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West Virginia Child Support Guidelines: The Melson Formula

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I. INTRODUCTION

All parents have an ethical responsibility to support their minor children. Despite this basic premise, many minor children are unsupported, both financially and emotionally, by parents who are absent from the household. These financially unsupported children must depend ultimately upon government agencies for their support.¹ In response to the growing cost of government child support expenditures, Congress enacted legislation to better ensure that noncustodial parents

1. From 1988 to 1992, the number of children receiving Aid to Families with Dependent Children benefits increased by 26.5%. HOUSE COMM. ON WAYS AND MEANS, 103D CONG., 1ST SESS., OVERVIEW OF ENTITLEMENT PROGRAMS: 1993 GREEN BOOK 698 (Comm. Print 1993).

support their minor children.² The West Virginia Child Support Guidelines (Guidelines)³ are a result of that federal mandate.⁴

It has been more than six years since the Guidelines became effective.⁵ Part II of this Note discusses the history of the Guidelines, including the federal legislative background which influenced the Guidelines' development. Part III explains the Guidelines' operation and provides a walk-through of the calculations involved in determining child support. Part IV examines the viability of child support agreements in West Virginia as they exist in conjunction with the Guidelines. Part V delineates events which may affect the duration of child support orders, including court-ordered modifications, age of majority of the child, death of a parent, and adoption. Finally, Part VI suggests changes in the current Guidelines, particularly proposing more accountability on the part of the custodial parent.

II. DEVELOPMENT OF THE WEST VIRGINIA CHILD SUPPORT GUIDELINES

A. *The Federal Mandate for State Child Support Guidelines*

Congress first became involved with child support when it enacted Title IV-A of the Social Security Act of 1935,⁶ which established the original Aid to Dependent Children (ADC) program.⁷ The ADC program was initially designed to provide support for children of widows, as well as children of divorced, separated, and unwed mothers.⁸ Nonetheless, the state programs which administered the ADC program primarily reached only the children of widows, because the prevailing

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

3. W. VA. C.S.R. §§ 78-16-1.1 to -20 (1988) (the Guidelines are located within the Legislative Rules for the Department of Human Services).

4. *See* W. VA. CODE § 48A-2-3 (1986).

5. The effective date of the Guidelines was May 2, 1988. W. VA. C.S.R. § 78-16-1.4 (1988).

6. Social Security Act, ch. 531, §§ 401-06, 49 Stat. 620, 627-29 (1935).

7. *Id.*

8. *Id.*

view of society was that children in the other groups were “unworthy” of support.⁹

In spite of this prevailing view, the “worthy-person” concept was rejected by the United States Supreme Court in the seminal case of *King v. Smith*.¹⁰ In *King*, the Court stated, “federal public welfare policy now rests on a basis considerably more sophisticated and enlightened than the ‘worthy-person’ concept of earlier times.”¹¹ Therefore, in one fell swoop, the Supreme Court nullified state rules which effectively excluded children who met federal eligibility standards but for their status as offspring of unwed, divorced, or separated parents. After the *King* decision in 1968, the number of children eligible for assistance increased, which necessarily lead to an increased drain on the ADC coffers.¹² An additional burden was created when Congress extended welfare eligibility to *families* with dependent children;¹³ henceforth the program was renamed Aid to Families with Dependent Children (AFDC).¹⁴

Changing demographics have further burdened the AFDC program. Divorces have drastically increased both in West Virginia¹⁵ and in the United States.¹⁶ Moreover, demographers have projected that

9. See MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 18-19 (1986).

10. 392 U.S. 309 (1968).

11. *Id.* at 324-25.

12. KATZ, *supra* note 9, at 33, 261-63.

13. Today, only about 3.5% of those receiving Aid to Families with Dependent Children (AFDC) benefits are children of widows; divorce accounts for 68%; illegitimacy for 20%; and extended separation for 8%. Brian L. Calistri, Note, *Child Support and Welfare Reform: The Child Support Enforcement Provisions of the Family Support Act of 1988*, 16 J. LEGIS. 191, 192-93 (1990). The AFDC program now serves over seven million children. *Id.*

14. 42 U.S.C. §§ 601, 606(b) (1988).

15. There were 10,100 divorces in West Virginia in 1991. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: NO. 141, MARRIAGES AND DIVORCES 103 (1993). In 1991, West Virginia experienced a divorce rate of 5.6 per thousand people and a marriage rate of 6.9 per thousand people. *Id.*

16. The number of divorced persons in the United States almost quadrupled from 4.3 million in 1970 to 15.8 million in 1991. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, POPULATION CHARACTERISTICS, SERIES P-20, NO. 461, MARITAL STATUS AND LIVING ARRANGEMENTS 6 (Mar. 1991) [hereinafter MARITAL STATUS].

approximately fifty percent of the marriages in the United States will end in divorce.¹⁷ Approximately fifty-two percent of divorcing couples have had children together.¹⁸ The increase in single-parent families and the subsequent increase in government expenditures on child support prompted Congress, in 1984, to enact legislation to control AFDC expenditures by placing the burden on the persons responsible for the welfare of the children — the children's parents.¹⁹

Although the AFDC program is operated by the states, funding is predominately provided by the federal government.²⁰ The elevated expenditures for the AFDC program, coupled with the mandate to reduce the federal deficit, provided the impetus for the federal government to control AFDC spending. In response, Congress passed the Child Support Enforcement Amendments (CSEA) of 1984,²¹ which amended Title IV-D of the Social Security Act.²² The CSEA mandated states to create child support guidelines by October 1, 1987,²³ as a *sine qua non* to the receipt of federal funding for the states' AFDC programs.²⁴

17. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* xvii (1985).

18. J. Thomas Oldham, Note, *Putting Asunder in the 1990's*, 80 CAL. L. REV. 1091, 1131 n.44 (1992).

19. See 42 U.S.C. § 667 (1988).

20. The AFDC program exemplifies cooperative federalism, where the federal government reimburses each participating state for a part of the state's expenditures, provided that the state administers the program in accordance with the pertinent federal statutes and regulations. *Heckler v. Turner*, 470 U.S. 184, 189 (1985).

21. Pub. L. No. 98-378, 98 Stat. 1305 (codified in scattered sections of 42 U.S.C.).

22. 42 U.S.C. §§ 651-69 (1988).

23. Pub. L. No. 98-378, § 18(a), 98 Stat. 1305 (codified at 42 U.S.C. § 667 (1988)).

24. "Each [s]tate, as a condition for having its [s]tate plan approved under this part, must establish guidelines for child support award amounts within the [s]tate." 42 U.S.C. § 667 (1988). Additionally, a "[s]tate plan for child and spousal support must provide, to the extent required by section 666 of this title, that the [s]tate (A) shall have in effect all of the laws to improve child support enforcement effectiveness which are referred to in that section. . . ." *Id.*

B. The West Virginia Response to the Federal Mandate

In response to the Congressional charge delineated above, the West Virginia Legislature enacted the Family Obligations Enforcement Act (FOEA) in 1986.²⁵ The stated purpose for the FOEA is to establish and enforce reasonable child support orders which encourage and require the child's parents to meet the obligation of providing that child with adequate food, shelter, clothing, education, health care, and child care.²⁶ The West Virginia Child Advocate Office (CAO) also was established in 1986;²⁷ pursuant to Article 2 of Chapter 48A, the Director of the CAO was mandated to establish, by legislative rule, guidelines for child support awards.²⁸ Accordingly, the CAO promulgated an agency-approved rule,²⁹ now the West Virginia Child Support Guidelines. The Guidelines are more commonly referred to as the "Melson Formula"³⁰ and are referenced at Title 78, Department of Human Services, Series 16, Guidelines for Child Support Awards. The Guidelines are used to calculate both the custodial obligor's and the noncustodial obligor's child support obligation in West Virginia.

25. W. VA. CODE §§ 48A-1-1 to -41 (1986).

26. W. VA. CODE § 48A-1-2 (1986).

27. W. VA. CODE § 48A-2-1 (1986).

28. W. VA. CODE § 48A-2-8 (1986). The legislature stated: "The promulgated guidelines shall not be based upon any schedule of minimum costs for rearing children based upon subsistence levels." W. VA. CODE § 48A-2-8(b) (1986). Rather, the premise of the promulgated guidelines is to be related, to the extent practicable, to the level of living that each child would enjoy if living in a household with both parents present. *Id.* Therefore, the legislature intended to "place" the absent parent back in the home monetarily. *Id.*

29. The proposed rule was filed on January 6, 1988. Telephone Interview with Debra Gram, Counsel to the Legislative Rule Making Committee (Oct. 3, 1994). On January 29, 1988, the Legislative Rule Making Committee approved the rule as filed. *Id.* The rule was presented to the House as House Bill 4344, and was presented to the Senate as Senate Bill 425. *Id.* The legislative rule was included in the Senate's Omnibus Rule Bill 397, which was passed on March 12, 1988. *Id.* The Department of Human Services filed the approved rule on April 12, 1988 as Title 78, Series 16 *et seq.*, and the rule became effective on May 2, 1988. *Id.*

30. *Holley v. Holley*, 382 S.E.2d 590, 593 (W. Va. 1989) (the formula was devised by a Delaware judge, Elwood F. Melson, Jr.).

III. THE MELSON FORMULA

A. Overview of the Formula

Currently, West Virginia and two other states utilize the Melson Formula to calculate child support awards.³¹ Two basic principles underlie the Melson Formula: (1) until the basic needs of the child are met, the noncustodial parent should not be permitted to retain any more income than is required to provide for the noncustodial parent's own basic self support; and (2) where income is sufficient to cover the noncustodial parent's basic needs, the child is entitled to share in any additional income.³² Thus, the child can benefit from the absent parent's higher standard of living.³³

Application of the Melson Formula requires a five-step process: first, each support obligor's³⁴ net income available for support is determined;³⁵ second, the child's primary support need is determined;³⁶ third, the child's primary support need is allocated to the support obligors in proportion to their net incomes to arrive at each support obligor's primary support obligation;³⁷ fourth, a standard of living allowance (SOLA) is calculated for the child;³⁸ and fifth, the primary support obligation and SOLA support obligation are added together to derive the total support obligation of the support obligors.³⁹ Each step in the process is described in detail below.

