

Summer 1994

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Recommended Citation

Funke, Sarah K. (1994) "Preserving the Purchasing Power of Child Support Awards: Can the Use of Escalator Clauses be Justified After the Family Support Act?," *Indiana Law Journal*: Vol. 69: Iss. 3, Article 9.

Available at: <http://www.repository.law.indiana.edu/ilj/vol69/iss3/9>

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Preserving the Purchasing Power of Child Support Awards: Can the Use of Escalator Clauses Be Justified After the Family Support Act?

SARAH K. FUNKE*

INTRODUCTION

With the increasing number of divorces in the United States today,¹ a growing number of children will face the prospect of living in single-parent households. The results of the 1991 Current Population Survey indicate that the proportion of children living with only one parent more than doubled from 1970 to 1991, from 12% to 26%,² with children of divorce comprising the largest category of these children.³ Of all children living in single-parent homes in 1991, a staggering majority, approximately 88%, lived with their mothers.⁴

Divorce frequently generates significant financial consequences for those involved, since the incomes that previously supported a single, cohesive family unit must be fragmented to maintain the separate households of the noncustodial and custodial parents.⁵ Because all parents' duty to support their

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1. According to the Census Bureau's March 1991 Current Population Survey, the number of currently divorced persons more than tripled from 4.3 million in 1970 to 15.8 million in 1991, representing 9% of all adults ages 18 and over 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: March 1991 at 6 (1991) [hereinafter MARITAL STATUS]. Demographers project that approximately half of the current marriages in the United States will end in divorce. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* xvii (1985).

2. MARITAL STATUS, *supra* note 1, at 7.

3. *Id.* at 8. In 1991, 37% of the children who lived with one parent were children of divorced families. Thirty-three percent of children in single-parent households were born to an unmarried parent, while 29% of single-parent children lived with a married parent whose spouse was absent (due to marital discord, death, etc.). *Id.* As these figures suggest, discussions about child support and its enforcement are complicated by the presence of two distinct populations, namely families in which the parents never married and families in which the parents were once married. This Note will focus on the latter category.

4. *Id.* The proportion of such children who live with their fathers, however, has grown in recent years. Since 1980, the proportion has increased from 8.5% to approximately 12%. *Id.*

5. Note, *Louisiana's Child Support Guidelines: A Preliminary Analysis*, 50 LA. L. REV. 1057, 1057 (1990) [hereinafter *Preliminary Analysis*]. See generally Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181 (1981). Weitzman notes that these consequences tend to be positive for men and negative for women. Her ten-year study of divorces in California (1968-1977) revealed that just one year after divorce, the standard of living for divorced women and their children dropped by 73%, while that of their ex-husbands increased by 42%. WEITZMAN, *supra* note 1, at 338-39. It must be noted, however, that family law scholars have intensely debated the accuracy of Weitzman's statistics. While Weitzman's

minor children continues even when marriage ends,⁶ children of divorced families are entitled to some level of support from the noncustodial parent.⁷

Even though both parents are legally responsible for supporting their children, the methods courts have traditionally used to establish support orders have forced the burden of support primarily upon the custodial parent, typically the mother.⁸ Until fairly recently, state statutes generally accorded courts a significant degree of discretion over the amount of child support to be awarded in a given case. This discretion contributed to the establishment of awards that were frequently quite inadequate.⁹ Moreover, the awards that courts granted even in similar circumstances were often highly disparate.¹⁰

By Congressional mandate,¹¹ all states have now adopted guidelines that operate as rebuttable presumptions in support proceedings. By incorporating fixed formulas as the basis for the support determination,¹² these guidelines have helped to increase the adequacy and uniformity of child support awards over those made under more discretionary standards.¹³ But even if an award manages to reflect accurately the needs of a child and the resources of a

critics agree that, on average, divorce hurts women financially to a greater extent than it does men, they disagree with Weitzman about the magnitude of the standard of living gap. IRA M. ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 294 (2d ed. 1991). For a survey of critiques of Weitzman's study, see *id.* 294-301.

6. See, e.g., cases cited in 27C C.J.S. *Divorce* § 655 n.87 (1986).

7. In the typical case, the noncustodial parent's support comes in the form of a court-ordered, monetary obligation that is payable to the custodial parent. In contrast, the custodial parent's obligation is presumed to be spent directly on the child. See INDIANA RULES OF COURT, INDIANA CHILD SUPPORT RULES AND GUIDELINES § 3(F)(1) (West 1993).

