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THE SEVENTEEN PERCENT SOLUTION: FORMULA GUIDELINES FOR DETERMINING CHILD SUPPORT AWARDS ARRIVE IN NORTH CAROLINA

I. INTRODUCTION

In 1974, Congress enacted Title IV-D of the Social Security Act.¹ The Act created a plan for the establishment and enforcement of child support in an attempt to control the escalating costs to the Aid to Families with Dependant Children (AFDC) program.² The title required states to institute programs designed to use existing state laws and procedures to establish and enforce support obligations, thereby alleviating the need of families so affected to rely on AFDC for assistance.³

While effective to a point, the Act did not fulfill the overall expectations of Congress,⁴ so ten years later the Child Support Enforcement Amendments of 1984 were passed.⁵ The amendments required each state to enact specific remedies and procedures within their child support programs in order to remain eligible to participate in AFDC benefit programs.⁶ While the majority of the Act dealt with the enforcement aspects of support awards, there was also a specific focus on the establishment of guidelines for use in determining the amount of awards in child support litigation.⁷ North Carolina was no exception to this

1. 42 U.S.C. § 651-662 (1974).

2. D. DODSON & R. HOROWITZ, *Child Support Enforcement Amendments of 1984: New Tools for Enforcement* (The Family Law Reporter Monograph No. 5, 1984).

3. HYLDEN DODSON, *The Social Security Amendment of 1974—A Joint State-Federal Child Support Enforcement Program*, 1 FAM. L. REP. 4049 (1975).

4. DODSON, *supra* note 2, at 1. Census bureau surveys found that approximately 40% of families theoretically entitled to support orders did not have them, and overall non-compliance with support orders was at "epidemic proportions." U.S. Dept. of Commerce, Bureau of the Census, *Child Support and Alimony: 1981* (Advance Report. See also, Cassetty & Douthitt, *Support and Visitation Schedules, Guidelines and Formulas*, 1 Improving Child Support Practice I-101 (ABA 1986).

5. Pub. L. 98-378 (1984).

6. *Id.*

7. 42 U.S.C. § 667 reads as follows:

(a) Establishment of guidelines; method

Each State, as a condition for having its State plan approved under this part, must establish guidelines for child support award amounts within the State. The guidelines may be established by law or by judicial or administrative action.

(b) Availability of guidelines; binding nature

The guidelines established pursuant to subsection (a) of this section 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.

(c) Technical assistance to States; State to furnish Secretary with copies

The Secretary shall furnish technical assistance to the States for establishing guidelines, and

mandate. On July 12, 1986, the North Carolina General Assembly ratified an act designed to comply with the 1984 Amendments to Title IV-D.⁸

This comment will begin with a discussion of the methods historically used in the determination of support awards. By examining these methods in light of the questions that can arise in any support litigation, it will be shown how they foretold of the necessity of implementing some formula-based control over award determination. The pros and cons of the use of formulas will be explored, with a particular focus on the guidelines eventually implemented in North Carolina. An historical perspective of support awards and formula use in North Carolina will be discussed, followed by the history of the implementation of the support guidelines now in use. The comment will end with a prognosis of the eventual successes and failures of specific aspects of formula implementation in North Carolina, and a conclusion as to the overall pluses and minuses of guideline use.

II. HISTORICAL PERSPECTIVE

The inadequacies and inequities of past methods used for determining child support awards have long been the source of great concern for both the participants in and observers of the child support system.⁹ Traditionally, the family court judge has examined the needs of the parties, then divided the available income in an attempt to meet their respective expenses.¹⁰ Awards were based on the balancing of two factors: the needs of the child, and the parents individual ability to contribute to meeting those needs.¹¹

Difficulties in achieving an equitable division of available income and at the same time adequately fulfilling the needs of the child have arisen on several levels. First, there is a triangle of human experiences that must be factored into the determination: the post divorce situations of the parents, the pre and post divorce situations of the child, and the influences acting upon the judge deciding the award. Second, within an ex-

each State shall furnish the Secretary with copies of its guidelines. Effective Date. Section 18(b) of Pub.L. 98-378 provided that: "The amendment made by subsection (a) (enacting this section) shall become effective on October 1, 1987."

8. An Act to Achieve Greater Consistency and Equity in the Setting of Child Support Obligations Amounts Through the Use of Guidelines, July 12, 1986, (amending N.C.G.S. 50-13.4, effective Oct. 1, 1987)

9. See generally, BRUNCH, *Developing Standards for Child Support Payments: A Critique of Current Practice*, 16 U.C.D.L. Rev. 49 (1982); CASSETTY & DOUTHITT, *Support and Visitation Schedules, Guidelines and Formulas*, 1 Improving Child Support Practice I-101 (ABA 1986); GINSBURG, *Judging the New Support Guidelines*, 10 Fam. Advoc. 29 (Spring 1988).

10. GINSBURG, *Judging the New Support Guidelines*, 10 Fam. Advoc. 29 (Spring 1988).

11. BRUNCH, *supra* note 9; see also, CASSETTY, *supra* note 9; HERRELL, *Child Support Guidelines: A Judge's View*, 1 Improving Child Support Practice I-60 (ABA 1986).

amination of the award's effect on and by each of these, both economic and social questions arise. In order to understand the necessity of formula and guidelines, as well as to adequately judge the merits and drawbacks of each major formula currently in use, a brief look at each point on the triangle is necessary.

1. *The Parents: Burdens v. Obligations*

In the vast majority of cases, children of divorced parents live with their mothers in sharply reduced economic circumstances.¹² Correspondingly, the fathers in such situations are most often freed from the majority of household costs, allowing an appreciable increase in their standard of living.¹³ Yet it is a rare instance where a supporting spouse is asked to provide an amount even approaching their former contribution. A custodial parent with two children requires 75% to 80% of the former household income to maintain the intact family's standard of living. Normally, the child support awards have provided approximately 33% of that amount.¹⁴

Adding to the reduction in household income for the custodial parent are the increases in expenses brought on by the realities of the single parent family. Often the single parent must re-enter the work force or increase the time already spent working. This necessitates day care expenses which can easily consume an entire support award.¹⁵ Increases in clothing and transportation costs as well as money spent on meals away from the home add to the single parent's burden.¹⁶ More time working means less time at home. That translates into less time to accomplish home maintenance chores already increased by those tasks formerly undertaken by the now absent parent. The purchase of assistance for simple home maintenance can easily be outside the economic reach of the

12. BRUNCH, *supra* note 9; See, D. Chambers, Making Father's Pay, 48 (1979); 4 Survey Research Center, U. Mich. Inst. Soc. Research, Five Thousand American Families-Patterns of Economic Progress 5,7, at 8, 17 (G. Duncan & J. Morgan eds. 1976); WEITZMAN & DIXON, *The Alimony Myth: Does No Fault Divorce Make a Difference?*, 14 FAM. L.Q. 141, 172-79 (1980).

A 1977 study in Los Angeles, California, yielded the following statistical information concerning mothers' greater willingness to assume custody of the minor children following divorce: Although 57% of the sampled fathers stated that they wanted custody, only 38% made any inquiries in that direction, and only 13% actually requested custody on the petition for divorce. In contrast, 96% of women involved in a divorce stated that they wanted custody of the children. 88% to 90% of the final custody decrees entered in Los Angeles in 1977 awarded sole custody of children to their mothers. WEITZMAN & DIXON, at 517 n. 127.

13. BRUNCH, *supra* note 9, at 51.

14. CHAMBERS, *supra* note 12.

15. BRUNCH, *supra* note 9, at 54; L. Weitzman, C. Brunch, & N. Winkler, Support Awards and Enforcement, National Judicial Education Program to Promote Equality for Man and Women in the Courts, Judicial Discretion: Does Sex Make a Difference? at 78 (NOW Legal Defense and Education Fund 1981); J. Emerson & Bay Area Child Care Project, Children's Council of San Francisco Report (Dec. 1980) (copy on file at U.C. Davis L. Rev. office).

16. BRUNCH, *supra* note 9, at 54-55.

custodial parent.¹⁷

Other hidden costs to the custodial parent arise when one considers credit given by the court to the supporting spouse for visitation time. Aside from food and entertainment costs, most other expenses paid by either parent while enjoying physical custody are duplicative.¹⁸ If an attempt is made to compensate for this in the determination of an award and some subsequent deviation occurs, (eg. the supporting parent's failure to exercise visitation rights) the custodial parent must accept the additional burden.¹⁹

Expenses such as these have been difficult if not impossible to take into account using the former child's needs vs. parent's income system.²⁰ A judge, making decisions on a case by case basis, can rarely accommodate either the time or the expense of assigning an equitable amount to each of these variables.²¹ Attorneys, precluded from contingent fees²² and often representing clients already experiencing economic hardship, find the time it takes to adequately research and present an accurate economic picture to be cost prohibitive. Therefore, a formula which provides the court with a starting point based on legislative research incorporating reasonable averages attributable to such expenses has obvious advantages.

The social ramifications of child support awards often strike the parents in how they relate to the incorporation of their obligations into their new family relationships. Should a stepparent, bringing additional income to the custodial parent's household, operate to decrease a supporting spouse's obligation? Public policy has historically disallowed such a credit.²³ Placing that financial burden on the prospective stepparent could operate to further impair the already difficult chances of a parent with custody of children remarrying.²⁴ The flip side of this question is to what extent should a supporting spouse's former or current familial obligations lessen his duty to pay? Should the fact that a parent now has children from a second relationship to support increase the burden of the custodian of his children from the earlier marriage? If it is determined that a support parent's current obligations should mitigate his duty to

17. *Id.* at 55.

18. *Id.*

19. *Id.*

20. CHAMBERS, *supra* note 12, at 40.

21. *Id.*; see generally, WILLIAMS, *Child Support Guidelines: Economic Basis and Analysis of Alternative Approaches*, 1 Improving Child Support Practice I-1 (ABA 1986)

22. A lawyer shall not enter into an arrangement for, charge, or collect: (1) any fee in a domestic relations matter, the payment or amount of alimony or support. . . ." Model Rules of Professional Conduct Rule 1.5(d)(1) (1983); "Contingent fee arrangements in domestic relation cases are rarely justified." Model Code of Professional Responsibility EC 2-20 (1981).