31. See NATIONAL CENTER FOR STATE COURTS, CHILD SUPPORT GUIDELINES: A COMPENDIUM (1990). The Melson Formula was developed and first utilized in Delaware, and was later adopted by both West Virginia and Hawaii. *Id.*

32. Robert G. Williams, *Guidelines for Setting Levels of Child Support Orders*, 21 FAM. L.Q. 281 (1987) (citing Family Court of the State of Delaware, *The Delaware Child Support Formula: Study and Evaluation*, Report to the 132d General Assembly).

33. *Id.*

34. The term "obligor" is defined as a person who owes a legal duty to support another person. W. VA. CODE § 48A-1-3(16) (1986).

35. W. VA. C.S.R. § 78-16-2.1 (1988).

36. W. VA. C.S.R. § 78-16-17 (1988).

37. W. VA. C.S.R. § 78-16-2.5 (1988).

38. W. VA. C.S.R. § 78-16-2.7 (1988).

39. W. VA. C.S.R. § 78-16-2.9 (1988).

B. Introduction to the Hypothetical Family

To elucidate the operation of the Melson Formula, this Note incorporates practical examples based upon a hypothetical divorced family, all members of which reside in West Virginia. The father, Bill, and mother, Nancy, have three children from their marriage. Neither parent has a child from a previous marriage. Each parent now maintains his or her own household. As with most divorced parents, the children reside with their mother.⁴⁰ Nancy and the three children are living in the marital home and Bill is currently paying the mortgage payment. Neither parent is remarried.

C. Step 1: Net Income Available for Support

1. The State Rules

a. Net Income

The income of a support obligor can be comprised of actual income,⁴¹ attributed income,⁴² or both. If a support obligor is justifi-

40. Of all children living in single-parent homes in 1991, approximately 88% lived with their mothers. MARITAL STATUS, *supra* note 16, at 7.

41. Income includes the following:

Commissions, earnings, salaries, wages, and other income due or to be due in the future to a support obligor from his or her employer and successor employers, including fringe benefits such as business expense accounts, business credit accounts, and tangible property such as automobiles and meals, to the extent that they provide a support obligor with property or services he or she would otherwise have to provide.

W. VA. C.S.R. § 78-16-3.1.1 (1988). Other forms of income include “[a]ny payment due to a support obligor from a profit-sharing plan, a pension plan, an insurance contract, an annuity, social security, unemployment compensation, supplemental employment benefits, and workers’ compensation payable . . . as temporary total disability benefits.” W. VA. C.S.R. § 78-16-3.1.2 (1988). Further, income includes:

[M]oney which is owing to a support obligor as a debt from an individual, partnership, association, public or private corporation, the United States or any federal agency, this state or any political subdivision of this state, any other state or a political subdivision of another state, or any other legal entity which is indebted to the obligor: Provided, That the court or master may disregard money owing to a support obligor as a debt upon a finding that the debt is uncollectible through rea-

ably unemployed, underemployed, or working below full earning capacity, then the court or family law master must attribute either a lesser amount of income or attribute no income at all to the support obligor.⁴³ Conversely, if a support obligor is unjustifiably⁴⁴ unemployed or underemployed, the family law master or court may attribute income to the support obligor in an amount equal to the support obligor's earning capacity in the local job market.⁴⁵ Finally, as an alternative to both of the preceding circumstances, if the support obligor is remarried and is unemployed or underemployed, the family law master or court may attribute income to the support obligor in an amount not to exceed that which the support obligor could derive from full-time employment at the current minimum wage.⁴⁶ In any case,

sonable collection procedures.

W. VA. C.S.R. § 78-16-3.1.3 (1988).

42. "The term 'attributed income' shall mean income not actually earned by a support obligor, but which may be attributed to such support obligor because he or she is unemployed, is not working full time, or is working below full earning capacity." W. VA. C.S.R. § 78-16-4.1 (1988).

43. Specifically: Income shall not be attributed to a support obligor who is unemployed or underemployed or is otherwise working below full earning capacity if any of the following conditions exist:

Such support obligor is providing care required by the children to whom the parties owe a joint legal responsibility for support, and such children are of pre-school age or are handicapped or otherwise in a situation requiring particular care by the support obligor;

Such support obligor is pursuing a plan of economic self-improvement which will result, within a reasonable time, in an economic benefit to the children to whom the support obligation is owed, including, but not limited to, self-employment or education;

Such support obligor is, for valid medical reasons, earning an income in an amount less than that previously earned;

Such support obligor has made diligent efforts to find and accept available work or to return to customary self-employment, to no avail; or

The court or [family law] master makes a finding that other circumstances exist which would make the attribution of income inequitable: Provided, That in such case, the court or [family law] master may decrease the amount of attributed income to the extent required to remove such inequity.

W. VA. C.S.R. § 78-16-4.1.1 to -4.1.1.5 (1988).

44. "[A] limitation on income is not justified . . . [if] it is a result of a self-induced decline in income, a refusal to occupy time profitably, or an unwillingness to accept employment and earn an adequate sum. . . ." W. VA. C.S.R. § 78-16-4.1.2 (1988).

45. W. VA. C.S.R. § 78-16-4.1.2 (1988).

46. W. VA. C.S.R. § 78-16-4.1.3 (1988).

income shall be attributed at the lesser of the support obligor's earning capacity in the local job market and the support obligor's capacity for earning at the current minimum wage.⁴⁷

The net income available for child support is computed by subtracting from the support obligor's income the following amounts: income tax;⁴⁸ taxes withheld from income;⁴⁹ deductions from income required by law;⁵⁰ deductions required by an employer as a condition of employment;⁵¹ deductions required by a union as a condition of

47. W. VA. C.S.R. § 78-16-4.1.4 (1988).

48. W. VA. C.S.R. § 78-16-2.1.1 (1988). Section 78-16-6.1 provides that: The term "income tax" or "income taxes" shall mean personal income tax paid by a support obligor on his or her taxable income under the laws of the United States, the State of West Virginia, any sister state, any territory, any political subdivision of such governmental bodies, and any other taxing jurisdiction, foreign or domestic.

W. VA. C.S.R. § 78-16-6.1 (1988). A support obligor is required to utilize the maximum number of exemptions allowed in calculating the child support obligation. *Wood v. Wood*, 438 S.E.2d 788 (W. Va. 1993).

49. W. VA. C.S.R. § 78-16-2.1.2 (1988). Section 78-16-7.1 provides that: The term "taxes withheld from income" shall mean the amount of income tax deducted and withheld by a[n] employer from income of a support obligor, computed in such a manner as to result, so far as practicable, in withholding an amount substantially equivalent to the income tax estimated to be due.

W. VA. C.S.R. § 78-16-7.1 (1988). The amount of taxes withheld is to be based upon the maximum number of withholding exemptions allowable. *Id.*

50. W. VA. C.S.R. § 78-16-2.1.3 (1988). Section 78-16-8.1 provides that: The term "deductions from income required by law" shall mean the amount deducted and withheld by an employer from income of a support obligor as required by law, including, but not limited to, attachments, social security taxes, assessments on wages made under the provisions of any employment security law, and child support payments made pursuant to a court order or a valid written separation agreement. "Deductions from income required by law" shall not include wage attachments and suggestions which are required by law to be deducted and withheld by the employer, but which are for the enforcement of debts which would not otherwise be considered under the provisions of this legislative rule in determining a support obligor's net income.

W. VA. C.S.R. § 78-16-8.1 (1988).

51. W. VA. C.S.R. § 78-16-2.1.4 (1988). Section 78-16-9.1 provides that: The term "deductions from income required by an employer as a condition of employment" shall mean the amount deducted and withheld by an employer from income of a support obligor as payment for uniforms, tools, equipment and other supplies necessary for the performance of services or labor on behalf of the employer.

employment;⁵² legitimate business expenses;⁵³ deductions for the benefit of children;⁵⁴ payments for the benefit of children;⁵⁵ indebtedness;⁵⁶ and the support obligor's self support need.⁵⁷

W. VA. C.S.R. § 78-16-9.1 (1988).

52. W. VA. C.S.R. § 78-16-2.1.5 (1988). Section 78-16-10.1 provides that: The term "deductions from income required by a union as a condition of employment" shall mean the amount deducted and withheld by an employer from income of a support obligor as dues, fees, or other assessments, for the benefit of a labor union or other employee organization, required to be withheld under the terms of a labor-management agreement.

W. VA. C.S.R. § 78-16-10.1 (1988).

53. W. VA. C.S.R. § 78-16-2.1.6 (1988). Section 78-16-11.1 provides that: The term "legitimate business expense" or "business expense" shall mean expenses paid for or incurred by the support obligor, in connection with the performance by him or her of services for the employer or another person or as a self-employed person, which expenses are not reimbursable, and which are lawfully deductible in computing taxable income under applicable income tax laws.

W. VA. C.S.R. § 78-16-11.1 (1988).

54. W. VA. C.S.R. § 78-16-2.1.7 (1988). Section 78-16-12.1 provides that: The term "deductions for the benefit of children" shall mean the amount deducted and withheld by an employer from income of a support obligor and paid to third parties for the benefit of the support obligor's children, including, but not limited to, hospital insurance and medical, dental or optical insurance.

W. VA. C.S.R. § 78-16-12.1 (1988).

55. W. VA. C.S.R. § 78-16-2.1.8 (1988). Section 78-16-13.1 provides that: The term "payments for the benefit of children" shall mean an amount or amounts paid by a support obligor to third parties on a regular, recurring basis for the benefit of the support obligor's children, including, but not limited to, tuition, health care expenses, hospital insurance, and medical, dental or optical insurance.

W. VA. C.S.R. § 78-16-13.1 (1988).

56. W. VA. C.S.R. § 78-16-2.1.9 (1988). Section 78-16-14.1 provides that: The term "indebtedness" means any legal or contractual obligation incurred as follows: (1) for the necessary support of a child with regard to food, clothing, shelter, and medical care; (2) for the purpose of acquisitions of or additions to or additions intended to add to the value of marital property of the parties as defined in section one, article two, chapter forty-eight of the code of West Virginia, one thousand nine hundred thirty-one, as amended.

W. VA. C.S.R. § 78-16-14.1 (1988). Further, any debt which is incurred with the obvious intent of decreasing child support payments will be disregarded. W. VA. C.S.R. § 78-16-14.2 (1988).

