H.B. 591: Child Support or Spousal Maintenance

Sharon J. Badertscher
Ohio's Mandatory Child Support Guidelines: Child Support or Spousal Maintenance?

Many states have experienced substantial problems creating and implementing effective child support systems. Poor enforcement and inadequate awards have forced many custodial parents to apply for public assistance. Congress took steps to remedy the problems by enacting the Child Support Enforcement Amendment. The federal law required states to develop formulas to guide judges in calculating child support awards. By 1988, Ohio enacted guidelines to comply with the congressional mandate. The Ohio guidelines solve some problems, but create a host of others. The author critiques the new Ohio child support guidelines, focusing specifically on their impact on non-custodial parents who earn substantial incomes.

Introduction

Ohio House Bill 591 became effective on April 12, 1990, establishing mandatory child support guidelines which change significantly the way child support is viewed by Ohio courts. The bill was enacted as an emergency measure to comply with federal legislation requiring all states to have such guidelines in place by

1. H.B. 591 amended Ohio Revised Code §§ 2151.23, 2301.35, 3105.21, 3109.04, 3109.05, 3111.07, 3111.08, 3111.09, 3111.13, 3111.14, 3113.04, 3113.21, 3113.31, 3115.22, 3115.24, 3705.07, 3705.09, 3705.10, and 5101.31 H.B. 591, preamble, 1990 Ohio Legis. Serv. 5-546, 5-547 (Baldwin). The sections of H.B. 591 pertaining specifically to child support guidelines have been codified in OHIO REV. CODE ANN. §§ 3109.05, 3111.13, 3113.21.5-21.8 (Anderson Supp. 1990) [hereinafter Ohio Guidelines] and became effective April 13, 1990.
October 1, 1989. Failure to enact such mandatory guidelines would have resulted in the loss of federal funds for state Aid to Families with Dependent Children (AFDC) programs. Although the actual calculations under the new guidelines have changed very little from those used under previous guidelines set by the Ohio Supreme Court, the new act significantly alters the presumptions which give rise to the calculations. Additionally, the new rules limit the discretion judges may exercise in determining the amount of child support awards.

Many states, including Ohio, have had substantial problems operating child support systems. In the past, insufficient child support awards and poor enforcement mechanisms often forced custodial parents to apply for public assistance following their divorces. The non-custodial parent, however, typically enjoyed a much higher standard of living. In an attempt to remedy this situation, Congress enacted legislation requiring state courts to calculate the amount of child support owed in any particular case within

3. Id; see also H.B. 591, § 5, 1990 Ohio Legis. Bull. (Anderson). "This act is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, and safety. The reason for this necessity is that its enactment at the earliest possible time is necessary to minimize the potential period of time that Ohio might be out of compliance with federal child support enforcement requirements." Id.
4. Compare child support guidelines under C.P. Sup. R. 75, 1987 Ohio Legis. Serv. 4-59 (Baldwin), which were repealed on March 12, 1990 with the rules which replace them, OHIO REV. CODE ANN. § 3113.21.5. C.P. Sup. R. 75 was issued October 1, 1987 by the Ohio Supreme Court under the Rules of Superintendence for Courts of Common Pleas to comply with 42 U.S.C. § 667. The guidelines were to be used as a starting point in calculating child support awards, but were not binding on the courts. Id.
5. OHIO REV. CODE ANN. § 3113.21.5(B)(1).
7. As of 1989, 88% of custodial parents were women. See BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 52, table 69 (1991) [hereinafter STATISTICAL ABSTRACT] (detailing living arrangements of children); see also id. at 53, table 71 (Female Family Householders with No Spouse Present-Characteristics by Race: 1970-1988). The term “custodial parent” will refer to the mother of the child unless indicated otherwise. The term “custodial parent” is no longer used in Ohio to describe the parent with whom the child resides. Instead, the legislature favors joint parenting and hence the term “residential parent” is used to describe the parent who lives with the child. OHIO REV. CODE ANN. § 3109.04(K)(2). For purposes of this note, however, the terms “custodial parent” and “non-custodial parent” will be used for clarity.
9. Id.
specified guidelines or formulas developed by the state legislatures. Requiring the use of such guidelines generally was intended to improve the economic situation of the custodial parent and child by (1) increasing the actual awards paid to the custodial parent, (2) limiting the discretion of the trial judge in reducing the award amount calculated under the formula, and (3) creating mechanisms to improve enforcement of support orders. The child support enforcement program frequently “result[ed] in awards which [were] much lower than what is needed to provide reasonable funds for the needs of the child in light of the absent parent’s ability to pay.” The guidelines represent a legislative attempt to provide for more even distribution of the cost of raising a child between custodial and non-custodial parents.

While these changes in the child support system are undoubtedly necessary, the new Ohio law creates a child support framework which, for those with substantial incomes, disproportionately shifts the cost of raising a child to the non-custodial parent. In fact, in some cases the new guidelines require him to pay an amount of support that is not rationally related to the actual cost of raising his child. Under the new guidelines, the support obligation for families with a combined income of more than $100,000 per year is calculated as a fixed percentage of the families’ incomes and, as such, requires high income parents to pay a disproportionately large sum in child support. At these high income levels, the amount ordered for child support no longer has any economic relevance to the actual needs of the child.

11. See, e.g., 42 U.S.C. §§ 653(a), 654(9)(A), 666(b) (establishing a parent locator service to find parents who are delinquent in their support payments, procedures allowing paternity to be established until a child reaches age eighteen and garnishment of wages to pay delinquent awards).
13. Id.
14. See supra note 7 (noting statistics establishing that most custodial parents are women).
15. The percentage of parental income that is used to calculate the child support obligation declines as income increases until the parental income reaches $100,000 per year. If the parents earn $100,000 per year or more, the child support obligation is calculated using a flat figure of 10% of parental income. See OHIO REV. CODE ANN. § 3113.21(D).
16. The use of the word “needs” throughout this note refers to the amount of money actually required to care for the child based on average expenditures on children from intact families at the same income level.
When a child support award exceeds the amount required to meet the actual needs of the child, the guidelines attribute the excess to maintenance of the child's standard of living. Thus, if the support obligation is directed largely at maintaining standard of living, the ultimate effect of the new guidelines is arguably the financial equalization of the custodial parent's household with the non-custodial parent's household. Income equalization as a theory for calculating child support has been rejected by most states which use child support guidelines; it is viewed as being inequitable to the non-custodial parent. Instead of attempting to equalize the economic status of both parents, most states concentrate on increasing the amount of support given to children in order to meet their actual needs.

Although methods of determining child support vary from state to state, the most common method involves a calculation based on a percentage of parental income reflecting the amount to be contributed by the non-custodial parent in order to meet the actual needs of the child. Similarly, the Ohio Guidelines include a calculation specifically directed at the actual needs of the child. These "needs," however, are defined, in part, in terms of parental income under the theory that the child is entitled to share in the wealth of the non-custodial parent. The support obligation is calculated as a percentage of the parents' combined income and prorated between the two parents according to their respective abilities to pay. The Ohio Guidelines incorporate a graduated scale for calculating the support obligation so that in most cases, awards are tailored to reflect the actual needs of children and families' needs.

17. All guideline models include some calculation for standard of living. See OHIO REV. CODE ANN. § 3113.21.5(B)(2)(b) ("[T]he court ... shall consider the needs and the standard of living of the children who are the subject of the child support order and of the parents."). It could be argued that child support which exceeds a child's needs is actually spousal support since improvements to the child's standard of living also benefit the custodial parent. See Linda S. Balisle, New Formulas to Fairness, FAM. ADVOC., Spring 1988, at 16, 21 ("The general objections [to guidelines] ... are that children do not need that much money and that, after a certain level, it is really spousal support.").

18. See Diane Dodson, A Guide to the Guidelines, FAM. ADVOC., Spring 1988 at 4, 6 (referring to excess income beyond that required for children's needs as "hidden alimony").

19. See id. ("[I]n most states, the courts looked at a detailed assessment of children's 'needs' based on statements of expenditures specifically for the children.").


21. OHIO REV. CODE ANN. § 3109.05(A)(1).

22. Id. §§ 3113.21.5(B)-(F).
ability to meet those needs at their respective income levels. However, when the flat percentage rate mandated by the Ohio Guidelines for all incomes over $100,000 is applied, the resulting support obligations far exceed the amount actually required to meet the child's needs.\footnote{23} While it can be argued that excessive awards benefit the child by stabilizing his environment and improving his immediate standard of living, in reality, a large portion of the award benefits the custodial parent and is not, in fact, child support.

In addition, the structure of the Ohio Guidelines renders the amount of support calculated under the formula virtually irrebuttable by the non-custodial parent. Federal law requires that the support obligation calculated under any state's guidelines be presumed the correct amount needed to support the child.\footnote{24} However, state guidelines cannot be drafted to address all possible situations which may affect a particular family or to recognize inequitable results in some circumstances. For this reason, the federal legislation requires all states to allow the support obligation calculated under state guidelines to be rebutted upon a showing that the award is unjust or inappropriate in that particular case.\footnote{25} The Ohio Guidelines, however, take the federal provision one step further by requiring that the rebutting party also demonstrate that the calculated award is not in the best interest of the child.\footnote{26}

Ohio's additional requirement creates a standard for rebuttal that can rarely be met by the non-custodial parent. While this additional requirement affects non-custodial parents at all levels of income, it is particularly problematic for the non-custodial parent with a substantial income. Under Ohio's new rules, high-earning non-custodial parents now have no practical way to establish that the obligation calculated under the support guidelines is far in excess of the financial support actually needed to raise the child or that other factors not considered in the calculation would prove such a large award inequitable.\footnote{27} This additional requirement en-

\footnotesize{23. See OHIO REV. CODE ANN. § 3113.21.5(D).}  
\footnotesize{24. 42 U.S.C. § 667(b).}  
\footnotesize{25. 42 U.S.C. § 667(b)(2). See generally Marilyn R. Smith, Grounds for Deviation, FAM. ADVOC., Spring 1988, at 22 ("Where guidelines are applied as a rebuttable presumption, a request for deviation should be based on persuasive evidence showing that imposition of the guidelines would injure one of the parties or the child.").}  
\footnotesize{26. OHIO REV. CODE ANN. § 3113.21.5(B)(1)(a).}  
\footnotesize{27. Other factors which may render an award inequitable are the ages of the children, the presence of second families, tax treatment of the payments, property division at the time of the divorce, non-monetary contribution and payment of private school tuition and
sures an unfair result when coupled with the inherent distortion of the guidelines’ calculation for non-custodial parents at high income levels.

