

The Federalization of Child Support Guidelines

by

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I. Introduction

Within the short span of fifteen years the federal government has systematically revolutionized the process for establishing and enforcing child support throughout the United States.¹ Within the past six years, the federal government has effectively usurped traditional state supremacy² over such family law issues as the setting and enforcing of child support and establishment of paternity. For years, the establishment and enforcement of child support obligations in one state were "of no special interest to other states."³

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¹ 1 U.S. DEP'T OF HEALTH AND HUMAN SERVICES, OFFICE OF CHILD SUPPORT ENFORCEMENT, TWELFTH ANNUAL REPORT TO CONGRESS FOR PERIOD ENDING SEPTEMBER 30, 1987, 7 (1988)(hereinafter Twelfth Report).

² U.S.C.A. Const. Amend. X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

³ RESTATEMENT OF CONFLICT OF LAWS § 458 comment a, 548 (1934).

Each state had its own procedures for setting the amount of child support. Most states allowed the trial judge broad discretion in setting the amount of child support in divorce or paternity actions as equity required because each family's circumstances were considered unique.⁴

The creation of the Office of Child Support Enforcement (OCSE) in 1975 created a mechanism for intra and interstate enforcement of support obligations in every state and set the stage for later federal intervention into areas previously viewed as the domain of the states. The major revolution came in August 1984 when Congress unanimously passed the Child Support Enforcement Amendments⁵ which radically changed the way states viewed child support orders. The 1984 Amendments required each state to adopt statewide advisory child support guidelines by October 1, 1987.⁶ Federal regulations added the requirement that the guidelines be numerical.⁷ The Family Support Act of 1988 not only affirmed the use of mathematical child support guidelines but also mandated that those setting child support in all states use the guidelines as a rebuttable presumption of the proper child support award by October 13, 1989.⁸

This Article discusses national attempts to establish and enforce child support obligations prior to 1984. It traces federal legislation from the addition of Title IV-D to the Social Security Act and creation of the Office of Child Support Enforcement; the federalization of child support guidelines as a result of enactment of the Child Support Enforcement Amendments and the Family Support Act; state responses; the effect of the support guidelines on the practice of family law. The last part predicts the federal government's likely future directions in child support establishment and enforce-

⁴ H. Clark, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 17.1, 719 (2d ed 1988). *See, e.g.*, *Smith v. Smith*, 387 So.2d 224, 225 (Ala. App. 1980) (Because every case is considered to be different and unique in itself . . . a trial judge must have discretion in ascertaining child support amounts).

⁵ Child Support Enforcement Amendments of 1984, (hereinafter 1984 Amendments); Pub. L. No. 98-378, 98 Stat. 1305 (1984) (codified at 42 U.S.C. §§ 651, 653-658, 664 (1988))(amending Part D of Title IV of the Social Security Act).

⁶ 42 U.S.C. § 667 (1988).

⁷ 45 C.F.R. 302.56(c) (1988).

⁸ Family Support Act of 1988, Pub. L. No. 100-485, 103f, 102 Stat. 2346 (1989)(codified at 42 U.S.C. § 667(b)(2) (1988)).

ment and potential areas for future federal government involvement.

II. Brief Pre-1984 History

The Elizabethan Poor Laws of England in the 16th century were government attempts to make a father pay the parish to provide support for his child.⁹ In the eighteenth century, Blackstone noted that parents have a duty to support their child as a matter of natural law.¹⁰ As late as 1953, however, there was some disagreement over the legal or equitable basis for the imposition of a support obligation on a parent.¹¹

Only in the latter part of the twentieth century, have all states recognized that both parents have a legal as well as moral obligation to support their children,¹² whether marital or nonmarital.¹³ Only in the past six years have states made the establishment and enforcement of the child support obligation a priority concern and seriously addressed the question of how much "support" parents should pay. Prior to the 1984 Amendments, the few national attempts to encourage uniformity among the states developed either from the National Conference of Commissioners on Uniform State Laws, who developed model legislation which was adopted by some

⁹ 8 Eliz. 1, C.3 § 7 (1576).

¹⁰ W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 446-447 (1765):

The duty of parents to provide for the maintenance of their children, is a principle of natural law . . . By begetting them, therefore, they have entered into a voluntary obligation, to endeavour, as far as in them lies, that the life which they have bestowed shall be supported and preserved . . . and if a parent runs away, and leaves his children, the churchwardens, and overseers of the parish shall seize his rents, goods, and chattels, and dispose of them toward their relief.

¹¹ *Greenspan v. Slate*, 12 N.J. 426, 97 A.2d 390 (N.J. 1953)(court used natural law and civil law analogies to find duty of father to pay \$45.00 for necessary medical care for a child).

¹² H. Krause, CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE 3 (1981). See, e.g., CAL. CIV. CODE § 196 (Deering Supp. 1990); KAN. STAT. ANN. § 60-1610(a) (Supp. 1989).

¹³ *Gomez v. Perez*, 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed.2d 56 (1973)(Texas statute unconstitutional in permitting legitimate child to enforce a right of support against father while denying right to illegitimate child).

states, or from Congressional attempts to enforce the collection of child support judgments.

A. *Uniform Laws*

1. *Uniform Desertion and Nonsupport Act*

In 1910 the Commissioners on Uniform State Laws proposed the Uniform Desertion and Nonsupport Act (1910 Act) which created a criminal action against fathers who deserted or wilfully refused to support their children under sixteen.¹⁴ The 1910 Act failed as an enforcement mechanism because prosecutors were reluctant to charge nonsupporting fathers with a crime which could result in a jail sentence and loss of employment. The 1910 Act contained no interstate enforcement provisions.

2. *URESА*

In 1950 the Commissioners on Uniform State Laws approved the Uniform Reciprocal Enforcement of Support Act (URESА) which provides a civil judgment procedure which allows for the interstate establishment and enforcement of child support in a civil action, a registration of an existing judgment procedure and a criminal extradition procedure.¹⁵ Under URESА the person seeking support (the obligee) files an action in the local court which is sent by mail to the local court in the state where the person who owes support (the obligor) lives. The court in the obligor's state obtains jurisdiction over the obligor, schedules a hearing and determines if there is a duty to support and if so, how much. The money is forwarded to the obligee. The procedure can be used interstate or intrastate.¹⁶

URESА was amended in 1952 and 1958 to clarify some provisions.¹⁷ An extensive revision in 1968 resulted in the Act being retitled the Revised Uniform Reciprocal Enforcement of Support Act (RURESА).¹⁸ A new section (§ 27) was added to allow the

¹⁴ Uniform Desertion and Nonsupport Act, 10 U.L.A. 71 (1922); *see also* 9B U.L.A. at 556 (1987).

¹⁵ Uniform Reciprocal Enforcement of Support Act (URESА) 9B U.L.A. 567 (1987)(hereinafter URESА).

¹⁶ *See Wornkey v. Wornkey*, 12 Kan. App. 2d 506, 749 P.2d 1045 (1988)(intrastate use of URESА between counties).

¹⁷ URESА, *supra* note 15, at 567.

