

# **Child Support And (In)ability To Pay: The Case For The Cost Shares Model**

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## **ABSTRACT**

*Currently enacted child support guidelines primarily focus on maintaining children's economic well-being when a single household is split into two. This article argues that this focus discounts another consideration which, when combined with the current analysis, could further advance children's well-being: the ability of parents to pay. An analysis of payment characteristics demonstrates that lower child support obligations may increase the amount of child support paid on average. Lowering presumptive obligations will make lower-income parents better able and more likely to pay their obligations, thereby increasing the amount of child support paid to lower-income children, while at most only marginally decreasing the amount of support paid by middle and upper income parents, which, when paid at all, usually exceeds the minimum obligations established by guidelines. The Cost Shares model of child support guidelines implicitly incorporates payment ability into the existing analysis, yielding slightly lower*

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*obligations, and thereby making it a better and easily implemented alternative to current guidelines.*

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## I. Introduction

Since their implementation in the late 1980s,<sup>1</sup> child support guidelines have focused primarily on preserving individual children's economic well-being.<sup>2</sup> With this in mind, current debates about child support guidelines concentrate on how to balance the trade-offs implicit in splitting a single household into two separate households: guidelines balance between not making individual children economically worse-off when their parents divorce, equalizing the economic well-being of the two resulting households, and distributing money to each resulting household based on which household would derive the greatest utility from the money.<sup>3</sup> In so balancing, the debate discounts another consideration that, when taken into greater account, also may advance children's well-being: the ability of parents to pay. It is this consideration that this article explores, arguing that lower absolute child support obligations<sup>4</sup> may increase the amount of child support paid on average, and that of proposed guidelines, the Cost Shares model is a better alternative to currently enacted guidelines because its unique balancing yields child support obligations that encourage payment.

Lowering presumptive child support obligations will make lower-income obligors (payers of child support) better able and thus more likely to pay those obligations, thereby increasing the amount of child support paid to lower-income

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<sup>1</sup> The Family Support Act of 1988 required states to implement mandatory numeric child support guidelines by May 1990. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (codified in scattered sections of 42 U.S.C.).

<sup>2</sup> See Tim Graves, Comment, *Child Support Guidelines Encourage Forum Shopping*, 37 DUQ. L. REV. 287 (1999).

<sup>3</sup> David Betson, et al., *Trade-Offs Implicit in Child-Support Guidelines*, 11 J. POL'Y ANALYSIS & MGMT. 1, 5 – 10 (1992).

<sup>4</sup> In this article, the terms child support award, child support obligation, child support order, and child support payment are used interchangeably. The term child support award generally refers to the amount payable to the parent receiving child support (which is then to be used for the benefit of the children), while the terms child support obligation, child support order, and child support payment generally refer to the amount payable by the parent owing child support.

children, while at most only marginally decreasing the amount of child support paid by middle and upper income obligors, which, when paid at all, usually exceeds the minimum obligations established by current guidelines, and, thus, should remain constant despite lower obligations. Overall, the setting of child support is better approached by incorporating the goal of increasing the total amount of child support paid into the current analysis; this approach has the potential to provide more child support for children on average, thereby advancing the best interests of children, while still preserving the insights into balancing upon which current guidelines are premised. Although new guidelines can be created or current guidelines better tailored to account for the ability of obligors to pay, a guideline already exists for states to implement that incorporates this perspective into the existing analysis: the Cost Shares model, which provides lower child support obligations at almost all levels of obligor income.<sup>5</sup>

The key to maximizing the total amount of child support paid is to explore the payment characteristics of obligors: when they do not pay, when they do pay, and when they pay more than the presumptive obligation yielded by child support guidelines. Research shows that non-paying obligors, generally known as “deadbeat dads” (fathers are the obligors in most cases<sup>6</sup>), do not pay their child support obligations for a number of reasons falling into two broad categories: they do not have the financial resources to pay, or they do not want to and do not intend to pay despite having the

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<sup>5</sup> Laura W. Morgan, *The “Cost Shares” Model of Child Support Guidelines (2004)*, available at <http://www.supportguidelines.com/articles/art200407.html> (last visited Nov. 17, 2008) (noting that the Cost Shares model “adopts the standard (target) of spending on the child in the post divorce situation . . . this is a lower normative standard”) (emphasis in original).

<sup>6</sup> One study found that fathers comprise less than 20 percent of custodial parents receiving child support to be spent on their children. Pamela J. Smock & Wendy D. Manning, *Nonresident Parents’ Characteristics and Child Support*, 59 J. OF MARRIAGE AND FAMILY 798 (1997).

financial capacity to do so.<sup>7</sup> Focusing on those who do not have the financial resources to pay, research also shows that these obligors would pay if they had the financial capacity to do so,<sup>8</sup> and that many could afford to pay smaller child support obligations consistently.<sup>9</sup> Accordingly, lowering child support obligations should increase the amount of child support actually paid by lower-income obligors in aggregate, thereby providing more child support for children on average, especially for children from lower-income households.

Moreover, there is evidence that some divorcing and divorced parents mutually agree to deviate upward from the presumptive child support obligation yielded by guidelines in an effort to better reflect the cost of continuing to raise their children at their current standard of living, or otherwise modify their child support arrangement to provide increased monetary support.<sup>10</sup> These deviations are upheld by judges, who also deviate from the presumptive obligations in some situations.<sup>11</sup> In most instances, it is the presence of one or more higher-earning parent that leads parents and judges to deviate from the presumptive obligation—that is, in a percentage of cases (possibly a high percentage of cases) involving middle and high income parents, the guidelines are used merely as guidance.<sup>12</sup> Thus, decreasing child support

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<sup>7</sup> See Ronald K. Henry, *Child Support at a Crossroads: When the Real World Intrudes Upon Academics and Advocates*, 33 FAM. L. Q. 235 (1999).

<sup>8</sup> See, e.g., Judi Bartfeld & Daniel R. Meyer, *Are There Really Deadbeat Dads?: The Relationship Between Ability to Pay, Enforcement, and Compliance in Nonmarital Child Support Cases*, 68 SOC. SERV. REV. 219 (1994).

<sup>9</sup> See JOCELYN ELISE CROWLEY, THE POLITICS OF CHILD SUPPORT IN AMERICA 162, 165 (2003).

<sup>10</sup> See Scott Altman, *Lurking in the Shadow*, 68 S. CAL. L. REV. 493 (1995); Stephen K. Erickson, *Family Law: If They Can Do Parenting Plans, They Can Do Child Support Plans*, 33 WM. MITCHELL L. REV. 827 (2007).

<sup>11</sup> See Kathleen A. Hogan, *The Big Case: Issues in High Income/High Asset Cases: Child Support in High Income Cases*, 17 J. AM. ACAD. MATRIMONIAL LAW 349 (2001).

<sup>12</sup> See *id.*; Altman, *supra* note 10; Erikson, *supra* note 10.

payment amounts should not cause the actual amount of child support paid by many higher income obligors to decline.

Combining these insights leads to the counterintuitive conclusion that decreasing presumptive child support obligations has the potential to increase the amount of child support paid in aggregate. Indeed, when obligor payment characteristics are explored thoroughly, guidelines that provide lower obligation amounts have the potential to increase the average child support paid per child while only decreasing what some individual children receive in a small percentage of cases. This article develops this conclusion in depth in support of the Cost Shares model, which is criticized as not being in the best interests of children precisely because it provides lower child support obligations at almost every level of obligor income, and which, accordingly, has been discarded by states.<sup>13</sup> In building the case made for the Cost Shares model, this article generally argues for a more nuanced approach to child support, an approach that includes the ability of parents to pay.

In order to fully examine how child support guidelines approach preserving children's economic well-being, this article first surveys the current debate surrounding child support guidelines. Part II of this article discusses the history of child support guidelines, focusing on the three prevailing guidelines and the Cost Shares model, and highlighting the compromises each strikes in balancing the trade-offs inherent in splitting one household into two. Part III compares the three prevailing guidelines and the Cost Shares model across a

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<sup>13</sup> Though introduced, the Cost Shares model has not been fully enacted by any state legislature. It has been partially enacted, without explicit recognition, in a few states. For example, Michigan treats child care expenses as additional to the basic child support amount: "The out-of-pocket expense paid by the custodial parent for child care is reduced by the child care credit the custodial parent will claim against income taxes; the balance after subtracting the credit must be paid by the parents in proportion to their incomes." The Cost Shares model handles this and many other child care expenses in the same way. Donald J. Bieniewicz, *Improving State Child Support Guidelines* (1999), available at [http://www.guidelineeconomics.com/files/VA\\_Bieniewicz1999.pdf](http://www.guidelineeconomics.com/files/VA_Bieniewicz1999.pdf) (last visited Nov. 17, 2008).

spectrum of obligor and obligee income points to better demonstrate how the balance each guidelines strikes causes child support obligations to vary depending on the guidelines.

Next, this article turns to the previously underdeveloped consideration of parents' ability to pay. Part IV discusses why some obligors do not pay their child support obligations, and what causes parents and judges to deviate from the guidelines. Part V connects the evidence of non-payment and deviation presented in Part IV with the comparisons of the child support guidelines in Part III to develop the case for the Cost Shares model. Finally, Part VI offers some concluding thoughts.

## II. History and Types of Child Support Guidelines

Prior to the late 1980s, child support obligations were determined by judges on a case-by-case basis. Although some states implemented child support guidelines voluntarily, and general rules of thumb and case law governed child support obligations in other states, overall the traditional case-by-case method was inadequate and problematic: analysts believed that awards often were deficient as compared to the true cost of raising children; obligations were inconsistent, resulting in unequal treatment of similarly situated individuals; and the adjudication of obligations was inefficient without consistent standards.<sup>14</sup> To remedy these problems, the Family Support Act of 1988 ("the Act") required states to implement mandatory numeric child support guidelines.<sup>15</sup> These quantitative guidelines set presumptive child support obligations; if a judge or court wishes to deviate from the presumptive obligation, the judge or court must explain why the obligation is "unjust or inappropriate" in the specific

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<sup>14</sup> See Robert G. Williams, *Guidelines for Setting Levels of Child Support Orders*, 21 FAM. L. Q. 281, 282 (1987); R. Mark Rogers, *Wisconsin-Style and Income Shares Child Support Guidelines: Excessive Burdens and Flawed Economic Foundation*, 33 FAM L. Q. 135, 135 (1999).

<sup>15</sup> Family Support Act, *supra* note 1.

case.<sup>16</sup> The Act also requires states to review their child support guidelines every four years.<sup>17</sup>

In response to the mandate, states have enacted three prevailing types of guidelines: the percentage of income standard, the Income Shares model, and the Delaware Melson Formula.<sup>18</sup> In addition to the three main types of guidelines, two recommended guidelines have gained attention, although neither has been enacted by any state: the American Law Institute's (ALI) Child Support Principles and the Cost Shares model. Each of these five guidelines seeks to balance the implicit trade-offs in splitting one household into two, as almost all divorces necessitate. All of the guidelines aim to preserve children's economic well-being, but differences in formulae based on this balancing result in different child support obligations for similarly situated parents (parents whose financial resources are the same) across states.<sup>19</sup> Nevertheless, the implementation of these guidelines has led to an increase in child support awards (and, consequently, obligations), greater consistency, and more efficient case processing as compared to pre-guidelines awards and child support case processing.<sup>20</sup>

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<sup>16</sup> 42 U.S.C. § 667(b)(2) (2008). “Effective October 13, 1989, the State must provide that there shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of the guidelines . . . is the correct amount of child support to be awarded.” Guidelines For Setting Child Support Awards, 45 C.F.R. § 302.56(f) (2008). “A written finding or specific finding on the record . . . that the application of the guidelines . . . would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption in that case, as determined under criteria by the State. Such criteria must take into consideration the best interests of the child.” 45 C.F.R. § 302.56(g).

<sup>17</sup> 45 C.F.R. § 302.56(e) (“The State must review, and revise, if appropriate, the guidelines . . . at least once every four years to ensure that their application results in the determination of appropriate child support award amounts.”).

<sup>18</sup> See Rogers, *supra* note 14, at 135 – 36.

<sup>19</sup> See Graves, *supra* note 2.

<sup>20</sup> See Nancy Thoennes, et. al., *The Impact of Child Support Guidelines on Award Adequacy, Award Variability, and Case Processing Efficiency*, 25 FAM. L. Q. 325, 345 (1991). It is estimated that the adoption of child

This Part goes on to discuss the three prevailing child support guidelines and the Cost Shares model in detail,<sup>21</sup> highlighting how each calculates child support obligations, the balance that each attempts to strike through its calculations, how that balancing translates numerically to presumptive child support obligations, and common criticisms levied against each.

#### A. Percentage of Income Standard

The simplest of the guidelines is the percentage of income standard. It currently is enacted in fourteen states.<sup>22</sup> The percentage of income standard calculates child support obligations by applying a set percentage to the income of the obligor parent (some states apply the percentage to gross income, while others use net income).<sup>23</sup> The obligation usually is calculated independent of the income of the custodial parent, who is assumed to meet his or her obligation by living with and caring for the child.<sup>24</sup>

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support guidelines more than doubled child support obligations, increasing obligations from \$10 billion to \$27 billion in 1979. William S. Comanor, *Child Support Payments: A Review of Current Policies*, in THE LAW AND ECONOMICS OF CHILD SUPPORT PAYMENTS 1, 4 (William S. Comanor, ed., 2004).

<sup>21</sup> As this article's main purpose is to make a case for the Cost Shares model as a better alternative to currently enacted child support guidelines, the ALI's Principles are not discussed in depth. For a brief discussion of the Principles, see *infra* Part II.D.

<sup>22</sup> Alaska, Arkansas, Georgia, Illinois, Mississippi, Nevada, New Hampshire, New York, North Dakota, Texas, and Wisconsin use the percentage of income standard. Massachusetts uses a hybrid version of the percentage of income standard. *What State Uses What Guideline*, GUIDELINE ECONOMICS, <http://www.guidelineeconomics.com/about/whichstate.htm> (last visited Nov. 17, 2008). Though this table categorizes Georgia's guidelines as following the Income Shares model, as discussed *infra* note 33 and accompanying text, Georgia's guidelines are better characterized as one of the most robust variations of the percentage of income standard.

<sup>23</sup> See Jane C. Venohr & Robert G. Williams, *The Implementation and Periodic Review of State Child Support Guidelines*, 33 FAM. L. Q. 7, 10 (1999).

<sup>24</sup> See Laurie J. Bassi & Burt S. Barrow, *Expenditures on Children and Child Support Guidelines*, 3 J. POL'Y ANALYSIS & MGMT. 478, 486 (1993).

