

THE GUIDELINES REVIEW PROJECT: A Primer for the Participant

PART ONE Purpose

Section 40-5-209 of the Montana Code Annotated (MCA) delegates to the Child Support Enforcement Division (CSED) the duty to develop, publish and circulate child support guidelines for use by courts, attorneys, parents and others to determine child support obligations. Also delegated to the CSED is the duty to review the Montana child support guidelines at four-year intervals. The primary and most important goal of the review process is to ensure that the guidelines continue to meet the needs of Montana's children and their parents. Once this is accomplished, the review process will, to the extent possible without infringing upon the primary goal, attempt to make the guidelines user friendly by the community of persons who must apply them to specific circumstances. The CSED is currently conducting the quadrennial guideline review.

At various times during the review process, members of the public, state legislators, attorneys, judges and other interested persons and groups may participate in the process. However, many of the potential participants may not have sufficient understanding of guidelines and related issues to allow an active role in the review process. Therefore, to assist these persons, and provide the agency with more input, the CSED has prepared this primer.

The purpose of this primer is twofold. The first is to educate the reader about child support guidelines in general. This will include a description and a comparison of the guidelines currently in use by other states as well as in Montana. The second purpose is to give the reader a critical overview of the economic concepts underlying existing guideline models and how the concepts may affect the equities of a particular case.

PART TWO Introduction to Guidelines

Formulas for determining child support are not new phenomena. In 1975, Congress passed Title IV-D of the Social Security Act, which required each state, as a condition of receiving federal welfare funds, to operate a child support enforcement program. The state child support enforcement offices established under the auspices of the Act became known as "IV-D agencies" (say 'four-dee') and the cases worked by these agencies were called IV-D cases. In the late 1970s, the code of federal regulations (CFR) at title 45, section 302.53 – since repealed – required state IV-D agencies to have some sort of formula for establishing support orders in IV-D cases only. In those early days of the IV-D program, the concentration of activities was on low-income families receiving cash assistance through the Aid to Families with Dependent Children (AFDC) program or those on the verge of requesting assistance. In essence, the regulation was targeted to apply in welfare and welfare recovery cases.

The object of formulas developed pursuant to 45 CFR 302.53 was to recover from the absent parent the amount of AFDC paid to the child and the child's custodial parent. If the absent parent could not repay the AFDC amount, the IV-D agency applied the formula to determine how much the parent could pay. In non-AFDC cases, the formulas established support as if AFDC had been paid to the child and custodial parent. There was no pretense, in these early formulas, of meeting the needs of children except as those needs related to AFDC paid or payable for a child. Because the custodial parent was assumed to have little or no income, these formulas generally did not count the income or income potential of the custodial parent as a factor in determining how much the absent parent should pay for child support. Likewise, there was apparently little consideration given to the advisability of applying low-income formulas to middle and high-income cases. For further discussion of this issue, see the Oregon court case *Smith v. Smith* 626 P.2d 342 (Or. 1981).

Federal regulations did not require IV-D agencies to actually use the formulas and it would appear that most did not. Many states, like Montana, instead applied other law such as MCA §40-5-221 that made the absent parent, without regard to ability to pay and without reference to formulas, 100 percent liable for repaying the full amount of AFDC paid to the child and child's custodian. During that time, only the State of Delaware had a guideline that applied to all cases statewide. The formula developed in the 1970s by Judge Elwood Melson of the Delaware Family Court is known as the Melson formula.

The first federal involvement in statewide child support guidelines came with the Child Support Enforcement Amendments of 1984, which provided for *advisory* guidelines to determine appropriate amounts of support. Congress gave the various states three years to develop and implement numeric guidelines and make them available to all judicial and administrative officials charged with setting support orders. Congress intended for these new guidelines to apply to all support cases including middle and high-income cases and without regard to whether a case was IV-D or non-IV-D. Because the guidelines were advisory, the courts were free to use them or not as they saw fit. Some states, like Montana, actively embraced the new guidelines while others ignored them.

In early 1984, to assist both the federal government and the states with the development and implementation of guidelines, the House Ways and Means Committee requested creation of a national advisory panel on child support guidelines. With the availability of federal funding, the National Center for State Courts undertook the task of establishing the panel; it became known as the "Child Support Project."

The Child Support Project was made up of individuals with a balance of interests, including government officials, representatives of custodial and non-custodial parents, a legal scholar and an economist. Dr. Robert Williams, principal in a private consulting company known as Policy Studies, Inc., was the prime investigator for the project. The final report, issued in 1987, consisted of recommendations to Congress for legislation on child support awards and recommendations to the states regarding the development of guidelines.

As part of its study, the Child Support Project reviewed two existing child support formulas/guidelines that were in use by the states of Delaware and Wisconsin. The Delaware guideline is, of course, the Melson formula noted above. The guideline from Wisconsin, called the percent of income model, is one version of a variety of formulas developed pursuant to 45 CFR 302.53 for use in recouping AFDC payments made on behalf of a child. While the Wisconsin model was not originally intended for use in all family support matters, it was thought by some to be adaptable to all cases. Of these two guidelines, the Child Support Project's final report recommended the Melson model for implementation by the states. The panel did not recommend the Wisconsin percent of income model.

In addition to the Melson model, the advisory panel recommended its own newly developed model, called income shares, which was based on the existing Washington state guidelines and Dr. Williams' adaptation of economic data contained in Thomas Espenshade's study, *Investing In Children: New Estimates of Parental Expenditures*.¹ The study relied upon expenditure data from the 1972-73 Consumer Expenditure Survey (CEX).