¹⁸ Revised Uniform Reciprocal Enforcement of Support Act (RURESА)

obligor to allege nonpaternity of the child as a defense to the obligation to support. The court in the state where the obligor lives determines paternity. Many states have the 1958 version, others the 1968, with many having some provisions from each version.¹⁹

The primary focus of URESA and RURESA is on the procedures for establishing and collecting support obligations rather than on the factors to be used for imposition of the support obligation. Therefore each state used its own factors for setting child support. Because URESA and RURESA were adopted before establishment of Title IV-D of the Social Security Act,²⁰ neither addresses the interrelationship with the state IV-D program which initiates the majority of URESA and RURESA petitions. Additionally, URESA and RURESA proceedings have traditionally been slow and nonproductive because of differences in state laws, the risk of modification of existing awards in the obligor's state,²¹ the backlog of cases in some jurisdictions, and the low priority of support cases relative to other actions.²²

3. *Uniform Marriage and Divorce Act*

In 1970 the Commissioners on Uniform State Laws approved the Uniform Marriage and Divorce Act (UMDA) which, among other things, proposed general factors for setting child support

(1968 Version) 9B U.L.A. 393 (1987). Five new sections were added and substantive procedural changes were made in twelve sections. For example, the URESA 2(m) definition of "state" was amended to include foreign jurisdictions having provisions similar to URESA.

¹⁹ Haynes, *The Uniform Reciprocal Enforcement of Support Act*, 63, 64 and Appendix IV-1, IV-2 in *INTERSTATE CHILD SUPPORT REMEDIES* (ABA Center on Children and the Law, Office of Child Support Enforcement, U.S. Dep't of Health and Human Services 1989). See also 9B U.L.A. at 381 (1988 & Supp. 1990) showing states with RURESA; 9B U.L.A. at 553 (1988 & Supp. 1990) showing Alabama, Alaska, Connecticut, Delaware, the District of Columbia, Guam, Indiana, Maryland, Massachusetts, Mississippi, Missouri, New York, Puerto Rico, Tennessee, Texas, Utah, Virgin Islands and Washington having varying versions of URESA.

²⁰ 42 U.S.C. §§ 651-665 (1988).

²¹ See, e.g., *Moffat v. Moffat*, 27 Cal. 3d 25, 165 Cal. Rptr. 877, 612 P.2d 967 (1980).

²² CENTER FOR HUMAN SERVICES, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *A STUDY TO DETERMINE METHODS, COST FACTORS, POLICY OPTIONS AND INCENTIVES ESSENTIAL TO IMPROVING INTERSTATE CHILD SUPPORT COLLECTIONS: FINAL REPORT* 36 (1985).

such as the financial resources of the child and the parents, standard of living of the family, and physical and emotional condition of the child.²³ While several states adopted variations of the UMDA provisions for setting child support,²⁴ as late as 1983 the majority of states had no statutory listing of any factors for a judge to consider.²⁵ A few judicial districts within states sometimes adopted a numerical chart but the figures had no relationship to the costs of rearing a child.²⁶ The lack of an objective, numerical standard left the setting of child support to virtually unfettered judicial discretion at the trial court level because appellate courts refuse to substitute their judgment for the trial judge's, absent a clear abuse of discretion.²⁷

4. *Uniform Parentage Act*

The Uniform Parentage Act (UPA) promulgated in 1973²⁸ cre-

²³ Uniform Marriage and Divorce Act (UMDA), 9A U.L.A. 147 (1973). . . . the court may order either or both parents . . . to pay an amount reasonable or necessary for his support, without regard to marital misconduct, after considering all relevant factors including:

- (1) the financial resources of the child;
- (2) financial resources of the custodial parent;
- (3) the standard of living the child would have enjoyed had the marriage not been dissolved;
- (4) the physical and emotional condition of the child, and his educational needs; and
- (5) the financial resources and needs of the noncustodial parent.

Id. at § 309.

²⁴ See, e.g., ARIZ. REV. STAT. § 25-320(A)(1989); DEL. CODE ANN., tit. 13 § 514 (Supp. 1989); IDAHO CODE tit. 32, § 706 (1989); ILL. STAT ANN ch. 40, § 505(a)(2)(Smith-Hurd 1989); IOWA CODE ANN § 598.21 (Supp. 1989); KY. REV. STAT. § 403.210 (1989); MINN. STAT. § 518.17 (4)(Supp. 1990); MONT. CODE. ANN. § 40-4-204 (1989); N.M. STAT. ANN. § 40-5-2 (1989); N.Y. DOM. REL. § 236 (McKinney 1989); OHIO REV. CODE ANN. § 3109.05 (Page Supp. 1989); R.I. GEN. LAWS § 15-5-16.2 (Michie 1988); VT. STAT. ANN. tit. 15, § 651 (1989); VA. CODE ANN. § 20-107.1 (Supp. 1989).

²⁵ H. Clark, *supra* note 4, at 719 n. 90; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ESSENTIALS FOR ATTORNEYS IN CHILD SUPPORT ENFORCEMENT 69 (1985).

²⁶ D. Chambers, MAKING FATHERS PAY: THE ENFORCEMENT OF CHILD SUPPORT 40 (1979); Family Law Bench-Bar Comm. Guidelines, Johnson County, Kansas, Schedule for Child Support (1985 Revision).

²⁷ Clark, *supra* note 4, at 719.

²⁸ Uniform Parentage Act, 9B U.L.A. 295 (1988).

ated a model statute for states to prove paternity and impose support obligations. The UPA provides a nine point list of considerations adding to the UMDA factors needs of the child, need and capacity of the child for education, and value of services of the custodial parent.²⁹ Seventeen states have adopted the Uniform Parentage Act and its support provisions.³⁰ While the UPA did add more considerations in setting child support, it contains no normative standards for judges to follow based on parental income.

B. Federal Child Support Enforcement

The federalization of child support guidelines probably would not have been accomplished without some of the "New Deal" legislation of the 1930's. In 1935 the Social Security Act established a public assistance program called Aid to Families with Dependent Children (AFDC).³¹ The AFDC program was designed to provide support for "dependent" children who were not being properly supported by their parents. At the time the program was created, 42% of the children were eligible for benefits because of death of a parent. By 1949, however, the cost of benefits was estimated to be \$205 million to aid families where the father was alive but not in the family and not paying support.³²

Congress began to look for ways to collect support from the absent parents of these children as a way to reduce the welfare roles

²⁹ 9B U.L.A. 295, 324-325 (1988) Section 15(e) provides:

In determining the amount to be paid by a parent for support of the child. . .a court. . .shall consider all relevant facts including:

- (1) the needs of the child;
- (2) the standard of living and circumstances of the parents;
- (3) the relative financial means of the parents;
- (4) the earning ability of the parents;
- (5) the need and capacity of the child for education, including higher education;
- (6) the age of the child;
- (7) the financial resources and the earning ability of the child
- (8) the responsibility of the parents for the support of others; and
- (9) the value of services contributed by the custodial parent.

³⁰ See UPA, 9B U.L.A. 287 (1988 & Supp. 1990).

³¹ 42 U.S.C. § 601 to 617 (1988).