8. WEITZMAN, *supra* note 1, at 276-78. Though most jurisdictions refrain from explicit gender preference when making custody decisions, studies estimate that courts give mothers primary custody up to 90% of the time. ELLMAN ET AL., *supra* note 5, at 508. This high figure is due largely to the great number of custody requests made by mothers. *Id.* For simplicity, this Note will refer to the "custodial parent" in the feminine gender and the "noncustodial parent" in the masculine gender.

9. See *infra* note 21 and accompanying text. Custodial parents' financial burdens are often exacerbated by the failure of noncustodial parents to comply with support orders. For example, in 1990, approximately half of the women entitled to receive child support awards actually received the full amount due them; approximately one-fourth of the women received only partial payment, while the remaining one-fourth received nothing whatsoever. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *WHO'S SUPPORTING THE KIDS* (1991). Further discussion of child support enforcement or collection is beyond the scope of this Note.

10. See *infra* note 22 and accompanying text.

11. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (codified in scattered sections of 42 U.S.C. (1988)).

12. Federal regulations implementing the Family Support Act of 1988 require that the guidelines established by each state "[b]e based on specific descriptive and numeric criteria and result in a computation of the support obligation . . ." 45 C.F.R. § 302.56(c)(2) (1992).

13. Advocates of child support guidelines have cited studies suggesting that the use of such formulas can dramatically increase the adequacy of often inadequate support awards. One early study reported that if all child support orders in the United States had been set using either of two formulas in effect in a few states prior to 1984, instead of using the prevailing discretionary standards, noncustodial parents would have owed \$26.6 billion in child support in 1984, instead of the \$10.1 billion that actually was owed. Charles Brackney, *Battling Inconsistency and Inadequacy: Child Support Guidelines in the States*, 11 HARV. WOMEN'S L.J. 197, 199 (1988); Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 N.C. L. REV. 209, 225 (1991). The two formulas were the Wisconsin percentage of income standard and the Delaware Melson formula. For a description of these formulas, see Robert G. Williams, *Guidelines for Setting Levels of Child Support Orders*, 21 FAM. L.Q. 281, 290-91, 295-301 (1987).

parent when it is established, changes in circumstances over time can seriously undermine the equity of a support award and diminish its real value.

In particular, inflation can drastically erode the value of an award.¹⁴ For example, even a relatively low constant inflation rate of 4% will erode the purchasing power of a fixed child support award by 22% in just five years.¹⁵ If an award is not adjusted periodically to account for inflation, the full brunt of its effects will fall on the custodial parent.¹⁶

In the Family Support Act of 1988, Congress "[s]pecifically recogniz[ed] the importance of modification to maintain[ing] adequacy and equity of support awards,"¹⁷ requiring states to implement procedures for periodically reviewing certain support orders, as well as regularly updating the guidelines by which orders are established.¹⁸ Though this policy would seem to favor the parent hoping to preserve an award against inflation, the changes that have come about pursuant to the Act in fact provide little more protection than the minimal level accorded by traditional modification procedures. Thus, the custodial parent is still in need of a mechanism that will allocate equitably the risk of inflation between both parents, rather than forcing her to bear the full brunt of its effects.

This Note suggests that escalator clauses are an ideal mechanism for providing this protection, and it examines the justification for their use in a modification system that, in theory, already favors the custodial parent. Part I briefly discusses the development of governmental recognition of the need for adequate and equitable child support awards, and it stresses the importance of preserving such awards once they have been established. Part II describes the burdens associated with traditional modification, particularly for inflation, and it discusses the impact that recent federal legislation has had on the process of adjusting awards. Part III discusses the role of escalators today as a mechanism for preserving awards, and it assesses the criticisms and merits associated with these automatic adjustment provisions. Finally, this Note concludes that, on balance, the use of escalator clauses is a viable and

14. See generally Philip Eden, *How Inflation Flaunts the Court's Orders*, FAM. ADVOC., Spring 1979, at 2.

15. 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).

16. The custodial parent necessarily bears the burden of inflation on her portion of the child support obligation. See Robert D. Wilson, Note, *Inflation-Proof Child Support Decrees: Trajectory to a Polestar*, 66 IOWA L. REV. 131, 150 (1980). "[I]t seems reasonable to assume that a fair amount of increases in [the custodial parent's] net earnings will be contributed to the children's expenses." *Id.* Without some sort of adjustment for inflation of the noncustodial parent's obligation, the custodial parent will be forced to shoulder the burden of rising costs on this portion as well.

