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## CHILD SUPPORT IN NORTH CAROLINA: WHAT IS THE STATE OF THE LAW AND HOW DID WE GET HERE?

LISA DUKELOW\*

### INTRODUCTION

Each year, as more marriages end in divorce and as more children are born out of wedlock, thousands and thousands of children are affected by court ordered child support awards.<sup>1</sup> Traditionally, child support awards were established by a trial judge using his or her discretion as to what was a reasonable award.<sup>2</sup> This system, however, resulted in vastly different amounts being awarded in similar situations.<sup>3</sup> As a result of the varying awards, substantial changes have occurred in child support laws.<sup>4</sup>

The purpose of this article is to examine what changes have occurred and to explore the impact of these changes. To accomplish this, the discussion will center upon two areas. First, the discussion will explore the origins of child support and how the federal government became involved in regulating portions of the child support system. Second, the discussion will examine the impact of the federal regulations on the North Carolina child support system. In examining the impact on North Carolina, the discussion will focus on how North Carolina courts currently award and modify child support.

### I. THE ORIGINS OF CHILD SUPPORT AND SUBSEQUENT FEDERAL REGULATION

#### A. *The Origins of Child Support*

As with so much of the law in this country, the origins of our child support laws are deeply rooted in the history and laws of England.<sup>5</sup> In the early English agrarian society, the father was the person in the

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1. JOSEPH I. LIEBERMAN, *CHILD SUPPORT IN AMERICA* 8 (1986).

2. Sarah K. Funke, *Preserving the Purchasing Power of Child Support Awards: Can the Use of Escalator Clauses Be Justified After the Family Support Act?* 69 IND. L.J. 921, 922 (1994).

3. *Id.*

4. *Id.*

5. LIEBERMAN, *supra* note 1, at 1.

family unit who had the authority and responsibility for the family.<sup>6</sup> Because of his role as provider and protector, the father would usually receive custody of the child if a couple separated.<sup>7</sup> This award of custody obligated the father to support his child. However, the father's obligation was only a moral one.<sup>8</sup>

The obligation of support became more than a moral obligation in the early seventeenth century when the Elizabethan Poor Law was adopted.<sup>9</sup> The Elizabethan Poor Law placed a legal obligation upon parents to provide basic support for their children.<sup>10</sup> If the parents failed to comply with this law, the magistrates could send the non-supporting parents to jail, fine them, or seize their property and use it to support the children.<sup>11</sup>

As English law progressed, other remedies became available for the nonsupport of children.<sup>12</sup> English common law provided a civil as well as a criminal remedy for nonsupport.<sup>13</sup> With regard to the criminal remedy, if the prosecutor could prove that a child was injured by his father's failure to care for him or her, the father was guilty of a common-law misdemeanor.<sup>14</sup> Although the father could be punished for the nonsupport of the child, there was no provision in this remedy to recover money for the child's support.<sup>15</sup>

The civil remedy for the nonsupport of children was the doctrine of necessities.<sup>16</sup> Under that doctrine, a person who had provided the child with necessities such as food, clothing or shelter and had not been reimbursed could bring suit against the father for the reasonable value of the goods and services used in providing the necessities.<sup>17</sup> In reality, this common-law remedy was seldom used, since society was generally unwilling to provide care for a child who lacked a "visible and liable parent."<sup>18</sup>

While nonsupport laws were available in English society, it was not until the nineteenth century that a father's obligation to support his

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6. Greg Geisman, Comment, *Strengthening the Weak Link in the Family Law Chain: Child Support and Visitation as Complementary Activities*. 38 S.D. L. REV. 568, 569 (1993).

7. *Id.*

8. *Id.*

9. *Id.*

10. Geisman, *supra* note 6, at 569.

11. *Id.*

12. *Id.*

13. *Id.*

14. Geisman, *supra* note 6, at 569.

15. *Id.*

16. B. Renee Sanderlin, *Alamance County Hospital v. Neighbors: North Carolina Rejects Child Support Provisions As A Limit on the Doctrine of Necessaries*. 65 N.C. L. REV. 1308, 1308 (1987).

17. *Id.*

18. LIEBERMAN, *supra* note 1, at 2.

children became legally enforceable. In the nineteenth century, English courts ruled that if parents separated because of the misconduct of the father, and their children thereafter lived with the mother, she could purchase necessities for the children and the father would be liable for the payment of those necessities. As time went by and more people left farms to begin working in factories, the law began to recognize that although the father was the authoritarian and financial provider in the family, it was the mother who provided the daily stability for the family home. Therefore, in 1839, English courts, for the first time, decreed that a mother could be granted custody of a child under the age of seven.<sup>19</sup>

Early child support laws in the United States closely reflected their English counterparts. As time passed, however, American courts recognized a presumption that it was best to place a child in the care of the mother.<sup>20</sup> In fact, this preference for maternal care was formalized by the American courts during the early twentieth century when they adopted the "Tender Years" presumption.<sup>21</sup> Although children were now being placed in the custody of their mothers, the father was still considered to be primarily liable for the support of the child. It was not until the mid-twentieth century that state courts began to find both mothers and fathers liable for the support of their children.<sup>22</sup>

Child support has traditionally been left to the domain of the state courts.<sup>23</sup> Consequently, individual state child support awards have resulted in some variations.<sup>24</sup> In addition to vast differences among awards, the enforcement of child support from state to state has been problematic.<sup>25</sup> Although problems existed, the federal government was reluctant to become involved since child support was traditionally an area and issue left to the states.