This note examines the inequity arising under the new guidelines and suggests possible solutions to this problem. This note first considers the problems inherent in the previous system of calculating child support and its devastating effects on women and children. It examines past problems related to inadequate awards and insufficient enforcement. This note then discusses the congressional response to the inequities in many state systems. The second section of this note describes Ohio's new law, its shift of financial burdens, the flat percentage rate calculation, and the rebuttable presumption. Additionally, the second section discusses the importance of an equitable award. Finally, in section three, this note proposes a solution based on the income shares model and changes in the application of the guidelines.

I. PROBLEMS WITH THE CHILD SUPPORT SYSTEM

Child support developed as a means of keeping children of single parent homes from becoming dependent on public assistance. To this end, most states enacted laws which essentially gave the judiciary a broad range of discretion in assessing specific child support awards. These laws were designed to benefit children by allowing the court to consider the children's and parents' individual circumstances. However, even with the existence of these

fees for extracurricular activities by the non-custodial parent. Smith, supra note 25, at 23. 28. See Hacker v. Hacker, 448 N.E.2d 831, 833 (Ohio Ct. App. 1981) (“the obligation to support one's own children is owed to the public generally”) (quoting State v. Ducey, 266 N.E.2d 233 (Ohio Ct. App. 1970)); State v. Turner, 209 N.E.2d 475, 477 (Ohio Ct. App. 1965) (“The intent of [the neglect statute] was to . . . relieve society of a burden that properly belonged to one charged by law with its obligation.”). Children often found themselves dependent on public assistance if their fathers deserted the family or if they were born out of wedlock; their mothers typically were unable to support them. See Donna Schueler, Origins and Development of the Law of Parental Child Support, 27 J. FAM. L. 807, 809-15 (1988). Child support laws were developed as a way to ensure that the public would be reimbursed by the father for the cost of providing for the needs of the child in these situations. Id.

29. See, e.g., N.Y. DOM. REL. LAW § 240:27 (McKinney 1980) (“[I]n designated matrimonial actions . . . the court must give direction as between the parties with respect to the child’s education and maintenance.”) Am. Sub. House Bill 614, § 3109.05, 1984 Ohio Legis. Serv. 5-909, 5-912 (Baldwin) (amended 1990) (“In a . . . child support proceeding, the court may order either or both parents to support or help support their children without regard to marital misconduct. In determining the amount reasonable or necessary for child support . . . the court . . . shall consider all relevant factors . . . .”).
laws, low awards and poor enforcement continued to force single parents and their children into poverty.\textsuperscript{30} Dependence on the welfare system following a divorce or an illegitimate birth usually resulted because the mother, not the father, was typically forced to bear the economic burden of raising the children alone.\textsuperscript{31} Since women generally were not the primary breadwinners and, in many cases, lacked sufficient skills to obtain adequate employment, families were often forced to turn to the public welfare system in order to survive.\textsuperscript{32} This situation, known as the "feminization of poverty," is the very problem the early child support rules attempted to correct.\textsuperscript{33}

The early child support systems failed to achieve their goal for two reasons. First, although the laws attempted to establish child support obligations which were to be paid by the non-custodial parent, these awards were often insufficient at the outset to meet the needs of the children and then were never adjusted over time to offset the effects of inflation.\textsuperscript{34} Second, once the obligation was ordered by the court, little was done to enforce it.\textsuperscript{35}

\begin{itemize}
\item \textsuperscript{30} Woods, \textit{supra} note 8, at 539.
\item \textsuperscript{31} \textit{Id.} at 538 ("Mothers with custody pay well over half the costs of childrearing."); \textit{see also} James B. McLindon, \textit{Separate but Unequal: The Economic Disaster of Divorce for Women and Children}, 21 \textit{FAM. L.Q.} 351, 353 (1987) ("While men enjoy a substantial increase in their per capita income following divorce, women (and children, of whom they generally receive custody) experience an equally substantial decline.").
\item \textsuperscript{32} \textit{See} Diana Pearce, \textit{Welfare is Not for Women: Toward a Model of Advocacy to Meet the Needs of Women in Poverty}, 19 \textit{CLEARINGHOUSE REV.} 412, 413 (1985) (discussing the "feminization of poverty"). Pearce argues that "much of women's poverty is due to two causes that are basically unique to females. Women often must provide all or most of the support for their children, and they are disadvantaged in the labor market." \textit{Id.}
\item \textsuperscript{33} Robert D. Thompson & Susan F. Paikin, \textit{Formulas and Guidelines for Support}, 36 \textit{JUV. \\& FAM. CT. J.} 33 (1985) (stating that the "'feminization of poverty' . . . [is caused] by insufficient levels of child support awards and poor collection rates").
\item \textsuperscript{34} Linda H. Elrod, \textit{Kansas Child Support Guidelines: An Elusive Search for Fairness in Support Orders}, 27 \textit{WASHBURN L.J.} 104, 109 (1987). \textit{See also} Woods, \textit{supra} note 8, at 539 (discussing the consequences of initial low awards that are never adjusted for inflation).
\item \textsuperscript{35} Vicki Pohlman \\& Geoffrey P. Walker, Note, \textit{H.R. 4325 and H. 614: Federal and State Answers to Economic Child Abuse?}, 11 \textit{U. DAYTON L. REV.} 139, 139 (1985) ("child support orders are . . . often wholly or partially ignored, thereby forcing custodial parents to apply in staggering numbers to Aid to Families with Dependent Children (AFDC) Programs.") (citations omitted). It should be recognized that enforcement could be difficult, time consuming and costly considering the expense of private counsel, locating parents who move away and evidentiary hearings. \textit{See, e.g.}, Linda H. Elrod, \textit{Enforcing Child Support Using the Revised Uniform Reciprocal Enforcement of Support Act}, 36 \textit{JUV. \\& FAM. CT. J.} 57 (1985) (addressing the enforcement of child support obligations across state lines).
\end{itemize}
As a result, the custodial parent was often forced to bear the primary cost of raising the children alone.

A. Inadequacy of Support Awards

One problem attributable to the early child support laws was undervaluation of the actual cost of raising the children in calculating support obligations. A 1981 Census Bureau study showed that the average child support award covering two children was $171 per month.\(^{36}\) That amount represents approximately sixty percent of the amount actually needed to raise two children at the poverty level in 1981; it equals only twenty-five percent of expenditures for two children made by a middle class family.\(^{37}\) Similarly, a 1983 Census study indicated that the average court order for child support for 1.7 children was $191 per month.\(^{38}\) This amount represents approximately eighty percent of the amount needed to raise 1.7 children at the poverty level in 1983; it equals only twenty-five percent of expenditures on children made by a middle class family.\(^{39}\) The poverty level, set in the U.S. Poverty Guidelines, represents the minimum amount of money needed to support a person at the lowest standard of living in this country.\(^{40}\)

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\(^{39}\) Gale M. Phelps & Jerald L. Miller, The New Indiana Child Support Guidelines, 22 Ind. L. Rev. 203, 205 (1988) (figures based on comparison with authoritative study by Thomas Espenshade of average family expenditures on children); see Williams, supra note 6, at 283-84 (comparing 1983 Census Bureau study of child support with Espenshade's estimates of average expenditures). Based on the Espenshade study's estimates, in order to provide adequate support, court ordered child support should have been 7.5 times higher than the amount awarded. Phelps & Miller, supra, at 205.

Census Bureau reports indicate that the mean income of women due child support, not including child support payments, was $10,226 in 1983. Id. at 205 n.14 While the average income of men owing child support was unknown, the average income of men in 1983 was $18,110. Id. The Espenshade study estimated that $749 per month was necessary to support 1.7 children. Id. If this amount is divided proportionately according to income, the non-custodial parent would be required to pay $479 per month—an amount 2.5 times greater than the $191 actually paid. Id. at 205.

\(^{40}\) Department of Health and Human Services: Annual Revision of Poverty Income
guideline issued in 1983, the minimum amount of income necessary to support the first member of a family, presumably the custodial parent, was $405 per month and for every family member thereafter, $140 per month.\textsuperscript{41} Thus, the minimum amount needed to support one child in 1983 was $140 per month or $1680 annually.\textsuperscript{42}

Most parents, however, can afford to provide for their children above the minimum subsistence level.\textsuperscript{43} While there are no set calculations for determining the proportion of income spent on children by families at any particular income level, it is generally agreed that parents with intact marriages spend a greater percentage of their income on their children than the amount required to subsist at the poverty level. These parents can afford to provide a higher standard of living for their children.\textsuperscript{44} Unfortunately, most child support awarded prior to enactment of the federal legislation mandating state guidelines did not even approximate the amount of support required to meet the needs of the children at a minimum subsistence level.\textsuperscript{45}

As a result of inadequate awards, children and custodial parents often suffered dramatic changes in their standards of living following a divorce, while the non-custodial parent enjoyed an improved standard of living.\textsuperscript{46} Studies show that one-fifth of children of divorce were moved to less affluent surroundings within six months of their parent's separation and that two-thirds of children of divorce were moved to less affluent surroundings within three to five years following their parent's divorce.\textsuperscript{47} The economic impact of such a move to lesser surroundings only exacerbates the emotional burden children already experience as a result of the

\textsuperscript{41} Id.

\textsuperscript{42} Compare the $140 per month needed to raise one child at the poverty level with the $191 actually ordered in 1983 for the support of two children. See supra text accompanying note 38.

\textsuperscript{43} Williams, \textit{supra} note 37, at 42.

\textsuperscript{44} \textit{Id.} See also THOMAS ESPENSHADE, \textit{Investing in Children: New Estimates of Parental Expenditures} 29 (1984).

\textsuperscript{45} See supra text accompanying note 42.

\textsuperscript{46} Woods, \textit{supra} note 8, at 539, n.14 ("In the first year after divorce, the standard of living of women declines 73 percent while their husbands' standard of living improves 42 percent.").

\textsuperscript{47} Carol S. Bruch & Norma J. Wikler, \textit{The Economic Consequences}, 36 JUV. & FAM. CR. J. 5, 20 (1985) (noting that as women's financial situations worsened after their divorce, they were forced to search for less expensive housing).
divorce.\textsuperscript{48} Even if child support awards were adequate at the time of the original order, many awards became inadequate as the cost of living increased.\textsuperscript{49} Estimates suggest that inflationary effects can decrease the purchasing power of a dollar by as much as twelve percent annually.\textsuperscript{50} Additionally, as children grow older, their expenses increase due to greater food consumption and increased participation in activities.\textsuperscript{51} Consequently, more money is required to meet their increased needs. Although many states, including Ohio, allowed for a modification of awards to account for a "change of circumstances," changes in the inflation rate or cost of living increases were generally perceived as being contemplated at the time of the original support order. The effects of inflation on the cost of living, therefore, did not amount to a "change of circumstances" under the common law.\textsuperscript{52} Thus, if the original order was inadequate, its subsequent devaluation due to inflation would compound the problem by increasing the financial burden placed on the custodial parent.