17. ELEANOR LANDSTREET & MARIANNE TAKAS, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, DEVELOPING EFFECTIVE PROCEDURES FOR PRO SE MODIFICATION OF CHILD SUPPORT AWARDS 2 (1991).

18. 42 U.S.C. § 666(a)(10)(A) (1988). Even prior to the enactment of the Family Support Act, many commentators stressed that the procedure for updating awards should be directly incorporated into the states' guidelines through periodic reapplication of the guideline formula to an award to ensure its continued adequacy over time. See, e.g., Brackney, *supra* note 13, at 212-13; Williams, *supra* note 13, at 318.

justifiable means of allocating the risk of inflation, and more importantly, of ensuring the well-being of children supported by awards.

I. THE GOAL OF ADEQUATE AND EQUITABLE AWARDS: AN OVERVIEW

A. *The Impetus Behind the Use of Guidelines in Establishing Awards*

Traditionally, statutes granted courts wide discretion to establish child support orders.¹⁹ States typically announced nebulous, general standards for judges to consider when determining awards, providing little or no guidance on how these specific factors should weigh in the balance.²⁰ This lack of guidance and of fixed standards contributed to the creation of awards amounts that frequently were inadequate.²¹ Wide judicial latitude in setting awards also led to unsystematic variation in award levels from judge to judge and from case to case, even in situations involving the same number of children and identical income levels.²² Support orders were generally unassailable on appeal²³ because these broad statutory provisions gave judges extensive discretionary powers.²⁴ Hence, the significant disparities among awards, and

19. ELLMAN ET AL., *supra* note 5, at 372.

20. Section 309 of the Uniform Marriage and Divorce Act exemplifies this "laundry list" approach. It states that:

In a proceeding for dissolution of marriage, legal separation, maintenance, or child support, the court may order either or both parents owing a duty of support to a child to pay an amount reasonable or necessary for his support, without regard to marital misconduct, after considering all relevant factors including:

- (1) the financial resources of the child;
- (2) the financial resources of the custodial parent;
- (3) the standard of living the child would have enjoyed had the marriage not been dissolved;
- (4) the physical and emotional condition of the child and his educational needs; and
- (5) the financial resources and needs of the noncustodial parent.

UNIF. MARRIAGE AND DIVORCE ACT § 309, 9A U.L.A. 400 (1987).

21. Murphy, *supra* note 13, at 220-21, 224, 226-27; see also Helen Donigan, *Calculating and Documenting Child Support Awards Under Washington Law*, 26 GONZ. L. REV. 13, 16-19 (1990-1991); Sally F. Goldfarb, *What Every Lawyer Should Know About Child Support Guidelines*, 13 FAM. L. REP. 3031, 3031 (1987). It should be noted, however, that another force contributing to inadequate awards in low-income families is the low income of the parents to begin with, a problem that is basically unaffected by the use of either fixed guidelines or discretion in establishing awards. Murphy, *supra* note 13, at 238.

22. Brackney, *supra* note 13, at 199-200. For a discussion of variations among judges, see 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). For an illustration of variations within judges' own decisions, see Lucy M. Yee, *What Really Happens in Child Support Award 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). Yee's analysis also showed that two-thirds of the men in her study paid more in monthly car payments than they did in their monthly child support payments. *Id.* at 36.

23. ELLMAN ET AL., *supra* note 5, at 372.

24. It should be noted, however, that some states, including Wisconsin and Delaware, had already begun by the late 1970's and early 1980's to experiment with various types of formulas, in order to regularize support awards. Brackney, *supra* note 13, at 202.

their often inadequate amounts, generally remained uncorrected by appellate courts.²⁵

In response to the undeniable failings of this discretionary system, Congress enacted two pieces of legislation in the 1980's to force improvements in the methods by which decisions regarding child support were made. Congress designed this legislation to regularize support orders and to make them more amenable to review. Congress first passed the Child Support Enforcement Amendments of 1984,²⁶ which amended Title IV-D of the Social Security Act.²⁷ The Amendments required states to create child support guidelines by October 1, 1987,²⁸ as a precondition to the receipt of federal funding for the states' Aid to Families with Dependent Children ("AFDC") programs.²⁹ Pursuant to the Amendments, states were to provide these guidelines to judges and all other officials who had the authority to establish child support awards.³⁰