There are two variations of the percentage of income standard. The “flat percentage model” calculates child support based on a fixed percentage across all levels of income of the obligor parent.<sup>25</sup> Stated differently, “under the [f]lat [p]ercentage [m]odel, the percentage of income devoted to child support remains constant at all income levels.”<sup>26</sup> In contrast, the “varying percentage model” applies different percentages to different levels of income such that “the percentage of [obligor] income devoted to child support varies according to level of income.”<sup>27</sup> In addition, states vary as to how they determine the base level of income to which the percentages are applied.<sup>28</sup> In all states that employ the percentage of income standard, the percentage varies based on the number of children supported, and, in some states, based on the children’s ages.<sup>29</sup>

In essence, the percentage of income standard is best thought of as a tax, with some states applying a flat tax regardless of the level of obligor income, and others applying a graded tax, similar to federal personal income tax.<sup>30</sup> For example, Wisconsin and Minnesota apply a flat percentage based on the number of children supported to obligor income regardless of the level of obligor income. Wisconsin’s model applies the following percentages to the obligor’s gross income: 17 percent for one child, 25 percent for two children, and 29 percent for three children.<sup>31</sup> Similarly, Minnesota’s model applies the following percentages to the obligor’s net income: 25 percent for one child, 30 percent for two children, and 35 percent for three children.<sup>32</sup> In contrast, Georgia’s model applies a varying percentage based on the combined level of obligor and obligee (receiver of child support)

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<sup>25</sup> See LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 1.03(c)(1) (1996 & Supp. 2007).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> See Bassi & Barrow, *supra* note 24, at 487.

<sup>29</sup> See MORGAN, *supra* note 25, at § 1.03(c)(1).

<sup>30</sup> See Venohr & Williams, *supra* note 23, at 12 (noting that the percentage of income standard “emulate[s] a tax”).

<sup>31</sup> *Id.* at 10 – 12.

<sup>32</sup> *Id.*

income, thereby making Georgia's model one of the most robust variations of the percentage of income standard currently enacted.<sup>33</sup>

The main goal of the percentage of income standard is to preserve individual children's economic well-being such that children are not made economically worse-off when their parents divorce.<sup>34</sup> In furtherance of this goal, the percentage of income standard transfers a sizable portion of the non-custodial parent's income to the custodial parent regardless of the relative impact on the non-custodial parent's standard of living. In addition, except standards similar to Georgia's model, the percentage of income standard does not consider the level of income of the custodial parent.<sup>35</sup>

By attempting to transfer enough money to the custodial parent so that individual children's standards of living are not negatively impacted by their parents' divorces, the percentage of income standard tends to yield numerically high child support obligations, especially as compared to the other guidelines, which will be confirmed by the calculations and comparisons in Part III. Also, the flat percentage variation model tends to yield higher obligations than the varying percentage model, particularly at lower levels of obligor income.

The main criticism levied against the percentage of income standard is that the percentage applied to income does not decrease as income increases (and as the percentage of income spent on children decreases).<sup>36</sup> This fault is remedied to a degree by the use of a variable percentage model based on income level to determine obligations and the use of standards to set a cap on obligations at a specific income level.<sup>37</sup>

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<sup>33</sup> GA. CODE ANN. § 19-6-15 (2007).

<sup>34</sup> David Betson, et al., *Trade-Offs Implicit in Child-Support Guidelines*, 11 J. POL'Y ANALYSIS & MGMT. 1, 7 (1992).

<sup>35</sup> *Id.* at 7. The percentage of income standard reflects the premises advanced by the maintenance support formulae discussed in Betson's article.

<sup>36</sup> See MORGAN, *supra* note 25, at § 1.03(c)(2).

<sup>37</sup> See *id.*

In addition, the percentage of income standard is criticized as being inherently unfair in not taking into account the custodial parent's income.<sup>38</sup> Although this omission may make the percentage of income standard simpler and easier to apply and understand, critics argue that the claim that "both parents are assumed to contribute to the child's upbringing in the same proportion as the obligor" because the standard implicitly presumes that "[t]he custodial parent is making the contribution in the manner he or she would have made had the parties not divorced," is based on a faulty rationale that does not reflect economic reality.<sup>39</sup>

Beyond these critiques, and in contrast to the main criticism levied against it (and implicit in the argument against not taking into account the custodial parent's income), the percentage of income standard also should be more explicitly criticized for unrealistically expecting lower-income obligors to be financially able to pay such a large percentage of their income in child support, even if such a higher percentage is necessary to maintain their children's economic well-being. The extra expenses associated with establishing and maintaining a new (and permanent) household, even if that new household is nothing more than a small apartment, combined with other costs of divorce and permanent separation, leaves little for child support.<sup>40</sup> While it can be claimed that fathers (who are the obligors in most cases) should be forced to follow through with their commitments, the reality is many lower-income fathers (including some middle-class fathers) are not financially able to pay such a high percentage of their income in child support without sacrificing their minimal economic well-being, a minimal

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<sup>38</sup> See *id.*

<sup>39</sup> *Id.* The percentage of income standard also is criticized for not considering adjustments for "child care, extraordinary medical expenses, shared or split custody, [or] serial family development . . . . [W]here such commonly occurring factors need to be dealt with as deviations rather than part of the formula, the goal of consistency and predictability is lost." *Id.*

<sup>40</sup> See ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE 115 – 121 (2003).

economic well-being that may be necessary in order to sustain their income levels or merely to sustain a healthy life.<sup>41</sup>

Indeed, the Federal Office of Child Support Enforcement has itself found and has commissioned studies that find that obligations are too high in some low-income obligor cases because low-income obligors simply do not have enough income. For instance, in a 1993 memorandum to state agencies regarding the administration of child support enforcement plans, the Office of Child Support Enforcement counseled that, “[i]n some cases, a downward adjustment may even be advantageous to the child if it results in an amount of support which can be paid fully, regularly, and timely by the obligor. An unrealistic order, which is inconsistent with the guidelines and the obligor's ability to pay, may result in only sporadic payments or none whatsoever.”<sup>42</sup> Similarly, in 2000, the Department of Health and Human Services' Office of Inspector General concluded that payment rates by low-income non-custodial parents could be improved by “setting realistic support obligations.”<sup>43</sup>

In short, as will be developed further in Part IV's discussion of obligor payment characteristics, fathers will only pay as much as they *can*, and the percentage of income standard expects many lower-income fathers to pay their way into a version of poverty that is counter-productive. Thus, the major problem with the percentage of income standard is not that its flat percentage (even if that flat percentage comes in steps as under the varying percentage model) forces higher-income obligors to pay more than necessary to maintain their

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<sup>41</sup> *Id.*

<sup>42</sup> *Role of IV-D Agency and Its Staff in Delivering Program Services: Information Memorandum*, THE OFFICE OF CHILD SUPPORT ENFORCEMENT, July 23, 1993, <http://www.acf.hhs.gov/programs/cse/pol/IM/1993/im-9303.htm> (last visited Nov. 17, 2008).

<sup>43</sup> *The Establishment of Child Support Orders for Low Income Non-Custodial Parents*, Department of Health and Human Services, Office of Inspector General (July 2000), available at <http://oig.hhs.gov/oei/reports/oei-05-99-00390.pdf> (last visited Nov. 17, 2008).

children's economic well-being; the problem is that its flat percentage asks too much of lower-income obligors.

### B. Income Shares Model

The Income Shares model is the most popular child support guideline, and currently is enacted in thirty-six states.<sup>44</sup> Building upon the critiques of the percentage of income standard, the Income Shares model takes into account both the obligor's and obligee's income. In this way, it is best thought of as a "cost-sharing mechanism."<sup>45</sup> It sets child support obligations by first determining what proportion of their combined income the divorcing parents spent on their children in an intact household.<sup>46</sup> This determination is based on economic data estimating child-rearing expenses; the applicable base child-rearing expense amount is adjusted according to extraordinary expenses unique to the divorcing couple's children such as child care and medical expenses.<sup>47</sup> The final amount, termed the "basic child support obligation," is then pro-rated between the two parents based on their relative incomes.<sup>48</sup>

For example, assume that the custodial parent's yearly income is \$50,000, the non-custodial parent's yearly income is \$70,000, 25 percent of the parents combined income was spent on their two children in an intact household, and there are no extraordinary expenses. The \$30,000 "basic child support obligation" would be apportioned \$12,500 to the custodial parent and \$17,500 to the non-custodial parent. Accordingly,

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<sup>44</sup> Alabama, Arizona, California, Colorado, Connecticut, the District of Columbia, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming use the Income Shares model. *What State Uses What Guideline*, *supra* note 22.

<sup>45</sup> Bassi & Barrow, *supra* note 24, at 487 (internal quotations omitted).

<sup>46</sup> MORGAN, *supra* note 25, at § 1.03(b)(1).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

the non-custodial parent would owe the custodial parent \$17,500 per year in child support for their two children.<sup>49</sup>

Similar to the percentage of income standard, some states calculate obligations according to gross income, while others base awards on net income.<sup>50</sup> Also, child-rearing expense estimates vary slightly state-to-state.<sup>51</sup>

Like the percentage of income standard, the Income Shares model also attempts to preserve individual children's economic well-being:

The Income Shares model is based on the precept that the child should receive the same proportion of parental income that would have been received if the parents lived together. Thus, the Income Shares model calculates child support as the share of each parent's income estimated to have been allocated to the child if the parents and child were living in an intact household.<sup>52</sup>

But unlike the percentage of income standard, the Income Shares model explicitly calculates child support based on both parents' incomes, and, thereby, as compared to the percentage of income standard, tends to yield similar child support obligations in cases in which the parents' income is about the same, but yields higher or lower obligations when the parents' incomes are divergent. This result is illustrated in Part III.

The main criticism levied against the Income Shares model is that it is based on faulty economic research and data that inaccurately estimates the cost of raising children,

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<sup>49</sup> The figures in this example were chosen for their ease of calculation and do not reflect actual Income Shares model guidelines. For a more detailed explanation of the Income Shares model calculation, see Robert G. Williams, *supra* note 14, at 291 – 94.

<sup>50</sup> MORGAN, *supra* note 25, at § 1.03(b)(2).

<sup>51</sup> See Venohr & Williams, *supra* note 23, at 14.

<sup>52</sup> Robert G. Williams, *supra* note 14, at 292.

especially children from higher-income households.<sup>53</sup> The Income Shares model was developed by the Institute for Court Management of the National Center for State Courts under the Child Support Guidelines Project.<sup>54</sup> Its developers relied on and wrote into the model tables reflecting estimates of child-rearing expenses derived from a study by Dr. Thomas Espenshade that calculated the percentage of income parents in an intact household spend on children at varying income levels.<sup>55</sup> Although many states subsequently updated their child support schedules with more current estimates of child-rearing expenses based on data provided from the Bureau of Labor Statistic's Consumer Expenditure Survey,<sup>56</sup> the differences between the new tables and the tables based on Espenshade's analysis are marginal.<sup>57</sup> Critics contend that all these tables contain fundamental flaws: the tables do not include many joint consumptions items (those items that benefit all family members, such as heating and other housing expenditures),<sup>58</sup> and the tables are based on under-reported income and under-reported expenses.<sup>59</sup> Accordingly, it is contended that child support obligations yielded by the Income Shares model are economically unreliable.

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<sup>53</sup> MORGAN, *supra* note 25, at § 1.03(b)(2). See also Ira Mark Ellman, *Fudging Failure: The Economic Analysis Used to Construct Child Support Guidelines*, 2004 U. CHI. LEGAL F. 167 (2004); Morgan, *supra* note 5.

<sup>54</sup> See Robert G. Williams, *supra* note 14, at 291.

<sup>55</sup> See *id.*, at 292 – 93; Venohr & Williams, *supra* note 23, at 12. See also THOMAS J. ESPENSHADE, INVESTING IN CHILDREN: NEW ESTIMATES OF PARENTAL EXPENDITURES (1984).

<sup>56</sup> See Venohr & Williams, *supra* note 23, at 14; Ellman, *supra* note 53, at 199.

<sup>57</sup> Compare the tables in Robert G. Williams, *supra* note 14, at 292 – 93 with the table in Venohr & Williams, *supra* note 23, at 14.

<sup>58</sup> Ellman, *supra* note 53, at 183.

<sup>59</sup> *Id.* at 208 – 16. R. Mark Rogers & Donald J. Bieniewicz, *Child Cost Economics and Litigation Issues: An Introduction to Applying Cost Shares Child Support Guidelines* 6 (2002), <http://www.guidelineconomics.com/files/LitigationIssues.pdf> (last visited Nov. 17, 2008) (“The bottom line is that the . . . tables for child costs—at every cost level—are based on more income than the parents actually have.”).

Beyond this criticism and a general critique of the underlying balance the Income Shares model strikes (a criticism common to each of the enacted guidelines), the Income Shares model generally is commended for preserving children's economic well-being while adjusting for the tendency of the percentage of income standard to decrease the non-custodial parent's standard of living, especially in cases in which the parents' income is divergent (such as a high earning custodial parent and a low earning non-custodial parent), and while retaining a relatively easy to apply formula.<sup>60</sup> However, though the Income Shares model may yield numerically lower child support obligations for lower-income obligors as the other parent's income increases, it still unrealistically expects some lower-income obligors to be financially able to pay a large percentage of their incomes in child support. Thus, the Income Shares model's solution to the biases in the percentage of income standard does not fully address how to handle some obligors lack of financial means and leaves some lower-income obligors in the same position as they were under the percentage of income standard: financially incapable of paying their entire obligations even if they sincerely want to support their children.

### C. Delaware Melson Formula

The Delaware Melson Formula (the "Melson Formula") was first implemented by Judge Elwood Melson, Jr. in Delaware in 1979, and currently is used in three states.<sup>61</sup> It has been characterized as "a more complicated version of the Income Shares model"<sup>62</sup> and as "the most comprehensive approach."<sup>63</sup> The Melson Formula is a three-step calculation. First, the net income of each parent is calculated; from this net income, a self-support reserve is subtracted.<sup>64</sup> Second, each parent's remaining income is applied to a pre-determined

<sup>60</sup> See Bassi & Barrow, *supra* note 24, at 489.

<sup>61</sup> See *id.* Delaware, Hawaii, and Montana use the Melson Formula. *What State Uses What Guideline*, *supra* note 22.

<sup>62</sup> MORGAN, *supra* note 25, at § 1.03(d)(1).

<sup>63</sup> Robert G. Williams, *supra* note 14, at 322.

