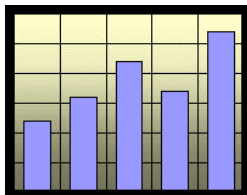

Economic Commentary on the Underlying Basis of Texas' Child Support Guidelines and Needed Directions for Study and Reform

July 12, 2006

**Submitted to:
Texas House Juvenile Justice and
Family Issues Committee
Austin, Texas**



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CHAPTER I

Executive Summary by Chapter

Chapter II—Child Support Guidelines: A Legal Presumption or Mere Public Policy?

Texas' child support guidelines are a legal presumption and should be held to standards for a legal presumption. A legal presumption should not be arbitrary. A legal presumption should be set aside (rebutted) when the case facts do not fit the presumed facts.

Chapter III—Background and Underlying Study of Texas' Child Support Guidelines

A review of Texas' child support guidelines finds that the Office of the Attorney General does not have readily available for the general public the economic basis for the state's child support guidelines. The underlying study can only be found based on the guidelines' economic characteristics and is found to be obligor-only guidelines with origins from a 1982 Wisconsin study by Jacques van der Gaag. From the underlying study, the guidelines are designed only to be applicable to low income cases for welfare recovery.

The guidelines' underlying study assumes: no income for the custodial parent, no parenting time for the obligor, the obligor is low income, the parents have available income as if they still live in the same household, the parents share child-related tax benefits as cost offsets, and the award is limited to the amount of the welfare payment to the custodial parent. The guidelines are inappropriately applied outside of these assumed circumstances based on the guidelines matching the characteristics of the 1982 Wisconsin study.

The guidelines underlying facts rarely fit case facts and should be set aside in nearly all cases.

Chapter IV—Overview of Key Economic Characteristics of Child Support Guidelines That Conform to Due Process and Equal Protection Standards

Key economic characteristics of sound child support guidelines include:

- Being based on economically valid child costs reflecting reduced available income due to both parents incurring household expenses in two separate households and with child costs declining as a percentage of net income as net income rises;
- Taking into account both parents' child costs associated with their own parenting time; and
- Treating child-related tax benefits as a cost offset to be shared by both parents.

Chapter V—Standard of Living Impact Analysis of Presumptive Awards

The child support guidelines currently in use typically generate awards that are much higher than would be the case if based on economically sound cost concepts and with an equal duty of support for both parents. These guidelines do not conform to equitable standard of living outcomes.

Specifically, current guidelines have presumptive awards that exceed child costs to such an extent that:

- In many cases where the custodial parent has significantly lower gross income than the non-custodial parent, the custodial parent still receives a significantly higher standard of living than the non-custodial parent.
 - In other cases where the custodial parent has significantly higher gross income than the non-custodial parent, the presumptive award boosts the custodial parent's relative standard of living rather than narrowing it.
- The inappropriate standard of living outcomes are due to three key factors:
- The presumptive percentages do not reflect child costs but instead are merely arbitrary income transfers.
 - Both parents' parenting time costs are not part of the presumptive calculation.
 - The child-related tax benefits are not shared proportionally between both parents and are a windfall to the custodial parent.

Chapter VI—Two Alternative Approaches to Child Cost Schedules that Take Into Account the Added Costs and Reduced Available Income of Maintaining Two Separate Households

Texas' child support guidelines are fixed percentages of obligor net income and conflict with professional studies that indicate that child costs decline as a percentage of net income as net income increases.

Texas should adopt more economically sound child costs that decline as a share of net income. However, most child cost studies use intact family data which overstates available income in divorce or never married situations. In these situations, two households are supported instead of one, reducing available income for other expenses—including child costs. There are two economic solutions to the presumption of intact family child costs not fitting case facts of divorced or never married parents:

1. Use single-parent child costs based on an average of the two parents' incomes, or
2. Make adjustments to the intact family data to reflect the additional adult overhead from two single-parent households compared to one intact household.¹

These alternatives would be Cost Shares or Income Shares adjusted with a second household discount.

Chapter VII—The Issue of Child-Related Tax Benefits as a Cost Offset

The child-related tax benefits received by custodial parents can include:

- head of household tax payer status,
- child dependency exemptions,
- child tax credits,
- additional child tax credits
- child care tax credits, and
- higher earned income credits for low-income working custodial parents.

Child-related tax benefits typically equal an extra \$100 per month in extra after-tax income per child. These child-related tax benefits should be cost offsets shared by both parents. Texas presumptively only allows the custodial parent to enjoy these cost offsets.

¹ More detailed discussion of these alternative methodologies can be found in *Alabama, Economic Report on Alternative Child Support Cost Schedules and Related Issues*, Advisory Committee on Child Support Guidelines and Enforcement, Administrative Office of Courts, Montgomery, Alabama, March 31, 2006.

Chapter VIII—The Issue of Parenting Time Adjustments

Without taking into account both parents' incurred child costs, child support guidelines do not apply a standard of equal duty of support. Additionally, the children are not supported in both households on the same basis.

Texas' guidelines assume that the non-custodial parent has no child costs. There is no built-in parenting time adjustment.

In contrast, Texas' custody law presumes joint legal custody with either significant standard parenting time or extended parenting time for the non-custodial parent. The presumptive child support guidelines conflict with Texas' custody presumption.

There are a number of ways that states presumptively take into account parenting time. The most economically sound parenting time adjustment is based on types of costs by categories for duplicated fixed costs (housing), non-duplicated fixed costs (clothing), and variable (time-varying) costs (food and transportation).

CHAPTER II

Child Support Guidelines: A Legal Presumption or Mere Public Policy?

One issue in particular creates substantial disagreement over what should be the appropriate features of child support guidelines. And that issue is whether such guidelines are legal presumptions designed to assure the correct amount of child support, or public policy choices designed to achieve a certain distribution of wealth. The author takes the position that child support guidelines are legal presumptions, and not public policy choices. When it is asked, for example, how long an unemployed worker should be eligible for unemployment benefits, a question of public policy arises. And when that determination is made from economic data, budget figures, and fiscal considerations, a public policy choice is made. But once this choice is made, the level of unemployment benefits is not presented in court as presumptive evidence against a litigant. Child support guidelines, however, are used as presumptive evidence in court against a child support obligor. There are stricter standards for legal presumptions than public policy choices.

The following summarizes key characteristics of a sound legal presumption for child support determination—the guidelines:

- Must be based on correct use of authentic economic data in their development;
- Must reasonably indicate in most cases an amount of child support due, assuming an equal duty of both father and mother to supply the reasonable needs of their children according to the resources available to each;
- Must be fully and fairly rebuttable;
- Shall not include arbitrary features; and
- Must be developed by responsible public authority on the basis of appropriate economic data and legal principles.

A key issue is whether Texas' child support guidelines confirm to these principles.

Documentation of these legal principles—with case citations—can be found in Appendix I.

CHAPTER III

Background and Underlying Study of Texas' Child Support Guidelines

Texas' child support guidelines work by applying a given percentage to obligor net income. From Texas' code:

Sec. 154.125. Application of Guidelines to Net Resources of \$6,000 or Less

(a) The guidelines for the support of a child in this section are specifically designed to apply to situations in which the obligor's monthly net resources are \$6,000 or less.

(b) If the obligor's monthly net resources are \$6,000 or less, the court shall presumptively apply the following schedule in rendering the child support order:

**CHILD SUPPORT GUIDELINES
BASED ON THE MONTHLY NET RESOURCES OF THE OBLIGOR**

1 child	20% of obligor's net resources
2 children	25% of obligor's net resources
3 children	30% of obligor's net resources
4 children	35% of obligor's net resources
5 children	40% of obligor's net resources
6+ children	Not less than the amount for 5 children

Section 154.126. Application of Guidelines to Net Resources of More Than \$6,000 Monthly.

(a) If the obligor's monthly net resources exceed \$6,000 per month, the court shall presumptively apply the percentage guidelines to the first \$6,000 of the obligor's net resources. Without further reference to the percentage recommended by these guidelines, the court may order additional amounts of child support as appropriate, depending on the income of the parties and the proven needs of the child.

(b) The proper calculation of a child support order that exceeds the presumptive amount established for the first \$6,000 of the obligor's net resources requires that the entire amount of the presumptive award be subtracted from the proven total needs of the child. After the presumptive award is subtracted, the court shall allocate between the parties the

responsibility to meet the additional needs of the child according to the circumstances of the parties. However, in no event may the obligor be required to pay more child support than the greater of the presumptive amount or the amount equal to 100 percent of the proven needs of the child.

Net resources are gross income of the obligor and excluding standard withholding for federal income taxes and Social Security taxes. The guideline percentages are fixed percentages of net income, varying only according to the number of children.

Text of Correspondence Requesting Documentation of the Underlying Study for Texas' Child Support Guidelines

The underlying facts of a legal presumption should be readily available. The underlying study for Texas' child support guidelines were requested.

Exhibit 1.

Ms. Amanda Crawford
Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, TX 78711

June 15, 2001

Subject: Request for information on study underlying Texas's child support guideline

Dear Ms. Crawford:

I am an economic consultant with one of my areas of specialization being child cost issues. I have a Texas client interested in this issue. As a result of the 1988 federal Family Support Act, each state was required to implement a statewide child support guideline based on economic data. I would like to obtain a copy of the economic study underlying Texas's current child support guideline. If the guideline is in essentially the same basic form as when initially implemented, I would like a copy of the underlying study that was the basis of the original implementation of the guideline. If possible, would you please forward a copy to the above address? If other steps are necessary to obtain this study, would you please notify me by mail or by email to the below address?

Sincerely,

R. Mark Rogers
Economic Consulting
770-412-1059
Email: RMRogers@mindspring.com

Response to Request for Underlying Study

Exhibit 2.