The federal regulations promulgated pursuant to the Amendments by the Department of Health and Human Services ("HHS") made clear that the broad statutory authority of the past would not suffice. These regulations required the guidelines to incorporate formulas based on "specific descriptive and numeric criteria" that would "result in a computation of the support obligation."³¹ In short, the regulations called for guidelines that were quantitative in form; they were not merely to list vague factors for judges to "consider."³² Though the Amendments and their accompanying regulations appeared to change the method by which judges were to calculate support orders, they ultimately did not alter the discretionary nature of the award process. Because these Amendments did not make use of the guidelines mandatory, judges and administrators were free to choose whether or not to use them.³³

Recognizing this deficiency in the 1984 legislation, Congress once again amended Title IV-D through the Family Support Act of 1988.³⁴ The Act transformed awards calculated under state "guidelines" (whether legislatively-

25. ELLMAN ET AL., *supra* note 5, at 372.

26. Pub. L. No. 98-378, 98 Stat. 1305 (codified in scattered sections of 42 U.S.C. (1988)).

27. 42 U.S.C. §§ 651-669 (1988).

28. Child Support Enforcement Amendments § 18(a).

29. Section 18(a) provides that "[e]ach State, as a condition for having its State plan approved under this part, must establish guidelines for child support award amounts within the State." As a precondition to federal funding, states also were required to implement effective enforcement techniques, as the name of the legislation suggests, including income withholding, asset seizure, and the interception of income tax refunds. HOMER J. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 736 (2d ed: 1988).

30. Child Support Enforcement Amendments § 18(a).

31. 45 C.F.R. § 302.56(c)(2) (1992).

32. WILLIAMS, *supra* note 15, at 1.

33. Section 18(a) of the Amendments stated that "[t]he guidelines established pursuant to [the Amendments] shall be made available to all judges and other officials who have the power to determine child support awards within such State, but need not be binding upon such judges or other officials." Child Support Enforcement Amendments § 18(a).

34. 102 Stat. 2343.

administratively-, or judicially-created)³⁵ into rebuttable presumptions.³⁶ Awards established pursuant to each state's factor-specific formula are presumed correct, with exceptions for special circumstances.³⁷

B. The Need for Updating Awards to Maintain Their Adequacy and Equity

None of the guideline formulas that states have adopted so far inherently protect awards against inflation. They do not contain specific provisions for automatic adjustments to counteract the deleterious effects of inflation on awards. Moreover, awards calculated under all of the formulas are in the form of fixed dollar amounts, which can, by their very nature, become outdated due to rising costs of living. Thus, even the most equitable child support awards established under the new state guidelines promulgated in accordance with the Family Support Act³⁸ may eventually fail to meet the needs of the child as a consequence of increases in costs over time due to inflation.³⁹

For example, due to rampant inflation during the 1970's and early 1980's, a child support order of \$500 per month awarded in 1978 would have purchased only \$465 worth of the same goods and services just one year later.⁴⁰ The same award in 1974 would have had a purchasing power in 1979 of only \$341, and such an award in 1969 would only have bought \$275 of goods and services in 1979.⁴¹ A child support award in 1975 of \$250 per month would have been worth only \$13 in 1984.⁴²

Fortunately, the inflation rate in recent years has remained relatively low; inflation in 1992 was around 3%.⁴³ If support awards are not periodically updated, however, even a low inflation rate can seriously undermine the real value of an award, destroying any adequacy it possessed when originally established. For instance, a constant inflation rate of only 4% will devalue a

35. 42 U.S.C. § 667(a).

36. *Id.* § 667(b)(2). Guidelines were to operate presumptively as of October 13, 1989. 45 C.F.R. § 302.56(f).

37. 42 U.S.C. § 667(b)(2) provides that "[a] written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case."

38. 102 Stat. 2343. For a discussion of the general improvement in support awards under the use of fixed guidelines, see Murphy, *supra* note 13, at 231-40.

39. Compounding the deleterious effects of inflation on the value of fixed support awards are the increasing costs of supporting children as they age. See, e.g., WEITZMAN, *supra* note 1, at 282; Carol S. Bruch, *Developing Standards for Child Support Payments: A Critique of Current Practice*, 16 U.C. DAVIS L. REV. 49, 52 (1982); Eden, *supra* note 14, at 3. In an intact marriage, the amount spent on a child at age 17 would be nearly three and one half times the amount spent on that child at age one. Eden, *supra* note 14, at 3. However, further discussion of this additional risk is beyond the scope of this Note.