23. BRUNCH, *supra* note 9, at 60.

24. *Id.*

support children from an earlier relationship, what effect should his current wife's income have on an elevation of his disposable income?²⁵ Should she carry the increased burden for the support of her family because of her husband's primary duty to support the children of his former family?

It is easy to see in how difficult a position the family court judge finds himself. For the most part, these questions are unanswerable to any definite degree, certainly in the context of making a blanket decision as opposed to deciding based on individual case facts. While formulas do not portend to eliminate these questions, they do give the family court judge a place to start. Then, after hearing the arguments from both sides, the specifics may be used to allow deviation from the formula-based figure.²⁶

2. *Children: What Do They Cost?*

The second obstacle facing the equitable determination of a support award is the assessment of what it costs to raise a child. There are as many answers to this seemingly simple question as there are studies of the topic.²⁷ The most obvious difficulty is how to separate the cost of one child from the expenditures which benefit the entire household.²⁸

An economic study done by Thomas Epensshade²⁹ addressed this question. Epensshade estimated that most household expenditures on children fall into three categories: food, housing, and transportation.³⁰ It is easy to see how difficult it would be to determine a two year old's share of a three bedroom house, or an eleven year old's share of the cost of the family car.³¹ Equally difficult is the task of deciding how much of a family meal is attributable to the child taking a portion from the main platter.³²

The easiest place to begin determining a child's needs is at the poverty level. The 1985 U.S. Poverty Guideline provides a subsistence cost of \$437.50 per month for the first member of the household, and \$150.00

25. *Id.* GINSBURG, *supra* note 9, at 36.

26. *See infra* pp. 8-10.

27. *See generally*, C. EDWARDS, *USDA Estimates of the Cost of Raising a Child: A Guide to Their Use and Interpretation*, U.S.D.A. Misc. Pub. No. 1411, (1981); Williams, *Development of Guidelines for Establishing and Updating Child Support Orders: Interim Report 15* (1985); L. Olsen, *Costs of Children* (1983); P. Eden, *Estimating Child and Spousal Support* (1977); National Inst. for Socioeconomic Research, *Review of Literature and Statutory Provisions Relating to the Establishment and Updating of Child Support Awards 33* (1984); T. Epensshade, *Investing in Children* (Urban Institute Press: Wash. 1984); T. Epensshade, *The Value and Cost of Children*, 32 *Population Bull.* 43 (Population Reference Bureau 1977).

28. WILLIAMS, *supra* note 21, at 4.

29. EPENSHADE, *Investing in Children*, at 44-59.

30. *Id.*

31. WILLIAMS, *supra* note 21, at 4.

32. *Id.*

per month for each additional member.³³ The next question is whether parents with incomes sufficient to provide more than subsistence support have a duty to do so, and if so, how much more should be provided?

The percentage of parental income spent on child care related costs varies according to income levels.³⁴ Epensshade has determined the proportional amounts of income spent on one, two, or three children in varying income groups. The results indicate that as income goes up, the percentage spent on children declines. This would seem to indicate that, on a percentage basis, there is a plateau over which children cease to benefit directly from a higher level of income.³⁵

It is this kind of information that is easily incorporated into a formula award system, but is lacking in the old method of support determination. Epensshade's study indicates that parents spend 26% of a net income of \$0-\$8,499, to 16% of an income of \$39,000+ in the support of a single child.³⁶ However, a study of support awards covering a broad range of incomes found that an average of 12% of the supporting spouse's pre-divorce income was allocated for the support of a single child after divorce.³⁷

These disparities have been attributed in part to the difficulties judges have faced attempting to be fair to all concerned.³⁸ Lack of accuracy in understanding the realities of the costs of child raising by both judges and parents,³⁹ coupled with an overprotective attitude of judges towards fathers building new lives, have contributed to the inequities of past awards.⁴⁰ Again, the institution of formulas has provided courts with a point of reference which has taken these economic factors into consideration.

Problems arise when extraordinary expenses for a specific child must be addressed. Formulas must by nature be based on averages rather than exceptions. How then to determine an award incorporating both the reasonable natural expenses of child rearing and the unexpected costs of a particular situation? How can the court ensure a child benefits from the

33. 50 Fed. Reg. § 9517-18 (1985).

34. WILLIAMS, *supra* note 21, at 8.

35. *Id.* at 6.

36. WILLIAMS, *supra* note 34. The figures used in Williams' table were derived from Epensshade, Tables 20 and A12, 1972-73 Consumer Expenditures Survey, Table 3, and Current Population Reports, Series P-60, No. 145.

37. C. Jones, N. Gordon, I. Sawhill, Child Support Payments in the United States, working paper 992-03 (Wash. D.C.: Urban Inst., Oct. 1976). *See also*, J. CASSETTY & F. DOUTHITT, *The Economics of Setting Adequate and Equitable Child Support Payment Awards, 1 Improving Child Support Practice*, I-105 (ABA 1986); J. Cassetty, Child Support and Public Policy (1978).

38. BRUNCH, *supra* note 9, at 51.

39. *Id.* Studies have shown that parents spending approximately 40.7% of their annual income to raise two children estimated their annual child rearing costs to be 14.7% of their income. Epensshade, *The Value and Cost of Children*, 32 Population Bull. 43 (Population Reference Bureau 1977).

40. BRUNCH, *supra* note 9, at 51. *See also* GINSBURG, *supra* note 9; HERRELL, *supra* note 11.

higher income standard one parent enjoys? Most formulas state as a purpose the need to maintain a pre-divorce standard of living for the children of the marriage. How does the court determine what sacrifices each parent would have made to provide their children with the "extras" in life? Formulas alone cannot provide for all of these circumstances. To compensate, most formulas contain provisions for what are known as "allowable deviations."⁴¹

The first step in arguing for an allowable deviation from a formula award is to determine what expenses are extraordinary as opposed to those included in the determination of the formula award. In many states, deviations are controlled by statute.⁴² Apart from statutory criteria, extraordinary expenses have been defined as "any large, discrete, legitimate child-rearing expense that varies greatly from family to family or from child to child."⁴³ These types of expenses can usually be placed into one of three categories: physical, educational, and emotional.⁴⁴

Physical costs usually include medical and day care expenses. Care should be taken to determine the sources of insurance coverage and what the limitations of the coverage are.⁴⁵ Uninsured medical expenses as well as catastrophic expenses can operate to provide for additional support or adjustments made in the base figures of formula evaluations. For unexpected future expenses, post-award changes in circumstances can always allow for adjustment in awards. Day care expenses are normally looked upon as being related to employment time constraints. It is important to examine each situation closely, however, and to include additional time obligations of the custodial parent when evaluating the duration of child care needed. In addition, some jurisdictions allow for deviations based on the value of the child care services provided by the custodial parent.⁴⁶

Extraordinary educational costs normally include those associated with college, private elementary and secondary schools, graduate or professional schools, special enrichment programs for children gifted in a particular area, and special educational programs for children who are handicapped in some manner. Generally impossible to incorporate into a generic formula, these expenses must be specifically delineated and awards adjusted accordingly. While the extent of these types of expenses are obviously limited by the post-divorce incomes of the parents, it is

41. See generally, SMITH, *Grounds for Deviation*, 10 Fam. Advoc. 22 (Spring 1988); GOLDFARB, *Dealing with Extraordinary Expenses*, 10 Fam. Advoc. 38 (Spring 1988).

42. See, e.g., N.C. GEN. STAT. § 50-13.4(c1)(1987).

43. GOLDFARB, *supra* note 41, at 38.

44. See *supra* note 41 and accompanying text.

45. Most states authorize the inclusion of a requirement that state agencies seek health insurance as part of the support obligation. According to the Office of Child Support Enforcement, this obligation should be viewed as an adjunct to, not a substitute for, the obligation to provide periodic financial support. GOLDFARB, *supra* note 41, at 40; see also 50 C.F.R. 41887, 41891 (1985).

46. See, e.g., WIS. STAT. § 762.25(1m)(e)(1983); see also *supra*, note 61.

imperative that due consideration to them be given if formulas are to be equitably implemented.

The last category, that of the emotional needs of the child, is the one that least lends itself to economic evaluation. Aside from the obvious emotional trauma accompanying the split of the family, children must also cope with the "riches to rags" syndrome which often occurs in the post-divorce custodial household.⁴⁷ Add to this the emotional roller coaster the child rides as he visits the relatively wealthy household of the support parent, then returns to the economically constrained custodial parent, and the need for further adjustment of the formula award becomes evident.⁴⁸ Since formulas are based on mid-range averages, they often must be reexamined when dealing with extremely high or extremely low income families.⁴⁹ Again, allowing for applicable deviations from the formula based award can provide both adequate and equitable solutions to these difficult situations which, under the old system, went largely ignored.

There are no easy methods for determining what it costs to raise a child. Harder still is deciding how much of a parent's income and attention should be allocated to that end. The use of formulas, with allowable deviations, brings the family court judge much closer to the possibility of achieving equity than was ever realized under the old system of award determination.

3. Judges: *The Impossible Position*

The third corner of the triangle warranting examination of its comparative effects on support awards before and after the implementation of formula use is that of the family court judge. Certainly a more impossible position is difficult to imagine. Given the unanswerable questions already discussed, adding those situations too unique to be examined here, and dividing them by the time available to decide each case, the problems facing the trier of fact are amply illustrated.

Even with the addition of formula awards, the family court judge remains responsible for a wide zone of discretion. Most formulas are only deemed advisory in nature.⁵⁰ Even those which operate as rebuttable

47. SMITH, *supra* note 41, at 24.

48. WEITZMAN, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. Rev. 1181, 1260-63 (1981).

49. See *infra*, text pp. 15-21; see also, N.C. GEN. STAT. § 13.4(c1)(4) (1987); GINSBURG, *supra* note 9, at 29.

50. There are currently 20 states where guidelines in use operate as a rebuttable presumption. They are Alaska, Arizona, California, Colorado, Delaware, Washington, D.C., Hawaii, Illinois, Minnesota, Montana, Nevada, New Jersey, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Vermont, West Virginia, and Wisconsin. Iowa, Maine and Virginia have guidelines which are rebuttable presumptions for administrative agencies, but are advisory to the courts. All other states are advisory at this time. SMITH, *supra* note 41, at 22.

presumptions require allowable deviations to work equitably.⁵¹ The implementation of formula awards, however, has been seen as the starting point for alleviating some of the inexplicable variances which have occurred all too frequently under the old system.