OFFICE OF THE ATTORNEY GENERAL - STATE OF TEXAS
JOHN CORNYN

June 26, 2001

Mr. R. Mark Rogers
Economic Consulting
130 Woodmont Drive
Griffin, GA 30224

Re: Your letter to Amanda Crawford dated June 15, 2001 requesting study on Child Support Guidelines; RQ # 01-8052

Dear Mr. Rogers:

The above referenced request received on June 19 has been forwarded to me for response under the Texas Public Information Act.

You will find a 47 page packet enclosed that is responsive to your request. There is no charge for providing you these copies. We do not have a copy of the study that was the basis of the original implementation of the guidelines.

Very truly yours,

A handwritten signature in blue ink that reads "Carol Campbell".

Carol Campbell
Assistant Attorney General

Enclosures

The Office of the Attorney General has no documentation of the economic basis of Texas' child support guidelines. This lack of documentation conflicts with the due process concept that any party that is affected by a legal presumption has the right to examine the basis for the legal presumption in order to be able to make an argument that the presumption does not apply to that particular case. Any state should be readily able to provide the underlying economic basis for its child support guidelines in order to comply with due process standards. Texas is not able to do this.

The Underlying Study for Texas' Child Support Guidelines Can Only Be Inferred from Its Characteristics

Texas has child support guidelines that are a fixed percentage of obligor income. The custodial parent's income is not a part of the presumptive award calculation. Obligor only guidelines have their origin in Wisconsin and are based on a 1982 study by Jacques van der Gaag. A summary of this study indicates that Texas's child support guidelines have no economic basis for application to child support cases in general. A comparison of typical case facts with underlying facts indicates that the presumptive calculation should be rebutted in nearly every case.

Rebuttal of the Presumption of Applicability of Texas' Child Support Guidelines Based on Comparing Typical Case Facts with Underlying Presumptive Facts

Texas' child support guidelines are a variation of child support guidelines initially implemented by the state of Wisconsin for Title IV-D welfare cases. Texas' guidelines conform to the characteristics of so-called Wisconsin-style guidelines. The underlying economic study and conditions for appropriate application of the guidelines were conducted and published by Dr. Jacques van der Gaag in 1982.² The guidelines were designed to be applicable only if the household had certain economic characteristics. These underlying economic characteristics of the household are:

² Jacques Van der Gaag, "On Measuring the Cost of Children," Child Support: Technical Papers, Volume III, SR32C, Institute for Research on Poverty, Special Report Series, University of Wisconsin, 1982.

- For the study, the households (both parents) averaged annual gross income of \$12,000 in 1982 dollars. In year 2005 dollars, this would be household income of \$24,286.³ The underlying study specifically states that at higher incomes, the applicable percentage should decline.⁴ The study also assumed the percentage would be applied only after setting aside a self-support reserve.
- The custodial parent is assumed to care for the children and not earn any income outside the home.
- The non-custodial parent is the sole income earner and the percentages applied to the non-custodial parent's income are based on tax law of 1982. Under the tax code in which the percentages are derived, the non-custodial parent that provided over half of the child's support would receive use of all child-related income tax benefits.
- The low-income characteristic also includes the fact that the guidelines were to be applied to income earners paying little or no income tax. Hence, under the appropriate low-income application, there is no need to take into account differences between gross income and net income.
- The guideline percentages were derived based on the assumption that the non-custodial parent is absent and that the children are with the custodial parent 100 percent of the time.
- The guideline percentages were to be applied with the amount of the award limited to the size of the welfare payments to the custodial household.⁵ The underlying study set a low ceiling on the amount of income on which the percentages would be applied.

In rebuttal to presumption of the applicability of these guidelines, the following are counter to conditions necessary for the application of the guidelines to be fair, just, and economically appropriate, and the presumption of applicability of the guidelines is rebutted:

³ The 2005 figure was calculated by the author by applying the ratio of the 2005 CPI (All Urban, annual average) to the 1982 CPI to the 1982 household income figure.

⁴ Linda Reivitz. "Percentage of Income Standard for Setting Child Support Awards," memorandum by Secretary, Department of Health and Social Services, State of Wisconsin, to members of the Wisconsin Judiciary, December 20, 1983, *Improving Child Support Practice, Volume One*, The American Bar Association, 1986, pp. I-221.

⁵ 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.

- The household income (combined for both parents) in question frequently is not low income. Lower percentages are economically appropriate at higher incomes as stated in the underlying economic study.⁶
- The obligee typically has income or should be imputed to have income instead of the presumption of no income based on the underlying facts. The underlying study states that when the obligee earns income, that both parents' income should factor into the child support determination and with lower percentages.⁷
- Since 1984, federal tax code gives the custodial parent the child-related tax benefits but this change is not reflected in the child support guidelines.⁸ No changes have been made in the basic percentages since the original study. The tax benefit "swing" from the non-custodial parent to the custodial parent is substantial. Additionally, the guidelines assume that both parents share in all child-related tax benefits as cost offsets. These child-related tax benefits are to be equitably shared as offsets to overall child costs but the guidelines do not address this issue, violating equal protection standards.
- The guidelines assume that the obligor has no parenting time and no associated costs with parenting time. In contrast, in typical cases the obligor has substantial court ordered parenting time with the child. The underlying study states that under shared parenting, adjustments should be made in the award.⁹

⁶ Linda Reivitz. "Percentage of Income Standard for Setting Child Support Awards," memorandum by Secretary, Department of Health and Social Services, State of Wisconsin, to members of the Wisconsin Judiciary, December 20, 1983, *Improving Child Support Practice, Volume One*, The American Bar Association, 1986, pp. I-221.

⁷ 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.

⁸ The Deficit Reduction Act of 1984 significantly affected domestic relations taxation in the areas of alimony, property divisions and transfers, and dependency exemptions. For custody decrees subsequent to 1984, this act allocated the dependency exemption to the custodial parent in all cases unless the custodial parent signed a written declaration each year that the non-custodial could claim the dependency exemption. See Steven D. Kittrell. "An Overview of the 1984 Domestic Relations Tax Provisions," *Improving Child Support Practice, Volume Two*, The American Bar Association, 1986, page IV-57.

⁹ Linda Reivitz. "Percentage of Income Standard for Setting Child Support Awards," memorandum by Secretary, Department of Health and Social Services, State of Wisconsin, to members of the Wisconsin Judiciary, December 20, 1983, *Improving Child Support Practice, Volume One*, The American Bar Association, 1986, pp. I-221.

- This case is not a welfare case and the guidelines are not intended by the underlying studies to be applied outside of situations in which the award is limited to low benefits.

In general, typical case circumstances are in complete contrast to the guidelines' underlying facts and rebut the applicability of the presumptive award. Additionally, case law indicates that when the underlying facts of a statutory presumption no longer exist, the presumption is unconstitutional. See *Leary v. United States*, 395 U.S. 6 at 32-37 (1969) and especially footnote 68. The underlying facts for the guidelines' presumptions are that the percentages are to be applied only in welfare cases and only up to recovering welfare payments made to the custodial parents. These underlying facts no longer exist.

See also See *Manley v. Georgia*, 279 U.S. 1, 49 S.Ct. 215 (1929). A presumption that is irrebuttable or denies a fair opportunity for rebuttal violates the due process clause of the Fourteenth Amendment of the U.S. Constitution.

Once the presumption set forth in Chapter 154 of Texas Code has been rebutted, the Court must exclude the presumption from the consideration of the jury or other trier of fact in order not to deny due process of law. See *Seaboard Coastline Railroad Co. v. Wroblewski*, 138 Ga. App. 793 (1976) regarding the rebuttal of a presumption forces the presumption to disappear from further consideration by the court in that case. A showing of credible evidence of more appropriate child costs for the instant case rebuts the presumptive child costs and the presumptive award is no longer to be considered by the court. This would suggest that the guidelines should be set aside in nearly all cases.

The bottom line is that the underlying study for Texas' child support guidelines is not readily available to the average affected party, given that the Office of the Attorney General does not have a copy on record nor documents the underlying basis for the guidelines.

CHAPTER IV

Overview of Key Economic Characteristics of Child Support Guidelines That Conform to Due Process and Equal Protection Standards

The first economic issue of child support guidelines is that the measure of child costs should be based on valid empirical studies that reasonably reflect typical case circumstances. These case circumstances would include the fact that the parents live in separate households and do not have the same available income as if they lived in the same household and in only one household. Additionally, the guidelines would take into account that typically both parents incur child costs and that both parents should share in the other parent's child costs in proportion to available resources (income). Child costs should be shared net of child-related tax benefits in order to apply an equal duty of support standard. The custodial parent generally receives large, child-related tax benefits that are cost offsets and in which the non-custodial parent generally is not entitled.

Hence, the key economic characteristics of sound child support guidelines include:

- **Being based on economically valid child costs reflecting reduced available income due to both parents incurring household expenses in two separate households and with child costs declining as a percentage of net income as net income rises;**
- **Taking into account both parents' child costs associated with their own parenting time; and**
- **Treating child-related tax benefits as a cost offset to be shared by both parents.**

CHAPTER V

Standard of Living Impact Analysis of Presumptive Awards

A traditional standard-of-living comparison uses the federal poverty threshold as a benchmark.¹⁰ Poverty thresholds vary according to household size. Starting with the one-child case, the issue here is one of how the payment of presumptive child support awards affect the standard of living for a one-adult household of the non-custodial parent and for the one-adult and one-child household of the custodial parent. Comparisons are also made for the one-adult household versus a one-adult-and-two-children household.

The poverty thresholds established by the Bureau of the Census vary by the number of children, so that using these varying thresholds takes into account the custodial parent's higher costs from supporting the children. The relevant poverty thresholds are:

Exhibit 3.