The income shares guideline is based on the assumption that a child should be supported at the same level of spending after family dissolution as he/she received when the family was intact. In determining child support, the parents' income is combined to replicate total income in an intact family. This amount is matched to economic estimates - Williams' adaptations - of how much an intact family with the same income and number of children would allocate to spending on the children. This estimated amount is then prorated between the parents according to each parent's share of combined income.

The income shares model lies in sharp contrast to Wisconsin's percent of obligor income guideline. As previously noted, the original Wisconsin guideline was intended for use in welfare and welfare recovery cases. To reach that goal, the guideline treated child support as if it were a form of user-related tax. The non-custodial parent was assessed the tax, based on his/her gross income and the number of children: 17% for one child, 25% for two, and so on, up to 34% for five or more children. The proceeds were used to reimburse AFDC benefits paid by the state and federal government, or, if applicable, were passed on to the child's custodian in non-assistance cases. This child support tax was withheld from the non-custodial parent's wages just as federal and state income taxes were withheld. Because it was a flat rate tax per number of children, with no exceptions, this method originally worked quite well. As the non-custodial parent moved from job to job or earned fluctuating amounts of income, a simple and constant percentage was withheld from earnings and paid over to state child support authorities.

When the 1984 child support amendments mandated the development of guidelines for application to all child support cases, Wisconsin simply extended use of its taxation method to all cases statewide. This extension was made without any adjustment to the percentage of income

¹ Williams, Robert G. Ph.D, and the Advisory Panel on Child Support Guidelines, *Development of Guidelines for Child Support Orders: Advisory Panel Recommendations and Final Report* prepared under a grant to the National Center for State Courts from the Office of Child Support Enforcement, U.S. Department of Health and Human Services, September, 1987, p. II-19.

taxed to the non-custodial parent. It was also made without any consideration of the custodial parent's income, even where it was sufficient to pay a share of the child's costs. In short, the guideline taxed non-custodial parents at all income levels on the same basis as it previously taxed low-income non-custodial parents when the guideline was targeted at welfare and welfare avoidance cases.² This single-minded limitation was one of the reasons the Child Support Project did not recommend Wisconsin-type guidelines.

The Melson guideline combines attributes of both the Wisconsin guideline and the income shares model. Melson calculates child support in three steps: first, after reductions for taxes and other mandatory deductions, each parent's income is reduced by a self-support reserve. The reserve is intended to allow each parent enough income to maintain minimum personal subsistence before paying support. Judge Melson, the author of the guideline, reasoned that without an allowance to meet at least basic subsistence needs, the parent would not be able to hold suitable employment and thus would not be a viable source of income for the child.

The second step is to establish each child's primary support allowance. Like the parental self-support reserve, the primary support allowance represents the minimum amount required to provide subsistence level support for the child. Both the self-support reserve and the primary support allowance are based on the federal poverty guidelines, updated annually by the Census Bureau and issued each year by the U.S. Department of Health and Human Services. Third, if any parental income remains after deducting the self-support reserve and the parent's share of the child's primary support allowance, a percentage of the remaining income is added to the support obligation. This last step is called the standard of living adjustment (SOLA) and is intended to allow the child to share in the parent's standard of living.

Four years after requiring the states to adopt *advisory* guidelines, Congress passed "The Family Support Act of 1988," which gave the states one year to develop and implement *mandatory* guidelines. No longer was the use of guidelines left to whim or chance. After the implementation date, the new law required that all child support orders entered by a court or state agency must be based on the state's guidelines.

With the change from advisory to mandatory guidelines, federal rule makers also required there be a legal presumption, in each state, that the amount of support resulting from application of the guidelines is the correct amount. If the support order was set at a different amount, specific findings regarding the reason for deviation were required. Another regulation

² For additional information concerning the underpinnings of early Wisconsin guidelines, see: Garfinkel, Irwin "The Evolution of Child Support Policy," *Focus*, Vol. 11. No. 1, Spring, 1988, University of Wisconsin-Madison, Institute for Research on Poverty, p. 13.

Institute for Research on Poverty, University of Wisconsin-Madison, "Documentation of the Methodology Underlying the Cost Estimates of the Wisconsin Child Support Program," Child Support Technical Papers, Volume III, SR32C, Special Report Series, 1982, pp.143-144.

Institute for Research on Poverty, University of Wisconsin-Madison, "Child Support: A Demonstration of the Wisconsin Child Support Reform Program and Issue Papers," Volume II, SR32B, Special Report Series, 1981, p.51

required there be only one set of guidelines for each state. In addition, federal rules required that guidelines be numeric, provide for children's health care needs, be reviewed every four years and provide a standard for modification such that a difference between the amount of the support order and the amount resulting from application of the guidelines would be sufficient reason for further review of the support order. This last provision included the exception that states could set a reasonable threshold for determining if the difference was sufficient to justify further review of the order. Beyond these specific requirements, federal rules allowed states to adopt any model of guidelines and to implement it by judicial, administrative or statutory means, as long as it applied to all child support cases in a state, including those settled by agreement of the parties.

In addition to requiring the use of guidelines, the Family Support Act of 1988 funded two studies. The first, undertaken by economist, David M. Betson, was to detail "the patterns of expenditures on children in two-parent families and single-parent families where the custodial parent was either divorced, separated, or never married."³ Published in 1990, this study was based on data from the national Consumer Expenditure Survey (CEX) of 1980-86, and updated the economic basis of the income shares guideline originally developed by Dr. Robert Williams, which relied on data from the 1972-73 CEX.