A study done of Denver court awards in 1978 found that amounts allocated for the support of one child ranged from six to forty percent of the supporting parent's post-divorce income.⁵² It was observed that in some cases the child support award was less than the supporting spouse's monthly car payment. In Michigan, the Administrative Office of the Court sent a hypothetical to sixty-nine offices of Friends of the Court asking for recommendations for child support awards under the facts presented. The responses came back awarding from \$0 to \$70 per week.⁵³ These examples serve to illustrate how susceptible awards decisions are to the influences acting on the person making them.

Judge Stephen B. Herrell illustrated how, without formulas, judges must rely solely on the evidence presented and how this can provide a less than accurate picture of the real facts:

[t]he attorney for the noncustodial parent will (and properly so) seek to "prove" the client had the best year ever just last year, will *never* make that much money again; will never get any more overtime no matter what, and in fact, the employer will be announcing massive layoffs just any day now. Not only that, the presence of the child in the other parent's home only adds about \$75 to the family budget. The custodial parent's lawyer on the other hand will of course seek to "prove" a similar scenario as to that parent's employment status; that the noncustodial parent is secretly about to remarry the wealthy "roommate" and that the child's presence in the household accounts for over half of the household expense.⁵⁴

Of course even with formulas, the judge is still liable to hear somewhat inflated accounts of reality. However, with a formula upon which to base decisions and closely defined deviations requiring competent evidence to implement, a judge is much closer to achieving equity than he has been without the guidelines.

Specific situations which an attorney litigating child support should look for to determine allowable deviations have already been examined.⁵⁵ Judges should be alert for the same situations. Formulas, used by themselves, have the same propensity for inequitable treatment of the parties

51. HERRELL, *supra* note 11, at 62. See also, SMITH, *supra* note 41, at 22.

52. YEE, *What Really Happens in Child Support Cases: An Empirical Study of Establishment and Enforcement of Child Support Orders in the Denver District Court*, 57 DENVER L. J. 38-42 (1979).

53. Michigan Friend of the Court Bureau, Proposed Child Support Guideline (draft), State Court Administrative Office: Lansing, Mich. (1985).

54. HERRELL, *supra* note 11, at 63.

55. See *supra*, text pp. 3-10.

as does the judge left solely to the parameters of his own discretion. The key to successful support awards lies in the marriage of the two methods. The discretion of the family court judge applied in conjunction with any advisory or rebuttable presumptive formula is the most reliable method currently available for achieving fair and functional child support awards.

III. CHILD SUPPORT AWARD FORMULAS

There are currently four major types of formulas in use or under study for possible use in determining child support awards. They are the Delaware Melson Formula, the Income Sharing Formula, the Cassetty Model, and the Wisconsin Formula. There are states whose chosen method does not fit exactly into one of these categories,⁵⁶ but their systems are so closely related to one of the above mentioned formulas that they do not bear closer scrutiny. In order to better judge the implementation of the particular formula chosen for use in North Carolina, each of the four formula types must be understood in both their benefits and drawbacks.

1. *The Delaware Melson Formula*

This method of determining child support awards was conceived and developed by Judge Elwood F. Melson in 1974.⁵⁷ Judge Melson's years on the bench fostered in him a concern with the disparity of child support awards under the then existing Delaware Statute.⁵⁸ Judge Melson's formula went into effect in Delaware in 1979, but has continually been reassessed and updated with what has been accepted as current economic data on child care expenditures.⁵⁹

The basic principles on which the Melson formula is based are as follows:

1. Parents are entitled to keep sufficient income for their most basic needs to facilitate continued employment.

56. *E.g.*, Kansas and Washington use a similar economic theory as that of the Income Sharing Formula, but based on a different percentage table. Minnesota uses the same basis for guidelines as the Wisconsin Formula, with slight percentage variations and an escalation factor based on the ages of the children.

57. National Inst. for Socioeconomic Research, *supra* note 27.

58. *Id.* Delaware judges were given only moderate statutory guidance, being directed to consider "among other things", the following:

- (1) The health, relative economic condition, financial circumstance, income, including the wages, and earning capacity of the parties, including the children;
- (2) The manner of living to which the parties have been accustomed when they were living under the same roof;
- (3) The general equities inherent in the situation.

13 Del. Code Ann. tit. 13, § 514 (1981).

59. DODSON, *A Guide to the Guidelines*, 10 FAM. ADVOC. 4 (Spring 1988).

2. Until the basic needs of children are met, parents should not be permitted to retain any more income than that required to provide the bare necessities for their own self-support.

3. Where income is sufficient to cover the basic needs of the parents and all dependents, children are entitled to share in any additional income so that they can benefit from the absent parent's higher standard of living.⁶⁰

Applying these basic rules requires a three-step analysis. First, a determination of each parent's available income for child support must be made. This starts with each parent's monthly income.⁶¹ From this figure, a self-support reserve is subtracted as a "primary support allowance".⁶² The remaining income is deemed available for the payment of child support.⁶³

The next step is to determine the children's primary support needs. This amount is calculated at subsistence level.⁶⁴ The amount per child is totaled,⁶⁵ and added to that are any extraordinary medical expenses and child care necessary to permit the custodial parent to work. When added together, the resulting figure becomes the primary support obligation. The primary support obligation is then divided between the parents on a prorata basis according to their individual available income amounts.⁶⁶

The final step in the Melson Formula is to determine the remaining parental income available for a standard of living adjustment (SOLA) in the award. Each parent's primary support obligations are subtracted from their available income amounts, any additional support obligations

60. WILLIAMS, *supra* note 21, at 20.

61. A parent's monthly income is determined considering all of the parent's sources of income. This includes business expense accounts which provide for meals and transportation which would otherwise be provided by the parent. Income may be imputed to the non-custodial parent based on earning capacity if he is unemployed or employed part-time by choice. If this is the case, the custodial parent's homemaking services may be considered as income for up to 50% of the household income. If the parent cannot meet his support obligations through income, but has assets of a value sufficient to pay, he may be required to divest himself of those assets. The Family Court of Delaware Procedure in Deciding Child Support Cases, Form 509P, Rev. 5/84 (1984).

62. The current reserve amount is \$450 per month for a parent living alone. If the parent has remarried or co-habitates with another adult, the amount of the reserve is one half the amount allowed for two people, currently set at \$630. An additional \$100 is allowed for work expenses, giving a parent in this situation \$365 per month (one half of \$630 plus \$100). WILLIAMS, *supra* note 21, at 21.

63. *Id.*

64. This amount is currently set at \$180 per month for the second member of the household (the first being assumed to be the parent), \$135 each for the third and fourth members, and \$90 each for every member thereafter. *Id.*, at 24; DODSON, *supra* note 59, at 10.

65. Added to this total are any extraordinary medical expenses and child care costs necessary to allow the custodial parent to work. The resulting total equals the primary support obligation. WILLIAMS, *supra* note 21, at 24; DODSON, *supra* note 59, at 10.

66. *E.g.*, if the supporting spouse has a \$2000 monthly income after his self-support reserve has been deducted, and the custodial parent has an income of \$1000 after deducting the reserve, the non-custodial parent is required to pay two thirds of the primary support, including any extraordinary expenses. See generally WILLIAMS, *supra* note 21, at 24.

the parent owes to other children (including those of a current marriage) are subtracted, and the remaining figure is the amount subject to SOLA support. The SOLA obligation is determined on a percentage of the remaining figure, based on the number of children requiring support.

One Child	15%
Two Children	25%
Three Children	35%
Four Children	40%
Five Children	45%
Six or more	50% ⁶⁷

The formula allows for an adjustment when joint custody provides each parent with physical custody for a minimum of thirty percent of the time. When such a situation occurs, each parent's child support obligation is calculated separately and custody each parent enjoys.⁶⁸ Further deviation is permitted in the form of quarterly court ordered supplemental child support payments to afford periodic relief to the custodial parent and to generally allow the children to share in the non-custodial parent's higher standard of living.⁶⁹

In applying this formula in the states which use it,⁷⁰ the figures arrived at are construed as a rebuttable presumption.⁷¹ Since the parties contemplating entering into a child support litigation are aware that there is little chance of obtaining an award different from that determined under the formula, settlement outside the court is encouraged.⁷² The formula is also easily used by parents without the involvement of attorneys, allowing parents in an already difficult situation the opportunity to work things out without requiring outside involvement.⁷³ In Delaware, it is used in the Delaware Family Court mandatory mediation process, where as a starting point for negotiations, it provides some parameters for achieving equity in circumstances already shown as being fraught with the pitfalls of inequitable decisions.⁷⁴

One of the major shortcomings of the formula is its inapplicability in

67. WILLIAMS, *supra* note 21, at 25.

"The total SOLA shall not exceed 50% of the discretionary income unless there is a prior finding of specific need." The Family Court of Delaware Procedure in Deciding Child Support Cases, Form 509P, Rev. 5/84, Part II, Step B (1984).

68. WILLIAMS, *supra* note 21, at 25.

69. *The Family Court of Delaware*, *supra* note 67, at Part IV; see also, DODSON, *supra* note 59, at 10.

70. The states currently using this formula are Delaware, Hawaii, and West Virginia. DODSON, *supra* note 59, at 10.

71. See *supra*, note 50; see generally, SMITH, *supra* note 41.

72. See generally, *National Inst. for Socioeconomic Research*, *supra* note 27, at 22-23; L. BALISLE, *New Formulas to Fairness*, 10 FAM. ADVOC. 16 (Spring 1988).

73. *National Inst. for Socioeconomic Research*, *supra* note 27, at 22-23.

74. See *supra*, text pp. 3-12.

low income situations. The self-support deduction theoretically cuts off any duty to support if the parent makes less than \$450 per month.⁷⁵ The court in such instances must then make minimal provisions from the available income.⁷⁶

By and large, this is a complete and effective formula. As long as the subsistence levels are kept up to date and care is taken to obtain accurate information upon which to base deviations from the formula amounts, the propensity for fairness and reasonability in support award determination is contained in this system.