Poverty Thresholds, 2004, U.S. Bureau of the Census
Annual, Current Dollars

One adult, under age 65	\$9,827
One adult, one child	\$13,020
One adult, two children	\$15,219
One adult, three children	\$19,223

However, non-custodial parents often have significant amounts of parenting time. This increases the non-custodial parent's poverty threshold costs while reducing those of the custodial parent. Conservatively, it is assumed that the non-custodial parent has 25 percent of total parenting time and that the children's portion of the poverty threshold shifts between the parents by that proportion. This 25 percent share is a little lower than the standard parenting time award. For one child, the difference between a one-adult household and a one-adult, one-child household is \$3,193 annually. Allocating 25 percent of this amount to the non-custodial parent results in a one-child poverty threshold of \$10,625 for the non-custodial parent and \$12,222 for the custodial parent. This adjustment takes into account the non-custodial parent's need to provide for the children while in his or her care.

¹⁰ The standard of living impact analysis is based on earlier research using 2004 tax code and 2004 poverty thresholds. Updated numbers would push the standard of living advantage a little more toward the custodial parent given that child-related tax benefits have risen since 2004.

It can be argued that because of fixed costs such as housing, a straight-line allocation of the child portion of the poverty threshold is inappropriate. However, while studies indicate that custodial parent child costs go down less than proportional to parenting time, they also indicate that a non-custodial parent's child costs go up more than proportional to parenting time.¹¹ Therefore, straight-line allocation appears to be a conservative measure of the non-custodial parent's share of poverty threshold levels as compared to that of the custodial parent. These are provided in Exhibit 4.

Exhibit 4.

Parenting Time Adjusted Poverty Thresholds, 2004, Annual
25 Percent Parenting Time Assumption for the NCP

	<u>Custodial Parent (CP)</u>	<u>Non-custodial Parent (NCP)</u>
One child case	\$12,222	\$10,625
Two children case	\$13,871	\$11,175
Three children case	\$16,874	\$12,176

In the analysis below, the standard of living is expressed as multiples of the appropriate poverty threshold provided in Exhibit 4. Scenarios start with custodial parent gross incomes that are 50 percent of that of the non-custodial parent. Additional comparisons assume the ratio of custodial parent gross income to non-custodial parent gross income of 70 percent, 100 percent, 130 percent, and 200 percent.

What are reasonable expectations for the outcomes of these standard of living comparisons? After income and FICA taxes have been deducted and after a presumptive child support transfer, an equitable outcome would be such that when both parents have equal gross incomes, that they both end up equal standards of living after taking into account differences in household size and the cost of the children. However, in cases where the non-custodial parent begins with a higher gross income, one would expect that the non-custodial parent would still have the higher standard of living after paying support. One might consider it equitable that the standard of living gap be narrowed somewhat, but not eliminated, by the child support transfer when one parent has a significantly higher gross income. However, one would not expect child support transfers to increase the initial standard of living gap for the higher earning parent.

¹¹ Henman, Paul and Kyle Mitchell (2001), "Estimating the Costs of Contact for Non-residential Parents: A Budget Standards Approach," *Journal of Social Policy*, 30 (July), 495-520.

Exhibit 5 shows the basic calculations for both parents' living standards relative to the poverty threshold.

The example provided in Table 6 starts with equal gross incomes. An equitable result would be to end with equal living standards after accounting for tax differences, the child support award, and household size inclusive of parenting time. However, the standard of living outcome is very different. As can be seen, the custodial parent's living standard is more than one-third higher than that of the non-custodial parent.

The standard of living analysis in Exhibit 5 is expanded in Exhibits 6.a. through 8.b. There are scenarios for one, two, and three children, and for non-custodial parent monthly gross incomes ranging from \$1,500 through \$6,000. Custodial parent income is then set at different percentages of non-custodial parent income: 50 percent, 70 percent, 100 percent, 130 percent, and 200 percent. These tables show the standard of living outcomes which are comparable to the final figure given in Table 6.

Exhibit 5.

The Standard of Living Impact of Texas' Child Support Guidelines: An Example

For One Child, 25%/75% Parenting Division

	<u>NCP</u>	<u>CP</u>
Gross income, annual	\$48,000	\$48,000
After-tax income	\$37,572	\$40,237
Presumptive child support	-7,512	+7,512
After tax, after presumptive Child support income	\$30,060	\$47,749
Appropriate poverty threshold	\$10,625	\$12,222
Income as multiple of threshold	2.829	3.907
Custodial parent's higher(+) or lower (-) standard of living compared to non- custodial parent		+38 %

As can be seen in these tables, Texas' guideline award creates a substantial shift in the living standards from the non-custodial to the custodial parent. As discussed below, when the

custodial parent has moderately lower income than the non-custodial parent, the former typically ends with a higher standard of living than the latter. For situations where the custodial parent has the higher gross income, the combination of child-related tax benefits and the child support transfer boosts the custodial parent's advantage. The income sharing mechanism does not share the child cost burden in a manner to narrow any standard of living difference between higher and lower income parents in a consistent manner, regardless of whether the custodial or the non-custodial parent has the higher income. Instead, these guidelines always boost the custodial parent's standard of living—even when the custodial parent is the one with the higher income level.

How do the tables show these outcomes? With Texas guidelines, as reported in Exhibits 6.a. and 6.b. for situations with custodial parent income one-half the income of the non-custodial parent (see lines CP Gross = 50% < NCP Gross), the child support award so exceeds actual child costs that the custodial parent's whole household has almost the same standard of living as the non-custodial parent. For situations in which the custodial parent has 70 percent of the non-custodial parent's income, the former ends up with a notably higher standard of living than the non-custodial parent—6 to 22 percent higher. When gross incomes are equal, the custodial parent ends up with a sharply higher standard of living—37 to 52 percent higher. And when the custodial parent has a higher gross income, the custodial parent's standard of living advantage is boosted even further. For example, with the custodial parent's gross income 30 percent higher than that of the non-custodial parent, with one child, the custodial parent achieves over a 66 to 78 percent higher standard of living. When the custodial parent has gross income that is double that of the non-custodial parent (100 percent higher), the custodial parent typically ends with a 130 to 140 percent higher standard of living following the child support transfer.

This standard of living analysis is carried further in Exhibits 7.a. and 7.b. for two-children cases. For situations in which the custodial parent has only half (50 percent) of the obligor's gross income, the standard of living gap is either eliminated or nearly eliminated. When the custodial parent has 30 percent less gross income than the obligor, the custodial parent ends up with a somewhat higher standard of living than the obligor. At equal incomes, the custodial parent ends up with a 40 to 65 percent higher standard of living than the non-custodial parent. Finally, when the custodial parent has the higher gross income, the child support award actually boosts the custodial parent's relative standard of living even further instead of narrowing the gap.

For the three-children analysis found in Exhibits 8.a. and 8.b., the outcomes are very similar to those for two-children.

Summary of Standard of Living Impact Analysis

The child support guidelines currently in use typically generate awards that are much higher than would be the case if based on economically sound cost concepts and with an equal duty of support for both parents. These guidelines do not conform to equitable standard of living outcomes.

Specifically, current guidelines have presumptive awards that exceed child costs to such an extent that:

- In many cases where the custodial parent has significantly lower gross income than the non-custodial parent, the custodial parent still receives a significantly higher standard of living than the non-custodial parent.
- In other cases where the custodial parent has significantly higher gross income than the non-custodial parent, the presumptive award boosts the custodial parent's relative standard of living rather than narrowing it.

**Custodial Parent's % Higher/Lower Presumptive
Standard of Living Compared to NCP
Texas Child Support Guidelines**

Exhibit 6.a.

ONE CHILD

NCP Monthly Gross Income:	<u>1,500</u>	<u>2,000</u>	<u>2,500</u>	<u>3,000</u>	<u>3,500</u>
CP Gross = 50 % < NCP Gross	-2	-4	-7	-10	-11
CP Gross = 30 % < NCP Gross	22	17	13	8	6
CP Gross = NCP Gross	52	44	38	36	37
CP Gross = 30 % > NCP Gross	78	69	68	67	68
CP Gross = 100 % > NCP Gross	139	139	136	132	131

Exhibit 6.b.

ONE CHILD

NCP Monthly Gross Income:	<u>4,000</u>	<u>4,500</u>	<u>5,000</u>	<u>5,500</u>	<u>6,000</u>
CP Gross = 50 % < NCP Gross	-13	-14	-16	-16	-16
CP Gross = 30 % < NCP Gross	6	6	6	7	7
CP Gross = NCP Gross	38	38	38	37	37
CP Gross = 30 % > NCP Gross	67	67	66	65	66
CP Gross = 100 % > NCP Gross	133	135	137	138	139

Exhibit 7.a.

TWO CHILDREN

NCP Monthly Gross Income:	<u>1,500</u>	<u>2,000</u>	<u>2,500</u>	<u>3,000</u>	<u>3,500</u>
CP Gross = 50 % < NCP Gross	10	9	5	0	-2
CP Gross = 30 % < NCP Gross	37	30	23	19	17
CP Gross = NCP Gross	66	57	50	44	44
CP Gross = 30 % > NCP Gross	93	82	76	74	76
CP Gross = 100 % > NCP Gross	149	147	144	139	138

Exhibit 7.b.

TWO CHILDREN

NCP Monthly Gross Income:	<u>4,000</u>	<u>4,500</u>	<u>5,000</u>	<u>5,500</u>	<u>6,000</u>
CP Gross = 50 % < NCP Gross	-3	-5	-7	-8	-9
CP Gross = 30 % < NCP Gross	13	13	13	13	13
CP Gross = NCP Gross	45	45	45	44	43
CP Gross = 30 % > NCP Gross	75	74	73	72	71
CP Gross = 100 % > NCP Gross	138	140	141	142	143

**Custodial Parent's % Higher/Lower Presumptive
Standard of Living Compared to NCP
Texas Child Support Guidelines**

Exhibit 8.a.

