BYU Law Review

Volume 1994 | Issue 4 Article 3

11-1-1994

Abating the Feminization of Poverty: Changing the Rules Governing Post - Decree Modification of Child Support Obligations

J. Thomas Oldham

Abating the Feminization of Poverty: Changing the Rules Governing Post-Decree Modification of Child Support Obligations

J. Thomas Oldham[*]

Table of Contents

 Law Foundation Scholar, University of Houston Law Center. This article has benefitted from the comments of a number of people, including Professor Margo Melli, Judge John Montgomery, Professor Allen Parkman, and Connie Chesnik, Esq. I would like to thank Michael Carr, Susan Cooper, Mark Schaffer, Deborah Travis-Neuberger, and Christina Zunker, students at the University of Houston, for their able research assistance. Helen Boyce and Harriet Richman obtained needed information from the library. Chaille Cooper, as always, provided encouragement.

> Our present practice presents the custodial parent with the Hobson's choice of absorbing the impact of significant daily deterioration in the purchasing power of fixed child support payments, or incurring substantial legal expenses in returning to court for needed modification.[1]

I. INTRODUCTION

American policy makers have given increasing attention to the economic problems faced by many single-parent households headed by women.[2] Although a number of explanations have been offered for these families' poverty, many believe that American policies toward children impoverish households headed by women.[3] Although this observation applies also to public support for families with children[4] and to the amount of initial child support awards, I focus here on the impoverishing effects of child support modification rules.

The prevailing American rule for child support modification in many instances requires the custodial parent, usually the mother, to absorb the effects of inflation,[5] the additional cost of raising older children,[6] and changes in the child's needs,[7] regardless of changes in the obligor's income.[8] To remedy these imbalances, she[9] must bear the cost of pursuing a new action and, in most states, prove that a party's

---

1. *In re* Marriage of Stamp, 300 N.W.2d 275, 279 (Iowa 1980).

2. *See, e.g.*, Paula England & Irene Browne, *Trends in Women's Economic Status*, 35 SOC. PERSP. 17, 40-41 (1992) (1987 statistics) (for example, of families with children, 46.1% of female-headed households are poor, compared to 17.6% of those headed by males; of all families, with or without children, about 11% are poor).

3. *See* MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 227-238 (1989); *see generally* RUTH SIDEL, WOMEN AND CHILDREN LAST (1986).

4. Commentators note that American public support for families with children is much lower than most other western countries. *See generally* CHILD SUPPORT ASSURANCE (Irwin Garfinkel et al. eds., 1992); CHILD SUPPORT: FROM DEBT COLLECTION TO SOCIAL POLICY (Alfred J. Kahn & Sheila B. Kamerman eds., 1988); Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 1989 ILL. L. REV. 367.

5. *See infra* part III.A.

6. *See infra* part III.B.

7. *See infra* part III.C.2.a.

8. *See infra* part III.C.

9. Because about 85% of all single parent families are headed by women, I will refer to the custodial parent as "she" and the noncustodial parent as "he." *See* Daniel R. Meyer & Steven Garasky, *Custodial Fathers: Myths, Realities, and Child Support Policy*, 55 J. MARR. & FAM. 73, 78 (1993).

circumstances have substantially changed since the date of the original order.[10] Further, she must make this decision with little guidance as to the likelihood of success: she is generally ignorant of the obligor's true financial situation,[11] and the judge's broad discretion to find that circumstances have or have not substantially changed creates even more uncertainty.[12]

I believe that these imbalances, coupled with these disincentives for seeking child support modification, contribute to the poverty of families headed by women.[13] In this Article, I discuss the American rule for child support modification and contrast with it rules allowing automatic adjustment of the support obligation. I also analyze several automatic adjustment mechanisms that courts could include in child support orders to avoid, in many instances, the necessity of subsequent judicial action.[14] I conclude by recommending that courts allow automatic adjustment[15] and advancing some new ideas to help remedy the imbalances facing custodial parents without duplicating the current system's disincentives to modification.[16]

II. THE AMERICAN RULE REGARDING CHILD SUPPORT MODIFICATION

A. Standards Governing Child Support Modification

In almost all American states, a parent obligated to pay child support (hereafter "obligor") makes periodic payments in an amount fixed by court order. Under the American rule for child support modification,[17] the amount remains fixed

---

10. *See* HOMER CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 727 (2d ed., student ed. 1988); *infra* part IV.B.1.

11. *See infra* part IV.A.

12. *See infra* part IV.B.1.

13. Other writers have recognized problems associated with child support. *See* Tamar Lewin, *Private Firms Help Single Parents Get What's Due*, N.Y. TIMES, May 21, 1994, at A1 col. 2 (discussing collection difficulties); *see also* Philip K. Robins, *Why Did Child Support Award Levels Decrease from 1978 to 1985?*, 27 J. HUM. RESOURCES 362 (1992) (discussing these and other factors as contributing to the decline in child support award levels, and concluding that the largest factor in the decline was the rising wages of women).

14. *See infra* part III.

15. *See infra* part III.D.

16. *See infra* part IV.

17. I use the term "American rule" for the majority rule governing the circumstances that allow modification of a child support order. Except where the context otherwise suggests, I use the term to encompass the stricter UMDA modifi-

throughout the period of the child's minority unless and until a parent initiates a new action and a court finds that the circumstances of at least one of the parents, or of the child, have substantially changed since the decree was rendered.[18] Common post-decree changes of circumstances include inflation and an increase of some magnitude in the obligor's income.[19] The Uniform Marriage and Divorce Act (hereafter "UMDA"),[20] adopted about two decades ago, promulgated a similar, but more strict, standard for child support modification: modification is permitted only where the circumstances of the parties have changed so much that the order has become unconscionable.[21]

B. The Policies Supporting the American Rule

1. Satisfying the needs of the child

The policy of discouraging subsequent modification may reflect a belief that the original amount of fixed child support adequately addresses the needs of a child, and that later modification would seldom be necessary. A related assumption may be that a child's needs have little to do with a parent's income. These assumptions, however, are questionable. First, the assumption that the initial decree adequately pays for the child's costs is generally agreed to be erroneous despite controversy over the precise meaning of a child's "cost."[22] Second, the assumption that a child's cost remains constant until the child is emancipated is faulty, since most families spend more on teenage children than they do on younger ones.[23] Finally, the as-

---

cation rule, discussed in this part. I will discuss below some attempts by courts to establish different procedures for changing the amount of child support due.

18. *See* CLARK, *supra* note 10, at 727; HARRY D. KRAUSE, CHILD SUPPORT IN AMERICA 18 (1981). The exact phrasing of the standard varies. For example, in some states a substantial change in circumstances must be shown. *See, e.g.*, Holley v. Holley, 864 S.W.2d 703, 796 (Tex. Ct. App. 1993). Others require a substantial change in circumstances that makes the initial order improper or unfair. *See* Morrill v. Millard, 570 A.2d 387, 389-90 (N.H. 1990). Some add a requirement that the substantial change in circumstances must not have been contemplated by the parties when the decree was entered. *See* Bilosz v. Bilosz, 441 A.2d 59, 61 (Conn. 1981), *superseded by statute as stated in* Darak v. Darak, 556 A.2d 145 (Conn. 1989); *In re* Marriage of Feustel, 467 N.W.2d 261, 263 (Iowa 1991).

19. Of course, the custodial parent's income could also increase.

20. 9A U.L.A. 147 (1987).

21. UMDA § 316(a), 9A U.L.A. at 489-90.

22. *See* ANDREA H. BELLER & JOHN W. GRAHAM, SMALL CHANGE: THE ECONOMICS OF CHILD SUPPORT 37-40 (1993).

23. *See infra* part III.B.

sumption that a child's needs can be computed without considering the financial condition of the parents defies empirical studies that confirm what may be obvious: the amount spent on a child is dependent upon the income of the family.[24] Absent an objective standard for needs, such as the cost of supporting a child at poverty level or at the level of "average" spending on children, computation of a child's "needs" requires consideration of the parents' financial condition.

2. Discouraging numerous lawsuits

Another policy behind these standards, stated in the context of the UMDA rule, is "to discourage repeated or insubstantial motions for modification."[25] Judges consistently express concerns that family law disputes will overload court calendars.[26] Discouraging lawsuits may also serve the laudable goal of discouraging former spouses from becoming mired in endless rounds of litigation. Although relevant, these concerns could be adequately addressed without making it difficult to modify a child support award. For example, the concern with clogging the courts could be remedied by entrusting the calculation of child support to an administrative agency, as do other common-law countries including Britain and Australia.[27] Requiring pre-trial mediation, limiting the frequency of modification, or barring modification actions that change support less than an established amount or percentage would also minimize the possibility of court congestion.[28] Finally, replacing fixed awards with some type of periodic and automatic adjustment of child support would likewise eliminate the need to go to court.

3. Facilitating the need to plan

Further, the American rule purports to accommodate the parties' need to plan their post-divorce financial lives; under

---

24. THOMAS J. ESPENSHADE, INVESTING IN CHILDREN: NEW ESTIMATES OF PARENTAL EXPENDITURES 29 (1984); Robert G. Williams, *Guidelines for Setting Levels of Child Support Orders*, 21 FAM. L.Q. 281, 288 (1987).

25. UMDA § 316 cmt., 9A U.L.A. 409, 490.

26. *See, e.g.*, Rand v. Rand, 392 A.2d 1149, 1150-51 (Md. Ct. Spec. App. 1978) (bemoaning the tendency of divorced parties to file frequent lawsuits).

27. *See* Margaret Harrison, *Child Maintenance in Australia: The New Era*, *in* ECONOMIC CONSEQUENCES OF DIVORCE 219 (Lenore J. Weitzman and Mavis Maclean eds., 1992); Mavis Maclean, *Child Support in the U.K.: Making the Move from Court to Agency*, 31 HOUS. L. REV. 515 (1994).

28. *See infra* note 149.

the American rule, parents are furnished with clear, precise, and fixed obligations. The American rule and UMDA child support modification rules give high priority to the parties' right to know in advance their exact post-divorce obligations. Although a reasonable consideration, it is not clearly the paramount one. Admittedly, some parties may attempt to plan additional financial commitments in light of the amount of the initial child support award. Still, it is extremely difficult to predict the future circumstances of the parties. From a policy perspective, it seems more important to assure that the child support system contains a workable mechanism so the order can adjust to these future circumstances. It is simply impractical and unfair to freeze child support based on the parties' circumstances when the decree is entered.

4. Maintaining work incentives

Current rules may also reflect a policy judgment that allowing children to share in the obligor's post-decree financial success skews the obligor's incentives to work for raises and promotes underemployment.[29] The concept of underemployment, a concern reflected in the child support law of many states, assumes that sharing a significant portion of one's income with those outside of one's household reduces the incentive to work hard. To truly avoid skewing an obligor's incentives, however, child support obligations would need to be nonmodifiable. The child support would then continue unaffected by future changes in the obligor's financial condition.

Although nonmodifiable child support orders would preserve the obligor's incentives, they would also be undesirable in several respects. First, it is probably pointless—and to many unfair or cruel—to expect an obligor to continue to make payments at the same level after the obligor is laid off or becomes ill. Second, some believe that child support may appropriately be reduced when the obligor becomes responsible for the support of other children. Also, a system that refuses to increase the obligation for a child who develops special needs unfairly forces the custodial parent to bear all such costs. It therefore seems both fair and inevitable to retain some means of modifying the child support order, at least in these situations.

---

29. *See infra* note 100 and accompanying text.

Freezing child support at a level based on the parties' financial circumstances at the time the decree was entered also ignores the youth of most divorcing couples.[30] Since these couples normally are still beginning their respective careers, and their earnings are relatively low, it would be unfair to bar the children from sharing in the obligor's later career success. If a modification rule requires the custodial parent to assume the risk of the obligor's financial setbacks, it seems equally fair to permit the custodial parent and the children to share post-decree successes. Further, to sustain any articulated purpose of child support, whether to meet the children's changing needs, to equalize the separated households' standards of living,[31] or to shield the children from the negative financial effects of the parents' divorce,[32] some allowance for modification is necessary.

5. *Gradual disentanglement of relationships*

It is also possible that the drafters of UMDA and, to a lesser extent, the supporters of the American rule contemplated a system similar to that envisioned by Professor Chambers in his article, *The Coming Curtailment of Compulsory Child Support*.[33] He noted that divorced fathers frequently remarry, often quickly after the divorce. These new partners of divorced fathers in many instances already have children from a prior relationship. He also pointed out that fathers in many instances gradually lose contact with their children from the former marriage[34] and form new bonds with the children in the new

---

30. *See generally* ANDREW J. CHERLIN, MARRIAGE, DIVORCE, REMARRIAGE (2d ed. 1992); *see also* J. Thomas Oldham, *Putting Asunder in the 1990s*, 80 CAL. L. REV. 1091, 1100 (1992) (reviewing DIVORCE REFORM AT THE CROSSROADS (Stephen D. Sugarman & Herma H. Kay eds., 1990)).

31. *See* June Carbone, *Income Sharing: Redefining the Family in Terms of Community*, 31 HOUS. L. REV. 359 (1994); Milton C. Regan, *The Boundaries of Care: Constructing Community after Divorce*, 31 HOUS. L. REV. 425 (1994).

32. *See generally* Carbone, *supra* note 31.

33. *See* David L. Chambers, *The Coming Curtailment of Compulsory Child Support*, 80 MICH. L. REV. 1614 (1982).

34. *Id.* at 1624. *See generally* FRANK F. FURSTENBERG, JR. & ANDREW J. CHERLIN, DIVIDED FAMILIES (1991); *see also* Frank F. Furstenberg, Jr. & Christine W. Nord, *Parenting Apart: Patterns of Childrearing After Marital Disruption*, 47 J. MARRIAGE & FAM. 893, 902 (1985); Tamar Lewin, *Father's Vanishing Act Called Common Drama*, N.Y. TIMES, June 4, 1990, at A18. *But see* Frank F. Furstenberg, Jr. et al., *The Life Course of Children of Divorce: Marital Disruption and Parental Contact*, 48 AM. SOC. REV. 656, 662-66 (1983) (estrangement appears to be abrupt).

household.[35] Chambers mentioned the possibility of a new American consensus that noncustodial parents' obligations should last for only a short period after divorce.[36] The traditional American rule regarding child support to some extent accomplishes a similar result due to the effects of inflation.[37] From this perspective, the American rule allows the support obligation to ebb as the absent parent's relationship with his children frequently ebbs.