### B. *Federal Regulation of Child Support*

The federal government became involved in child support in 1935 with the enactment of Aid to Families with Dependent Children (AFDC).<sup>26</sup> While this program was initially enacted to help support children whose fathers had died, the program is now used more fre-

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19. *Id.* at 2-3.

20. *Id.* at 3.

21. *Id.*

22. *Id.*

23. Charlotte L. Allen, *Federalization of Child Support: Twenty Years and Counting*, 73 MICH. BUS. L.J. 660, 660 (1994).

24. *Id.* See also Funke, *supra* note 2, at 924 (discussing how states have traditionally granted judges great discretion in the establishment of child support awards and how identical situations can still result in a variety of awards).

25. Allen, *supra* note 23, at 660.

26. LIEBERMAN, *supra* note 1, at 5.

quently by the families of children whose fathers have left home and refused to pay support.<sup>27</sup>

As reliance upon AFDC increased among children whose fathers failed to pay support, public outrage demanded reform.<sup>28</sup> In response, the federal government enacted the Child Support and Establishment of Paternity Act of 1974.<sup>29</sup> This act created Title IV-D of the Social Security Act which established federal standards for state child support enforcement.<sup>30</sup> If the state agency for child support enforcement<sup>31</sup> did not meet the federal standards, the federal government would then reduce the contributions it made to that state's AFDC budget.<sup>32</sup> If the state complied with federal standards, the federal government would pay seventy-five percent of the cost the state incurred by operating its child support collection program.<sup>33</sup> Although the enactment of the Child Support and Establishment of Paternity Act of 1974 had some positive results, the number of non-supporting parents continued to increase.<sup>34</sup>

Public outrage toward non-supporting parents grew, and in response, the federal government passed the Child Support Enforcement Amendments of 1984.<sup>35</sup> These 1984 amendments required the states to create and provide child support guidelines to judges by October 1, 1987.<sup>36</sup> A state that failed to create the required guidelines would lose federal funding for its AFDC program.<sup>37</sup> By 1989, every state had enacted numerical formula-based guidelines for determining the proper amount of child support. Although these guidelines were enacted in all states, they were still advisory and not binding on family law judges.<sup>38</sup> Since judges were free to use or ignore the guidelines,

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27. *Id.*

28. *Id.* at 6-7.

29. *Id.* at 7.

30. Margaret C. Haynes, *Child Support and the Courts in the Year 2000*, 17 AM. J. TRIAL ADVOC. 693 (1994).

31. LIEBERMAN, *supra* note 1, at 7. Once a state established an agency for child support enforcement, the agencies often became known as the IV-D agency. *Id.*

32. *Id.* The federal government would reduce the state's AFDC budget by five percent. In most states, a five percent reduction in the AFDC budget was a multimillion-dollar penalty. *Id.*

33. *Id.*

34. *Id.* at 8.

35. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (codified as amended in scattered sections of 42 U.S.C.).

36. Child Support Enforcement Amendments of 1984 § 18(a). The 1984 amendments contained extensive provisions relating to the establishment and enforcement of support awards but no provisions specifically applicable to modification.

37. Child Support Enforcement Amendments of 1984 § 9. This amendment placed conditions on each state by requiring each state to establish guidelines for child support awards made within that state. The establishment of these guidelines was a condition which had to be met before the state AFDC plan would be approved under Title IV-D. *Id.*

38. Marvin M. Moore, *The Significance of a Divorced Father's Remarriage in Adjudicating a Motion to Modify His Child Support Obligations*, 18 CAP. U. L. REV. 483, 484 (1989).

the 1984 amendments did not alter the discretionary nature of the child support awards.<sup>39</sup>

Continuing with its effort to improve child support, Congress passed the Bradley Amendments in 1986.<sup>40</sup> These amendments concentrate on the collection of child support rather than on the amount of child support to be awarded.<sup>41</sup> The amendments provide that on the date any child support payment or installment becomes due, such payment or installment will by operation of law become a judgment.<sup>42</sup> As a judgment, the payment or installment is then entitled to receive full faith and credit.<sup>43</sup> In addition, the Bradley Amendments provide that when payments or installments become due, they become vested and are no longer subject to retroactive modification.<sup>44</sup> The Bradley Amendments, however, do allow limited modification. Modification will be permitted for the time period in which there is a pending petition seeking modification, but only from the date on which notice is given.<sup>45</sup>

While the Bradley Amendments were positive steps taken to solve child support collection problems, Congress soon realized that the 1984 Child Support Enforcement Amendments were not equalizing child support, since the required guidelines were advisory rather than mandatory.<sup>46</sup> Therefore, Congress amended Title IV-D through the Family Support Act of 1988.<sup>47</sup> The 1988 amendments substantially affected two areas of child support.<sup>48</sup> First, the amendments required each state to establish mandatory presumptive child support guidelines. Inherent within the mandatory nature of the guidelines was the rebuttable presumption that the amount of support established by the guidelines was correct.<sup>49</sup> In creating mandatory guidelines, the states were required to include certain federally established criteria.<sup>50</sup>

39. Funke, *supra* note 2, at 925.

40. Haynes, *supra* note 30, at 694.

41. *Id.*

42. 42 U.S.C. § 666(a)(9)(A) (1988).

43. § 666(a)(9)(B).

44. § 666(a)(9)(C).

45. § 666(a)(9).

46. Funke, *supra* note 2, at 925. Another deficiency in the 1984 amendments was the absence of provisions specifically applicable to modification. The 1988 amendments directly addressed the modification of child support awards by the states. See 42 U.S.C. § 667(b)(2) (1988).

47. Funke, *supra* note 2, at 925. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (codified as amended in scattered sections of 42 U.S.C.).