THREE CHILDREN					
NCP Monthly Gross Income:	<u>1,500</u>	<u>2,000</u>	<u>2,500</u>	<u>3,000</u>	<u>3,500</u>
CP Gross = 50 % < NCP Gross	10	10	6	1	-1
CP Gross = 30 % < NCP Gross	37	30	24	19	18
CP Gross = NCP Gross	65	56	50	47	47
CP Gross = 30 % > NCP Gross	90	82	78	76	77
CP Gross = 100 % > NCP Gross	151	148	145	140	137

Exhibit 8.b.

THREE CHILDREN					
NCP Monthly Gross Income:	<u>4,000</u>	<u>4,500</u>	<u>5,000</u>	<u>5,500</u>	<u>6,000</u>
CP Gross = 50 % < NCP Gross	-2	-3	-4	-5	-6
CP Gross = 30 % < NCP Gross	16	16	16	16	16
CP Gross = NCP Gross	47	47	47	46	45
CP Gross = 30 % > NCP Gross	77	75	74	73	72
CP Gross = 100 % > NCP Gross	137	138	139	139	140

- Texas' child support guidelines clearly include alimony for the custodial parent under the guise of child support—which is not the purpose intended for child support guidelines.

Summary Findings from Standard of Living Analysis Regarding Guideline Equity

- The Texas presumptive awards do NOT allocate the child support burden according to the parents' relative ability to pay.
- Importantly, the gains in the standard of living of the custodial parent reflect the economic fact that the custodial parent contributes to child costs at a far lower rate than the non-custodial parent. Economic data show that any case law that assumes that the custodial parent contributes at the same rate as the non-custodial parent is unfounded. The logic of such an assumption is quite bizarre. If one assumes that the custodial parent always spends in the same proportion implicitly as the non-custodial parent explicitly, then the logic is that one could make the custodial parent spend more on a child by making the non-custodial parent spend more on the child. Such assumptions also violate the principles of the underlying economic study.
- Texas' child support guidelines do not explicitly provide for financial support of a child when in the care of the non-custodial parent.
- Texas' guideline awards include such large amounts of hidden alimony that a non-custodial parent is unable to provide for a child when in the non-custodial parent's care to the same extent as in the custodial parent's household. This violates equal protection standards for both the child and the non-custodial parent. Such excessive child support awards are not in the best interest of the child.
- The guidelines are biased toward including hidden alimony for the custodial parent even when the custodial parent earns substantially higher gross income than the non-custodial parent. The guidelines do not even meet standards of fairness for alimony. If the guidelines did, there would be a narrowing of the standard of living gap for the non-custodial parent when the custodial parent has a higher gross income. Instead, the guideline boosts the standard of living of the custodial parent relative to non-custodial parent in both circumstances—when the custodial parent earns either substantially less or substantially more than the non-custodial parent.
- The child support guidelines are arbitrary and bear no relationship to the intended federal purpose of the guidelines of determining an economically appropriate child support award.

- The child support guidelines bear no relationship to the constitutional standards for child support of requiring each parent to have an equal duty in supporting the child.

- The inappropriate standard of living outcomes are due to three key factors:
 - The presumptive percentages do not reflect child costs but instead are merely arbitrary income transfers.

 - Both parents' parenting time costs are not part of the presumptive calculation.

 - The child-related tax benefits are not shared proportionally between both parents and are a windfall to the custodial parent.

CHAPTER VI

Two Alternative Approaches to Child Cost Schedules that Take Into Account the Added Costs and Reduced Available Income of Maintaining Two Separate Households

Child Cost Studies Indicate that Child Costs Decline as a Percentage of Net Income as Net Income Increases

First, Texas' child support guidelines are fixed percentages of obligor net income. This presumptive fact for child costs conflicts with professional studies on child costs. Professional studies indicate that child costs decline as a percentage of net income as net income increases.

See:

- Van der Gaag, Jacques. "On Measuring the Cost of Children," *Child Support: Technical Papers, Volume III, SR32C, Institute for Research on Poverty, Special Report Series, University of Wisconsin, 1982, pp. 1-44.*
- Thomas Espenshade, *Investing in Children: New Estimates of Parental Expenditures*, the Urban Institute Press, 1984.
- David Betson working with Policy Studies, Inc., Denver, CO. See Robert G. Williams, "Child Support Guidelines: Economic Basis and Analysis of Alternative Approaches," *Improving Child Support Practice, Volume One*, The American Bar Association, 1986, p. I-8.
- Mark Lino, "Expenditures on Children by Families, 2000 Annual Report, U.S. Department of Agriculture, May 2001.
- R. Mark Rogers and Donald J. Bieniewicz, "Child Cost Economics and Litigation Issues: An Introduction to Applying Cost Shares Child Support Guidelines," presented to Southern Economic Association, National Association of Forensic Economics section, November 12, 2000.
- Virginia General Assembly. See "Technical Report: The Costs of Raising Children," Virginia General Assembly, November 7, 2000, the Joint Legislative Audit and Review Commission (JLARC).

Texas' child support guidelines should be based on child cost studies that realistically have child costs decline as a percentage of net income as net income rises. Additionally, presumptive child costs should reflect available income. As discussed below, the Income Shares methodology (without adjustments) assumes that the parents still have available income based on living in the same house and sharing just one set of household overhead.

Two economic approaches to improved presumptive child costs would be to adopt cost tables based on either an adjusted version of the Income Shares methodology (to take into account the added cost of a second household) or the Cost Shares methodology. These are discussed below.

It is important to keep in mind that adopting either of these cost tables leaves the issues of parenting time adjustments and child-related tax benefits separately. Use of either of these cost schedules does not result in economically sound awards unless there also are also presumptive parenting time adjustments and sharing of child-related tax benefits.

Background and Assumptions of the Income Shares Methodology

Income Shares cost schedules are based on national research on child costs as discussed in *Alternative Estimates of the Cost of Children from the 1980-86 Consumer Expenditure Survey*, by David M. Betson, University of Notre Dame, September 1990. These underlying economic characteristics of the household include, among others:

- The household is intact.
- The child support award is based on combined parental incomes.
- The household does not have the additional overhead that is incurred by a separated family that would reduce income available to spend on children.
- The cost schedule assumes that the household has income available for children based on both parents sharing adult overhead costs as found in one, combined household.

Use of Intact Family Data on Child Costs Overstates Child Costs for Situations in Which There Are Two, Single-Parent Families

The use of intact family data results in child cost schedules that reflect situations in which for any given level of combined income (of the two parents), there is only one set of adult "overhead" or adult fixed costs such as housing and utilities. Once the fixed costs of a mortgage or rent

payment and utilities are paid and shared by the two parents, the remaining after-tax income can be spent on other “things”—including children. In contrast, when the two parents are divorced or unwed, there are two sets of adult overhead for the same level of combined income. There is less after-tax income after paying for housing and utilities. There is less discretionary income available combined for other things—including children. In each of the two households, there is on average half of the income available less housing and utilities. Less income is spent on children in a divorced situation simply because in part there is less combined income after paying for adult fixed costs. This has been recognized in the forensic economic literature.

A joint income standard for child support imposes a greater burden on the NCP [non-custodial parent] than the CP [custodial parent]. The NCP is forced to pay for child costs assuming less burdensome intact family overhead that is not the actual circumstance. Instead, the NCP pays child support for intact family expenditure standards but truly can only afford one-parent household spending because of higher overhead. In contrast, the CP receives intact family based child support that exceeds one-parent based child support but actually spends on the child as though the CP is in a one-parent household because that indeed is the case. The intact family based child support that exceeds one-parent based expenditures is then a windfall—or profit—for the CP.¹²

Use of Intact Family Data for the Child Cost Schedule Gives the Child the Right to a Higher Standard of Living than Either Parent

A simple example shows the economic inequity of using intact family data for child cost schedules. Assume that the mother and father each earn \$4,000 gross income per month. The child is entitled under intact family guidelines to a standard of living based on \$8,000 per month. In contrast, each of the parents spends on themselves based on \$4,000 gross income per month. In reality, the non-custodial parent is required to pay child support based on an intact family standard, the custodial parent receives child support based on an intact family standard, but the custodial parent only spends the child support as if in a single-parent household. Not all of the child support is spent on the child and the custodial parent receives a sizeable financial windfall from child support based on intact family data.

Solutions to the Presumption of Intact Family Child Cost Schedule’s Conflict with the Fact that Child Support Is Applied to Non-Intact Family Situations

There are two economic solutions to the presumption of intact family child costs not fitting case facts of divorced or never married parents:

¹² See R. Mark Rogers and Donald J. Bieniewicz, “Child Cost Economics and Litigation Issues: An Introduction to Applying Cost Shares Child Support Guidelines,” Reading #20 in *Assessing Damages in Injuries and Deaths of Minor Children*, ed. by Thomas R. Ireland and John O. Ward, Lawyers & Judges Publishing Co., Tucson, AZ, 2002, p. 358.

1. Use single-parent child costs based on an average of the two parents' incomes, or
2. Make adjustments to the intact family data to reflect the additional adult overhead from two single-parent households compared to one intact household.¹³

Use of single-parent data is the more economically sound approach. Such an approach is discussed by Rogers and Bieniewicz in various economics articles and professional presentations.¹⁴ The child cost schedule should be based on single-parent household data and on an average of the two parents' incomes. Average income is the maximum standard of living that can be sustained in both households.

The Income Shares intact family data on child costs can be at least partially corrected for the additional adult overhead of a second household to be maintained after divorce or in unwed situation. One can deduct the cost of a second mortgage (or rent) and utilities from combined income used in the "look up" of child costs. That is, the "look up" value of income should not be just combined gross income but combined gross income minus the additional mortgage and utilities. Should there be some question as to which parent's mortgage and utilities should be deducted, it may be reasonable to use an average of the two parents. The same cost schedule can be used but the income used should be redefined for this adjustment.