Most likely, however, the loss of value of child support awards under the American rule is inadvertent rather than intentional. First, neither the drafters of the UMDA nor American courts have mentioned a policy such as Chambers'. Second, child support currently is not a short-term obligation; American law extends the child support obligation until the child reaches majority.[38] Further, many contend that child support should be increased with the age of the child[39] or even extended beyond the age of majority, at least if the child is attending college.[40]

III. AUTOMATIC ADJUSTMENT OF CHILD SUPPORT AWARDS

Instead of expressing a child support award as a fixed amount, the award could be drafted in various ways so that the amount due automatically changes without the need for additional court action. I will discuss these alternatives below.

A. Accounting for Inflation

Expressing child support awards as a fixed amount causes inflation to erode their real value over time.[41] This erosion

---

35. Chambers, *supra* note 33.

36. Chambers, *supra* note 33, at 1632-33.

37. *See infra* part III.A.

38. *See* CLARK, *supra* note 10, at 716.

39. For example, Espenshade found that older children were significantly more expensive that younger ones. *See* ESPENSHADE, *supra* note 24, at 28-31. In light of this finding, some guidelines take into consideration the age of the child when setting child support.

40. *See* Margaret Campbell Haynes, *Supporting Our Children: A Blueprint for Reform*, 27 FAM. L.Q. 7, 25 (1993); U.S. COMM'N ON INTERSTATE CHILD SUPPORT, SUPPORTING OUR CHILDREN: A BLUEPRINT FOR REFORM, Recommendation No. 29, *reprinted in Official Recommendations of the United States Commission on Interstate Child Support*, 27 FAM. L.Q. 31, 45 (1993); Judith S. Wallerstein & Shauna B. Corbin, *Father-Child Relationships after Divorce; Child Support and Educational Opportunity*, 20 FAM. L.Q. 109 (1986).

41. It is true that the inflation rate has been decreasing during the past

obviously has substantial negative effects on the standard of living of the custodial parent and the child.[42] Although short periods during this century have been deflationary rather than inflationary,[43] the last four decades have been periods of continuing inflation,[44] and a period of significant deflation in the near future seems unlikely.[45]

1. American courts' response to automatic adjustments for inflation

a. General approval. More than any other automatic adjustment mechanism, courts have approved automatic periodic adjustment of child support to account for inflation; these automatic adjustments are called cost-of-living adjustments (hereafter "COLAs"). Judges generally seem to perceive COLA provisions to be fundamentally different from other adjustment procedures. COLA provisions are viewed as a means of merely retaining the real value of the initial order,[46] rather than of "modifying" it. These courts have been sensibly receptive to a means of trying to anticipate inflation without forcing the custodial parent to initiate a new legal action to increase support.[47]

---

decade. For example, from January 1979 to January 1984, the Consumer Price Index for All Urban Consumers, U.S. City Average, increased 49.4%. In contrast, from January 1984 through January 1989, the index increased 18.8%, and from January 1989 through January 1994 it increased 20.7%. (Information obtained from the U. S. Dept. of Labor). Although the inflation rate has lowered, inflation still continues, and over a period of years can be significant.

42. *See* BELLER & GRAHAM, *supra* note 22, at 121 (finding that child support orders would be 25% to 32% higher if adjusted for inflation, depending upon the period and inflation rate being studied); Gale M. Phelps & Jerald M. Miller, *The New Indiana Child Support Guidelines*, 22 IND. L. REV. 203, 210 (1988) (calculating that an order of $500 in 1976 would have declined in value to $261 by 1986 unless modified).

43. *See* Marriage of Mentel, 359 N.W.2d 505, 507 (Iowa Ct. App. 1984) (arguing that, because there have been periods of deflation, courts should not take judicial notice of inflation).

44. *See generally* Consumer Price Index for All Urban Consumers, U.S. City Average, 1956-1994, provided to the author by the U. S. Dept. of Labor.

45. *See* Philip Eden, *How Inflation Haunts the Court's Orders*, FAM. ADV., Spring 1979, at 2, 3.

46. *See generally* H.P.A. v. S.C.A., 704 P.2d 205 (Alaska 1985); Brevick v. Brevick, 628 P.2d 599 (Ariz. Ct. App. 1981); Branstad v. Branstad, 400 N.E.2d 167 (Ind. Ct. App. 1980); *In re* Marriage of Stamp, 300 N.W.2d 275, 279-80 (Iowa 1980); Hempton v. Hempton, 329 N.W.2d 514 (Mich. Ct. App. 1982); Bradley v. Earl, 491 N.Y.S.2d 709 (App. Div. 1985); Roya v. Roya, 494 A.2d 132, 133-34 (Vt. 1985).

47. For example, in *In re Marriage of Stamp*, 300 N.W.2d at 276-77, the

b. Courts' concerns and qualifications. One court stated that orders with COLA provisions, while less objectionable where the obligor has a steady job with regular salary increases to match inflation, were inadvisable where both parties were self-employed with significant oscillation of their incomes.[48] This statement encompasses the fundamental objection to a COLA system: even in a period of inflation, there is no guarantee the obligor's income will increase commensurately. For this reason, the Washington Supreme Court has concluded that a COLA provision is unenforceable unless it provides for the possibility of an obligor's financial hardship.[49] Minnesota, a state that has adopted a COLA scheme by statute,[50] deals with this problem by giving the obligor the right to petition the court to reduce or suspend the COLA increase upon a showing that the obligor's income did not increase by the amount of inflation.[51] Still other courts have incorporated such a limit to COLA provisions in the decrees.[52]

Unless the COLA provision sets forth the mechanics of the adjustment, however, it can be ambiguous and lead to disputes.[53] For example, a reference to the Department of Labor's

---

court approved this decree:

> On or before each anniversary date of this decree, the parties shall file a stipulation with the Clerk of this Court providing for increased or decreased child support payments based upon the following: Child support payments shall be increased or decreased by the same percentage as the percentage change in the National Consumer Price Index as published by the United States Department of Labor for the most recent twelve month period for which the data is available, provided that [the obligor's] gross income for the like period has increased by at least the same percentage. If [the obligor's] gross income increased by a lesser percentage, then the payments to [the obligee] shall increase by this lesser percentage. In the event [the obligor] claims the benefit of the above limitation, he shall submit copies of his federal tax returns or other sufficient proof of income to [the obligee] for the relevant years. If the parties are unable to stipulate to the correct adjustment amounts, either may request that the Court may determine the same, either itself or by appointment of a special master.

48. *In re* Marriage of Phipps, 379 N.W.2d 26, 29 (Iowa Ct. App. 1985); *see also* Falls v. Falls, 278 S.E.2d 546 (N.C. Ct. App. 1981).

49. Edwards v. Edwards, 665 P.2d 883 (Wash. 1983) (en banc).

50. MINN. STAT. ANN. § 518.641 (West Supp. 1994).

51. *Id.* In connection with the filing of any such affidavit, the obligor should be required to file other information that substantiates the income set forth in the affidavit, such as a copy of the prior year's W-2 form and a copy of a recent pay check.

52. *See In re* Marriage of Garvis, 411 N.W.2d 703 (Iowa Ct. App. 1987); Roya v. Roya, 494 A.2d 132 (Vt. 1985).

53. *See* McNeil v. McNeil, 607 So. 2d 1192, 1197 (Miss. 1992); Wing v. Wing,

cost of living index would not distinguish between its numerous different computations—some figures are national, while others are local. Another potential problem, seldom recognized by courts, is that the increase in average costs in the community may not correspond to any increase in costs relating to the particular child. Another objection is that a COLA adjustment merely tries to keep the real value of the award constant; it does not attempt to adjust the award based upon any changes in the parties' circumstances.

Sometimes courts have attempted to include in the decree an estimate of future annual inflation; under such decrees, the child support would automatically increase each year by the amount specified. Although fixing the annual increase in the order creates certainty, it also increases the potential for inaccuracy and has generated a mixed judicial response.[54]

2. *Analysis of automatic adjustment for inflation*

COLA systems have the advantage of being more simple than other automatic adjustment procedures, such as the percentage of income system.[55] Although they require periodic notification to the parties of the amount of the change in the cost of living and computation of the new child support amount, the additional administrative costs are probably small and would be justified by the benefits. In Minnesota, the state office of child support enforcement calculates the change in the cost of living every two years and notifies the parties of the presumptive new order.[56] Administrators of Minnesota's program indicated during informal discussions with the author that the program appears to be working well.[57] In the alternative, a

---

549 So.2d 944, 948 (Miss. 1989); Bradley v. Earl, 491 N.Y.S.2d 709 (App. Div. 1985).

54. *Compare In re* Marriage of Pfeffer, 443 N.W.2d 92, 95 (Iowa Ct. App. 1989) (deleting from the order an annual increase of eight percent) *with* Wallace v. Wallace, 661 P.2d 455, 457 (Mont. 1983) (approving a provision calling for a five percent annual increase). *See also* Morrison v. Kirkland, 567 So.2d 363, 364 (Ala. Civ. App. 1990) (rejecting an order calling for a $50 per month increase). Other courts have disapproved COLA provisions where the custodial parent earns a significant salary and receives a substantial amount of property at divorce. *See In re* Marriage of Brown, 462 N.W.2d 683, 685 (Iowa Ct. App. 1990).

55. *See infra* part III.C.

56. The statute provides two different CPI indexes for the Minneapolis-St. Paul area. MINN. STAT. ANN. § 518.641 (West Supp. 1994).

57. Interview between the author and Len Biernat, Hamline Law School; Interview between the author and Karen Smigielski, Office of Child Support En-

state could promulgate one COLA annually that would govern all decrees. This COLA system would be clear, although it would still require individual computation of the amount of the change in each support award. If either of these two systems is perceived as requiring too much action by state employees, the parties could be given the responsibility of agreeing upon the amount of the new award, and filing a stipulation with the court setting forth the new amount.[58]

The COLA system seems clearly better than the current system of fixed awards. Pursuant to the COLA system, the real value of the child support order remains the same; in contrast, under the current system, the real value of the award gradually diminishes. The COLA system requires no information from either parent. It seems relatively simple and will require little court time. Furthermore, COLA indexes are relatively accurate in measuring the local inflation rate because they track changing prices in the local area; courts can use these indexes to ensure that COLA provisions effectively maintain the value of the child support order. Some administrative expense will be incurred, of course, to staff the child support office. In contrast to percentage of income orders,[59] child support orders with COLA provisions retain the collection options available when the order is expressed in a fixed dollar amount. For example, the order may easily be enforced by contempt.

One disadvantage of the COLA mechanism is that it freezes the real value of the child support at the amount set forth in the initial decree. It does not automatically adjust due to any changes in the parties' circumstances; this would require one parent to initiate a legal modification action, unless some type of automatic review and adjustment system is created.[60]

B. Accounting for the Increased Costs of Raising Older Children

Although most families spend more on teenage children than they do on younger ones,[61] few courts have been recep-

---

forcement.

58. For example, this was the procedure approved in *In re* Marriage of Stamp, 300 N.W.2d 275 (Iowa 1980) (permitting a hearing before a special master, with both parents sharing the cost of the proceeding, if the parties could not agree on the new amount).

59. *See infra* part III.C.

60. I will discuss this below. *See infra* part IV.C.

61. DAVID BETSON, ALTERNATIVE ESTIMATES OF THE COST OF CHILDREN FROM

tive to orders automatically increasing child support when the child reaches a certain specified age.[62] This trend reflects judges' general reluctance in family law cases to consider future events that are possible but not certain to occur.[63] Appellate courts admonish trial courts to make a determination based upon facts as they *now* exist regarding the needs of the child and the ability of both parents to bear these costs.[64] Increases based upon the child's becoming older are perceived to be speculative.[65] Even assuming that a child's costs will increase with age, some courts express reservations because the parents' future relative incomes are uncertain.[66] Other courts state that a child support order may only be modified upon a showing of a post-decree change of circumstances; an automatic increase, without a showing of a change in circumstances, would violate this principle.

Despite this general reluctance, some courts have allowed automatic adjustment to compensate for the increased costs of raising older children.[67] For example, one court approved an order pursuant to which the child support due increased five percent per year.[68] Additionally, the guidelines of a few states

---

THE 1980-86 CONSUMER EXPENDITURE SURVEY 49 (1990); LEWIN/ICF, ESTIMATES OF EXPENDITURES ON CHILDREN AND CHILD SUPPORT GUIDELINES 4-21 (1990) (submitted to the Office of the Assistant Secretary for Planning and Evaluation, U.S. Dep't of Health and Human Servs.). *See generally* ESPENSHADE, *supra* note 24, at 30-31. *Cf.* Irwin Garfinkel & Marygold S. Melli, *The Use of Normative Standards in Family Law Decisions: Developing Mathematical Standards for Child Support*, 24 FAM. L.Q. 157, 169-70 n.31 (1990).

62. *See, e.g.*, Morrison v. Kirkland, 567 So. 2d 363 (Ala. Civ. App. 1990); Royse v. Royse, 491 N.E.2d 397, 401-402 (Ohio Common Pleas 1984); Eikenhorst v. Eikenhorst, 746 S.W.2d 882, 886 (Tex. Ct. App. 1988); Abrams v. Abrams, 713 S.W.2d 195, 197 (Tex. Ct. App. 1986).

63. For example, most divorce courts only consider tax effects of a divorce property division if the tax consequence is caused by the decree and is certain; other potential tax effects that might occur later are not considered. *See generally* J. THOMAS OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY § 13.03[5] (1994).

64. *See Morrison*, 567 So. 2d at 364; Penkoski v. Patterson, 440 So. 2d 45, 46-47 (Fla. Dist. Ct. App. 1983).

65. *See In re* Marriage of Moore, 453 N.E.2d 102, 104-105 (Ill. App. Ct. 1983); McManus v. McManus, 348 N.E.2d 507, 509 (Ill. App. Ct. 1976); Wallace v. Wallace, 661 P.2d 455, 458 (Mont. 1983) (Haswell, J., dissenting in part); Lairmore v. Lairmore, 617 P.2d 892 (Okla. 1980); Fossum v. Fossum, 374 N.W.2d 100 (S.D. 1985); *In re* J.M. & G.M., 585 S.W.2d 854, 856-57 (Tex. Civ. App. 1979).