The second study funded by the Family Support Act, "Estimates of Expenditures on Children and Child Support Guidelines"⁴ reviewed and reported the results of Betson's study but also reviewed the results of many other relevant studies concerning the expenditures made on children and the effect of separation and divorce on household standard of living.

Pursuant to the federal requirements, guideline implementation groups in the various states considered, modified, and adopted versions of all three of the models described in the 1987 Child Support Project report. According to Laura Morgan's *Child Support Guidelines: Interpretation and Application*, (2003 supplement) some 35 states (including Washington, D.C.) have adopted the income shares model; fourteen states adopted some version of the non-recommended Wisconsin percent of income guideline; and, three states use the Melson model of child support guidelines.⁵

Many have wondered why so many states adopted the income shares guideline, an untested theoretical child support model, when many states had at least informal, *advisory* rules in use prior to the federal requirement for guidelines. The most likely explanation seems to be that, given only one year to develop and adopt *mandatory* child support guidelines, most states, opted for the guideline model developed by the Child Support Project, i.e., the income shares model. With little or no effort on the part of the states, adoption of this model gave them not only a recommended guideline but, one based on what appeared to be a credible, current study setting

³ Betson, D.M. 1990 "Alternative Estimates of the Cost of Children from the 1980-86 Consumer Expenditure Survey." Institute for Research on Poverty, Special Report 51, University of Wisconsin-Madison.

⁴ Lewin/ICF. 1990. "Estimates of Expenditures on Children and Child Support Guidelines." Report submitted to the U.S. Department of Health and Human Services, Washington, D.C.

⁵ Morgan, Laura W., *Child Support Guidelines: Interpretation and Application*, New York: Aspen Publishers, Inc., 2003 Supplement

the level of the support variables. States obviously had little time to independently question the economic basis for the income shares model.

The same question can be asked of states that adopted the non-recommended percent of income guideline used by Wisconsin. Why would so many states adopt a model that considered almost none of the factors recommended by the Child Support Project? The easy answer is simplicity. For those states that chose not to invest the time and money necessary to develop their own, the original Wisconsin guideline was carefree and extremely easy to use. Child support could be calculated as a flat tax on all non-custodial parents with no exceptions to its application or consideration for additional features found in other guidelines. Provisions for expenses such as childcare, health insurance, and extraordinary expenses, often called “add-ons,” were not a part of the guideline and did not affect the percentage the non-custodial parent was required to pay. In short, because the early Wisconsin guideline considered so little, it was extremely simple to use.

Unfortunately, for many of the states that adopted a percent of income guideline, necessity caused them to lose a goodly portion of the simplicity. In its original application to welfare repayment cases, there was no need for the guideline to consider added features. However, when the guideline was extended to all cases statewide, especially in middle and upper income cases, the need to consider add-ons became apparent. Equally apparent was the need to make adjustment for shared and split custody cases as well as extended visitation. Consequently, the guideline was subject to a process of amendment to reflect those and other concerns. To effectuate some of the amended provisions it became necessary to gather financial information from the custodial parent. Some of the revisions even went so far as to include the income of the custodial parent. Others moved from using only gross income to basing child support on net income. Approximately 14 states currently use the percent of income model, according to Laura Morgan, half of which use a flat percentage rate and half a percentage rate that varies with income.⁶

For a feature-by-feature comparison of percent of income, income shares and Melson guidelines, please refer to Table 1, below, at page 14.

PART THREE

Other Guideline Concepts

As described in Part Two, there are three conceptual models for child support guidelines now in use by one or more states: 1) a Wisconsin type percent of income model; 2) the income shares model; and 3) the Melson model. In addition, there are three other models that should be

⁶ This statement is based on Table 1-3, identifying the guidelines model adopted by each state, in Morgan’s *Child Support Guidelines: Interpretation and Application* (see Reference section in this report). The number of percent of income states with a variable percentage rate applied to income is disputed by R. Mark Rogers, who counts only two states in that category. Rogers is an economist and member of the 1998 Georgia Commission on Child Support, who consults on child costs.

mentioned here. None of the additional three are currently in use by any state; however, they include concepts worth discussion. In brief, the three additional models are:

1) Income Equalization Model: the economic burden of household dissolution, or non-formation, is distributed equivalently between the parents in this model. The goal is to equalize the standard of living in the parents' post-separation households. To do so, the income of each parent is allocated between the households based on the number of persons in each. Consider an example where mother has annual net income of \$12,000 and residential custody of three children. Father has annual net income of \$22,000 and lives alone. The standard of living for mother and children is 65 percent of the 2003 poverty level for a family of four. Father is at 245 percent of the poverty level for a single person. To equalize the standard of living between the two households, father would have to pay the annual sum of \$10,800 - 49 percent of his net income - to mother. After this transfer, both households would have an equal standard of living at 124 percent of their respective poverty levels. If mother receives welfare benefits, rather than working outside the home, father would be ordered to pay \$13,850 annually or 63 percent of his net income. This order would effectively reduce father's standard of living from the original 263 percent of poverty to 98 percent of the poverty level for his household size.

One of the benefits of the income equalization approach is that it addresses the gender-gap in earnings between men and women, which can and does impair the ability of women to support their children, alone. Thus, the income equalization model is generally considered to include an element of spousal support, or alimony, as well as child support. Opponents point out that, in most states, spousal support is a matter determined on its own needs and merits and therefore should be considered separately from any determination of child support. Because the spousal support element combined with child support causes a high rate of income transfer from one parent to the other, opponents also suggest that it creates substantial, although different, disincentives or disinclinations for the parents to earn income for the children. Since the income equalization model was introduced in the early 1980s and has yet to be adopted by any state, it appears the opponents' arguments have prevailed. As a practical matter, the political climate in most states would likely prevent guidelines from mandating income transfers of the size necessary to accomplish true income equalization.