Adjusting a standard Income Shares cost schedule for a second household's expenses may be a more "comfortable" approach, given that it keeps the traditional Income Shares cost schedule as its starting point. Additionally, adjusting an intact family data cost schedule for the added cost of a second household is not a novel idea. Kansas has built in such a calculation in its presumptive child cost schedule. Kansas uses a variation of the Income Shares methodology. As noted in the Kansas guidelines:

¹³ More detailed discussion of these alternative methodologies can be found in *Alabama, Economic Report on Alternative Child Support Cost Schedules and Related Issues*, Advisory Committee on Child Support Guidelines and Enforcement, Administrative Office of Courts, Montgomery, Alabama, March 31, 2006.

¹⁴ See R. Mark Rogers and Donald J. Bieniewicz, "Child Cost Economics and Litigation Issues: An Introduction to Applying Cost Shares Child Support Guidelines," Reading #20 in *Assessing Damages in Injuries and Deaths of Minor Children*, ed. by Thomas R. Ireland and John O. Ward, Lawyers & Judges Publishing Co., Tucson, AZ, 2002, pp. 333-380. See also "Child Support Guidelines: Underlying Methodologies, Assumptions, and the Impact on Standards of Living," R. Mark Rogers and Donald J. Bieniewicz, Conference on the Law and Economics of Child Support Payments, University of California, Santa Barbara, September 20, 2002 as published in *The Law and Economics of Child Support Payments*, William S. Comanor, ed., Edward Elgar Publishing, 2004.

The [child cost] schedules also include a built-in reduction from average expenditures per child (the dissolution burden), because of the financial impact on the family of maintaining two households instead of one.¹⁵

Virginia has conducted research into this approach. But this approach was not adopted not so much due to the second household adjustment but due to the novel approach to estimating the alleged standard costs.¹⁶

Introduction to the Cost Shares Methodology

In the mid-1990s, the Children's Rights Council (CRC) developed a prototype child support guideline based on long-established principles in state law in order to correct the perceived problems with existing state child support guidelines.¹⁷ This model guideline has since been developed into a working version called the Cost Shares child support guideline.¹⁸ The Cost Shares guideline diverges from percent-of-obligor-income guidelines and the Income Shares guideline in several key ways. Most importantly, the Cost Shares guideline bases its child cost schedule on numbers derived directly from actual surveys of parents, rather than by using income equivalence measures.

The Cost Shares approach using data on direct expenditures on children, although not yet fully adopted by a state for presumptive cost schedules, is used by most states for add-ons such as medical insurance premiums, day care costs, and special expenses. It may be considered rational to extend this same approach—using data on direct expenditures on children instead of

¹⁵ See Kansas Judicial Branch, Rules Adopted by the Supreme Court, Rules Relating to District Court, Administrative Order 180, Re: 2003 Kansas Child Support Guidelines, Kansas Child Support Guidelines, II(C).

¹⁶ See *Review of Child Support Guideline, Report to the Secretary of Health and Human Resources, the Honorable Jane H. Woods and the General Assembly of Virginia*, by Secretary's Triennial Child Support Panel, October 31, 2002, pp. 8-9. See also "Determining the Level of Child Support," discussion paper, submitted to Secretary's Child Support Guideline Review Panel, Richmond, Virginia, November 2002, by William M. Rodgers III, Associate Professor of Economics, The College of William and Mary, Williamsburg, Virginia, pp. 20-24. This study based child costs largely on per capita child cost from the U.S. Department of Agriculture and other sources. Per capita costs inappropriately assume that each child's share of housing costs (and others) is the same as each parent's share even though many adult costs are incurred whether the adults have children or not.

¹⁷ Donald J. Bieniewicz, "Child Support Guidelines Developed by Children's Rights Council," in U.S. Department of Health and Human Services, *Child Support Guidelines: the Next Generation*, 1994, pp. 104-125.

¹⁸ See R. Mark Rogers and Donald J. Bieniewicz, "Child Support Guidelines: Underlying Methodologies, Assumptions, and the Impact on Standards of Living," in *The Law and Economics of Child Support Payments*, William S. Comanor, ed., Edward Elgar Publishing, 2004.

indirect equivalence measures—to all cost categories rather than be limited to add-ons. The Cost Shares approach is receiving favorable reviews by some child support agencies and child support guideline review commissions.¹⁹

The full Cost Shares methodology has three key elements beginning with the cost schedule. The two additional features generally not included in most states' guidelines are the sharing of the tax benefits attributable to the children and incorporating parenting time adjustments to ensure that the children are supported in both parents' households on the same basis. At this point, this report focuses solely on the child cost schedule (Schedule of Basic Child Cost Obligations).

The Cost Shares Schedule of Basic Child Cost Obligations relies primarily on the U.S. Department of Agriculture (USDA) child cost tables as the key inputs but with specific adjustments to reduce the USDA reliance on per capita estimates for some components. The Cost Shares schedule of child costs is based upon components for housing, food, transportation, clothing, education, health care, and "other."

There are important reasons why the Cost Shares methodology uses average income instead of combined income for developing child cost schedules. However, it should be noted that the Cost Shares cost schedule can be converted to a combined income basis. There are both legal and economic reasons for using average income. First, traditional principles of legal presumptions require that a presumption fit the intended circumstances—the presumption should be based on circumstances similar to which it is applied. See *Leary v. United States*, 395 U.S. 6 at 32-37 (1969) and especially footnote 68. For child support cases, guidelines are applied to non-intact families and the presumption should reflect that as a matter of due process.

The use of intact family data does not reflect typical finances for non-intact families—this is an economic reason for using average income instead of combined income. Specifically, intact family data assume that the parents live in the same house and have only one set of bills for a mortgage or rent payment and for household utilities. Child cost schedules based on intact family data assume the parents have available income assuming only one set of housing costs. In fact the parents have two households to support—even if the children live in only one household all of the time. The available income for child support should take into account that

¹⁹ See *The Guideline Review Project: A Primer for the Participant*, prepared by Montana's Child Support Enforcement Department for its 2002 guideline review panel. See pages 8 and 9 of Part I in the January 2005 update of this document. See also *Final Report* by New Hampshire's Commission to Study Child Support and Related Child Custody Issues, December 1, 2004, page 20 and pages 25-30.

there are two single-parent households with combined income spread over two households, not one. Average income is the most income that can be found in both households—this is the maximum standard of living for both households.

It has been argued that the children's standard of living should not be impacted by divorce or by parents not living together. However, maintaining the children's standard of living can place a significant burden on the obligor parent. Additionally, it is unclear from a legal perspective whether or not a child has a right to a higher standard of living than the parents. As an example, during marriage two parents each earn \$4,000 per month in gross income for combined gross income of \$8,000 per month. The married household's standard of living is based upon \$8,000 in gross income per month. After divorce, each parent's household has a standard of living based upon \$4,000 in gross income per month. The use of intact family child costs data says that the children have a right to an \$8,000 per month standard of living while each of the parent's would provide themselves with a standard of living based upon \$4,000 per month. Also, in many cases, the parents never lived together and the child never lived at the \$8,000 standard of living. The Cost Shares methodology puts both the parents and children on the same basis for the appropriate standard of living for sharing child costs.

Underlying Economic Studies for the Cost Shares Basis Schedule of Basic Child Support Obligations

The primary source of data for the Cost Shares child support model is *Expenditures on Children by Families*, published annually by the Family Economics Research Group (FERG), U.S. Department of Agriculture. Data used to estimate expenditures on children are from the 1990-92 Consumer Expenditure Survey—Interview portion. This survey is administered by the Bureau of Labor Statistics, U.S. Department of Labor. This survey is based on a sample of 12,850 husband-wife households and 3,395 single-parent households. The Bureau of Labor Statistics weights the survey data to reflect the composition of the overall U.S. population of interest. Econometric analysis was used to estimate household and child-specific expenditures. That is, statistical techniques were used to evaluate the expenditure data to control for family size, income, and other factors to determine expenditures on children by family size.

The FERG report provides estimates of family expenditures on children for separate cost categories. These are housing, food, transportation, clothing, health, child care & education, and "other." Each category is based on an average of the expenditures by category from survey data.

The FERG estimates are on a marginal cost basis, except for the housing, transportation, and other miscellaneous cost estimates, which are per capita (household costs are allocated equally to all household members, including children). Per capita estimation is known to yield much higher estimates of child costs than marginal cost estimation and should be viewed as an "upper limit" for child costs for these categories.

To obtain marginal housing costs for children, the Cost Shares model incorporates housing cost data from the latest U.S. Department of the Interior's "Regional Quarters Rental Survey." These are extensive surveys of private housing to provide a basis for determining market rents to charge government employees for government-furnished housing. The housing data used for Cost Shares guidelines are for owner-occupied types of houses but which are rentals. The current version of the Cost Shares child cost schedules has an expanded definition for the housing component cost. The housing component includes not only the rental cost but also includes utilities, maintenance, and furnishings. These costs are derived from cost ratios (of these costs to shelter costs) from the Bureau of Labor Statistics.

The Cost Shares model has the same components as the FERG estimates. However, for the Cost Shares model, child expenditure levels were interpolated at \$50 income increments using a regression based technique.

CHAPTER VII

The Issue of Child-Related Tax Benefits as a Cost Offset

Texas' child support guidelines do not presumptively share child-related tax benefits as a cost offset. Additionally, the underlying study is based on both parents sharing these cost offsets but the application of the guidelines results in only the custodial parent enjoying these cost offsets. This violates applying a principle of equal duty of support in which both parents share child costs net of cost offsets (from tax benefits) on the same basis.