66. *See, e.g.*, *Royse*, 491 N.E.2d at 401-02; Condon v. Condon, 312 S.E.2d 588, 589 (S.C. Ct. App. 1984).

67. *See* ESPENSHADE, *supra* note 24, at 28-31; *see also* BETSON, *supra* note 61; LEWIN/ICF, *supra* note 61 (discussing the rising cost of older children).

68. *Wallace*, 661 P.2d at 457. Three justices dissented in part, arguing that

provide that child support should be higher for older children than for younger children.[69]

Each automatic adjustment mechanism has its own advantages and disadvantages. For example, the automatic step-up based upon age has the benefit of not requiring any information or action by anyone; the order merely changes at a certain specified point. This lowers transaction and administrative costs of the adjustment. Of course, it is unclear whether the actual future costs of the child will deviate from the average trend; although it is probable the child will cost more, it is not certain.[70] Also, there is no certainty that the income of the obligor will increase, thereby enabling the obligor to afford the higher costs.[71]

Some of these problems could be solved, or at least minimized, by giving the obligor the right to file an affidavit stating that the costs of the child had not increased by the designated amount or that his income had not increased sufficiently to meet the modified obligation. By filing this affidavit, the obligor would avoid the step-up in support provided in the decree. The affidavit solution, however, would create two additional problems. First, allowing the obligor to avoid the increase imposes all of the inflation and the costs of older children on the custodial parent regardless of her ability to bear the costs. Second, the additional procedure could increase the number of court hearings that would be required. Even if these problems could

---

the automatic annual increase, not tied to the inflation rate, was inappropriate. Because the increase was annual and might be said to be a rough approximation of the inflation rate, this might be considered a COLA case. Compare this case to Morrison v. Kirkland, 567 So. 2d 363, 364 (Ala. Civ. App. 1990), where the court disapproved an award that provided for a $50 per month increase in the award. Another court approved a provision increasing the child support by $50 per month on the first anniversary of the decree where the parties had agreed to such an adjustment mechanism. Cisneros v. Cisneros, 787 S.W.2d 550, 551-52 (Tex. Ct. App. 1990). Also, another court has refused to enforce an order that increased child support by eight percent annually. *In re* Marriage of Pfeffer, 443 N.W.2d 92, 95 (Iowa Ct. App. 1989).

69. *See, e.g.*, D.C. CODE ANN. § 16-916.1 (Supp. 1994); *Mass. Child Supp. Guidelines* (Oct. 1, 1989), *in* NATIONAL CENTER FOR STATE COURTS, CHILD SUPPORT GUIDELINES: A COMPENDIUM 433, 434-37 (1990); *see also* WASH. REV. CODE § 26.19.011 (West. Supp. 1994) (varying the child support obligation on the age of the child and the obligor's income, but not expressly based upon percentage of obligor's income).

70. *See* Lairmore v. Lairmore, 617 P.2d 892 (Okla. 1980).

71. Of course, one might say that it is not clear that the custodial parent can bear these increased costs, but the current system effectively imposes those costs on the custodial parent.

be resolved, the automatic step-up based on age is less desirable than an automatic adjustment mechanism based on a COLA system or on a percentage of the obligor's income.

C. Accounting for Changes in the Obligor's Income

Courts have been generally unreceptive to attempts to automatically adjust the amount of child support due based upon post-decree changes in the obligor's income.[72] Courts especially disapprove of the percentage of income method, which expresses a child support award as a specified percentage of the obligor's salary.[73] Although some of this disapproval stems from statutory authority[74] and traditional attachment to the American rule,[75] many courts have articulated significant policy concerns with orders that automatically adjust to changes in the obligor's income. In this part, I discuss and evaluate the benefits of these orders and the major concerns with them.

1. The benefits of percentage of income orders

The obvious benefit of the percentage of income method is that it requires no action to adjust to the current circumstances of the obligor. If a state desires to base child support modification decisions solely on the obligor's income, this method is desirable for its very low transaction costs. Wisconsin now permits courts to express a child support order as a percentage of income,[76] and this system apparently has worked fairly well for some types of obligors.[77] Indeed, Wisconsin courts now use

---

72. *See, e.g.*, *In re* Marriage of Ferguson, 566 N.E.2d 335 (Ill. App. Ct. 1990) (construing ILL. REV. STAT. ch. 40, para. 505(a)(5) (1989)). *See also* cases cited *infra* notes 73-75, 82-113.

73. Newsome v. Newsome, 227 S.E.2d 347, 348-49 (Ga. 1976) (disapproving percentage of income method).

74. Some courts have found that the percentage of income method is invalid under child support statutes allowing modification only under a substantial change in circumstances standard because not every increase in income constitutes a *substantial* change in circumstances. *See* Grover v. Grover, 839 P.2d 871, 873 (Utah Ct. App. 1992).

75. Some courts, apparently uncomfortable with departures from the American rule, merely reiterate the idea that child support should be expressed in the form of a fixed dollar amount and that it should only be modified via a modification action after the court has heard all relevant information. *See, e.g.*, Breen v. Breen, 471 N.Y.S.2d 617 (App. Div. 1984).

76. *Wis. Child Support Percentage of Income Standard*, WIS. ADMIN. CODE § HSS 80.03(3), *in* NATIONAL CENTER FOR STATE COURTS, *supra* note 69, at 1000.

77. Letter from Robert Cook, Esq., Cook & Franke, to J. Thomas Oldham (May 10, 1994) (on file with the author) ("The system is working very well."); Let-

percentage of income orders about as frequently as fixed sum orders.[78]

A few other states have accepted percentage of income awards.[79] Although Texas courts do not permit percentage of income awards by judicial decrees, if the parties agree to such provisions, these are enforced.[80] An Indiana court has moved toward automatic adjustment by allowing adjustment of the child support obligation based upon the state's income shares guideline.[81]

2. A percentage of income order neglects relevant factors

a. The needs of the child. One criticism, however, is that the obligor's income is not the only factor that should be considered when deciding upon the appropriate amount of child support due.[82] Courts frequently note that the percentage of income method improperly ignores the needs of the child.[83] In

---

ter from Susan Hansen, Esq., Hansen, Gagne & Foley, to J. Thomas Oldham (May 10, 1994) (on file with the author) (also noting the benefits of such orders when the obligor's income is relatively stable, but does not think they should be used where the obligor does not have a stable job); Letter from Gregg Herman, Esq., Loeb, Herman & Drew, to J. Thomas Oldham (Feb. 15, 1994) (on file with the author) ("Virtually all would agree with me that the system by which the parties can elect and the court order either a floating percentage order or a fixed dollar amount is a good one."); Interview between J. Thomas Oldham and Marygold Melli, Professor, Wisconsin Law School (Feb. 7, 1994); Letter from Anne Wadsack, Dewitt & Porter, to J. Thomas Oldham (May 10, 1994) (on file with the author) ("Where the obligor's income is relatively steady, or generally increasing, it is a very useful and equitable device.").

78. *See* Judi Bartfeld & Irwin Garfinkel, *Utilization and Effects of Payments on Percentage-Expressed Child Support Orders*, INSTITUTE FOR RES. ON POVERTY, June 1994, at 7.

79. *See also infra* note 115 and accompanying text (discussing acceptance of percentage of increase orders).

80. Doss v. Doss, 521 S.W.2d 709 (Tex. Civ. App. 1975); Malone v. Malone, 637 So. 2d 76 (Fla. Dist. Ct. App. 1994) (summarized in 20 Fam. L. Rep. (BNA) 1361 (1994)).

81. Herron v. Herron, 457 N.E.2d 564 (Ind. Ct. App. 1983); *see also* Henderson v. Lekvold, 621 P.2d 505 (N.M. 1980) (enforcing a decree which increased the child support, if the obligor's income increased, to an amount as specified in the guideline in effect at the time of the increase in the obligor's income).

82. *See, e.g.*, Euston v. Euston, 759 S.W.2d 788, 789 (Tex. Ct. App. 1988).

83. *Id.*; Hunter v. Hunter, 498 N.E.2d 1278, 1288 (Ind. Ct. App. 1986); *see also In re* Marriage of Meeker, 272 N.W.2d 455, 456 (Iowa 1978); Stanaway v. Stanaway, 245 N.W.2d 723, 725 (Mich. Ct. App. 1976); Thrash v. Thrash, 809 P.2d 665, 667 (Okla. 1991) (holding that court has no authority to order such an award, but that parties may agree to it); Picker v. Vollenhover, 290 P.2d 789, 801 (Or. 1955); Hood v. Hood, 335 N.W.2d 349 (S.D. 1983); Karim v. Karim, 290 N.W.2d 479 (S.D. 1980); Barlow v. Barlow, 282 S.W.2d 429, 431 (Tex. Civ. App. 1955);

particular, a substantial increase in the obligor's income may cause the payments to exceed the needs of the child.[84] This defect is particularly important if one is applying a "needs-based" standard when computing the appropriate amount of child support. This standard bases child support upon evidence of the costs of the child and not upon the parents' incomes. The parties' relative incomes are relevant only in the allocation of the child support obligation between the parents. This standard is inconsistent with a policy that would automatically permit modification upon a showing of change in the obligor's income. The percentage of income model reflects a policy judgment that the child has a claim to a certain percentage of the obligor's income, while the needs-based standard reflects the different view that the child has a claim to have his needs met.

Recognizing that a child's needs are to a large extent determined by the resources of the parents,[85] however, all states have ostensibly moved away from an express needs-based model toward guidelines based upon the income of one or both parents. Drafters of the guidelines have generally been persuaded that each divorced parent has the duty, post-divorce, to allocate to a child the same portion of his income that would have been allocated while the family was intact.[86] Under current guidelines, the needs of the child are not considered, except as a ground for deviation from the presumptive amount.

b. The custodial parent's income. Percentage of income orders also ignore, in addition to the needs of the child, the earnings of the custodial parent.[87] Only about one-third of all state guidelines now accept that the obligor's income should be the sole factor that determines the amount of child support.[88]

Grover v. Grover, 839 P.2d 871, 873 (Utah Ct. App. 1992); Jacobs v. Jacobs, 254 S.E.2d 56 (Va. 1979); Keyser v. Keyser, 345 S.E.2d 12 (Va. Ct. App. 1986).

84. Brevick v. Brevick, 628 P.2d 599, 602 (Ariz. Ct. App. 1981) (rejecting a child support award expressed as 30% of the obligor's income); *see also* Chasin v. Chasin, 582 N.Y.S.2d 512, 514 (App. Div. 1992).

85. *See supra* note 24 and accompanying text.

86. *See generally* Williams, *supra* note 24, at 292.

87. *Id.*; Hunter v. Hunter, 498 N.E.2d 1278, 1288 (Ind. Ct. App. 1986); *see also In re* Marriage of Meeker, 272 N.W.2d 455, 456 (Iowa 1978); Stanaway v. Stanaway, 245 N.W.2d 723, 725 (Mich. Ct. App. 1976); Thrash v. Thrash, 809 P.2d 665, 667 (Okla. 1991) (holding that the court has no authority to order such an award, but that parties may agree to it); Picker v. Vollenhover, 290 P.2d 789, 801 (Or. 1955); Hood v. Hood, 335 N.W.2d 349 (S.D. 1983); Karim v. Karim, 290 N.W.2d 479 (S.D. 1980); Barlow v. Barlow, 282 S.W.2d 429, 431 (Tex. Civ. App. 1955); Grover v. Grover, 839 P.2d 871, 873 (Utah Ct. App. 1992); Jacobs v. Jacobs, 254 S.E.2d 56 (Va. 1979); Keyser v. Keyser, 345 S.E.2d 12 (Va. Ct. App. 1986).

88. *See* NATIONAL CENTER FOR STATE COURTS, *supra* note 69 (about one-third

About two-thirds reject this as too limited and follow the income shares guideline or Melson formula; both consider the income of both spouses when calculating the presumptive child support award.[89] The percentage of income model could apparently be applied only in those jurisdictions whose guidelines are based solely upon the income of the non-custodial parent.[90] This defect is particularly important in those states applying the income shares guidelines or the Melson formula.[91] Both of these approaches consider the income of both parents to calculate the child support award, while the percentage of income approach only looks to the income of the noncustodial parent. A state following either approach could therefore only accept a percentage of income order under the assumption that the parents' incomes change in roughly the same relative amounts.

c. Other relevant factors. The percentage of income method also ignores the obligor's ability to pay, multiple marriage problems, and the custodial parent's need for stable payments. For example, if the obligor is laid off, the method may totally relieve an obligor of all child support obligations despite his ability to pay some amount, as when the obligor has other assets.[92] It may also require an obligor to pay more child support even when his ability to pay does not rise with the award, a problem especially acute when the adjustment is based upon changes in the obligor's hourly rate and not upon actual monthly earnings.[93] The percentage of income method may present related problems in a multiple marriage situation.[94] The method does not generally contemplate the possibility that the obligor will remarry and establish a new family, or that the custodial parent will remarry.[95] Courts also worry that this

---

of all states base child support solely on the obligor's income).

89. *See* Williams, *supra* note 24; NATIONAL CENTER FOR STATE COURTS, *supra* note 69; Judicial Council of California, Review of Statewide Uniform Child Support Guideline (Dec. 1993) at 29.

90. For a list of these states, see Judicial Council of California, *supra* note 89, at 29. Alternatively, a percentage of income system could be created that adjusts the child support due based upon the income of both parents.

91. *See* Williams, *supra* note 24, at 291-95 (discussing the income shares model of child support); *id.* at 295-301 (discussing the Melson formula, adopted in Delaware).

92. Brevick v. Brevick, 628 P.2d 599, 602 (Ariz. Ct. App. 1981); *see also* Roszko v. Roszko, 705 P.2d 951, 954 (Ariz. Ct. App. 1985); Newsome v. Newsome, 227 S.E.2d 347, 349 (Ga. 1976).

93. *See* Jensen v. Jensen, 629 P.2d 765 (Mont. 1981).