2) Marginal Expenditure Formula: Recently released by the American Law Institute (ALI), an affiliate of the American Bar Association, is a child support guideline model, known as the Marginal Expenditure Formula. Because of the influential standing of the ALI in the legal academic community, this model bears watching for future consideration. It appears the model is an enhanced income shares formula based, generally, on the Massachusetts' child support guideline. The ALI model deviates from the typical income shares model in two important respects: it provides a self-support reserve for the child's household and it includes a supplement designed to enhance the likelihood that the child will enjoy a minimally adequate standard of living and avoid a standard of living substantially inferior to that of the nonresidential parent. It appears that the result will achieve approximately equal living standards in many cases and minimize the living standard disparity in the remainder.

3) Cost Shares Model: The cost shares model originated with Donald J. Bieniewicz, an economist with the Children's Rights Council (CRC), in the mid-1990s.⁷ It is based on parents sharing actual child costs, some of which are determined by the Consumer Expenditure Survey (CEX) of single-parent households. This is the same survey upon which the income shares and percent of income models base their estimates of child costs, as discussed earlier. Those models, however, use an indirect method of estimation while the cost shares model uses data from the USDA annual report, *Expenditures on Children by Families*, which allocates actual expenditures among family members. Some of the categories of data - clothing, child care, and education - are child-specific expenditures which are simply divided by the number of children in the household. Expenditures such as food and health care are allocated according to research, which determines each family member's share.

The remaining categories of housing, transportation, and miscellaneous, for which there is no research base, are allocated, by USDA, on a per capita basis. Per capita means equal allocation to each family member, a method that is thought to overestimate child costs, but, according to the USDA, has fewer disadvantages than a marginal cost method, which focuses on the incremental cost of adding a person/child to an existing household. The Cost Shares model, however, substitutes Department of the Interior cost estimates for housing and husband-wife data as a proxy for single parent data in transportation and miscellaneous costs instead of the per-capita allocation by USDA.

The costs shares guideline also is distinguished by its use of the parents' *average income* to determine the level of child costs to incorporate into the formula. By contrast, the income shares model uses the *combined income* of parents when determining the support amount. Consider, however, that neither parent lives at the level of combined income because they no longer live together and it becomes clear that average income is the more realistic approach.

Perhaps the most significant feature of the cost shares model is the crediting of child-related income tax benefits directly against the cost of the child before the remainder is shared by the parents. By calculating the actual tax liability of each parent, based on standard amounts for exemptions and deductions, the amount of tax benefits accruing to the residential parent because of the children is determined and used to reduce the level of child costs in the child support calculation. Only the remaining costs, those not offset or reimbursed in some way, are shared by the parents. This feature is in substantial contrast with all other guideline models.

It is interesting to note that the cost shares model has a self-support reserve for each parent that is deducted from income before calculating child support. The federal Office of Child Support Enforcement recommends that all states adopt guidelines that similarly provide for a

⁷ See Donald J. Bieniewicz, "Child Support Guideline Developed by Children's Rights Council," Chapter 11, *Child Support Guidelines: the Next Generation*, U.S. Department of Health and Human Services, April 1994, pp. 104-125.

self-support reserve.⁸ The recommended amount of the cost shares self-support reserve is 133 percent of the poverty guidelines for a single person.⁹

Finally, the cost shares model recognizes the variable costs that travel with the child when the child moves from one parent to the other for visitation or alternate parenting periods. Variable costs are those expenses that effectively follow the child from one parent's home to the other; items like food and entertainment costs. Fixed costs, on the other hand, refer to overhead-type expenses such as mortgage/rent payment or car payments that are due each month regardless of whether the child currently resides in the household. Other guidelines use thresholds of 90 to 110 days per year, during which the non-custodial parent's costs of parenting are ignored. Under cost shares, with no visitation threshold, each parent owes the other for each day the child is with the other parent, leaving no period in which the NCP's parenting costs are not considered. If the NCP parents the child ten days per year, the custodial party pays child support to the NCP for those ten days and the parents' obligations are offset.

PART FOUR Guidelines in Montana

Montana's first attempt to develop state wide child support guidelines occurred in 1984 when Governor Ted Schwinden established the Montana Child Support Advisory Council. The Council was created in compliance with the Child Support Enforcement Amendments of 1984, which, as discussed earlier, required states to develop advisory guidelines providing a numerical formula for the setting of child support amounts.

The Council consisted of eight members appointed by the Governor. The members included a district court judge, a state legislator, a non-custodial parent, a custodial parent, a representative from a child's rights group, a representative from Montana's Indian tribes, a welfare worker, and an employee of Montana's Child Support Enforcement Division (CSED). Also included, but not as members, were support staff, including an attorney.

To develop a guideline for Montana, the Council first examined those guidelines already in use by other states, i.e., the percent of income and Melson models. The Council also considered the newly developed but untested income shares model.

Of all the models, the Council considered the Wisconsin percent of income the easiest to

⁸ U.S. Department of Health and Human Services, Administration for Children and Families, Office of Child Support Enforcement, *State IV-D Program Flexibility with Respect to Low Income Obligor's Imputing Income; Setting Child Support Orders and Retroactive Support; Compromising Arrearages; Referral to Work-Related Programs and Other Non-Traditional Approaches to Securing Support*. Policy Interpretation Questions (PIQ)-00-03, Washington, DC, September, 2000.