2. *Income Sharing Formula*

The basic model for Income Sharing stands on two premises:

1. After a divorce, children should be supported at a level commensurate with their standard of living before divorce, if this is consistent with principle two.
2. Where a reduction in standards of living is required because two households must now be supported, the available resources should be divided between the two post-divorce households in proportion to the number of members in each home.⁷⁷

This model was developed by the Institute for Court Management of the National Center for State Courts under the Child Support Guidelines Project.⁷⁸ In drafting this model, the intent was to combine the most authoritative economic data available on child rearing costs with the principles for guidelines as enunciated by the project's Advisory Panel.⁷⁹ This model is by far the most common method adopted by states complying with the federal mandate.⁸⁰

To apply the formula, first the income of both parents are added together and compared to the table for determining the percentage of the total to be allocated for child support.⁸¹ The percentage amount is then prorated between the parents based on their proportionate shares of the

75. *National Inst. for Socioeconomic Research*, *supra* note 27, at 22-23.

76. *Id.*

77. I. SAWHILL, *Developing Normative Standards for Child Support Payments*, 1 IMPROVING CHILD SUPPORT Practice I-119, 121-22 (ABA 1986).

78. WILLIAMS, *supra* note 21, at 12.

79. *Id.*

80. DODSON, *supra* note 59, at 10. There are currently eighteen states using this system: Alaska, Arizona, Colorado, Florida, Indiana, Kentucky, Maine, Michigan, Missouri, Montana, Nebraska, New Jersey, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, and Vermont. *See also, supra*, note 56.

81. States using the Income Shares Model may base their system on either gross or net income. Each has a table with two cross-graduated scales applying a percentage figure based on the number of children and the aggregate amount of income. For instance, under the gross income table, parents with one child and an income of \$20,000-24,999, would have a support obligation of 16.1% of that amount. The same income applied to four children would be 35.4%. *See Williams, supra* note 21, at 14-15.

total income. The supporting spouse pays the custodial spouse the amount indicated, while the custodial parent is presumed to be spending their obligatory share on the child in their custody.⁸²

Additional expenses, such as child care and special medical expenses are added to the basic obligation in the same prorated manner. Further adjustments are made for variances in traditional custody arrangements. In cases of joint custody, the expenses incurred by each parent are presumed to be in approximate proportions to the time spent with custody of the child.⁸³ The child support obligation is calculated for each parent, and pay-over amounts are determined for the supporting spouse.⁸⁴

The application of this guideline allows a great range of optional implementation. Variances in net versus gross income, ages of supported children, and number of additional dependents are all easily incorporated into the system.⁸⁵

There are, however, critics of this model.⁸⁶ It is noted that this plan takes no notice of family savings, payments on the principal of a home, gifts, contributions, or personal insurance in determining expenditures on children.⁸⁷ Critics assert that the formula does not require both parents to be employed, but instead encourages the custodial parent to stay home and be supported by the non-custodial spouse.⁸⁸ It has been suggested by one economist that the supporting spouse's obligation be reduced in proportion to the benefits the custodial parent receives by living with the children.⁸⁹ The difficulty in assigning a monetary value to such benefits is obvious. It has also been argued that such benefits are offset by the additional stress inherent in the single parent's situation.⁹⁰

The primary plus to the Income Shares Formula is that it focuses on maintaining the pre-divorce standard of living for the child as closely as may be mathematically possible. Its plus, however, is also at the root of its largest minus. The focus on mathematical standards does not allow for sufficient deviation from the formula on a case by case basis. While easy to apply and economic in terms of time and litigation, there are too many possibilities for the inequitable treatment of the parents. While keeping both eyes on the task of maintaining the former lifestyle of the

82. *Id.* at 13.

83. *Id.* at 16.

84. *Id.* at 18.

85. DODSON, *supra* note 59, at 10.

86. *Id.*

87. BERGMANN, *Setting Appropriate Levels of Child Support Payments, The Parental Child-Support Obligation*, 115, 116-17 (J. Cassetty ed. 1983).

88. SAWHILL, *supra* note 77, at 131-38.

89. BRUNCH, *supra* note 9, at 52-53.

90. Judith Cassetty, PhD., is Chief of Research and Planning, Office of the Attorney General for the State of Texas, Child Support Division.

parties, it is too easy to lose sight of the current lifestyle requirements which must be considered in order to insure fairness.

3. *The Cassetty Model*

This plan is also known as the Equal Living Standard. The formula model was developed by Dr. Judith Cassetty,⁹¹ for the purpose of ensuring "that the children of divorced parents suffer the least economic hardship possible and continue to enjoy a standard of living which is as close to the original pre-divorce level as possible."⁹² While not in current use, this model has been recognized for "its alternative conceptual approach to determining child support."⁹³

The first step in the Cassetty plan is to subtract from the net total income of both post-divorce households, a poverty level subsistence for each member of each group. The remaining income is then divided between the two households proportionately to the number of members in each.⁹⁴

For non-traditional custody arrangements, the model figures are adjusted by varying the family size of each household according to the amount of physical custody.⁹⁵ Thus, if one child spends 33% of the time with one parent and 66% of the time with the other, the first household is calculated based on one and one third members while the second is said to have one and two thirds members.

One of the major differences between this model and the others examined is that Cassetty uses total net income of each household unit as opposed to that of the divorced parent only. That means that income generated by a current spouse of either parent as well as that provided by any working children is added into the base figure for application of the poverty level subtraction. In addition, other dependents of either parent in their post-divorce households are included at the other end of the equation.⁹⁶

There is no built-in adjustment for extraordinary expenses in the Cassetty Model. Because there are no working models of this formula currently in use, it is difficult to say whether such adjustments would be implemented.⁹⁷ Since each parent pays a proportion of their entire post-

91. J. CASSETTY & F. DOUTHITT, *The Economics of Setting Adequate and Equitable Child Support Payment Awards*, Tex. St. Bar, Fam. L. Sec. Rep., Special Support and Visitation Issue, at 12 (1984).

92. DODSON, *supra* note 59, at 9.

93. WILLIAMS, *supra* note 21, at 26-28.

94. *Id.* at 28.

95. *Id.* at 29. It is noted that an increased presence in the home of the non-custodial parent tends to reduce the award amount significantly, while an increased presence in the custodial home tends to increase the award amount significantly. *Id.*

96. *Id.*

97. *Id.* at 10.

divorce household income, without retention of any reserve amounts, it is possible that deviation contingencies would be deemed unnecessary. Because the formula focuses on the needs of the child to the exclusion of all but the absolute necessities of the parents, there is little need for the allowable deviations discussed earlier.

It is the same focus, however, that leaves the Cassetty Model open to the same attacks as the Income Shares Formula experiences. There seems to be little regard for a balance between the needs of the child and those of the post-divorce households of each parent. It looks as though in practice, this model could operate to the detriment of the members of the parent's current households. As with all formula implementation, however, much study is required after the formula is put into use to determine the operational inequities of the system.

4. *The Wisconsin Formula*

The Wisconsin Formula, also known as the Percentage of Income Standard, is the simplest support award guideline to understand and implement.⁹⁸ In 1980, the Wisconsin Department of Health and Social Services adapted the Delaware Melson Formula into an income percentage support guideline. This guideline was given to a group of the state's family law judges and court commissioners and over the next several years was voluntarily implemented throughout Wisconsin.⁹⁹ In July, 1987, the Wisconsin legislature made the guidelines a rebuttable presumption to be applied in all initial child support orders.¹⁰⁰ The formula

98. *National Inst. for Socioeconomic Research*, *supra* note 27, at 32.

99. BALISLE, *supra* note 72, at 16; see WIS. STAT. §§ 46.25(9) (a) and 767.25(1j).

100. The statutory factors contained in WIS. STAT. § 767.25 for consideration in determining the fairness of the application of the guidelines are as follows:

- (a) The financial resources of the child.
- (b) The financial resources of the parents as determined under § 767.255.
- (bj) Maintenance received by either party.
- (bp) The needs of each party in order to support himself or herself at a level equal to or greater than that established under 42 U.S.C. § 9902(2).
- (bz) The needs of any person, other than the child, whom either party is legally obligated to support.
- (c) The standard of living the child would have enjoyed had the marriage not ended in annulment, divorce or legal separation.
- (d) The desirability that the custodian remain in the home as a full-time parent.
- (e) The cost of day care if the custodian works outside the home, or the value of custodial services performed by the custodian if the custodian remains in the home.
- (ej) The award of substantial periods of physical placement to both parents.
- (em) Extraordinary travel expenses incurred in exercising the right to periods of physical placement under § 767.24.
- (f) The physical, mental and emotional health needs of the child, including any costs for health insurance as provided for under subsection (4m).
- (g) The child's educational needs.
- (h) The tax consequences to each party.
- (hm) The best interests of the child.
- (i) Any other factors which the court in each case determines are relevant.

awards are presumed to apply in all child support cases unless the court finds "by the greater weight of credible evidence" that the use of the percentage standard is unfair to the child or any of the parties based on factors which are enumerated under the statute.¹⁰¹

The formula is based on a percentage of the parent's gross income determined by the legislature to be expended on child rearing in a relatively constant manner across a wide range of incomes.¹⁰² The percentages so determined are as follows:

- 17% of the parent's income for one child
- 25% of the parent's income for two children
- 29% of the parent's income for three children
- 31% of the parent's income for four children
- 34% of the parent's income for five or more.¹⁰³

Under the Wisconsin Formula, there is no adjustment for the income of the custodial parent. It is assumed that the custodial parent will expend their designated proportion directly on the child without the court's interference.¹⁰⁴ There are no formula adjustments for any other factors previously discussed as allowable deviations, such as medical or day care expenses, or the varying ages of the children involved. Rather, these factors are contained in the statutory listings which operate to allow variations upon the determination of unfairness in the application of the formula awards.¹⁰⁵

The 1987 statutes require that the standard be based on gross income and assets.¹⁰⁶ Gross income is defined as including 100% of wage and salary income, interest, dividends, net rental income, self-employment income, and all other income except that gained through public assistance programs.¹⁰⁷ Parents with prior support obligations may deduct those from the gross income total prior to the percentages being assessed.¹⁰⁸ The purpose of this design is to allow the formula's implementation to function like an income tax.¹⁰⁹ The ultimate goal is for such awards to be automatically applied by employers under a statewide withholding

WIS. STAT. § 767.25(1m) (1987).