48. Once again the federal government required states to comply with the Child Support Enforcement Act by requiring compliance prior to approval of their AFDC programs. 42 U.S.C. § 607(b)(2) (1988).

49. 42 U.S.C. § 667(b)(2) (1988).

50. Family Support Act of 1988, 45 C.F.R. § 302.56(c) (1994). The guidelines implemented by the states were required to (1) take into consideration all income and earning of the absent parent, (2) be based on specific descriptive and numeric criteria, (3) result in computation of a

However, states were allowed the freedom to establish their own guideline theories,<sup>51</sup> the dollar amounts used in the calculation of the guidelines, and the criteria that allow a trial court to deviate from the guidelines.<sup>52</sup>

The second area of child support affected by the 1988 amendments was the modification of child support orders. The Family Support Act of 1988<sup>53</sup> mandated that states adopt certain procedures for periodic modification of child support orders, with such procedures occurring over two different time periods.<sup>54</sup> By October of 1990, each state was to have implemented a plan specifying how and when child support orders enforced by the state child support enforcement agency would be reviewed and if appropriate, adjusted. In addition, there were to be procedures for conducting reviews of existing child support orders.<sup>55</sup> These reviews were only required to take place if they were requested by a parent or by the state child support enforcement agency.<sup>56</sup>

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presumptive child support obligation, and (4) provide for children's health care needs through health insurance coverage or other means. *Id.*

51. Susan Roehrich, Comment, *Making Ends Meet: Toward Fair Calculation of Child Support When Obligor Must Support Both Prior And Subsequent Children*, 20 WM. MITCHELL L. REV. 967, 968-72 (1994). "The guideline theories that have been implemented by the states include the 'income-shares' model, the 'income equalization' or 'equal living standards' model, the 'percentage of income' model, the 'cost-sharing' model and the 'Melson formula.'" *Id.* at 972-73. Under the income-shares model, the amount of child support is determined by combining the income of the obligor and obligee. This combined income is then proportionately divided between the parents based on their respective incomes, to arrive at a percentage. Under this model, the child will receive the same percentage of the obligor's income he or she would have received if the household had remained intact. *Id.* at 973.

Under the equal living standards model, "[e]qualization is accomplished by totalling the income and resources of both households and allocating a percentage to each household according to its size and composition of children and adults." *Id.* at 974. Under the percentage of income model, "the obligor's income is considered and a percentage of the obligor's adjusted base income is awarded as child support." *Id.* at 974-75.

Under the cost-sharing model, "the custodial and noncustodial parents share actual costs, generally in proportion to the income and resources of each parent." *Id.* at 975. "The Melson [model] incorporates the principles of the income-shares model with the policy that parents should share additional income with their children. . . . According to this method of calculation, any amount of the obligor's income that exceeds the presumptive guidelines amount may be allocated to the children." *Id.* at 975-76.

52. Since there is a rebuttable presumption that the amount of the award resulting from the application of the guidelines is correct, 42 U.S.C. § 667(b)(2) and the Family Support Act of 1988, 45 C.F.R. § 302.56(g) (1988), require that the trial court make a written finding of fact on the record before a deviation from the mandatory guidelines will be allowed. *See also* Roehrich, *supra* note 51, at 969-75.

53. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (codified as amended in 42 U.S.C. § 666).

54. 42 U.S.C. § 666(a)(10) (1988).

55. § 666(a)(10)(A).

56. *Id.* If review of a child support award was mandated and adjustments were required, the reviewing court or agency was required to make the adjustments according to the guidelines unless deviation was applicable. *Id.*

By October 1993, the states had to further implement a process for the mandatory periodic review of all child support orders enforced by the state child support enforcement agency.<sup>57</sup> Included in this process was a requirement that the states provide notice to each parent of the right to request a review, a thirty-day notice to each parent prior to a scheduled review, and notice of any proposed adjustments.<sup>58</sup>

As time passed and the issues of child support became more newsworthy, the federal government became more involved. As of yet, we do not have federal child support guidelines or regulations, but by threatening to withhold money, the federal government can seek to create a certain degree of uniformity throughout the various states and territories.<sup>59</sup>

## II. THE IMPACT OF FEDERAL REGULATIONS ON THE NORTH CAROLINA CHILD SUPPORT SYSTEM

### A. North Carolina's Response to Federal Regulations

Historically, North Carolina has recognized the duty of a parent to support his or her minor child.<sup>60</sup> Initially this duty of support was placed upon the father of the child.<sup>61</sup> With the enactment of North Carolina General Statute section 50-13.4(b) in 1981, both parents became primarily liable for the financial support of their child(ren).<sup>62</sup> Traditionally, the amount of support for which a parent would be liable was within the discretion of the trial court judges and was based on the evidence presented to him or her.<sup>63</sup> Once the amount of child

57. 42 U.S.C. § 666(10)(B) (1988). If adjustments were appropriate, they had to be made under the state child support guidelines unless a deviation was permitted. *Id.* In addition, the 1993 deadline required that if the family was receiving AFDC under § 602(a)(26), the case must be reviewed and, if appropriate, adjusted, at least once every three years, unless the state determines that a review is not in the best interests of a child and neither parent requests a review. If the family is not receiving AFDC, but is an IV-D case under § 602(a)(36) (a case in which the custodial parent is being provided child support enforcement services in connection with the programs established under Title IV-D of the Social Security Act), the parents shall have a right, upon request, to receive a review and, if appropriate, an adjustment at least once every three years. *Id.* If a parent is not getting AFDC or is not participating in an IV-D program, this regulation does not address their ability to modify the child support award.

One commentator has urged states to enact guideline-based modification standards which apply to all child support modification. Haynes, *supra* note 30 at 711.