57. W. VA. C.S.R. § 78-16-2.3 (1988).

b. Self Support Need

The term "self support need" means the absolute minimum amount of income that a support obligor must retain to function at his or her maximum productivity,⁵⁸ and includes only debts and expenses for food, clothing, shelter, medical care, and job-related transportation.⁵⁹ The self support need may be determined by probative facts concerning the actual needs of the support obligor.⁶⁰ If the support obligor does not present convincing probative facts to the family law master or court concerning his or her minimum support requirements, the family law master or court will assign⁶¹ the "presumptive minimum support need"⁶² to the parent.

The "presumptive minimum support need" of a support obligor is based upon his or her rank in the particular household.⁶³ The presumptive minimum support need has not changed in West Virginia since the Guidelines were promulgated in 1988, and there is no provision in the Guidelines for an increase due to inflation. However, in 1990, Delaware increased its presumptive minimum support need for an unmarried, first member of the household from \$450 per month to \$550 per month based upon the consumer price index and the then current poverty standard for a single person.⁶⁴ In West Virginia, if the support obligor is an unmarried, first member of the household,⁶⁵

58. W. VA. C.S.R. § 78-16-15.1 to -15.3 (1988).

59. W. VA. C.S.R. § 78-16-15.2 (1988).

60. W. VA. C.S.R. § 78-16-15.3 (1988).

61. *Id.*

62. W. VA. C.S.R. § 78-16-17.1 (1988). The term "presumptive minimum support need" means the amount of money that a person is presumed to need for the necessities of life, based upon that person's rank in the particular household. *Id.* The presumptive minimum support needs of the several members of a given household are as follows: first member — \$450 per month; second member — \$180 per month; third and fourth members each — \$135 per month; and each additional member — \$90 per month. *Id.*

63. *Id.*

64. REPORT OF THE FAMILY COURT JUDICIARY, THE DELAWARE CHILD SUPPORT FORMULA, EVALUATION AND UPDATE, *in* CHILD SUPPORT GUIDELINES: A COMPENDIUM (1990).

65. "The first member of the household is the adult head of the household." W. VA. C.S.R. § 78-16-17.1.1 (1988). Where the support obligor lives with his or her parents or other separate family, the support obligor and the children in his or her custody will be considered to be in a household by themselves and the support obligor is considered the

the presumptive minimum support need is \$450 per month.⁶⁶ If the support obligor has remarried and both the support obligor and his or her present spouse are employed, the presumptive minimum need is \$365 per month.⁶⁷ If the support obligor is remarried and unemployed, and the family law master or court has attributed income to the support obligor, the support obligor's presumptive minimum need is \$315 per month.⁶⁸

2. Case Law Interpretation of the State Rules

Income includes both overtime pay and the fair market value of health insurance coverage supplied by an employer.⁶⁹ In cases involving fluctuating income, income must be considered over a period sufficient to include significant fluctuations.⁷⁰ For cases arising after October 1, 1993, the Rules of Practice and Procedure for Family Law implicitly provide that courts should consider income over at least a two-year period when determining the parents' incomes.⁷¹ Payroll deductions for savings purposes cannot be used to reduce income available for child support.⁷²

The Guidelines at Subsection 78-16-4.1.4 (regarding attributed income) state that attributed income shall be the lesser of the calculations made in Subsection 78-16-4.1.2 (for obligors who are unjustifiably unemployed or underemployed) or Subsection 78-16-4.1.3 (for obligors who are remarried and unemployed or underemployed).⁷³ Reading these subsections in *para materia*, it is apparent that they are not clear, yet they have not been expounded by case law. The plain meaning of the subsections suggests that the maximum income attributed to a remarried, unemployed support obligor would be the amount

adult head of the household. *Id.*

66. W. VA. C.S.R. § 78-16-17.1.2 (1988).

67. W. VA. C.S.R. § 78-16-17.1.3 (1988).

68. W. VA. C.S.R. § 78-16-17.1.4 (1988).

69. *Stevens v. Stevens*, 412 S.E.2d 257 (W. Va. 1991).

70. *Ball v. Wills*, 438 S.E.2d 860 (W. Va. 1993).

71. *Id.* at 865; W. VA. FAM. CT. R. 11(b)(1)-(2) (1994).

72. *Wood v. Wood*, 403 S.E.2d 761 (W. Va. 1991).

73. W. VA. C.S.R. § 78-16-4.1.4 (1988).

that he or she could earn at a full-time minimum wage job. However, the language of Subsection 78-16-4.1.3 clearly states that a court or family law master may use either Subsection 78-16-4.1.2 or Subsection 78-16-4.1.3 as alternatives in calculating a support obligor's attributed income. Thus, Subsection 78-16-4.1.4 creates an ambiguity concerning the method to be used in calculating attributed income, and the legislature should either promulgate a clearer rule, or delete Subsection 78-16-4.1.4 in its entirety. Some practitioners and family law masters indicate that Subsection 78-16-4.1.4 is never utilized because of its patent ambiguity.

Notwithstanding Subsection 78-16-4.1.4, neither unemployment nor underemployment for legitimate reasons necessarily invokes the attribution of income.⁷⁴ In *Taylor v. Taylor*,⁷⁵ the Supreme Court of Appeals of West Virginia refused to attribute income to a support obligor that he had earned prior to his good-faith⁷⁶ resignation from employment. In *Taylor*, Mr. Taylor resigned his employment in West Virginia because he had been informed that he would be required to work in Kentucky and would be on call twenty-four hours a day,

74. Income shall not be attributed if the:

[S]upport obligor is providing care required by the child to which the parties owe a joint responsibility for support, and such child is of preschool age or is handicapped or otherwise in a situation requiring particular care by the support obligor;

[S]upport obligor is pursuing a plan of economic self-improvement which will result, within a reasonable time, in an economic benefit to the children to whom the support obligation is owed, including, but not limited to, self-improvement or education;

[S]upport obligor is, for valid medical reasons, earning an income in an amount less than that previously earned;

[S]upport obligor has made diligent efforts to find and accept available suitable work or to return to customary self-employment, to no avail; [or the]

[C]ourt or master makes a finding that other circumstances exist which would make the attribution of income inequitable: Provided, That in such case, the court or master may decrease the amount of attributed income to the extent required to remove such inequity.

W. VA. C.S.R. § 78-16-4.1.1 to -4.1.1.5 (1988).

75. 432 S.E.2d 785 (W. Va. 1993).

76. "In common usage this term is ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation." BLACK'S LAW DICTIONARY 477 (6th ed. 1992).

seven days a week.⁷⁷ He resigned due to his desire to remain in close proximity to his children and to spend more time with them.⁷⁸ Before resigning, Mr. Taylor did secure another job, but was terminated after only one day of employment due to lack of work available.⁷⁹ The *Taylor* court found that a family law master has discretionary power regarding the attribution of income.⁸⁰ Furthermore, the *Taylor* court affirmed that although Mr. Taylor did not use good judgment in terminating his employment, and although the limitation on his income was a result of a self-induced decline, the \$2,170 monthly income should not be attributed to him.⁸¹

As *Taylor* exemplifies, not all circumstances involving unemployment or underemployment will cause attribution of income. However, the determination remains a discretionary power of the family law master. Therefore, noncustodial parents should realize that unless their circumstances are predominantly the same as in *Taylor*, it is impossible to predict how a court or family law master will rule concerning income attribution and, in fact, their family law master may not be as lenient as the one in *Taylor*.

In *Belcher v. Terry*,⁸² the circuit court not only attributed income to a support obligor, but also assessed damages and imposed criminal sanctions against the support obligor's "source of income"⁸³ where the "source of income" helped the support obligor circumvent the payment of child support. *Belcher* involved support obligors who made arrangements with their employers to receive their pay in cash in an attempt to circumvent the collection of child support payments.⁸⁴ The *Belcher* court held that any attempt by the support obligor and his or her "source of income" to circumvent the payment of child support can meet with both compensatory and punitive damages as well as

77. *Taylor*, 432 S.E.2d at 787.

78. *Id.*

79. *Id.*

80. *Id.* at 788.

81. *Id.*

82. 420 S.E.2d 909 (W. Va. 1992).

83. Source of income is defined as "an employer or successor employer or any other person who owes or will owe income to an obligor." W. VA. CODE § 48A-1-3(19) (1992).

84. *Belcher*, 420 S.E.2d at 911-12.

criminal sanctions for the "source of income."⁸⁵ In fact, West Virginia Code § 48A-5-3(o) makes it a misdemeanor for a "source of income" to knowingly and willfully conceal the fact that it is paying income to an obligated parent with the intent to avoid withholding from the parent's income amounts payable as support.⁸⁶

3. The Hypothetical Family

To illustrate how to calculate the net income available for support, assume that the hypothetical divorced parents, Bill and Nancy, both have income. Bill works as an engineer for a coal company and earns a regular salary of \$4,000 per month and also earns overtime pay averaging \$800 per month. Nancy works as a professor at a local college and earns an income of \$3,450 per month. Both support obligors have health insurance which is provided by their employers. The health insurance of both obligors has a fair market value of \$150 per month. Nancy incurs a monthly child care expense of \$200 per month for the youngest child. Each support obligor's net income available for child support is calculated as follows:

Bill		Nancy	
INCOME		INCOME	
Salary	\$4,000	Salary	\$3,450
Overtime pay	800	Overtime pay	0
Insurance	<u>150</u>	Insurance	<u>150</u>
Subtotal	\$4,950	Subtotal	\$3,600

85. *Id.* at 914.

86. W. VA. CODE § 48A-5-3(o) (1992).

DEDUCTIONS

Mortgage payment	(500)
Income taxes	(1,000)
Self support	<u>(450)</u>
Subtotal	<u>(1,950)</u>
Total	\$3,000

DEDUCTIONS

Child care	(200)
Income taxes	(950)
Self support	<u>(450)</u>
Subtotal	<u>(1,600)</u>
Total	\$2,000

Thus, Bill and Nancy have total monthly net incomes available for child support of \$3,000 and \$2,000, respectively.