94. Price v. Price, 606 S.W.2d 51, 52-53 (Tex. Civ. App. 1980).

95. This would need to be dealt with via a modification action, if state law

method could cause the amount of child support received to oscillate a great deal, causing financial hardship to the custodian.[96]

A further objection is that the percentage of income standard fails to replicate the expenditures that the parents would have made for the child had they remained together, because it allocates a constant percentage of income to child support. Intact families' child support expenditures, on the other hand, diminish as a percentage of income as the families' income increases.[97] This objection applies with special force to those states adopting the income shares guidelines, which are calculated in recognition of the diminishing share of income allocated to children.[98] Unless adjusted, the percentage of income method conflicts with the policy judgment that child support should mirror intact families' actual spending habits. Some states address this concern by exempting from the calculation obligor income above a stated amount.[99] Courts could also address that concern by incorporating a sliding percentage scale into the adjustment order.

3. A percentage of income order may encourage underemployment

Courts have also been concerned that the percentage of income method could encourage underemployment more than the traditional fixed-sum order.[100] Given the custodial

---

permits modification in these circumstances. *See infra* notes 119-120.

96. Means v. Means, 511 N.E.2d 323, 324 (Ind. Ct. App. 1987).

97. *See, e.g.*, ESPENSHADE, *supra* note 24, at 25-29; Williams, *supra* note 24, at 288. Not all studies confirm that spending on children gradually decreases as a percentage of the family's income gradually as the family's income increases. *See* Garfinkel & Melli, *supra* note 61.

98. *See* Williams, *supra* note 24, at 288-89 (explaining the proportionate reduction as costs rise); *id.* at 292 (the income shares model incorporates this economic evidence). Some research corroborates that the percentage of income spent on children decreases as income increases. *See* ESPENSHADE, *supra* note 24, at 25-29; LEWIN/ICF, *supra* note 61, at 4-21. Others question whether the percentage really decreases. *See* Garfinkel & Melli, *supra* note 97, at 169 n.31.

Surprisingly, under the District of Columbia's guideline, based on the percentage of income model, the obligor's percentage increases as the obligor's annual income goes from $7,500 to $75,000. D.C. CODE ANN. § 16-916.1 (Supp. 1994); *see also* MINN. STAT. ANN. § 518.551 (West Supp. 1994); *Mass. Child Supp. Guidelines* part III(A) (Oct. 1, 1989), *in* NATIONAL CENTER FOR STATE COURTS, *supra* note 69, at 438; *N.D. Guidelines for Absent Parent Child Supp.*, *in* NATIONAL CENTER FOR STATE COURTS, *supra* note 69, at 713.

99. *See, e.g.*, TEX. FAM. CODE ANN. § 14.055(c) (West Supp. 1994). *See generally* Williams, *supra* note 24, at 169. .

100. *See* Roszko v. Roszko, 705 P.2d 951, 954 (Ariz. Ct. App. 1985). Under the

parent's transaction costs of seeking modification, an obligor with a fixed obligation may assume that he will retain all post-decree wage increases. An obligor with a percentage of income obligation, on the other hand, would understand that he would have to share wage increases with the custodial parent. To avoid the underemployment incentive and still permit children to share in later career advancement, the child support obligation could be based on a "normal" career path for someone with the obligor's experience and training rather than on what actually happens.[101] The difficulty and expense of predicting the "normal" career path, however, make this alternative unworkable. These proposals are also probably unnecessary, since the only study on underemployment disincentives under percentage of income orders concluded that the obligor's work effort does not vary significantly from the work effort under a fixed sum order.[102]

4. A percentage of income order may create enforcement problems

Percentage of income orders may also be difficult to enforce.[103] First, determining the obligor's "income" for purposes of the support calculation can sometimes be quite difficult.[104] The difficulty is often exacerbated by the obligor's incentive and ability to manipulate his apparent income. To avoid these problems, Wisconsin courts, lawyers, and child support workers are reluctant to apply the percentage of income method to self-employed obligors.[105] In addition, Wisconsin administrators

---

American rule, voluntary reduction of post-decree income generally is not grounds for a modification of the child support award. *See In re* Marriage of Powell, 474 N.W.2d 531, 534 (Iowa 1991). A substantial body of case law, exemplified by these cases, discusses the possibility of underemployment. The question usually arises when the obligor petitions to reduce his child support obligation to reflect a post-decree salary decrease.

101. *See* EDWARD P. LAZEAR AND ROBERT T. MICHAEL, ALLOCATION OF INCOME WITHIN THE HOUSEHOLD 175-77 (1988) (discussing a similar proposal).

102. *See* M.M. Klattiwer, *Child Support Awards and the Earnings of Divorced Fathers*, SOC. SCI. REV. (forthcoming).

103. Breiner v. Breiner, 236 N.W.2d 846 (Neb. 1975); *see also* Means v. Means, 511 N.E.2d 323 (Ind. Ct. App. 1987); Di Tolvo v. Di Tolvo, 328 A.2d 625 (N.J. Super. Ct. App. Div. 1974), *rev'd sub nom.* Petersen v. Petersen, 428 A.2d 1301, 1303-04 (N.J. 1981); Provenzano v. Provenzano, 418 N.Y.S.2d 140 (App. Div. 1979).

104. *See, e.g., In re* Marriage of Winne, 606 N.E.2d 777, 783-84 (Ill. App. Ct. 1992) (considering whether amounts allocated by an employer to the parent's capital account were "income" for purposes of the child support guideline); Mabee v. Mabee, 617 A.2d 162, 164 (Vt. 1992) (discussing whether capital gains are income).

105. Letter from Gregg Herman, Esq., *supra* note 77; Letter from Bonnie

find it difficult to determine whether an order expressed as a percentage of income is in arrears.[106] Even if an obligor is employed and garnishment is available, child support obligations for non-salary income other than wages[107] are also difficult to monitor under a percentage of income order. Of course, such other sources of income could be included in the definition of income for purposes of the child support obligation, but an employer would have no knowledge of the employee's income from such sources and could not withhold additional child support based on such additional income. Since relatively few obligors probably receive substantial income from sources other than salary, outside income should not present a significant problem. Of those obligors who do have substantial outside income, the custodial parent could pursue a private claim for any additional child support due, facilitated by the periodic exchange of financial information I suggest below.[108]

Enforcement problems should be minimal where most of the obligor's income comes from a stable job. Employers can compute the amount of child support without great difficulty even where expressed as a percentage of the obligor's income, making garnishment a viable option despite changes in income.[109] Basing guidelines on gross income, as Wisconsin does, further simplifies the employer's task. The guidelines should also clarify which employee benefits are considered income and which deductions from income are permitted.[110] Percentage of income orders could also be useful if the income of the obligor oscillates and the obligor could afford different levels of child support at different times. Of course, this might cause the custodial household some uncertainty.

Abramoff, Esq., Case, Drinka & Diel, to J. Thomas Oldham (June 17, 1994) (on file with the author); Telephone interview with Connie Chesnick, Wisconsin Department of Health and Social Services (Mar. 4, 1994).

106. Letter from Bonnie Abramoff, Esq., *supra* note 105; Letter from Carlo Esqueda, Division Manager, Dane County (Wisconsin) Courts Division Manager, to J. Thomas Oldham (June 7, 1994) (on file with the author); Telephone interview with Connie Chesnick, *supra* note 105.

107. For example, royalties, rents, interest, dividends or capital gains.

108. *See infra* part IV.A.

109. Telephone Interview with Connie Chesnick, *supra* note 105; Letter from Gregg Herman, Esq., *supra* note 77.

110. *See, e.g.*, TEX. FAM. CODE ANN. § 14.053(b) (West Supp. 1994) (deducting social security taxes and federal income taxes for a person "claiming one personal exemption and the standard deduction" to compute the applicable income figure for the guidelines).

Contempt enforcement is probably unavailable for percentage of income orders. To be enforceable by contempt, an order must clearly state what the party is ordered to do.[111] An order to pay a percentage of one's "income" may not be clear, particularly if the applicable income figure includes deductions for a number of specified costs. For example, Texas calculates its child support from the obligor's "net resources," which are defined as gross income[112] less social security taxes and federal income tax withholding for a single person claiming one personal exemption and the standard deduction. I am not confident that a court would conclude that an order to pay a certain percentage of an obligor's net resources would be sufficiently clear to be enforceable by contempt.[113]

5. Possible improvements to the percentage of income child support order

As discussed above, after the promulgation of guidelines states are increasingly basing child support on parents' incomes rather than childrens' needs,[114] a basis more compatible with orders automatically adjusting to changes in the obligor's income. Possibly due to this changing conception of child support, a minority of courts have been receptive to orders that automatically varied the amount of child support due based upon changes in post-divorce income of the obligor. Although the percentage of income order has generally been disfavored, courts have been more receptive to the percentage of increase method.[115] The percentage of increase method expresses the award as a fixed amount, generally computed from the guidelines based upon the information that exists at the

---

111. *See generally* J. THOMAS OLDHAM, TEXAS MARITAL PROPERTY RIGHTS 473 (2d ed. 1992).

112. Gross income includes wages and all other income such as bonuses, interest, net rental income, capital gains and dividends.

113. Other states, such as Wisconsin, apply their guidelines to gross income. *Wis. Child Support Percentage of Income Standard*, WIS. ADMIN. CODE § HSS 80.03, *in* NATIONAL CENTER FOR STATE COURTS, *supra* note 69, at 1000-01 (establishing support order formulas). This could be somewhat easier for the obligor to comprehend than net income schemes like that of Texas.

114. *See supra* text accompanying notes 85-86.

115. *See, e.g.*, Roszko v. Roszko, 705 P.2d 951, 954 (Ariz. Ct. App. 1985) (upholding percentage of increase method); Hayes v. Hayes, 283 S.E.2d 875 (Ga. 1981); Jensen v. Jensen, 629 P.2d 765 (Mont. 1981); Heinze v. Heinze, 444 A.2d 559 (N.H. 1982); *In re* Marriage of Mahalingam, 584 P.2d 971 (Wash. Ct. App. 1978); Madison v. Madison, 859 P.2d 1276 (Wyo. 1993).

time of the decree, plus a specified percentage of any future increase in the obligor's salary. While the percentage of income method automatically adjusts when an obligor is laid off, the percentage of increase method only automatically adjusts upward; to lower the amount due, the obligor must initiate an action for a modification. The percentage of increase order is perceived to be better than the percentage of income order because the former guarantees the custodial parent a specified minimum amount and lack of compliance is easier to detect.

Other variations could make automatic adjustments acceptable to more courts. For example, courts have approved orders that set a maximum amount the obligation can increase, regardless of how much the obligor's income increases.[116] This limitation would ensure that the obligor's payment does not substantially exceed the child's needs and would reflect in part the finding that families' spending on children as a percentage of income decreases with increases in income.[117] Similarly, a percentage of income order could be adjusted to accommodate the concerns of low-income obligors. A self-support reserve could be specified so that low-income obligors would not have to pay support until the minimum income level had been reached.

D. Allow Automatic Adjustment of Child Support

Despite the advantages of automatic adjustment mechanisms, however, many courts are troubled by them. This reluctance to embrace automatic adjustment stems from the majority view that child support should be based upon current evidence before the court, not predictions of what is probable. This preference for current financial information is understandable. However, the structural effect of the current approach deserves examination.

As previously discussed, courts' rejection of automatic adjustment mechanisms places the custodial parent at a substantial disadvantage. The custodial parent's inadequate informa-

---

116. Anneberg v. Anneberg, 116 N.W.2d 794 (Mich. 1962); Stanaway v. Stanaway, 245 N.W.2d 723, 724-25 (Mich. Ct. App. 1976) (order invalidated because no maximum amount was set forth); Edwards v. Edwards, 665 P.2d 883 (Wash. 1983) (en banc). *But see* Hakken v. Hakken, 298 N.W.2d 907 (Mich. Ct. App. 1980) (finding that ceilings are not required for escalator clauses).

117. Some guidelines provide that they apply only up to a certain level of income. *See, e.g.*, TEX. FAM. CODE ANN. § 14.055(c) (West Supp. 1994); Chasin v. Chasin, 582 N.Y.S.2d 512 (App. Div. 1992); *Nebraska Child Supp. Guidelines* para. O (Jan. 1, 1990), *in* NATIONAL CENTER FOR STATE COURTS, *supra* note 69, at 582.

tion, the cost of legal action, and the vague standard for modification all discourage modification actions. If the award is not modified, inflation and the higher cost of children as they age force the custodial parent to bear an increasing portion of child-related expenses. Causing the custodial parent to bear an increasing portion of the expenses of the child seems unfair as a social policy, and unjustifiable unless the problems of automatic adjustment are substantial.

Current American child support practice works great hardship on the custodial parent. Policymakers should consider some means of automatic adjustment to child support orders to avoid the necessity of subsequent judicial proceedings. Periodic COLA review, at a minimum, is needed. Expressing a child support order as a percentage of the obligor's income, rather than as a fixed amount, would also avoid later court actions. Because the percentage of income method focuses only on the obligor's income, it seems unlikely that the percentage of income approach will be accepted in states applying the income shares approach or the Melson approach. Also, another automatic adjustment mechanism would be needed in percentage of income states where the obligor is not an employee with a relatively stable job. In these instances, I would propose a COLA system.[118]

The percentage of income method is best suited for those states which accept that child support should be based only on the obligor's income. Certain variations to the percentage of income approach, such as the percentage of increase method, as well as other possible changes to percentage of income orders discussed above, could remedy concerns about the obligor's ability to pay, hardship on low-income obligors, the custodial parent's need for stable payments, and the ability of the order to reflect the decreasing percentage of income that families dedicate to child support as income rises. Percentage of income

---

118. There is some question whether a COLA system is permitted under federal law for orders governed by Title IV-D. When Wisconsin submitted its plan for child support review and adjustment, its plan incorporated a COLA option. The response of the Federal Office of Child Support Enforcement was that child support orders governed by Title IV-D may only be adjusted based upon guidelines. *See* Letter from Ms. Kay Willmouth to Ms. Mary Southwick (March 24, 1994) (on file with the author). A "Title IV-D case" is an action to establish or enforce support obligations brought under the Child Support Enforcement Act, Part D of Title IV of the Federal Social Security Act. 42 U.S.C.A. § 651-669 (West 1991).

If this construction of federal law is correct, the law should be changed. COLA provisions are useful and should not be barred.

orders apparently do not, as some courts have feared, cause more underemployment than fixed payment orders. Finally, while it creates some enforcement problems, a percentage of income order seems to work fairly well for obligors whose income comes mainly from a stable job.