What Are Child-Related Tax Benefits?

The child-related tax benefits received by custodial parents can include:

- head of household tax payer status,
- child dependency exemptions,
- child tax credits,
- additional child tax credits
- child care tax credits, and
- higher earned income credits for low-income working custodial parents.

Before quantifying the magnitude of these child-related tax benefits, what are some of the specifics of these benefits?

Differences in Tax Treatment between the Custodial Parent and the Non-custodial Parent

The Internal Revenue Service generally attributes child-related tax benefits to the custodial parent in divorced and unwed situations. The custodial parent is entitled to head of household status while the non-custodial parent typically has single tax payer status. Child-related tax benefits are summarized in Federal Form 1040 from the Internal Revenue Service.

From Federal form 1040 from the Internal Revenue Service for calendar tax year of 2005, the divergent treatment of custodial and non-custodial parents is substantial:

- The standardized deduction (line 40, Form 1040), for a single person (the non-custodial parent) was \$5,000 compared to \$7,300 for a head of household taxpayer (the custodial parent). This is a bonus of \$2,300 in deductions for the custodial parent.

- The custodial parent only is able to claim the dependent exemptions as a legal right (lines 6c and 42, Form 1040). The 2005 value of each dependent exemption is \$3,200.
- For low income and moderately low income working parents, custodial parents receive dramatically more favorable treatment than do non-custodial parents in terms of the size of earned income credits under Federal income tax law, calendar 2005 code.

The earned income credit was as much as:

- \$399 if you did not have a qualifying child (non-custodial parent),
 - \$2,662 if you had one qualifying child, or
 - \$4,400 if you had two qualifying children.
- The Taxpayer Relief Act of 1997 gave custodial parents a tax credit of up to \$400 per child. The credit went to up to \$500 per child in 1999. Subsequent legislation boosts child tax credits to up to \$1,000 per child by 2010.
 - The marginal tax rate increases for head of household taxpayers begin at higher income threshold levels than for single, non-custodial parents. This is seen in Schedule X and Schedule Z, 2005 1040, Forms and Instructions, Department of the Treasury, page 82.

Exhibit 9.

Schedule X—If your filing status is Single

If your taxable income is:		The tax is:		of the amount
Over—	But not over—			over—
\$0	\$7,300	-----	10%	\$0
7,300	29,700	\$730.00 +	15%	7,300
29,700	71,950	4,090.00 +	25%	29,700
71,950	150,150	14,652.50 +	28%	71,950
150,150	326,450	36,548.50 +	33%	150,150
326,450	-----	94,727.50 +	35%	326,450

Schedule Z—If your filing status is Head of household

If your taxable income is:		The tax is:		of the amount
Over—	But not over—			over—
\$0	10,450	-----	10%	\$0
10,450	39,500	\$1,045.00 +	15%	10,450
39,500	102,800	5,447.50 +	25%	39,500
102,800	166,450	21,197.50 +	28%	102,800
166,450	326,450	39,019.50 +	33%	166,450
326,450	-----	91,819.50 +	35%	326,450

Defining the Value of Child-Related Tax Benefits

The value of child-related tax benefits is defined as the difference in after-tax income for a parent with the child-related tax benefits versus without the child-related tax benefits. These benefits generally are limited to head of household status, the child exemption, and the child tax credits. There may also be earned income credits and child care credits. The below table is an example of calculating the child-related tax benefits for a custodial parent in Texas using official 2005 tax code. The example is for two children (under age 17) and with head of household status, child dependency exemptions, and child tax credits.

In Exhibit 10, one sees an example for a moderate income custodial parent with \$3,000 monthly gross income—or \$36,000 annual salary. The example is for two children. One sees the child-related tax benefits in part with the higher federal standard deduction for head of household status for the CP with tax benefits (\$7,300 versus \$5,000), the two extra federal dependency exemptions (\$9,600 versus \$3,200), and the child tax credits (\$2,000 versus zero). Additionally at the federal level, the with-benefits federal income tax is \$2,346 versus \$3,809 without. The net impact of the child-related tax benefits is that the custodial parent's after-tax income is

\$32,900 with the child-related tax benefits versus \$29,437 without. The annual child-related tax benefit is an extra \$3,463 in after-tax income, or \$289 monthly. Essentially, the custodial parent has \$289 per month in child-related tax benefits as a cost offset against spending on the children.

Exhibit 10.

Quantifying Child-Related Tax Benefits	Custodial Parent With Tax Benefits	Custodial Parent Without Tax Benefits
Monthly Gross Wages/Salary	\$3,000	\$3,000
Monthly Gross Income Total	3,000	3,000
Annual Total Gross Income	\$36,000	\$36,000
Standard Deduction (2005 tax code)	-7,300	-5,000
Exemptions	-9,600	-3,200
Federal Taxable Income	19,100	27,800
Federal Income Tax	-2,346	-3,809
Earned Income Credit	+0	+0
Child Tax Credits	+2,000	+0
Social Security Tax	-2,232	-2,232
Medicare Tax	-522	-522
After Tax Income, <u>Annual</u>	\$32,900	\$29,437
Addendum: After-Tax Income, <u>Monthly</u>	\$2,742	\$2,453

Based on final 2005 tax code, Federal.

The Impact of Tax Benefits on Each Parent’s Ability to Pay Shares of Child Costs

Exhibit 11 summarizes the difference in Federal tax code treatment of custodial parents (CPs) to that of non-custodial parents (NCPs). The horizontal axis is gross income for each parent (with each having the same gross income). The vertical axis is the net income advantage that the custodial parent has at each level of gross income. It shows the after-tax income of the CP minus the after-tax income of the NCP. Taxes are Federal personal income taxes, Medicare, and Social Security taxes (2005 tax). Earned income credits are added. Standard deductions are used. Exhibit 34 shows a dramatic after-tax advantage for the custodial parent.

- As seen in Exhibit 11, child-related tax benefits are a very significant offset to total child costs—typically worth \$250 to \$400 in extra monthly after-tax income for the custodial parent (for one to two children). Child-related tax benefits typically include head of household status, exemptions, child tax credits, and earned income credits.

As seen in Exhibit 12, even if only the child exemptions and tax credits are considered, the extra after-tax monthly income from child-related tax benefits is quite substantial—generally about \$100 per child per month.

**Child-Related Tax Benefits: Additional Net Income Per Month,
Federal Income Tax Code, 2005**

Exhibit 11.

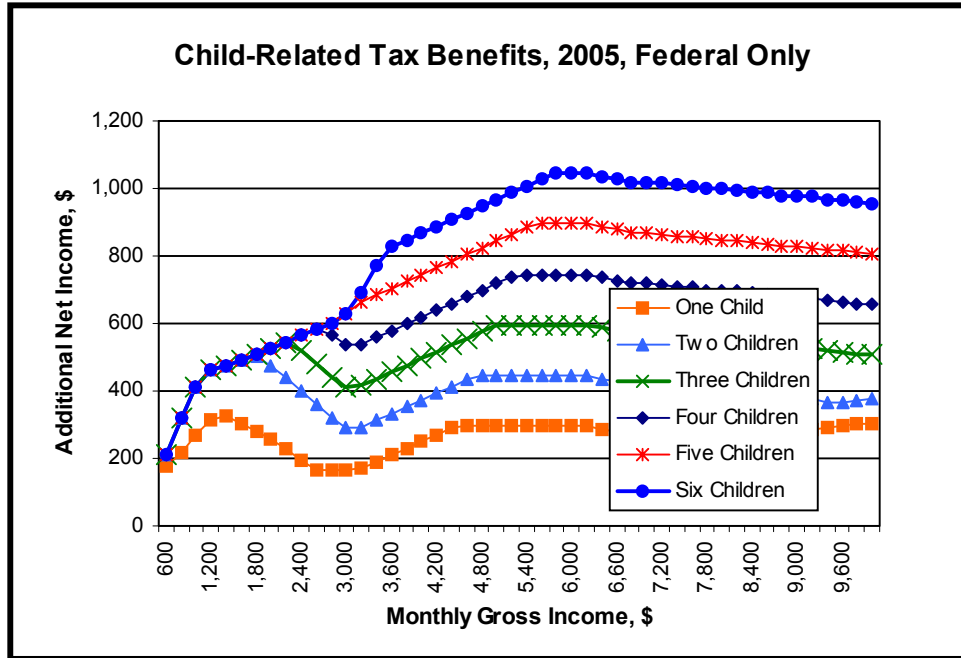
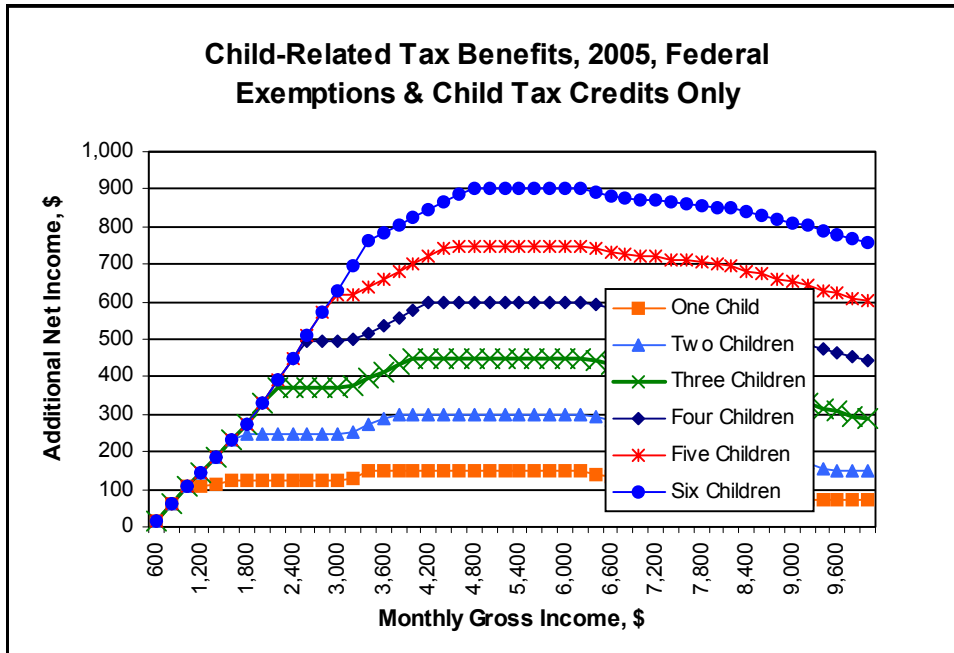


Exhibit 12.