D. Step 2: The Child's Primary Support Need

1. The State Rules

Each child has a presumptive minimum primary support need. The presumptive minimum primary support need is the absolute minimum amount of money that a child requires for food, clothing, shelter, and medical care,⁸⁷ unless the court determines that a variance above the presumptive minimum primary support need is supported by convincing evidence.⁸⁸ The actual amount of the presumptive minimum primary support need is based upon a person's rank in his or her household.⁸⁹ The first member of the household, the adult head of the household, has a presumptive minimum need of \$450 per month.⁹⁰ The second member, typically the oldest child, has a presumptive minimum need of \$180 per month.⁹¹ The third and fourth members each have a presumptive minimum need of \$135 per month.⁹² The fifth member and each additional household member thereafter have a presumptive minimum need of \$90 per month.⁹³

87. W. VA. C.S.R. § 78-16-16.1 (1988).

88. W. VA. C.S.R. § 78-16-16.2 (1988).

89. W. VA. C.S.R. § 78-16-17.1 (1988).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

To determine the total primary support need of a child, the court or family law master adds to the presumptive minimum primary support need of the child in question the following amounts: the cost of the child's extraordinary medical expenses; the cost of child care needed to allow a custodial parent to work; and the cost of other necessary special needs of the child.⁹⁴ The court or family law master deducts from the preceding sum any unearned income of the child.⁹⁵ The amount resulting from these calculations equals the total primary support need of a child.⁹⁶

2. Case Law Interpretation of the State Rules

The amount of the presumptive minimum primary support need of a child is a presumption which can be rebutted⁹⁷ by showing that the needs of a particular child are greater than the presumptive amount.⁹⁸ Circumstances which may justify abandoning the rebuttable presumption include a change in the cost of living caused by inflation,⁹⁹ an

94. W. VA. C.S.R. § 78-16-2.4 (1988).

95. *Id.*

96. *Id.*

97. Specifically:

There shall be a rebuttable presumption, in any proceeding before a family law master or circuit court judge for the award of child support, that the amount of the award which would result from the application of such guidelines [W. Va. Code of State Rules §§ 78-16-1 to 78-16-20] is the correct amount of child support to be awarded.

W. VA. CODE § 48A-2-8(a) (1993). *See also* *Thompson v. Thompson*, 430 S.E.2d 336 (W. Va. 1993) (the amount of child support shall be in accordance with the child support guidelines); *Langevin v. Langevin*, 420 S.E.2d 576 (W. Va. 1992) (there shall be a rebuttable presumption that the amount of child support determined by the guidelines is the correct amount); *Sly v. Sly*, 416 S.E.2d 486 (W. Va. 1992) (there is a rebuttable presumption that the amount of child support resulting from application of child support guidelines is correct); *Gardner v. Gardner*, 400 S.E.2d 268, 275 (W. Va. 1990) (the amount of child support determined in accordance with the guidelines is presumptively correct); *Holley*, 382 S.E.2d at 592 (the child support guidelines provide for a rebuttable presumption that the resultant child support award is the correct amount). *See* 42 U.S.C. § 667 (1988).

98. "[T]he pole star for determining when a modification of a child support order is necessary is the welfare of the child." *Gardner*, 400 S.E.2d at 271.

99. *Id.* at 273 (between 1977 and 1987, inflation reduced the real value of a \$500 per month support award to \$261) (citing U.S. DEP'T OF HUMAN SERVICES, DEVELOPMENT OF GUIDELINES FOR CHILD SUPPORT AWARDS: ADVISORY PANEL RECOMMENDATIONS AND

increase in the child's needs because the child is older,¹⁰⁰ changes affecting basic needs such as housing or transportation,¹⁰¹ and orthodontic expenses.¹⁰² Although the presumption of the child's minimum primary support need is rebuttable, in order to rebut the presumption in a particular case the circuit court or family law master must make a written finding on the record that the application of the Guidelines would be unjust or inappropriate.¹⁰³

3. The Hypothetical Family

Recall in the hypothetical household that the three children reside in the family home with their mother, Nancy. The aggregate presumptive minimum primary support need of the three children is \$450 per month and is calculated as follows: the oldest child is considered the second member of the household and the corresponding presumptive minimum need is \$180 per month;¹⁰⁴ the middle child and the youngest child are considered the third and fourth household members, respectively, and the presumptive minimum need of each is \$135 per month.¹⁰⁵ Therefore, the aggregate presumptive minimum primary support need of the three children is \$450.

FINAL REPORT II-ix (Sept. 1990)); *Corbin v. Corbin*, 206 S.E.2d 898, 903 (W. Va. 1974) (inflation or a change in the cost of living can be a substantial change requiring modification of child support awards).

100. *Gardner*, 400 S.E.2d at 273 (the current estimated annual expenditure for a single child age 0-2 by a middle income family is \$7,080, for a child age 6-8 is \$7,470, for a child 12-14 is \$8,110, and for a child 15-17 is \$8,620; the pattern of increased expenditures for the older child does not vary with household income or geographical region) (citing U.S. DEPARTMENT OF AGRICULTURE, FAMILY ECONOMICS RESEARCH GROUP, LINO, MARK, "EXPENDITURES ON A CHILD BY HUSBAND-WIFE FAMILIES," FAMILY ECONOMICS REVIEW 2-18 (Sept. 1990)); W. VA. CODE § 48A-2-8(f)(5) (1993) (the legislature recognized that expenditures on children increase as the children grow older). See *Law v. Law*, 356 S.E.2d 637 (W. Va. 1987) (increased expenses were partly due to the increase in the ages of the children).

101. See *Gardner*, 400 S.E.2d at 272; *Holley*, 382 S.E.2d at 591 (a need to change housing because of the disrepair of the family home justified a modification of child support).

102. *Id.* See also *Lambert v. Miller*, 358 S.E.2d 785 (W. Va. 1987).

103. *Gardner*, 400 S.E.2d at 275 (citing W. VA. CODE § 48A-2-8(a) (1992)).

104. W. VA. C.S.R. § 78-16-17.1 (1988).

105. *Id.*

E. Step 3: Primary Support Obligation: Apportioning the Child's Total Primary Support Need

1. The State Rules

After arriving at the child's total primary support need,¹⁰⁶ it is necessary to calculate what portion of that need is to be paid by each support obligor, such portion being termed the support obligor's "primary support obligation."¹⁰⁷ To calculate the primary support obligation of each support obligor, divide his or her individual net income available for support¹⁰⁸ by the two obligors' combined net income available for support.¹⁰⁹ The resulting percentages establish the burden of each support obligor with respect to the total primary support need of their child.¹¹⁰ Finally, multiply the resulting percentages by the amount of the total primary support need of the child¹¹¹ to arrive at each obligor's respective primary support obligation.¹¹²

2. The Hypothetical Family

In the hypothetical family, Bill has net income available for child support of \$3,000 per month, and Nancy has net income available for child support of \$2,000 per month. Their combined net income available for child support is \$5,000 (\$3,000 + \$2,000 = \$5,000). To calculate the separate primary support obligations of Bill and Nancy, divide each parent's individual net income by their combined net income to obtain the percentage of the primary child support each is to pay. The individual percentages are calculated as follows:

-
106. See discussion *supra* part III.D.
 107. W. VA. C.S.R. § 78-16-2.5 (1988).
 108. See discussion *supra* part III.C.
 109. W. VA. C.S.R. § 78-16-2.5 (1988).
 110. *Id.*
 111. See discussion *supra* part III.D.
 112. *Id.*

$$\$3,000 / \$5,000 = .60 \text{ — } 60\% \text{ Apportioned to Bill}$$

$$\$2,000 / \$5,000 = .40 \text{ — } 40\% \text{ Apportioned to Nancy}$$

Bill is obligated to pay sixty percent of the children's primary support need, and Nancy is obligated to pay forty percent of it. Multiplying these percentages by the children's total primary support need yields the amount of each parent's respective primary support obligation:

	Bill	Nancy
Children's total primary support need	\$450	\$450
Multiplied by: Support obligor's percentage	<u>60%</u>	<u>60%</u>
Primary support obligation	\$270	\$180

Therefore, Bill and Nancy are responsible for \$270 and \$180 of the children's monthly primary support need, respectively.

F. Step 4: Standard Of Living Allowance

1. The State Rules

After calculating the primary support obligation of each support obligor, each obligor's standard of living allowance (SOLA) obligation is computed. The SOLA is included in the child support calculation to ensure that child support will be related to the level of living which the child would enjoy if the child were living in a household with both parents present.¹¹³

An obligor's SOLA obligation is based upon two factors: (1) the income available to the support obligor; and (2) the number of children for whom the support obligor is obligated to pay child support.¹¹⁴ The income available for SOLA is determined first by ascer-

113. W. VA. CODE § 48A-2-8(b) (1992); W. VA. C.S.R. § 78-16-2.6 (1988); *Bettinger v. Bettinger*, 396 S.E.2d 709 (W. Va. 1990) (child support should be keyed to the level of living which such children would enjoy if they were living in a household with both parents).

114. W. VA. C.S.R. § 78-16-2.6 (1988).

taining the support obligor's net income available for child support,¹¹⁵ and from that amount deducting the following items: (1) the support obligor's primary child support obligation,¹¹⁶ and (2) other primary support obligations owed by the support obligor in favor of children who are not of the union of the parties to the case.¹¹⁷ The resulting figure from this calculation equals an obligor's income available for SOLA.

Once the income available for SOLA is calculated, the next step is to multiply it by the appropriate SOLA percentages.¹¹⁸ The appropriate percentages are fifteen percent for the first child, ten percent each for the second and third child, and five percent each for the fourth, fifth and sixth child.¹¹⁹ Multiplying each child's SOLA percentage by a support obligor's income available for SOLA yields the per-child SOLA obligation of that obligor. The sum of the per-child amounts equals the total SOLA obligation of that support obligor.¹²⁰

The Guidelines provide for a cap on the SOLA support to be paid by the support obligor.¹²¹ The total amount required to be paid by a support obligor as a SOLA obligation must not exceed fifty percent of the support obligor's income available for SOLA, unless the court or family law master sets forth, in writing, findings of specific need of the child.¹²² Therefore, SOLA support is normally available only to the first six children of the union of the parties, because the sum of the first six children's SOLA percentages equals fifty percent.¹²³ However, this limitation is probably of little consequence today in light of the continuing trend toward smaller families.