<sup>64</sup> Venohr & Williams, *supra* note 23, at 16.

primary support need for the child or children. This primary support need is calculated from the economic data underlying the tables used in the Income Shares model.<sup>65</sup> Third, “[t]o the extent that either parent has income available after covering the self-support reserve and his or her share of the child’s [or children’s] primary support needs, an additional percentage of the remaining income is applied to the child support obligation.”<sup>66</sup> The total child support obligation for each parent is calculated by adding steps two and three.<sup>67</sup>

For example, the current Delaware guidelines incorporate a self-support reserve of \$970 per month, and provide a minimum child support obligation based on the number of children (\$720 per month for two children assuming the parents’ combined income is sufficient to pay that amount).<sup>68</sup> This minimum child support obligation is increased by a set percentage to reflect an appropriate standard of living adjustment (24% of remaining net income in the case of two children).<sup>69</sup>

Like the percentage of income standard and the Income Shares model, the Melson Formula begins with the premise that children should not be made worse-off because of their parent’s divorce. However, the Melson Formula incorporates several policy judgments as to what may make children worse-off: most notably, it presumes that “the support of others is impossible until one’s own basic support needs are met” and that higher income parents “should share their additional incomes with their children, improving their children’s standard of living as their own standard of living improves.”<sup>70</sup>

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *The Family Court of the State of Delaware: Delaware Child Support Formula Evaluation and Update* 12, 14 (October 2, 2006), <http://courts.state.de.us/How%20To/Support/?ChildSupportGuidelinesEdV121106.pdf> (last visited Nov. 17, 2008).

<sup>69</sup> *Id.* at 12.

<sup>70</sup> MORGAN, *supra* note 25, at § 1.03(d)(1).

These premises cause the Melson Formula to yield child support obligations similar to those required under the percentage of income standard and Income Shares model in cases in which the parents' income is similar, but produce less extreme standard of living differences between the two resulting households when the parents' income is divergent. In addition, because of its self-support reserve, the Melson Formula tends to yield obligations that are lower when the parents' income is lower as compared to the other two guidelines, and because of its sharing of additional income, it tends to yield higher obligations when the parents' income is higher as compared to the other two guidelines.<sup>71</sup> These results are confirmed in Part III.

Though the Melson Formula is more internally consistent than the other two models because it takes into account both the parents' needs and the children's needs, which causes it to be deemed fairer, it is criticized because its calculations seem more complicated than the other two models.<sup>72</sup> As it relies on similar economic data as the Income Shares model, it is also criticized for yielding economically unreliable child support obligations.<sup>73</sup> Further, like the other two models, the Melson Formula should be criticized for expecting lower-income obligors to pay more than financially feasible. But because the Melson Formula includes an allowance for basic needs, it is not the lowest income obligors that are the most likely to not be able to financially pay; rather, it is those obligors whose income falls at the low end of "middle income" that are required to pay substantial portions of their incomes in order to equalize the standards of living across the two resulting households.<sup>74</sup> And it is in these cases that the obligors are unable to afford their child support obligations without slipping close to the poverty line on which the allowance for basic needs is built, a line that may not allow

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<sup>71</sup> See Betson, *supra* note 3, at 14.

<sup>72</sup> MORGAN, *supra* note 25, at § 1.03(d)(2).

<sup>73</sup> See Ellman, *supra* note 53.

<sup>74</sup> See *infra* Part III.

them to maintain a life that permits them to sustain their current level of income.<sup>75</sup>

The exploration of the Income Shares model's and the Melson Formula's economic unreliability also leads critics to observe that all three prevailing child support guidelines strike a balance that makes the fairness judgment that children's economic well-being should be preserved as much as possible, which some view not to be in the best interests of the child.<sup>76</sup> This observation has led to the creation of other child support models, most notably the Cost Shares model, which is discussed next, and the ALI's Child Support Principles, which is discussed briefly in contrast to the Costs Shares model.

#### *D. Cost Shares Model*

The proposed Cost Shares model addresses the complexities of splitting one household into two much differently from the three prevailing guidelines. The basic Cost Shares model is a four-step calculation: first, basic child costs for a single-parent household are determined based on the average of both parents' income; second, other expenses, such as child care and medical expenses, are added; third, the tax benefit received by the custodial parent is deducted from total child costs; and fourth, the resulting child costs are allocated "between the two parents based on each parent's share of after-tax income that is above a recommended self-support level."<sup>77</sup> Even when compared to the relatively complex Melson Formula, this calculation makes the Cost Shares model by far the most robust model because it takes into account more variations in individuals' circumstances.

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<sup>75</sup> See *supra* notes 40 and 41 and accompanying text.

<sup>76</sup> Ellman, *supra* note 53, at 183 (noting that when "parents do not have equal incomes, then the marginal expenditure model[, upon which the three prevailing child support guidelines are premised,] yields a result that is harder to defend," as opposed to when parents do have equal incomes, in which case, an "award based upon marginal child expenditures seems to satisfy fully the most expansive plausible claim that [children] could make").

<sup>77</sup> Rogers & Bieniewicz, *supra* note 59, at 13 – 14.

This calculation also reflects the balance the Cost Shares model attempts to strike. Instead of focusing solely on maintaining children's pre-divorce standard of living, the Cost Shares model seeks to establish obligations based on realistic actual expenditures of households.<sup>78</sup> In so doing, the Cost Shares model does not base its calculations on the economic data that has come under criticism;<sup>79</sup> rather, it bases child support obligations on what custodial parents spend on their children after household dissolution.<sup>80</sup> The Cost Shares model also explicitly includes poverty thresholds for both parents and accounts for the beneficial tax treatment accruing to custodial parents that helps to improve custodial parents' standards of living.<sup>81</sup>

Its assumptions and the way it balances interests cause the Cost Shares model to yield lower child support obligations as compared with the three prevailing guidelines at every level of obligor income except when the parents' incomes are both close to the poverty level.<sup>82</sup> It is these lower obligations that bring criticism to the Cost Shares model, both from those who view fairness as designing guidelines that seek to not make children economically worse-off when their parents divorce, and from those who view a different balance as in the best interests of children.<sup>83</sup> The Cost Shares model's lower awards especially come under fire from those in favor of the ALI's Child Support Principles (the "Principles"), which are discussed briefly to highlight the lower versus higher award debate.

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<sup>78</sup> R. Mark Rogers & Donald J. Bieniewicz, *Child Support Guidelines: Underlying Methodologies, Assumptions, and the Impact on Standards of Living*, THE LAW AND ECONOMICS OF CHILD SUPPORT PAYMENTS 60, 71 (William S. Comanor, ed., 2004).

<sup>79</sup> See *supra* note 59 and accompanying text.

<sup>80</sup> See Morgan, *supra* note 5.

<sup>81</sup> See Rogers & Bieniewicz, *supra* note 59, at 8 (noting that the custodial parent will "enjoy a higher presumptive standard of living than the non-custodial parent in most income situations—even when the custodial parent earns significantly less prior to the child support transfer" because of the beneficial tax treatment).

<sup>82</sup> See Morgan, *supra* note 5.

<sup>83</sup> See Ellman, *supra* note 53.

Like the Cost Shares model, the Principles approach child support from a perspective other than not making individual children economically worse-off when their parents divorce. Specifically, the Principles seek to identify ways to increase total utility by distributing money to each household based on which household would derive the greatest utility from that money.<sup>84</sup> For example, when the non-custodial parent's income is higher than the custodial parent's income, and thus the custodial parent's household has a lower standard of living, the Principles provide increased child support to the custodial household to narrow the standard of living gap.<sup>85</sup> Similarly, when the custodial parent's household's standard of living is higher than the non-custodial parent's, the child support obligation is lower.<sup>86</sup> The major difference between the Principles and the Cost Shares model is that while recognizing that child support payments may be burdensome to obligor parents, especially lower-income obligor parents, the Principles do not try to fully protect the interests of the obligor parent if that parent's standard of living is substantially higher than the residential parent's.<sup>87</sup> The result is higher child support obligations.

Perhaps as expected, generally it is fathers' rights groups who support the Cost Shares model and feminists who support the Principles.<sup>88</sup> But supporters of guidelines that tend to yield numerically higher child support obligations may not be as in opposition to supporters of guidelines that yield slightly lower obligations as they think they are. It is

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<sup>84</sup> See Betson, *supra* note 3, at 9.

<sup>85</sup> See Leslie Joan Harris, Commentary, *The ALI Child Support Principles: Incremental Changes to Improve the Lot of Children and Residential Parents*, 8 DUKE J. GENDER L. & POL'Y 245, 248 (2001).

<sup>86</sup> See *id.*

<sup>87</sup> See *id.*

<sup>88</sup> See CROWLEY, *supra* note 9, at 189 (noting that fathers' rights groups' "central goal has been to modify child support awards, usually in a downward direction" and that fathers' rights groups have backed the Cost Shares model); Ellman, *supra* note 53, at 215 ("Any revision of child support guidelines presents the potential for a contest between feminist and father's rights groups."); Morgan, *supra* note 5 (noting that the Cost Shares model "has received support among non-custodial parents").

uncontroversial that the underlying motivating goal of child support is to properly compensate the expenditures made by custodial parents on their children that should be paid by the non-custodial parents—in short, to provide money to custodial parents. Child support guidelines meet this imperative by identifying how best to balance the tradeoffs implicit in dividing a household to advance the best interests of children. All three of the enacted guidelines seek to preserve individual children's economic well-being. In basing its obligations on realistic actual expenditures of post-divorce households, the Cost Shares model identifies and incorporates another consideration upon which guidelines should focus: the ability of parents to pay. When payment ability is explored in depth, as is done in Part IV, it becomes apparent that more children will receive more support if obligors are required to pay less, thereby leaving more children better-off, assuming better-off is defined as actually receiving payment. Thus, contrary to current criticism, the Cost Shares model should be praised for adequately considering what obligors actually are able to pay.

The next part of this article graphically explores and then analyzes how the balance each of the three enacted child support guidelines and the Cost Shares model translates to presumptive child support obligations, focusing predominantly on child support obligations of lower-income obligors to demonstrate how it may be that lower-income obligors cannot financially pay their child support obligations despite their desire to support their children.

### **III. The Prevailing Guidelines and the Cost Shares Model Compared**

As noted, the concerns inherent in designing guidelines are balanced differently by each of the child support guidelines.<sup>89</sup> This difference in balancing necessarily causes the guidelines to yield divergent child support obligations

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<sup>89</sup> See Bassi & Barrow, *supra* note 24, at 494 (“For example, the percentage of income guideline is simpler to implement and update than the Income Shares or Melson guideline, but it ignores some equity issues that some states believe are important, for example, taking both parents’ incomes into account.”).

across the spectrum of obligor and obligee income points. This part graphically compares and analyzes the three prevailing guidelines currently enacted and the Cost Shares model across a spectrum of obligor and obligee income points to demonstrate how child support obligations vary across the guidelines, focusing particularly on lower-income obligors.

#### *A. Calculations*

To create the graphs in sub-part B, child support obligations (paid from the non-custodial parent to the custodial parent) are calculated based on hypothetical monthly gross income of \$1,000 to \$8,000 (in increments of \$100) for each parent, for a total of seventy hypothetical monthly gross income points per parent and 4,900 child support obligation permutations for each of the guidelines.<sup>90</sup>

To numerically compare the child support obligations yielded by the three prevailing guidelines and the Cost Shares model, the same assumptions necessarily must be made in calculating obligations under each of the guidelines. For simplicity, it is assumed that the divorcing couple has two children and has elected to have the children spend a majority of their time with and live with the mother (the custodial parent, designated the “obligee”); accordingly, the children spend relatively little time with their father (the non-custodial parent, designated the “obligor”).<sup>91</sup> In addition, it is assumed that the non-custodial parent incurs no fixed costs associated with the children and that there are no additional costs for child care and education or other extraordinary expenses. All

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<sup>90</sup> Spreadsheets containing the calculations of the child support obligations across these income point permutations for each of the prevailing guidelines and the Cost Shares model are on file with the author.

<sup>91</sup> Although it is assumed the children spend almost one hundred percent of their time with their mother, this does not necessarily require the father to not spend any time with them, only that they are treated as living exclusively with their mother under the guidelines (and, thus, the father is treated as not incurring any expenses associated with the children); this assumption is likely to be more accurate in the situation of obligor non-payment that will be explored later than in other divorce situations. Accordingly, “obligee” refers to the mother and “obligor” refers to the father.

figures used in the calculations reflect 2006 dollars, either as reported in 2006<sup>92</sup> or translated into 2006 dollars based on the Consumer Price Index.<sup>93</sup>

As some of the guidelines calculate child support obligations based on net income, the seventy hypothetical gross income points per parent are translated to net income based on 2006 Internal Revenue Service (IRS) tax rules.<sup>94</sup> In

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<sup>92</sup> For example, poverty levels are taken from the United States Department of Health and Human Services website, which are updated every year. *See* 2006 Federal Poverty Guidelines, <http://aspe.hhs.gov/poverty/06poverty.shtml> (last visited Nov. 17, 2008).

<sup>93</sup> For example, most states that have adopted the Income Shares model calculate a basic child support obligation based on a 1986 study of what intact households spent in dollars on children. Courts in these states use the Consumer Price Index (CPI) to update the 1986 dollars. *See* Robert G. Williams, *supra* note 14, at 291 – 95. The Bureau of Labor Statistic's CPI Inflation Calculator is used to translate older dollars to 2006 dollars. *See* CPI Inflation Calculator, <http://data.bls.gov/cgi-bin/cpicalc.pl> (last visited Nov. 17, 2008).