³² Garfinkel and Melli, *The Use of Normative Standards in Family Law Decisions: Developing Mathematical Standards for Child Support*, 24 FAM. L.Q. 157, 160 (1990).

by enacting the first federal child support legislation in 1950.³³ During the 1960's the child support enforcement program expanded by allowing use of Social Security records to obtain addresses and information on absent parents.³⁴ In 1967 each state was required to establish a single unit whose task was to collect child support and establish paternity.³⁵

In 1975, Congress passed Title IV-D of the Social Security Act.³⁶ Title IV-D represented a national attempt to find a solution to enforce parental support obligations by tying federal welfare benefits to state attempts to recoup costs from parents. It came after a congressional committee concluded that "[t]he problem of welfare in the United States is, to a considerable extent, a problem of the nonsupport of children by their absent parents."³⁷

Title IV-D created the Office of Child Support Enforcement (OCSE) as a cooperative federal agency to work with state governments and the United States Department of Health and Human Services to provide four basic child support services: location of absent parents, establishment of paternity, establishment of support and enforcement of support. The child support program is often called the "IV-D program" and it originally focused on those receiving AFDC benefits. The significant provisions of the 1975 legislation are:

- * IV-D plan requirements for federal approval of state assistance plans;
- * creation of the federal parent locator service;
- * creation of penalties for states which failed to implement effective IV-D services;
- * requirement that support in AFDC cases be paid to the state for distribution;
- * federal incentive payments of 12% of collection in interstate AFDC cases;

³³ Section 402(a)(11) was added to the Social Security Act, codified at 42 U.S.C. § 602(a)(11), requiring state welfare agencies to notify law enforcement personnel upon providing AFDC for a child who was abandoned or deserted by a parent.

³⁴ Pub. L. No. 89-97; 79 Stat. 286 (1965).

³⁵ Pub. L. No. 90-248; 81 Stat. 821 (1968).

³⁶ Social Security Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2348 (pertinent sections codified at 42 U.S.C. §§ 651 - 665 (1988)).

³⁷ STAFF OF THE SENATE COMM. ON FINANCE, 94th Cong., 1st Sess., CHILD SUPPORT DATA AND MATERIALS 3 (Comm. Print 1975).

- * federal funding for 75% of states' administrative costs; and
- * support services were made available for those not receiving welfare.³⁸

Applicants for IV-D services must assign their rights to uncollected child support to the state; agree to cooperate in getting a support order established, including obtaining a paternity determination, if necessary; and agree to help find the absent parent. Failure to cooperate will deny the parent benefits but not the child.³⁹ The trend since 1975 has been to expand both the scope and purpose of the child support enforcement program. Additional federal legislation authorized garnishment of federal employee wages for support orders.⁴⁰ In 1980 federal funding was made permanent for non-AFDC cases and incentives were expanded to include all AFDC cases, not just interstate cases.⁴¹ In 1982 the Federal Parent Locator Service was created.⁴²

The creation of OCSE to monitor, assist and supervise state collection efforts coupled with the provisions for federal monetary incentives, such as ninety percent funding for development and use of automated systems, set the stage for the federal government to play a larger role in the child support area should it need (or desire) to do so. If the federal government now wanted states to cooperate in establishment and enforcement endeavors, it could threaten the loss of valuable federal funding for failure to comply.

III. The Need for Guidelines

The Congressional desire to decrease the federal costs of the welfare system by shifting more of the economic burden for children to their parents, in particular the "absent" parent, provided the major impetus for guidelines. Two major problems existed nationally when the 1984 Amendments were enacted. First, child support awards were inadequate to cover the actual costs of raising a child, and second, child support orders varied drastically for no apparent reason.

³⁸ 42 U.S.C. §§ 651-662 (1988).

³⁹ 42 U.S.C. § 602 (1988).

⁴⁰ 42 U.S.C. §§ 659-662 (1988).

⁴¹ Pub. L. No. 96-265; 94 Stat. 441 (1980).

⁴² 42 U.S.C. § 653 (1988).

A. Adequacy of Child Support Awards

Female-headed households have increased due to the number of unmarried women having and keeping their babies and the rising divorce rate of the 1960's and 70's. Out of wedlock births rose dramatically from 4% of total births in 1950 to 23.4% in 1985.⁴³ Many women did not seek to establish paternity so no judicial support order was entered.⁴⁴ When paternity was established, often the judge set a token payment of \$10.00.⁴⁵

In the divorce context, mothers have traditionally been awarded custody of minor children. In many cases women either did not have a support order, fathers did not pay the amounts ordered, or the amounts ordered were far too low to maintain a child at subsistence level even when noncustodial parents could afford to pay more.⁴⁶ A Census report found that only 46% of all women who were potentially eligible to receive support had support orders entered. Only half of the women received the full amount of support ordered, with 26% receiving partial payment and 24% receiving no payment.⁴⁷

Rarely did child support orders have any relationship to the actual costs of maintaining a child.⁴⁸ The average support award in 1983 was \$191 a month for one and seven-tenths children⁴⁹ which

⁴³ See U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1985, 64 (105th ed. 1986).

⁴⁴ See U.S. BUREAU OF THE CENSUS, CHILD SUPPORT AND ALIMONY: 1983, CURRENT POPULATION REPORTS P-23, No.152 (1986)(showing failure to obtain support awards in 80% of out of wedlock births).

⁴⁵ Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 24 FAM. L.Q. 1, 5 (1990).

⁴⁶ Yee, *What Really Happens in Child Support Award Cases: An Empirical Study of Establishment and Enforcement of Child Support Orders in the Denver District Court*, 57 DENVER L.J. 21, 36 (1979)(two-thirds of the fathers were ordered to pay less in child support per month than they were spending in car payments).

⁴⁷ U.S. BUREAU OF THE CENSUS, CHILD SUPPORT AND ALIMONY: 1983 (SUPPLEMENTAL REPORT), CURRENT POPULATION REPORTS, Series P-23, No. 148, October 1986.

⁴⁸ See generally D. Chambers, *supra* note 26, at 38-40; L. Weitzman, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985); Bruch and Wikler, *Developing Normative Standards for Child Support Payments: a Critique of Current Practice*, THE PARENTAL CHILD SUPPORT OBLIGATION 119 (J. Cassetty ed. 1983).

⁴⁹ U.S. BUREAU OF CENSUS, CHILD SUPPORT AND ALIMONY: 1983, CUR-

was only 25% of the average expenditures for children at a middle income level.⁵⁰ It was only 80% of the poverty level.⁵¹

In the post divorce situation, one researcher found that the standard of living for the custodial parent and minor children declined 73% while the noncustodial parent's standard of living rose 42%.⁵² One professor's study found that the mother with custody of two children needs 76% to 80% of the intact family's former income to maintain the family's predivorce standard of living, but child support awards equaled only 33% of that amount.⁵³

The lack of spousal support, the custodial mother's reduced earning capacity (either due to increased child care responsibilities or lack of skills), combined with nonexistent or unrealistically low child support awards resulted in an increase in women and children receiving government assistance. During the 1970's, increasing numbers of female-headed households fell below the poverty level, until one half of all families in poverty were headed by women.⁵⁴ Close to 90% of the beneficiaries of AFDC are mother-headed single parent households with minor children.⁵⁵ The burgeoning numbers of female-headed households seeking government assistance led Congress to consider ways to get noncustodial parents to pay adequately for their children. The Senate Report accompanying the 1984 Amendments indicated that part of the motivation for the requirement for guidelines was to meet "[the] problem that the amounts of support ordered are in many cases unrealistic. This fre-

RENT POPULATION REPORTS, SPECIAL STUDIES SERIES P-23, No. 141 (July 1985) (hereinafter Special Studies).

⁵⁰ T. Espenshade, *INVESTING IN CHILDREN: NEW ESTIMATES OF PARENTAL EXPENDITURES* 28 (1984).

⁵¹ 48 Fed. Reg. 7010-11 (1983).

⁵² Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 U.C.L.A. L. REV. 1181, 1253-56 (1981).

⁵³ D. Chambers, *supra* note 26, at 48.