58. 42 U.S.C. 666(10)(C) (1988). Once parents get notice of the proposed adjustments, they have thirty days to initiate proceedings to challenge such adjustments. *Id.*

59. See *supra* note 49 and accompanying text.

60. Layton v. Layton, 263 N.C. 453, 456, 139 S.E.2d 732, 734 (1965).

61. *Id.*

62. Although the father is no longer primarily liable for child support, N.C. GEN. STAT. § 50-13.4(b) (1994) does not diminish any of the support obligations of the father. *Plott v. Plott*, 313 N.C. 63, 68, 326 S.E.2d 863, 867 (1985).

63. *Plott*, 313 N.C. at 68, 326 S.E.2d at 867.



support had been established, the award would not be disturbed on appeal unless a clear abuse of discretion could be shown.<sup>64</sup>

The court's award of support was based on evidence of the amounts necessary to meet the reasonable needs of the child for health, education, and maintenance.<sup>65</sup> In determining that amount, the trial judge was required to consider the estates, earnings, conditions, and accustomed standards of living of the child and the parents.<sup>66</sup> In addition, the trial judge was instructed to consider the child care and homemaking contributions of each party and any other factors which would warrant consideration in a particular case.<sup>67</sup>

The trial judge was required to make specific findings of fact regarding each of the foregoing considerations to enable an appellate court to ascertain if the judge had given due regard to these factors.<sup>68</sup> Therefore, the trial judge was required to hear evidence and make specific findings in each case concerning both the awarding and modification of child support.<sup>69</sup>

Currently, however, unless there is a deviation from the child support guidelines, specific fact findings are no longer required in child support cases.<sup>70</sup> When the federal Child Support Enforcement Amendments of 1984 were passed, North Carolina developed and enacted guidelines for determining the amount of child support awards.<sup>71</sup> In keeping with the federal mandates concerning child support guidelines, the North Carolina Child Support Guidelines were advisory in nature and were not binding on the judges.<sup>72</sup> Consequently, judges continued to award child support based on their own discretion rather than on the formulas established in the guidelines.<sup>73</sup>

64. See generally *Beall v. Beall*, 290 N.C. 669, 228 S.E.2d 407 (1976); *Eudy v. Eudy*, 288 N.C. 71, 215 S.E.2d 782 (1975); *Plott v. Plott*, 313 N.C. 63, 326 S.E.2d 863 (1985).

65. *Plott*, 313 N.C. at 68, 326 S.E.2d at 867.

66. *Id.*

67. *Id.*

68. *Id.* See also *Crosby v. Crosby*, 272 N.C. 235, 158 S.E.2d 77 (1967) (stating that such findings are necessary to an appellate court's determination of whether the judge's order is sufficiently supported by competent evidence).

69. *Plott*, 313 N.C. at 68-69, 326 S.E.2d at 867.

70. N.C. GEN. STAT. § 50-13.4 (c) (1994). Specific findings of fact are required when there is a deviation from the guidelines. *Id.*

71. N.C. GEN. STAT. § 50-13.4(c1) (1987) required the Conference of Chief District Judges to create advisory child support guidelines.

72. The advisory guidelines became effective on October 1, 1987. See North Carolina Child Support Guidelines, AOC-A-162, Rev. 1987; *Browne v. Browne*, 101 N.C. App. 617, 622, 400 S.E.2d 736, 739 (1991). The guidelines were based on the percentage of income model; therefore, the amount of child support awarded to the custodial parent was based on a fixed percentage of the non-custodial parent's income level. The recommended child support award for one child was 17% of the custodial parent's income, the recommended child support for two children was 25%, and 29% for three children. North Carolina Child Support Guidelines, AOC-A-162, Rev. 1987.

73. *Browne*, 101 N.C. App. at 622, 400 S.E.2d at 739.

## 22 NORTH CAROLINA CENTRAL LAW JOURNAL [Vol. 22:14]

Beginning in October of 1989, however, the use of child support guidelines became mandatory. After Congress enacted the Child Support Enforcement Amendments of 1984, it realized that states were not actually applying the advisory guidelines. Therefore, Congress enacted the Family Support Act of 1988 which required states to establish a set of mandatory, presumptive child support guidelines. The Act provided that these mandatory guidelines created a rebuttable presumption that the amount of child support derived from applying the formulas in the guidelines was the correct amount of child support.<sup>74</sup>

In response to the Family Support Act of 1988, the 1989 session of the North Carolina General Assembly amended North Carolina General Statute section 50-13.4(c) to require the mandatory use of the 1987 Child Support Guidelines from October 1, 1988, through June 30, 1990.<sup>75</sup> In order to fully comply with the Family Support Act of 1988, however, North Carolina either had to add to its established guidelines or create new ones.<sup>76</sup> Therefore, in 1989, the General Assembly amended North Carolina General Statute section 50-13.4(cl) to require the Conference of Chief District Judges to prescribe uniform statewide presumptive guidelines for computation and awarding of child support.<sup>77</sup>

These guidelines were required to include criteria for determining the support necessary for the reasonable needs of a child, when deviation from the guidelines would be appropriate, and a provision stipulating that the guidelines would be reviewed periodically.<sup>78</sup> The guidelines created by this Conference became effective on October 1, 1990.<sup>79</sup> These mandatory, presumptive guidelines were based on an income-shares model of child support, and the criteria used in the guidelines went beyond the criteria established in the 1987 guidelines.<sup>80</sup> The 1990 guidelines provided a detailed discussion of what

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74. See *supra* notes 47-49 and accompanying text.