115. See discussion *supra* part III.C.

116. W. VA. C.S.R. § 78-16-2.6.1 (1988). See discussion *supra* part III.E.

117. W. VA. C.S.R. § 78-16-2.6.2 (1988).

118. W. VA. C.S.R. § 78-16-2.7 (1988).

119. *Id.*

120. W. VA. C.S.R. § 78-16-2.8 (1988).

121. W. VA. C.S.R. § 78-16-2.7.1 (1988).

122. *Id.*

123. See *supra* text accompanying note 119. With the 50% cap, only six children would be eligible for SOLA benefits (15% for the first child, plus 10% for the second child, plus 10% for the third child, plus 5% for the fourth child, plus 5% for the fifth child, plus 5% for the sixth child).

The court or family law master is afforded some discretion to limit the SOLA obligation in situations where a support obligor has a high income. "If the discretionary income of either support obligor exceeds six thousand dollars per month, or if the combined discretionary income of both [parents] exceeds eight thousand dollars per month, the court or [law] master *may* not apply the percentages set forth in . . . [S]ection [78-16-2.7]."¹²⁴ Under such circumstances, the court or family law master shall equitably determine the SOLA obligation to avoid a windfall to the custodial obligor or a hardship to the noncustodial obligor.¹²⁵ Additionally, the Guidelines pronounce that an excessive amount of SOLA obligation may not be in the best interest of the child or children.¹²⁶

2. Case Law Interpretation of the State Rules

There is no cap on the dollar amount of child support that can be awarded.¹²⁷ Thus, although a court or family law master may limit SOLA support if the discretionary income of an obligor exceeds the six thousand dollar per month threshold, it is not required to do so.¹²⁸ The Supreme Court of Appeals of West Virginia has ruled that a decision *not* to follow the SOLA percentages should be undertaken in light of the legislative preference that child support should be keyed to the level of living which the child would enjoy if the child were living in a household with both parents present.¹²⁹ However, if the court or family law master determines that the SOLA percentages should not be used, an explanation must be given in the findings of fact.¹³⁰

124. W. VA. C.S.R. § 78-16-2.7.2 (1988) (emphasis added).

125. *Id.*

126. *Id.*

127. *Ball*, 438 S.E.2d at 865 n.4.

128. *Bettinger*, 396 S.E.2d at 720; W. VA. C.S.R. § 78-16-2.7.2 (1988).

129. *Bettinger*, 396 S.E.2d at 721.

130. *Id.* at 721-22.

3. The Hypothetical Family

Recall that Bill and Nancy have three children. The SOLA percentage for the oldest child is fifteen percent.¹³¹ The SOLA percentage for the second and third children is ten percent each.¹³² The total SOLA percentage for the three children is the sum of the percentages allocated to each. Thus, the total SOLA percentage in this hypothetical is thirty-five percent (15% plus 10% plus 10%).

	Bill	Nancy
Net income available for support	\$3,000	\$2,000
Less: Primary support obligation	<u>270</u>	<u>180</u>
Net income available for SOLA	\$2,730	\$1,820
Multiplied by: Children's SOLA percentage	<u>35%</u>	<u>35%</u>
Total SOLA obligation	\$955.50	\$637.00

Thus, the SOLA obligation of Bill and Nancy, without adjustments by the court or family law master, is \$955.50 and \$637.00, respectively.

G. Step 5: Total Monthly Child Support Obligation

1. The State Rules

Once a support obligor's primary child support obligation and SOLA support obligation are determined, the two amounts are merely added together to finally arrive at the obligor's total monthly child support obligation.¹³³ An obligor may take a credit against his or her total child support obligation for payments to third parties in the form of home loan installments, land contract payments, payments for utility services, property taxes, insurance coverage, or other expenses or charges reasonably necessary for maintenance of a residence for the

131. See *supra* text accompanying note 119.

132. *Id.*

133. W. VA. C.S.R. § 78-16-2.9 (1988).

support obligor's children.¹³⁴ The credit can be taken only if such expenses have been denominated as child support by a child support order or by a valid separation agreement.¹³⁵ However, in no event can the credit reduce the parent's total monthly child support obligation to an amount less than the parent's primary support obligation.¹³⁶

2. The Hypothetical Family

For the hypothetical family, the total monthly child support obligation of Bill and Nancy is determined as follows:

	Bill	Nancy
Primary support obligation	\$ 270.00	\$ 180.00
SOLA support obligation	<u>955.50</u>	<u>637.00</u>
Total monthly child support obligation	\$1,225.50	\$ 817.00

Bill's total monthly child support obligation for the children is \$1,225.50, and Nancy's total obligation for the children is \$817.00. The aggregate monthly child support awarded for the children's benefit is \$2042.50.

H. Mode of Child Support Payment

1. The State Rules

In the typical custody situation, the custodial obligor has legal and physical custody of the child on a full time basis while the noncustodial obligor has only visitation rights; the custodial obligor retains his

134. W. VA. C.S.R. § 78-16-2.9.4 (1988).

135. *Id.*

136. *Id.* As an example, if a support obligor has a total monthly child support obligation of \$500 per month and \$200 of that total is for primary support, then the court or family law master may allow the support obligor to make payments to third parties in an amount not to exceed a total of \$300 in lieu of making an equivalent cash payment to the custodial parent. However, the support obligor must pay at least the \$200 primary support to the custodial obligor.

or her child support obligation, and the noncustodial obligor pays his or her monthly child support payment as directed by the court.¹³⁷ A noncustodial obligor's obligation to pay child support is only satisfied by making the payment to the custodial obligor: (1) directly; (2) through the child advocate's office; or (3) to third parties for the benefit of the child. The payments cannot be made directly to the child, typically.¹³⁸

In cases where the support obligors have split custody,¹³⁹ each obligor retains that share of the support obligation owed to the child or children in his or her custody.¹⁴⁰ After such retention, if one support obligor's total child support obligation exceeds the amount retained, that obligor must pay the excess to the second obligor for the benefit of the children living with the second obligor.¹⁴¹

In cases where the support obligors share physical joint custody on an equal basis, each will be considered to have the child for six months during the course of the year.¹⁴² The "pay out" of each support obligor for the year is determined by multiplying each obligor's monthly child support obligation times six months.¹⁴³ If one obligor's six-month obligation is greater than that owed by the other, the excess amount must be divided by twelve and paid monthly over the course of the year by the obligor owing the greater amount, unless the parties agree otherwise.¹⁴⁴

Additionally, every child support order entered or modified after January 1, 1994, must provide for automatic income withholding.¹⁴⁵

137. W. VA. C.S.R. § 78-16-2.9.1 (1988).

138. *Kimble v. Kimble*, 341 S.E.2d 420 (W. Va. 1986); *Lauderback v. Wadsworth*, 416 S.E.2d 62 (W. Va. 1992).

139. In cases of split custody, each parent is a custodial parent maintaining legal and physical custody of one or more of the children. *Graham v. Graham*, 326 S.E.2d 189 (W. Va. 1984).

140. W. VA. C.S.R. § 78-16-2.9.2 (1988).

141. *Id.*

142. W. VA. C.S.R. § 78-16-2.9.3 (1988).

143. *Id.*

144. *Id.*

145. W. VA. CQDE § 48-2-15(b) (Supp. 1994); W. VA. CODE § 48A-5-1 (Supp. 1994).

However, the income withholding does not have to begin immediately.¹⁴⁶ Typically, the support payment is deducted from the noncustodial obligor's income by his or her employer,¹⁴⁷ transferred to the CAO,¹⁴⁸ and later distributed to the custodial obligor.¹⁴⁹

2. The Hypothetical Family

a. Typical Custodial Situation

Thus far in the hypothetical family's situation, Nancy has been the custodial obligor. Because Nancy is the custodial obligor, she will simply retain her portion of the child support obligation.¹⁵⁰ Bill, as the noncustodial obligor, will pay his monthly child support obligation as directed by the court,¹⁵¹ which now means that his child support obligation will be withheld from his wages and transferred to Nancy by the CAO.¹⁵²

After the monthly child support payments are made, Bill will be left with \$1,774.50 of his monthly income, and Nancy will have \$3,225.50, which includes both her monthly income and the monthly child support received from Bill.

b. Shared Physical Joint Custody

With shared physical joint custody, the support obligors are considered to share physical joint custody of the three children on an equal basis during the course of the year.¹⁵³ The monthly child sup-

146. "[W]here one of the parties demonstrates . . . that there is good cause not to require immediate income withholding, or in any case where there is filed with the court a written agreement between the parties which provides for an alternative arrangement, such order shall not provide for income withholding to begin immediately." W. VA. CODE § 48-2-15(b) (Supp. 1994).

147. *Id.*

148. W. VA. CODE § 48A-2-13 (Supp. 1994).

149. W. VA. CODE § 48A-2-12 (Supp. 1994).

150. W. VA. C.S.R. § 78-16-2.9.1 (1988).

151. *Id.*

152. *See supra* text accompanying notes 145-149.

153. W. VA. C.S.R. § 78-16-2.9.3 (1988).

port obligation of each support obligor initially is determined in the standard manner.¹⁵⁴ Once the monthly child support obligation of each support obligor is determined in the standard manner, the next step is to multiply the monthly support obligation by six months,¹⁵⁵ as follows:

	Bill	Nancy
Monthly child support obligation	\$1,225.50	\$817.00
Multiplied by: Six months	<u> 6</u>	<u> 6</u>
Six-month obligation	\$7,353.00	\$4,902.00

Next, calculate the difference in the six-month obligation amounts of the two obligors:¹⁵⁶

Bill's six-month obligation	\$7,353
Less: Nancy's six-month obligation	<u>(4,902)</u>
Difference in six-month obligations	\$2,451

Finally, the difference is divided by twelve and paid monthly over the course of the year by the support obligor who owes the difference:¹⁵⁷

Difference in six-month obligations	\$2,451
Divided by: Twelve months	<u> 12</u>
Monthly payment of obligor owing difference	\$204.25

Therefore, Bill would pay \$204.25 per month to Nancy every month of the year.

c. Split Custody

A split custodial arrangement would render significantly different results. For example, assume that Bill maintains custody of one child

154. See discussion *supra* part III.C-G.

155. W. VA. C.S.R. § 78-16-2.9.3 (1988).

156. *Id.*

157. *Id.*

and Nancy maintains custody of the other two children in accordance with a split custody order. The net incomes available for support by each obligor, as well as their apportioned percentages of the total primary child support need would not change,¹⁵⁸ because those figures are based solely upon the obligors' net incomes. However, the children's total presumptive minimum primary support need would change due to the change in the composition of the two households. With split custody, each support obligor is considered to be the head of his or her household; Bill would be the head of his household and Nancy would be the head of her household. Regardless of the children's relative ages, the child living with Bill would be the first child in Bill's household and would have a presumptive minimum primary support need of \$180 per month.¹⁵⁹ Similarly, the two children living with Nancy would be the first and second children, respectively, in Nancy's household and would have presumptive minimum primary support needs of \$180 per month and \$135 per month.¹⁶⁰ Therefore, in this split custody situation, the total presumptive minimum primary support need of the three children is \$495 per month.¹⁶¹

Of the total presumptive minimum primary child support need in this split custody example, Bill would be responsible for \$297 per month, and Nancy would be responsible for \$198 per month calculated as follows:

158. Bill would be apportioned sixty percent of the primary support obligation and Nancy would be apportioned forty percent of the primary support obligation. *See* discussion *supra* part III.E.2.