<sup>94</sup> Of relevance, a standard deduction of \$5,150 is taken for the non-custodial parent as he is assumed to be single, and a standard deduction of \$7,550 is taken for the custodial parent as she is assumed to be the head of a household. *See* Publication 501: Exemptions, Standard Deduction, and Filing Information For Use In Preparing 2006 Returns 22 (2006), <http://www.irs.gov/pub/irs-pdf/p501.pdf> (last visited Nov. 17, 2008). An exemption of \$3,300 is taken for the non-custodial parent who has one person in his household, and an exemption of \$9,900 is taken for the custodial parent who has three people in her household. *See id.* at 8 – 9. An earned income credit is given to the custodial parent when her adjusted gross income is under \$36,348 as she is assumed to be the head of a household. *See* Publication 596: Earned Income Credit (EIC) For Use In Preparing 2006 Returns (2006), <http://www.irs.gov/pub/irs-pdf/p596.pdf> (last visited Nov. 17, 2008). A child tax credit of \$2,000 (\$1,000 per child) is given to the custodial parent; the child tax credit is reduced by \$50 for each \$1,000 by which the custodial parent's modified adjusted gross income exceeds \$75,000. *See* Publication 972: Child Tax Credit For Use In Preparing 2006 Returns (2006), <http://www.irs.gov/pub/irs-pdf/p972.pdf> (last visited Nov. 17, 2008). Social security tax of 6.2% is withheld on the first \$94,200 of gross income for both parents. *See* Publication 15-A: Employer's Supplemental Tax Guide 36 (2007), <http://www.irs.gov/pub/irs-pdf/p15a.pdf> (last visited Nov. 17, 2008). Medicare tax of 1.45% is withheld on all gross income for both parents. *See id.* Finally, the federal income tax calculation is based on the 2006 Federal Tax Rate Schedule. *See* 2006 Federal Tax Rate Schedule,

order to translate gross income to net income, state income taxes also must be withheld. It is assumed Georgia state taxes are withheld under all the guidelines,<sup>95</sup> except under the Delaware Melson Formula because the Formula specifies that child support must be calculated based on the withholding of Delaware state taxes even if the parents do not live in Delaware.<sup>96</sup> Georgia is chosen because until July 1, 2006, its guidelines were a flat percentage version of the percentage of income standard,<sup>97</sup> and also because its guidelines have been used to calculate hypothetical child support obligations under the percentage of income standard in prior literature.<sup>98</sup>

Child support obligations under the percentage of income standard are calculated according to Georgia's prior model (a flat percentage version of the percentage of income

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<http://www.irs.gov/formspubs/article/0,,id=150856,00.html> (last visited Nov. 17, 2008).

<sup>95</sup> Of relevance, a standard deduction of \$2,300 is taken for both the custodial and non-custodial parent. *See* State of Georgia Department of Revenue 2006 Individual Income Tax 500 and 500EZ Forms and General Instructions 8 (2006), [http://www.etax.dor.ga.gov/inctax/2006\\_forms/TSD\\_Individual\\_Income\\_Tax\\_500\\_and\\_500EZ\\_Forms\\_and\\_General\\_Instructions\\_IT511.pdf](http://www.etax.dor.ga.gov/inctax/2006_forms/TSD_Individual_Income_Tax_500_and_500EZ_Forms_and_General_Instructions_IT511.pdf) (last visited Nov. 17, 2008). A personal exemption of \$2,700 is taken for both the custodial and non-custodial parent, and the custodial parent receives an extra \$3,000 exemption for each child, for a total exemption of \$8,700. *See id.* Finally, the Georgia state income tax calculation is based on the Georgia Tax Rate Schedule. *See id.* at 17 – 19.

<sup>96</sup> *See* The Family Court of the State of Delaware: Delaware Child Support Formula Evaluation and Update, *supra* note 68. Of relevance, a standard deduction of \$3,250 is taken for both the custodial and non-custodial parent. *See* 2006 Delaware Resident Income Tax Return 6 (2006), [http://revenue.delaware.gov/services/Developer/2006/ia/personal/TY06\\_ReaderBooklet\\_i2.pdf](http://revenue.delaware.gov/services/Developer/2006/ia/personal/TY06_ReaderBooklet_i2.pdf) (last visited Nov. 11, 2008). The Delaware state income tax calculation is based on the 2006 Delaware State Income Tax Table. *See id.* at 23 – 25. Finally, Delaware provides an earned income credit of 20% of the federal earned income credit. *See id.* at 1. This amount is subtracted from the state income taxes due.

<sup>97</sup> Compare GA. CODE ANN. § 19-6-15 (1998) with GA. CODE ANN. § 19-6-15 (2007). *See also supra* note 33 and accompanying text.

<sup>98</sup> *See* Rogers, *supra* note 14; Rogers & Bieniewicz, *supra* note 59.

standard based solely on obligor gross income).<sup>99</sup> Similar to prior literature, the median percentage applied to gross income to calculate child support obligations for two children is used to calculate obligations.<sup>100</sup>

Child support obligations under the Income Shares model are calculated according to the original Income Shares model developed by the Institute for Court Management of the National Center for State Courts.<sup>101</sup> The economics underlying the model have been adopted with little adjustment by most of the states using the Income Shares model.<sup>102</sup> The obligations are calculated based on parents' gross income according to the tables included in an article written by Dr. Robert Williams, director of the Child Support Guidelines Project, who helped devise the Incomes Shares model.<sup>103</sup> These tables reflect estimates of child-rearing expenses derived from Espenshade's study.<sup>104</sup> Although many states subsequently updated their child support schedules with more current estimates of child-rearing expenses,<sup>105</sup> as noted, the differences between the new tables and the tables based on Espenshade's analysis are marginal.<sup>106</sup>

Child support obligations under the Delaware Melson Formula are calculated based on the steps outlined in the Delaware Child Support Formula Evaluation and Update from

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<sup>99</sup> See Rogers, *supra* note 14, at 137 ("Georgia uses percent-of-income guidelines based on the obligor's gross income multiplied by a percentage based on the number of children for whom support is being determined.").

<sup>100</sup> The percentage range of obligor gross income for two children is 23 percent to 28 percent. *See id.* Accordingly, 25.5 percent is applied to each obligor gross income point to determine child support orders.

<sup>101</sup> *See supra* note 54 and accompanying text.

<sup>102</sup> *See* Venohr & Williams, *supra* note 23, at 12 ("All but a handful of Income Shares states adopted the prototype Income Shares model developed by the Advisory Panel staff, or a modified version of the prototype.").

<sup>103</sup> Williams, *supra* note 14, at 292 – 93. As these tables are in 1986 dollars, the CPI inflation calculator is used to update the figures to 2006 dollars. *See supra* note 93.

<sup>104</sup> *See supra* note 55 and accompanying text.

<sup>105</sup> *See* Venohr & Williams, *supra* note 23, at 14.

<sup>106</sup> *See supra* note 57 and accompanying text.

October 2, 2006.<sup>107</sup> Finally, child support obligations under the Cost Shares model are calculated according to the steps outlined in a 2002 paper by the developers of the Cost Shares model that includes tables for total expenditures on children in single-parent households upon which the Cost Shares model is based.<sup>108</sup>

### B. Comparisons and Analysis

This sub-part graphically compares and analyzes the three prevailing guidelines and the Cost Shares model at a selection of obligee (custodial mother) income points to demonstrate how child support obligations yielded by each of the guidelines converge and diverge at different obligor (non-custodial father) income points. Of the seventy possible obligee income points, five are selected: \$1,900,<sup>109</sup> \$2,500, \$3,000, \$4,500, and \$8,000. These income points are selected to provide a diverse range of hypothetical custodial mothers receiving child support so that the divergence in child support obligations under the guidelines can be assessed for lower-income, middle-income, and higher-income obligors, with an emphasis on lower-income obligors. The graphs each present the range of obligor income points that best illustrates where the guidelines converge and diverge—that is, at what income levels non-custodial fathers pay different or similar amounts under the guidelines, assuming the custodial mother's income is held steady.

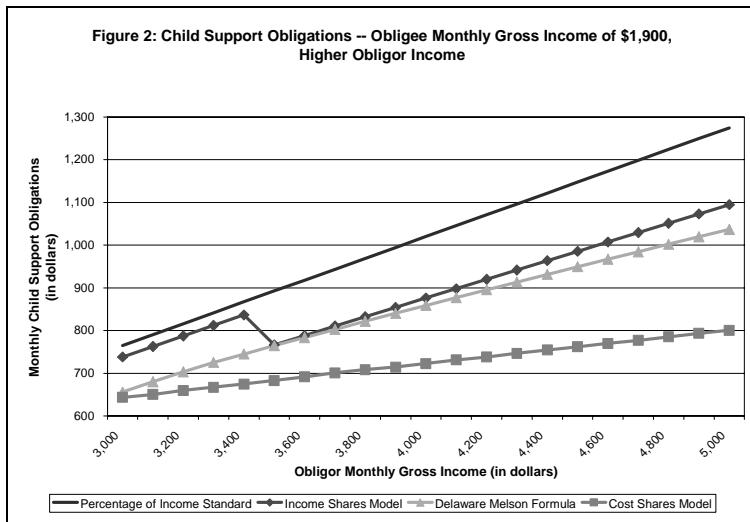
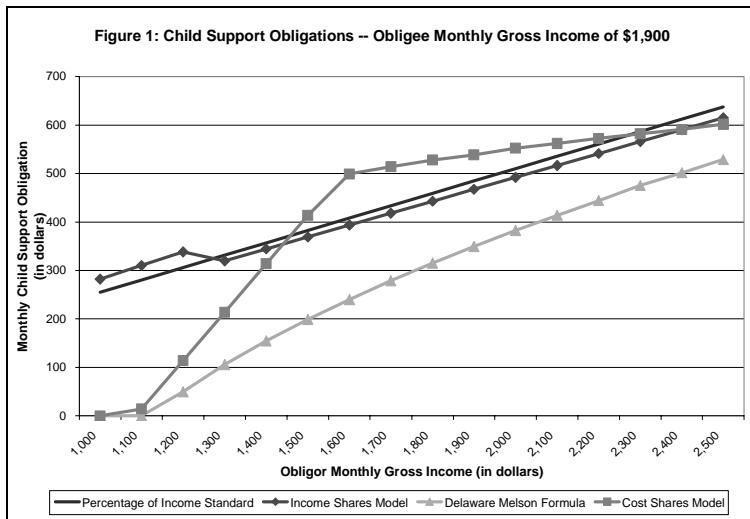
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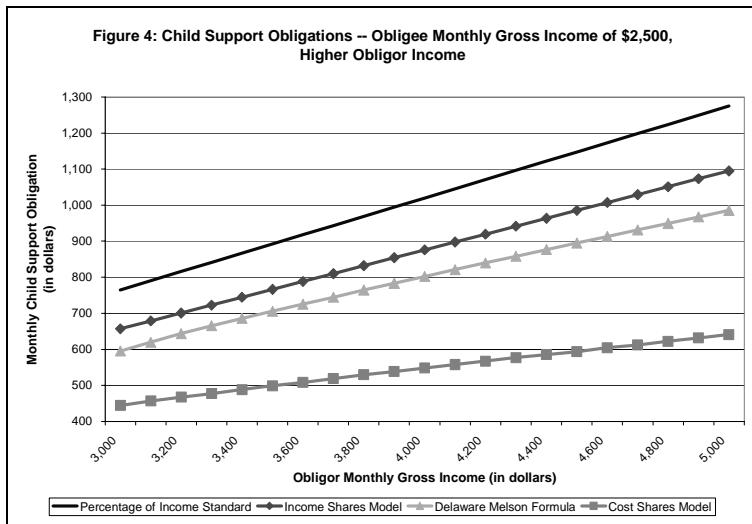
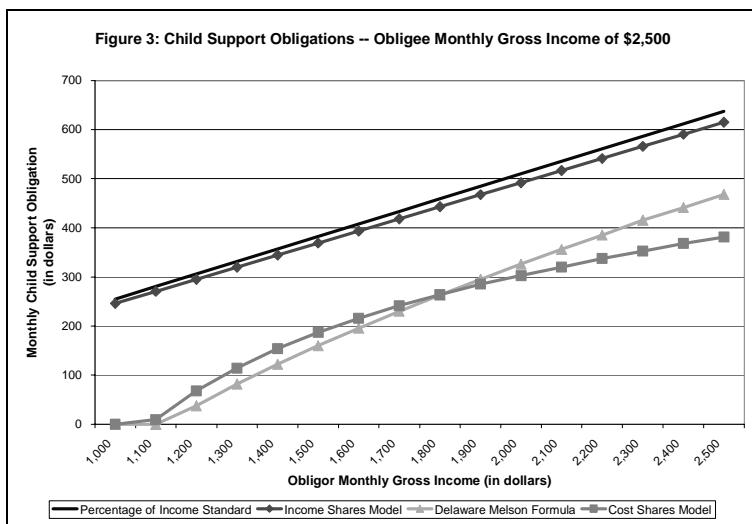
<sup>107</sup> See The Family Court of the State of Delaware: Delaware Child Support Formula Evaluation and Update, *supra* note 60. For the child support order calculation steps and Delaware's assumptions, see *supra* Part II.C. For a more detailed explanation of the calculation, see Venohr and Williams, *supra* note 23, at 16, and Charles T. Berry, *West Virginia Child Support Guidelines: The Melson Formula*, 97 W. VA. L. REV. 809, 815 (1995) (outlining a five-step process for applying the Melson Formula).

<sup>108</sup> See Rogers & Bieniewicz, *supra* note 59, at 13 – 22.

<sup>109</sup> \$1,900 is chosen as the lowest obligee income point because it is just above the approximately \$1,840 poverty threshold for a three person household in 2006. 2006 Federal Poverty Guidelines, *supra* note 92.

**1. Lower-Income Obligees: Obligee Incomes of \$1,900 and \$2,500**





Figures 1 and 2 present child support obligations to be paid by the non-custodial father (obligor) when the custodial mother's (obligee's) monthly gross income is \$1,900, with Figure 1 focusing on obligor income that is relatively low and Figure 2 focusing on obligor income that is relatively high. Similarly, Figures 3 and 4 present child support obligations to be paid by the non-custodial father when the custodial mother's income is \$2,500, again with Figure 3 focusing on obligor income that is relatively low and Figure 4 focusing on

obligor income that is relatively high. These graphs, as do the subsequent graphs, demonstrate that in balancing the interests implicated in splitting one household into two, the guidelines produce divergent, sometimes substantially divergent, child support obligations.

Unsurprisingly, the percentage of income standard yields higher child support obligations across all income points except in the rare instance illustrated in Figure 1 in which the obligee's monthly income is very low *and* the obligor's monthly income is very low.<sup>110</sup> First, when the obligor's monthly income is just above the poverty level, the Income Shares model yields higher child support obligations.<sup>111</sup> This result is consistent with the Income Shares model's initial reliance on economic data regarding what parents spend on children in intact households.<sup>112</sup> It is at these very low income levels that the Income Shares model requires parents to spend a substantial portion of their incomes on their children, even more so than the strict percentage used by the percentage of income standard. But, as evident by comparing Figures 1 and 2, as the combined parents' income increases (and the obligor's income rises and diverges), the Income Shares model quickly yields increasingly lower child support obligations, confirming that the Income Shares model overall yields lower obligations than the percentage of income standard, especially as the parents' income diverges.<sup>113</sup>

Second, when the obligor's monthly income is slightly above the poverty level, the Cost Shares model yields higher child support obligations. This result is consistent with the Cost Shares model's reliance on economic data concerning

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<sup>110</sup> When the obligee's monthly gross income is \$2,200, the Income Shares model yields child support orders lower than the percentage of income standard; when the obligee's monthly gross income is \$2,100, the Cost Shares model yields child support orders lower than the percentage of income standard.