101. Wisconsin Dept. of Health and Soc. Ser., Percentage of Income Standard for Setting Child Support Awards, Memorandum (Rev. Dec. 20, 1983) 1 Improving Child Support Practice, at 216 (1986); see also, WILLIAMS, *supra* note 21, at 10.

102. Wisconsin Dept. of Health and Soc. Ser., Percentage of Income Standard for Setting Child Support Awards, 1 Improving Child Support Practice, 219 (1986).

103. WILLIAMS, *supra* note 21, at 11.

104. See *supra* note 100.

105. WIS. STAT. § 46.25(9) (a) (1987).

106. Wisconsin Dept. of Health and Soc. Ser., *supra* note 102, at 220.

107. National Inst. for Socioeconomic Research, *supra* note 27, at Appendix IV.

108. WILLIAMS, *supra* note 21, at 11.

109. *Id.*

system.¹¹⁰

The key to the equitable application of the Wisconsin Formula is the variety of statutory factors allowing deviation from the percentage standard. Recognition of this fact is evident in an examination of the changes which have occurred in the statutory listings from the time of their inception to the July, 1987 rebuttable presumption legislation.¹¹¹ The use of the guideline was studied in its advisory capacity for several years prior to making the standard presumptive. This allowed the practitioners in the field to "work the bugs out" of the system and cover most of the contingencies expected to arise by expanding the list of deviation factors.

Wisconsin's original criteria for setting award amounts varying from the percentage guidelines consisted of eight factors.¹¹² The focus of the statutory factors was ostensibly on determining general parameters for a fair and equitable support award, giving due consideration to the "custodial parent's assets and income, special needs, age and health of both custodial parent and children and customary station in life, and the ability of the non-custodial parent to pay determined by income, assets and debts as well as age and health."¹¹³ This turned out to be a somewhat unrealistic goal in actual practice.

A close examination of this list of factors will reveal an almost exclusive concern for the needs of the child. The parent's ability to pay and any factor which might operate to make the guideline unfair to the supporting parent was not addressed at all. In 1983, a new introduction was added to the statute, providing that the court could determine support payments deviating from the percentage income standard if sufficient evidence was found that the standard was unfair based on the listed factors.¹¹⁴ As the formula in its advisory capacity was put into practice, changes began to appear in the statute, refining and clarifying the allowable deviations as questions arose and were answered.

The first major changes arrived in 1985. Six new factors allowing for deviation from the formula percentages were created to take effect on

110. WIS. STAT. § 767.25 has been amended since the institution of the guidelines as advisory in 1983 as follows:

(bj): created by 1985 Act 29, § 2362g, eff. July 1, 1987;
 (bp): created by 1985 Act 29, § 2362j, eff. July 1, 1987;
 (bz): created by 1985 Act 29, § 2362m, eff. July 1, 1987;
 (ej): repealed and recreated by 1987 Act 355, § 38m, eff. May 3, 1988;
 (em): created by 1985 Act 29, § 2362r, eff. July 1, 1987;
 (em): amended by 1987 Act 355, § 39, eff. May 3, 1988;
 (f): amended by 1987 Act 413, § 63, eff. June 17, 1988;
 (hm): created by 1985 Act 29, § 2362w, eff. July 1, 1987.

WIS. STAT. § 767.25(1m) (1987).

111. See *supra*, notes 100, 110.

112. *Edwards v. Edwards*, 97 Wis. 2d 111, 293 N.W.2d 160 (1980).

113. See WIS. STAT. § 767.25(1) (1987).

114. See *supra*, note 110.

July 1, 1987.¹¹⁵ These factors reflected occurrences which have been incorporated into other formulas which have been discussed above, and may be said to have a direct influence on the fairness of the financial burden an order to pay support imposes on the parent. Taken into account in the new factors were maintenance in other forms received by either party, (eg. alimony, possession of the family house, health insurance, etc.) the parents' own needs for support, other support obligations of the parents, unusual custody arrangements, and extraordinary travel costs for the exercise of visitation rights.¹¹⁶ Tacked on as almost an afterthought was an additional umbrella consideration, "the best interests of the child."¹¹⁷

Where the initial set of factors focused almost solely on the needs of the child, it is easy to see that in five years of practice the inequities of the formula's implementation regarding the supporting spouse were amply brought to the attention of the legislature.

With the advent of these additional factors came the next significant change in the Wisconsin statute: the form of application of the standard itself. Effective July 1, 1987, was a new introductory paragraph mandating that except as provided in the list of deviations, courts were to determine child support awards by using the percentage income standard.¹¹⁸ The advisory guidelines had become a rebuttable presumption. In addition, the use of the deviation list was limited to findings based on a higher standard of evidence.¹¹⁹

There are a number of reasons postulated for the changeover to mandatory guidelines. For one, studies showed that the appellate courts refused to reverse trial courts for not applying the guidelines so long as the judge indicated that some consideration was given to the formula percentages when the award was set.¹²⁰ There was also a great discrepancy statewide towards the actual implementation of the system. While some judges were pleased with the guidelines, others "went out of their way to find reasons not to apply the percentage standards."¹²¹ In order to facilitate consistency across the state, it would seem trial court judges required a plan more mandatory in nature.

One of the best reasons for the change lie in one of the greatest advantages of the use of formulas: the shift of bargaining power between the custodial and the supporting spouse. The effect formulas have had in

115. See WIS. STAT. § 767.25(1m),(bj),(bp),(bz),(ej) and (em) (1987).

116. WIS. STAT. § 767.25(1m)(hm) (1987).

117. WIS. STAT. § 767.25(1j) (1987). Subsec. (1j) created by 1985 Act 29, 2360, eff. July 1, 1987.

118. WIS. STAT. § 767.25(1m) (1987). Subsec. (1m) (intro) amended by 1987 Act 37, § 1, eff. Aug. 14, 1987.

119. BALISLE, *supra* note 72, at 16.

120. *Id.*

121. See *e.g.*, *supra*, at 15.

this area has already been explored.¹²² By making the guidelines presumptive, the bargaining base becomes even stronger. Now that judges and commissioners can no longer veer from the formula by merely "indicating consideration", litigation of the subject should be curtailed even further.¹²³

It should be noted that included in the amendments brought about in 1987, is the fact that upon appeal for modification of a support award, application of the guidelines reverts to being within the decision-maker's discretion.¹²⁴ The only requirement of the court is that it state on the record the reasons for the finding of unfairness in the application of the guidelines, and its reasons for the modification of the award.¹²⁵

Because the presumptive attributes of the guidelines are so new, there are no published cases questioning the fairness of the application of the standards in this light. There have been seminars wherein attorneys have discussed how to make a case of unfairness based on the standards of support which have existed in the state since the 1977 amendments to the statute: that being the standard of living the child would have enjoyed had there been no divorce.¹²⁶ The consensus is that if evidence can be presented that this standard has not been met, there is room for the trial court to rebut the presumptive award.¹²⁷

There are currently five states using the Wisconsin Formula.¹²⁸ Among them is the state of North Carolina. In order to predict the future of the standard's use in North Carolina, its current application must be compared to its corollary in the developmental stages of Wisconsin's application. By noting the changes the Wisconsin standard has gone through, the future of the formula in North Carolina may be examined with the benefit of hindsight, allowing some corners to be cut in the development of an equitable implementation. Before making this comparison a brief look at the history of support awards and the treatment of formula use in North Carolina is in order.

IV. NORTH CAROLINA: HISTORICAL PERSPECTIVE

1. *The Parental Duty to Support Minor Children*

The common law doctrine of a father's duty to support his minor children after he has left the family made its way into North Carolina

122. BALISLE, *supra* note 72, at 16.

123. *Id.*

124. WIS. STAT. § 767.25 (1n)(b) (1987).

125. WIS. STAT. § 767.25(1)(c) (1987).

126. BALISLE, *supra* note 72, at 16.

127. *Id.*

128. The five states currently using the Wisconsin Formula are Georgia, Mississippi, Nevada, North Carolina, and Wisconsin. Dodson, *supra* note 9, at 9; *see also, supra*, note 56.

caselaw early in the state's history.¹²⁹ Prior to July 5, 1971, this duty continued under common law until the child reached the age of 21. In 1971, the age limit was statutorily changed to eighteen,¹³⁰ but continued to place the primary burden of support upon the father of the child.

In 1945, the Supreme Court of North Carolina stated:

It is the public policy of the State that a husband shall provide support for himself and family. This duty he may not shirk, contract away, or transfer to another. It is not 'a debt' in the legal sense of the word, but an obligation imposed by law, and penal sanctions are provided for its willful neglect or abandonment.¹³¹

That the primary obligation for supporting minor children rested on the shoulders of the father was reiterated under the amended child support statutes of 1967.¹³² The mother's support obligations were, therefore, secondary, and as such the mother was entitled to reimbursement by the father under civil action for money spent on the support of their children.¹³³ Absent the receipt of sufficient support from the father, however, (through default, death, or any other reason) the mother's obligation became primary until such time as reimbursement was available to her.¹³⁴

The modern era has brought changes in the income generating roles between men and women which have been reflected in statutory modifications to the primary support obligations of parents. N.C.G.S. § 50-13.4(b) was amended in 1981 to read:

"In the absence of pleading and proof that the circumstances otherwise warrant, the father and mother shall be primarily liable for the support of a minor child, and any other person, agency, organization or institution standing in loco parentis shall be secondarily liable for such support."¹³⁵

This alteration in the primary support obligation was not seen as a diminution of the father's obligations, but rather as an enlargement of a mother's responsibilities, accurately reflecting the changes in the normal ability of a mother to contribute to the support of her children.¹³⁶

The North Carolina courts have always had fundamentally recognized doctrines of common law and moral law, as well as the statutory interpretation of those doctrines upon which to base placement of the duty and obligation of parents to support their children. Not so fundamen-

129. Walker v. Crowder, 36 N.C. (1 Ired. Eq.) 478 (1843).

130. "A minor is any person who has not reached the age of 18." N.C. GEN. STAT. § 48A-1 (1971).