40. Eden, *supra* note 14, at 2.

41. *Id.* By 1979 the inflation rate had risen to over 12%, having increased at a rate of over 6% annually during the preceding decade. *Id.*

42. WEITZMAN, *supra* note 1, at 281. The inflation rate averaged 3.3% during the years 1982 to 1987. ELIZABETH S. BENINGER & JEANNE W. SMITH, DETERMINING CHILD & SPOUSAL SUPPORT § 621.3 (Cum. Supp. 1992).

43. *Pacific Rim Growth*, L.A. TIMES, Sept. 28, 1992, at D3.

fixed support award by 22% in just five years.⁴⁴ Without regular adjustments, the full brunt of the effects of rising costs on the value of a support award will fall upon the custodial parent.⁴⁵ Thus, in addition to bearing the burden of inflation on her own portion of the support obligation directly, she will be forced to endure as well the burden on the father's portion, as inflation slowly but steadily chips away at the value of his unadjusted support obligation.

II. THE ROLE OF THE FAMILY SUPPORT ACT IN PRESERVING THE VALUE OF AWARDS

A. Traditional Modification and Its Effect on Adjustment for Inflation

Family law is distinct from other areas of law in that modifications of judicial orders and of agreements between parties are much more commonplace. Nevertheless, prior to the enactment of the Family Support Act,⁴⁶ modification of child support awards was an area still largely overlooked by law reformers hoping to improve the child support system.⁴⁷ Reform in the field of child support law tended to focus primarily on the issues of establishing and enforcing support orders, as opposed to modifying them.⁴⁸ For example, the Child Support Enforcement Amendments of 1984,⁴⁹ the first piece of major federal legislation directed at creating effective establishment and enforcement procedures, contained no provisions that specifically addressed the importance of award modification in order to ensure the continued adequacy and equity of awards over time.⁵⁰

Until relatively recently, the states' traditionally restrictive criteria and procedures for modification have compounded the lack of formal recognition of modification's correlation to truly adequate awards.⁵¹ The mechanism for updating any child support award traditionally has been a modification proceeding in which the party seeking a modification must petition the court

44. WILLIAMS, *supra* note 15, at 95. As stated by economist Philip Eden, "The roots of inflation are so deep, and are so well entrenched and institutionalized in our economic system that there is widespread . . . acceptance that it is a continuing fact of life. Economists no longer debate whether we shall have inflation, but rather what will be the precise rate of increase." Eden, *supra* note 14, at 3.

45. Bruch, *supra* note 39, at 59; Wilson, *supra* note 16, at 150.

46. 102 Stat. 2343. For a discussion of the ways in which the Act addressed the issue of modification, see *infra* notes 60-78 and accompanying text.

47. LANDSTREET & TAKAS, *supra* note 17, at 1.

48. *Id.*

49. Pub. L. No. 98-378, 98 Stat. 1305 (codified in scattered sections of 42 U.S.C. (1988)).

50. LANDSTREET & TAKAS, *supra* note 17, at 1.

51. See *id.* Even prior to 1988, however, some states had attempted to ease the burden of initiating modifications. For example, Michigan allowed parties to request modification biennially, without requiring an initial showing of changed circumstances. Brackney, *supra* note 13, at 212. Arizona required that the parents exchange financial information every few years to assess the need for an adjustment of the award. *Preliminary Analysis*, *supra* note 5, at 1081.

or administrative hearing officer for an alteration of the award.⁵² In order to obtain a modification, the petitioning party carries the burden of proving that circumstances have changed since the determination of the initial award. The criteria for demonstrating a change of circumstances vary from state to state, with some states requiring a very restrictive showing. To illustrate, the Uniform Marriage and Divorce Act sets forth the common law rule requiring the petitioning party to show a change "so substantial and continuing as to make the terms unconscionable."⁵³

In addition to being substantial, the change in circumstances generally has to be continuing and unanticipated. A petitioner may not ask a judge to conduct another hearing based on the same facts that existed at the time the original order was established.⁵⁴ If she dislikes the initial award, but cannot show changed circumstances under the given standard, her only recourse is to appeal the decision to a higher court on the grounds that the decision is unsupported by the facts or is marred by legal error.⁵⁵ Arguably, courts may prevent modification based on such grounds as increased obligor income, inflation, and increased age of the child because the parties could "anticipate" these factors at the time the original order was established.⁵⁶

Further, the traditional modification procedure is adversarial, requiring the petitioner to retain an attorney. As a result, any increase in the award will be at least partially offset by attorney fees and court costs.⁵⁷ In addition, with respect to modifications based on inflation, the process of having to return to court to obtain an adjustment forces the petitioner to play "catch up,"⁵⁸ as the modified award will still be subject to the effects of future inflation.