75. *Browne*, 101 N.C. App. at 622, 400 S.E.2d at 739.

76. *Id.* The guidelines in effect from October 1, 1987, through September 30, 1989, were advisory in nature and did not include the required federal standards. See *supra* text accompanying notes 48-59.

77. N.C. GEN. STAT. § 50-13.4(cl) (Supp. 1990).

78. *Id.* The guidelines must be reviewed at least once every four years by the Conference of Chief District Judges. The Conference, upon review, shall determine whether the application of the guidelines results in appropriate child support awards. If it does not, the guidelines will be modified to reflect these changes. *Id.*

79. *Browne*, 101 N.C. App. at 623, 400 S.E.2d at 740.

80. Compare North Carolina Child Support Guidelines, AOC-A-162, Rev. 1987 with North Carolina Child Support Guidelines, AOC-A-162, Rev. 1990. See also *Browne*, 101 N.C. App. at 623, 400 S.E.2d at 740.

constituted income and how child care expenses,<sup>81</sup> health insurance,<sup>82</sup> and extraordinary expenses<sup>83</sup> expended on behalf of the child would be divided. In addition, the guidelines provided for situations involving split or joint custody,<sup>84</sup> and situations where a parent was responsible for supporting children other than those involved in the support order.<sup>85</sup>

In keeping with the mandates of the Family Support Act of 1988, the Conference of Chief District Judges revised the child support guidelines in August of 1991. The revised guidelines "increased the child support obligation of parents with low incomes, allowed (rather than mandated) judges to impute potential income to an unemployed or underemployed parent, and changed the credit allowed for a parent's financial responsibility for the support of children other than those involved in the pending action."<sup>86</sup> In the fall of 1993, the Conference of Chief District Judges again reviewed the child support guidelines. Upon completion of this review, recommendations were made and the guidelines were once again revised. The new guidelines became effective on October 1, 1994, and although they were still based on the income-shares model, revisions were made in basic sup-

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81. Child care costs were required to be reasonable. Seventy-five percent of the child care costs incurred due to employment or job search was to be added to the basic obligation. N.C. Child Support Guidelines AOC-A-162, Rev. 1990.

82. Health insurance was to be provided by the parent who could obtain the most comprehensive coverage through an employer at the least cost. If a parent carried health insurance coverage for himself or herself and the child, the cost of that coverage could be deducted from that parent's gross income. *Id.*

83. The guidelines defined extraordinary expenses as including but not limited to the "costs reasonably necessary for . . . dental treatments, asthma treatments, physical therapy and any uninsured chronic health problem." In addition, the guidelines provided that "[a]t the discretion of the Court, professional counseling or psychiatric therapy for diagnosed mental disorders [would] also be considered as an extraordinary medical expense." The cost of these expenses was to be apportioned between the parents "in the same manner as the basic child support obligation . . ." was divided and paid as the Court deemed equitable.

Costs associated with a child attending any special or private elementary or secondary schools to meet his or her particular educational needs and any expenses for the transportation of the child between the homes of the parents were to be added to the basic child support obligation. *Id.*

84. Different worksheets were to be used when joint or split custody was utilized. *Id.*

85. Under the guidelines,

[t]he amount(s) of any pre-existing court order(s) for child support or amount paid per separation agreement(s) should be deducted from gross income to the extent payment is actually made under such order(s) or agreement(s). The amount of financial responsibility a parent has for his or her child(ren) currently residing in the household who are not involved in this action should be deducted from gross income.

*Id.* The adjustment to the gross income could be made at the time child support was established or in a proceeding to modify the order. However, the adjustment at a modification proceeding was not to be the sole basis for a reduction in the child support award. *Id.*

86. John Saxon, *The New North Carolina Child Support Guidelines*, in *THE REVISED CHILD SUPPORT GUIDELINES*, I-3 & 4 (North Carolina Bar Foundation, 1994). Compare North Carolina Child Support Guidelines, AOC-A-162, Rev. 1990 with North Carolina Child Support Guidelines, AOC-A-162, Rev. 1991.

port obligations for certain income levels.<sup>87</sup> Additionally, the guidelines included revisions relating to Social Security benefits received for the benefit of a child; a self-sufficiency reserve for low-income parents; the reduction a parent is allowed for the payment of health insurance premiums; the amount of an expense necessary to qualify as an extraordinary expense; the amount of child care expenses that can be added to the basic child support obligation; and, the modification of child support orders.<sup>88</sup>

### B. North Carolina's System for Awarding and Modifying Child Support

Although historically, the father was primarily liable for the support of a child,<sup>89</sup> the North Carolina General Assembly, in 1981, established that both parents are primarily liable for the financial support of their child.<sup>90</sup> However, this statute does not mean that both parents are equally liable.<sup>91</sup> Case law and the North Carolina Child Support Guidelines have established that, depending on the circumstances of a given situation, one parent may be required to bear more of the support obligation than the other parent.<sup>92</sup>

North Carolina also recognizes that if the parents are not able to support the child, others may be secondarily liable for providing support.<sup>93</sup> A person who is secondarily liable is one who is standing *in loco parentis*. However, those who have assumed the role of *in loco parentis* will be liable only if the needs of the child exceed the ability of the child's natural parents to meet those needs.<sup>94</sup> A stepparent will have assumed the status of *in loco parentis* if he or she voluntarily and in writing agrees to support the stepchild.<sup>95</sup> Although stepparents may be liable for child support, the Court of Appeals has held that stepparents, and other persons standing *in loco parentis*, will not have

87. *Id.* at I-4. Compare North Carolina Child Support Guidelines, AOC-A-162, Rev. 1991 with North Carolina Child Support Guidelines, AOC-A-162, Rev. 1994.