159. *See* discussion *supra* part III.D.1.

160. *Id.*

161. This hypothetical exemplifies that in any split custody arrangement, the total presumptive minimum primary child support need will be greater than where one parent has physical and legal custody of all the children as in a typical custodial situation. In the split custody example involving Bill and Nancy, the total presumptive minimum primary child support need is \$495 per month, whereas the total presumptive minimum primary child support need was \$450 per month where all the children were living with Nancy.

	Bill	Nancy
Total presumptive minimum primary child support need	\$495	\$495
Multiplied by: Income apportioning percentage ¹⁶²	<u>.60</u>	<u>.40</u>
Monthly primary child support obligation	\$297	\$198

Because of the resulting change in their primary support obligations, each support obligor's net income available to pay SOLA also changes. After deducting the primary child support obligation from the net income available for support, Bill would have \$2,703, and Nancy would have \$1,802 available to pay SOLA as shown below:

	Bill	Nancy
Net income available for child support	\$3,000	\$2,000
Less: Primary child support obligation	<u>(297)</u>	<u>(198)</u>
Net income available for SOLA	\$2,703	\$1,802

In addition, the SOLA percentages applicable to the support obligors would change because of the change in household composition. The child living with Bill would be the first child in Bill's household and would be entitled to a fifteen percent SOLA.¹⁶³ The first child in Nancy's household also would be entitled to a fifteen percent SOLA, and the second child in her household would be entitled to a ten percent SOLA.¹⁶⁴ Therefore, the total SOLA percentage would be forty percent.¹⁶⁵

Due to the change in the support obligors' net incomes available for SOLA and the change in the SOLA percentage, the SOLA obligations also change:

162. See discussion *supra* part III.E.2.

163. See *supra* text accompanying note 119.

164. *Id.*

165. Again, this hypothetical exemplifies that in any split custody arrangement, the total SOLA percentage will be greater than where one parent has physical and legal custody of all the children as in a typical custodial situation. In the split custody example involving Bill and Nancy, the total SOLA percentage is 40% whereas the total SOLA percentage was only 35% where all the children were living with Nancy.

	Bill	Nancy
Net income available for SOLA	\$2,703	\$1,802
Multiplied by: Total SOLA percentage	<u>40%</u>	<u>40%</u>
SOLA obligation	\$1,081.20	\$720.80

The aggregate SOLA obligation of Bill and Nancy is \$1,802 (\$1,081.20 + \$720.80).

Therefore, in this particular split custody situation, the total of Bill's child support obligation would be \$1,378.20, and the total of Nancy's child support obligation would be \$918.80 calculated as follows:

	Bill	Nancy
Primary support obligation	\$ 297.00	\$ 198.00
Plus: SOLA support obligation	<u>1,081.20</u>	<u>720.80</u>
Total child support obligation	\$1,378.20	\$ 918.80

The aggregate support obligation of Bill and Nancy is \$2,297 (\$1,378.20 + \$918.80).

At this juncture, in a typical divorce case, the custodial obligor would retain his or her child support obligation while the noncustodial obligor pays his or her child support obligation to the custodial obligor. For split custody arrangements, however, an additional step is necessary to determine the amount of support owed to each child.¹⁶⁶ First, the per-child percentage of the SOLA must be calculated. The child in Bill's custody represents fifteen percent of the forty percent total SOLA percentage; this equates to a thirty-seven and one-half percent share of the total SOLA ($15\% \div 40\% = 37.5\%$). The first child in Nancy's custody represents fifteen percent of the forty percent total SOLA percentage; again, this equates to a thirty-seven and one-half percent share of the total SOLA. The second child in Nancy's household represents ten percent of the forty percent total SOLA per-

166. W. VA. C.S.R. § 78-16-2.8 (1988).

centage; this equates to a twenty-five percent share of the total SOLA ($10\% \div 40\% = 25\%$). The aggregate percent share of SOLA for the two children in Nancy's household is sixty-two and one-half percent and is derived by simply adding the percent shares of the two children ($37.5\% + 25\% = 62.5\%$).

After the percentage share of SOLA is determined for the child in Bill's custody and for the two children in Nancy's custody, the SOLA apportionment of the aggregate SOLA obligation is determined by merely multiplying the children's associated percentages by the aggregate SOLA obligation:

	Child in Bill's Custody	Children in Nancy's Custody
Aggregate SOLA obligation	\$1,802	\$1,802
Multiplied by: Percentage share of SOLA	<u>37.5%</u>	<u>62.5%</u>
SOLA apportionment	\$675.75	\$1,126.25

Next, the SOLA apportionment and the primary child support obligation are added to determine the total child support obligation for the respective children:

	Child in Bill's Custody	Children in Nancy's Custody
SOLA apportionment	\$675.75	\$1,126.25
Plus: Primary child support obligation	<u>180.00</u>	<u>315.00</u>
Total support owed to children	\$855.75	\$1,441.25

Because this is a split custody arrangement, Bill would retain the share of the total support owed to the child in his custody, i.e. \$855.75.¹⁶⁷ The remainder of Bill's child support obligation would be paid to Nancy.¹⁶⁸ In this case, Bill would pay Nancy \$522.45 per month, as determined below:

167. W. VA. C.S.R. § 78-16-2.9.2 (1988).

168. *Id.*

Bill's total child support obligation	\$1,378.20
Less: Child support retained by Bill	<u>(855.75)</u>
Child support paid to Nancy	\$522.45

IV. CHILD SUPPORT AGREEMENTS

There is a rebuttable presumption that the child support obligation calculated under the Guidelines, derived through the operation of the Melson Formula, is correct.¹⁶⁹ However, the Guidelines are not followed: (1) when the parties have knowingly and intelligently waived the child support award amount under the Guidelines after disclosure of that amount, and the parties have agreed to another amount; or (2) when the amount of the child support award under the Guidelines would be contrary to the best interests of the child or the parties.¹⁷⁰

In order to waive the child support amount calculated pursuant to the Guidelines, the parties must be informed by the trial judge of the amount of child support proposed by application of the Guidelines.¹⁷¹ The trial judge is required to award the Guideline amount unless each party makes a knowing and intelligent waiver of the amount and enters into an agreement providing otherwise for child custody and support.¹⁷²

Child support agreements are valid in West Virginia, and agreements cannot be modified except when the reason for modification directly concerns the welfare of the child.¹⁷³ Thus, if a change in

169. W. VA. CODE § 48A-2-8(a) (1993); *Wood*, 438 S.E.2d at 794; *Signorelli v. Signorelli*, 434 S.E.2d 382, 390 (W. Va. 1993); *Zaleski v. Zaleski*, 432 S.E.2d 538, 541 (W. Va. 1993); *Taylor*, 432 S.E.2d at 787; *Phillips v. Phillips*, 425 S.E.2d 834, 839 (W. Va. 1992); *Moss v. Bonnell*, 412 S.E.2d 495, 498-99 (W. Va. 1991); *Langevin*, 420 S.E.2d at 578; *Sly*, 416 S.E.2d at 492; *Wyatt v. Wyatt*, 408 S.E.2d 51, 55 (W. Va. 1991); *Wood v. Wood*, 403 S.E.2d 761, 766 (W. Va. 1991); *Gardner*, 400 S.E.2d at 274-75; *Henderson v. Henderson*, 397 S.E.2d 916, 917 (W. Va. 1990); *Bettinger*, 396 S.E.2d at 720; *Holley*, 382 S.E.2d at 592.

170. *Holley*, 382 S.E.2d at 592 (citing W. VA. CODE § 48A-2-8 (1992)).

171. *Clay v. Clay*, 388 S.E.2d 288, 293 (W. Va. 1989).

172. *Id.*

173. *Cool v. Cool*, 441 S.E.2d 395 (W. Va. 1994); *Thompson*, 430 S.E.2d at 336; *Phillips*, 425 S.E.2d at 834; *Langevin*, 420 S.E.2d at 576; *Wyatt*, 408 S.E.2d at 51;

circumstances does occur, a child support agreement may estop a corresponding change in the support award. Nonetheless, child support agreements are not necessarily permanently binding upon the parties. The West Virginia Code clearly affords review of support agreements entered after July 1, 1990, if the award is not within plus or minus fifteen percent of the Guidelines.¹⁷⁴ In addition, the Supreme Court of Appeals of West Virginia has consistently held that child support agreements do not terminate the courts' jurisdiction to provide for the support, maintenance, and education of a minor child.¹⁷⁵ Therefore, parties should be advised that the finality of any child support agreement cannot be predicted with absolute certainty.

The Supreme Court of Appeals of West Virginia encourages the use of property settlement agreements to resolve child support issues.¹⁷⁶ Notwithstanding the potential shortfalls listed in the preceding paragraph, more child support issues should be settled by agreement between the parties. While the strict application of rigid formulae may be conducive to correctly engineering a bridge, highway, electrical circuitry, or machine, the application of formulae to human behavior is not so predictable. The question becomes: Who can better make child support decisions — the parents who can interject all of the variables, both economic and non-economic, or a judge who can only apply a rigid formula? The obvious answer is the former.