Consequently, traditional modification procedures can pose significant barriers for a custodial parent wishing to modify an order, particularly when she needs to have the award adjusted for inflation. To obtain an adjustment of an award in order to preserve its adequacy, a custodial parent must recognize the possibility of modification. A custodial parent also must have the sophistication to know how to go about acquiring the modification, the resources to obtain an attorney and pay court costs, and the ability to meet the often significant burden of proof.⁵⁹

52. Williams, *supra* note 13, at 314-15. In all states, the court presiding over a divorce case retains jurisdiction after the divorce decree, which incorporates any support awards, is issued. The case remains open, and the party seeking a modification must simply file a motion to modify. JOSEPH I. LIEBERMAN, *CHILD SUPPORT IN AMERICA* 68-69 (1986).

53. UNIF. MARRIAGE AND DIVORCE ACT § 316(a), 9A U.L.A. 147, 489 (1987). Until just recently, Colorado, Kentucky, and Montana all followed this rule. LANDSTREET & TAKAS, *supra* note 17, at 3.

54. LIEBERMAN, *supra* note 52, at 69.

55. *Id.*

56. LANDSTREET & TAKAS, *supra* note 17, at 1. For example, the Oregon Court of Appeals stated that "inflation is a factor properly considered in fixing the basic amount of child support." *In Re Marriage of Maurer*, 619 P.2d 964, 967 (Or. Ct. App. 1980).

57. Cynthia C. George, *Combatting the Effects of Inflation on Alimony and Child Support Orders*, 57 CONN. B.J. 223, 223 (1983).

58. Wilson, *supra* note 16, at 140.

59. Williams, *supra* note 13, at 316.

*B. Changes in the Modification Process
Under the Family Support Act*

The Family Support Act of 1988⁶⁰ specifically recognized the importance of modifying awards to preserve their adequacy, imposing on states certain requirements related to award modification.⁶¹ The Act calls for periodic review of and reapplication of guideline formulas to "IV-D orders"⁶² to ensure that award adequacy is maintained.⁶³ Thus, parents whose orders are enforced by the state child support agency are able to obtain a review of their award without initially having to make a showing of changed circumstances, other than that application of the guidelines would result in a change in the award.⁶⁴

By October of 1990,⁶⁵ the Act required states to complete the following:

- (1) Have a plan specifying how and when child support orders enforced by the State child support enforcement agency will be reviewed and, if appropriate, adjusted;
- (2) Conduct reviews of existing child support orders if requested to do so by either parent or by the State child support enforcement agency; and
- (3) Adjust the child support order, if appropriate, in accordance with the State's child support guidelines.⁶⁶

As of October 1993,⁶⁷ additional requirements have been imposed regarding the process by which all orders enforced by the states' child support enforcement agencies must be reviewed:

- (1) If the family is receiving AFDC, the case must be reviewed and, if appropriate, adjusted at least once every three years, unless the State determines that a review is not in the best interests of a child and neither parent requests a review.

60. 102 Stat. 2343.

61. As stated in the Proposed Rules to the Family Support Act, "With the enactment of the [Act], States will be required to refocus their thinking and their efforts in the area of support awards. For the first time, emphasis will be placed on ensuring the continued appropriateness of the amount of support awarded." 55 Fed. Reg. 33,417 (1990).

62. All states are required by Title IV-D of the Social Security Act, 42 U.S.C. §§ 651-669, to establish child support programs, in order to receive federal financial support for their AFDC programs. MARGARET C. HAYNES ET AL., CHILD SUPPORT REFERENCE MANUAL I-3 (1990). The services these programs are to provide include: location of absent parents, establishment of paternity, establishment of support awards, and enforcement of support awards. Though IV-D services are open to all custodial parents regardless of their income level, they are free of charge only to recipients of AFDC. Custodial parents not receiving AFDC must pay an application fee. Margaret C. Haynes, *Federal Legislation Improves Child Support Enforcement*, 7 CONN. FAM. L.J. 20, 20 (1988) [hereinafter Haynes, *Federal Legislation*], reprinted in HAYNES ET AL., *supra*, at I-51. The phrase "IV-D orders," in the context of the Family Support Act's provisions relating to child support, thus refers to orders enforced by the state child support program, whether or not the clients are AFDC recipients. *See id.* at I-54.