⁵⁴ See, e.g., BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, *CURRENT POPULATION REPORTS: MONEY, INCOME AND POVERTY STATUS OF FAMILIES AND PERSONS IN THE UNITED STATES, 1983*, Series P - 60, No. 145 at table 115, 21-22 (1985). See also HOUSE COMM. ON GOV'T. OPERATIONS, *Opportunities for Self-Sufficiency for Women in Poverty*, H.R. REP. No. 459, 99th Cong. 1st Sess. 3 (1985).

⁵⁵ See generally OFFICE OF CHILD SUPPORT ENFORCEMENT, *CHILD SUPPORT ENFORCEMENT, SEVENTH ANNUAL REPORT TO CONGRESS FOR THE PERIOD ENDING SEPTEMBER 30, 1982* (1983).

quently results in awards which are lower than what is needed to provide reasonable funds for the needs of the child in light of the absent parent's ability to pay."⁵⁶

The Office of Child Support Enforcement (OCSE) reported that \$10.9 billion dollars was due in child support in 1985.⁵⁷ A 1985 study done for OCSE found that if a normative child support guideline⁵⁸ had been used that tied child support to the absent parent's income, instead of relying on judicial discretion, the amount of child support owed would have been \$26.6 billion.⁵⁹ Therefore, increasing the amount of child support owed by absent parents was seen as one means of alleviating some of the problems associated with the growing impoverishment of women and children.

B. Consistency in Support Orders

Because judges traditionally set child support on a case by case basis, the amounts ordered varied considerably between similarly situated parents. The vague use of factors such as a "just and proper" amount of support or the "financial resources of the parents and standard of living of the family" led to wide disparities in awards. For example, a father with a monthly income of \$900 paid \$50 for two children while another father with \$450 monthly income paid \$60 for two children.⁶⁰

Sometimes judges used other factors not mentioned specifically in the statutes, such as the existence of other children or a new spouse, the earnings of a new spouse, expenses of visitation, custodial arrangements, child care expenses, tax exemption, medical expenses and the like.⁶¹ Inconsistencies in the amount of support

⁵⁶ S. REP. NO. 387, 98th Cong., 2nd Sess. 40 (1984).

⁵⁷ Twelfth Report, *supra* note 1, at 5 showing only \$7.2 billion collected.

⁵⁸ The Delaware (Melson) Formula on the Wisconsin Percentage of Income Standards are examples of normative guidelines.

⁵⁹ Haskins, *Estimates of National Child Support Collections Potential and the Income Security of Female-Headed Families*, Report to the Office of Child Support Enforcement, Bush Institute for Child and Family Policy, University of North Carolina at Chapel Hill (April 1985). A more recent article using the Colorado Income Shares and Wisconsin's percentage of income found the amount would be between \$28 and \$30 billion. See Garfinkel & Oellerich, *Noncustodial Fathers' Ability to Pay Child Support*, 26 DEMOGRAPHY 219 (1989).

⁶⁰ Yee, *supra* note 46, at 37.

⁶¹ See, e.g., *Rook v. Rook*, 469 So.2d 172 (Fla. App. 1985); *Redding v. Redding*, 398 Mass. 102, 495 N.E.2d 297 (1986); White and Stone, *A Study of Alimony*

ordered between persons similarly situated created negative perceptions of the judicial system.⁶²

Predicting what a child support award would be varied depending on the judge, the attorneys and numerous other factors. Several studies demonstrated the wide range of support awards depending on the judge or variations based on geographical locations.⁶³ Most jurisdictions that had developed schedules prior to 1984 based them on custom rather than economic data.⁶⁴ Objective guidelines based on schedules or charts for all child support orders would provide greater consistency and greater predictability which, in turn, would reduce litigable issues and encourage settlement⁶⁵ as well as create the perception of "fairness" in the judicial system.

IV. The Child Support Amendments of 1984 - Discretionary Guidelines

In August 1984, Congress unanimously passed the Child Support Enforcement Amendments of 1984⁶⁶ which amended the 1974 Social Services Amendments to the Social Security Act, the authority for the Child Support Enforcement Program.⁶⁷ The 1984 Amendments required states to establish a child support commission.⁶⁸ The Amendments added several procedures relating to child support establishment and collection, such as wage withhold-

and *Child Support Rulings With Some Recommendations*, 10 FAM. L.Q. 75 (Spring 1976)(studying 532 cases in Orange County, Florida and finding ten variables of essential factors considered).

⁶² See Schmehl, *Calculation of Child Support in Pennsylvania*, 81 DICK. L. REV. 793 (1977); see generally D. Chambers, *supra* note 26.

⁶³ Williams & Campbell, *Review of Literature and Statutory Provisions Relating to the Establishment and Updating of Child Support Awards*, Report to U.S. Office of Child Support Enforcement 1-3 (1984). See also J. LIEBERMANN, *CHILD SUPPORT IN AMERICA* 12 (1986) (fathers earning \$145 - \$155 a week ordered to pay \$10 - \$60 a week depending on judge); D. CHAMBERS, *supra* note 26, at 38-42; Yee, *supra* note 46, at 38-42; A. Hoyt, *CHILD SUPPORT AWARDS: AN ANALYSIS OF JUDICIAL DISCRETION IN DIVORCE CASES IN KANSAS* 41-44 (1984).

⁶⁴ D. Chambers, *supra* note 26, at 40.

⁶⁵ *Silvia v. Silvia*, 9 Mass. App. 339, 400 N.E.2d 1330 (1980).

⁶⁶ 1984 Amendments, *supra* note 5, 42 U.S.C. § 651, 653-658, 664 (1988).

⁶⁷ Pub. L. No. 93-647, 88 Stat. 2337 (codified at 42 U.S.C. §§ 651-662 (1988) (primarily amending Title IV, § 101(a) of the Social Security Act).

⁶⁸ 45 C.F.R. § 304.95 (1989).

ing,⁶⁹ paternity establishment throughout a child's minority,⁷⁰ personal property liens, state income tax refund offset,⁷¹ and expedited judicial or administrative process for establishing and enforcing support orders.⁷²

The state child support commissions, among other things, were to study and develop discretionary child support guidelines by October 1, 1987, with key provisions of the law stating:

(a) Each State, as a condition for having its State plan approved . . . must establish guidelines for child support award amounts within the State . . . by law or by judicial or administrative action.

(b) The guidelines . . . shall be made available to all judges and other officials who have the power to determine child support awards . . . but need not be binding . . .⁷³

The Office of Child Support Enforcement (OCSE) promulgated regulations to implement the guidelines and required that guidelines be based on specific descriptive and numeric criteria and result in a computation of the support obligation.⁷⁴ This made it clear that a mere listing of factors for a judge to consider, such as the financial resources of the parties and needs of the child, was not sufficient to meet the intent of the legislation. Normative support guidelines making most child support orders capable of mathematical calculation would also make it possible to expedite the setting of support because it could be done by nonjudicial personnel without the necessity for a judicial proceeding in every case.

V. State Responses

Prior to the 1984 Amendments, three states (Delaware, Washington and Wisconsin) were using guidelines in most cases.⁷⁵ The majority of states, however, had no numerical guidelines at all, let alone statewide guidelines. Most states had too much money in-

⁶⁹ 1984 Amendments, *supra* note 5; 42 U.S.C. § 661 (1988).

⁷⁰ 1984 Amendments, *supra* note 5; 42 U.S.C. § 654(4)(A) (1988).