CHAPTER VIII

The Issue of Parenting Time Adjustments

Without taking into account both parents' incurred child costs, child support guidelines do not apply a standard of equal duty of support. Additionally, the children are not supported in both households on the same basis.

Texas' guidelines assume that the non-custodial parent has no child costs. There is no built-in parenting time adjustment.

In contrast, Texas' custody law presumes joint physical custody. The presumptive child support guidelines conflict with Texas' custody presumption.

There are a number of ways that states presumptively take into account parenting time. Some are more economically sound than others. A non-exhaustive list of parenting time adjustments include:

- Cross crediting percentages for obligor only guidelines with percentages pro-rated by parenting time. An example would be Minnesota, although their guidelines change in 2007 and adopt a different approach at that time.
- Cross-crediting in Income Shares states by allocating the standard child cost amount by parenting time into expense columns for each parent and then having each parent proportionally share in the other's child costs. Some states set a threshold for such a methodology and some states have multipliers that allegedly take into account the added costs of duplicated housing. An example would be North Carolina.
- "Retained costs" is a version of cross crediting in some Income Shares states. Standard child costs are pro-rated by shares of combined income. Then, each parent is credited against their share of child costs in proportion to each parent's share of parenting time. These net amounts are then offset against each other with the difference paid by the higher net owed parent.
- Some Income Shares states calculate both parents' shares of standard child costs and then the non-custodial parent is credited with a sliding scale percentage of the total costs

with that credit applied to that parent's income share of standard costs. The sliding scale of percentage credit rises as parenting time share rises. An example is Arizona.

- Some Income Shares states cross credit the standard child costs based on parenting time and based on types of costs by categories for duplicated fixed costs (housing), non-duplicated fixed costs (clothing), and variable (time varying) costs (food and transportation). Examples include Missouri and New Jersey. This approach probably is the most economically sound while applying a standard of equal duty of support.

Example of Economically Sound Parenting Time Adjustments

Most methods of making a parenting time adjustment assume that all child costs vary in fixed proportions to parenting time shares. Another more economically sound method of making a parenting time adjustment is to recognize that not all child costs vary by parenting time. Some costs are fixed and some costs do vary by parenting time. Fixed costs include such as housing and clothing. Variable costs include such as food and transportation. Also, some fixed costs are duplicated by both parents (housing) and some are incurred by only one of the parents (perhaps activity fees). One economic study calculated estimates for three basic categories of fixed duplicated costs, fixed non-duplicated costs, and variable costs. The best known study on this issue is *Determining the Cost of Raising Children in Non-intact Arizona Households*, by Dr. James W. Shockey, University of Arizona, presented to the Arizona Judicial Council, February 1995. Based on this study, the average shares of total child costs allocated to these three components are: fixed duplicated costs, 28.17 percent; fixed non-duplicated costs, 33.87 percent; and variable costs, 37.96 percent.

One scenario could be relatively modest amounts of parenting time for the secondary custodial parent. The variable costs would be pro-rated by parenting time but not any of the fixed costs. The secondary custodial parent would have low parenting time and would not have set aside housing for the child. The below applies such a parenting time adjustment using New Mexico's child cost schedule.

Example 1. Mother is the obligee. Father has 30 days of parenting time annually. Only the variable costs are pro-rated by parenting time shares.

Exhibit 13.

	Mother	Father	Combined
PART I. Basic Support Obligation			
1. Gross Monthly Income	\$3,000	\$4,000	\$7,000
2. Percentage of Combine Income	42.86%	57.14%	100.00%
3. Number of Children			1
4. Basic Support from Schedule			\$815
5. Number of 24 Hour Days with Each Parent, Annually	335	30	
6. Percentage with Each Parent	91.8%	8.2%	
7. Each Parent's % Share of Fixed Non-duplicated Costs	100.0%	0.0%	
8. Each Parent's Fixed Duplicated Child Costs	\$230	\$0	
9. Each Parent's Fixed Non-Duplicated Child Costs	\$276	\$0	
10. Each Parent's Variable Child Costs	\$284	\$25	
11. Basic Support Allocated by Parenting Time	\$790	\$25	
PART II. ADDITIONAL PAYMENTS			
12. Children's Health and Dental Insurance Premium	\$0	\$0	
13. Work-Related Child Care	\$0	\$0	
14. Additional Expenses	\$0	\$0	
15. Each Parent's Total Additional Payments	\$0	\$0	
16. Each Parent's Total Child Expenses	\$790	\$25	
PART III. ALLOCATION OF COSTS ON PRO-RATA BASIS			
17. Father's Share of Mother's Total Expenses		\$451	
18. Mother's Share of Father's Expenses	\$11		
19. Net Child Support Obligation with Parenting Time Adjustment and Additional Payments	-\$441	\$441	

Example 2. Mother is the obligee. Father has 110 days of parenting time annually. The variable costs are pro-rated by parenting time shares. Additionally, the father has the same fixed duplicated costs as the mother. Only the mother incurs fixed, non-duplicated costs.

Exhibit 14.

PART I. Basic Support Obligation	Mother	Father	Combined
1. Gross Monthly Income	\$3,000	\$4,000	\$7,000
2. Percentage of Combine Income	42.86%	57.14%	100.00%
3. Number of Children			1
4. Basic Support from Schedule			\$815
5. Number of 24 Hour Days with Each Parent, Annually	255	110	
6. Percentage with Each Parent	69.9%	30.1%	
7. Each Parent's % Share of Fixed Non-duplicated Costs	100.0%	0.0%	
8. Each Parent's Fixed Duplicated Child Costs	\$230	\$230	
9. Each Parent's Fixed Non-Duplicated Child Costs	\$276	\$0	
10. Each Parent's Variable Child Costs	\$216	\$93	
11. Basic Support Allocated by Parenting Time	\$722	\$323	
PART II. ADDITIONAL PAYMENTS			
12. Children's Health and Dental Insurance Premium	\$0	\$0	
13. Work-Related Child Care	\$0	\$0	
14. Additional Expenses	\$0	\$0	
15. Each Parent's Total Additional Payments	\$0	\$0	
16. Each Parent's Total Child Expenses	\$722	\$323	
PART III. ALLOCATION OF COSTS ON PRO-RATA BASIS			
17. Father's Share of Mother's Total Expenses		\$413	
18. Mother's Share of Father's Expenses	\$139		
19. Net Child Support Obligation with Parenting Time Adjustment and Additional Payments	-\$274	\$274	

Example 3. Mother is the obligee. Father has 182 days of parenting time annually. The variable costs are pro-rated by parenting time shares. Additionally, the father has the same fixed duplicated costs as the mother. The father and mother share fixed, non-duplicated costs equally.

Exhibit 15.

PART I. Basic Support Obligation	Mother	Father	Combined
1. Gross Monthly Income	\$3,000	\$4,000	\$7,000
2. Percentage of Combine Income	42.86%	57.14%	100.00%
3. Number of Children			1
4. Basic Support from Schedule			\$815
5. Number of 24 Hour Days with Each Parent, Annually	183	182	
6. Percentage with Each Parent	50.1%	49.9%	
7. Each Parent's % Share of Fixed Non-duplicated Costs	50.0%	50.0%	
8. Each Parent's Fixed Duplicated Child Costs	\$230	\$230	
9. Each Parent's Fixed Non-Duplicated Child Costs	\$138	\$138	
10. Each Parent's Variable Child Costs	\$155	\$154	
11. Basic Support Allocated by Parenting Time	\$523	\$522	
PART II. ADDITIONAL PAYMENTS			
12. Children's Health and Dental Insurance Premium	\$0	\$0	
13. Work-Related Child Care	\$0	\$0	
14. Additional Expenses	\$0	\$0	
15. Each Parent's Total Additional Payments	\$0	\$0	
16. Each Parent's Total Child Expenses	\$523	\$522	
PART III. ALLOCATION OF COSTS ON PRO-RATA BASIS			
17. Father's Share of Mother's Total Expenses		\$299	
18. Mother's Share of Father's Expenses	\$224		
19. Net Child Support Obligation with Parenting Time Adjustment and Additional Payments	-\$75	\$75	

APPENDIX I

Detailed Commentary: Child Support Guidelines—A Legal Presumption or Mere Public Policy?

One issue in particular creates substantial disagreement over what should be the appropriate features of child support guidelines. And that issue is whether such guidelines are legal presumptions designed to assure the correct amount of child support, or public policy choices designed to achieve a certain distribution of wealth. The author takes the position that child support guidelines are legal presumptions, and not public policy choices. When it is asked, for example, how long an unemployed worker should be eligible for unemployment benefits, a question of public policy arises. And when that determination is made from economic data, budget figures, and fiscal considerations, a public policy choice is made. But once this choice is made, the level of unemployment benefits is not presented in court as presumptive evidence against a litigant. Child support guidelines, however, are used as presumptive evidence in court against a child support obligor. There are stricter standards for legal presumptions than public policy choices.