\textsuperscript{48} Id.

\textsuperscript{49} Id. at 23 ("As the purchasing power of each support dollar decreases, the custodial parent is left to reduce expenditures or, if possible, finance them out of other resources.").

\textsuperscript{50} Id. Although the annual inflation rate rose to 12.5\% in 1980, inflation rates have more recently ranged between 4 and 6\%. \textit{WORLD ALMANAC AND BOOK OF FACTS} 115 (Mark S. Hoffman ed., 1991). \textit{See also} David Hage et al., \textit{Living with Less Inflation}, U.S. \textit{NEWS AND WORLD REP.}, Oct. 7, 1991, at 56 (citing recent inflation rates).

\textsuperscript{51} \textit{See e.g.}, Gnirk v. Gnirk, 589 A.2d 1008, 1012 (N.H. 1991) (holding that the predictable effects of inflation and costs associated with the growth of the child are not considered in determining a substantial change in circumstances); Labita v. Labita, 537 N.Y.S.2d 835, 836 (N.Y. 1989) ("A generalized claim that a child's needs have increased as the child has matured or as a result of inflation does not warrant an upward modification of child support."). \textit{But see} Franks v. Franks, 812 P.2d 304, 306 (Idaho Ct. App. 1991) (taking inflation over the last four years into account in determining a change in circumstances); Nicholas v. Nicholas, 400 S.E.2d 608, 610 (W. Va. Ct. App. 1990) (concluding that a substantial change in circumstances may be deemed to have occurred because of a change in the cost of living or increases in children's needs as they get older).

\textsuperscript{52} Compare Bright v. Collins, 442 N.E.2d 822 (Ohio Ct. App. 1982) (noting the general rule that a modification is available only where (1) the circumstances have changed sufficiently to render the previous order unreasonable and (2) such circumstances were not contemplated at the time of the original order) with \textit{OHIO REV. CODE ANN.} § 3113.21.5(B)(4) (if the amount of support is recalculated under the guidelines and the result varies from the original order by more than 10\%, this change of circumstances will be considered substantial enough to require modification).
B. Enforcement

The second factor contributing to the increased number of children in single parent homes dependent on welfare was the states' inability to enforce support awards. Generally under prior child support laws, the rate of enforcement of support orders was very low. Statistics indicate that, in the early 1980s, approximately one in every four children lived in a single parent household. Of those children, thirty percent received no support at all and fewer than fifty percent received the entire amount of support owed to them. A United States Census Bureau study indicated that in 1983, child support orders totaled approximately $10.1 billion. Of that amount, only $7.1 billion was actually collected, leaving a total of $3 billion outstanding support dollars owed to children nationwide. Ohio, in particular, had a poor compliance rate. According to 1984 estimates, the non-compliance rate in Ohio varied by county from forty-six percent in Clark County to sixty-four percent in Mahoning County. The non-compliance rate for families receiving Aid to Families with Dependent Children (AFDC) was over ninety-two percent.

Several explanations can be given for the poor compliance rates both in Ohio and in general. First, prior to the federal statute, information compilation systems were either non-existent or

54. See Woods, supra note 8 (stating that nearly one-third of all child support awarded goes unpaid).
56. Id. According to Howe, the problems of children whose needs are not being met are often described as the result of parental neglect. In many cases, those problems could be characterized as the result of community neglect because of poor enforcement of child support awards. Id.
57. See 1983 CENSUS REPORT, supra note 38, at 3.
58. Id.
60. Id. Poor compliance rates can be attributed to unemployment and underemployment of the non-custodial parent. Id. at 154. Additionally, it should be noted that while custodial parents can access the services of the prosecutors' offices to modify or enforce an award, the non-custodial parent must hire a private attorney. Hiring counsel can be prohibitively expensive if the non-custodial parent is unemployed. Presumably, some parents counted as underpaying or not paying support could comply with modified orders if they could afford legal counsel to initiate modification proceedings.
poorly managed. Non-custodial parents could easily move away from their children, ignoring their obligation with little chance of being found. Difficulties in enforcing child support orders were compounded if the non-custodial parent moved outside of the jurisdiction of the court that issued the order. Additionally, identifying fathers was often difficult. As the number of illegitimate births increased, the states simply did not have any mechanism in place to identify the fathers of these children to order support payments for them.

A second explanation for the enforcement problem involves the subjectivity of the case-by-case method of determining support awards. Broad judicial discretion allowed in case-by-case determinations led to inequitable results; similarly situated parties did not receive similar awards. Studies indicate that while each judge tended to be consistent in his or her awards, the orders statewide varied considerably. A 1978 Denver, Colorado survey revealed that awards for one child varied from five percent to thirty-three percent of the obligor’s income. Some of these awards were actually lower than the obligor’s car payment. In a similar study conducted by the Administrative Office for Michigan courts, researchers sent a hypothetical case to various Friends of the Court throughout the state and asked them to recommend an amount of money that should be awarded as child support. The results of

63. Elrod, supra note 34, at 57. Insufficient personnel in prosecutors’ offices to track support obligors caused problems when obligors moved from the state that had originally issued the order and caused lengthy delays in obtaining support payments. Id. Additionally, judges in the obligors’ states tended to favor the obligors since they were the only parties present in court. Id. Now, under 42 U.S.C. § 651, which authorized the appropriation of funds to carry out the provisions of the Child Support Enforcement Act, these problems are being addressed. States are required to give full faith and credit to support awards from other jurisdictions. 42 U.S.C. § 654(a). To eliminate state bias toward its own residents, states may use the federal courts to enforce awards. 42 U.S.C. § 660.
64. See Pohlman & Walker, supra note 35, at 173. Implicit in the requirement of the child support amendments that expedited processes to determine paternity be enacted is the notion that prior mechanisms for establishing paternity were either inadequate or non-existent. Id.
65. See Williams, supra note 37, at 41 (assessing variations in awards determined on a case-by-case basis).
66. Williams, supra note 6, at 284.
67. Williams, supra note 37, at 41.
68. Id.
69. Id. at 41-42 (citing Michigan Friend of the Court Bureau, Proposed Child Support Guideline (draft) State Court Administrative Office: Lansing, Michigan (Jan. 1985)).
this survey ranged from awards of $0 to $70 per week. Such inconsistencies in the case-by-case method alienate parties from the system, making them much less likely to comply with an order of support after having the chance to compare their awards with others and discover the inconsistent results.

Another explanation for poor compliance involves the cost to the custodial parent of enforcing the child support order. The legal costs involved in pursuing enforcement can often be prohibitive. In Ohio, enforcement proceedings could be brought through the state prosecutor’s office, saving the custodial parent the expense of hiring a private attorney. However, to exercise this option, the custodial parent would have to have known the services were available. Alternatively, the custodial parent might have tried to minimize her total legal costs by delaying enforcement action until a substantial arrearage had accrued. However, that strategy sometimes worked against the custodial parent because, if the case went to court, the judge might determine that the father was unable to pay the support due and award a reduced amount. Under Ohio law, a parent who prevails in an enforcement proceeding could be awarded attorney fees in addition to arrearages. This alternative can also be ineffective in the long-run; an obligor not complying with a support order is likely to be even less motivated to comply with an order for arrearages, plus current support, plus attorney fees. Because of the deficiencies of enforcement mechanisms, custodial parents were often forced to bear child-rearing costs alone. It was primarily this situation which prompted Congress to act with respect to child support, an issue traditionally left to the states, and ultimately to require the development of state child support guidelines.

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70. Id.
71. See Pohlman & Walker, supra note 35, at 177.
72. This option is still available to the custodial parent. See Ohio Rev. Code Ann. § 3115.22(A).
73. See Williams, supra note 6, at 316.
74. Woods, supra note 8, at 539.
75. Id.
C. The Congressional Response

Congress responded to the problems of inadequate child support awards and poor enforcement rates by passing the Child Support Enforcement Amendment of 1984. This legislation emphasized enforcement and attempted to improve the adequacy and consistency of new awards by requiring states to develop guidelines or formulas for calculation of child support. Ideally, these guidelines and formulas should promote equal treatment of all parents so that similarly situated parties receive similar awards. In addition, the guidelines should be structured to improve the overall rate of awards at all income levels. Although the 1984 Amendments continued to allow courts to consider individual circumstances when determining amounts awarded in particular cases, Congress suggested that judges use the calculated amount as a starting point for the award ultimately ordered.

In 1988, Congress further amended the Social Security Act to limit judicial discretion in making child support orders. This 1988 Amendment, the current federal law, mandates that judges order the amounts calculated under the guidelines as the child support awards unless one of the parties can demonstrate that the guideline amount is inappropriate or unjust under the particular circumstances. In effect, the 1988 Amendment creates a presumption that the amount calculated under any state’s guidelines is the actual amount needed to support the child. While judicial discretion has been significantly reduced by the 1988 Amendment,

78. 42 U.S.C. §§ 651-668 [hereinafter the 1984 Amendments]. Title IV-D of the Social Security Act, 42 U.S.C. §§ 651-662, was originally enacted in 1975 to create a basic child support program.
79. Dodson, supra note 17, at 5.
81. Id.
82. Id.
83. 42 U.S.C. § 667(b)(2) [hereinafter the 1988 Amendment]. Compare the 1988 Amendment (“There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded.”) with the 1984 Amendments, Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, § 18(a), 98 Stat. at 1321 (“guidelines . . . shall be made available to all judges and other officials who have the power to determine child support awards within such State, but need not be binding upon such judges or other officials.” (emphasis added)).
84. 42 U.S.C. § 667(b)(2).
discretion has not been entirely displaced. If a judge determines that the calculated amount is inappropriate, the judge must set forth in writing the specific factors which account for any deviation from the guidelines.\textsuperscript{85}

The 1988 Amendment provides the basic framework for states to enact new child support laws. This amendment does not, however, specify any particular basis or underlying theory for a state's guidelines, nor does it specify maximum or minimum levels of support. Federal regulations merely direct that the state's guidelines provide for a computation of the child support award based on specific descriptive and numeric criteria,\textsuperscript{86} and that the guidelines comply with the basic requirements mentioned above.\textsuperscript{87} States specify the factors, such as remarriage of the party or ages of children, courts may consider in the calculation. Factors not specifically listed under a state's guidelines may be considered only if a court makes a written finding or a finding on the record that failure to account for the factor would render an award unjust or inappropriate.\textsuperscript{88}