<sup>111</sup> Approximately \$1,090 is the poverty threshold for a single person household in 2006. 2006 Federal Poverty Guidelines, *supra* note 92.

<sup>112</sup> See *supra* notes 46 – 49 and accompanying text.

<sup>113</sup> See *supra* Part II.B. This result is also confirmed by subsequent Figures.

what parents spend on their children after household dissolution and with its explicit inclusion of poverty thresholds for both parents.<sup>114</sup> As the Cost Shares model does not require parents to pay any child support until their income is greater than 133 percent of the applicable poverty level,<sup>115</sup> as evidenced by Figure 1, it is not until the obligor's income is \$1,100 per month that he is required to pay child support. At that point, as evidenced by the steep upward order as obligor income rises, the obligor is required to pay as much as he can in order to meet the children's basic needs as determined by data concerning what parents spend on children after household dissolution. As evidenced by comparing Figures 1 and 2, once that basic need is met, the Cost Shares model yields lower child support obligations. Further, as evidenced in Figure 3, once the obligee's income is 133 percent above the poverty level, the obligee is required to contribute what she can in order to meet the children's basic needs, thereby decreasing what the obligor parent is required to pay.

Similarly, the Melson Formula's initial assumption that each parent should not pay any child support until his or her basic needs are met causes the Melson Formula to yield lower obligations when the parents' income is lower. When the obligee's income is \$1,000 or under, the obligee cannot afford any child support based on the assumed poverty level.<sup>116</sup> Conversely, when the obligor's income is above the poverty line, the Melson Formula's assumption that each parent should share marginal increases in his or her standard of living causes the obligor's child support obligation to rise so that he can share the increase in his standard of living with the children. These results are evidenced most clearly in Figures 1 and 3.

Figures 2 and 4 illustrate the criticism of the Melson Formula made in Part II.C: that although the Melson Formula provides an allowance for basic needs, it is those obligors whose income is toward the low end of "middle income" who are required to pay substantial portions of their income.

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<sup>114</sup> See *supra* notes 80 and 81.

<sup>115</sup> See Rogers & Bieniewicz, *supra* note 59, at 14, n. 16.

<sup>116</sup> *Supra* note 68.

Specifically, when the parent who is receiving child support has very low income, the Melson Formula expects the higher income-earning parent to pay a relatively high child support obligation in order to equalize the standards of living across the two households. However, this result is only true when the higher income-earning parent is making relatively low income, evidenced by the increasing divergence of child support obligations under the Melson Formula as compared to the Income Shares model at the tail-end of Figures 2 and 4. Yet it is at these income levels that the obligor is least able to pay such a high percentage of income. As noted (and rather intuitively), lower-to-middle-income obligors cannot realistically pay that high a percentage of their income, even when they cut expenses to the bare minimum.<sup>117</sup> And as explored in Part IV, these obligors will feel, and objectively will be, unable to pay their entire obligations. In contrast, as evidenced in Figures 2 and 4, and even in Figure 3, the Cost Shares model requires obligors to pay a much lower percentage of their income, which may be more realistic.

Further, Figures 2 and 4 confirm that the Melson Formula yields child support obligations similar, although lower, to those under the percentage of income standard and Income Shares model when the parents' income is similar, but produces less extreme standard of living differences between the two resulting households when the parents' income is divergent.<sup>118</sup> In particular, as the parents' incomes increase and diverge, the Melson Formula's obligations move away from those yielded by the Income Shares model.

Overall, Figures 1 – 4 demonstrate that the Cost Shares model, even at relatively low levels of obligor income, yields lower child support obligations. Though the Income Shares model's more robust calculations may yield lower obligations than the percentage of income standard, and the payment characteristics of obligors presented in Part IV demonstrate that the Melson Formula's even more robust calculations may yield still lower obligations than the Income Shares model,

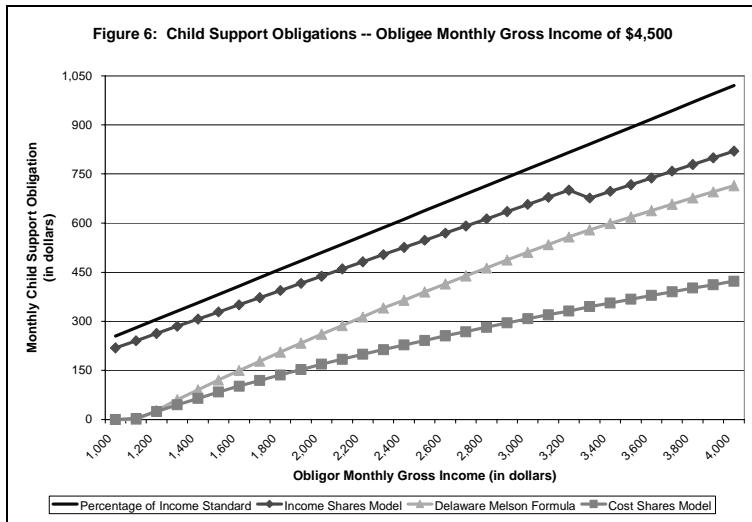
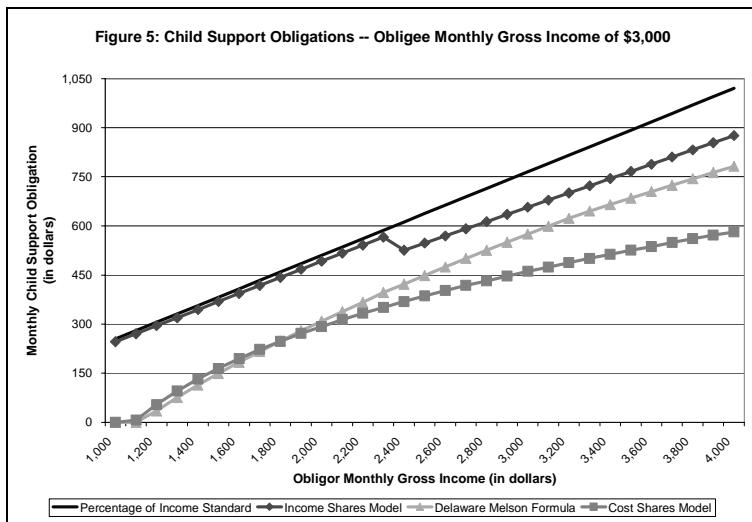
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<sup>117</sup> See *supra* notes 40 and 41, and accompanying text.

<sup>118</sup> See *supra* Part II.C.

those obligations still may not be low enough to allow lower-income obligors to feel that they are able to pay their entire obligations while maintaining an adequate standard of living, even if that standard only meets their minimum needs.<sup>119</sup>

## 2. Middle-Income Obligees: Obligee Income of \$3,000 and \$4,500



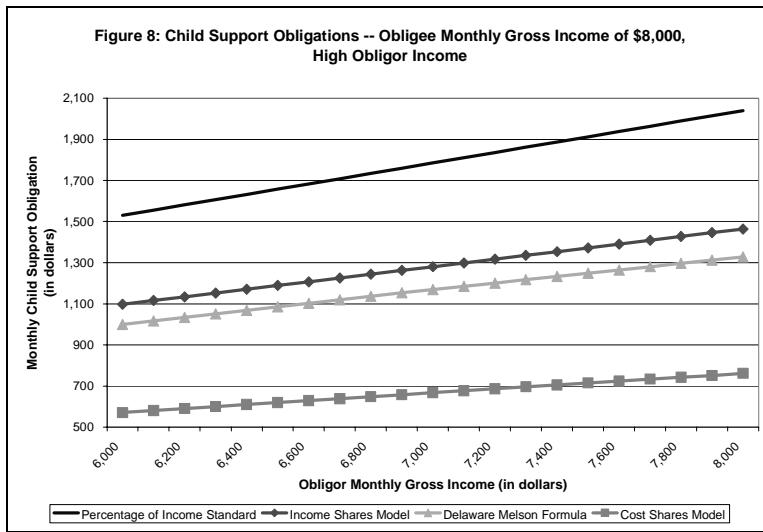
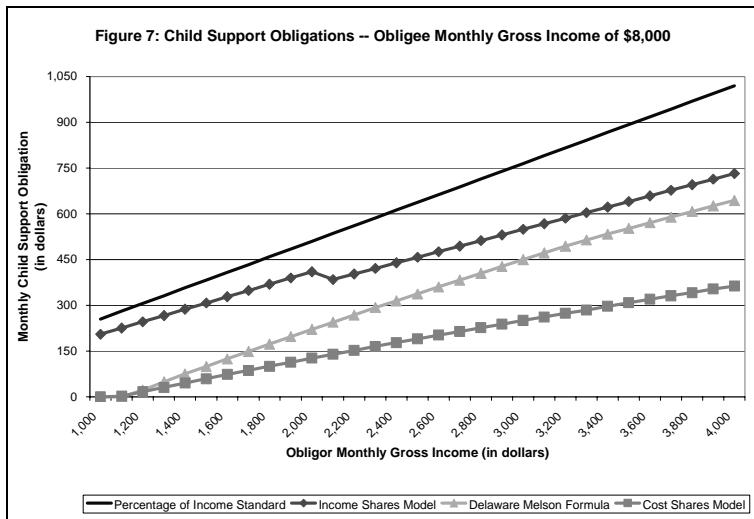
<sup>119</sup> See *supra* notes 40 and 41, and accompanying text.

Figure 5 presents child support obligations to be paid by the non-custodial father (obligor) when the custodial mother's (obligee's) monthly gross income is \$3,000, and Figure 6 presents child support obligations to be paid by the non-custodial father when the custodial mother's monthly gross income is \$4,500. These Figures reconfirm that the Income Shares model yields lower child support obligations as compared to the percentage of income standard and that the Melson Formula yields more divergent awards the more the parents' income differ. They also begin to demonstrate how much greater obligations under the percentage of income standard are as compared to the still relatively high Income Shares model. Further, these Figures show that the Cost Shares model yields increasingly lower child support obligations as obligee and obligor income increases, especially as compared to the Income Shares model enacted in a majority of states. Though the Cost Shares model may require obligors to pay a similar amount of child support when both parents' income is just above the poverty level, once one or both parents make above the poverty level, even if that amount is still considered lower-income, the obligor is required to pay an obligation that is increasingly lower than that required under current guidelines.<sup>120</sup>

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<sup>120</sup> In a few instances, as illustrated by Figures 1, 3, and 5, the Cost Shares model yields higher than or very similar obligations to the Melson Formula.

### 3. Higher-Income Obligees: Obligee Income of \$8,000



Figures 7 and 8 present child support obligations to be paid by the non-custodial father (obligor) when the custodial mother's (obligee's) monthly gross income is \$8,000, with Figure 7 focusing on relatively low obligor income and Figure 8 focusing on relatively high obligor income. These Figures, when compared to the previous Figures, illustrate that as the obligee's monthly income increases, the obligor is required to

pay consistently less in child support. They also further demonstrate how much greater obligations under the percentage of income standard are as compared to the still relatively high Income Shares model. Finally, they demonstrate how the Cost Shares model's reliance on economic data regarding expenditures by parents on their children after divorce translates to lower obligations, especially when the custodial parents make middle-to-high income.

### *C. Who Supports Which Guidelines And Which Guidelines Should They Really Support*

In addition to analyzing how the three prevailing guidelines and the Cost Shares model balance the legitimate interests inherent in the child support system, these calculations can be used to evaluate which guidelines each interested party impacted by the child support system (custodial parents, non-custodial parents, and children) should support. Custodial parents should favor guidelines that yield the highest child support obligation, allowing them to provide more for their children (and more for themselves as a byproduct of living with the children). Taking only the numerical obligation into account, among the three currently enacted guidelines, custodial parents generally should be in favor of the percentage of income standard or the Income Shares model that bases its obligations on gross income.<sup>121</sup> Likewise, non-custodial parents should favor guidelines that yield the lowest child support obligation, thereby paying less child support to the custodial parent and preserving their standard of living. Accordingly, taking only the numerical obligation into account, non-custodial parents generally should be in favor of the Income Shares model that is based on net income or the Delaware Melson Formula.

Yet, a more nuanced analysis of the guidelines may cause custodial and non-custodial parents to alter their

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<sup>121</sup> Though not demonstrated graphically, the gross income version of the Income Shares model tends to yield slightly higher obligations than that net income version of the Income Shares model. *See supra* Part II.B.

evaluation of which guidelines are more favorable to them. For example, the non-custodial parent may want to pay the custodial parent more in child support in order to provide his or her children with a better standard of living in the house where they spend most of their time, regardless of how an increased payment would benefit the custodial parent. Similarly, the custodial parent may want to ensure that the non-custodial parent does not pay so much child support that his or her standard of living decreases so drastically that the children are faced with an impoverished parent when they visit their non-custodial parent.<sup>122</sup>

These observations can be applied to analyze which guidelines children, through child advocates, should favor. Under the assumptions of this article, again taking only the numerical obligation into account, child advocates generally should favor the same guidelines as custodial parents because the children's standard of living will be improved by the higher child support payments that custodial parents desire. Again adopting a more nuanced approach, child advocates also may be attracted to guidelines that better ensure that custodial parents will receive payment from obligors, guidelines that provide higher payments to lower-income custodial parents, or guidelines that split the necessary decrease in standard of living between the two resulting households so that the children's parents will both live similarly.

If child advocates are concerned about lower-income parents receiving higher payments, they may be more likely to favor the Melson Formula. Similarly, if child advocates are concerned about both parents having a minimum standard of living, they should prefer the Melson Formula, which does not impoverish lower-income obligors as greatly as the other guidelines and requires higher-income parents to pay more money to lower-income parents even if the lower-income

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<sup>122</sup> "To privilege children's needs over their parents', we are forced to privilege the custodial parent over the absent parent. To privilege the claim of the wage earner on earnings, we weaken children's claim on their parents' aid, and put the provider of income ahead of the provider of care." Betson, *supra* note 3, at 19.

parent is the non-custodial parent. However, because the Melson Formula still yields relatively high orders for low-to-middle-income (though not very low income) obligors,<sup>123</sup> child advocates that are concerned about custodial parents receiving payment from obligors may be reluctant to favor it. Further, as with the percentage of income standard and the Income Shares model, the Melson Formula yields high absolute obligations when obligor income is middle-to-high.<sup>124</sup> Obligors faced with such a high child support order, even if it is proportionately small relative to their total income, may refuse to pay the order on the principle that it is too high and unfairly elevates the standard of living of the custodial parent or for some other reason.