In order to be legally sound, child support guidelines:

- Must be based on correct use of authentic economic data;
- Must reasonably indicate in most cases an amount of child support due, assuming an equal duty of both father and mother to supply the reasonable needs of their children according to the resources available to each;
- Must be fully and fairly rebuttable as against the equal duty of both parents to supply the reasonable needs of their children according to their respective resources;
- Must not include arbitrary or unfounded assumptions; and
- Must be developed by responsible public authority.

The reports by Policy Studies Inc. and R. Mark Rogers Economic Consulting should be reviewed, keeping these legal principles in mind.

At the request of the author, the following legal commentary has been prepared by John Remington Graham of the Minnesota Bar (#3664X), who has served as a founding professor in the Hamline University School of Law, and also as a public prosecutor and a public defender in the State of Minnesota. Since his admission to practice in 1967, Mr. Graham has actively litigated both in the collection of child support and in the defense of child support obligors.

Underlying Legal Principles for Sound Child Support Awards

A. Introduction. Our purpose here will be to lay out general principles in a systematic manner to assist the court in better understanding the motion now pending for determination and modification of child support.

For many years there has been a conventional standard of child support in family law, which turns on right reason, and has never been difficult to apply once the necessary facts of a particular case were gathered. There would be no insurmountable problem today if this conventional standard were routinely applied and we had no child support guidelines at all.

This conventional standard is that *both father and mother have an equal duty to provide for the reasonable needs of their children on an ability-to-pay basis*. By reasonable needs we mean basic needs plus or minus whatever special circumstances dictate, -- i. e., the actual costs of raising a child, not a theoretical sum which is not related to economic reality. And those costs

must be shared by both parents according to their resources. The leading case on this interpretation of child support statutes is *Smith v. Smith*, 626 Pac. 2d 342 (Ore. 1981).

The problem now causing no end of trouble arose from the seemingly plausible idea that we needed child support guidelines to assist family courts in determining how much it costs to raise a child and in treating like cases in like manner. The theory was fair enough, but justice was frequently a casualty in the implementation, for guidelines were actually devised in some parts of the country to increase child support far beyond the actual needs of the children, to promote exploitation of child support obligors, to create economic incentives for divorce, and to create a child support industry. And even where these guidelines have been designed in good faith, they have not infrequently been put together in economic ignorance. The difficulties vary from one State to another. Some States have better guidelines than others. And some guidelines not only have relatively fewer flaws, but are easier to repair.

B. The Constitutional Standard of Child Support: In order to provide a cogent analysis, we must restate constitutional principles against which the soundness of a particular set of guidelines must be measured. For the conventional standard of child support is also reinforced by principles of fundamental law, which produce a constitutional standard of child support.

Procreation is a joint act and a joint responsibility. Men and women are equal before the law under the guarantee of equal protection in the United States Constitution, particularly as impacted by the 19th Amendment. See, e. g., *Adkins v. Children's Hospital*, 261 U. S. 525 at 552-553 (1923), and *Frontiero v. Richardson*, 411 U. S. 677 at 685 (1973). Particularization of this principle has been necessary especially in the field of family law. In the wake of *Frontiero*, it was held fairly early that there may be no legal preference or presumption in favor of father or mother on the question of child custody, as held in *State ex rel. Watts v. Watts*, 350 N. Y. S. 2d 285 (N. Y. City Fam. Ct. 1975), and *Commonwealth ex rel. Spriggs v. Carlson*, 368 Atl. 2d 635 (Pa. 1977). The leading case on equal protection in the field of family law is *Orr v. Orr*, 440 U. S. 268 (1979), in which it was held that a statute allowing alimony to women, but not to men, is per se unconstitutional, and there are clear suggestions in the opinion of the court (440 U. S. at 273) that the same principle applies to child support. In *Conway v. Dana*, 318 Atl. 2d 324 (Pa. 1974), it has in any event been held that both father and mother have an equal duty to pay child support in proportion to their respective means.

The constitutional standard of child support places further emphasis on the proper amount to be awarded. The State's interest is limited to assuring that the reasonable needs of the child are met, in light of his or her social, cultural, economic, or other circumstances. Child support may not be used as a pretext for tax-free alimony or transfer of wealth or social engineering by public authority. The amount ordered may be increased somewhat if the parents of the child enjoy greater wealth, but may not be measured by an arbitrary percentage of the income of either or both parents when such percentage exceeds the reasonable needs of the child. Married parents may not be ordered to use a certain percentage of their income in supporting their children, so long as reasonable needs are met, and the same is true of parents divorced. See, e. g., *Moylan v. Moylan*, 384 N. W. 2d 859 at 866 (Minn. 1984), and *Melzer v. Witzberger*, 480 Atl. 2d 991 at 995 (Pa. 1984). This inherent limit on child support follows from an acknowledged domain of family privacy which is protected by the 14th Amendment, and shield reasonable discretion of parents in raising their children, free of governmental intrusion or regulation, whether the parents are married, single, or divorced. The leading cases on point are *Pierce v. Society of Sisters*, 268 U. S. 510 (1925); *Wisconsin v. Yoder*, 406 U. S. 205 (1972); and *Troxel v. Granville*, 530 U. S. 57 (2000).

C. Statutory guidelines adopted by the several States: In order to capture conditional grants of Congress to promote child support collections under the Federal Family Support Act of 1988 (42

United States Code, Sections 654, 666, and 667, implemented by 45 Code of Federal Regulations, Sections 302.33, 302.55, and 302.56), all States of the Union adopted guidelines for the determination of child support for all obligators.

For a moment let us consider the nature of such guidelines. The most striking feature is that they amount to *statutory presumptions* which ordain that, given certain basic facts about the resources of the parents and the number of children, a certain amount of child support suggested by the guidelines is presumed by law to be the correct amount that should be paid by one parent to the other. The amount suggested can be rebutted by the evidence introduced in a particular case. But in the absence of such evidence, the amount presumed is the amount ordered.

In any event, these guidelines must conform to a significant body of jurisprudence on the characteristics of *statutory presumptions*, expounded in the twin cases of *Manley v. Georgia*, 279 U. S. 1 at 6 (1920), and *Western & Atlantic R. R. v. Henderson*, 279 U. S. 629 at 642-644 (1929). The underlying principle in both cases was thus stated in identical language: "*A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the 14th Amendment.*"

In any event, two rules have been shaped to govern *statutory presumptions* both in criminal prosecutions and in civil litigation. The first rule is that there must be a reasonable relationship between the basic facts and the presumed facts. See *Leary v. United States*, 395 U. S. 6 at 32-37 (1969). The second rule is that a *statutory presumption* must always be fully and fairly rebuttable. See *Vlandis v. Kline*, 412 U. S. 441 at 446-447 (1973). If a presumption is ill-founded, it is to that extent unconstitutional even if rebuttable. If a presumption is irrebuttable to correct injustice in particular cases, it remains to that extent unconstitutional even if otherwise reasonable as a generality.

And child support guidelines, as *statutory presumptions*, must always be read in conformity with guarantees of equal protection, family privacy, and due process in the 14th Amendment, and more generally in keeping with the principle that, if legislation can be fairly read in different ways, one constitutionally sound and the other constitutionally invalid or dubious, the constitutionally sound interpretation should be adopted, notwithstanding legislative history and all other considerations. See, e. g., *Jones & Laughlin Steel Corporation v. National Labor Relations Board*, 301 U. S. 1 at 30 (1937).

It will, therefore, be necessary to review the key provisions of the Federal Family Support Act of 1988.

Two provisions are of key importance:

The first is 42 United States Code, Section 667, which reads,

"(a) Each States, as a condition for having its State plan approved under this part, must establish guidelines for child support award amounts within the State. The guidelines may be established by law or by judicial or administrative action, and shall be reviewed at least once every four years to ensure that their application results in the determination of appropriate award amounts.

"(b)(1) The guidelines established pursuant to subsection (a) of this section shall be available to all judges or other officials who have the power to determine child support awards within the State.

"(b)(2) There shall be a rebuttable presumption, in any judicial 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 a specific finding on the record that the application of the guidelines would be unjust or inappropriate in a

particular case, as determined under the criteria established by the State, shall be sufficient to rebut the presumption in that case.”

The other is 45 Code of Federal Regulations, Section 302.56(h), which reads as follows:

“A State must consider economic data on the cost of raising children and analyze case data, gathered through sampling or other methods, on the application of, and deviations from the guidelines. The analysis must be used in the State’s review of the guidelines to ensure that deviations are limited.”

Read in light of the guarantees of equal protection and family privacy the United States Constitution, an award is “appropriate” within the meaning of 42 United States Code, Section 667(a), not by meeting a purely subjective standard, but by meeting an objective legal standard which is shaped by conventional definition and constitutional principle, -- the equal duty of both father and mother to supply the reasonable needs of their children in proportion to their respective means.

Again read in light of the guarantee of due process in the 14th Amendment, the Family Support Act of 1988 requires that child support guidelines be well founded in fact, that they be fully rebuttable when individual situations require deviation, and that they be based on correct use of authentic economic data. The importance of correct use of authentic economic data is brought out by the *Federal Register*, Vol. 56, No. 94, May 15, 1991, p. 22348, where it says that “any legitimate view of guidelines would include analysis of case data on the application of the guidelines, as well as analysis of current economic data on costs of raising children.”

Contrary to what is commonly assumed, therefore, the Federal Family Support Act of 1988 read in light of conventional standards and constitutional principles does not authorize or countenance the creation of child support guidelines to accomplish the objectives of “public policy” developed by legislators or bureaucrats. All social and political agendas must be set aside, and the entire focus must be upon correct use of authentic economic data to achieve a best generalized estimate of what an obligor’s monthly payment should be, based on his or her equal duty to provide for the reasonable needs of the children in proportion to his or her share of the total resources of both parents.

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