⁷¹ 42 U.S.C. § 666(a)(3)(1988).

⁷² 42 U.S.C. § 666(a)(2)(1988); 45 C.F.R. § 303.101 (1989).

⁷³ 1984 Amendments, *supra* note 5; 98 Stat. 1305, 1321-22 (codified as amended at 42 U.S.C. § 667 (1988)); 45 C.F.R. 302.56 (1989).

⁷⁴ 45 C.F.R. § 302.56(c) (1989).

⁷⁵ Williams, *Court Support Guidelines: Economic Basis and Analysis of Alternative Approaches*, in IMPROVING CHILD SUPPORT PRACTICE I-10-25 (A.B.A. 1986).

vested in social service agencies and relied too heavily on federal assistance and matching funds to not comply. Governors across the nation appointed citizens to child support commissions.

Anticipating that states would need some direction in tackling the issues of drafting child support guidelines, the House Ways and Means Committee requested OCSE establish a national advisory panel⁷⁶ on child support guidelines to formulate some general principles to be used in drafting guidelines.⁷⁷ The National Center for State Courts, OCSE, the ABA and other groups regional and national conferences and materials for those involved in the task of formulating guidelines.⁷⁸

Child support commissions struggled to draft models for guidelines by educating themselves on the types of guidelines available, the costs of raising children, and the variables that needed to be considered. Often there was substantial opposition of noncustodial parents who foresaw increases in the amount of child support and legislators who resented the federal intrusion into a previously state dominated area. Guidelines were recommended after public hearings, questionnaires, and other means of public input.

A. *Legislative v. Court Rule*

The initial political hurdle involved whether the legislature, an administrative agency or the supreme court should implement the guidelines in each state. Nineteen states and D.C. have adopted statutory child support guidelines.⁷⁹ Twenty two states, Guam and

⁷⁶ H.R. REP. No. 527, 98th Cong., 1st Sess. 48 (1983). The panel was composed of judicial, legislative and child support enforcement officials representatives of custodial and noncustodial parents a legal scholar and an economist. The project was funded by Grant No. 18-P-20003-3-01, Office of Child Support Enforcement, U.S. Dept. of Health and Human Services.

⁷⁷ U.S. DEP'T OF HEALTH & HUMAN SERVICES, OFFICE OF CHILD SUPPORT ENFORCEMENT, DEVELOPMENT OF GUIDELINES FOR CHILD SUPPORT ENFORCEMENT: Final Report I-4 (1987)(hereinafter Final Report).

⁷⁸ R. Williams, DEVELOPMENT OF GUIDELINES FOR ESTABLISHING AND UPDATING CHILD SUPPORT ORDERS INTERIM REPORT OF U.S. DEP'T OF HEALTH AND HUMAN SERVICES (June 1985); ABA National Conference on Child Support Practice Materials (April, 1985); IMPROVING CHILD SUPPORT PRACTICE (A.B.A. 1986).

⁷⁹ See Munsterman, Grimm & Henderson, *The Current Status of Child Support Guidelines*, 14 State Court Journal 4, 7 (Spring 1990) (hereinafter Guidelines Summary) showing Colorado, District of Columbia, Florida, Georgia, Illinois, Louisiana, Maryland, Minnesota, Mississippi, Nevada, New Hampshire, New

Puerto Rico adopted guidelines by court rule.⁸⁰ Ten states and the Virgin Islands use administrative rules for their guidelines.⁸¹ Because of the nature of the legislative process, the statutory approach is less flexible when modifications are needed. Administrative or court rules may prove to be more easily modifiable when changes need to be made.⁸²

B. *Models For Guidelines*

Prior to the call for statewide guidelines, judges set child support on a case by case basis by viewing individual budgets of the parents. Child support came out of what was left of the nonresidential parent's net income after paying for housing, and other expenses using a "feed a hog approach" based on the bare minimum necessary to maintain a child at subsistence level. Besides being unworkable for a statewide guideline, this approach rewarded the extravagant parent at the expense of a frugal parent.⁸³ The parent who routinely spent more on a child was able to justify a higher award than a parent who historically watched pennies. The judge typically did not compare the noncustodial parent's standard of living and the child's.⁸⁴ The approach failed to take into consideration the needs of any particular child and was unfair to the child whose parents were above the poverty level.⁸⁵

The push for child support guidelines made states reevaluate

Mexico, New York, Oklahoma, South Dakota, Texas, Utah, Virginia, Washington and West Virginia.

⁸⁰ *Id.* showing Alabama, Alaska, Arizona, Arkansas, California, Delaware, Hawaii, Idaho, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, Wyoming.

⁸¹ Support Summary, *supra* note 79, at p. 7 showing Connecticut, Kentucky, Maine, Montana, North Dakota, Oregon, South Carolina, Tennessee, Vermont, Virgin Islands and Wisconsin.

⁸² For example, Kansas Supreme Court Administrative Order #59 was adopted October 1, 1987. Minor modifications were made October 1, 1989 to comply with the Family Support Act. A further revision of the guideline was promulgated in Administrative Order #75 on April 1, 1990. Because the legislature meets only January to April, a legislative guideline would have been difficult to adopt and revise as deficiencies were revealed.

⁸³ Cassetty, *Emerging Issues in Child Support Policy and Practice*, in *THE PARENTAL CHILD SUPPORT OBLIGATION* 5 (J. CASSETTY, ED. 1983).

⁸⁴ *Id.*

⁸⁵ T. Espenshade, *supra* note 50, at 2-3 (1984).

the "feed a hog" cost approach. The shift has been toward the position that a child is entitled to be supported in a style and condition consonant with the position in society of the parents.⁸⁶ Where the child has a wealthy parent, the child "needs" more than the bare necessities of life.⁸⁷ States began to accept and adopt the new philosophy that child support should be a reasonable amount suitable to the child's circumstances and situation in life and the parents' financial ability to pay.⁸⁸

The problem was converting this philosophy into a workable numerical model. Child support commissions wanted to study economic data to determine average parental allocations on children in intact marriages based on income and number of children.⁸⁹ Unfortunately no survey data was available that directly measured parental expenditures on children and the information was hard to develop because children and parents jointly share in such expenses as housing, transportation and food.⁹⁰

1. *Income Shares Model*

The Institute for Court Management of the National Center for State Courts under the Child Support Guidelines Project prepared a model called the Income Shares Model.⁹¹ The income shares model is consistent with the Uniform Marriage and Divorce Act provision which considers the standard of living of the family prior to divorce.⁹² Income shares reflects the belief that a child should receive the same proportion of parental income that the

⁸⁶ Final Report, *supra* note 77, at I - 4 (Principle (3) . . . to the extent either parent enjoys a higher than subsistence level standard of living, the child is entitled to share the benefit of that improved standard).

⁸⁷ *White v. Marciano*, 190 Cal. App. 3d 1026, 235 Cal. Rptr. 779 (1987)(millionaire father ordered to pay \$1500 for 21 month old); *In re Marriage of Boyden*, 164 Ill. App. 3d 385, 115 Ill. Dec. 458, 517 N.E.2d 1144 (1987)(father ordered to pay \$2,250 per month when income was over \$329,000 a year).

⁸⁸ *Steenland-Parker v. Parker*, 375 Pa. Super 457, 544 A.2d 1010 (1988); *Brunick v. Brunick*, 405 N.W.2d 633 (S.D. 1987).

⁸⁹ Elrod, *Kansas Child Support Guidelines: An Elusive Search for Fairness in Support Orders*, 27 Washburn L.J. 104, 120-125 (1987).