The Cost Shares model remedies these defects: it yields lower child support obligations at almost every income level as compared to all three prevailing guidelines. Hence, the Cost Shares model can be viewed as guarding against obligor non-payment, both voluntary non-payment and non-payment because of financial constraints,<sup>125</sup> while still addressing concerns about each parent maintaining a minimum standard of living.

The next part of this article explores why some obligors do not pay their child support obligations and what causes parents and judges to deviate from the guidelines to provide evidence that supports the contention that the Cost Shares model is a better alternative to currently enacted child support guidelines.

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<sup>123</sup> *Supra* Figures 2 and 4.

<sup>124</sup> *Supra* Figures 5 – 8.

<sup>125</sup> These financial constraints may be better termed “perceived financial constraints,” because, as will be discussed in Part IV.A, most currently enacted guidelines treat lower-income obligors differently to ensure that they have enough money after their child support orders have been paid in order to meet their basic needs. However, the guidelines set the amount of income necessary to meet basic needs at the poverty line. *Infra* Part IV.A. This income level may not be enough for the obligor to meet his or her basic needs for a variety of reasons, causing the obligor not to pay the child support order because of financial constraints. *Supra* notes 40, 41.

#### **IV. Obligor Payment and Judicial Deviation Characteristics**

Nationally \$105.4 billion was owed in past-due child support in 2006, an increase from the \$96 billion owed in 2003.<sup>126</sup> This part first discusses the treatment of lower-income and higher-income obligors under currently enacted child support guidelines. It then presents evidence concerning when and why some obligors do not pay their child support obligations, and when and why some parents and judges deviate upwards from the presumptive child support obligation yielded by the guidelines.

##### *A. Current Treatment of Lower-Income Obligors*

According to a 2003 study, non-custodial parents that earn \$10,000 or less (in 2003) owe approximately 70% of past-due child support.<sup>127</sup> Other studies have “found that child support awards are set above what poor nonresidential parents can reasonably pay and sometimes exceed the nonresidential parent's income.”<sup>128</sup> States have incorporated the findings of these studies and other evidence into their guidelines by treating lower-income parents differently.<sup>129</sup> The majority of states have written a self-support reserve for non-custodial parents into their guidelines.<sup>130</sup> For example, Minnesota, which uses the percentage of income standard, applies a lower

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<sup>126</sup> Soreson, et al., *Assessing Child Support Arrears in Nine Large States and the Nation*, 1 (2007), <http://aspe.hhs.gov/hsp/07/assessing-CS-debt/index.htm> (last visited Nov. 17, 2008); Jane C. Venohr & Tracy E. Griffith, *Child Support Guidelines: Issues and Reviews*, 43 FAM. CT. REV. 415, 425 (2005).

<sup>127</sup> Venohr & Griffith, *supra* note 126, at 425.

<sup>128</sup> *Id.*

<sup>129</sup> As of 2005, 39 states “includ[ed] an adjustment for nonresidential parents with near poverty income.” *Id.*

<sup>130</sup> As of 2005, 28 states provided a self-support reserve. *Id.* “The self-support reserve ensures that the nonresidential parent's income after payment of child support is sufficient to at least provide a subsistence level of living. Typically, if the self-support reserve is applied, the support award is based on the difference between the nonresidential parent's net income and the self-support reserve.” *Id.*

percentage to lower-income obligors.<sup>131</sup> Similarly, some states using the Income Shares model do not require lower-income obligors to pay more than a minimal amount of support unless the obligor's income is above the poverty level.<sup>132</sup>

However, when both obligee and obligor have low incomes, providing an adjustment for lower-income obligors presents a difficult decision between adopting guidelines that yield an obligation low enough that the lower-income obligor will be able to pay, and adopting guidelines that yield a high enough obligation that lower-income obligees will be able to support their children.<sup>133</sup> In these situations, some guidelines effectively provide higher self-support reserves for non-custodial parents through lower allocation of remaining income to child support, while others allocate any extra income after meeting the poverty threshold to child support.<sup>134</sup> The evidence discussed below in subpart C concerning the payment characteristics of lower-income obligors suggests that perhaps this decision should be made in favor of adopting guidelines that yield lower child support obligations so that lower-income obligors will be able to pay their entire obligation instead of not paying any of their obligation (in contrast to paying the proportion of their obligation they can afford) when faced with an entire obligation they are unable to afford.

### *B. Current Treatment of Higher-Income Obligors*

When the guidelines were first enacted, many states limited the range of their guidelines, thereby excluding higher-income households. Though the success of the guidelines has prompted states to extend the range of their guidelines, states wishing to amend their guidelines to include higher-income households remain constrained by the economic estimates of

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<sup>131</sup> Venohr & Williams, *supra* note 23, at 33.

<sup>132</sup> *Id.* at 33 – 34.

<sup>133</sup> *Id.* at 34 (“In some situations, there is simply not enough income to adequately provide for the obligor, obligee, and the children.”).

<sup>134</sup> For instance, compare the Income Shares model to the Delaware Melson Formula.

intact household expenditures on children that are unreliable when the parents' combined income is over \$180,000.<sup>135</sup> States have responded to this constraint in two main ways: first, “[i]n some instances states have adopted child support guidelines that do not have a maximum or cap on the income to which they apply but rather call for a fixed percentage of parental income to be allocated to child support no matter how high that income may be”; and, second, “[m]ore commonly, states have adopted child support guidelines that contain brackets applicable to combined parental income figures up to a maximum monthly amount.”<sup>136</sup> A small minority of states require that higher-income cases be decided on a case-by-case basis.<sup>137</sup>

In states that have adopted the first solution, higher-income cases usually prompt judges to consider the “appropriateness of deviation from the statutory guidelines.”<sup>138</sup> In states that have adopted the second solution, judges either assume that the obligation set by the guidelines is correct and require the parent to rebut this presumption by demonstrating that the obligation is inadequate or excessive, or entirely disregard the guidelines’ obligation and analyze the children’s needs and the parent’s ability to pay on a case-by-case basis.<sup>139</sup>

There are a number of arguments against applying a mechanical child support obligation calculation to higher-income individuals which lead judges to deviate from the guidelines in these cases. It is asserted that “[e]xcessively high child support awards run afoul of case law, which requires that support (1) not effectuate the distribution of the

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<sup>135</sup> Venohr & Williams, *supra* note 23, at 34.

<sup>136</sup> Hogan, *supra* note 11, at 350.

<sup>137</sup> Graves, *supra* note 2, at 298. “States . . . that make case-by-case determinations often specify the highest guideline amount as a presumptive floor.” *Id.*

<sup>138</sup> Hogan, *supra* note 11, at 350. “For example, it is certainly debatable whether an automatic award of eleven percent of the parent’s gross monthly income would be appropriate regardless of whether that income figure was \$10,000 or \$100,000.” *Id.*

<sup>139</sup> *Id.* at 350 – 51.

obligor's estate, (2) not provide an inappropriate windfall for the child, and (3) not preclude a parent's right to direct a child's lifestyle.”<sup>140</sup> Also, it is argued that a mechanical calculation does not accurately reflect the degree to which parental income spent on their children declines as their income increases.<sup>141</sup> These criticisms, combined with guidelines whose ranges may not extend to higher-income cases, prompt parents and judges to deviate from the guidelines in many higher-income cases,<sup>142</sup> a result that is informative and important when choosing guidelines, especially guidelines that yield lower child support obligations.

### C. Obligor Payment Characteristics

Identifying the payment and non-payment characteristics of obligors is crucial to understanding whether guidelines actually will be effective in providing custodial parents with the child support they need to take care of their children. Research has shown that characteristics of noncustodial parents (and, thus, mainly obligors, and mostly fathers<sup>143</sup>) are more important to understanding and predicting child support obligation payment than resident parents' characteristics.<sup>144</sup> Non-paying obligors do not pay their child support obligations for a number of reasons that fall into two broad categories: they do not have the financial resources to pay, or they do not want to and do not intend to pay despite having the financial capacity to do so.<sup>145</sup> Obligors that do not pay despite having the financial capacity to do so are truly “deadbeat dads,” whereas obligors that do not pay because

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<sup>140</sup> Graves, *supra* note 2, at 298.

<sup>141</sup> Hogan, *supra* note 11, at 351.

<sup>142</sup> See *supra* notes 10 – 12 and accompanying text.

<sup>143</sup> Smock & Manning, *supra* note 6 at 807.

<sup>144</sup> *Id.* (noting that “to understand the determinants of child support, information on the nonresident parent is crucial”).

<sup>145</sup> Venohr & Williams, *supra* note 7.

they do not have the financial resources to do so are better termed “turnips.”<sup>146</sup>

### 1. Deadbeat Dads

Though studies demonstrate that fathers with higher income and more education are more likely overall to pay their child support obligations, indicating that one determinant of paying child support is the ability to do so,<sup>147</sup> there are still a significant minority of fathers who refuse to fulfill their child support obligations despite having the financial capacity to do so. A 2001 study found that 42 percent of noncustodial fathers do not pay their child support obligations despite having “no apparent financial reason to shirk this responsibility.”<sup>148</sup> Similarly, a 1998 study found that between 34 and 41 percent of noncustodial fathers are able non-payers.<sup>149</sup>

What makes these fathers choose not to pay? In addition to higher income and more education, research indicates that fathers are more likely to pay child support to

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<sup>146</sup> The term “turnip” is adapted from Ronald B. Mincey & Elain J. Sorensen, *Deadbeats and Turnips in Child Support Reform*, 17 J. POL’Y ANALYSIS & MGMT. 44 (1998) (noting that the term “turnip” comes from the common saying that “you can’t get blood from a turnip”).

<sup>147</sup> See Todd K. Shackelford, et. al., *An Evolutionary Perspective On Why Some Men Refuse Or Reduce Their Child Support Payments*, 27 BASIC & APPLIED SOC. PSYCH. 297, 298 (2005); Judi Bartfeld & Daniel R. Meyer, *Child Support Compliance Among Discretionary And Nondiscretionary Obligors*, 77 SOC. SERV. REV. 347, 349 (2003) (“Ability to pay is strongly linked to compliance in the empirical literature.”). Studies have linked ability to pay with compliance for over a decade. For example, a 1996 study found that “[c]ompliance is higher among cases with greater ability to pay. Compliance increases dramatically with income, although it does fall somewhat for the highest income payers. . . . Compliance also varies with the relative burden of support orders.” Daniel R. Meyer & Judi Bartfeld, *Compliance with Child Support Orders In Divorce Cases*, 58 J. OF MARRIAGE & THE FAMILY 201, 205 (1996).

<sup>148</sup> Elaine Sorensen & Chava Zibman, *Getting to Know Poor Fathers Who Do Not Pay Child Support*, 75 SOC. SERV. REV. 421, 422 (2001). This is the most recent estimate of noncustodial fathers. Marcia Cancian & Daniel R. Meyer, *Fathers of Children Receiving Welfare: Can They Provide More Child Support?*, SOC. SERV. REV. 179, 201 (2004).

<sup>149</sup> Mincey & Sorensen, *supra* note 146, at 47.

women to whom they previously had been married or with whom they have maintained an amicable relationship, and if they live close to or visit frequently with their children.<sup>150</sup> In contrast, fathers are less likely to pay when they feel their child support obligations are numerically unfair<sup>151</sup> and, more qualitatively, when they feel they do not know how their money is being spent, such as when the custodial mother denies them access to their children or they merely have limited access to their children.<sup>152</sup> They also may not pay in order to spite the custodial mother with whom they have a contentious relationship, even if in doing so they harm their children.<sup>153</sup>

Further, particularly in the case of a lower-income father who has the financial ability to fulfill his obligation but nevertheless chooses not to do so, if the custodial parent receiving the money to be spent on the children also receives welfare, in an attempt to recoup welfare expenditures, the federal government forces the custodial parent to assign her

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<sup>150</sup> Shackelford, *supra* note 147, at 298 – 99. See also Lenna Nepomnyaschy, *Child Support and Father-Child Contact: Testing Reciprocal Pathways*, 44 DEMOGRAPHY 93 (2007) (discussing the relationship between noncustodial fathers' payment of child support obligations and contact with their children); Henry, *supra* note 7, at 264 (asserting that "the obligor's access to the child" is one of the three most important predictors of compliance with child support obligations).

<sup>151</sup> See I-Fen Lin, *Perceived Fairness and Compliance with Child Support Obligations*, 62 J. OF MARRIAGE & THE FAMILY 388 (2000) (finding that perceived fairness of child support obligations increases father's compliance and that perceived fairness can be increased by decreasing child support obligations); Henry, *supra* note 7, at 264 (asserting that "the fairness of the order" is one of the three most important predictors of compliance with child support obligations); Daniel R. Meyer, *Fathers and the Child Support System*, in CHILD SUPPORT: THE NEXT FRONTIER 88, 93 (J. Thomas Oldham & Marygold S. Melli, eds., 2000) (noting that "when fathers have discretion about whether they will pay . . . those who think their orders are fair pay more support").

<sup>152</sup> Henry, *supra* note 7; Shackelford, *supra* note 147, at 301.

<sup>153</sup> Shackelford, *supra* note 147, at 302 – 03. See generally Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921 (2005).

award to the federal government.<sup>154</sup> When faced with effectively paying their child support obligations to the federal government, non-custodial parents may refuse to pay those obligations for a variety of reasons. Non-custodial parents may refuse to pay because they cannot trace how their money is being spent. They also may refuse to pay because they anticipate that custodial parents will unfairly use money meant for the children on themselves as the welfare payments they receive combine money that is meant to support both the parents and the children and money that is meant to support solely the children, making it difficult to separate what portion of the payments should be spent on whom. Additionally, under these circumstances and in other situations in which obligors fear that money meant for their children will be spent by custodial parents on themselves, obligors may choose to provide in-kind transfer—such as buying food, clothing, and other necessities for the children—rather than make a monetary payment, thereby providing for their children, but technically not fulfilling their child support obligations.<sup>155</sup>

Although there is no research regarding what portion of fathers do not pay their child support obligations because of these more qualitative concerns, it can be assumed that fathers who choose not to pay are more likely to do so because of factors that cannot be remedied by lowering numerical child support obligations. As noted, fathers who are more educated and earn higher incomes are more likely to pay their child support obligations. Part of the reason why these fathers are more likely to pay undoubtedly stems from their ability to pay, but part of the reason likely comes from an understanding that monetary support is important for their children's well-being and development.<sup>156</sup> Even if many of these fathers feel that

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<sup>154</sup> Ronald K. Henry, *Child Support Policy and the Unintended Consequences of Good Intentions*, in THE LAW AND ECONOMICS OF CHILD SUPPORT PAYMENTS 128, 128 (William S. Comanor, ed., 2004).