131. Ritchie v. White, 225 N.C. 450, 452-53, 35 S.E.2d 414, 415 (1945).

132. See, N.C. GEN. STAT. § § 50-13.4(a) through (e) (1967).

133. American National Fire Insurance Co. v. Gibbs, 260 N.C. 681, 133 S.E.2d 669 (1963); Saiced v. Abeyounis, 217 N.C. 644, 9 S.E.2d 399 (1940); Raleigh Banking & Trust Co. v. York, 199 N.C. 624, 155 S.E. 263 (1930).

134. 4 LEE, NORTH CAROLINA FAMILY LAW, § 229, 116 (1981).

135. N.C. GEN. STAT. § 50-13.4(b) (1981).

136. Alamance County Hosp. v. Neighbors, 315 N.C. 362, 338 S.E.2d 87 (1986).

tally recognized have been the methods by which awards have been attached to those obligations. An examination of the modern era caselaw shows that despite what was intended as a uniform basis for awarding child support, in practice the propensity was for awards that were too often arbitrary, inequitable and insufficient.¹³⁷

2. *Determining Child Support Awards*

The 1967 statutes provided the basis for support, the limitations of support, and the method of distribution for support payments.¹³⁸ Under the statutes, awards were to be based on the relative ability of the parties to provide support (in the order of obligation) and the needs of the child requiring the support.¹³⁹ Both criteria are subject to wide interpretation, necessitating the institution of equally wide judicial discretionary powers to decide the parameters of each on a case by case basis.¹⁴⁰

It has already been discussed how difficult determining the "needs of the child" can be.¹⁴¹ North Carolina courts have, on several occasions, attempted to define the area, but with little success. In *Williams v. Williams*,¹⁴² the court offered the following self-defeating definition:

It is frequently said that the parent must supply his minor children with necessities, but the word "necessaries" is a relative and elastic term. Necessaries are not limited to those things which are absolutely necessary to sustain life, but extend to articles which are suitable in view of rank, position, fortune, earning capacity and mode of living of the parent. Articles that might be a luxury to one person may very well be a necessary to another. The customs and fashions of the time as to articles in general use may be a factor to be considered. Many articles which at one time were commonly regarded as luxuries for the few have at a later time become reasonable necessities for the many. The standard of living has been constantly improving. The law requires the parent to do no more than the best he can to support his child in the manner suitable to his station and circumstances.¹⁴³

This definition seems to define the needs of the child primarily by the parent's ability to pay. The greater the income of the parents, the broader the definition of "necessaries" becomes. The family court judge using this statement as his guide for determining an award would arguably be within his discretion in disregarding the "needs of the child" criteria, and basing his decision instead solely on the parents.

137. *Hamilton v. Hamilton*, 57 N.C. App. 182, 290 S.E.2d 780 (1982).

138. See, N.C. GEN. STAT. § 50-13.4(b) (e) (1967).

139. N.C. GEN. STAT. § 50-13.4(b) (1967).

140. Clark, *LAW OF DOMESTIC RELATIONS*, § 15.1 (1968); 4 Lee, *NORTH CAROLINA FAMILY LAW*, § 229 (1981).

141. See Clark, *supra*, note 140, at 6-10.

142. 261 N.C. 48, 145 S.E.2d 229 (1964).

143. *Id.* at 57, 145 S.E.2d at 233.

Later caselaw attempted to more closely define a child's needs and the parents' corresponding obligations. In 1979, the North Carolina Court of Appeals stated that necessities "include food, clothing, lodging, medical care and proper education."¹⁴⁴ This definition reflected the statute in force at the time which provided for support in an amount suitable for providing "the reasonable needs of the child for the health, education, and maintenance, having due regard to the estates, earning, conditions, accustomed standard of living of the child and the parties, and other facts of the particular case."¹⁴⁵ The parents' income was taken into account, particularly insofar as it related to the child's pre-divorce standard of living, but the judge was allowed to limit the award to the custodial parent's ability to document expenses in specific areas.

The only appellate review standard placed on the trial court judge's award determination was whether a basis in factual findings had been evidenced in the record. The trial court's conclusions of law must have been "based upon factual findings specific enough to indicate to the appellate court that the judge below took 'due regard' of the particular 'estates, earnings, conditions and accustomed standard of living' of both the child and the parents."¹⁴⁶ This is not a standard specific enough to insure consistency and equity in award decisions.

The problems inherent in the above discussed methodology did not go unnoticed. Both attorneys, attempting to curtail a judge's discretionary powers, and trial judges, trying to fashion a reusable plan for award determination, have been trying to "sneak" a formula-based award system into use for many years. For the most part, they have met with little success.

3. *Caselaw: Early Formula Use*

One of the first North Carolina cases appealed in part on the use of a formula-based award was 1963's *Fuchs v. Fuchs*.¹⁴⁷ The plaintiff father and defendant mother were divorced in 1962. In a separation agreement executed in 1961, it was agreed that the mother would have custody of the child and receive monthly support payments from the father in the sum of \$100 for each of the two minor children of the marriage.¹⁴⁸ On June 11, 1963, the defendant filed a motion praying the plaintiff be required to pay not less than \$400 per month for the support of both children.¹⁴⁹ Defendant provided no evidence pertaining to the needs of the children, but based her request on the following: "In view of the plain-

144. *Bethea v. Bethea*, 43 N.C. App. 372, 375, 258 S.E.2d 796, 799 (1979).

145. N.C. GEN. STAT. § 50-13.4(c) (1976).

146. *Beall v. Beall*, 290 N.C. 669, 228 S.E.2d 407 (1976).

147. 260 N.C. 635, 133 S.E.2d 487 (1963).

148. *Id.* at 636, 133 S.E.2d at 489.

149. *Id.* at 637, 133 S.E.2d at 489.

tiff's means and condition in life, \$200 per month for the support of two children is not a reasonable amount."¹⁵⁰

The court apparently agreed. Finding no facts relating to the needs of the children, the court instead attempted to base its decision on a rudimentary formula of its own making. It reasoned that the plaintiff, having remarried a woman with one minor child, now had the responsibility of supporting five people: himself, his new wife and child, and his two minor children from his marriage to the defendant. The court found as a fact that the plaintiff's net income after allowable deductions was \$953 per month. Split five ways, the resulting division provided \$190.60 per person per month. The court then determined that the sum of \$190.60 per month was required for the support of each child in order to maintain them in accordance with the means and condition of life for the plaintiff.¹⁵¹

Without making a specific statement as to the reasons why, the North Carolina Supreme Court disagreed with the use of this method for award determination stating only "we do not approve the method used in the court below in arriving at the amount awarded for the support of the minor children involved herein."¹⁵² It may well be that the court was swayed by the lack of evidence pertaining to the specific needs of the children.¹⁵³ Without such evidence, the use of a formula such as this has in it all the dangers inherent in any blindly applied mechanical method.

In 1981, the North Carolina Court of Appeals addressed the use of a formula for determining a support award in *Falls v. Falls*.¹⁵⁴ Here, the husband appealed the trial court's decision on several levels, among which were "the Findings and Conclusions in which the amount of child support automatically increases each September based on the Cost of Living Index and is contingent on the needs of the children likewise increasing."¹⁵⁵

The Order, in allowing a cost of living adjustment, (COLA) specified the following:

The amount of the monthly child support payment for each child shall be increased for the succeeding 12 months by such amount, if any, as may be necessary to keep the level of the payments, during those succeeding 12 months at a consistent level by comparison of the United States Con-

150. *Id.*

151. *Id.*

152. *Id.* at 641, 133 S.E.2d at 492.

153. *Id.*

154. 52 N.C. App. 203, 278 S.E.2d 546 (1981); *but see*, Frykberg v. Frykberg, 76 N.C. App. 401, 333 S.E.2d 766 (1985), where the court held that a "provision for automatic increases in child support as a function on the Consumer Price Index, contained in the contractual agreement of the parties and not incorporated into the consent judgement, is not void as against public policy." (Emphasis added).

155. *Falls*, 52 N.C. App. at 205, 278 S.E.2d at 549.

sumer Cost of Living Index for the month of September, 1980, for the same month of the year of 1981 and each year thereafter. If the Index is revised by changing the base period, this shall be taken into consideration . . . [i]f at any time the government of the United States ceases to compile and publish the . . . Index, then the obligation of the husband . . . shall be governed by other statistics, published or private, as are commonly accepted as reflecting with reasonable reliability the information now contained in the . . . Index.¹⁵⁶

The court of appeals, recognizing the trend toward formula use, particularly in Iowa,¹⁵⁷ was loath to dismiss the COLA out of hand. The court admitted that there were some "attractive features" to its use, among them the preservation of the original award from the "ravages of inflation", the reduction of the burden the courts felt resulting from adversary modification proceedings, the elimination of the costs of such proceedings on the parties, and "the uncertainty such proceedings bring."¹⁵⁸

Regardless of the advantages, however, the court of appeals stressed the fact that "escalation clauses have uniformly been rejected when the formula *assumes that no change will occur in other factors affecting child support*."¹⁵⁹ The court rejected the trial court's attempt at setting up a "self-adjusting, self-perpetuating support order in this case because the court ignored the relevant and changing circumstances surrounding the children *and the parties*."¹⁶⁰ The major problem in the trial court's formula was not the use of a formula in general, but rather the determining factor chosen. The Consumer Price Index was found to be an indicator lacking in sufficient measures of the various factors involved in an accurate cost of living evaluation. The fact that a number of other published compilations of cost of living indicators existed also influenced the court of appeals.¹⁶¹

The greatest objection, however, lies in the court of appeal's determination that the formula allowed "future changes in support payments without any showing of changed circumstances of the parents."¹⁶² Finding the formula lacking in its ability to attach relevance to the income of

156. *Id.* at 216, 278 S.E.2d at 555.

157. The court cited the following cases in support of its position: *Peterson v. Peterson*, 85 N.J. 638, 428 A.2d 1301 (1981); *In re Stamp*, 300 N.W.2d 275 (Iowa 1980), *reh. denied*, (Iowa 1981); *Branstad v. Branstad*, 400 N.E.2d 167 (Ind. App. 1980); *In re Meeker*, 272 N.W.2d 455 (Iowa 1978); *In Interest of J.M. and G.M.*, 585 S.W.2d 854, 856-57 (Tex. Civ. App. 1979); *In re Mahalingam*, 21 Wash. App. 228, 584 *Id.*, at 216.