⁹⁰ Terrell, *Expenditures on Children for Child Support: Economist as Policy Advisor* 1-2 (Paper for Eastern Economic Association, March 1989). See generally T. Espenshade, *supra* note 50.

⁹¹ Final Report, *supra* note 77.

⁹² UMDA, *supra* note 23, at § 309 (3).

child would have received if the family were not divided.⁹³ The basic child support obligation is figured by multiplying the combined income of both parents by percentages which decline as income increases. The total obligation is determined by adding actual work-related child care expenses and medical insurance coverage to the basic obligation and then prorating the total obligation between the parents on the basis of their proportionate shares of income. The residential parent is assumed to spend his or her share on the child. The nonresidential parent makes a cash payment. As of February, 1990, thirty-two states and Guam had adopted the income shares approach.⁹⁴

2. *Percentage of Income Model*

The flat percentage of income model sets child support as a percentage of the obligor's income, with percentages varying with the number of children. For example, the Wisconsin model uses percentages of obligor gross income as 17% for one child, 25% for two children, 29% for three children, 31% for four children and 34% for five or more children.⁹⁵ Nine states have adopted the flat percentage of income approach.⁹⁶ Seven states and Puerto Rico are using a varying percentage of income standard which varies according to the amount of parental income.⁹⁷

The states with flat or varying percentage standards also adopt the philosophy that a child has a right to share in the parent's standard of living.⁹⁸ The major difference is that with income shares,

⁹³ R. Williams, *Child Support Guidelines: Economic Basis and Analysis of Alternate Approaches*, IMPROVING CHILD SUPPORT PRACTICE I-12-13 (A.B.A. 1986).

⁹⁴ Guidelines Summary, *supra* note 79, at p. 6 Guideline Models by State, showing Alabama, Arizona, Colorado, Connecticut, Florida, Guam, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Missouri, Montana, Nebraska, New Jersey, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington.

⁹⁵ WIS. STAT. § 767.25 (1989).

⁹⁶ Guidelines Summary, *supra* note 79, at Table 1 showing Alaska, Georgia, Illinois, Mississippi, Nevada, North Carolina, Tennessee, Texas and Wisconsin.

⁹⁷ *Id.* showing Arkansas, California, District of Columbia, Massachusetts, Minnesota, North Dakota, Puerto Rico, Wyoming.

⁹⁸ *Thompson v. Newman*, 383 N.W.2d 713 (Minn. App. 1986)(out of wedlock child entitled to enjoy benefits of income of both parents); *Needles v. Needles*, 489 N.Y.S.2d 783, 111 A.D.2d 756 (1985)(one factor is standard of living the child

the child support obligation declines as a percentage of the nonresident parent's income as total income increases and there are more variables such as health insurance and child care to consider.

The major advantage to the percentage of income approach is the simplicity of use. The percentage of income approach uses fewer variables because it does not consider the custodial parent's income or make provisions for child care or extraordinary medical expenses. Unlike the income shares approach, the percentage of income test needs no long worksheets or mathematical computations to figure proportionate shares of combined total income. The simplicity of requiring only the income of nonresident parent, and the mathematical simplicity of multiplying the income by the appropriate percentage, makes the burden easier on parties, attorneys and the courts.⁹⁹

3. Delaware - Melson

Delaware and Hawaii and West Virginia use the Delaware Child Support Formula.¹⁰⁰ The Delaware (Melson) approach also allows the child to share in the standard of living of the parents but only after the parents keep sufficient income to meet their basic needs based on a standard amount (usually federal poverty level standard). The child's basic needs are met next. When income is sufficient to cover the basic needs, the children are entitled to share in any additional income to get the benefit of the absent parent's higher standard of living.¹⁰¹

C. Gross v. Net Income

States had to decide whether to use gross, adjusted gross or net income as the income base. Only four states have a straight gross income approach.¹⁰² Twenty three states and Guam have adopted

would have enjoyed had the family remained intact); *Dickinson v. Dickinson*, 461 So.2d 1184 (La. App. 1984)(children are entitled to be maintained in same manner as before separation or divorce).

⁹⁹ Garfinkel & Melli, *supra* note 32, at 174.

¹⁰⁰ Guidelines Summary, *supra* note 79.

¹⁰¹ Family Court of the State of Delaware, *The Delaware Child Support (Melson) Formula* (1989).

¹⁰² Guidelines Summary, *supra* note 79, at p. 8 Income Base Used in Each State (Feb. 1990), showing Georgia, Nevada, New Mexico and North Carolina.

an adjusted gross income figure.¹⁰³ Twenty four states, Puerto Rico and the Virgin Islands start with a net income figure.¹⁰⁴

State guidelines vary as to the definitions of income and on the exact deductions that can be taken. Guidelines differ on issues of voluntary unemployment or underemployment; when should income be attributed to a parent; how income for the self-employed is defined; and how non-performing assets are treated.

D. Supplemental Factors

The greatest area for discrepancies between the guidelines, however, shows up in the areas that judges consider outside of the numerical chart. Guidelines, being general, do not cover every situation. Most states include supplemental factors such as the age of the children, child care expenditures, dependency exemption for federal income tax purposes, shared or joint custody, extraordinary visitation costs, special educational needs, and extraordinary medical expenses that the court may consider as reasons for deviating from the amount stated in the guidelines.¹⁰⁵ This area of broad judicial discretion could allow for substantial deviations from the guideline amount in some jurisdictions.

E. Binding v. Persuasive Guidelines

Prior to the Family Support Act¹⁰⁶ which mandated that the guidelines become a rebuttable presumption of the child support award, some courts emphasized that the guidelines were *not* mandatory and allowed judicial discretion,¹⁰⁷ but were presumptively valid.¹⁰⁸ Twenty states gave the guidelines presumptive sta-

¹⁰³ *Id.* showing Alabama, Arizona, Colorado, D.C., Guam, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, Ohio, Oklahoma, Oregon, Rhoda Island, South Carolina, Utah, Vermont, Virginia and Wisconsin.

¹⁰⁴ *Id.* showing Alaska, Arkansas, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, Puerto Rico, South Dakota, Tennessee, Texas, Virgin Islands, Washington, West Virginia, Wyoming.

¹⁰⁵ *See, e.g.*, Kansas Administrative Order 75 (1990).

¹⁰⁶ 42 U.S.C. § 667(b)(2) (1988).

¹⁰⁷ *Boris v. Blaisdell*, 142 Ill. App. 3d 1034, 97 Ill. Dec. 186, 492 N.E.2d 622 (1986).

¹⁰⁸ *See, e.g.*, *Lampa v. Lampa*, 371 Pa. Super. 1, 537 A.2d 350 (1988).

tus, six considered them mandatory in welfare cases, and seventeen considered the guidelines advisory.¹⁰⁹

F. Guidelines As Change Of Circumstances For Modification

Traditionally, child support awards are modifiable throughout a child's minority based on a showing of a material change of circumstances.¹¹⁰ What was not so clear after the 1984 Amendments was whether a state's adoption of the guidelines was a sufficient change in circumstances to allow a parent to seek modification of an existing award. Some guidelines expressly provided that the adoption of guidelines was a change in circumstances¹¹¹ while others provided that it was a change in circumstances if application of the guidelines would make a certain percentage change in the amount of child support due.¹¹²

Some courts continued to insist on proof of increased needs of the child in modification proceedings.¹¹³ Other courts allowed modification where there was a substantial imbalance between the supporting parent's high earning capabilities and the child's needs.¹¹⁴ If a change of circumstances was found, however, most states evaluated all motions for modification in light of the newly enacted guidelines.¹¹⁵

¹⁰⁹ NATIONAL CENTER FOR STATE COURTS, CHILD SUPPORT GUIDELINES SUMMARY 4 (May 27, 1988) (hereinafter 1988 Summary).