88. North Carolina Child Support Guidelines, AOC-A-162, Rev. 1994.

89. Layton v. Layton, 263 N.C. 453, 456, 139 S.E.2d 732, 734 (1965).

90. N.C. GEN. STAT. § 50-13.4(b) (1981). See also Alamance County Hosp. v. Neighbors, 315 N.C. 362, 366, 338 S.E.2d 87, 89 (1986) (noting that the 1981 amendment does not diminish a father's responsibilities, but rather enlarges the mother's responsibilities by making both parents primarily liable for the support of the child).

91. See Boyd v. Boyd, 81 N.C. App. 71, 343 S.E.2d 581 (1986) (noting that both parents share the support obligation according to their relative abilities); Plott v. Plott, 313 N.C. 63, 326 S.E.2d 863 (1985) (stating that a shared legal duty to support a child does not impose an equal financial contribution by both parties).

92. Plott, 313 N.C. 63, 326 S.E.2d 863 (1985). See also North Carolina Child Support Guidelines, AOC-A-162, Rev. 1994.

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

94. Duffey v. Duffey, 114 N.C. App. 382, 387, 438 S.E.2d 445, 448 (1994).

95. *Id.*

their support obligations decided through application of the guidelines. Rather, the support obligation will be decided at the discretion of the trial judge.<sup>96</sup>

In most situations, the amount of child support a person will be required to pay is calculated according to the guidelines.<sup>97</sup> Under the guidelines, both the obligor's and obligee's incomes are taken into consideration. The instructions provide that the gross incomes of the obligor and obligee are taken into consideration when determining the basic child support obligation.<sup>98</sup> If a parent does not have income because he or she is unemployed or if a parent has a very low income due to underemployment, the trial judge is obligated to calculate that parent's potential income.<sup>99</sup> This potential income is then used in determining the basic child support obligation of that parent.<sup>100</sup>

Potential income or a party's capacity to earn income may be the basis of a child support award only if the court makes specific findings of fact that the party has deliberately depressed his or her income or has acted in a manner that establishes a deliberate disregard for the party's obligation to provide support for his or her child.<sup>101</sup> Therefore, if a parent is employed in a job for which he or she is qualified and is making a good faith effort to support his or her child, the parent will not have potential income imputed to him or her.<sup>102</sup> Likewise, there will be no imputation of potential income if the parent could

96. *Id.*

97. *Id.* (stating that the North Carolina Child Support Guidelines will not be applied to determine the child support obligation of a party who is *in loco parentis*). N.C. GEN. STAT. 50-13.4(b) (1994) requires the application of the guidelines in all other situations.

98. Gross income under the guidelines includes income from any source, including salary, wages, commissions, bonuses, dividends, pensions, Social Security benefits, unemployment benefits, workers compensation benefits, and alimony from someone other than the other parent to this particular child support action. Public benefits such as AFDC, Supplemental Security Income benefits and food stamps are not included in the total comprising gross income. Under the revised 1994 guidelines, Social Security benefits received by a parent for the benefit of a child but which are based on the earnings record of the disabled obligor are not considered as income to the obligor or the obligee. North Carolina Child Support Guidelines, AOC-A-162, Rev. 1994.

99. *Id.* If a parent is voluntarily unemployed or underemployed, the potential income of this parent should be determined. Potential income will not be calculated for a parent who is staying at home to care for a child under three years old. *Id.* See also *Stanley v. Stanley*, 51 N.C. App. 172, 275 S.E.2d 546 (1979), cert. denied, 303 N.C. 182, 280 S.E.2d 454 (1980), appeal dismissed, 454 U.S. 959 (1981); *Atwell v. Atwell*, 74 N.C. App. 231, 328 S.E.2d 47 (1985); *Whitley v. Whitley*, 46 N.C. App. 810, 266 S.E.2d 23 (1980).

100. North Carolina Child Support Guidelines, AOC-A-162, Rev. 1994.

101. See *Greer v. Greer*, 101 N.C. App. 351, 399 S.E.2d 399 (1991); *Goodhouse v. DeFravio*, 57 N.C. App. 124, 290 S.E.2d 751 (1982).

102. Under the 1994 guidelines, a self-support reserve has been established. Therefore, if an obligor has a low income, the reserve will ensure that the obligor will have a sufficient income to maintain a minimum standard of living based on the 1993 federal poverty level. North Carolina Child Support Guidelines, AOC-A-162, Rev. 1994.

make more at another job, provided that the reason for not taking the higher paying job is not an effort to disregard child support.<sup>103</sup>

While part of a child support award is based on the parents' income, the amount of expenditures necessary to meet the reasonable needs of the child is also considered.<sup>104</sup> Historically, the trial judge who awarded the child support would make specific findings of fact regarding these expenditures.<sup>105</sup> However, under the 1994 guidelines, the basic amount of support is presumed to cover all child-related expenses except for health insurance.<sup>106</sup> Therefore, if the amount established by the guidelines does not cover a particular child's necessary and reasonable expenses, the custodial parent can seek a deviation from the guidelines to meet these extra expenses.<sup>107</sup> If the trial judge determines that a particular child's needs exceeds the amount established in the guidelines, the judge's decision must include specific findings of facts that justify a deviation from the guidelines.<sup>108</sup>

In addition to being responsible for the basic child support obligation, a parent can be required to provide both health insurance and extraordinary expenses for a child. Under the 1994 guidelines, the cost of providing a child with health insurance is added to the basic obligation and is divided between the parents based upon their incomes.<sup>109</sup> If the child has extraordinary medical expenses that exceed \$100 per year, the entire amount of the expenses will be allocated between the parents based on their incomes.<sup>110</sup>

103. See *Beall v. Beall*, 290 N.C. 669, 228 S.E.2d 407 (1976); *Whitley v. Whitley*, 46 N.C. App. 810, 266 S.E.2d 23 (1980); *Holt v. Holt*, 29 N.C. App. 124, 223 S.E.2d 542 (1976).

