] The principles of the guidelines implicated here are derived from the income shares model, on which the guidelines are based. Child Support and Arrearage Guidelines (2005), preamble, § (d), pp. ii–iii. The income shares model reflects the statutory obligation of both parents to contribute to child support in accordance with their abilities. See General Statutes § 46b-84 (d). Under the income shares model, the portion of family income spent on children declines as a percentage of family income as that income increases because proportionately their need decreases. Child Support and Arrearage Guidelines (2005), preamble, § (d), p. iii; see footnote 3 of this opinion.

[3] General Statutes § 46b-84 (d) provides: "In determining *whether a child is in need* of maintenance and, if in need, *the respective abilities of the parents* to provide such maintenance and the amount thereof, the court

shall consider the age, health, station, occupation, earning capacity, amount and sources of income, estate, vocational skills and employability of each of the parents, and the age, health, station, occupation, educational status and expectation, amount and sources of income, vocational skills, employability, estate and needs of the child." (Emphasis added.)

[4] The plaintiff was awarded $8.1 million in cash and investment accounts, including an investment account that generated approximately $95,680 of interest per year, based upon the income reflected in her financial affidavit. This is in addition to the trial court's generous award of alimony.

[5] General Statutes § 46b-61 provides: "In all cases in which the parents of a minor child live separately, the superior court for the judicial district where the parties or one of them resides may, on the application of either party and after notice given to the other, make any order as to the custody, care, education, visitation and support of any minor child of the parties, subject to the provisions of sections 46b-54, 46b-56, 46b-57 and 46b-66. Proceedings to obtain such orders shall be commenced by service of an application, a summons and an order to show cause."

[6] General Statutes § 46b-84 (a) provides in relevant part: "Upon or subsequent to the annulment or dissolution of any marriage or the entry of a decree of legal separation or divorce, the parents of a minor child of the marriage, shall maintain the child according to their respective abilities, if the child is in need of maintenance. . . ."

[7] General Statutes § 46b-82 provides in relevant part: "(a) . . . In determining whether alimony shall be awarded, and the duration and amount of the award, the court . . . shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability of such parent's securing employment.

"(b) Any postjudgment procedure afforded by chapter 906 shall be available to secure the present and future financial interests of a party in connection with a final order for the periodic payment of alimony."

[8] This case highlights the difficulty of using a net income approach because of the following situation, which could easily occur. Assume the defendant is awarded a bonus in December of year one and makes his alimony payment that December. Because the alimony payment is deductible, the defendant's tax liability will be decreased and, depending upon other income and deductions (yet another problem), he will receive a tax refund in year two that arguably is attributable to the alimony that was paid in December of year one. The deduction requires the payment of additional alimony in year two, which of course is deductible in year two and leads to another tax refund in year three. Assuming bonuses are received in successive years, this problem will repeat itself indefinitely.

[9] It appears that some states use gross income for making child support while others use net income. All three of our adjoining states use gross income for the purpose of determining child support. See, e.g., N.Y. Dom. Rel. Law § 240.1-b (McKinney Sup. 2010). In Massachusetts, the child support guidelines are based on gross income. See Commonwealth of Massachusetts, Administrative Office of the Trial Court, "Child Support Guidelines" (2009), available at http://www.mass.gov/courts/childsupport/guidelines.pdf, p. 2 (last visited February 23, 2010). The same is true for Rhode Island. See Rhode Island Family Court, "Administrative Order 2007–03: Rhode Island Family Court Child Support Formula and Guidelines" (2007), available at http://www.cse.ri.gov/downloads/admin_order2007_03.pdf, p. 3 (last visited February 23, 2010).

[10] Massachusetts, by statute, bases alimony on gross income. See, e.g., *Britton* v. *Britton*, 69 Mass. App. 23, 27, 865 N.E.2d 1174 (2007) (in awarding alimony, trial court properly considered husband's gross income and other factors listed in Mass. Gen. Laws c. 208, § 34 [2003]). A court may consider the tax effects of its orders upon the parties; see *Early* v. *Early*, 413 Mass. 720, 728, 604 N.E.2d 17 (1992); but such consideration is discretionary in the absence of a request to do so. See *Bennett* v. *Bennett*, 15 Mass. App. 999, 1000, 448 N.E.2d 77 (1983). New York uses an all income approach and directs the court to consider the tax consequences of its orders. See N.Y. Dom. Rel. Law § 236 B 6 a (1) and (7) (McKinney Sup. 2010). In Rhode Island, the court must consider the supporting spouse's "earned and unearned income" and "ability to pay." R.I. Gen. Laws § 15-5-16 (b) (2) (ii) (F) (2003). Thus, the court is required to consider the "economic situation of the parties viewed in light of the financial exigencies of one spouse and the ability of the other spouse to meet those needs." *Fisk* v. *Fisk*, 537 A.2d

418, 421 (R.I. 1988). The decision to take into account the tax consequences of property distribution is subject to the discretion of the trial court. *Koutroumanos* v. *Tzeremes*, 865 A.2d 1091, 1100 (R.I. 2005).