158. 52 N.C. App. at 217, 278 S.E.2d at 555.

159. Emphasis in original.

160. Emphasis in original.

161. The court cited discrepancies between the findings of the Consumer Price Index and the Personal Consumption Expenditure Deflator, which is calculated as part of the Gross National Product. 52 N.C. App. at 218, 278 S.E.2d at 556.

162. *Id.* at 219, 278 S.E.2d at 557.

the parents, the court saw a violation of the statutory requirements of the time.¹⁶³

The court did not dismiss the idea of formula use completely, however. In closing, the opinion related what an acceptable annual adjustment formula should minimally include.

1. Provisions focusing not only on the needs of the child, but also on the relative abilities of the custodial and non-custodial parent to pay;
2. Provisions stating that if the non-custodial parent's income decreases, or increases by a lesser percentage than the percentage change in the index, then the child support payments shall decrease or increase by a like or lesser percentage;
3. Provisions stating that if the parties are unable to determine or stipulate to the correct adjustment, either party may request that the court determine the same; and
4. Provisions allowing either party to petition the court for modification due to substantial and continuing change of circumstance.¹⁶⁴

This is indicative of the realization by the courts that for a formula to work, some allowable deviation and court discretion must be available. Most of the ideas expressed above found their way into the final statutory implementation of North Carolina's percentage income formula.¹⁶⁵

This realization was again expressed in 1982 by the court of appeals in *Hamilton v. Hamilton*.¹⁶⁶ In *Hamilton*, the plaintiff mother offered two possible formulas for determining the award according to objective criteria. While not appearing in the record, it is stated that the formulas offered were based on guidelines appearing in professional publications, so it may be assumed that they were reasonably close to some of those discussed above.¹⁶⁷

The importance of this case lies in the court of appeals' unqualified support for formula-based awards. In a statement highly prophetic of the eventual implementation, the court said:

Employment of a standard formula such as one of those suggested by plaintiff would take into account the needs and resources of the parents, as well as the needs of the children, and would result in fair apportionment of responsibility in the majority of cases. While many others might not fit neatly into the established guidelines, the formula would provide a starting point for negotiations or formulation of judicial remedies.¹⁶⁸

163. N.C. GEN. STAT. § 50-13.4(c) (1977) which stated: Payments ordered for the support of a minor child shall be in such amounts as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, and other facts of the particular case. (Emphasis added)

164. 52 N.C. App. at 220, 278 S.E.2d at 781.

165. See *infra*, pp. 38-39.

166. 57 N.C. App. 182, 290 S.E.2d 780 (1982).

167. See *supra*, pp. 13-25.

168. 57 N.C. App. at 183-84, 290 S.E.2d at 781 (1982).

With this statement by the court of appeals, the stage was finally set for the North Carolina Supreme Court's determination that formula guidelines for deciding amounts of child support awards was not an abuse of the trial court's discretion. This determination was forthcoming in 1985 in *Plott v. Plott*.¹⁶⁹

Briefly, the judicial history of *Plott v. Plott* is as follows. Subsequent to the parties' agreement that the father take custody of the minor child of the marriage, the Forsyth County District Court determined that the mother must pay \$135 per month in support of that child. The mother appealed the judgment and the North Carolina Court of Appeals reversed and remanded.¹⁷⁰ The District Court of Forsyth County, Gary B. Tash, J., on remand, ordered the mother to pay \$150 per month for child support. Again she appealed and again the judgment was vacated and remanded.¹⁷¹ The court of appeals' decision was taken to the North Carolina Supreme Court, Frye, J., where it was held that "determining child support amounts by the use of a mathematical formula was not an abuse of discretion, although mathematical accuracy was required."¹⁷²

The first appellate court remand was based in part on the fact that the statute in effect at that time placed the primary obligation of support on the father.¹⁷³ Under that statute, for the mother's secondary obligation to allow for an order requiring her to pay, a showing that the father could not reasonably provide all the support needed by the child was necessary. Since the facts did not bear this out, the order requiring support be provided by the non-custodial mother was held to be in error.¹⁷⁴

In June, 1981, the statute was amended to place the primary obligation of support equally upon the mother and father.¹⁷⁵ Thus, at the time of second trial, the new statute allowed for Judge Tash's order of support from the mother. In this light, Judge Tash made the following determinations:

1. That the available income of the plaintiff father over and above his reasonable expenses is approximately \$886 per month;
2. That the available income of the defendant mother over and above her reasonable expenses is approximately \$180 per month; and
3. That the reasonable needs of the child for health, education, and maintenance is approximately \$625 per month.¹⁷⁶

169. 313 N.C. 63, 326 S.E.2d 863 (1985).

170. 54 N.C. App. 493, 285 S.E.2d 879 (1981).

171. 65 N.C. App. 657, 310 S.E.2d 51 (1983).

172. 313 N.C. 63, 326 S.E.2d 863 (1985).

173. See *supra*, note 132.

174. 65 N.C. App. at 658-59, 310 S.E.2d at 58 (1983).

175. See *supra*, note 135.

176. 65 N.C. App. at 660-61, 310 S.E.2d at 55-56 (1983).

The trial court took this information, applied its own mathematical formula, and determined the award in the following manner:

[t]he plaintiff's available income of \$886 per month was found to be approximately four times the amount of defendant's \$180 per month, therefore, defendant's share of the support obligation was set at one fourth of the \$625 needed by the child, or \$150 per month.¹⁷⁷

The second appeal was based in part on the defendant mother's contention that to apply such a calculation was in conflict with the statutory requirement that the trial court give "due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties and other facts of the particular case."¹⁷⁸ The appellate court agreed. Vacating the Order, the court of appeals stated that the trial court had "abused its discretion in basing the amount of defendant's contribution on a mathematical equation rather than her relative ability to provide support as required by N.C. Gen. Stat. § 50-13.4(b) and (c)."¹⁷⁹

The North Carolina Supreme Court took this opportunity to give their support to the use of formulas. The decision was handed down on February 27, 1985.¹⁸⁰ Writing for the court, Justice Frye framed the issue as follows: "whether a trial court abuses its discretion by applying a formula to determine the non-custodial parent's proportionate share of child support."¹⁸¹ The court answered simply and succinctly, "no".¹⁸²

The court, citing commentators in the field, noted that "no precise formula exists to assist the court in determining a fair support award, and the uniqueness of each divorce renders a precedent almost valueless."¹⁸³ It did, however, recognize the fact that not only were many jurisdictions using support formulas, but that each usage was being shown as "an effective uniform means of allocating the burden of child support proportionately between parents in accordance with their respective financial resources."¹⁸⁴ Reciting the court of appeals' language in *Hamilton*,¹⁸⁵ the supreme court determined that the use by a trial judge of a formula "based on a ratio established by the parties' disposable income figures seems a fair method to apply so that parents can share equally the responsibility for supporting their children."¹⁸⁶ With this

177. *Id.* at 161.

178. N.C. GEN. STAT. § 50-13.4(c) (1981).

179. 65 N.C. App. at 669, 310 S.E.2d at 58 (1983).

180. 313 N.C. 63, 326 S.E.2d 863 (1985).

181. *Id.* at 64, 326 S.E.2d at 864, 865.

182. *Id.*

183. Note, *Inflation-Proof of Child Support Decrees: Trajectory to a Polestar*, 66 IOWA L. REV. 131, 135 (1980).

184. 313 N.C. at 78, 326 S.E.2d at 872.

185. See *supra*, note 163 and accompanying text.

186. *Plott*, 313 N.C. at 79, 326 S.E.2d at 873.

supreme court approval, the next step was the statutory interpretation of a uniform guideline for child support awards.

4. *The Statute*

Responding to the federal mandate requiring support guidelines be enacted by states wishing to participate in the benefits of various AFDC programs,¹⁸⁷ the North Carolina legislature appointed the Child Support Study Committee to research the question.¹⁸⁸ At the same time, during the 1985 Conference of Chief District Court Judges, the Child Support Guidelines Committee was appointed by Judge Lester Martin at the request of Chief Justice Branch, to develop a uniform guideline system.¹⁸⁹

The legislature's study committee, meeting on March 21, 1986, heard from Janet Mason of the Institute of Government who reported both on the Department of Human Resources (DHR) Task Force Report to the Secretary of DHR, and the report of the Conference of Chief District Court Judges to the Chief Justice of the Supreme Court.¹⁹⁰ The Study Committee instructed the staff to draft a bill incorporating the following:

1. That the Conference of Chief District Court Judges shall draw the guidelines;
2. That the guidelines shall be advisory in nature;
3. That in two years time the Administrative Office of the Courts shall survey the judicial districts on the effectiveness of the guidelines and report to the General Assembly.¹⁹¹

After reviewing the formulas in use around the country at that time, and considering comments and suggestions from over twenty-five district court judges, the committee of the Conference of Chief District Court Judges drafted the recommendation that the percentage income formula in use in Wisconsin¹⁹² be adopted to operate statewide as guidelines for determining the child support obligations of each parent.¹⁹³ The committee further recommended that allowable deviations from the formula awards be limited in basis to one or more of the following:

- (a). Special needs of the child, including physical and emotional health needs, educational needs, day-care costs, or needs related to the child's age;

187. See *supra*, note 6 and accompanying text.

188. Legislative Research Comm'n, Report to the 1985 Gen. Ass. of North Carolina, (1986 Session).

189. Child Support Guidelines Committee of the Conference of Dist. St. Judges, Report (Feb. 1986).

190. Legislative Research Comm'n, *supra* note 188 at 3c.

191. *Id.* More detailed minutes of the meeting are available in the Legislative Library at the Legislative Building, Raleigh, N.C.