63. The Act did not set forth any such requirement for orders not enforced by state child support enforcement agencies.

64. HAYNES ET AL., *supra* note 62, at VI-7.

65. 42 U.S.C. § 666(a)(10)(A).

66. LANDSTREET & TAKAS, *supra* note 17, at 2; *see also* 55 Fed. Reg. 33,415 (1990).

67. 42 U.S.C. § 666(a)(10)(B).

(2) If the family is not receiving AFDC, the parents shall have a right, upon request, to receive a review, and if appropriate, an adjustment at least once every three years.⁶⁸

In addition, states must notify parents subject to IV-D orders enforced by that state of their rights regarding periodic reviews and proposed adjustments.⁶⁹ Specifically, they must notify parents of any review, at least thirty days in advance; of the right of the parent to request a review; and of a proposed adjustment in the award amount or a determination that the amount need not be changed.⁷⁰ When a parent is notified of a proposed adjustment or determination of "no change," the state must provide her with at least thirty days after the notification to begin proceedings to challenge the adjustment or determination.⁷¹

The guidelines themselves must be reviewed at least once every four years, "to ensure that their application results in the determination of appropriate child support award amounts."⁷² Such review and adjustment of the formulas serve, in part, to ensure that any awards established or modified pursuant to the guidelines are accurate with respect to current cost of living determinations.⁷³

The Act itself imposed no changes on the means by which non-IV-D orders could be modified.⁷⁴ Consequently, parents whose orders are not enforced by the state child support enforcement agency are still left with the traditional process of petitioning for modification, based on a showing of changed circumstances.⁷⁵ However, several states have imposed certain changes on their own initiative,⁷⁶ apparently to relieve the petitioning parent of some of the burden associated with initiating a modification.

For example, some states essentially allow changes in the guidelines themselves to serve as a "change in circumstances," along with the traditional bases for showing changed circumstances.⁷⁷ In addition, several states now provide that a change in circumstances will be rebuttably presumed, without the necessity of any further showing, if application of the guidelines to the parties' present circumstances results in an order that differs by a specific percentage or dollar amount from the current award.⁷⁸

68. LANDSTREET & TAKAS, *supra* note 17, at 2; *see also* 55 Fed. Reg. 33,415.

69. 42 U.S.C. § 666(a)(10)(C); *see also* 55 Fed. Reg. 33,415.

70. 42 U.S.C. § 666(a)(10)(C)(i)-(iii).

71. *Id.* § 666(a)(10)(C)(iii).

72. *Id.* § 667(a).

73. BENINGER & SMITH, *supra* note 42, § 622.

74. Haynes, *Federal Legislation*, *supra* note 62, at 1-52.

75. If a modification is warranted, the new obligation will then be calculated through the guideline formula. 45 C.F.R. § 302.56(a).

76. LANDSTREET & TAKAS, *supra* note 17, at 3.

77. HAYNES ET AL., *supra* note 62, at VI-7. However, 13 states specifically hold that establishment of guidelines is not, in and of itself, an adequate change to modify a pre-existing support order. *Id.*

78. For example, Alabama and Rhode Island require only a variation of 10% or more from the existing award. ALA. R. JUD. P. 32(A)(2)(ii) (1990); R.I. Fam. Ct. Admin. Order No. 87-2 (Oct. 1987). Alaska and the District of Columbia both mandate a variation of 15% or more. ALASKA R. CIV. P. 90.3(b) (1993); D.C. CODE ANN. § 16-916.1(o)(3) (Supp. 1993). Indiana requires the amount to vary by more than 20%. IND. CODE § 31-1-11.5-17(a)(2)(A) (Supp. 1993). Maryland requires a hefty

C. Effect of the Family Support Act on Adjusting Awards, Particularly for Inflation

Based on the foregoing discussion, the custodial parent hoping to have a child support award adjusted for inflation would appear to be in a unique and favorable position. She is fortunate in that the field of family law has traditionally tended to look more favorably on modification of existing judicial orders than have other areas of law. Further, she now has the "moral support" of federal legislation officially recognizing the significance that modification has in ensuring the adequacy and equity of support awards. In addition, particularly if her support order is being enforced by the state child support agency, she may find access to the modification process less formidable than it previously has been. However, on closer inspection, the actual extent to which she is "favored" by these factors is more superficial than real.