⁹ For use in all guideline models, a self-support reserve of 133 percent of the poverty threshold is the recommendation of an appointed panel on medical child support reporting to the Department of Health and Human Services and Department of Labor. See Department of Health and Human Services, *21 Million Children's Health: Our Shared Responsibility*, The Medical Child Support Working Group's Report? June 2000, p.70.

use. However, the council rejected it for lack of fairness and equity. The Council considered the Melson formula next and found it to be the most fair and equitable of the models but rejected it because it appeared to be more complex to use. The income shares model appeared to be a compromise between the two. It also appeared to be based on recent information on child-rearing costs. Therefore, without time to consider other possibilities, the Council settled on the income shares model, as did most other states. The Council petitioned the Montana Supreme Court to enact rules to adopt the income shares model, which it did, in January 1987.

With passage of the Family Support Act of 1988 and the requirement to adopt and use mandatory guidelines, states were also required to periodically review and update those guidelines. The 1989 Montana Legislature delegated this task to the CSED when it enacted §40-5-209, MCA. By administrative rule, dated July 1990, the CSED adopted a slightly modified version of the Supreme Court guidelines.

After several years experience as the highest volume user of guidelines in Montana¹⁰, the CSED became aware of the inadequacies of the income shares guideline model. For one, the guideline did not adequately consider very low-income families and very low-income payers of support. It also did not adequately provide for serial families, blended families, split and shared custody situations and similarly complex but common cases. There was also a sense among CSED caseworkers that the guideline resulted in support orders that exceeded the ability of low and middle-income parents to pay.

In an attempt to find solutions, the CSED contacted the American Bar Association's Center on Children and the Law. A representative from the organization came to Montana to provide technical assistance to the CSED.¹¹ That effort ended in the conclusion that the income shares model did not provide an adequate foundation for addressing complex family cases. Instead, it was determined that, of all possible model guidelines, only the Melson model provided a suitable foundation to correct the totality of problems experienced by the CSED when applying the income shares guideline. Consequently, in July of 1992, the CSED discarded the income shares guideline and adopted an entirely new guideline based on a modified version of the Melson formula.

Subsequent to adoption of the Melson type guideline and as part of its first periodic review, the CSED contracted with the University of Montana's Department of Community and

¹⁰ The CSED is currently responsible for entering over 50 percent of all child support orders in the State of Montana, including orders issued by the District Courts.

¹¹ The representative from the ABA Center for Children and the Law later used her experience in working with Montana as the basis for an article published in the Fall, 1992 issue of Family Law Quarterly, 26 Fam. L. Q. 171 (1992). Entitled, "Improving Child Support Guidelines: Can Simple Formulas Address Complex Families?," the article concluded that Montana's new version of the Melson formula was the guideline best suited to handle both the complex family cases as well as those involving low-income parents. A similar conclusion was reached by the American Bar Association's Presidential Working Group on the Unmet Legal Needs of Children and Their Families in its report, "America's Children at Risk: A National Agenda for Legal Action", published in July 1993 by the ABA.

Governmental Studies (DCGS) in the fall of 1995. The DCGS joined with The Center for the Support of Families in Denver, Colorado, to organize a study team. The objective of this impartial study team was to examine the adequacy and effectiveness of the new, modified Melson guidelines. The study team was also to make a recommendation as to whether the CSED should retain that guideline for continued use in Montana.

As part of the project, the study team conducted interviews with district court judges, family law attorneys, state legislators and various advocates on all sides of the child support issue. On several occasions, the study team solicited written and oral comments from all members of the judiciary, the bar, the state legislature, and the general public. While there were complaints about the perceived complexity, the consensus of this oral and written commentary was that the CSED should retain the modified Melson guidelines.¹² The majority was unwilling to sacrifice the fairness, the equity, and the versatility achieved by the guidelines even though it would take more effort to apply them. As another result of the commentary, the study team suggested several changes to make the guidelines easier to use without losing the equity. The CSED adopted most of those suggestions, which, in turn, caused a general revision of the guideline rules to incorporate them. The revised rules became effective November 1, 1998.

The Melson guideline allows each parent to retain sufficient income to meet basic, personal needs, i.e. the self-support reserve. The Montana version of Melson sets the self-support reserve at 130 percent of poverty. The reason for having a self-support reserve is obvious. A parent that cannot meet his or her own basic needs is not a viable source of income for child support because the parent will likely not be able to hold a job. For example, a parent must have a sufficient diet to fuel the physical demands of employment; transportation to and from the job site; and, facilities for personal grooming appropriate to the employer's needs. If a low-income parent is not allowed to keep income sufficient to pay these expenses, the likelihood of the parent being able to acquire and maintain employment is substantially reduced.

PART FIVE

A Critical Review of the Three Conceptual Models

More than a decade has passed since the inception of mandatory guidelines and a multitude of reports, studies and other published analyses of child support guidelines are currently available. A review of those publications indicates there is unrest in the child support community, regarding guidelines. The following summarizes a selection of this material. Readers will find references in the attached bibliography and will also find many at www.guidelineconomics.com. The website is operated by R. Mark Rogers, an economist, formerly of the Federal Reserve Bank of Atlanta and a member of the Georgia Commission on Child Support. Rogers has authored a number of articles focusing on the shortcomings of both the income shares model and the Wisconsin-style percent of income model.

¹² Department of Community and Government Studies, Center for Continuing Education and Summer Programs, University of Montana and The Center for the Support of Families, *Montana Child Support Guidelines Review*, submitted to the Child Support Enforcement Division, Montana Department of Public Health and Human Services, May, 1996.