104. See *Coble v. Coble*, 300 N.C. 708, 268 S.E.2d 185 (1980); *McCall v. McCall*, 61 N.C. App. 312, 300 S.E.2d 591 (1983); *Dishmon v. Dishmon*, 57 N.C. App. 657, 292 S.E.2d 293 (1982).

105. See *Napowsa v. Langston*, 95 N.C. App. 14, 381 S.E.2d 882 (1987), *cert. denied*, 325 N.C. 709, 388 S.E.2d 460 (1989); *Atwell v. Atwell*, 74 N.C. App. 231, 328 S.E.2d 47 (1985).

106. See N.C. GEN. STAT. § 50-13.4(c), (c1) (1994); North Carolina Child Support Guidelines, AOC-A-162, Rev. 1994. Under the guidelines, the trial court is no longer required to make specific findings of fact regarding the child's expenses if he or she is simply applying the guidelines. *Id.*

107. N.C. GEN. STAT. § 50-13.4(c) (1994).

108. *Id.*

109. Saxon, *supra* note 86, at I-11. Under the 1991 guidelines, health insurance premiums were considered part of the basic award for child support, and the parent who paid the premiums could deduct the amount from the child support obligation. North Carolina Child Support Guidelines, AOC-A-162, Rev. 1991.

110. North Carolina Child Support Guidelines, AOC-A-162, Rev. 1994. Extraordinary medical expenses include, but are not limited to, reasonable and necessary costs for dental treatment, treatment for asthma, physical therapy, or any uninsured chronic health problem of the child for whom support is sought. In addition, judges may consider professional counseling or psychiatric therapy for diagnosed mental disorders as extraordinary medical expenses. Extraordinary medical expenses must exceed \$100 per illness or condition and must not be covered by insurance before the expenses will be apportioned between the parents. *Id.*

A support order is not a final order until the child reaches majority.<sup>111</sup> In fact, child support orders are always open for modification or for vacation.<sup>112</sup> A child support order may be modified when the party seeking modification has established a showing of a change in circumstances.<sup>113</sup>

North Carolina courts have held that a change in circumstances can involve either the child or the obligor's ability to pay the child support obligation. When the change of circumstances involves the child, the party seeking modification must establish that there has been a substantial change relating to "child-oriented expenses."<sup>114</sup> However, the courts have allowed the modification of child support awards based solely on the obligor's ability to pay the child support obligation.<sup>115</sup> In cases involving the reduction of a child support obligation because the obligor has had a reduction in income, the courts have required the obligor to establish that his or her income has been "significantly reduced."<sup>116</sup>

Although the courts of North Carolina have always required an "actual" substantial change of circumstances for modification of support orders, the adoption of the revised 1994 Child Support Guidelines may change this standard. Prior to the adoption of mandatory guidelines in 1987, North Carolina courts had held that the showing of changed circumstances had to be an actual change in circumstances. After the guidelines were adopted, the court was presented with cases in which the facts used to establish the initial child support obligation had changed solely due to the passage of time. In response to these situations, the North Carolina Court of Appeals held in *Davis v. Risle* that the enactment of the child support guidelines did not mean that a child support order could be modified solely by plugging new facts, which had developed over time, into the guideline formula to arrive at a new amount.<sup>117</sup> The court, in holding that there must be an

111. See *McLeod v. McLeod*, 266 N.C. 144, 146 S.E.2d 65 (1966).

112. See *Leach v. Alford*, 63 N.C. App. 118, 304 S.E.2d 265 (1983).

113. See *Crosby v. Crosby*, 272 N.C. 235, 158 S.E.2d 77 (1967); *Gilmore v. Gilmore*, 42 N.C. App. 560, 257 S.E.2d 116 (1970).

114. See *Greer v. Greer*, 101 N.C. App. 351, 355, 399 S.E.2d 399, 402 (1991); *Gilmore v. Gilmore*, 42 N.C. App. 560, 257 S.E.2d 116 (1970).

115. See *Hammill v. Cusack*, 118 N.C. App. 82, 453 S.E.2d 539, cert. denied 340 N.C. 359, 458 S.E.2d 187 (1995); *McGee v. McGee*, 118 N.C. App. 19, 453 S.E.2d 531, cert. denied, 340 N.C. 359, 458 S.E.2d 189 (1995) (stating that a significant involuntary decrease in the obligor's income will satisfy the necessary showing of changed circumstances required to justify modification of child support orders, even though there is not any change in the expenses necessary to provide for the reasonable needs of the child). See also *Pittman v. Pittman*, 114 N.C. App. 808, 443 S.E.2d 96 (1994).

116. The reduction of income in *Hammill* was from \$73,455.00 per year to \$35,550.00 per year. In *McGee*, the reduction in income was from \$24,000 per month to \$2,083 per month.