The 1988 Amendment also contains several provisions designed to improve state enforcement mechanisms. Among other things, Congress has established a national parent locator service.\textsuperscript{89} The purpose of the locator service is two-fold. First, it provides states with access to numerous personal records of the non-custodial parent to increase the likelihood that enforcement authorities can find parents who move away from the jurisdiction which imposed the support obligation.\textsuperscript{90} Second, it requires increased cooperation among the states in collecting delinquent payments from parents living outside the jurisdictional reach of the court that issued the original order.\textsuperscript{91}

The use of guidelines in child support calculations is a major step toward improving the economic situation of the custodial parent and the child. The structural models upon which the states

\textsuperscript{85} Id.
\textsuperscript{86} 45 C.F.R. § 302.56 (1990).
\textsuperscript{87} Id.
\textsuperscript{88} 42 U.S.C. § 667(b)(2). For example, one commentator suggests that guidelines do not suffice when one of the parents suffers from a chronic illness, the child has unusual therapeutic or educational needs or an older child works and contributes to the family income. Williams, supra note 6, at 312.
\textsuperscript{89} 42 U.S.C. § 666.
\textsuperscript{90} 42 U.S.C. § 653.
\textsuperscript{91} 42 U.S.C. §§ 654(8), (9)(B).
base their guidelines are founded on economic data which reflect
the costs of raising a child. Therefore, the guidelines should im-
prove the adequacy of awards while consistently and propor-
tionately distributing these child-rearing costs between the par-
ents.92 According to one commentator, states which enacted
guidelines prior to the 1984 Amendments have found the results
fair and equitable in most cases.93

However, guidelines are not ideal in all situations. Guidelines
cannot account for all of the circumstances of each family to
which they apply. With respect to income families with incomes
that are particularly high or low, guidelines are especially ineffec-
tive.94 For example, low income parents may not be able to meet
a support obligation if the non-custodial parent is dependent on
public assistance. The obligation for a high income parent can
likewise be affected by a substantial property settlement awarded
in the divorce or by the provision of in-kind services for the child.95
If the guidelines are to fix one inequity without creating another,
they must be flexible enough to accommodate any factor which
would render an inequitable result, particularly at very low or very
high incomes. It is here that the new Ohio Guidelines fail.

II. OHIO’S RESPONSE: SHIFTING THE BURDEN

Prior to the 1984 Amendments, Ohio law afforded judges
complete discretion in awarding child support to a custodial par-
ent.96 To comply with the federal requirements of the 1984

92. See Williams, supra note 37, at 43 (noting that because formula models reflect
differing interpretations of similar data, the adequacy of support awards may vary).
93. See Williams, supra note 6, at 291. For examples of statutes establishing child
support guidelines prior to 1984, see DEL. CODE ANN. tit. 13 § 514 (1990); WASH. REV.
CODE ANN. §§ 26.19.001 to -.110 (West Supp. 1991); WIS. STAT. ANN. § 767.251 (West
1987). Colorado, Maine, Michigan, Nebraska, New Jersey and Vermont adopted the In-
come Shares model shortly after enactment of the 1984 amendment. See COL. REV. STAT.
COMP. LAWS ANN. § 42-364.16 (1987); N.J. STAT. ANN. § 2A:34-23 (Supp. 1991); VT.
94. See Williams, supra note 6, at 312 ("[E]xperience in several states has suggested
that application of guidelines is most difficult at both extremes of the income range.").
95. See id. ("At high parental income levels (e.g., $100,000 per year or more), child
support levels are significantly affected by tax considerations and trade-offs between other
elements of an overall divorce settlement, such as property division and spousal main-
tenance.").
96. Am. Sub. House Bill 614, § 3109.05, 1984 Ohio Legis. Serv., supra note 29, at 5-
912. See also supra text accompanying note 29.
Amendments, the Ohio Supreme Court developed child support guidelines to supplement the existing Ohio law. These guidelines, codified in the Rules of Superintendence for Courts of Common Pleas, mirrored the federal requirements and, therefore, did not require calculations made under the guidelines to be binding on the judge's final child support order. In effect, Ohio continued to maintain a child support system which allowed judges complete discretion in issuing awards.

The Ohio General Assembly enacted the new guidelines in order to comply with the 1988 Amendment mandating that state guidelines be binding on judges issuing support awards. The new Ohio Guidelines incorporated the guidelines already in place under the Rules of Superintendence for the Court of Common Pleas, but significantly changed the presumptions involved in the application these guidelines. The new guidelines are now binding on judges' support decisions and judges can exercise discretion only if the amount calculated under the guidelines is inappropriate or unjust and not in the best interest of the child, as determined by a variety of factors enumerated in the statute. The new guidelines focus on improving the child's standard of living as well as shifting more of the cost of raising the child to the non-custodial parent. While the calculation under the new guidelines may seem similar to previous guidelines, its application to any given case before the court is very different from the application of previous guidelines.

The Ohio Guidelines conform with the Income Shares Model. This model is based on the theory that children should receive the same portion of their parents' income that they would

97. C.P. Sup. R. 75, 1987 Ohio Legis. Serv., supra note 4, at 4-59 (repealed 1990). According to practicing family law attorney Michael P. Lavigna, Jr., some courts, such as the domestic relations court in Cuyahoga County, allowed for liberal deviation from the guidelines while other courts, such as the domestic relations court in Lake County, adhered strictly to the guidelines and would not allow deviation even by agreement of the parties. Interview with Michael P. Lavigna, Jr. in Cleveland, Ohio (March 3, 1991).

98. Compare C.P. Sup. R. 75, 1987 Ohio Legis. Serv., supra note 4, at 4-59 ("The court should exercise broad discretion in deviating from the Guidelines in cases where application would be inequitable to the child or children or to one of the parties.") with OHIO REV. CODE ANN. § 3113.21.5(B)(3) ("In determining whether (an award) would be unjust or inappropriate and would not be in the best interest of the child, the court may consider the following factors and criteria: (a) Special and unusual needs of the children; (b) Obligations for minor or handicapped children; . . . (c) Extended times of visitation; . . . (e) Mandatory deductions from wages; . . . (f) Disparity in income between parties or households . . . "). The statute does not indicate whether this list is meant to be exhaustive, but it lacks a provision stating that other factors can be considered.

99. See OHIO REV. CODE ANN. § 3113.21.5.
have received if their parents continued to live together. Both the Income Shares Model and the Ohio Guidelines determine the appropriate support figure using economic data regarding parental expenditures on children. These data suggest that while the actual dollar amount spent on children increases as parental income rises, the percentage of families' incomes devoted to the children actually declines. At higher levels of income, a lower percentage of the family's total income is required to meet the basic needs of the child.

Under this economic presumption, the child support obligation is calculated by taking into consideration the number of children and the parents' combined income. Since the Ohio Guidelines are based on the Income Shares Model, the percentage of income used to determine the child support obligation should decline as income rises. This is, in fact, the result under Ohio's guidelines for families with combined income less than $100,000 per year.

The guidelines' support schedule applies if combined parental income is at least $6000 per year. At this level of income, the child support obligation for one child is four percent of the parents' combined income. At a combined parental income of $7200 per year, the support obligation is almost fifteen percent of
the parents' income. The percentage of combined income allocated by the guidelines to child support continues to decrease as parental income increases, leveling off at ten percent for combined incomes of $100,000 per year. According to the support schedule, this ten percent figure is applied up to a combined income level of $120,000 per year. For parents with combined income of more than $120,000, the statute fails to provide definitive guidance. At the opposite extreme of the income range, the Ohio statute allows the child support obligation to be determined on a case-by-case basis. The statute is not as forgiving at high income levels, and it may even be considered unfair to the non-custodial parent.

If the parents' combined income exceeds $120,000 per year, the Ohio statute first indicates that the support obligation should be determined on a case-by-case basis, considering the needs and standards of living of both the children and parents. However, the statute then states that the support obligation for a single child family must be calculated by using the same percentage of family income, ten percent, as used at the combined income level of $120,000 per year. This calculation will be the amount of support due from parents with combined incomes exceeding $120,000, unless it can be shown that such an amount would be inappropriate or unjust, and not in best interest of the child. Thus, this section of the statute seems to contradict itself.

If this apparent contradiction in the statute is resolved by applying the case-by-case method to calculate the support obligation, the result may arguably be fair and equitable for all parties involved. Those states that pioneered the use of guidelines discovered that guidelines are particularly ineffective at very high income levels due to the significant number of factors affecting these parties. At higher levels of income, parties are more likely to pro-

106. Id.
107. Id.
108. Id.
109. Id. § 3113.21(B)(2)(a). If the parents' combined annual income is less than $6000, the statute directs courts to "review the obligor's gross income and living expenses to determine the maximum amount of child support that it reasonably can order without denying the obligor the means for self-support . . . ." Id.
110. Id. § 3113.21(B)(2)(b).
111. Id.
112. Id.
113. See Williams, supra note 6, at 312.
vide for their children through a large property settlement or in-kind services, including, for example, trust funds for educational needs. These factors are not considered under the guidelines, or if considered, are not given much weight in the calculation. Use of the case-by-case method would allow for consideration of these factors.

Undoubtedly, use of a pure case-by-case method contributed to the problems plaguing the original child support system. That method could arguably lead to similar inequitable results if allowed under the new guidelines. For example, at very high income levels, judges may be reluctant to award high amounts of child support, even in cases where supplemental income factors are absent. Conversely, judges may award very high amounts of support despite the presence of these factors simply because the non-custodial parent can afford the payment. Although both results are possible under a pure case-by-case determination of child support, inequitable results like these could be avoided if courts use the guidelines as a starting point in the award calculation, coupled with subsequent application of the case-by-case method when the presence of outside factors merit deviation from the guideline amount.

Arguably, a pure case-by-case method is prohibited under the 1988 Amendment to the federal statute because the regulations promulgated under that act require state guidelines to employ a numerical calculation to be used by courts for determining child support obligations. Since the case-by-case method is not a numerical calculation, it does not comply with the federal rules. Notwithstanding these rules, a number of jurisdictions provide for an income cap above which the guidelines do not apply. Although it may be reasonable to assume Congress did not expect the states to develop guidelines to cover all income levels, the statute contains such strict language that it seems to preclude any determination using a case-by-case method.