E. Modification Actions Will Remain Necessary Even with Automatic Adjustment

Although automatic adjustment mechanisms will to some extent reduce the need for post-decree modification, post-decree modification will remain necessary even if automatic adjustment is accepted. No automatic adjustment system addresses a substantial increase in the needs of the child. Also, no automatic adjustment mechanism considers what should occur if a parent establishes a new permanent relationship. If the guideline permits a court to consider the income of a new partner or an obligation to support a new partner, new relationships could be grounds for modification of the child support award.[119] Some states allow modification for an obligor who assumes additional support obligations.[120] Substantial changes in the visitation arrangements may also justify modification.[121] Fur-

---

119. Not all guidelines expressly permit, and some forbid, courts' consideration of the income or needs of a new partner. *See, e.g.*, MINN. STAT. § 518.551(5)(b)(1) (West Supp. 1994) (not providing for this consideration, but allowing consideration of other factors); TEX. FAM. CODE ANN. § 14.055 (West Supp. 1994) (not providing for this consideration, but allowing consideration of other factors); ALASKA R. CIV. P. 90.3 cmt. (6)(B)(6) (1994); IDAHO R. CIV. P. 6(c)(6) (1994); *id.* 6(a)(4); *Ariz. Child Supp. Guidelines* part 5(f) (Dec. 31, 1989), *in* NATIONAL CENTER FOR STATE COURTS, *supra* note 69, at 41; *Del. Child Supp. Formula* part III (Jan. 1990), *in* NATIONAL CENTER FOR STATE COURTS, *supra* note 69, at 121. In contrast, some guidelines do direct courts to consider new partners. *See, e.g., N.D. Guidelines for Absent Parent Child Supp.* part IV, *in* NATIONAL CENTER FOR STATE COURTS, *supra* note 69, at 710-12. *See generally infra* notes 158-61.

120. Some states do not permit a court to consider such obligations incurred after the entry of the initial decree. *See* Judicial Council of California, Review of Statewide Uniform Child Support Guideline (Dec. 1993) at 75-77. A number of other states do permit courts to consider such children. *See, e.g.*, IOWA CODE ANN. § 598.21 (West 1981); MO. CIV. P. FORM No. 14 cmt. (Presumed Child Support Amount Calculation Worksheet). Under a third approach, some states do not permit an obligor to decrease child support due to subsequent children, but permit the obligor to present evidence of subsequent children in response to a petition to increase child support. *See, e.g.*, N.M. STAT. ANN. § 40-4-11.1(C)(2)(e) (Michie Supp. 1993); *Colo. Child Supp. Guideline* part III(B) (Sept. 1986), *in* NATIONAL CENTER FOR STATE COURTS, *supra* note 69, at 90; *Del. Child Supp. Formula* § III part X (Jan. 25, 1990), *in* NATIONAL CENTER FOR STATE COURTS, *supra* note 69, at 124.

121. *See generally* Marygold Melli & Patricia Brown, *The Economics of Shared Custody: Developing an Equitable Formula for Dual Residence*, 31 HOUS. L. REV.

ther, a COLA provision will not always keep up with post-decree increases in the obligor's income.

A recent pilot program was conducted to study, among other things, the extent to which old fixed amount orders required modification. This study found that, of the orders studied, relatively few that were more than three years old required adjustment.[122] Of those that did, however, almost all were too low.[123] The new orders were based upon the child support guidelines then in effect and upon each parent's current income. Of those orders that increased, the amount of the increase was significantly higher than what would have resulted with a COLA increase from the time of initial order.[124]

---

543 (1994).

122. *See* CALIBER ASSOCIATES, EVALUATION OF CHILD SUPPORT REVIEW AND MODIFICATION DEMONSTRATION PROJECTS IN FOUR STATES: CROSS-SITE FINAL REPORT (1992) [hereinafter "CROSS-SITE FINAL REPORT"]. Of the orders selected, 10% were modified. *Id.* at 172. In some instances the custodial parent did not authorize a review of the order, so the agency could not determine whether modification was warranted. *Id.*

123. *See id.* 172-73.

124. *Id.* at 180-185. In those cases where the custodial parent was receiving aid for dependant children, the order was increased by an average of 115%. *Id.* at 182. For non-AFDC custodial parents, the average increase was 66%. *Id.* This increase in all instances was higher than what would have resulted from an annual COLA increase from the date of the decree. For example, in Colorado the average increase was 67%, while a COLA provision would have resulted in an increase of 41%, on average. *Id.* at 185. For Florida, the actual average increase when the order was modified was 97%; an annual COLA provision would have resulted in an increase of 36%. *Id.* Finally, in Illinois the actual average increase amounted to 114%, while an annual COLA increase would have been 30%. *Id.*

These figures may to some degree reflect a "pre-guideline effect," in that the old orders being modified were orders entered before guidelines had been accepted in these states. Therefore, it is instructive to consider the data from Delaware, which had accepted guidelines in 1979. The investigators found that, when post-1979 Delaware orders were reviewed, of those modified the average increase was 60%, compared to an increase of 27% that would have resulted from an annual COLA increase. *Id.*; *see also* CALIBER ASSOCIATES, EVALUATION OF CHILD SUPPORT REVIEW AND MODIFICATION DEMONSTRATION PROJECT IN FOUR STATES: DELAWARE FINAL REPORT IV-68 (1992). (The number of children involved did not significantly change between the date of the original order and the modification. *Id.* at IV-67-68.) When comparing the Delaware findings with those from Illinois and Florida, it appears that the findings from these states may reflect a "pre-guideline effect" which artificially increases the difference between the COLA and the actual modification. For example, Delaware orders entered before 1979 were increased an average amount of 74%, compared to the 60% finding regarding post-1979 orders. *Id.* at IV-76. Still, the Delaware findings regarding post-1979 orders suggest that annual COLA increases will not be adequate for all cases, even where the initial order is calculated based upon a guideline.

For further discussion of this pilot project and its findings, *see infra* notes 186-190 and accompanying text.

Depending upon the automatic adjustment mechanism chosen, other situations would necessitate a modification. For example, even a COLA system requires modification if the obligor is laid off or if his income substantially changes. This would not be true if the child support is expressed as a percentage of the obligor's income, but would be if the order was a percentage of increase order. If no automatic adjustment system is accepted, the need for modification would be even more pressing.

IV. NEW IDEAS REGARDING CHILD SUPPORT MODIFICATION

In most states, a child support order is expressed as a fixed amount, subject to modification only upon a substantial and unforeseen change of circumstances.[125] As stated in the introduction, the custodial parent must assess her chances in a modification action without information about the obligor's financial situation or helpful guidance in understanding what comprises a substantial change in circumstances. Although allowing automatic adjustment of child support will reduce the importance of modification for some parents, modification will still be needed in some instances. The continuing need to allow child support modification requires new ideas to better remedy the problems facing custodial parents. In this part, I recommend a number of relatively simple changes to remedy these defects and to improve the system governing modification of child support.

A. Information Exchange

Few states today make any effort to provide a parent with information about post-decree changes in the financial condition of the other parent.[126] Even if a parent is willing to devote the resources to pursue a modification proceeding, a parent still has little information to determine whether it would be wise to initiate a modification proceeding. It seems likely that this lack of information more often than not works to the disadvantage of the custodial parent. If the custodial parent does not

---

125. *See, e.g.*, Holley v. Holley, 864 S.W.2d 703, 706 (Tex. Ct. App. 1993); Manners v. Manners, 706 P.2d 671, 675 (Wyo. 1985). *See generally* CLARK, *supra* note 10, at 727.

126. *Cf.* COLO. REV. STAT. § 14-10-115(3)(b)(II) (West Supp. 1993) (providing that a court may, if it wishes, require an annual exchange of financial information).

learn of any significant raises received by the other parent, the custodial parent may well defer or never initiate an action to increase child support, even though the action would have been successful. Of course, the lack of information could have the opposite effect if the custodial parent's income has significantly increased and the other parent is unaware of this change.

Some means should be found to provide an accurate periodic exchange of information between parents. One simple way of doing this would be to require a parent to send a copy of his or her tax return to the other parent by May 1 of each year. Such a procedure would be less than perfect. Some parents never file tax returns. Even if they do, there is no guarantee that the tax return is truthful. Also, if the parent has remarried and filed a joint return, the information would not be as useful, because the income of a new spouse is not generally included in the guideline calculation. Still, such a procedure in many instances could give the other parent at least a rough idea of the financial condition of the other spouse. Also, tax returns include information about things other than wages that could be relevant to a child support determination, such as interest, rents, investment income, royalties and capital gains.[127] This proposed disclosure procedure would require no direct governmental involvement. Also, it would not require the parties to draft an additional disclosure document; they merely would have to copy a document already being created for another purpose. To verify the accuracy of the information exchanged, spouses could be asked to forward a copy of the most recent W-2, as well as the most recent pay stub (if the parent is a salaried employee).

B. Establish Objective Standards for Child Support Modification

Despite the pressing need for child support modification where, as is customary today, child support is expressed as a fixed amount and is not automatically adjusted, most states provide little guidance as to the meaning of the standard—substantial change of circumstances—that generally

127. Some guidelines include investment income and royalties as income when computing the presumptive child support obligation. *See, e.g.*, N.H. REV. STAT. ANN. § 458-C:2(IV) (1992); OHIO REV. CODE ANN. § 3113.215(A)(2) (Supp. 1993); 231 PA. CODE § 1910.16-5 (Supp. 1994); TEX. FAM. CODE ANN. § 14.053(b) (West Supp. 1994).

governs child support modification.[128] To better provide guidance to parties and courts alike, I propose that child support guidelines be applied to child support modification actions as well as to initial awards, and that an objective standard should be established for what constitutes a substantial change in circumstances.

1. The tension between discretion and rules

Courts wisely recognize the need for judicial discretion to consider all relevant factors before modifying child support obligations, but the current breadth of discretion in modification decisions makes outcomes unpredictable. The results parallel the unpredictability of initial awards under the traditional pre-guideline system of substantial discretion.[129] To create additional certainty in this area, some states have established, by presumptive rules, an objective standard of what constitutes a substantial change in the parties' circumstances. For example, some states have adopted a policy that there presumptively is a substantial change in the circumstances of the parties if, at the time the parent petitions a court, a child support award computed under the current guidelines, based upon the current income of the parties, would deviate by more than a certain specified percentage from the amount of the initial award.[130]

Would it be wise to create an objective standard regarding child support modification? The appropriate balance between fixed rules and discretion[131] has been a recurring theme in Anglo-American law.[132] Family law commentators have also

---

128. *See generally* CLARK, *supra* note 10, at 727.

129. *See generally* Kenneth R. White & R. Thomas Stone, Jr., *A Study of Alimony and Child Support Rulings with Some Recommendations*, 10 FAM. L.Q. 75, 83 (1976); Lucy M. Yee, *What Really Happens in Child Support Cases: An Empirical Study of Establishment and Enforcement of Child Support Orders in the Denver District Court*, 57 DEN. L.J. 21, 28-30, 52-55 (1979).

130. *See* IND. CODE § 31-1-11.5-17(a) (Burns Supp. 1994) (requiring that the new amount deviate by 20% from the existing order); KY. REV. STAT. ANN. § 403.213(2) (Michie/Bobbs-Merrill Supp. 1992) (specifying 15%); *In re* Marriage of Pugliese, 761 P.2d 277, 278 (Colo. Ct. App. 1988) (determining that if the child support as calculated under the current guideline differs from the current order by at least 10%, there presumptively has been a change of circumstances); Mullin v. Mullin, 612 A.2d 796, 798-99 (Conn. App. Ct. 1992) (specifying 15%).

131. Professor Sullivan refers to this distinction as one between rules and standards. *See generally* Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57-58 (1992).

132. *See generally* KENNETH C. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969); FREDERICK SCHAUER, PLAYING BY THE RULES (1991); THE USES OF

considered the issue.[133] Advocates of rules contend that they force decisionmakers to treat like cases alike, thereby reducing arbitrariness or bias.[134] One response to this view is that rules cannot always consider all relevant factors, so that in fact like cases are not treated alike.[135] So, in Professor Sullivan's view, "a decision favoring rules thus reflects the judgment that the danger of unfairness from official arbitrariness or bias is greater than the danger from the arbitrariness that flows from the grossness of rules."[136]

Aside from the relative arbitrariness of rules or discretion, another relevant concern pertains to the transaction costs of each. Proponents of rules argue that, due to the predictability resulting from rules, litigation costs are reduced and settlement is facilitated.[137]

A rule is a relatively rigid regulatory mechanism. In theory, rules are mechanically applied. A legislative amendment is necessary to change a rule embodied in a statute. In contrast, a system permitting substantial discretion is more flexible and can adapt to changing social needs without action by the creator of the rule. For this reason, a discretionary system can react more quickly to social change and facilitate creativity.[138]

A choice between rules and discretion may also involve a choice of the appropriate decisionmaker. If rules are promulgated by the legislature, the legislature is permitted to make the important policy choices, whereas a policy of discretion normally allows judges to make such choices.[139] The relative desirability of rules may then depend upon whether a certain policy choice seems more appropriately delegated to judges or legislators.[140]

DISCRETION (Keith Hawkins ed., 1992); Pierre Schlag, *Rules and Standards*, 33 U.C.L.A. L. REV. 379 (1985).

133. *See* Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165 (1986); Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215 (1991).

134. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1688 (1976); Antonin Scalia, *The Rule of Law As a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178-79 (1989); Sullivan, *supra* note 131, at 62.

135. *See* Sullivan, *supra* note 131, at 62, 66.

136. *Id.* at 62.

137. *See generally* Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 N.C. L. REV. 209, 223 (1991).

138. *See generally* DAVIS, *supra* note 132, at 25.

139. *See* Sullivan, *supra* note 131, at 64.