Although modified from its original version, the percent of income model is one of the oldest guidelines in continuous use in the country and it will be considered first. Next, we will discuss the income shares model and, finally, the Melson formula.

A. Percent of Income Model

As discussed above, the percent of income model originated in Wisconsin as a form of flat tax applied to the gross income of non-custodial parents, required to reimburse the state for welfare benefits paid on behalf of their children. The non-custodial parent's gross income was multiplied by the applicable percentage, based on the number of children for whom support was to be calculated. There were no exceptions or add-ons considered. When Wisconsin extended its guideline to all cases, statewide, the simple guideline was amended to reflect factors not considered by the original version. Since that time, thirteen other states have adopted the model and many have revised it in an attempt to meet the needs of their citizens. Because there are so many differing versions of the percent of income model, we will focus primarily on the Wisconsin guideline.

In its preamble, the Wisconsin guideline purports to be founded on an economic study by Jacques Van der Gaag, entitled *On Measuring the Costs of Raising Children*. In his work, Van der Gaag recognized the principle that as net income increases, the percentage spent on children declines. This principle is so well established in the economic community as to be axiomatic. However, the Wisconsin guideline applies the same percentage across the board to all levels of gross income, i.e., the high-income parent pays the same percentage as the low-income parent. Coupled with the practical effect of progressive tax rates, the higher income parent will pay a higher percentage of net income than the lower income parent; just the opposite of Van der Gaag's economic principle. Thus, at higher income levels, the Wisconsin guidelines can create an unjustified windfall for children and custodial parents. As noted by the Wisconsin courts, the presumptive application of the percentage standards in high-income families is irrational, absurd, and spousal maintenance (alimony) in the guise of child support. (e.g. *Parrett v. Parrett* (Ct. App. 1988); *Huber v. Huber* (Ct. App. 1990); and, *Nelson v. Candee* (Ct. App. 1996)) According to R. Mark Rogers, "current obligor-only guidelines violate almost every assumption of the underlying Van der Gaag study."¹³

Other criticisms of the Wisconsin guideline include its reliance on gross income, although approximately half of the fourteen states that adopted it now base it on the non-custodial parent's *net income*. Further, there is no self-support reserve built into the Wisconsin guideline and, as a result, low-income non-custodial parents are often reduced to below poverty status after the payment of child support. Due to unequal taxation of the parents, whether divorced or never married, the use of gross income can result in the custodial parent enjoying a significantly higher standard of living than the non-custodial parent, after-tax and after-child

¹³ Rogers, R. Mark "The 'Cost Shares' Child Support Guideline: A Working, Superior Alternative To Current Guidelines" (Paper presented at 13th National Conference Children's Rights Council, Bethesda, Maryland, May 5, 2001) p. 2.

support. This is true particularly where the custodial party's gross income is higher than the non-custodial party. Consider the following example:

Mother has custody of the parties' two children. Her annual gross income is \$25,000; Father's annual gross income is \$17,500. Mother files taxes as head of household and claims all child-related tax benefits including the children's tax exemptions, earned income tax credit, child tax credit, and dependent care (child care) tax credit. Father files single with one exemption.

Using 2003 tax rates, the value of Mother's tax advantage from filing status, exemptions and tax credits, all child-related, is approximately \$4,357. Consequently, Mother has after-tax income of \$24,202. Father has after-tax income of \$14,513.

Applying the Wisconsin percent of income guideline to determine support for the two children ($25\% \times \$17,500 = \$4,375$ per year) results in Father owing approximately \$365 per month to Mother.

When child support is added to Mother's after-tax income, she will have total income of \$28,577 available for herself and the children ($\$24,202 + \$4,375$). Comparing her income to the 2003 federal poverty level for a household of three, she and the children will have a standard of living equal to **208%** of the poverty level. Father's after-tax, after-child support income will be \$10,133, which is **96%** of the poverty level for one person.

Further compounding the problem is the limited application of the Wisconsin guidelines to the non-custodial parent. Van der Gaag's, and similar economic studies, are based on family consumption in intact households. As used in those studies, household income includes the income of both parents. Therefore, it is the combined income of the parents that determines the percentage the family spends on children. It is this combined level of expenditure on children that properly determines the share that should be allocated to the non-custodial parent. Accordingly, to determine the percentage of income a non-custodial parent should pay as child support, sound economic principles require the custodial parent's income as part of the equation.

Finally, a criticism directed at both percent of income and income shares guidelines, because they both rely upon percentages of income spent on children by intact families, is that, upon separation, the family loses the economies of scale it enjoyed when all lived together in one household. In other words, the parents will now have to support two households, each with its expenses for rent, utilities, food, and so on, with the same amount of money they previously spent to support one household. This is the fallacy of what have come to be known as "continuity of expenditure" guidelines. The parents, now each supporting their own household, do not have the same amount of income available to spend on their children as when they lived together because more of it is spent on overhead items like shelter. In addition, the non-custodial parent

no longer sees the child-related benefits of the federal income tax, which now all go to the custodial household. The NCP is expected to pay support in an amount equal to the support previously provided to the intact household, with reduced earnings and increased expenses. Obviously, it cannot be done.

The Advisory Panel on Child Support Guidelines¹⁴ recommended that all guidelines make some provision for eleven specific factors. The recommended factors and consideration given them by the three guidelines reviewed here are shown in Table 1.