The apparent contradiction in the Ohio Guidelines could also be resolved by applying the same percentage to the combined

114. See id.
115. OHIO REV. CODE ANN. § 3113.21.5(B)(3). While it can be argued that in-kind contributions will be given weight under the statute, in reality, those contributions can never be considered to reduce an award because of the wording of the statute's rebuttable presumption. For further explanation, see infra text accompanying notes 152-69 discussing the problems with the rebuttable presumption in Ohio.
116. 45 C.F.R. § 302.56(e).
117. Balisle, supra note 17, at 21.
income of parents earning more than $120,000 as is applied to families earning $120,000 per year. However, the resulting support obligation would be unfair to the non-custodial parent. Such a flat rate calculation will result in a child support obligation which has virtually no economic relevance to the needs of the child. Instead, the guidelines should continue to decrease the percentage of income allocated to child support as combined income rises to reflect economic data indicating that the percentage of family income spent on children decreases as income increases.\textsuperscript{118} The Ohio Guidelines, however, arbitrarily terminate the reduction of percentage at ten percent for families with combined incomes of $100,000 per year or more.\textsuperscript{119} As income increases above $100,000, the amount of support calculated under the guidelines then becomes disproportionately greater than the amount that economic data suggest would have been spent on the child had the marriage continued.\textsuperscript{120} It is the application of this fixed percentage to incomes over $100,000 that leads to inequitable results under the Ohio Guidelines.

Moreover, the amount of support calculated using this fixed percentage cannot, as a practical matter, be rebutted by the non-custodial parent under the Ohio Guidelines. The Ohio Guidelines require that the amount calculated under the guidelines be binding on judges unless a party can show that amounts awarded are inappropriate or unjust and not in the best interest of the children.\textsuperscript{121} An insufficient award can easily be shown not to be in the best interest of a child.\textsuperscript{122} An excessive award, however, cannot be rebutted so easily. It is difficult to argue that a greater amount of support would not be in the child's best interest. Therefore, even though the amount of support calculated under a fixed percentage does not reflect the average expenditures to satisfy a child's needs at that income level, the non-custodial parent cannot effectively rebut the presumption favoring the formula amount.

A. Child Support as a Flat Percentage of Income

Application of a flat percentage rate to calculate child support

\textsuperscript{118} See supra note 101 and accompanying text.
\textsuperscript{119} OHIO REV. CODE ANN. § 3113.21.5(D).
\textsuperscript{120} This assertion assumes average family expenditures. It is possible that one particular family would spend more or less frugally than the average figures indicate.
\textsuperscript{121} OHIO REV. CODE ANN. § 3113.21.5(B)(1)(a).
\textsuperscript{122} See infra text accompanying notes 157-58.
when combined parental income exceeds $100,000 creates disparity between the award and average expenditures on children from high income families which widen as income increases.\textsuperscript{123} For example, at a combined parental income of $500,000 per year, the child support obligation for one child would be $50,000 per year under the Ohio Guidelines.\textsuperscript{124} The total amount of money actually required to raise a child to age seventeen in a one child family at a high socio-economic level has been estimated in one study at $135,700.\textsuperscript{125} Since this amount represents the total expenditures on the child for seventeen years, an average yearly expenditure would equal $7,982 per year based on 1981 prices.\textsuperscript{126} Adjusted to 1990 price levels, this figure would represent total expenditures on the child of $11,474.84 per year.\textsuperscript{127} "High socio-economic level" generally represents cases in which the father has a college education and a white collar job.\textsuperscript{128}

Another study, the Olson study, estimates total lifetime expenditures on a child at a high socio-economic level at

\begin{tabular}{|c|c|c|}
\hline
year & % change & annual expense \\
\hline
1981 & & 7,982.00 \\
\hline
1982 & 6.2\% & 8,476.88 \\
\hline
1983 & 3.2\% & 8,748.14 \\
\hline
1984 & 4.3\% & 9,124.31 \\
\hline
1985 & 3.6\% & 9,452.79 \\
\hline
1986 & 1.9\% & 9,632.39 \\
\hline
1987 & 3.6\% & 9,979.16 \\
\hline
1988 & 4.1\% & 10,388.30 \\
\hline
1989 & 4.8\% & 10,886.94 \\
\hline
1990 & 5.4\% & 11,474.84 \\
\hline
\end{tabular}

See \textit{Statistical Abstract}, supra note 7, at 474, table 765 (listing changes in consumer price index).

\textsuperscript{123} Although it may not always hold true, this article assumes that (1) the non-custodial parent was the household's primary wage earner, (2) the non-custodial parent continues to earn a higher income than the custodial parent (based on Census Bureau statistics which show men earn more than females, \textit{Statistical Abstract}, supra note 7, at 459, table 740), and (3) the custodial parent is unemployed (to simplify calculations).

\textsuperscript{124} Ten percent of $500,000 is $50,000. \textit{Ohio Rev. Code Ann.} \textsection{3113.21.5(D)}.

\textsuperscript{125} \textit{Espenshade}, infra note 44, at 52. These figures are based on an assumption that the wife works full-time for the entire year. If the wife were unemployed, the average lifetime expenditure on a child would be $117,800. \textit{Id.} at 56 These figures include expenditures for food at home, food away from home, shelter, fuel and utilities, household goods, clothing, transportation, health care, recreation and other miscellaneous expenditures. \textit{Id.} at 56.

\textsuperscript{126} \textit{Id.} at 52.

\textsuperscript{127} The 1990 price levels are derived by adjusting the 1981 figures in accordance with the percent change in CPI-U as follows:

\textsuperscript{128} \textit{Espenshade}, supra note 44, at 104.
$306,026.99.\textsuperscript{129} This equals approximately $13,910.38 per year using 1982 prices,\textsuperscript{130} or $18,829.95 per year adjusted to 1990 prices.\textsuperscript{131} Olson’s data for those at a “high socio-economic level” includes families with combined parental income of up to $75,000 or $82,000 per year or more.\textsuperscript{132} Even if the $18,829.95 figure is used as an estimate of annual expenditures on one child at a high socio-economic level, a $31,170.05 differential remains between this amount and the $50,000 per year child support award calculated under the guidelines.

Even allowing for age-sensitive and other statistical adjustments, the inequity of the result is apparent. Arguably, these spending figures seem low for families with such high incomes. One explanation may be that families with incomes of more than $100,000.00 have been underrepresented in both studies.\textsuperscript{133} An additional amount could be added to each annual total to adjust for this a possible statistical underrepresentation. Even with this type of adjustment, however, a significant amount of awards for children of wealthy parents would still not be attributable to the actual cost of raising the children.\textsuperscript{134} In addition, the calculation under the

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
\textbf{Year} & \textbf{\% Change} & \textbf{Annual Expenditure} \\
\hline
1982 & $13,910.38 & \\
1983 & 3.2\% & 14,355.51 \\
1984 & 4.3\% & 14,972.80 \\
1985 & 3.6\% & 15,511.82 \\
1986 & 1.9\% & 15,806.54 \\
1987 & 3.6\% & 16,375.58 \\
1988 & 4.1\% & 17,046.98 \\
1989 & 4.8\% & 17,865.23 \\
1990 & 5.4\% & 18,829.95 \\
\hline
\end{tabular}
\caption{Yearly Expenditure Changes}
\end{table}

\textsuperscript{129} See LAWRENCE OLSON, COSTS OF CHILDREN 94 (1983) (calculated by adding the total real expenditures on food at home, housing, clothing, transportation, health care and other miscellaneous expenditures). Many variables could account for the differences between the Olson and Espenshade studies’ results. The Olson study is cited not to discredit Espenshade, but rather to highlight the fact that alternate means exist for calculating the amount of money normally spent on a child.

\textsuperscript{130} Olson calculates total expenditures for a child until age 22, but he does not include the cost of college tuition. Id. at 96-98. Thus, the total annual figure represents the total lifetime expenditures calculated by Olson, divided by 22.

\textsuperscript{131} 1982 prices are adjusted by the CPI-U to reflect 1990 price levels as follows:

\textsuperscript{132} See OLSON, supra note 129, at 51, 95.

\textsuperscript{133} See ESPENSHADE, supra note 44, at 20 (defining families of high socio-economic status as those in which college-educated fathers hold white-collar jobs without regard to family income); OLSON, supra note 129, at 95 (including families with incomes as low as $75,000 per year in the high socio-economic category).

\textsuperscript{134} Arguably, after a child’s needs are being met a comfortable level, no additional
guidelines is not adjusted for the age of the child. A normal one-year old or two-year old child clearly does not need $50,000 per year to satisfy his needs at a comfortable standard of living. Although the disparity between the amount awarded and the amount needed will lessen as the child grows older and expenses rise, the child support obligation determined under the guidelines still includes a large amount which bears little relationship to the actual needs of the child. This excess is paid directly to the custodial parent with no requirement that the custodial parent account for its use to benefit the child.

Even if all support in excess of that required to meet the basic needs of a child could be attributed to maintaining the child’s standard of living, the support ordered is nevertheless unfair to non-custodial parents. One of the goals of the new guidelines is to provide children with the financial resources that would have been available to them if the parents were living together in the same household. parents were living in the same home, their child would enjoy the parents’ standard of living in addition to the amount spent specifically on the child. Therefore, it is not wrong, per se, to include an amount in the support obligation which is devoted to maintaining the child’s standard of living. This amount, however, should not be so disproportionate to the amount required to meet the child’s needs that the award looks less like child support and more like an attempt by the court to equalize the financial situations of the two households.

support should be given. See Ira H. Lurvey, The Richest Kid on the Block, FAM. ADVOC., Summer 1985, at 20, 22 (discussing the controversy over whether affluent parents should pay only for reasonable maintenance of the child or for a standard of living similar to the affluent parent’s).

135. See OHIO REV. CODE ANN. § 3113.21.5(D).
136. Recall that the figures used in the Espenshade and Olson studies were average expenditures for the life of the child. The annual figure will be lower in the child’s early years and higher in the child’s later years. See supra notes 127, 131 and accompanying text, demonstrating the effect of inflation on the cost of child rearing.
137. See Balisle, supra note 17, at 21 (arguing that when the support awarded exceeds the amount required to satisfy the needs of the children, the excess becomes spousal support).
138. See OHIO REV. CODE ANN. § 3109.05(A)(1)(c) (“In determining the amount reasonable or necessary for child support, [the court shall consider] . . . [i]the standard of living and circumstances of each parent and the standard of living the child would have enjoyed had the marriage continued.”).
139. See generally Balisle, supra note 17 (discussing how a family’s customary spending habits can be replicated in order for the child to enjoy the standard of living enjoyed before the divorce).
140. See Dodson, supra note 18, at 5-6 (“One theory [proposed during the development
Although the child benefits from excess support payments, the custodial parent arguably benefits to a greater degree because she receives income she otherwise would not receive, and she need not spend the money solely on the child.\textsuperscript{141} Rather, the money is available for extravagances which may not benefit the child at all. Of course, it is impossible to improve the child’s standard of living without providing the same improvement for the custodial parent.\textsuperscript{142} Likewise, denying maintenance of the custodial parent’s standard of living also denies that maintenance to the child. While the guidelines were designed to correct this problem in particular, the rules were intended primarily to keep children off public assistance, not to provide “a windfall for the custodial parent, nor . . . to reward or compensate the custodial parent for the act of child tending.”\textsuperscript{143} While child support should not be designed solely to meet the child’s needs at the poverty level, the support obligation should also not be so disproportionate to the child’s needs that the award is effectively being used to financially equalize the two households.