¹¹⁰ H. Clark, *supra* note 4, at 724; UMDA, *supra* note 23, at § 316(a).

¹¹¹ 1988 Summary, *supra* note 109, showing California, South Dakota and Texas.

¹¹² 1988 Summary, *supra* note 109, showing Alabama, Colorado, Indiana, Ohio, Rhode Island and Vermont.

¹¹³ Miller v. Miller, 415 N.W.2d 920 (Minn. App. 1987) (Minn. Stat. § 518.64(2) requires trial court to determine whether statutory factors have changed enough to create a substantial change in circumstances).

¹¹⁴ In re Marriage of Boyden, 164 Ill. App. 3d 385, 115 Ill. Dec. 458, 517 N.E.2d 1144 (1987), appeal denied 119 Ill.2d 554, 119 Ill. Dec. 382, 522 N.E.2d 1241 (1988); Reese v. Reese, 755 S.W.2d 437 (Mo. App. 1988).

¹¹⁵ 1988 Summary, *supra* note 109. See also Mack v. Mack, 749 P.2d 478, 483 (Hawaii App. 1988)(Family Court erred in failing to apply the guidelines promulgated by Board of Family Court Judges pursuant to Hawaii Revised Statutes 576D-7 (Supp. 1986) in modification proceeding); Reese v. Reese, 755 S.W.2d 437, 439 (Mo. App. 1988)(Missouri Child Support Guidelines should be accorded substantial consideration in determining and reviewing child support awards); Shutter v. Reilly, 372 Pa. Super. 251, 539 A.2d 424, 426 (1988) (guidelines should be consulted so that the suggested amount of support is, at a minimum, given due

VI. The Family Support Act of 1988 - Binding Guidelines

The use of guidelines and performance standards did increase the amount of child support collected.¹¹⁶ Congress reasoned that if the guidelines were mandatory and some of the differences between states were removed, even more money could be collected. Congress moved another step closer to federalization of the child support area by adopting the Family Support Act of 1988.

Title I of the Family Support Act required that after October 1, 1989, the state's child support guidelines must serve as a rebuttable presumption (rather than advisory) of the amount of support which should be paid whenever "setting or modifying" an award.¹¹⁷ Only a written finding on the record of a proceeding for the award of child support that the use of the guidelines would be unjust or inappropriate will justify a deviation from the numerically calculated amount.¹¹⁸

The Family Support Act requires that at a minimum the guidelines established must: take into consideration all earnings, income and resources of the absent parent;¹¹⁹ be based on specific descriptive and numeric criteria which results in a computation of the sup-

consideration, and so there may be uniformity of awards for persons similarly situated); *Hadrava v. Hadrava*, 357 N.W.2d 376, 379 (Minn. App. 1984)(upon showing of change in circumstances, the court must apply the law in effect at time of modification which were the statutory guidelines); *In re Marriage of Stone*, 749 P.2d 467, 467 (Colo. App. 1987) (guidelines apply to all support obligations whether established or modified).

¹¹⁶ Twelfth Report, *supra* note 1, at 7.

¹¹⁷ Family Support Act of 1988, Pub. L. No. 100-485, § 103 (a)(3) (effective Oct. 13, 1988); 102 Stat. 234 (codified at 42 U.S.C. § 667(b)(2) (1988)); S.B. 1511, adopted Sept. 30, 1988.

There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case.

42 U.S.A. § 667(2)(b) (1988).

¹¹⁸ 42 U.S.C. 667(b)(2).

¹¹⁹ 45 C.F.R. § 302.53(a) (1989).

port obligation; provide for coverage of the child or children's health care needs including health insurance when available to the parents at reasonable cost;¹²⁰ and apply to all orders in the state.¹²¹

A. *Agreement or Stipulation of the Parties*

The child support guidelines are the standard by which all agreements or stipulations which include provisions for child support are to be judged. By including "all support" awards, the Family Support Act included setting of initial orders whether determined by the court or agreed upon by the parties in a separation agreement. If judges and hearing officers refuse to follow the guidelines in approving agreements, the state stands to lose a portion of its welfare funding.

Even before the 1988 Amendments, several states explicitly required that any voluntary agreement of the parties be viewed in light of the guidelines.¹²² The policy has long been that the parties by contract should not be able to adversely affect the child's right to adequate support.¹²³ A recent Hawaii case found that parents cannot enter into an agreement for child support that would be lower

¹²⁰ 45 C.F.R. § 303.31(1) (1989). Children's health coverage can be included in several ways. Either the absent or custodial parent can cover children with his/her employment based on other reasonably provided group coverage. If only one parent has access to employment based coverage which include the children, the other parent may be deemed responsible for an appropriate share of the premiums and unreimbursed health care expenses.

¹²¹ The Family Support Act also set performance standards for state paternity establishment programs; authorized enhanced federal funding for genetic testing; mandated wage withholding of all IV-D orders by November 1990, and of all new child support orders by January 1994 unless the parties agree to an alternate arrangement or the court finds good cause for not ordering it; and mandated automatic tracking and monitoring support awards.

¹²² See 1988 Summary, *supra* note 107, listing Alabama, Colorado, the District of Columbia, Louisiana, Puerto Rico, Tennessee and Wisconsin.

¹²³ See, e.g., *Compart v. Compart*, 417 N.W.2d 658 (Minn. App. 1988)(child support stipulation setting support at less than one half the amount called for in the child support guidelines inconsistent with court's obligation to protect the interests of minor children); *Sharp v. Sharp*, 422 N.W.2d 443 (S.D. 1988)(court can modify child support even when set by stipulation). See also *Miller v. Miller*, 415 N.W.2d 920 (Minn. App. 1987)(existence of stipulation between the parties insufficient to prevent modification based on change of circumstances); *Blisset v. Blisset*, 123 Ill.2d 161, 121 Ill. Dec. 931, 526 N.E.2d 125 (1988). (court not bound by parties' agreement with respect to support of children).

than the suggested guidelines.¹²⁴ If the parties do not agree upon the guideline amount of support, the agreement should include the factors as to why the amount is different and why the deviation is in the *child's* best interests. The judge will make the final determination if the agreement justifies the deviation.

B. Updating Old Support Orders

The Family Support Act includes two measures designed to ensure that child support orders do not become inadequate by the mere passage of time. First, states must review the guidelines every four years to ensure that their application results in the determination of appropriate child support amounts.¹²⁵ Theoretically, states will adjust the numerical guidelines as necessary to reflect increased costs of rearing children.

The second measure is a monitoring requirement of existing support awards. By October 1993, states must establish a procedure for reviewing child support awards for those receiving IV-D services at least every three years and, where appropriate, seek modification.¹²⁶ States must have monitoring equipment in place that will allow them to pull up support orders and review them to see if they need to be modified because the guidelines have been modified or because there has been a change in circumstances since the last award or modification. Once states figure out the logistics of automatically reviewing court orders on a regular basis, support orders can be modified regularly to keep them current because the burden will not be on the custodial parent to seek a modification.