Table 1: Factors Considered in Child Support Guidelines

Factors	Percent of Income	Income Shares	Melson
Specification of income: gross or net	Yes (gross)	Yes (either)	Yes (net)
Imputed income	Yes	Yes	Yes
Custodial parent income	No	Yes	Yes
Child's age	No	No	No
Child care expenses	No	Yes	Yes
Support obligations for other dependents	Yes	Yes	Yes
Income of current spouse	No	No	No
Custody arrangements	Yes	Yes	Yes
Obligor self-support reserve	No	Yes	Yes
Medical costs	No	Yes	Yes
Geographic variation	No	No	No
Total factors considered	4	8	8

The percent of income guideline considers only four of the recommended factors, which is an improvement over the guideline's modest beginnings, but still only half the number of factors considered by the income shares and Melson guidelines.

B. The Income Shares Model

Of the three conceptual models for child support guidelines now in use, the income shares model is used by more states than any other. Its initial premise is simple. The cost of raising children is allocated based on each parent's share of combined income. As a concept, the income shares model appears to avoid many of the criticisms directed at the Wisconsin percent of income guidelines. However, it is not totally free from complaint and it appears there is a growing body of dissatisfaction with the model.

As used in the income shares model, "child costs" are not the amount a parent actually spends on a child. Rather, "child costs" reflect the amount needed to restore the parents to a pre-

¹⁴ Williams, Robert G. Ph.D, and the Advisory Panel on Child Support Guidelines, *Development of Guidelines for Child Support Orders: Advisory Panel Recommendations and Final Report*, 1987.

child standard of living. Reasoning that, in a two-adult household, the adults will spend X amount to live at Y standard of living, the question is how many additional dollars are needed to maintain the two adults at the same Y standard of living, when a child is added to the household. Those additional dollars, according to the designers of the income shares model, represent the cost of the child.

As the basis for its guideline, the designers of the income shares model began with what is known as an “income equivalence” measure. Income equivalence measures were developed by economists over 100 years ago to answer a specific question: how much income is needed for different family types -varying by number of adults and number of children - to have the same standard of living? For example, those studies attempted to quantify how much income a two-parent family with one child needs to have the same standard of living as a two-adult household without children. The designers of the income shares model then adapted the original income equivalence measures to answer the question: how much income is needed to restore the standard of living to a family’s pre-child level? This restoration amount is deemed to be the cost of the child.

The adaptation of income equivalence measures to child support guidelines relies on one of two methods. The first is referred to as the “Engel” method, which made family spending on food a measure of the family’s standard of living. Then, it compared how much additional income would be necessary, after the addition of a child, to restore the family to its earlier share of spending on food, thereby restoring the family’s standard of living to its pre-child level.

The second method used to adapt income equivalence measures is the Rothbarth methodology. This method compares changes in levels of household spending on purely adult goods to determine child costs. The concern about adults shifting their spending between adult-only goods and goods shared with the child, argued for the use of adult-only goods to measure change in wellbeing. A variation of this method, known as the Betson-Rothbarth estimator, uses a particular bundle of adult goods to measure household standard of living. Under this method, child costs are defined when spending on adult clothing, alcohol, and tobacco are equal for families with and without children. It is this Betson-Rothbarth method that is the basis for many of the revised versions of the income shares model.

The income shares methodology ignores the budget constraints faced by families with children. In real life situations parents do not make spending decisions based on some theoretical notion of extra income being available to restore parents to a pre-child level of wellbeing. Instead, the family will make decisions based on the same level of income they had prior to adding the child and will experience an overall decline in standard of living for each child added to the family. Thus, the percentage of family income spent on the added child will be less than estimated under the ideal circumstances of the income shares model and its presumed availability of extra income.

The choice of adult goods also leads to the overstatement of child costs. Not only are there spending constraints but there are also substitution effects. When a child is added to the family, parents will alter consumption to less expensive alternatives. Parents may also reduce the

rate of consumption or choose to consume fewer goods as a result of adding children. This is particularly true when considering the consumption of alcohol and tobacco, which parents may well decrease voluntarily after the addition of the first child. Thus, using a pre-child level of consumption of adult goods as the basis will cause an overstatement of child costs because parents do in fact consume less adult goods after adding children.

Income shares guidelines are based on studies of intact families. While, at first, this may seem reasonable, it does not make economic sense. When a formerly intact family splits into two households, there is considerably higher overhead as compared to the intact family. There are two sets of housing costs, utilities, insurance, transportation expenses, and so on. Given the same income, there is no way that two households can maintain the same standard of living as one intact, two-parent household. After paying necessary overhead expenses, each parent will simply have less income available for spending on children than that found in intact families. Notwithstanding this economic fact, the income shares guideline estimates child costs based on how many additional dollars are necessary to maintain the adult household standard of living at the pre-child standard. Since real dollars are less available in split households, this method of estimating child cost depends on the availability of “phantom” income. Without imposing a disproportionate burden on the parent to reduce his or her standard of living beyond that expected by family dissolution, how can a parent be expected to pay phantom dollars for child support?

Guidelines based on intact family data do not take into account extra adult overhead that occurs in divorced and unwed situations. They do not consider the actual costs of children and they depend on “phantom income” to pay child support. Common sense tells us that tracking adult consumption of items such as adult clothing, alcohol, and tobacco is not an appropriate method for estimating child costs. Such methodology fails to reflect real life situations.