A large portion of such a disproportionate award is not child support, but rather is lifestyle maintenance or even alimony. Several problems arise under a system which allows alimony or maintenance to be characterized as child support. First, the custodial parent may already be receiving alimony or maintenance payments from the non-custodial parent to help insure the family’s standard of living.\textsuperscript{144} To factor standard of living into child support as well would be equivalent to requiring the non-custodial parent to pay this obligation twice. If the non-custodial parent does not pay alimony or maintenance because the parents were never married or of the guidelines was that the children’s standard of living should be preserved following the divorce, or at least not be lowered any more than the noncustodian’s.”).

\textsuperscript{141} But see Lurvey, supra note 134, at 22 (“[C]ourts have accepted the irrelevance of the premise that in providing for the child, the custodial parent also may benefit indirectly in sharing certain facilities and benefits otherwise indivisible. That the mother may benefit indirectly by payments for the child’s support . . . does not invalidate those payments . . . .”).

\textsuperscript{142} See Williams, supra note 37, at 42 (arguing that since “most expenses related to child rearing are commingled with expenditures benefitting all household members . . . it is difficult to separate out a child’s share of major household expenses” such as food, housing and transportation).

\textsuperscript{143} Lurvey, supra note 134, at 21.

\textsuperscript{144} See Dodson, supra note 18, at 6 (discussing the theory that child support awards based on equalization of living standards between custodial and non-custodial homes would actually award additional alimony to the custodial parent by raising his or her standard of living along with the child’s).
because the court did not order such a payment as part of a property settlement, the custodial parent is not entitled to extra support as an element of the child support award.\textsuperscript{145} While children should not suffer financially because their parents were not married or because the custodial parent received a low property settlement, the court should not engage in property division under the guise of child support.

Second, because the award is characterized as child support rather than maintenance or alimony, the custodial parent receives this income free of tax liability.\textsuperscript{146} While alimony or maintenance is taxed as income to the recipient, child support is not viewed as income to the recipient and is taxed as income to the payor as income.\textsuperscript{147} At high levels of income, child support awards are large amounts of money. If the award is inappropriately characterized as child support, the non-custodial parent is burdened with an additional tax liability he or she would not have had if the award were properly characterized alimony or maintenance.

Finally, even if it were possible to separate the amount of money attributable to the child’s standard of living from that of the custodial parent, the concept of a child being entitled to a flat percentage of a parent’s income is problematic generally. According to this theory, a child is entitled to enjoy certain benefits simply because the parent can afford to provide them. For middle- and low-income families, this notion is less problematic because all or most of the child support award is actually being used to meet the needs of the child. For high income families, however, a large portion of the award can be attributed to allowing the child to benefit from his parents’ wealth beyond an amount necessary to meet that child’s actual needs.\textsuperscript{148} Arguably, cases involving

\textsuperscript{145} See id. ("If alimony awards were used as the basis for a large part of the award to the custodial household, nonmarital children would end up with a lower living standard than children of divorced parents, even though their parents had similar incomes.").

\textsuperscript{146} See id. ("The necessity of identifying two separate components of alimony and child support arises primarily as a result of tax laws, which treat the two differently.").

\textsuperscript{147} I.R.C. § 71 (1991). Alimony is included in the gross income of the recipient and the payor is entitled to an offsetting deduction, id. § 215, whereas child support is not included in the gross income of the recipient and no deduction is allowed to the payor, id. § 71.

\textsuperscript{148} See Lurvey, \textit{supra} note 134, at 22 (noting that children are "entitled to be supported in a condition consistent with the position in society of their parents, and that a father's duty does not end with the furnishing of mere necessities if he is able to afford more") (quoting Caldwell v. Caldwell, 22 Cal. Rptr. 854, 856 (1962)).
wealthy parents lead courts to step into parents' shoes and make parenting decisions about the goods and privileges they will give their children. For example, is a child entitled to a new car when she reaches sixteen simply because her father can afford to buy it for her? If the child's parents were married, the court certainly would not order her parents to buy the car if they chose not to do so. Yet, if the parents are divorced, the non-custodial parent may not be afforded the opportunity to make that decision. One Ohio court has already issued such an order requiring the non-custodial parent to provide his child with a new car.149

Some courts may also order the non-custodial to parent provide for a college education for a child who chooses to go.150 Again, the court would not impose this obligation on the child's parents if they were married. What if, for example, a parent wants his or her child to work toward providing at least a portion of college tuition? By requiring a parent to pay these benefits through a child support award, the court is, in effect, making this parenting decision for the non-custodial parent. While a parent may arguably have a moral obligation to provide his child with some of these benefits, that perceived obligation is not grounds for courts to impose a legal obligation to provide them.151

As when courts order parents to pay for cars, college or similar "extras," courts applying a flat percentage which yields a sup-

149. Kupniewski v. Kupniewski, No. 58307, 1990 Ohio App. LEXIS 2248, 1990 WL 75194 (Ohio Ct. App. June 7, 1990) (holding that where a teenage child was engaged in extra-curricular activities that required use of a car, an increase in child support was justified even without a showing that her father would have bought her a car had the marriage continued).

150. Sally F. Goldfarb, A Model for Fair Allocation of Child Support, 21 FAM. L.Q. 325, 344 (1987) ("[C]ourts and legislatures in a growing number of states have demonstrated a willingness to impose college costs on noncustodial parents."); Sally F. Goldfarb, Dealing with Extraordinary Expenses, 10 FAM. ADVOC. 38, 40 (1988) ("[S]ome [states] may compel postminority support even without an agreement between the parents; some will enforce an agreement between the parents for postminority support; and some will neither compel postminority support nor enforce a postminority support agreement."). Traditionally, however, courts have held that the support obligation ends with the child's eighteenth birthday or graduation from high school, whichever occurs later. A court can include college tuition in a support award by classifying tuition as an ordinary child rearing expense and factoring this amount into the child support obligation. But see Goldfarb, supra at 344 (arguing that college tuition should not be treated as an ordinary expense included in the support award because the average award does not adequately compensate for the true cost of an advanced degree, thereby causing injustice to the custodial parent).

151. See generally Schuele, supra note 28, at 810 (noting that early debates focused on whether child support should be a legal obligation or whether it should remain a moral obligation left within the discretion of the parents).
port award greater than the amount a child actually needs deviate from the underlying goal of the child support system. The rules guiding judges should allow them to order awards adequate to ensure that parents, not the general public, provide for the child’s needs without requiring them to make unnecessary transfers of wealth between parents.

B. The Rebuttable Presumption

Unfortunately, the support award calculated under the state’s flat percentage formula is presumed to be the amount necessary to support the child. The Ohio Guidelines make it difficult for the non-custodial parent to contest successfully this amount. Congress’ 1988 Amendment mandates this presumption in order to limit judicial discretion in awarding child support, a primary factor contributing to the general problem of inadequate awards. No state’s guidelines could be sufficiently specific to consider all possible situations affecting a particular family or rendering an award inequitable. The 1988 Amendment addresses this issue by allowing the presumption to be rebutted upon a showing that the amount awarded is unjust or inappropriate in particular cases.

The rebuttable presumption was created to allow some judicial discretion when a factor not considered under the guidelines would render an award unjust to the party involved. Since Congress permitted states to decide what factors would be considered in their child support guidelines’ calculations, an amount calculated under one state’s guidelines may be inappropriate under the same circumstances in another state with different rules. For example, factors such as extraordinary medical expenses, second families, and complex property settlements may be accounted for under some states’ guidelines while not addressed in others. Thus, the

153. See Williams, supra note 37, at 41; see also supra text accompanying notes 65-71.
154. Balisle, supra note 17, at 20 (noting that “[f]ew child support guidelines define all the expenses that are assumed to be included or excluded in the child support award” and citing extra costs such as health insurance, uninsured medical and dental expenses, summer camp, lessons, private school and college tuition as examples).
156. See Smith, supra note 25, at 35 (“Even the most carefully crafted child support guidelines cannot provide for every contingency . . . . Judicial discretion will continue to play a major role.”).
158. Williams, supra note 6, at 290-94; see Smith, supra note 25, at 23 (“Guidelines
amount of support awarded for a child with extraordinary medical needs may be adequate in a state which makes appropriate provisions in its guidelines for these expenses, but completely inadequate in a state whose guidelines do not account for this situation.

The Ohio Guidelines add an additional requirement for rebutting the presumption mandated by Congress. Under the 1988 federal rules, a parent may rebut the presumption in favor of the guideline calculation merely by showing that the facts and circumstances of the particular situation are so unusual that awarding the calculated amount would be unjust or inappropriate. Under the Ohio Guidelines, however, the objecting party must show that the amount calculated is not only unjust or inappropriate, but that it is also not in the best interests of the child. This additional requirement creates a standard for rebuttal that will rarely, if ever, be met by the non-custodial parent.

The Ohio statute's failure to define the phrase "the best interest of the child" complicates a non-custodial parent's case to rebut the presumption favoring the guideline amount. Because this provision has only recently been enacted, there is presently no case law interpreting this phrase in the context of a child support order. However, if this phrase is to be interpreted according to its traditional meaning, prior case law construing "the best interests of the child" in custody and visitation cases may be helpful. Ohio courts have typically considered the age of the children, their physical and mental well-being and the child's adjustment at home, school and in the community as factors to be considered in determining if custody or visitation would be in the child's best interest. All of these factors deal directly with the physical, mental and emotional health of the child.

vary considerably from one jurisdiction to the next in their complexity, both in terms of the factors that are included and in the way deviations are handled. Whether a particular case should be treated as a deviation will depend on how detailed the guidelines are [with respect to several factors] . . . .