140. *See generally* Homer Clark, *The Role of the Court and Legislature in the*

Framing the choice in terms of a choice between "rules" or "discretion" is to some degree artificial. It is quite rare to encounter a regulatory scheme that is a "pure" rule or permits unfettered discretion; most policies are compromises that fall somewhere between those two extremes.[141] The challenge for those formulating policy is to decide upon the optimal balance between rules and discretion for a given subject.[142]

Judges traditionally have possessed a great deal of discretion under American family law. During the past few decades, some family law writers have advocated various limitations upon this discretion.[143] Although the relevant factors depend upon the issue presented, many concerns recur when considering the appropriate balance between rules and discretion regarding family law policy choices. Proponents of discretion in family law matters emphasize the individualized justice that is thereby possible.[144] This obviously is an important concern regarding an issue such as child support; many factors not incorporated into guideline computation could be relevant to a determination of an appropriate amount of child support, such as any special needs of a child or, if a parent has remarried, the income or needs of the new partner or any subsequent children. Critics note, however, that a system of discretion has a number of costs. First, results are more difficult to predict, so early settlement is discouraged and litigation costs are increased.[145] Also, judgments based upon discretion are based in part upon the judge's personal beliefs and biases, so a discretionary system yields inconsistent results. Finally, some con-

---

Growth of Family Law, 22 U.C. DAVIS L. REV. 699 (1989).

141. *See generally* Carl E. Schneider, *The Tension Between Rules and Discretion in Family Law: A Report and Reflection*, 27 FAM. L.Q. 229 (1993).

142. *See generally* DAVIS, *supra* note 132, at 3-4.

143. *See generally* Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 36-43 (1987) (child custody); Glendon, *supra* note 133, at 1181-82 (child custody); Ramsay L. Klaff, *The Tender Years Doctrine: A Defense*, 70 CAL. L. REV. 335, 357-58 (1982) (child custody); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975, at 226, 262 (child custody); Murphy, *supra* note 137 (child support rules); Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1119 (1989) (alimony rules). *Cf.* John W. Ester, *Maryland Custody Law—Fully Committed to the Child's Best Interest?*, 41 MD. L. REV. 225, 250 (1982) (advocating discretion in child custody decisions); Schneider, *supra* note 133 (discussing the pros and cons of discretion and rules in child custody decisions).

144. *See* Schneider, *supra* note 141, at 234-35.

145. *See* Glendon, *supra* note 133.

tend that judges are biased toward men and are uninformed about the costs of children, so a system of judicial discretion results in discrimination against custodial mothers.

The acceptance of child support guidelines during the past decade reflects a judgment that, at least for child support, regulatory policy should shift more toward rules and away from discretion. Guidelines now clearly apply in all states as presumptive standards for an initial award of child support. An argument could be made that the payment schedule for child support should be specified when the decree is entered, and that this schedule normally should not be modified.[146] In my discussion above, though, I outlined the deficiencies of such a scheme and concluded that the optimal child support system should adjust to any significant post-decree changes in the parties' circumstances.[147] This conclusion, one that is to some degree accepted by the American rule, does not seem too controversial. Given this conclusion, the question thus becomes how to adapt child support awards to post-decree changes in circumstances. Given the acceptance of guidelines regarding initial awards, these guidelines seem an obvious potential mechanism for updating child support awards.

2. *Apply child support guidelines to modification actions*

If one wishes to integrate guidelines into the modification process, a number of different options are possible regarding the current system of modifying a child support order expressed as a fixed amount. For example, a state in which guidelines govern modifications as well as initial orders could abandon the "substantial change of circumstances" concept, and permit a parent to file a modification action whenever he or she chooses. The child support would be recomputed based upon the parties' financial situation at that time. Wisely, few states have accepted this approach.[148] One fairly obvious benefit of

---

146. *See supra* part II.B.5.

147. *Id.*

148. Washington apparently does permit a modification action without a showing of a substantial change in circumstances if the order has not been modified within two years. *See* WASH. REV. CODE § 26.09.170(8) (West Supp. 1994). Delaware permits a modification if the child support award would be changed by $25. *See Del. Child Supp. Formula* part X (Jan. 1990), *in* NATIONAL CENTER FOR STATE COURTS, *supra* note 69, at 124. In Massachusetts, as of 1994, child support orders may be modified if the order is inconsistent with the guidelines. An Act to Improve the Economic Security of Children of the Commonwealth, 1993 Mass. Acts

the "substantial change of circumstances" rule is that it attempts to balance the costs of the modification proceeding against the resulting benefit. In view of the legal and emotional costs of a modification action, as well as the concomitant burden upon courts, it seems wise to place some reasonable limits upon a parent's right to initiate a modification action.

3. Possible limitations on modification actions

A number of possible limits to modification actions are available. One alternative would be to limit the frequency of modification actions. For example, a parent could be barred from initiating a modification action for two years after any support action; some exception would be necessary for extreme hardship.[149] In my view, though, a modification rule based upon time focuses upon the wrong factor.

Another alternative would be to use the guidelines as an objective standard of substantial change of circumstances. Since guidelines focus upon the income of one or both parents, they indirectly address changes in the parents' situations. Guidelines can provide an objective standard for child support modification actions by equating substantial change of circumstances with a deviation beyond a specified percentage between the original child support award and the amount that would currently be awarded under the guidelines. The exact percentage chosen would depend upon the judgment made about what is the appropriate balance between updating awards and judicial economy. Some precedent exists for choosing 10 percent,[150] 15%,[151] 20%,[152] or 25%.[153] If the presumptive award would deviate from the current order by at least the prescribed amount, the modification action would be permitted.[154] Of course, under such a system the moving party could

---

ch. 460 (amending MASS. GEN. L. ANN. ch. 119A, §§ 1 & 13; *id.* ch. 208, §§ 28 and 28A (West 1994)).

149. A similar approach has been adopted in a few states. *See, e.g.*, WASH. REV. CODE § 26.09.170 (West Supp. 1994) (permitting a child support modification without showing a change in circumstances if the order has not been modified within the previous 24 months, but requiring such a showing if the decree has been modified within the last 24 months).

150. *See In re* Marriage of Pugliese, 761 P.2d 277 (Colo. Ct. App. 1988).

151. VT. STAT. ANN. tit. 15, § 660(b) (Supp. 1994); KY. REV. STAT. ANN. § 403.213(2) (Michie/Bobbs-Merrill Supp. 1992).

152. IND. CODE ANN. § 31-1-11.5-17 (Burns Supp. 1994).

153. UTAH CODE ANN. § 62A-11-320.5(3) (1993).

154. It is unclear how such a system would deal with a situation where the

still establish a substantial change in circumstances by other means, such as by showing a substantial change in the child's needs.

The objective standard for what constitutes a substantial change in circumstances should only create a rebuttable presumption that such a change has occurred. Therefore, if circumstances initially justified a deviation from the guidelines at the time of the entry of the order, and those circumstances remain unchanged, the presumption would be rebutted despite the deviation. Similarly, circumstances that now justify a deviation from the guidelines will rebut the presumption even if the initial order was based upon the guidelines.[155]

This proposed objective standard for what constitutes a substantial change in circumstances might permit more modification actions than the current substantial change in circumstances standard, thereby potentially increasing court caseloads. Of course, because my proposed standard clearly establishes what needs to be shown to presumptively be able to obtain a modification of the order, such an objective standard could reduce judicial caseload by both reducing unsuccessful filings and by encouraging settlement where modification is indicated. Even if this proposed standard for modification would increase judicial caseloads such a result should not cause this alternative regime to be rejected. First, a number of methods exist for easing burdens imposed on courts as a result of child support modification actions. One example is New Jersey's system of hiring "hearing officers," supervised by judges, who hear almost all modification actions. The result proposed by the hearing officer is then forwarded to the judge for final approval.[156] Also, even if judicial caseloads will be increased by the standard I suggested above, this cost should not outweigh the societal benefits of updating child support orders to reflect the parents' current circumstances.

---

non-custodial parent was not initially ordered to pay any support, and the modification action is to obtain some support. For an example of a court dealing with this issue under the traditional rule, see S.A.B.S. v. H.B., 767 S.W.2d 860 (Tex. Ct. App. 1989).

155. For example, under current law in many states, if the obligor had remarried and fathered another child, this could cause a court in many states not to grant an increase in child support, even if the obligor's income had significantly increased. *See infra* notes 157-163 and accompanying text.

156. Interview with Raymond Rainvill, New Jersey Administrative Office of Courts (May 9, 1994).

4. Address other foreseeable changes of circumstances in the guidelines

Guidelines will be less useful in modification actions if they do not address what should occur if either parent remarries or assumes responsibility for other children.[157] An increasing number of guidelines do address such problems. For example, of the 23 states whose guidelines discuss what should occur if a parent establishes a new significant relationship, about one-half allow courts to consider the income of the new partner, while the other one-half forbid it.[158] Many guidelines specify how courts should calculate a child support award if the obligor establishes a parent-child relationship with a new child.[159] Some do not permit a downward modification based upon subsequent children of the obligor.[160] Others do permit a downward modification, and specify how the calculation should be done.[161] Others allow a downward modification, but give the court discretion regarding the amount of the appropriate reduction.[162] To the extent that the respective guideline

---

157. Divorced people frequently remarry. *See generally* Oldham, *supra* note 30.

158. *See generally* Judicial Council of California, *supra* note 89, at 74-75. For example, some forbid the court from considering evidence of the income of the obligor's new spouse for any purpose. *See, e.g.*, Stark v. Nelson, 878 S.W.2d 302 (Tex. Ct. App. 1994). In contrast, others do not include the new spouse's income in the formula, but permit the court to consider the effect of the new spouse's income on the obligor's living expenses. *See, e.g., N.D. Dakota Guidelines for Parent Child Supp.* para. IV, *in* NATIONAL CENTER FOR STATE COURTS, *supra* note 69, at 711.

The approach accepted by a state regarding this issue would be affected by whether a stepparent has an obligation to support the child of his or her spouse. Most states do not impose such an obligation. *See* Marygold S. Melli & Ann M. Stanton, *The Child Support Obligation* 11-37, ch. 11 *in* 1 ALIMONY, CHILD SUPPORT & COUNSEL FEES—AWARD, MODIFICATION AND ENFORCEMENT (Matthew Bender); Duffey v. Duffey, 20 Fam. L. Rep. (BNA) 1154 (N.C. Ct. App. 1994). Some do impose this support duty on stepparents. *See, e.g.*, S.D. CODIFIED LAWS ANN. § 25-7-8 (1992); Ainsworth v. Ainsworth, 574 A.2d 772 (Vt. 1990).

159. Judicial Council of California, *supra* note 89, at 75-77.

160. *Id.*; *see, e.g., Del. Child Supp. Formula* part III (Jan. 1990), *in* NATIONAL CENTER FOR STATE COURTS, *supra* note 69, at 121.

161. *See, e.g.*, TEX. FAM. CODE § 14.055(j) (West Supp. 1994). Generally the amount of a hypothetical child support order for the child, based upon the guidelines, is subtracted from the obligor's income before arriving at the obligor's income for purposes of the guideline calculation. *See, e.g.*, OHIO REV. CODE ANN. § 3113.215 (Supp. 1993); OR. ADMIN. R. 137-50-400 (1989), *in* NATIONAL CENTER FOR STATE COURTS, *supra* note 69, at 759; TEX. FAM. CODE ANN. § 14.053(b) (West Supp. 1994).

162. *See, e.g.*, CAL. FAM. CODE §§ 4059(g), 4071(a)(2), 4071(b) (granting the court discretion regarding the amount, if any, by which the support should be reduced in this situation).

does not clearly specify how to treat these common post-decree changes in the parties' lives, the parties will not be able to predict the outcome of any contemplated modification action, thereby reducing the utility of guidelines in these situations.[163]

5. Modifying orders entered before guidelines were promulgated

One might argue that child support decrees entered before the acceptance of guidelines constitute a different regime, and therefore, the guidelines should not govern their modification;[164] in other words, guidelines should not be given retroactive effect. The acceptance of guidelines reflects a policy judgment that standards for the computation of child support need to be clearer and the amounts need to be higher. Using guidelines as a standard for modification would facilitate the realization of these important goals.[165]

Some contend, however, that divorce financial settlements negotiated before the adoption of guidelines were negotiated in a different "legal environment," and the application of guidelines would be unfair.[166] This point raises the question whether before the adoption of guidelines parties addressed lower child support awards via other means. It is possible that in some instances, due to the lower child support award, a judge might have ordered more spousal support than would have resulted at a higher level of child support. In such instances, it would be unfair to award the recipient both the amount of spousal support based upon the lower amount of child support and to increase the child support. It is unclear how often this might have occurred. Relatively few spouses receive spousal support, and those who do generally receive it

---

163. *See, e.g.*, *In re* Marriage of Ladely, 469 N.W.2d 663, 665-66 (Iowa 1991) (providing little guidance to lower courts regarding how to respond when the obligor has additional children); *see also In re* Marriage of Linberg, 462 N.W.2d 698, 701 (Iowa Ct. App. 1990) (opining that trial courts could "consider" the income of a stepparent).

164. *See generally* Peter Leehy, Note, *Child Support Standards Act and the New York Judiciary: Fortifying the 17 Percent Solution*, 56 BROOK. L. REV. 1299, 1336 (1991).

165. For example, New Zealand applies its new child support system to all orders, even those entered before the new regime was adopted. *See* W.R. Atkin, *Child Support in New Zealand Runs into Strife*, 31 HOUS. L. REV. 631 (1994) (forthcoming).

166. Leehy, *supra* note 164, at 1337.

for a short period.[167] Even if the spousal support amount was inflated to compensate for a lower pre-guideline child support amount, the spousal support normally would have stopped by the time the custodial parent requests modification. Applying guidelines to the modification of pre-guideline orders would therefore result in hardship to few obligors. Also, if the spousal support level was established in a settlement agreement, frequently such agreements provide that, if child support is increased, spousal support will be decreased. In this situation, increasing child support therefore would have little effect.

Another objection to applying the guidelines to the modification of pre-guideline orders is that the obligor may have made concessions in the property division in exchange for a lower child support obligation. Applying the guidelines in this situation could be unfair to the obligor, requiring him to pay child support twice. Since many divorcing couples have little property,[168] this concern is of limited scope. Many states therefore apply guidelines retroactively to all modification actions.[169] Any unfairness can be resolved on an individual basis.[170]

Child support orders entered before the adoption of guidelines generally are lower than orders entered after guidelines were adopted. These obligors may have incurred other obligations when the award was lower, and could experience hardship if the initial order is significantly increased. If it would be difficult to bear the entire increase at once, it could be implemented in steps.