192. See *supra*, pp. 20-25.

193. See *supra*, note 189.

- (b). Shared physical custody arrangements or extended or unusual visitation arrangements;
- (c). A party's other support obligations to a current or former household;
- (d). A party's extremely low or extremely high income, such that application of the guidelines produces an amount that is clearly too high in relation to the party's own needs or the child's needs;
- (e). A party's intentional suppression or reduction of income, hidden income, income that should be imputed to a party, or a party's substantial assets;
- (f). Support that a party is providing or will be providing other than by periodic money payments, such as lump sum payments, possession of a residence, payment of a mortgage, payment of medical expenses, or provision of health insurance coverage;
- (g). A party's own special needs, such as unusual medical or other necessary expenses;
- (h). Any other factor the court finds to be just and proper.¹⁹⁴

The committee concluded with the recommendation that the statutes be amended to direct a periodic review and revision of the guidelines.¹⁹⁵

The committee's report was fairly specific in its relation of the underlying premises for its determination. Citing the simplicity of the guideline, the committee stressed the importance of the guideline's ability to invite the exercise of judicial discretion, encourage settlements, increase consistency, and improve the efficiency of hearing cases and writing orders.¹⁹⁶ The report relates the committee's determination that gross income is a fairer and easier basis to use than net income,¹⁹⁷ and echoes the statutory rule that both parents have an equal duty to support¹⁹⁸ even though the custodial parent's obligation "does not flow through the court."¹⁹⁹ Recognizing that guidelines had already found their way into the North Carolina family law practice, the committee in closing, summed up the purpose of their task as follows:

The issuance of uniform guidelines is not intended to drastically reform the way in which child support amounts are being determined in the state: thus, the recommended guidelines are the same as or similar to those that are already being used by a number of judges in the state.²⁰⁰

In 1986, upon receipt of the committee's recommendations, the General Assembly of North Carolina ratified Chapter 1016 of Senate Bill 924 entitled "An Act to Achieve Greater Consistency and Equity in the Set-

194. *Id.*

195. N.C. GEN. STAT. § 7A-148 (1986), which addresses the annual conference of the chief district judges.

196. *See supra*, note 189.

197. *Id.*

198. N.C. GEN. STAT. § 50-13.4(b) (1987).

199. *See supra*, note 103 and accompanying text.

200. *See supra*, note 189.

ting of Child Support Obligation Amounts Through the Use of Guidelines." The statutes were amended to incorporate the power confided in the Conference of Chief District Court Judges for the prescription of the guidelines, and the provisions for variation from them based on the eight factors described above.²⁰¹ The bill also provided for the date of effectiveness, October 1, 1987.²⁰²

Because of the relative recent institution of the North Carolina guidelines, there are no cases which have completed the appellate process further defining the guidelines' application. In order to attempt to analyze the hurdles North Carolina is likely to meet, it is necessary to examine this state's institution of the guidelines in comparison to how the same guidelines have been amended and applied over the last several years in the state of Wisconsin.

V. THE APPLICATION OF THE WISCONSIN FORMULA IN NORTH CAROLINA

As has already been discussed, the percentage income guidelines in Wisconsin underwent many significant alterations over the period of time between implementation and reaching the level of rebuttable presumption.²⁰³ What changes will be deemed necessary in North Carolina remains to be seen as formula-based judgments make their way through the appellate process.

The North Carolina legislature has had the opportunity to see this formula at work and has incorporated many of the Wisconsin amendments to their original statute in its implementation here. Only two of Wisconsin's amended factors are absent in the North Carolina statute: that of the desirability that the custodial parent remain in the home as a full-time parent, and the tax consequences of the award to each party.²⁰⁴

There are strong arguments both for and against the desirability of the custodial parent remaining in the home. It has already been shown how economically difficult it is for a single parent to maintain the pre-divorce standard of living in the custodial home. Given that this is a primary concern²⁰⁵ and realizing that the application of the percentage income standard requires the presumption that the custodial parent will expend a proportionate amount directly on the child,²⁰⁶ it would seem mandatory that the custodial parent contribute an income of some kind. In addition, arguments against the use of formulas have often centered on the

201. *Id.*

202. This is the date mandated by the Child Support Enforcement Amendments of 1984. See *supra*, note 5 and accompanying text.

203. See *supra*, pp. 21-23.

204. WIS. STAT. §§ 767.25 (1m)(d) and (h) (1987).

205. N.C. GEN. STAT. § 50-13.4(c) (1987).

206. See *supra*, note 103 and accompanying text.

guideline's encouragement of the custodial parent not to work.²⁰⁷ This could operate to place an unfair burden on the supporting spouse, as well as to deprive the child of the increased standard of living. Of course the argument in favor of such a consideration is the obvious benefit to the child of having a parent in the home. In addition, the absence of the increases in costs due to a working single parent's lifestyle²⁰⁸ may make up somewhat the loss in income. This will have to be monitored in the application of the guidelines to determine the necessity of a like amendment to the North Carolina statutes.

The second Wisconsin factor to be ignored by the North Carolina legislature is the tax consequences faced by each parent. This refers to what are known in Wisconsin as "Lester Payments".²⁰⁹ Since North Carolina has no corollary system, there does not seem to be a necessity for such a consideration to be included in the statutory factors here.

Another difference between the two systems is North Carolina's lack of a statutory definition of "gross income". This will no doubt be argued extensively as the guidelines are implemented. As cases being appealed on this question are resolved, some working definition must be drafted. It was noted that one of the reasons Wisconsin chose to use gross income over net was the future intent of the state to withhold support awards automatically from the paycheck of the supporting spouse, much like an income tax is withheld.²¹⁰ There is no record of a like intent by the North Carolina legislature. The only reference given to the choice of gross income by the Judicial Committee was that it is "fairer and easier to use than net income."²¹¹ Perhaps they are waiting to see if Wisconsin is successful in its plan. Regardless, the importance of a definitive determination of what constitutes gross income for the purposes of applying the guideline percentages is plainly recognizable.

There are two factors for consideration included by the Judge's Committee which are not found in the Wisconsin version. One is a reflection of caselaw precedent, while the other is merely a recognition of the value of judicial discretion as opposed to the mechanical application of the guidelines.

The first provides that when the income of the non-custodial parent is either so high or so low that the award resulting under the guidelines is inequitable, the trial court may deviate from the formula.²¹² The purpose of this subsection is two-fold. On the surface, this allows the court to modify a guideline award in order to ensure equity in the support

207. See *supra*, p. 7.

208. See *supra*, pp. 3-4.

209. BALISLE, *supra* note 72, at 17.

210. See *supra*, p. 21.

211. See *supra*, note 196.

212. N.C. GEN. STAT. § 50-13.4(c1)(4) (1987).

obligation. Arguments could easily be made against such a modification, however, and it is difficult to envision a situation where this consideration on its own would operate to nullify a guideline award. If a parent is making an extremely high income so that the award indicated by the guideline is greatly above the child's documented need, it could still be argued that the child has the right to the surplus under the policy of maintaining his former standard of living. If the income of the parent is only \$400 per month, does that mean that the child is not eligible for his \$68 share? The parental obligation to support remains the same regardless of the amount of income available for distribution.

It is in the second, underlying purpose of this subsection that its real value may be found. It is a statement to all those involved in making award determinations that the guidelines are not infallible. Applied without consideration to the extremes of a situation, these formulas can result in inequitable burdens and unfair results. This subsection's primary function, therefore, is as a warning not to let the formula guidelines blindly administer justice on their own.

The second subsection found only in North Carolina statute allows the court to consider evidence that the income of the supporting spouse at the time of the award hearing is not indicative of either their actual assets or earning capacity. Ordinarily, the ability of the supporting spouse to pay an award is determined by his or her income at the time of the judgment.²¹³ However, there have been instances where the court has discovered any number of efforts by the non-custodial parent to present an incorrect picture of the income subject to an award distribution. Deliberate attempts by the supporting parent to depress earning capability,²¹⁴ excessive spending in disregard for the support obligation,²¹⁵ or complete failure to exercise the capacity to earn an income,²¹⁶ will operate to allow the judge to base an award on the application of the guidelines to the parent's capacity to earn rather than actual earnings.

All of the cases on this point were decided prior to the institution of the guidelines. It may be assumed that the frequency with which the issue has arisen had something to do with the Judge's Committee attachment of such importance to it. Again, it serves to illustrate the fact that the guidelines do not automatically ensure fairness. It also serves to reiterate the value and need for a comprehensive definition of gross income.

The remaining subsections of the North Carolina statute may be divided into two groups: those serving to increase the child's needs over

213. *Plott v. Plott*, 313 N.C. 63, 326 S.E.2d 863 (1985); *Atwell v. Atwell*, 74 N.C. App. 231, 328 S.E.2d 47 (1985).

214. *Goodhouse v. DeFravio*, 57 N.C. App. 124, 290 S.E.2d 751 (1982).

215. *Beall v. Beall*, 290 N.C. 669, 228 S.E.2d 407 (1976).

216. *Holt v. Holt*, 29 N.C. App. 124, 223 S.E.2d 542 (1976); *Stanley v. Stanley*, 51 N.C. App. 172, 275 S.E.2d 546 (1980).

and above the guideline award, and those serving to mitigate the financial ability of the supporting parent to meet his obligation to pay.²¹⁷ They are logical and self-explanatory in nature, easily proved or disproved by a sufficient evidentiary showing. As the application of the guidelines is currently limited to an advisory capacity, it would seem that the parties involved in support litigation have the propensity for adequate protection. Only time and the appellate process will tell.

VI. CONCLUSION

The main question waiting to be answered in North Carolina is whether the guidelines will attain the level of rebuttable presumptiveness. Certainly the lessons learned in Wisconsin necessitating such a change will apply here as well. While it is arguably reasonable to allow time and process to determine the actual need, much effort could have been saved by giving proper credence to the historical precedents offered by Wisconsin. Making the guidelines a rebuttable presumption is the natural progression of the use of the percentage income formula. The primary goals as stated by the North Carolina legislature are to achieve consistency and fairness in awarding child support, while at the same time allowing judicial discretion on a case by case basis. Mandating the use of the formula percentages with the understanding that deviations must be adequately proved to be in the best interests of the parties functions to fulfill these goals to a greater certainty than is otherwise achievable.

What the future holds for formula use in the determination of child support awards in North Carolina remains to be seen. There is no question but that the need for such controls existed.

J. BRAD DONOVAN*

217. See, Subsec. (1) which operates to increase the child's need for support; See, Subsec. (2),(3),(6), and (7), which operate to mitigate the parent's obligation.

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