<sup>155</sup> Robert J. Willis, *Child Support and the Problem of Economic Incentives*, in THE LAW AND ECONOMICS OF CHILD SUPPORT PAYMENTS 31, 47 (William S. Comanor, ed., 2004) ("[A] non-custodial father will always prefer to make in-kind transfers to the child instead of giving fungible transfers to the mother in order to avoid leakages . . .").

<sup>156</sup> Shackelford, *supra* note 147, at 298 – 99.

their child support obligations are numerically unfair, it is likely that these educated fathers will pay the obligation despite their stance on its fairness.

In addition, higher income fathers are more likely to have steady salaries, making wage garnishment a more powerful threat, both in that garnishment likely would be successful, and in that such an action carries a stigma higher income individuals may be anxious to avoid.<sup>157</sup> Also, as shown by census data, higher income women and men tend to marry each other, and, thus, upon divorce, tend to collect child support from each other.<sup>158</sup> Higher income custodial parents may have better resources, more time, and more motivation to enforce child support orders—such as hiring lawyers or alerting child support enforcement offices to non-payment (and then following up with them)—thereby increasing the incentives for non-custodial parents to pay their obligations in order to avoid such measures. Therefore, most fathers who choose not to pay their obligations withhold support based on qualitative concerns child support guidelines almost certainly cannot address.

## 2. Turnips

As of 2001, there were 2.5 million noncustodial fathers (26 percent of all noncustodial fathers) whose financial resources were so limited that they had little, and in many cases, no ability to pay their child support obligations.<sup>159</sup> Research finds that whereas nearly all noncustodial fathers who did pay child support had incomes above the poverty

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<sup>157</sup> Wage garnishment is one method by which payment of child support obligations can be forced. Other methods include moving for license revocation, attaching tax refunds, placing a lien on property, and filing a contempt motion. *Collecting Past Due Child Support*, Lawyers.com, <http://family-law.lawyers.com/child-support/Collecting-Past-Due-Child-Support.html> (last visited Nov. 17, 2008).

<sup>158</sup> See United States Census Bureau, <http://www.census.gov/hhes/www/income/income.html> (last visited Nov. 17, 2008).

<sup>159</sup> Sorensen & Zibman, *supra* note 148, at 430. See also Bartfeld and Meyer, *supra* note 147, at 349 (noting the “importance of the burden of the support order,” defined as “the amount owed in support, relative to actual income” in assessing ability to pay).

level, only three percent of nonresident fathers with income below the poverty level paid child support.<sup>160</sup> Similarly, a 1998 study found that between 16 and 33 percent of young noncustodial fathers cannot afford to pay their child support obligations, and a 1997 study found that at least 15 percent and as many as 25 percent of noncustodial fathers qualify as poor.<sup>161</sup>

Further, as of 2001, there were at least one million noncustodial fathers who qualified as poor who nevertheless still paid their child support obligations, evidencing that many other poor noncustodial fathers likely would pay their obligation if they were financially able to do so.<sup>162</sup> Thus, as of 2001, there were over 3.5 million noncustodial fathers (approximately 36 percent of all noncustodial fathers) who had very low incomes.<sup>163</sup> Studies find that compliance rates increase as noncustodial fathers' income increases further evidencing that the relative burden of the child support obligation is important in assessing whether a lower-income father will be able financially to pay his obligation.<sup>164</sup>

Fathers may be too poor to afford their entire child support obligations for an amalgam of reasons. Research has estimated that 60 percent of lower-income fathers are of a racial or ethnic minority, that only two percent of lower-income fathers have a college degree, that 42 percent of lower-

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<sup>160</sup> Sorensen & Zibman, *supra* note 148, at 422 – 23.

<sup>161</sup> Mincey & Sorensen, *supra* note 146, at 47; Elaine Sorensen, *A National Profile of Nonresident Fathers and Their Ability to Pay Child Support*, 59 J. OF MARRIAGE AND THE FAMILY 785, 791 (2007) (noting that these estimates are “considerably higher than the poverty rate among self-reporting nonresident fathers”).

<sup>162</sup> Elaine Sorensen & Helen Oliver, *Policy Reforms Are Needed to Increase Child Support From Poor Fathers*, 2 (2002), available at <http://www.urban.org/uploadedPDF/410477.pdf> (noting that “[o]ne quarter of these fathers are paying more than 50 percent of their gross income in child support” and that “among non-poor fathers, only 2 percent pay [that] much”).

<sup>163</sup> *Id.* at 4.

<sup>164</sup> Meyer and Bartfeld, *supra* note 147, at 211 (noting that results of their study “suggest that guidelines that require more than 30% of the father’s income may involve a trade-off in the form of lower compliance”).

income fathers do not have a high school diploma, and that lower-income fathers' employment status changes often, causing them to work much less than full-time on a per annum basis.<sup>165</sup> These characteristics make it difficult for lower-income fathers to find stable work with a salary adequate to lift them out of poverty, with lack of education, lack of work experience, and poor health proving to be the largest obstacles.<sup>166</sup> Without stable employment, lower-income fathers have trouble maintaining regular child support payments because of their fluctuating weekly and monthly income.<sup>167</sup> These findings have prompted commentators to urge for the implementation of programs designed to provide lower-income fathers with greater access to employment-related services and work-support systems.<sup>168</sup>

In addition, evidence shows that lack of stable formal employment not only decreases lower-income fathers' financial ability to pay their child support obligations, but also that being removed from the child support payment enforcement system associated with formal employment causes these lower-income fathers to not pay their obligations

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<sup>165</sup> Sorensen and Zibman, *supra* note 148, at 423 – 24; Sorensen and Oliver, *supra* note 160, at 5 – 7.

<sup>166</sup> Sorensen and Zibman, *supra* note 148, at 425; Mincey & Sorensen, *supra* note 146, at 48 (“[Turnips] are younger, less educated, more likely to be African American, and more likely to have less work experience.”); Henry, *supra* note 7, at 264 (asserting that “the obligor’s work stability” is one of the three most important predictors of compliance with child support obligations).

<sup>167</sup> Maureen R. Waller & Robert Plotnick, *Effective Child Support Policy for Low-Income Families: Evidence from Street Level Research*, 20 J. OF POL’Y ANALYSIS AND MGMT. 89, 103 (2001) (“[Lower-income] fathers have problems with paying regular support when they have irregular employment. Because their jobs [are] often part-time, temporary, or low-paying, they find it hard to make child support payments and meet their own basic expenses at the same time.”).

<sup>168</sup> Sorensen and Zibman, *supra* note 148, at 430 – 31; Cancian & Meyer, *supra* note 148, at 202 (“Only by increasing nonresident fathers’ earning capacity can child support serve to substantially decrease the poverty of resident mothers and their children without increasing it among nonresident fathers.”); Shackelford, *supra* note 147, at 304 (“We suspect that job training that leads to better jobs or perhaps to any job will increase the reliability with which child support is paid by noncustodial fathers.”).

based on some of the individual qualitative payment preference factors associated with able non-payers.<sup>169</sup> For example, a lower-income father who has the financial capacity to pay a portion of his obligation may decide not to pay any of it without prompting from the enforcement system associated with stable formal employment, such as the routine withholding of child support from the obligor's income and the requirement that employers report new hires to a central database.<sup>170</sup>

Also, a sizable majority of nonpaying fathers owe substantial amounts of child support in arrearages. There is evidence that when faced with such daunting amounts they are unlikely to be able to pay off, even if they have enough income to pay their monthly child support obligations, lower-income fathers tend to not pay either their monthly or arrearage obligations.<sup>171</sup> Commentators have suggested establishing "arrearage amnesty programs" to encourage these fathers to pay their obligations as they become financially able to do so, thereby ensuring that lower-income fathers that can afford to pay and want to pay their obligations are not discouraged by unrealistic arrearage obligations.<sup>172</sup>

Beyond hypothesizing about what steps can be taken to improve the financial capacity of lower-income fathers and how such efforts may decrease the percentage of lower-income fathers financially unable to pay their current child support obligations, the results of these studies also lead commentators to call for modifications to child support guidelines so that resulting child support obligations are more reflective of lower-income fathers' economic

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<sup>169</sup> Bartfeld & Meyer, *supra* note 147, at 364 – 65.

<sup>170</sup> *Id.* at 349.

<sup>171</sup> *Id.* at 365.

<sup>172</sup> *Id.* See also Sorensen & Oliver, *supra* note 162, at 14 (noting that current arrearage policies "result in large arrears that poor fathers cannot pay"); Waller & Plotnick, *supra* note 167, at 104 ("Fathers who feel intimidated or overwhelmed by child support enforcement may ignore child support orders and accumulate substantial arrearages.").

circumstances.<sup>173</sup> Similarly, fathers' rights groups have cited this and other research in maintaining that current child support guidelines leave lower-income fathers in "an economically untenable position."<sup>174</sup> Fathers' rights groups contend that lower-income fathers often have difficulty financially taking care of themselves, let alone financially providing for their children, a situation that most current child support guidelines fail to appreciate.<sup>175</sup>

The observation that lower-income fathers spend what money they have on their immediate needs is bolstered by research concerning the bankruptcy rates and characteristics of middle-class families.<sup>176</sup> Even post-divorce middle-income fathers find it difficult to pay for rent, other necessities, and incidental unforeseen costs, and still have enough money to meet their child support obligations.<sup>177</sup> These are fathers who feel terrible about potentially shirking their obligations, so terrible that bankruptcy and its stigma appear to be the best option.<sup>178</sup> If middle-income fathers, many with ex-wives who are earning a similar income, are in such a "financial maelstrom"<sup>179</sup> that they are turning to bankruptcy, it is logical that lower-income fathers, especially those with ex-spouses with income just above the poverty level, and thus higher child support obligations, also have difficulty meeting their entire obligations despite their best intentions. Moreover, middle-income fathers are not the target of the work-support and "arrearage amnesty" programs that commentators advocate,

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<sup>173</sup> See Mincey & Sorensen, *supra* note 146, at 48; Sorensen & Oliver, *supra* note 162, at 13.

<sup>174</sup> CROWLEY, *supra* note 9, at 163.

<sup>175</sup> *Id.* at 163, 189.

<sup>176</sup> WARREN & TYAGI, *supra* note 40, at 97 – 122.

<sup>177</sup> *Id.* at 120 ("We estimate that more than 160,000 with child support and alimony obligations will end up in bankruptcy in [2003] alone . . . [making] fathers who owe child support more than three times more likely to file for bankruptcy than single men who don't owe support.").

<sup>178</sup> Bankruptcy does not allow these fathers to get out of paying their child support obligations. All child support (and alimony) obligations come through bankruptcy 100 percent "intact." Rather, bankruptcy discharges most other debt, such as credit card debt, that fathers have been building up in order to meet their child support obligations every month. *Id.*

<sup>179</sup> *Id.*

yet they have trouble meeting their obligations too. “Arrearage amnesty” programs certainly may help lower-income fathers, who are perhaps the most likely to forgo paying their entire obligations even if they can pay a portion.<sup>180</sup> However, the fact that middle-income fathers also are having a difficult time meeting their obligations may further indicate that current child support guidelines do not reflect economic reality and that the increased payment of child support cannot be induced solely through programs such as work support and “arrearage amnesty.”

Indeed, research shows that lower-income fathers “tend to have the actual means to pay small support awards on a consistent basis.”<sup>181</sup> For example, one study found that on average noncustodial fathers “are able to pay nearly five times more in child support than they currently pay,” but that this “ability to pay differs substantially by the race, marital status, and poverty status of the custodial mother.”<sup>182</sup> Another study found that lower absolute child support obligations result in higher compliance among lower-income noncustodial fathers.<sup>183</sup>

Lower-income fathers’ ability to pay some, but not all, of their obligations becomes important when evaluating the various child support guidelines. As evidenced by the graphs in Part III.B, current guidelines yield higher obligations for the noncustodial parent across the income spectrum when the

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<sup>180</sup> As middle-income fathers are turning to bankruptcy, which does not discharge their child support obligations, it can be assumed that they are more likely to pay as much of their obligations as possible. This assumption is consistent with the observations in Part IV.C.1 concerning payment characteristics of fathers with higher education and more stable incomes.

<sup>181</sup> CROWLEY, *supra* note 9, at 165.

<sup>182</sup> Cynthia Miller, et al., *Child Support in the U.S.: Can Fathers Afford To Pay More?*, 43 REV. OF INC. & WEALTH 261, 278 – 79 (1997); Sorensen, *supra* note 161 (finding that on average noncustodial fathers can increase their child support payments).

<sup>183</sup> CROWLEY, *supra* note 9, at 165; Judi Bartfeld & Daniel R. Meyer, *Are There Really Deadbeat Dads?: The Relationship Between Ability to Pay, Enforcement, and Compliance in Nonmarital Child Support Cases*, 68 SOC. SERV. REV. 219 (1994).

custodial parent has lower income. Yet it is when the noncustodial parent has low income that he is least able to pay a high percentage of his income in child support. Child support guidelines that yield lower obligations may allow a portion of lower-income fathers to be able financially to pay their child support obligations. Accordingly, based on the evidence regarding the payment characteristics of lower-income fathers, unlike true deadbeat dads, child support guidelines have the potential to decrease the percentage of lower-income fathers who do not pay their child support obligations, thereby increasing the aggregate amount of child support paid, especially the aggregate amount paid to children from lower-income households.

#### *D. Deviation Characteristics*

In addition to focusing on obligor payment characteristics, research also has explored when and why parents and judges deviate from the presumptive obligation yielded by child support guidelines. Evidence spanning a decade shows that some divorcing and divorced parents deviate upward from or otherwise modify the presumptive obligations yielded by the guidelines in an effort to better reflect the costs of continuing to raise their children at their current standard of living and to better replicate how they provided for their children pre-divorce. For example, a 2003 study which explored what obligors voluntarily bear in terms of child-related expenses over and above their mandated child support obligations found that many noncustodial fathers, including noncustodial fathers who spend little time (less than 30%) with their children, provide direct financial support to their children over and above their child support obligations.<sup>184</sup> Similarly, a 1993 study found that divorced parents modify their child support arrangements in response to changing circumstances and that a substantial minority of divorced parents informally modify (i.e., modifications not reported to the court) the presumptive child support obligation

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<sup>184</sup> William V. Fabricius & Sanford L. Braver, *Non-Child Support Expenditures On Children By Nonresidential Divorced Fathers: Results Of A Study*, 41 FAM. CT. REV. 321 (2003).

within a few months of divorce; further, in both instances, these deviations are predominately upward.<sup>185</sup>

Some upward deviations are the product of negotiations during divorce proceedings.<sup>186</sup> For example, noncustodial fathers may bargain for more visitations in return for paying increased child support, or for more favorable property division in exchange for increased child support payments.<sup>187</sup> In most instances, it is the presence of one higher earning parent that leads to such bargaining.<sup>188</sup> In line with this observation, studies of higher-income cases demonstrate that higher-income parents tend to deviate from the guidelines in favor of considering the unique aspects of their specific circumstances, especially when the current guidelines do not extend to their financial situation, as discussed in Part IV.B.<sup>189</sup> Also as noted in Part IV.B, judges endorse such deviations from the guidelines, especially when presented with one higher-earning parent.<sup>190</sup> In addition, evident by the discussion of the current treatment of higher-income obligors, sometimes judges are forced to deviate from the guidelines in setting child support obligations because the guidelines do not extend to the income level of the divorcing couple appearing before the judge.