In summary, an objective standard for child support modification would provide benefits to the parties. Both the parties

---

167. *See generally* Marsha Garrison, *Economics of Divorce: Changing Rules, Changing Results, in* DIVORCE REFORM AT THE CROSSROADS (Herma Kay & Stephen Sugarman eds., 1990); Robert McGraw et al., *A Case Study in Divorce Law Reform and Its Aftermath*, 20 J. FAM. L. 443, 473, 474-75 (1982); James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351 (1987); Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 U.C.L.A. L. REV. 1181, 1221 (1981).

168. *See* Weitzman, *supra* note 167, at 1188.

169. Some states' guidelines provide that the adoption of the guidelines by itself constituted a substantial change in circumstances, so every order entered before the promulgation of guidelines could be automatically adjusted. *See, e.g.*, 1984 Iowa Acts ch. 1088, § 6 ("The enactment of subsection 1 of section 598.41 constitutes a substantial change in circumstances authorizing a court to modify a child custody order pursuant to section 598.21 and chapter 598A.").

170. *See, e.g.*, S.D. CODIFIED LAWS ANN. § 25-7-6.10 (1992).

and the judge would better understand when modification is proper. In contrast, the current system's subjectivity leads to less predictability in determining whether a substantial change has occurred. The objective standard would also remedy the problem of a scanty record in the original support order. Under the current system, the absence of evidence in the record of the circumstances at the time makes proof of change of circumstances almost impossible.[171] An objective standard would also limit litigation to those cases in which one party would be substantially benefitted. This limitation would lead to an efficient use of court time as less time would be allocated to unsuccessful modifications. An objective standard would also lead to more consistent results. Finally, it should induce parents to initiate more modification actions where the action is warranted.

This discussion assumes that the current regime of child support expressed in fixed amounts will continue for the foreseeable future in most states. If percentage of income orders are accepted, of course, modification presumably would be needed less frequently. Also, because orders expressed as a percentage of income automatically adjust when the obligor's income changes, a hypothetical child support order based upon the parties' current circumstances would less frequently deviate from the currently effective order amount by the specified minimum percentage to justify an adjustment.

C. Provide Only Limited Automatic Periodic Review and Adjustment

The American rule's failure to allow for automatic adjustment leads some to contend orders should be reviewed automatically and periodically. Indeed, Congress has mandated that custodial parents should be informed every three years of their right to attempt to modify the applicable child support order.[172] Orders affecting a parent receiving Aid for Families with Dependent Children (hereafter "AFDC") must be reviewed once every three years, unless the review would not be in the best interests of the child.[173]

---

171. *See, e.g.*, S.A.B.S. v. H.B., 767 S.W.2d 860, 862 (Tex. Ct. App. 1989).

172. *See generally* Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 243 (1988); 45 C.F.R. §§ 302, 303, 303.7, 303.8 (1993). This automatic review every three years has been enacted by certain states as well. *See, e.g.*, 43 OKLA. STAT. ANN. tit. 43, § 118.1 (West 1990).

173. Family Support Act of 1988, *supra* note 172; *see also* 42 U.S.C.

In an attempt to learn more about the costs and benefits of an automatic periodic review program, Congress funded pilot programs in four states.[174] In these programs, custodial parents whose orders were at least approximately three years old were randomly selected. These parents were then contacted and informed that they could have their order reviewed for possible modification.[175]

This pilot project led to two surprising findings. First, a significant number of custodial parents did not want the order reviewed.[176] When contacted, parents gave a number of reasons for declining review. Some explanations were not surprising. For example, some parents were not receiving any child support, and felt a review of the order would be not be useful. Others were reluctant to go to court, or felt that the obligor was paying all he could afford.[177] Other explanations were not as obvious. In a few states, a surprising number of parents did not consent to a review because they did not want to undermine what they felt was a good relationship with the obligor.[178] If the relationship were undermined, the custodial parent was concerned that the obligor would be less reliable regarding the payment of child support. Other parents were concerned that the child support order would be decreased, not increased.[179]

Another finding is related to the first. Of the cases selected where the parent was not receiving AFDC, a surprisingly small percentage of the orders were modified.[180] Although this may result in part from the low rate of consent to the review process, the percentage of orders modified among AFDC recipients

---

§ 666(a)(10)(B)(i)-(ii) (1988).

174. The states were Florida, Illinois, Delaware and Colorado. *See* CROSS-SITE FINAL REPORT, *supra* note 122.

175. Parents receiving AFDC benefits had to consent to the review; other parents could choose whether to participate. *Id.*

176. *Id.* at 128-44. Of custodial parents contacted, almost three-quarters of all cases selected were terminated before a full review of the order. Of these terminated cases, 45% were terminated because the custodial parent did not authorize the review. *Id.* at 135. (Those parents not receiving AFDC benefits had to consent to a review of the order.) Of those parents not receiving AFDC benefits, only 15% of all cases selected received a full review. *Id.* at 144.

177. *Id.* at 229.

178. *Id.* at 232.

179. *Id.* at 236. Custodial parents had to consent to the review before the agency had sufficient financial information to calculate a new presumptive amount.

180. Orders in six percent of all non-AFDC cases selected were modified. *Id.* at vi.

was not significantly higher even though they were required to consent.[181] Even among non-AFDC custodial parents consenting to review, a full review of financial information was often unnecessary because the youngest child had become emancipated, the obligor was dead, no enforceable order existed, the agency could not locate a parent, or the need for modification was otherwise obviously foreclosed.[182]

In some circumstances, of course, cases were modified. The orders in 85% of those AFDC cases receiving a full review were increased, were reduced in 5%, and remained unchanged in the remaining cases.[183] The result for parents not receiving AFDC benefits was lower; 77% of all such orders were increased, 8% were lowered, and 15% remained unchanged.[184] Although only about 10% of all cases selected[185] resulted in modification,[186] the modification was significant when it occurred. Of parents with AFDC benefits, the order, when modified, was increased an average of 115%.[187] Of parents not receiving AFDC, the average increase amounted to 66%.[188] These amounts were significantly higher than what would have occurred with COLA increases from the date of the order.[189] The correlation was positive between the age of the order and the percentage increase.[190]

The pilot project findings cast some doubt upon the wisdom of automatic review of support orders at certain prescribed intervals. Substantial effort was expended to modify a relatively small percentage of orders reviewed. If one of the automatic adjustment mechanisms suggested above[191] had been employed in the initial orders, even a smaller percentage presumably would have been modified. I would argue that, if an automatic adjustment mechanism for support is accepted, periodic review of all orders should not be automatic. In view of the

---

181. *Id.*
182. *Id.* at iv, 136.
183. *Id.* at 147.
184. *Id.* at 148.
185. Remember that most cases selected did not result in a review. *See supra* note 176 and accompanying text.
186. CROSS-SITE FINAL REPORT, *supra* note 122, at vi. Fifteen percent of all AFDC cases were modified, compared to six percent of non-AFDC cases.
187. *Id.* at 182.
188. *Id.*
189. *Id.* at 185.
190. *Id.*
191. *See supra* part III.

higher rate of modification obtained in cases involving AFDC cases,[192] the greater governmental expenditures regarding such families, and the lower incentive such custodial parents have to attempt to modify child support,[193] it may be sensible to continue the current practice of mandatory review of such orders every three years. For all other orders, it should be sufficient if the state would hire sufficient personnel so that either parent could call and request the employee to calculate the presumptive child support amount that would result based upon the parents' current financial information.[194] If the state adopts an objective standard for a substantial change in circumstances, as suggested above,[195] the parent should then be fairly certain whether modification would be possible, and could act accordingly.

D. Allow Contractual Limitations on the Right to Post-Decree Modification

When discussing modification, the preceding section assumed that the initial child support order normally is calculated pursuant to the guidelines. This may not always be true; child support could deviate from the guidelines due to other aspects of the parties' financial settlement. For example, the obligor may be willing to make certain concessions regarding the property division, or may allow the custodial parent to live in the marital home, in exchange for a lower child support award than that set forth in the guidelines.[196] In such a situation, if the custodial parent would have the right shortly after the agreement is finalized to modify the child support order based upon the guidelines, this type of bargaining would not occur.[197]

---

192. *See supra* note 183 and accompanying text.

193. Any increase in child support normally is retained by the government as reimbursement for AFDC benefits provided.

194. I proposed above one way that parties could exchange financial information annually. *See supra* part IV.A. Once parties have this information, computer software exists in most states to compute the presumptive amount of child support due. *See* Raggio & Harhai, *Tools of the Trade*, 15 FAM. ADV. 6, 8 (1993).

195. *See supra* note 171 and surrounding text.

196. For example, the spouses made such an agreement in Kelley v. Kelley, 20 FAM. L. REP. (BNA) 1554 (Va. 1994). This type of bargaining is discussed in Atkin, *supra* note 165.

197. It currently is unclear whether many states now enforce contractual restrictions upon child support modification. *See, e.g.*, Elliott L. Epstein, *The Enforceability of Extra-statutory and Repudiated Divorce Settlement Agreements*, 8 ME. B.J.

This bargaining option could be preserved by allowing the parties to enter into enforceable contractual limitations upon the right to modify the child support award. Still, enforcing waivers of modification could negatively affect the children, especially if the waiver rule allowed no exceptions.

Some courts have been skeptical of attempts by spouses to limit the ability of a court to modify child support due to a party's change in circumstances. Indeed, a number of opinions hold that parents may not limit a court's ability to modify child support.[198] These courts seem concerned about the possible negative effects of such agreements upon the well-being of children. One judge stated that "[t]he support of one's children is not a proper area for long-term economic gambling, and the courts will not enforce the parties' attempts to engage in such speculation."[199]

---

144 (May 1993) (opining that a Maine court would not enforce such an agreement). *See also* cases cited *infra* note 198. Some European countries have been more favorably disposed toward such agreements. *See* Marie-Thérèse Meulders-Klein, *Financial Agreements on Divorce and the Freedom of Contract in Continental Europe*, ch. 18 *in* THE RESOLUTION OF FAMILY CONFLICT 297 (John M. Eekelaar & Sanford N. Katz eds., 1984). Australia permits limitations upon child support modification, while New Zealand does not. *See* Atkin, *supra* note 165.

198. *See, e.g.*, *Ex parte* Alabama, 20 Fam. L. Rep. (BNA) 1112 (Ala. 1993) (stating that a waiver of a right to child support would not be enforced); Guille v. Guille, 492 A.2d 175 (Conn. 1985) (refusing to enforce decree stating that child support was not modifiable); Lieberman v. Lieberman, 568 A.2d 1157, 1162-63 (Md. Ct. Spec. App. 1990); Mora v. Mora, 861 S.W.2d 226 (Mo. Ct. App. 1993) (holding that parties may not by agreement relieve one parent of future support obligation without court approval); Brenneman v. Brenneman, No. WD-90-33, 1991 WL 49998 (Ohio Ct. App. 1991); *In re* Marriage of Wood, 806 P.2d 722, 723 (Or. Ct. App. 1990) (allowing husband's action for child support despite wife's unfavorable property settlement and husband's waiver of any right to support); Hill v. Hill, 819 S.W.2d 570 (Tex. Ct. App. 1991); Pettit v. Pettit, 818 S.W.2d 561, 562 (Tex. Ct. App. 1991); Huckeby v. Lawdermilk, 709 S.W.2d 331 (Tex. Ct. App. 1986); Duke v. Duke, 448 S.W.2d 200, 203 (Tex. Civ. App. 1969); Grimes v. Grimes, 621 A.2d 211 (Vt. 1992) (concluding that waiver of a right to modify should be unenforceable even where the obligor is trying to reduce child support); Pauley v. Pauley, 263 S.E.2d 897 (W. Va. 1980) (allowing action for child support despite lump-sum payment at divorce and custodial parent's waiver of any additional right to support); Kelley v. Kelley, 20 FAM. L. REP. (BNA) 1554 (Va. 1994). In contrast, a few courts have upheld contractual limits to modification. *See* Ruhe v. Rowland, 706 S.W.2d 709 (Tex. Ct. App. 1986).

One Texas case has held that, if parties establish a child support obligation in a settlement agreement, if the child support is reduced in a modification action the custodial parent may sue based on the contract and obtain the originally specified amount. *Hill*, 819 S.W.2d at 571. However, if the child support is increased, the obligor may not sue the custodial parent for the difference between the originally specified amount and the increased amount. *Id.* at 572.

199. *Hill*, 819 S.W.2d at 572.

The hazards of limiting child support modification are clear. In the event that the circumstances of at least one of the parties changed in a substantial and unforeseeable way, disallowing modification could prove disastrous. For example, if the obligor was laid off or if the child incurred some substantial new unforeseen expense, modification would clearly be appropriate, regardless of the parties' agreement. Similarly, modification should be allowed if there is a change of custody. Still, some significant benefits could exist if parties are permitted to bargain about child support and its modifiability. Can these benefits be achieved without unreasonably risking the ability of the system to adjust to future unforeseen circumstances?

If one wished to give parties flexibility to bargain regarding property division and child support, as well as its modifiability, while trying to protect a party who experiences a substantial unforeseen change in circumstances, some distinction could be made between those events in the future that are not surprising or particularly unforeseeable, such as gradual salary raises or increases in the cost of a child as he ages, and other changes that are less foreseeable, such as illness, loss of a job, or a substantial unforeseen increase in the expenses related to a child. A waiver of a right to modify would be enforceable in the former circumstance, but not in the latter. Alternatively, parties could be permitted to make an agreement that would bind them for a certain period of time, such as five years; after that period, either party could then request a modification due to a substantial change in circumstances. Also, in the event of a custody change (or a substantial modification of the visitation arrangement), modification would be necessary.

The desirability of bargaining regarding below-guideline child support rests upon the assumption that the custodial parent would receive some financial benefit for accepting lower child support. If restrictions on child support modification are permitted, and the child support is lower than the guideline amount, before accepting the agreement judges should verify that the agreement was freely made and that the custodial parent received some substantial economic concession for the agreement to lower child support or limit its modifiability. A waiver of visitation rights would not constitute such an economic benefit. Bargaining regarding child support and its modifiability could be abused. Courts certainly should not approve such a waiver unless the custodial parent has obtained a significant economic concession from the other parent.