Divorce is difficult and upsetting to all parties involved, particularly the children. Although the parents may have conflicts between them, for their children's sake they may be more amenable to compromise if they have the opportunity to negotiate an agreement between

Gangopadhyay v. Gangopadhyay, 403 S.E.2d 712 (W. Va. 1991); Stewart v. Stewart, 395 S.E.2d 551 (W. Va. 1990); Clay, 388 S.E.2d at 288; Martin v. Martin, 346 S.E.2d 61 (W. Va. 1986); Grijalva v. Grijalva, 310 S.E.2d 193 (W. Va. 1983).

174. W. VA. CODE § 48-2-15(e) (Supp. 1994).

175. See, e.g., Robinson v. McKinney, 432 S.E.2d 543, 548 (W. Va. 1993) (quoting W. Va. Code § 48-2-16(a) (1984)); Langevin, 420 S.E.2d at 577; Wyatt, 408 S.E.2d at 54; Clay, 381 S.E.2d at 293; Stewart v. Stewart, 351 S.E.2d 439, 440 (W. Va. 1986); Grijalva, 310 S.E.2d at 196; State ex rel. Ravitz v. Fox, 273 S.E.2d 370, 371 (W. Va. 1980); In re Estate of Hereford, 250 S.E.2d 45, 52 (W. Va. 1978); State ex rel. Trembly v. Whiston, 220 S.E.2d 690 (W. Va. 1975); Corbin, 206 S.E.2d at 899.

176. Warner v. Warner, 394 S.E.2d 74, 79 (W. Va. 1990).

them. Negotiating their own agreement prior to being subjected to the adversarial atmosphere before a family law master provides the parents the opportunity to direct their own fate and the fate of their children. In this way, parents will be more prone to adhere to their own agreement than to provisions imposed by a family law master. Even so, the agreements should provide for review and modification should either party, by fortuitous event, experience a diminished financial status. Therefore, agreements should provide under which circumstances review would be acceptable.

V. DURATION OF CHILD SUPPORT ORDERS

A. *Child Support Orders Can Only be Changed by the Courts*

Once child support has been judicially ordered, the amount of the award can only be modified by another judicial order.¹⁷⁷ Even then, a circuit court's authority to modify a child support order is prospective only.¹⁷⁸ Thus, there can be no modification of the terms of a child support order by mere agreement or contract between the parties.¹⁷⁹ In banning contracts between the parties which affect child support orders, the Supreme Court of Appeals of West Virginia has reasoned that "[t]he welfare and interests of minor children must be protected by the courts [because] . . . [children] are not independently represented in connection with any property settlement agreement and they are not parties to such an agreement."¹⁸⁰

177. *Lauderback*, 416 S.E.2d at 62; *Stevens*, 412 S.E.2d at 257; *Wyatt*, 408 S.E.2d at 51; *Stewart*, 395 S.E.2d at 551; *Goff v. Goff*, 356 S.E.2d 496 (W. Va. 1987); *Kimble*, 341 S.E.2d at 420; *Corbin*, 206 S.E.2d at 898; *Bailey v. Bailey*, 35 S.E.2d 81 (W. Va. 1945).

178. *Farley v. Farley*, 412 S.E.2d 261 (W. Va. 1991); *Nancy Darlene M. v. James Lee M., Jr.*, 400 S.E.2d 882 (W. Va. 1990); *Goff*, 356 S.E.2d at 496.

179. *Louderback*, 416 S.E.2d at 62; *Kimble*, 341 S.E.2d at 424; *Bailey*, 35 S.E.2d at 83.

180. *Lauderback*, 416 S.E.2d at 65 (citing *Stewart*, 351 S.E.2d at 439).

B. Age of Majority of the Child

Under the West Virginia emancipation statute,¹⁸¹ child support obligations terminate when the child reaches the age of majority.¹⁸² Based upon this statute, the Supreme Court of Appeals of West Virginia, in *McKinney v. McKinney*,¹⁸³ expressly recognized the age of majority as eighteen.¹⁸⁴ Under West Virginia's emancipation statute, "upon turning eighteen an individual enjoys the rights and privileges, as well as sharing in the burdens and obligations, of adult status."¹⁸⁵ Whether the child's parents are married or divorced, the child is free to make it on his own; parents are not legally obligated to take care of their children beyond that day.¹⁸⁶

Notwithstanding the emancipation statute, the legislature recently reenacted Section 48-2-15d, which provides for child support beyond the age of eighteen where the child is enrolled in a secondary education or vocational program.¹⁸⁷ Thus, these two statutory provisions are in contradiction of one another as they currently exist. Although

181. W. VA. CODE § 2-3-1 (1992).

182. *Id.* Specifically:

[A]ny order or mandate providing for payment of child support for any person up to the age of twenty-one years contained in any decree or order of divorce or separate maintenance or in any order in any non-support or bastardy proceeding, which decree or order was entered prior to June nine, one thousand nine hundred seventy-two, may by order of the court be terminated as to such person attaining the age of eighteen years.

Id.

183. 337 S.E.2d 9 (W. Va. 1985).

184. *Id.* at 9-10.

185. *Id.* at 10 (interpreting W. VA. CODE § 2-3-1 (1992)).

186. *Id.*

187. W. VA. CODE § 48-2-15d(a) (Supp. 1994) (effective Mar. 12, 1994). Specifically:

Upon a specific finding of good cause shown and upon findings of fact and conclusions of law in support thereof, an order for child support may provide that payments of such support continue beyond the date when the child reaches the age of eighteen, so long as the child is unmarried and residing with a parent and is enrolled as a full-time student in a secondary educational or vocational program and making substantial progress towards a diploma; Provided, That such payments may not extend past the date that the child reaches the age of twenty.

Id.

Section 48-2-15d limits the extension of child support to the age of twenty,¹⁸⁸ it provides that prior orders for education and related expenses entered under the 1993 version of the statute shall continue in full force and effect until the court, upon motion of a party, modifies or vacates the order.¹⁸⁹ An order may be modified or vacated upon a finding that the facts and circumstances which supported the entry of the order have changed;¹⁹⁰ the child has not been accepted or is not enrolled in, and making satisfactory progress in, an educational program at an accredited college, or the parent ordered to pay the expense is no longer able to make the payments;¹⁹¹ the child, at the time the order was entered, was under the age of sixteen;¹⁹² the amount ordered to be paid was determined by the Guidelines;¹⁹³ or the order was entered after March 14, 1994.¹⁹⁴

There is tension between Section 48-2-15d and Section 2-3-1 because the former provides for support until age twenty and the latter provides for emancipation at age eighteen. To date, there is no reported case which pertains to the extended support provision of Section 48-2-15d. Therefore, a prediction cannot be made with certainty as to how the Supreme Court of Appeals of West Virginia would rule concerning the conflict of the laws. However, it should be noted that for the court to accept West Virginia Code § 48-2-15d as controlling, it

188. *Id.*

189. W. VA. CODE § 48-2-15d(c) (Supp. 1994). The 1993 version of this reenacted statute also provided for child support to age twenty where the child was enrolled in a secondary educational or vocational program. W. VA. CODE § 48-2-15d(a) (Supp. 1993). Additionally, the 1993 version stated:

The court may make an award for educational and related expenses for an adult child up to the age of twenty-three who has been accepted or is enrolled and making satisfactory progress in an educational program at a certified or accredited college. The amount of these payments shall be related to the ability of the parent to make the payments. The payments shall be made to the custodial parent when the adult child is residing with that parent or to a third party as designated by the court. If the child is not residing with a parent, the payments shall be paid to the child or to such third parties as so designated by the court.

W. VA. CODE § 48-2-15d(b) (Supp. 1993).

190. W. VA. CODE § 48-2-15d(c)(1) (Supp. 1994).

191. W. VA. CODE § 48-2-15d(c)(2) (Supp. 1994).

192. W. VA. CODE § 48-2-15d(c)(3) (Supp. 1994).

193. W. VA. CODE § 48-2-15d(c)(4) (Supp. 1994).

194. W. VA. CODE § 48-2-15d(c)(5) (Supp. 1994).

would necessarily have to overrule or qualify its prior holding in *McKinney* that court ordered child support ends at the age of majority.

Apart from these statutory provisions, West Virginia case law also recognizes exceptions to the general rule that child support terminates at the age of eighteen. For example, a parent will be legally liable to support an adult child where the adult child is unmarried, unemancipated, insolvent, and physically or mentally incapacitated from supporting himself.¹⁹⁵ Also, a parent may be legally bound to support an adult child if the parent has entered into an agreement to that effect pursuant to a divorce decree.¹⁹⁶

C. Death of the Obligor

Death does not necessarily relieve a support obligor of the obligor's child support obligation. In *Robinson v. Robinson*,¹⁹⁷ the Supreme Court of Appeals of West Virginia held that a decree in a divorce action for child support becomes ineffective upon the death of the support obligor.¹⁹⁸ However, forty-two years later, in *Scott v. Wagoner*,¹⁹⁹ the court qualifiedly overruled *Robinson*, and concluded that a court has the authority to enforce a child support obligation as a lien against a deceased obligor's estate.²⁰⁰

195. *McKinney*, 337 S.E.2d at 10 n.2 (citing *James G. v. Caserta*, 332 S.E.2d 872, 882 (W. Va. 1985)) (recognizing common law rule that where a child is incapable of supporting himself because of physical or emotional disabilities, the parents' obligation to support continues beyond the child's age of majority).

196. *Thompson*, 430 S.E.2d at 336 (father bound to pay all expenses related to the college education of his four children pursuant to settlement agreement); *Martin*, 346 S.E.2d at 61 (father was obligated to continue providing support for children pursuant to separation agreement specifying that the father would provide support until each child reached age twenty-one); *McKinney*, 337 S.E.2d at 10 (citing *Cutshaw v. Cutshaw*, 261 S.E.2d 52 (Va. 1979)) (jurisdiction of divorce court to provide for support and maintenance terminated at age of majority unless otherwise provided by agreement incorporated into divorce decree); *Ritchea v. Ritchea*, 260 S.E.2d 871, 872 (Ga. 1979) (neither jury nor judge has jurisdiction to extend a parent's obligation to his child beyond his eighteenth birthday).

197. 50 S.E.2d 455 (W. Va. 1948).

198. *Id.* at 462.

199. 400 S.E.2d 556 (W. Va. 1990).

200. *Id.* at 560.