Another problem is, like the Wisconsin guideline, the income shares model does not include an up front self-support reserve. The effect of income shares guidelines on low-income parents was part of a study,¹⁵ undertaken by Indiana University Department of Economics. The Indiana study found, using data gathered for the year 1999 from those states with an income shares model guideline, that the non custodial parent is required to pay, on average, 24.9 percent of net income for child support. To illustrate the harsh effect of this support level on low-income parents, consider this example, noted in the Indiana study. The non-custodial parent earns \$720 per month (annual net income of \$8,640, an amount that exceeded the 1999 poverty level by \$420 per year). The custodial parent earns \$480 per month. In this example, a payment of 24.9 percent will reduce the non-custodial parent from an income level above poverty to a level at 79 percent of poverty. If we support a public policy that everyone is entitled to live at no less than the poverty level, then we have, through the application of an income shares guideline, thwarted that policy.

¹⁵ Maureen A. Pirog, Professor and Chair, Public Policy Analysis Faculty, Co-Director, IU Institute for Family and Social Responsibility and Environmental Affairs, Bloomington, Ind., “Presumptive State Child Support Guidelines: A Decade of Experience” *Policy Currents*, Vol. 12 No. 1 Spring 2003 (Retrieved from http://apsapolicysection.org/vol12_1/guidelines.html)

The Indiana study concluded that under such harsh circumstances as the example, there is a high likelihood that the non-custodial parent will avoid compliance with the support order, entirely. Setting child support at high levels initially looks good; children of low-income parents will indeed need that money. However, if the parent is unable to pay or can only make sporadic payments, the child will not benefit from a high support order. Accordingly, the study suggests that lowering child support to a level where the non-custodial parent can meet his or her *basic support needs* will increase the amount of money actually paid for child support.

C. Melson Model Guidelines

As noted previously in this discussion, the Melson formula is the only guideline that effectively makes poverty prevention a goal. It does so by setting basic child support and parental self-support reserves at a percentage of the federal poverty guidelines. If there is a weak link in Melson guidelines, it is use of the poverty figures as the baseline. The federal government uses the poverty guidelines as a measure of the relative wellbeing of the nation's citizens. As such, it determines the level of federal funding paid to states and individuals for food supplements and various welfare-related programs. The poverty level is a minimum standard of living politically recognized as the level we as a nation do not want our citizens to live below.

Unfortunately, no one knows for sure whether the standard of living established by the poverty guidelines does indeed provide a minimum subsistence standard for food, housing and other needs. Some critics of the guidelines say they understate a person's subsistence needs, while others claim they exaggerate those needs. There is no clear answer, although it is not uncommon that programs base eligibility on a multiple of the poverty level: food stamp eligibility, for example, is pegged at 130 percent of the poverty level for a given household size. Like the percent of income and income shares guidelines, the poverty guidelines are not based on actual costs or expenses of children. Rather, they are based on estimates of the costs determined by use of the Engel methodology. The major and only real value of using the poverty guidelines is their political acceptance as a standard of wellbeing. Obviously, the best method of setting a child support standard is to base it on the actual cost of raising children.

The State of Delaware, where the Melson guideline originated, recognized another problem related to reliance on the poverty level. When the state conducted the 1998 review of its guideline, it concluded that use of the poverty level as the basis for the current guideline "overestimates both the basic needs of children as compared to adults and the capacity of households to economize."¹⁶ That is, the poverty guidelines make no distinction between adults and children. The initial level for a one-person household is supplemented by a standard amount for each person added, whether child or adult, and regardless of the size of the household. A three-person household consisting of two adults and one child has the same value as a one adult, two children household. The Delaware review panel decided that children do not consume

¹⁶ See, ?The Family Court of the State of Delaware, Delaware Child Support Formula, Evaluation and Update, October 1, 1998,? Report of the Family Court Judiciary, the Honorable Vincent J. Poppiti, Chief Judge.

household resources at the same level as an adult. Therefore, assigning an adult value to the child causes an overstatement of child costs. The review also noted that the poverty guidelines assign a constant value no matter how many additional persons are added to the household, which is contrary to known and accepted economic principles that as households increase in size there are greater and greater economies of scale that can be achieved. Ignoring such economies of scale will, again, result in an overstatement of child costs in those larger families.

For these reasons, Delaware abandoned the federal poverty guidelines as a basis for its child support guideline variables. In its place, the Family Court selected an approach recommended by the National Research Council in its publication, *Measuring Poverty: A New Approach*.¹⁷ The approach begins with family expenditures for food, shelter, and clothing at the 30th to the 35th percentile of all family expenditures on those items as measured by the Consumer Expenditure Survey. Children are valued at seven tenths of an adult and there is an adjustment for the economies of scale possible with larger families.

The standard of living adjustment (SOLA), the final phase of the Melson guideline, consists of a percentage, increasing as the number of children increase, applied to income available at the point in the calculation where a parent has met his/her portion of the child's primary support. For example, a Montana parent with two children will pay 21% of income available for SOLA, whether the amount available in the child support calculation is \$5,000 or \$500,000. Because of the use of these flat rates, some of the criticisms that apply to the Wisconsin guideline can also be leveled at SOLA. That is, the effect of a flat tax rate is contrary to studies, which show that as parental income increases, the percentage of income spent on children decreases. Montana may want to consider a sliding scale instead of a fixed SOLA rate to comport with the economic evidence.

PART SIX

Conclusion

Having laid the foundation for the guidelines review, Montana's task is to choose the model that best meets the goals set by the state. In addition, federal regulations require consideration of economic evidence on the cost of raising children and analysis of data gathered regarding deviations from the guidelines in actual case records.

¹⁷ Citro, Constance F. and Robert Michael, (Eds.). 1995. *Measuring Poverty: A New Approach*. National Research Council, Washington, D.C., National Academy Press.

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