117. 104 N.C. App. 798, 800, 411 S.E.2d 171, 173 (1991).

actual change in a child's circumstances to warrant modification of the support award, stated that it did "not believe that the Guidelines were enacted to remove the changed circumstances requirement which stands guard at the flood gates of litigation."<sup>118</sup> The court noted that the requirement of "a substantial and material change of circumstances is a heavy burden of proof which was deliberately read into the statute via case law in order to protect the finality of judgments [and offer] a sense of stability [to] child support orders."<sup>119</sup>

While the courts are requiring actual changes in circumstances, the 1994 revised guidelines provide that "in any proceeding to modify an existing order which is three years old or older, a deviation of 15% or more between the amount of the existing order and the amount of child support resulting from application of the Guidelines shall be presumed to constitute a substantial change of circumstances warranting modification."<sup>120</sup>

Under the 1994 Child Support Guidelines, if an order is simply three years old and a disparity of fifteen percent or more exists by the application of the guidelines, either the obligor or obligee will be able to seek a modification in the basic child support obligation.<sup>121</sup> It would be prudent to note at this time, however, that no court in North Carolina has ruled on this standard for modification, and although the guidelines are mandatory and presumptive, they are not state law.<sup>122</sup> Consequently, it would be possible for an appellate court to reject the fifteen percent modification standard.

Although a court could reject this standard, that is unlikely considering the language the North Carolina Court of Appeals used in the *Davis* decision. In *Davis*, the court stated that it did "not believe that the Guidelines were enacted to remove the changed circumstances requirement."<sup>123</sup> Since the guidelines are now seeking to define a presumed change in circumstances, the courts will likely adhere to this standard.

If modification of a child support order is granted, the court will arrive at the new child support obligation through the application of the North Carolina Child Support Guidelines.<sup>124</sup> Therefore, if a trial judge deviates from the presumptive support mandated in the guide-

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118. *Id.*

119. *Id.*

120. North Carolina Child Support Guidelines, AOC-A-162, Rev. 1994.

121. *Id.*

122. See N.C. GEN. STAT. 50-13.4(c1) (1994) which requires the Conference of Chief District Judges to prescribe uniform statewide presumptive guidelines.

123. *Davis*, 104 N.C. App. at 800, 411 S.E.2d at 173.

124. See *Hammill v. Cusack*, 118 N.C. App. 82, 453 S.E.2d 539, *cert. denied*, 340 N.C. 359, 458 S.E.2d 187 (1995); *McGee v. McGee*, 118 N.C. App. 19, 453 S.E.2d 531, *cert. denied*, 340 N.C. 359, 458 S.E.2d 189 (1995).



lines, he or she will still be required to make specific findings of fact to justify such deviation.<sup>125</sup> In addition, a modification of the child support obligation will not be applied in a retroactive manner.<sup>126</sup> A court is permitted, however, to allow a retroactive increase in the support from the date on which a motion seeking modification is filed.<sup>127</sup>

If a party has an enforceable child support obligation, this obligation will, in most cases, cease when the child turns eighteen unless the parents have contracted otherwise.<sup>128</sup> Under North Carolina statutes, the obligation to provide support continues until the child is eighteen unless the child has been emancipated before his or her eighteenth birthday.<sup>129</sup> If a child is emancipated prior to turning eighteen, the support obligation terminates at the time of emancipation.<sup>130</sup> However, the support obligation can extend beyond the child's eighteenth birthday in limited circumstances, such as when the child is still in primary or secondary school and is making satisfactory academic progress towards graduation.<sup>131</sup> In that situation, the support obligation will continue until the earlier of the child turning twenty or graduating from school.<sup>132</sup>

However, a parent may obligate himself or herself for additional child support.<sup>133</sup> North Carolina courts have held that contracts to provide support for a child beyond the statutorily required obligations will be enforced under the principles of contract law.<sup>134</sup> Unfortunately, the use of contract law principles will preclude the court from holding a non-complying parent in contempt of court.<sup>135</sup> Rather, the obligee will have to bring an action against the obligor for breach of contract. Additionally, since the obligor will have no court-ordered child support obligation, the courts will not have the power to enlarge the child support obligation agreed upon in the contract.<sup>136</sup>

125. See *supra* text accompanying note 107.

126. N.C. GEN. STAT. § 50-13.10 (1990).

127. *Hill v. Hill*, 335 N.C. 140, 435 S.E.2d 766 (1993). In addition to filing the motion for modification, notice of the modification must also be given. N.C. GEN. STAT. § 50-13.5 (1994).

128. See N.C. GEN. STAT. § 50-13.4(b) (1994); *Harding v. Harding*, 46 N.C. App. 62, 264 S.E.2d 131 (1980). But see N.C. GEN. STAT. § 50-13.8 (1994) which requires a parent to provide support for a child who is mentally or physically incapable of self-support for so long as the child remains mentally or physically incapable of self-support.

129. N.C. GEN. STAT. § 50-13.4(c) (1994).

130. *Id.*

131. *Id.*

132. *Id.*

133. See *Harding v. Harding*, 46 N.C. App. 62, 264 S.E.2d 131 (1980).

134. *Id.*

135. The courts have contempt power only over court-ordered child support obligations. See *Bottomley v. Bottomley*, 82 N.C.App. 231, 346 S.E.2d 317 (1986).

136. See also *Harding*, 46 N.C. App. at 62, 264 S.E.2d at 131.

### III. CONCLUSION

The law surrounding North Carolina child support is clearly a mixture of federal requirements, state mandates, and judicial interpretation. While the new child support guidelines have clarified many previously unclear issues, there still remain some unresolved issues, including the grounds for seeking modification of a child support award. This issue will likely provoke vigorous discussion in the future since both obligee and obligor have the power to seek modification.

Although the modification issue remains unclear, issues clarifying the definition of income and the basis on which awards are made have been successfully resolved. The successful resolution of these issues has come, however, through the joint effort of the federal government, the state government, and the judicial branch. It seems likely, therefore, that future resolution of child support issues will also occur through the combined efforts of Congress, the states, and the judiciary.