E. Recognize Tax Planning Strategies in Modification Decisions

After divorce, the tax consequences of payments from one former spouse to the other depend upon whether the payment is considered child support or spousal support. The latter is taxable to the recipient and deductible by the payor, while the former has no tax consequence.[200] If the non-custodial parent is in a significantly higher marginal tax bracket than the custodial parent, spouses frequently agree to pay a higher amount of "alimony." Although in some instances the total amount is designated alimony, it often is, in reality, the sum of child support and whatever the obligor is paying as spousal support.[201]

Any rule regarding child support modification must reflect an awareness of these negotiations between spouses and should not foreclose them. If spouses have agreed to designate transfer payments as "alimony," not child support, a blind application of the modification rule proposed above could permit a custodial parent to petition for "child support" after the decree is entered, thereby potentially allowing the custodial parent to receive, in effect, double child support. This problem could be addressed by adding a provision to the settlement agreement to the effect that the spousal support would be reduced by 150% of any increase in child support.

F. Avoid Excessive Administrative Control over Child Support Modification Decisions

Judges have long been concerned about family disputes overloading court calendars. Indeed, an important justification for the American rule regarding child support modification was its tendency to discourage parents from seeking a subsequent judicial audience regarding a change in support. A number of states have attempted to relieve some of the burden family law

---

200. *See generally* OLDHAM, *supra* note 111, at 453.

201. Some courts have shown a willingness to look behind a label of "alimony" to see whether the award is in fact child support or a part of the property division. *See, e.g., In re* Gleason, 20 FAM. L. REP. (BNA) 1518 (Ill. Ct. App. 1994) (treating payments deductible as alimony for tax purposes as child support payments); Erickson v. Erickson, 449 N.W.2d 173 (Minn. 1989) (finding that payments labelled as alimony really were child support); Schaffer v. Schaffer, 643 P.2d 1300, 1303 (Or. Ct. App. 1982) (finding that payments labelled alimony were in fact part of the property division).

disputes impose on courts by creating administrative or quasi-judicial hearing officers to hear family law matters.[202]

Alternatives to judicial proceedings have certain obvious advantages. Depending upon the job qualifications established for the decisionmaker, salary costs may be lower.[203] Also, parties may incur less cost if they feel more inclined to participate in these proceedings without an attorney.[204] Further, judicial proceedings may be intimidating to parties. Still, the trend toward administrative determinations of child support matters does present some troublesome issues.

An administrative system for child support determinations would be cheaper only if non-lawyers are hired to be the hearing officers. It is by no means clear that non-lawyers can adequately fulfill these tasks. First, although in some instances the calculation of the presumptive amount due under guidelines is routine, in others child support calculations under the guidelines are complicated. For example, should an obligor's cafeteria plan benefits be included in income? What about capital gains, expense account reimbursements, overtime pay, inheritances or gifts?[205] In addition, the guidelines themselves are sometimes extremely complicated.[206] I have some concern whether non-lawyers could apply the guidelines.[207] Second, the guidelines do not provide clear answers for all situations; decisionmakers are given substantial discretion. For example, some states do not specify a certain exact percentage for the support; the guideline provides that the support should be

---

202. *See generally* H. Ted Rubin, *Policy Issues with Quasi-Judicial Hearing Officers in Child Support Proceedings*, ST. CT. J., Fall 1987, at 4; Barbara Everist, Comment, 34 S.D. L. REV. 573, 575 (1989) (summarizing South Dakota recommendations). *See, e.g.*, MINN. STAT. ANN. § 518.551(10) (West Supp. 1994) (establishing an administrative process for child support).

203. For example, of the hearing officers serving in New Jersey courts, about 50% are lawyers. Interview with Raymond Rainvill, *supra* note 156. In contrast, the "masters" serving in Texas family courts are all lawyers.

204. *See* Everist, *supra* note 202, at 576.

205. A number of guidelines include such things as capital gains. Some even permit courts to consider gifts and inheritances. *See, e.g.*, N.Y. DOM. REL. LAW § 240(1-b)(e) (McKinney Supp. 1994).

206. The award for Most Complicated Guideline must go, by acclamation, to California. *See* CAL. FAM. CODE § 4055 (West 1994).

207. For example, the Australian Child Support Agency has been criticized for providing incorrect information to parties. *See* Margo Kingston, *Maintenance Scheme Fails Children, Says Judge*, THE AGE, Mar. 6, 1992, at 16; Karen Middleton, *Child Support Staff Under Fire From Ombudsman*, THE AGE, Oct. 7, 1992, at 6.

within a certain range of percentages, with the exact percentage to be selected by the decisionmaker based upon the parties' circumstances.[208] Many other states give the decisionmaker discretion to consider whether to deviate from the guideline due to various factors, such as if the obligor has remarried and/or has become responsible for the support of another child,[209] or if the visitation arrangement has been substantially changed.[210] In addition, a number of states permit the decisionmaker to impose child support at a rate higher than the guideline amount if it is determined that the obligor is underemployed.[211] So, the calculation of child support in many instances will not be a ministerial task. The decisionmaker will have substantial discretion when awarding child support. Indeed, empirical studies find that American judges deviate from the presumptive guideline amount about one-fourth to one-third of the time.[212] This is additional evidence that child support calculations under guidelines frequently are not ministerial.[213] It has traditionally been

---

208. *See, e.g.*, GA. CODE ANN. § 19-6-15 (Supp. 1994); *Mass. Child Supp. Guidelines*, part III(A), *in* NATIONAL CENTER FOR STATE COURTS, *supra* note 69, at 438.

209. *See generally* Judith M. Billings, *From Guesswork to Guidelines—The Adoption of Uniform Child Support Guidelines in Utah*, 1989 UTAH L. REV. 859, 874-75, 902; Rebecca Garland, Note, *Second Children Second Best? Equal Protection for Successive Families Under State Child Support Guidelines*, 18 HAST. CONST. L.Q. 881 (1991).

210. *See generally* Melli & Brown, *supra* note 121.

211. *See, e.g.*, PA. R. CIV. P. 1910.16-5 (c)(1) (disallowing downward adjustment for voluntary underemployment); S.C. Dep't of Soc. Servs., *Child Support Guidelines* para. III(A)(4) (Oct. 1987), *in* NATIONAL CENTER FOR STATE COURTS, *supra* note 69, at 857.

212. *See, e.g.*, Marygold Melli & Judi Bartfeld, *Use of the Wisconsin Percentage-of-Income Standard to Set Child Support: Experience in Twenty Counties September 1987-December 1989*, Institute for Research on Poverty, Univ. of Wisconsin (June 1991), at 4-5. The authors reviewed awards based upon the Wisconsin percentage of the obligor's income standard. If the percentage of income ordered was within 2% of the guideline amount, the authors designated these orders as "in compliance" with the guidelines. The authors found that, based upon this definition of compliance, about one-third of the orders did not comply.

The Center for Policy Research also studied the extent to which child support orders deviate from the guidelines. *See* The Impact of Child Support Guidelines: An Empirical Assessment of Three Models (October 1989). Awards within 10% of the amount suggested by the guideline were considered in compliance. The authors found that about 60% of the orders were in compliance, about 10% were higher than expected, and 30% were lower. *Id.* at 69.

A recent study by Lewin/ICF, under the direction of Burt S. Barnow, also found a substantial rate of deviation. *See* LEWIN/ICF, *supra* note 61.

213. Of course, one could argue that judges deviate too often, and that there

thought that lawyers are well-trained to exercise discretion; would it be wise to delegate such decisions to non-lawyers?

If child support modification proceedings would be transferred to an administrative tribunal, one possible effect would be fewer deviations. In Australia, child support is set by an administrative body, but either party may appeal to a judge for deviation.[214] One observer of the recent Australian reforms states that parties in very few instances avail themselves of the right to appeal to a judge.[215] Whether this would be perceived a benefit or a detriment would depend upon one's evaluation of the effects of judicial discretion in child support matters.

Compared to judicial proceedings where the parties are represented by counsel, administrative procedures might not as thoroughly develop reliable financial information regarding the parties.[216] Because parents have been known to be less than forthright about their respective financial conditions when a child support obligation is being calculated, this is not a trivial concern. This concern presents the related issue of whether any advantage offered by legal representation is justified by the additional expense.

One writer recently has noted that an increasing number of parties are not retaining a lawyer in family law matters, even where such disputes are being resolved by courts.[217] Although to some degree this is attributed to the poverty of parties in family law matters, the author also attributes the rise to people's increasing interest in "self-help."[218] This may suggest

---

would be a lower deviation rate with administrative procedures.

214. *See generally* Harrison, *supra* note 27.

215. *Id.* at 230. It is unclear whether this is due to cost of the appeal or the judge's unwillingness to deviate from the formula applied by the administrative body. Australians may deviate from the formula if they make a private agreement regarding the amount of child support and are not receiving state support. *Id.* So, there may be more deviations in Australia than are indicated by the infrequent judicial appeals.

Another commentator notes that in New Zealand, which has adopted a system similar to that of Australia, there are many appeals to courts to request a deviation from the formula, and that departure orders are frequently granted. *See* Atkin, *supra* note 165.

216. *See generally* Mavis Maclean, *Child Support in the United Kingdom: Making the Move from Court to Agency*, 31 HOUS. L. REV. 515 (1994).

217. *See* Suzanne Northington, *Pro Per Behavior*, CAL. LAW., May 1994, at 29; *see also* Bruce D. Sales et al., *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?*, 37 ST. LOUIS U. L.J. 553 (1993).

218. *See* Northington, *supra* note 217.

that for many parties it is no cheaper to go to an administrative hearing than to court.[219]

Transferring responsibility for child support modification to an administrative agency could present problems common to government bureaucracies. For example, many have complained about the rudeness and delays stemming from the Australian system.[220] According to some reports, the Australian Child Support Agency receives more complaints than any other Australian government agency.[221] Of course, to some extent this could be attributed to the low level of funding of the Child Support Agency.[222] The new English Child Support Office also has received a great deal of criticism.[223]

If all matters pertaining to child support would be allocated to an agency, including the initial award, this would present additional issues. Judges and parties now tend to look at the economic settlement, including the property division, spousal support, if any, and child support, as a package. If a court has the power to determine all three matters, this gives the court great flexibility. The court's options would be restricted if courts no longer had the power to award child support.

When considering whether to allocate responsibility for child support determinations to a court or an administrative body, some states have adopted a compromise solution. They allow hearing officers or other officials to hear child support matters and their recommendations are forwarded to a

---

219. One study of divorcing couples found that neither party was represented in over half of all cases; in 90% of all cases, one litigant was not represented. *See* Sales et al., *supra* note 217, at 594.

For a general discussion of suggestions regarding pro se procedures for child support modification, see generally Eleanor Landstreet & Marianne Takas, U.S. Dep't of Health and Hum. Servs., Developing Effective Procedures for Pro Se Modification of Child Support Awards (Sept. 1991).

220. *See, e.g.*, Anne Crawford, *Committee to Call for Alimony Crackdown*, THE AGE, Jan. 9, 1994, at 7; Enrica Longo, *Child Agency Complaints Draw Fire*, THE AGE, Aug. 30, 1993, at 2; Middleton, *supra* note 207, at 6; Caroline Milburn, *Reduce Child Support, Say Fathers*, THE AGE, July 21, 1993, at 7; Sue Neales, *Looking at a Broader Child Support Scheme*, AUSTL. FIN. REV., Oct. 30, 1990, at 55.

221. *See* Prudence Anderson, *Child Support Body Criticized*, AUSTL. FIN. REV., August 30, 1993, at 7; Longo, *supra* note 220, at 2.

222. *See* Enrica Longo, *Tax Office to Pay Under Child Support Pact*, THE AGE, July 17, 1993, at 5.

223. *See* Patricia Wynn Davies & Marianne MacDonald, *Lilley Gives Child Support Agency Another Chance*, INDEPENDENT (U.K.), July 5, 1994, at 1.

judge.[224] This could be another way to ease court congestion while retaining some judicial supervision of the process.

V. CONCLUSION

In almost all states, a child support obligation is expressed as a fixed amount. This amount is not adjusted or modified until the child becomes emancipated, unless a parent can establish that the circumstances of one of the parents or the child have materially changed. This rule erodes the real value of child support unless the custodial parent initiates a new legal proceeding, and is unfair to that parent. At a minimum, a child support expressed as a fixed amount should periodically be adjusted automatically for increases in the cost of living.[225] Alternatively, the child support obligation could be expressed as a percentage of the obligor's income, not as a fixed amount, with a minimum self-support reserve deducted and a specified cap for high-income obligors.[226] This would allow the award to adjust to changes in the obligor's financial situation without further court action. In most instances, either adjustment mechanism will result in higher awards for custodial families.[227]

Rules for modification of child support orders should be clarified.[228] Currently, orders may not be modified unless a parent proves the circumstances of one of the parties have substantially changed. No objective standard is provided in most states. The "substantial change in circumstances" standard grants the judge too much discretion and provides too little guidance to the parties, thereby potentially discouraging some valid claims and encouraging some spurious ones. If an objective standard for what presumptively constituted a substantial change in circumstances would be established, this standard would give parents guidance regarding when modification would be successful and would facilitate consistent results. In addition, it would encourage valid claims and discour-

---

224. *See, e.g.*, S.D. CODIFIED LAWS ANN. § 25-7A-22 (1992). Also, New Jersey and Texas have accepted such a procedure. In New Jersey, the officer is called a "hearing officer;" in Texas, a "master."

225. *See supra* part III.A.

226. *See supra* part III.C.

227. Bartfeld & Garfinkel, *supra* note 78, at 12.

228. *See supra* IV.B.1.

age claims where the change in child support would not be significant.

Furthermore, spouses should be obligated to exchange financial information periodically, so each parent could judge (based upon the promulgated objective standard) whether modification of child support would be possible.[229] Finally, the state child support agency should hire employees to calculate, upon the request of either parent, the presumptive amount of child support due, based upon the current circumstances of the parties.

Any system of modification of child support needs to reflect an awareness that a divorce settlement is a economic package. The property settlement and spousal support, if any, can affect the child support obligation. At times a custodial parent may wish to agree to a child support amount lower or higher than the presumptive guideline amount, in exchange for some other economic concession. The rules for modification should permit such bargaining, with certain public policy limits.[230]

Some suggest that child support decrees should be reviewed automatically at certain intervals. If the reforms suggested above are adopted, an automatic review of all orders is unnecessary. The current policy of limiting such reviews to parents receiving AFDC benefits seems wise.[231]

229. *See supra* part IV.A.
230. *See supra* parts IV.D-E.
231. *See supra* part IV.C.