160. OHIO REV. CODE ANN. § 3113.21.5(B)(1)(b). This additional requirement applies only in the case of high income families, not low income families. Id. See also supra note 109 and accompanying text.
162. See, e.g., Bodine v. Bodine, 528 N.E.2d 973 (Ohio Ct. App. 1988) (noting that although the court had broad discretion, it considered the children's age and physical and mental well-being in determining whether visitation with their father would be in their best interest).
163. OHIO REV. CODE ANN. § 3109.04(F)(1) defines the term "best interest of the
If this interpretation of "best interests of the child" carries over to the Ohio Guidelines, a party seeking to rebut the presumed accuracy of the calculation must demonstrate that the amount is inappropriate or unjust and would adversely affect the child's physical, mental and emotional well-being. A parent challenging the amount calculated as being insufficient to meet the needs of the child could easily argue that the amount awarded is so low that the child's physical or emotional well-being would be adversely affected because the child will be deprived of basic necessities. However, if the award is challenged as excessive because it accompanies a large property settlement or provision of in-kind services, the non-custodial parent may have great difficulty demonstrating that a large amount of money would damage the child's physical or mental well-being. The burden of proof to show that the high award is not in the best interest of the child is particularly difficult for the non-custodial parent.

Congress created a rebuttable presumption to allow application of judicial discretion in those cases where factors not directly considered under the guidelines would render the amount calculated inequitable. The 1988 Amendment does not seem to mandate blind devotion to the formula, but rather appears to advocate that children's needs be met with an eye toward fairness to all parties. To ensure such fairness to all parties, the presumption should be rebuttable by any party affected by the order. The Ohio Guidelines, however, effectively preclude the non-custodial parent from successfully challenging the amount calculated under the guidelines by operation of the additional statutory language

child" for child custody purposes as including the following factors: "(a) The wishes of the child's parents regarding his care; (b) ... (c) [t]he wishes and concerns of the child, as expressed to the court; (c) [t]he child's interaction and interrelationship with his parents, siblings, and any other person who may significantly affect the child's best interest; (d) [t]he child's adjustment to his home, school and community; (e) [t]he mental and physical health of all persons involved in the situation ...."

164. See Smith, supra note 25, at 22 (noting that a support award may be too low if a child's extraordinary medical needs are not taken into account).
165. See id. (stating that "complex property divisions with in-kind contributions similar to child support — such as transfer of a marital home with a low mortgage rate — also may justify going outside the guidelines").
166. See generally id. (discussing reasons for judicial discretion).
168. See Smith, supra note 25, at 22 (arguing that deviation from guidelines should be based on a showing of adverse effects on the child or one of the parents).
requiring proof that the calculated amount adversely affects the "best interests of the child."

While this additional burden can be a problem for non-custodial parents at all income levels, the burden may be particularly problematic for the non-custodial parent who earns substantial income. These parents are paying support at levels likely to be most disproportionate to the amount of support actually needed, and they have no effective way to argue that an award is excessive or that the child's needs are satisfied through other means. In such cases, the heavy burden of the rebuttable presumption perpetuates inequitable settlements under the guise of child support.

C. The Importance of an Equitable Award

Criticism of the new statute alleging inequitable treatment of wealthy fathers is not likely to arouse much sympathy from the general public or from lawmakers. Traditionally, women and children have been viewed as victims of the child support system. Furthermore, there are arguably few cases involving parents whose income exceeds $100,000. Therefore, some observers may contend that the new guidelines benefit a greater number of people than they burden and that the burdened group can afford to pay excess support in any event. Furthermore, even if the amount ordered for child support has no relationship to the needs of the child, it still represents only ten percent of the obligor's income. Finally, some might concede that solutions which satisfy all parties involved in child support cases are impossible to attain and, therefore, contend that if the Ohio law must err, the error should be on the side that most benefits the child.

There are several responses to these arguments. First, each person entering a court of law is entitled to the same protection and consideration of his or her financial resources as all others who enter that court, regardless of whether those financial resources are minimal or substantial. The resources allocated from a

169. See supra text accompanying notes 125-36.
170. See supra text accompanying notes 31-33.
172. Because the previous child support system led to inconsistent awards, the new guidelines should aim for consistent support payments at all income levels. See, Ginsburg, supra note 167, at 29 (arguing that guidelines are intended to lead to more consistent and predictable support orders).
high income parent should be tailored just as closely to the child's needs as those resources taken from a lower income parent. Arbitrary determination of child support to be paid by a high income parent is unjust if the support obligation of a low income parent is carefully considered. The high income parent is entitled to have his dollars considered just as carefully as his less affluent counterpart.

Second, the Ohio Guidelines do not actually solve the problem of unequal distribution of child-rearing costs, but merely reverses the party affected. The guidelines were designed in part to remedy the loss of income and decreased standard of living of the custodial parent relative to the increased standard of living enjoyed by the non-custodial parent. The extreme disparity, however, between the standards of living of the custodial and non-custodial parents was largely a problem affecting middle income families, not high income families. To address this problem by ordering a large amount of child support to be paid by high income families, then, is simply inequitable. This is not to suggest that the standard of living of both parents should be ignored when calculating child support awards. The goal of the new child support system is generally to compensate for past inequities in parents' standards of living which had typically occurred at lower income levels. Requiring large sums of child support to be paid by high income families does not remedy any problems of the past, but can create new problems for the future.

Finally, cases involving high income families are more likely to consume more court time than those involving lower income families because the parties' finances are more complex. Therefore, these parties in particular should be encouraged to create settlements which would best meet the needs of their families. However, the Ohio Guidelines make settlement more difficult by effectively prohibiting trade-offs of child support for other consideration. Under the Ohio Guidelines, a modification in the amount of support can be accomplished merely by showing that there is a ten percent deviation between the amount which would be calculated under the guidelines at the time a request for modification and the amount of the original order. Therefore, an agreement compromising child

173. Bruch & Wikler, supra note 47, at 5.
174. For example, extremely high awards could foster non-compliance, see supra text accompanying note 76, and hurdles to settlement, see infra text accompanying notes 175-76.
175. OHIO REV. CODE ANN. § 3113.21.5(B)(4).
support for another element of the settlement package could be modified almost immediately after the purported agreement was finalized if the child support figure deviates from the guideline amount by more than ten percent. For example, the parties to a divorce proceeding could agree that the custodial parent receive the marital residence free and clear of the mortgage in exchange for lower monthly child support payments. After the divorce is finalized, however, the custodial parent could request a modification of the child support award. If the amount calculated under the guidelines is ten percent greater than the amount the custodial parent receives under the settlement, the child support obligation would be increased to the guideline amount, and the non-custodial parent would be barred by res judicata from re-claiming any interest forfeited in the marital residence.

Because parties who earn substantial incomes would probably consider many factors in a private settlement not recognized under the guidelines, a ten percent deviation could well occur between the amount of monthly support settled upon and the amount calculated under the statute. For this reason, it would be more advantageous for the non-custodial parent to pay only the amount under the statute and not negotiate a property settlement which may better suit the needs of the child.176 While this type of disincentive may occur at all income levels, the problem strikes largely at high income parents who have assets substantial enough to enter into such creative bargaining. In these situations, more cases will be tried, draining the families' resources and consuming valuable court time. For this reason alone, it is in everyone's best interest to remedy the law's apparent inequity.

III. Is There a Solution?

The child support guidelines cannot easily be restructured to be fair and equitable to all parties at all income levels.177 Efforts to develop guidelines encompassing economic variables for families

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176. But see Williams, supra note 6, at 286 (suggesting that guidelines encourage settlements since the amount ordered as support by the court will be known to both parties during the pretrial stages).

177. On the other hand, experience demonstrates that a pure case-by-case method is ineffective, often creating system-wide inequities. See supra text accompanying notes 65-71. Because the guidelines were developed to avoid such inequitable results, see supra text accompanying notes 78-80, any possible remedy to the present situation cannot resemble a return to the prior, case-by-case system.
at all income levels would be impractical because the resulting formula would be extremely complex. Arguably, one alternative to modifying the basic formula would be to require high income parties to hire an expert to calculate the appropriate percentage of parental income. Since there are relatively few cases involving parents with such high income, maintaining the existing formula while allowing special expert calculations in more limited cases appears reasonable. However, a system which relies on expert opinions may not be a wise use of the court’s time or the family’s resources.

Other alternatives are available to the legislature to improve the present guidelines. For example, the legislature might adopt a model other than the Income Shares Model, changing the theory upon which the child support system is now based. Because Congress did not specify a particular theory to govern child support calculations, Ohio is free to abandon this model. If the legislature opted to retain the Income Shares Model, restructuring the calculation at upper income levels and revising the rebuttable presumption may offer a solution.

A. The Income Shares Model

If the Ohio legislature chose to remedy the problems with the current guidelines by abandoning the Income Shares Model, the existing rules would have to be completely restructured at all income levels. Implementing such a solution could cause significant problems for court officials and attorneys. An abrupt change would likely cause system-wide confusion. Additionally, the basic theory upon which the Ohio Guidelines are based is designed to achieve equitable results. The Income Shares Model is structured,

178. See supra text accompanying notes 94-95, 114-15 (noting that guidelines for high income levels would need to encompass variables involving contributions to children through property settlements or trust funds).

179. Presumably, each party would hire his or her own expert. Then, if the parties cannot agree upon a figure from those recommended by the experts, a court would have to hear the issue at trial.

180. See supra text accompanying notes 99-103 (describing the Income Shares Model).

181. The Income Shares Model and the Ohio Guidelines both calculate support figures after evaluating economic data regarding parental expenditures on children. If another model were used, support figures would be based on different economic data. For example, under the Income Equalization Model, support figures would be based on the percentage of the non-custodial parent’s income that would equalize his income with that of the custodial parent. See supra text accompanying notes 18-19.
in part, to adequately reflect the true costs of raising children, while other models seem to concentrate on achieving a higher standard of living for children, placing less emphasis on their specific needs.\footnote{182 See generally Williams, supra note 6, at 290-304 (reviewing various types of child support guidelines).}

The Melson formula, for example, was adopted in Delaware prior to the Congressional mandate and focuses on improving a child's standard of living.\footnote{183 See Williams, supra note 6, at 295 (citing Family Court of the State of Delaware, The Delaware Child Support Formula: Study and Evaluation, REPORT TO THE 132ND GENERAL ASSEMBLY). The basic principles underlying the formula are that (1) "[u]ntil the basic needs of children are met, parents should not be permitted to retain any more income than that required to provide . . . for their own self support," and (2) "[w]here income is sufficient to cover the basic needs of [the family] . . . children are entitled to share in any additional income so that they can benefit from the absent parent's higher standard of living." Id. See also Dodson, supra note 18, at 10 (Courts "may consider a supplemental award to enable the children to live at the higher standard of living enjoyed by the more affluent parent.").} The formula calculates the amount of money required to maintain every family member, including the children, at the poverty level.\footnote{184 See id. ("After primary support obligations of each parent are calculated . . . a percentage of remaining income is allocated to . . . [enable] the child to benefit from the higher standard of living of the parent.").} Income in excess of this amount is then proportioned between the two households, first to meet the needs of the child and then to improve the child's standard of living.\footnote{185 Williams, supra note 6, at 301 ("[T]he primary support amount represents the minimum amount required to maintain a child at a subsistence level.").} This formula has no rational relationship to the needs of the child or expenditures on the child. As a result, families at both middle- and upper-income levels suffer from the same problems experienced by upper income families subject to the Ohio Guidelines. Thus, the Melson formula does not help to solve the problems arising under the existing Ohio Guidelines.