In *Scott*, Mr. Scott was shot to death by his new wife's lover, leaving his new wife as the sole beneficiary of his estate.²⁰¹ Mr. Scott's ex-wife sued the estate for the remainder of Mr. Scott's child support obligation.²⁰² The circuit court dismissed the ex-wife's suit,²⁰³ apparently basing its decision upon the *Robinson* rule that a child support obligation terminates upon an obligor's death. On appeal, the *Scott* court concluded, "in a case involving child support, if compelling equitable considerations are present . . . a court has the authority to enforce the child support obligation as a lien against the deceased obligor's estate."²⁰⁴ Thereafter, the *Scott* court held that the ex-wife had stated a claim upon which relief could be granted²⁰⁵ and remanded the case for determination in accordance with its holding.²⁰⁶

In sum, the *Scott* decision may promise more than it delivers regarding its assurance to provide for children upon the death of a support obligor. Because the *Scott* decision only qualifiedly overrules *Robinson*, and because the *Scott* decision is based upon unusual and compelling equitable circumstances, the general rule in *Robinson*, that child support obligation terminates upon the death of an obligor, probably still will apply in most cases. To avoid the ambiguities raised by *Scott*, parties to a divorce proceeding are advised to provide for the continuing support of their children via an agreement. Such agreement might, for example, establish continuing support by means of life insurance proceeds.

201. *Id.* at 557.

202. *Id.*

203. *Id.*

204. *Scott*, 400 S.E.2d at 560.

205. Interestingly, the *Scott* court reiterated a portion of *Robinson* in its dicta by stating that "generally" a child support order terminates automatically upon the death of the support obligor. *Id.* at 558-59 (quoting 24 AM.JUR.2D *Divorce and Separation* § 1048 (1983)).

206. *Id.* at 560.

D. Adoption of the Child

Resignation from parental duties does not necessarily abrogate child support payments.²⁰⁷ In *Kimble v. Kimble*,²⁰⁸ the noncustodial father agreed to the adoption of his child by the custodial mother's current spouse.²⁰⁹ The *quid pro quo* for the father's permission for the adoption was the termination of his responsibility to pay child support payments.²¹⁰ In compliance with these terms, the father thereafter ceased paying his child support obligation.²¹¹ However, the adoption was never judicially consummated, and the father eventually was served a petition which demanded delinquent child support payments and requested modification for increased child support.²¹² The circuit court ruled in favor of the father.²¹³

On appeal, the *Kimble* court declared that *consent* to the adoption of a child is alone insufficient to terminate the noncustodial obligor's obligation to make child support payments.²¹⁴ However, the court held that in limited circumstances, a custodial obligor may be equitably estopped from seeking enforcement of a child support obligation: (1) where the welfare of the child has not been and will not be adversely affected; (2) where the noncustodial obligor has executed formal consent to the adoption of the child in exchange for the release of the obligation; and (3) where the adoption is not consummated due to the inaction of the custodial obligor with such inaction causing a detriment to the noncustodial obligor.²¹⁵ "Conversely, where the welfare of the child has been or becomes adversely affected, a custodial parent will not be barred by the doctrine of equitable estoppel from

207. *Stevens*, 412 S.E.2d at 257; *Kimble*, 341 S.E.2d at 420; *Hopkins v. Yarbrough*, 284 S.E.2d 907 (W. Va. 1981).

208. 341 S.E.2d 420 (W. Va. 1986).

209. *Id.* at 423.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Kimble*, 341 S.E.2d at 422-23.

214. *Id.* at 422.

215. *Id.* at 430.

seeking reinstatement of the decretal obligation.²¹⁶ The court remanded the *Scott* case for further factual findings.²¹⁷

Similarly, in *Stevens v. Stevens*,²¹⁸ the custodial father surrendered his parental rights to the West Virginia Department of Health and Human Services.²¹⁹ Subsequently, the noncustodial mother petitioned for and was granted custody of the child.²²⁰ The court found that although the father had entered into an agreement with the Department of Health and Human Services whereby he relinquished custody of the child and surrendered all legal rights to the child, the agreement was merely between parties.²²¹ Thus, the rights to the child were never judicially terminated.²²² The court cited the rule adopted in *Kimble*²²³ in concluding that the father's parental rights were never judicially terminated.²²⁴ Therefore, the court reasoned that the father's obligation to support the child should continue.²²⁵

Where the adoption is consummated, the noncustodial obligor must pay support to the date the adoption is judicially effective.²²⁶ In *Hopkins v. Yarbrough*,²²⁷ the adoption of the child was consummated and judicially recognized.²²⁸ However, the noncustodial obligor owed an arrearage of child support at the time of the adoption.²²⁹ The circuit court refused to enforce the payment of the child support arrearage.²³⁰ On appeal, the *Hopkins* court held that the circuit court was

216. *Id.* at 431.

217. *Id.*

218. 412 S.E.2d 257 (W. Va. 1991).

219. *Id.* at 261.

220. *Id.*

221. See discussion *supra* part V.A. (generally, child support obligations can only be modified by court order).

222. *Stevens*, 412 S.E.2d at 262.

223. *Kimble*, 341 S.E.2d at 420.

224. *Stevens*, 412 S.E.2d at 262.

225. *Id.*

226. *Hopkins*, 284 S.E.2d at 910.

227. *Id.*

228. *Id.* at 908.

229. *Id.*

230. *Id.*

without authority to modify or cancel arrearages of child support payments which accrued prior to the date of the adoption.²³¹

However, the *Hopkins* court did recognize that except for his obligation to pay arrearages, the noncustodial obligor had no child support obligation subsequent to the adoption.²³²

VI. SUGGESTED CHANGES IN THE CHILD SUPPORT GUIDELINES

Three changes are needed to the Guidelines. First, there needs to be some accountability on the part of the custodial obligor for the child support payments both received and retained. Second, there needs to be an inflation provision applicable to the presumptive minimum support need of both the children and the parents. Third, the percentages associated with SOLA should be tempered for high income parents.

The stated purpose of the Family Obligations Enforcement Act,²³³ under which the Guidelines were promulgated, is to establish and enforce reasonable child support orders and to encourage and require a child's parents to meet the obligation of providing adequate food, shelter, clothing, education, health care, and child care for the children of this state.²³⁴ Such a lofty height cannot be attained with half a ladder. The emphasis of the Guidelines concerns the procurement of child support payments from the noncustodial obligor. However, there is no emphasis on the disposition of the child support payments once they are received by the custodial obligor.

By omission, the legislature has provided that child support payments can be utilized in any manner the custodial obligor wishes. There is no provision in either the West Virginia Code or the Guidelines that expressly provides that the custodial obligor has a fiduciary duty to utilize the payments for the benefit of the children. The custo-

231. *Hopkins*, 284 S.E.2d at 911.

232. *Id.* at 909 (citing W. VA. CODE § 48-4-5 (1969) [now W. VA. CODE § 48-4-11 (1992)]).

233. The Family Obligations Enforcement Act incorporates Chapter 48A of the West Virginia Code. W. VA. CODE § 48A-1-1 (1993).

234. W. VA. CODE § 48A-1-2 (1992).

dial obligor is not only unaccountable for the payments received from the noncustodial obligor, but is also unaccountable for the child support payments owed by and retained by the custodial obligor. If the impetus for legislating the current Guidelines was for the financial betterment of children, the legislature has not gone far enough. The West Virginia Code should be amended to include a provision which mandates that any child support calculated under the Guidelines must be actually utilized by the custodial obligor for the benefit of the child.

Second, the legislature should include an escalator into the Guidelines for the presumptive minimum support need of both the children and the parents to account for the ravages of inflation.²³⁵ The current Guidelines provide for a presumptive minimum support need, but the amount is stated in a fixed dollar amount.²³⁶ Even a relatively low inflation rate of four percent per year will erode the purchasing power of a fixed dollar provision by twenty-two percent in just five years.²³⁷ That necessarily means that the \$450 presumptive minimum support need for a parent, which was incorporated into the Guidelines in 1988,²³⁸ in today's dollars would purchase less than \$350 worth of food, housing, and services. Moreover, the \$180 presumptive minimum support provision for the first child in a custodial household²³⁹ has a purchasing power of less than \$140 today. Therefore, the equity of the Guidelines is eroding, as is the purchasing power associated with the fixed dollar allowances.

Third, the legislature should place a realistic limit on the SOLA award. The SOLA award is currently determined by a straight percentage of the parents' discretionary income. There is no rational relationship between the needs of the children and the amount of the award. Further, the fixed percentage SOLA determination can be prejudicial

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

236. W. VA. C.S.R. § 78-16-17.1 (1988).

237. ROBERT G. WILLIAMS, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, DEVELOPMENT OF GUIDELINES FOR ESTABLISHING AND UPDATING CHILD SUPPORT ORDERS: INTERIM REPORT 95 (1985).

238. W. VA. C.S.R. § 78-16-17.1 (1988).

239. *Id.*

to high income support obligors, because they conceivably could be required to pay the percentage regardless of the level of their income.²⁴⁰ This practice is inherently inequitable in light of the criticism stated above concerning the lack of accountability of the custodial parent. A more equitable method of awarding SOLA would be to cap the SOLA award based upon the average expenditures for children made by parents with similar pecuniary means. Of course, the cap should be reviewed periodically to account for both inflation and possible changing trends in spending concerning children.

VII. CONCLUSION

The Guidelines have provided greater predictability to the amount of child support awards because the awards are now determined by the Melson Formula as opposed to judicial discretion. In addition, child support agreements between parties continue to be a viable alternative to judicially-ordered support. In fact, the Supreme Court of Appeals of West Virginia encourages such agreements. As to child support orders, while only a court may modify them, factors such as the age of majority of the child, the death of a parent, or the adoption of a child may affect the duration.

Notwithstanding the firm improvements described above, the Guidelines have not fully accomplished the legislature's stated purpose. There is currently no requirement for the custodial obligor to account for either the child support payment received from the noncustodial obligor or the child support retained by the custodial obligor. Until there are accountability requirements for both obligors, there can be no assurance that the child actually receives the benefits to which he or she is entitled.

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240. See W. VA. C.S.R. § 78-16-2.7.2 (1988) (if the discretionary income of one parent exceeds six thousand dollars per month, or the combined discretionary income of both parents exceeds eight thousand dollars per month, the court may not apply the fixed SOLA percentages).