Some deviations are the product of informal negotiations months or years after a divorce is finalized. For example, there is evidence that while generally believing that the child support system is productive and compliance with the formal system is important, lower-income parents tend to deviate from their presumptive child support obligations when “they perceive them to be unfair, counterproductive, or

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<sup>185</sup> H. Elizabeth Peters, et al., *Enforcing Divorce Settlements: Evidence from Child Support Compliance and Award Modifications*, 30 DEMOGRAPHY 719, 724 (1993) (finding that 15 to 30 percent of divorced parents modify the financial portion of their divorce settlement within three years of divorce, with 80 percent of these modifications constituting informal changes not reported to the court).

<sup>186</sup> Altman, *supra* note 10.

<sup>187</sup> *Id.* at 495 – 96; Erickson, *supra* note 10, at 837 – 38.

<sup>188</sup> Altman, *supra* note 10.

<sup>189</sup> Hogan, *supra* note 11.

<sup>190</sup> *Id.*

punitive.”<sup>191</sup> In recognition of the poor noncustodial fathers’ financial situation, custodial mothers will accept in-kind payments, such as diapers, toys, clothing, and shoes, in exchange for formal cash child support payments.<sup>192</sup> Some noncustodial fathers, both poor and more financially able, have emphasized that they prefer these in-kind payments to be recognized as fulfilling a portion of their child support obligation because such payments allow them to feel they have more control over how their money is spent and because such payments provide their children with tangible reminders of them.<sup>193</sup> While in the case of poor noncustodial fathers, custodial mothers may informally negotiate with the noncustodial fathers to allow such payments to be recognized as fulfilling a portion of the fathers’ support obligations, in the case of more financially able fathers, custodial mothers may view such in-kind payments as a necessary addition to the child support obligations yielded by the guidelines, thereby requiring that middle and high income fathers pay more in child support than that mandated by the guidelines, with the fathers agreeing to do so by way of in-kind payments.

Accordingly, in a percentage of cases involving middle or high income parents, it can be assumed that the presumptive guidelines will be used merely as guidance. Such an assumption appears valid in light of evidence that lower absolute child support obligations have no impact in terms of compliance among middle and high income noncustodial fathers.<sup>194</sup> The next part of this article connects this evidence concerning deviation from the presumptive obligations yielded by the child support guidelines and the evidence regarding obligor payment characteristics with the obligations yielded by the currently enacted child support guidelines to present a case for the Cost Shares model.

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<sup>191</sup> Waller and Plotnick, *supra* note 167, at 90.

<sup>192</sup> *Id.* at 100.

<sup>193</sup> *Id.*

<sup>194</sup> CROWLEY, *supra* note 9, at 165; Bartfeld and Meyer, *supra* note 183.

## V. The Case for the Cost Shares Model

Currently enacted child support guidelines focus primarily on preserving children's pre-divorce standard of living, debating how best to balance the trade-offs implicit in splitting one household into two after starting from this assumption. Alternatively, guidelines could incorporate an assessment of the ability of obligors to pay their obligations into this balancing. One proposed child support guideline does this. By calculating child support obligations based on what parents spend on children post-separation, the Cost Shares model implicitly takes into account ability to pay. It is this consideration which leads it to yield obligations that not only are more likely to be paid, but also that are more likely to generate greater payment amounts on average based on evidence of when obligors pay or do not pay their obligations even when they are financially able to pay. This makes the Cost Shares model a better alternative to current guidelines.

Though generating greater child support payment amounts could be achieved by increasing individual child support obligations yielded by guidelines, which proposals such as the ALI's Principles do, it is perhaps better achieved through encouraging actual payment of obligations. Combining the payment and deviation characteristics discussed in Part IV indicates that child support guidelines themselves, and not merely enforcement mechanisms, can encourage payment. This synthesis consists of three postulates.

First, even though lower income noncustodial fathers do have the financial ability to pay a portion of their child support obligations, when faced with the inability to fulfill their entire obligations, some are dissuaded from making even a portion of the required payments, although they would fulfill their obligations if they were financially able to meet them in their entirety.<sup>195</sup> It is reasonable to postulate that child support

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<sup>195</sup> See generally Kimberly A. Folse, *The Child Support Obligation, Non-Custodial Parental Income And Compliance: Data Collection Strategies*, 26 J. SOC. SERV. RESEARCH 39 (1999) (noting that "[i]f full payment is the goal, then maybe having an order that is lower than the standard amount

guidelines which yield slightly lower obligations than currently enacted guidelines may allow a portion of these lower-income fathers to be financially able to pay their entire child support obligations, thereby providing more children with support. Though inevitably a percentage of lower-income fathers will choose not to pay their obligations for reasons unrelated to the numerical amount, such guidelines, like the Cost Shares model, have the potential to address a sizable proportion of non-payment by lower-income obligors.

Second, a minority of noncustodial fathers who have the financial means to pay their obligations refuse to do so for reasons unrelated to the numeric obligations. It is reasonable to postulate that their non-payment cannot be addressed by child support guidelines, an assumption that is confirmed by evidence that lower absolute obligations have no impact on compliance among middle and high income noncustodial fathers.<sup>196</sup>

Third, a proportion of middle and high income divorcing parents deviate upwards from or otherwise modify the presumptive obligations yielded by the guidelines. It also is reasonable to postulate that child support guidelines that provide lower obligations across the obligor income spectrum will not cause a sizable percentage of other financially able noncustodial fathers to modify their child support payments downward along with the revised guidelines; rather, they will continue paying what they had been previously. And perhaps, when taken in aggregate, those that do decrease their payments will be offset by increased payments by those higher-income obligors who formerly believed their obligations to be too high and, thus, refused to pay. Hence, enactment of child support guidelines that provide lower obligations across the obligor income spectrum, such as the Cost Shares model, likely will have little impact on payment by higher-income obligors.

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could be conducive to better payment, or better still, full payment" by lower-income obligors).

<sup>196</sup> Crowley, *supra* note 9.

Combining these postulates, it is evident that lowering presumptive child support obligations has the potential to increase payment of child support in the aggregate, particularly to children from lower-income households because it is lower-income obligors whose net payment amounts will increase the most when presumptive obligations are lowered. More lower-income obligors will be financially able to pay their obligations, while many higher-income obligors will continue paying the level of support that is already an upward deviation from or other modification of the current guidelines. Those higher-income obligors who do decrease their payments may be supplemented by increased payments from other higher-income obligors who previously felt their obligations to be too high. Though some obligors will decrease their payment levels along with the lower presumptive obligations, the aggregate decrease likely will not be as great as the aggregate increase in money paid by previously noncompliant obligors. Because it is predominately lower-income obligors who will adjust their payment rates if presumptive obligations are lowered, even if the aggregate decrease is slightly higher than the aggregate increase, it may be asserted that lowering presumptive child support obligations still advances the aggregate best interests of children, because, as a whole, the child support system has the most interest in encouraging payment to children from lower-income households. It is these children that likely are most in need of the money that is not being paid under current guidelines, and it is these children who will benefit in aggregate from lowering child support obligations.

Briefly returning to the discussion in Part III.C regarding who "should" support which guidelines, this exploration demonstrates that custodial parents, non-custodial parents, and child advocates should all support guidelines that yield lower child support obligations. Non-custodial parents should be in favor of such guidelines because they require them to pay less money. Similarly, child advocates, when taking a more nuanced view of what is best for the children whose interests they are advancing, also should favor such guidelines. Finally, perhaps most counter intuitively, the

welfare of custodial parents, who predominately are mothers, may increase under such guidelines.

Though it has been asserted that the post-divorce standards of living of mothers and fathers are divergent and, accordingly, inequitable,<sup>197</sup> some commentators have offered evidence that the so-termed “gender gap” has diminished considerably since the enactment of child support guidelines.<sup>198</sup> Like some children receiving child support, some individual custodial mothers would experience a decrease in their standard of living and, individually, believe that the “gender gap” had widened, but, aggregately, based on the contention that the lowering presumptive child support obligations has the potential to increase child support payments, custodial mothers should experience an increase in their standard of living. Hence, guidelines that yield lower child support awards have the potential to further decrease the “gender gap.”

Choosing specific child support guidelines necessarily requires making policy decisions about what interests should be elevated and what interests should be sacrificed. A strict and unyielding focus solely on the ability of parents to pay their obligations is not the best way to approach the setting of child support obligations. Rather, a view towards payment ability—and concomitantly, what leads obligors to not pay despite their ability to do so—should be incorporated into an evaluation of child support guidelines. New guidelines could be created or current guidelines could be tailored to better take into account these observations about payment characteristics.

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<sup>197</sup> See Judi Bartfeld, *Child Support and the Postdivorce Economic Well-Being of Mothers, Fathers, and Children*, 37 Demography 203 (2000) (finding “that custodial mothers and children fare dramatically worse than noncustodial fathers”); Sanford L. Braver, *The Gender Gap in Standard of Living After Divorce: Vanishingly Small?*, 33 FAM. L. Q. 111, 134 (1999); Sorensen, *supra* note 161, at 791 (finding that “custodial mothers are much more likely to be poor than nonresident fathers”).

<sup>198</sup> Braver, *supra* note 197; Kimberly Folse & Huge Varela-Alvarez, *Long-Run Economic Consequences of Child Support Enforcement For The Middle Class*, 31 J. OF SOC. ECONS. 273 (2002) (concluding that in the case of middle income parents “it is the noncustodial parent, usually the father, who suffers the most”).

However, the Cost Shares model already considers ability to pay, while still primarily determining how best to split the decrease in standard of living inherent in dividing one household into two, similar to all enacted guidelines and as newly created guidelines would seek to do.

Even though the Cost Shares model's lower obligations will lead to some individual children receiving less child support, a tradeoff must be made. While it may be argued that the Cost Shares model is not in the best interest of an individual child (as it may not be in the best interest of an individual custodial parent), evidence of obligor payment characteristics and evidence concerning deviations from the presumptive child support obligations yielded by the guidelines indicates that the Cost Shares model may be in the best interests of children when they are viewed as a group. This is particularly salient for children with lower-income parents, who, when considered as a group, would benefit the most from increased child support payments. Accordingly, the Cost Shares model should be viewed as a better alternative to currently enacted child support guidelines: it most likely provides more child support for children on average, while still preserving the insights into balancing upon which current guidelines are premised.

## **VI. Conclusion**

The Family Support Act of 1988 marked an important development in child support. Since its enactment, states have adopted three prevailing types of child support guidelines, thereby addressing the award level and consistency and case processing efficiency problems that plagued the child support system prior to the Act. Indeed, the mandated guidelines generally have been supported and praised for almost two decades.<sup>199</sup> However, enacted guidelines all approach the setting of child support obligations from the perspective of

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<sup>199</sup> Though the mandated guidelines have been praised by practitioners and lawyers, they have been criticized by some economists. *See generally*, Comanor, *supra* note 20.

maximizing individual children's well-being. This approach overlooks another important element: ability to pay.

When this element is incorporated into an analysis of child support guidelines, it becomes apparent that there may be a better alternative to currently enacted guidelines. This article has argued that the Cost Shares model is one better alternative, an alternative ready for states to implement immediately. Although counterintuitive, based on evidence of obligor payment characteristics and evidence concerning deviation from the presumptive child support obligations yielded by the guidelines, decreasing child support obligations has the potential to increase the amount of child support paid in aggregate, thereby providing more support to more children. In providing lower child support obligations at almost every level of obligor income, the Cost Shares model succeeds in balancing among the many interests implicated in the child support system that other guidelines take into account while also yielding obligations that encourage payment. This balancing has the potential to increase the aggregate amount of child support paid to children, especially children from lower-income households, who may have the most to gain from increased payments. In this way, the Cost Shares model is superior to existing guidelines.

Though this article has made a case for the Cost Shares model because it already considers what new or revised guidelines likely would take into account when adding a greater emphasis on ability to pay to their calculations and because it can be easily adopted by states, the observations made in this article are equally applicable to the designing of new guidelines that seek to balance the interests implicated in the child support system differently from the Cost Shares model and other enacted guidelines. What the evidence presented in this article demonstrates is that any child support guidelines can be better designed if the goal of establishing obligations that encourage payment is incorporated into the analysis. As it is non-payment by lower-income obligors that is best addressed by lower child support obligations, and the decrease in payment amounts by some higher-income obligors is merely a necessary collateral consequence of lowering

obligations in order to facilitate payment by lower-income obligors, any guidelines that distinguish between lower and higher-income obligors likely would provide more money to children in aggregate and also be in the best interests of more individual children.

For example, guidelines could be tiered, with the bottom tier yielding lower obligations for lower-income obligors, similar to those set by the Cost Shares model, the top tier yielding higher obligations for higher-income obligors, similar to those set by a “share the pain” approach to child support favored by the ALI Principles,<sup>200</sup> and the middle tiers yielding obligations close to current obligations, similar to those set by the Income Shares model. Judges could make the initial determination as to which tier an obligor should fall under by considering both obligor and obligee income, and then apply the appropriate guidelines. As with current child support obligations, obligations could be revised based on changed circumstances, and judges and parents could treat the presumptive obligation merely as a floor and deviate upward.

This is but one example of how a more nuanced approach to child support guidelines can be achieved. Regardless of exactly how the guidelines tailor obligation amounts to encourage obligor payment, such incorporation will advance the welfare of all children in aggregate. Although any alteration of obligations downwards necessarily will cause some obligors to adjust their child support payments downwards along with their decreased obligations, the trade-offs implicit in choosing child support guidelines dictate that some impacted parties will be harmed in all instances. Acknowledging that a choice must be made, based on payment characteristics of obligors, guidelines such as the Cost Shares model that either implicitly or explicitly integrate a view of ability to pay have the potential to provide more child support for more children, especially children from lower-income households.

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<sup>200</sup> WARREN & TYAGI, *supra* note 40, at 117 – 18.