Wisconsin has adopted guidelines calculating child support based on a flat percentage of the non-custodial parent's income.\footnote{186 Wis. STAT. ANN. § 767.25 (West 1987); see also Williams, supra note 6, at 290 ("Child support orders are determined only on the basis of the obligator's gross income and the number of children to be supported."). According to Williams, "[t]he Wisconsin percentage of income standard may be the most well-known example of a flat percentage guideline." Id.} A flat percentage rate is applied at all levels of income under the assumption that all families spend the same portion of their incomes on their children.\footnote{187 Williams, supra note 6, at 291; see also Dodson, supra note 18, at 7 ("In some

is not used in the calculation the statute assumes that the custodial parent is already contributing support to the children. Most economists agree, however, that the percentage of income most parents spend on their children declines as income increases. Because application of a straight percentage to income levels above $100,000 is a significant part of the problems associated with the Ohio Guidelines, this model would certainly not improve equity in awards and may in fact spread inequitable results to families at all income levels.

The final alternative, the Cassetty formula, gained attention in Texas because of its unusual conceptual approach to child support awards. This model concentrates on equalizing incomes between the two families. Under the Cassetty Formula, child support is determined by calculating the total income of the custodial and non-custodial households and dividing that amount by the number of family members. A court using this formula would distribute each family member’s share to the household in which he or she lives. This formula makes no reference to the actual needs of the children. The Cassetty formula, therefore, can be criticized as awarding maintenance rather than child support.

B. Changes in Application of the Guidelines

While changing the particular model upon which the Ohio Guidelines are based will not solve the problem, changes in application of the rules at high income levels may improve the situation. Other states that have adopted the Income Shares Model have had to deal with problems at the upper extreme of the income scale, and their approaches can be useful in solving this problem.

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states the guideline is expressed as a flat percentage of the noncustodian’s income because the percentage of family income devoted to children was found to be fairly constant across income levels. In other cases, the data suggested a decreasing percentage of family income spent on children at higher income levels.
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188. Williams, supra note 6, at 291.
189. See supra notes 123-36 and accompanying text (discussing the discrepancy between percentage calculations under support guidelines and actual amounts spent on children in families with higher income levels).
190. Williams, supra note 6, at 302.
191. See Williams, supra note 6, at 302; see also Dodson, supra note 18, at 6 (discussing the Equal Living Standards Model which is similar to the Cassetty model).
192. Williams, supra note 6, at 302.
193. Id.
194. For a discussion of the inequity of awarding maintenance under the guise of child support, see supra text accompanying notes 144-51.
for Ohio.

The calculations under the Kentucky guidelines, for example, are similar to those developed in Ohio. The Kentucky guidelines apply at combined parental incomes of $1200 per year or more; at $1200, the support obligation is sixty percent of combined income. The percentage of combined income allocated to child support gradually declines as income rises, leveling off at ten percent for combined parental income of $120,000 per year, just as under the Ohio Guidelines. However, for incomes exceeding $120,000, the Kentucky guidelines allow courts to exercise discretion in determining the amount of the award.

The Kentucky guidelines do not impose the same flat percentage rate to incomes exceeding $120,000 per year and further, do not suggest that the amount calculated at $120,000 be used as a minimum for awards outside the scope of the guidelines. Rather, the Kentucky law allows for a strict case-by-case method.

Additionally, the Kentucky statute applies the rebuttable presumption in the same form as that mandated by the 1988 Amendment to the federal law rather than Ohio’s modified version. The Kentucky statute establishes a rebuttable presumption in favor of the guideline calculation, but allows courts to deviate from the guidelines where their application would be inappropriate or unjust.

Colorado has also adopted guidelines for the calculation of child support similar to Ohio’s guidelines. Under the Colorado statute, the guidelines are initially applied at income of $6,000 per year; at that level, the support obligation equals four percent of combined family income. The percentage of combined family income rises to twenty-two percent for those families with a com-

195. See KY. REV. STAT. ANN. § 403.212(1)(f)(6) (Baldwin 1990) (including tables provided for calculating child support based on income and number of children).
196. Id.
197. Id. § 403.212(1)(f)(5).
198. Id.
199. Id.
200. See supra text accompanying notes 152-69.
201. KY. REV. STAT. ANN. § 403.211(2).
202. KY. REV. STAT. ANN. § 403.211(3)(e) (providing for judicial consideration of combined parental income in excess of guidelines).
204. Id. § 14-10-115(10)(b).
bined income of $8,400 per year, and then it declines gradually as family income rises, leveling off at ten percent for approximately $100,000 of combined family income. The ten percent rate applies for all incomes between $100,000 and $120,000 per year.

If combined family income exceeds $120,000 per year, the statute allows judges to exercise discretion in determining the amount of the award. Courts have defined some limits on this discretion. In one case, for example, the court concluded that judicial application of the strict ten percent figure required at the $120,000 income level was inappropriate to determine the child support award for a family whose income far exceeded $120,000. The court found that the guidelines should not be extrapolated to apply to families with incomes greater than those specifically addressed because to do so would be inappropriate and unjust to the non-custodial parent. Instead, the court held that the dollar amount calculated under the guidelines for families earning $120,000 would serve as the starting point for the support order, and that the court should then adjust the figure in light of specific factors which may otherwise be considered to rebut the presumption in favor of the guideline amount.

The New York guidelines are not as similar to the Ohio Guidelines as those of Kentucky and Colorado. However, New York has developed a particularly interesting application of the rebuttable presumption worth noting. To achieve an equitable result in a particular case, the New York guidelines allow for adjustment downward, as well as upward, of the amount calculated under the statute. The New York law lists factors not specifically incorporated in the guideline calculation which may render the award inappropriate or unjust in a particular situation. These factors include the financial resources of the parents, extraordi-
expenses of the parents. While the actual amount calculated under this statute could still lead to extremely high awards, the presumption in favor of the guideline amount is structured so that any party to the matter can rebut the propriety of the award.

All of these guidelines provide alternatives for Ohio legislators to consider in revising the Ohio child support rules. The New York guidelines comply with federal regulations by computing child support obligations under a formula set by the state. At the same time, however, the amounts calculated under the New York guidelines can be adjusted as needed to ensure an equitable result for the individual family involved. Furthermore, New York allows for judicial consideration of many important factors in rebutting the amount of the award calculated under its statute.

Ohio should revise the presumption favoring the guideline calculation to allow consideration of other factors which could render an award inequitable. First, the legislature should repeal the requirement that any deviation from the guidelines be permitted only if the amount calculated under the guidelines is not in the “best interest of the child.” Instead, the presumption should be rebuttable with evidence that the award is unjust or inappropriate, as suggested by Congress. A list of factors not considered under the guidelines should be drafted to define when an award is inappropriate or unjust. By removing the “best interest” requirement and adding specific considerations to evaluate the award’s fairness, Ohio would substantially correct the inequity created by the statute with respect to higher income families.

Second, the legislature should restructure the guidelines so that the actual award calculated will not yield such extreme results upper income levels. One way to accomplish this is to apply the guidelines to incomes up to $120,000 per year and apply a case-by-case method to determine the appropriate upward adjustment, if any, attributable to income over $120,000. The minimum award would be the amount mandated for families with $120,000 of combined income. This result could be characterized as unfairly limiting the child support obligations of society’s wealthiest members. In fact, under the proposed rule, the child support award for a family earning $120,000 per year could be the same as the

216. Id. § 240(1-b)(f)(6).
217. 45 C.F.R. § 302.56.
218. OHIO REV. CODE ANN. § 3113.21.5(B)(3).
award for families earning $500,000 or $1,000,000 per year. However, the goal of the child support system is to satisfy the needs of children. Parity of awards among families with such high incomes is immaterial as long as the needs of the children are met. If an award is not sufficient to meet the needs of the children, the custodial parent should be able to rebut the presumption in favor of the award and obtain a modified support order.220

Ohio could also follow the Kentucky approach,221 applying the guidelines in cases where family income does not exceed $120,000 per year and allowing courts to exercise discretion in a strict case-by-case method for families with income over that amount. A court could consider any factors relevant to a particular family, and it would not be required to use the guideline calculation for $120,000 of income as a minimum award.

Finally, if the legislature intends to keep the guideline percentages intact, another approach may be appropriate. The non-custodial parent could be required to pay the custodial parent a sum of money which reflects the amount a high income family would typically spend to satisfy its children's needs.222 Any amount calculated under the statute in excess of the child's actual needs, and thus attributable to maintaining the child's standard of living, should be placed in a trust fund or college fund managed by a trustee. Even though the non-custodial parent would still be required to pay an extremely high amount of child support, this arrangement provides some assurance to the non-custodial parent that the additional support is used for the child's benefit and not as alimony or maintenance for the non-custodial parent.

IV. CONCLUSION

The child support system is not perfect. For many years children have suffered due to the weaknesses of the system. Recent legislative initiatives undertaken nationally and in Ohio are intended to right these wrongs by equally apportioning the costs of child-rearing between both parents according to economic capacity. We must be careful, however, that in our concern for the children, we

220. See generally Balisle, supra note 17, at 21 (noting that if the award does not adequately reflect the amount needed to meet the needs of the child, it can be rebutted under the guidelines).

221. See supra text accompanying notes 195-202.

222. See supra text accompanying notes 125-32.
do not shift these burdens beyond reason or necessity. The Ohio formula, in its present form, does just that. It is not relevant that the injured parties are high income non-custodial parents. The guidelines should not render any class of individuals victims. Revisions that can benefit all parties involved must be made to prevent unnecessary victimization in child support proceedings.

SHARON J. BADERTSCHER*

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