VII. Effect of Guidelines on Practice of Law

Federalization of child support establishment and enforcement was meant to reduce the welfare roles and the major application was for those receiving AFDC. The 1984 Amendments, however, have changed the rules of the game for all parents and changed to some extent the practice of family law. For one thing, many states have seen a substantial shift from judicial participation to an administrative or quasi-judicial approach, using referees, court trustees or

¹²⁴ Ching v. Ching, 751 P.2d 93 (Haw. App. 1988).

¹²⁵ Pub. L. No. 100-485, 103(b); 102 Stat. 2346 (1988); 42 U.S.C. § 667(a) (1988).

¹²⁶ 42 U.S.C. § 666(a)(10)(B) (1988).

hearing officers to set child support.¹²⁷

Guidelines, however, do not reduce the need for effective advocacy. While guidelines have become the standard by which the adequacy of a child support award is judged, lawyers still have a major role to play. Guidelines change the framework for bargaining between the parties. In the traditional pre-guideline divorce case, the custodial parent had to justify a child support award by showing the parent's expenses and the child's needs. There was no presumption minimum amount. Under the guidelines, the presumption is that the scheduled guideline amount is the appropriate "minimum." The person seeking more or less than the guideline amount must show why the deviation is in the child's best interests.

Because of the time and money involved to overcome the presumption in favor of the guideline amount, it will not be worth the effort unless there is enough data to convince the judge that deviation is in the child's best interests. When a deviation downward occurs, it will probably be because maintenance or property awards to the custodial parent more than make up for a reduced support amount. Child support therefore becomes a non negotiable issue in many cases.

Worksheets have become commonplace as lawyers fill in the relevant information for application of the state's guideline. Numerical guidelines coupled with increased computer usage has led to the development of computer programs. The lawyer with a lap top can plug in different maintenance and child support figures and the computer will figure out the tax consequences and income in each situation. Maximizing the resources of the parties has become easier.

The shift from the "needs" approach to "income" approach means that the key to setting child support is to begin with proper income figures. If necessary, lawyers must challenge the statement of income and use discovery to find all sources of income, especially perquisites.

Most advocacy in the years ahead will probably be taking place in the areas of the proper amount of support in shared residency cases and support amounts when parents' incomes exceed the guideline schedules. Shared custody situations continue to be trouble-

¹²⁷ U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, COMPARATIVE ANALYSIS OF COURT SYSTEMS PROCEDURES AND ADMINISTRATIVE PROCEDURES TO ESTABLISH AND ENFORCE CHILD SUPPORT OBLIGATIONS (1980).

some because most guidelines are set up on the basis of one residential parent and provide little, if any, direction for handling shared residency.¹²⁸

In some states the guidelines apply to incomes within a certain range. Incomes above the schedule are left to judicial discretion. Lawyers have wide latitude in arguing appropriate support amounts above the guideline level. A parent may consider paying "too much" support to the residential parent as a disincentive to contributions for a college fund or direct contributions on items for the child.

VIII. Future Directions - Toward a National Guideline

The failure of absent parents to adequately support their children remains a problem.¹²⁹ Today, establishment and enforcement of child support have become national concerns because of the economic price tag to the federal government.

To the extent that the normative guidelines result in a higher support award than under prior law, they may achieve the goal of improving the financial status of children and equalizing the economic burdens of divorce. If the guidelines actually assist in moving female headed households out of poverty and reducing the welfare roles, then perhaps the federal limitations on judicial discretion in support cases are warranted.

A recent study on the enactment of guidelines, however, found that even with the guidelines, children living with mothers will have a lower standard of living than they did during the marriage and than they would have if living with their fathers, especially for young children in low and moderate income households in which the mother is not working.¹³⁰ Among the reasons given for this failure are that states failed to design guidelines to ensure children a living standard equal to that of their noncustodial parent; the guidelines do not require children to receive enough support to ensure

¹²⁸ See, e.g. Kansas Administrative Order #75 (1990).

¹²⁹ 1 U.S. DEPT OF HEALTH AND HUMAN SERVICES, OFFICE OF CHILD SUPPORT ENFORCEMENT, THIRTEENTH ANNUAL REPORT TO CONGRESS FOR PERIOD ENDING SEPTEMBER 30, 1988, 7 (1989).

¹³⁰ Dodson, *Report Card on State Child Support Guidelines*, ABA Family Law Annual Meeting Compendium 8-3, 8-4 (1990).

that they and their custodian do not live in poverty; costs of child rearing were underestimated in data used to develop guidelines; and failure to apportion costs equitably between the parents.¹³¹

The Family Support Act did not mandate the amount of the guidelines. While many states may share a similar "philosophy," there are wide disparities in the amounts being awarded under the new guidelines.¹³² A 1990 study, using a fact situation of a father earning \$25,316 and a mother earning \$13,029 with one child, found the annual support amounts across the United States ranged from a low of \$1,503 to a high of \$6,828.¹³³ A \$5,300 disparity would seem great enough to encourage forum shopping. The only way to eliminate the inconsistencies between state guidelines is for Congress to adopt a nationwide normative child support guideline. Although the majority of states have adopted the income shares approach, it is likely that a national guideline would follow the Wisconsin percentage of income model because of its simplicity.

The interstate cases continue to be difficult because most states use URESA, which applies the law of the state of the obligor.¹³⁴ Because most of family law still remains the domain of the states, reflecting the economics and policies of each state, the guidelines are different. The noncustodial parent may live in a state with a relatively low cost of living in the south or midwest while the custodial parent and child live in a state with a high cost of living on the east coast. Is it appropriate to use the cost of living in the noncustodial parent's state? Because of these often substantial differences, there is the possibility of forum shopping.

IX. Conclusion

Congress has given the indication that it intends to remain a dominant force in the child support and other related areas. The Family Support Act requires a new Commission on Interstate Child Support Enforcement to report to Congress by May 1, 1991, on (A)

¹³¹ *Id.* at 8-4.

¹³² Brackney, *Recent Developments - Battling Inconsistency and Inadequacy: Child Support Guidelines in the States*, 11 HARV. WOMEN'S L.J. 197 (1988).

¹³³ Women's Legal Defense Fund, *Child Support Award Levels in Hypothetical Cases* 1 (1990).

¹³⁴ *Napolitano v. Napolitano*, 732 P.2d 245 (Colo. App. 1986)(mother and children lived in England where support ends at age 17, but father lived in Colorado and support ordered under Colorado law until age 21).

. . . improvements in the interstate establishment and enforcement of child support awards, and (B) revising the URESA.¹³⁵ The National Conference of Commissioners on Uniform State Laws is currently in the process of revising and substantially rewriting URESA.

A more serious worry of many is that Congress will use child support as the means to move into other areas that have traditionally been the province of the states, such as custody and visitation issues. At the time the 1984 Amendments were enacted, Congress passed a sense of Congress resolution that “. . . State and local governments must focus on the vital issues of child support, child custody, visitation rights, and other related domestic issues. . .”¹³⁶ After witnessing the vast nationwide changes in child support establishment and enforcement, the fear that Congress may move into these areas appears founded. Lawyers, judges, legislators, and others involved in these domestic issues must begin to address effectively problem areas surrounding these issues before Congress removes more domestic relations areas from state control and individual advocacy.

¹³⁵ P.L. No. 100-485 § 126(d)(2) (1988).

¹³⁶ 1984 Amendments, *supra* note 5, § 23, 98 Stat. 1305, 1329-30.