1. Effect of the Act on Orders Enforced by the State Child Support Enforcement Agency

The Family Support Act⁷⁹ gave parents with IV-D orders the power to request a review of their awards,⁸⁰ yet it did not specify the precise method by which states must assist a parent requesting such a review.⁸¹ The Act simply mandated that the state give the parent notice of this right to a review, notice of any scheduled review or proposed adjustment, and notice of a right

variation of at least 25%. MD. FAM. LAW CODE ANN. § 12-202(b)(2) (Supp. 1991). Some states require a difference in dollar amount. Delaware, for example, calls for an increase in the amount of the current support order by at least \$25 per month. *The Delaware Child Support Formula: Evaluation and Update, Report of the Family Court Judiciary* (Jan. 25, 1990). Minnesota, on the other hand, mandates a variation of \$50 or more per month and of at least 20%. MINN. STAT. ANN. § 518.64 (West Supp. 1993). The use of this sort of language by many states is apparently indirectly aimed at addressing the issue of whether the adoption of the guidelines themselves, or changes in the guideline formulas, may be grounds for requesting a modification based on changed circumstances. See MD. FAM. LAW CODE ANN. § 12-202(b)(2) (disqualifying adoption of the guidelines as grounds for requesting a modification based on a change of circumstances unless the award as calculated under the guidelines would vary by the requisite percentage).

79. 102 Stat. 2343.

80. See *supra* text accompanying notes 60-68.

81. LANDSTREET & TAKAS, *supra* note 17, at 2. The 1990 Proposed Rules for the implementation of the Family Support Act encouraged, but did not require, states to "move away from an adversarial method of establishing, reviewing and modifying orders . . ." 55 Fed. Reg. 33,418 (1990). States were encouraged to implement a pro se process for the establishment and adjustment of orders, under which parents, whether their orders were enforced by the state child support enforcement agency or not, would essentially represent themselves in proceedings. *Id.* A few states have already implemented pro se processes to lessen the need for and the cost of counsel associated with adversarial modification proceedings, as well as to "increase accessibility to justice." LANDSTREET & TAKAS, *supra* note 17, at 3. Such programs involve the use of detailed, standardized forms with easily understandable instructions that can be completed by pro se litigants. The use of simplified forms is complemented by accessible services to aid parents in completing required forms and in learning about the modification process. These services generally include some combination of support personnel, written materials, or video-interactive and/or computerized resources. See *generally id.* at 15-33.

to challenge an adjustment.⁸² States were left free to choose how to implement the review and adjustment processes, whether through the courts or through the state IV-D agency.⁸³

Under the Act's 1990 requirements, unless the state child support enforcement agency requested a review, all IV-D clients were forced to take some sort of legal action to initiate the review process, once they were made aware of their right to do so.⁸⁴ Initiating the process of review thus required at least some degree of legal sophistication on the parent's part, depending on how effectively the state apprised her of her right to review and of how to go about actuating that right. Moreover, the process itself could still be adversarial, with attendant attorney fees and court costs, unless the state chose to provide representation or otherwise absorb costs, an unlikely prospect in non-AFDC cases.⁸⁵

For non-AFDC parents, these same obstacles remain even under the 1993 review requirements. The automatic, periodic review of orders scheduled to begin in October 1993, which requires no initiating action whatsoever on the part of the parents, applies only to AFDC cases.⁸⁶ Non-AFDC parents can obtain a review only upon request. Even after states have fully implemented the updated review procedures, they will certainly continue to require non-AFDC recipients to obtain a review only upon parental request. Considering the financial and procedural burden of implementing automatic triennial review for *all* IV-D orders, states clearly would have no incentive to initiate such a process without being required to do so. Thus, the previously mentioned obstacles with respect to review upon parental request will undoubtedly continue for non-AFDC cases even after 1993.

Furthermore, whether reviews conducted pursuant to the 1993 requirements are automatically initiated by the state or initiated by parental request, the Act does not require that they occur more frequently than every three years. In fact, the Proposed Rules assert that "[t]he State must establish procedures specifying the circumstances under which orders will be reviewed more recently than every [thirty-six] months."⁸⁷ Since this directive serves to limit the number of reviews that states will be required to conduct, it is probable that rises in the cost of living, at least during periods of low-to-moderate inflation, would not be deemed a "suitable" circumstance warranting more frequent review. The result is that, absent some "suitable" circumstance, the award will not be reviewed more often than every three years, leaving the

82. LANDSTREET & TAKAS, *supra* note 17, at 2; *see supra* text accompanying notes 69-71.

83. LANDSTREET & TAKAS, *supra* note 17, at 7.

84. 42 U.S.C. § 666(a)(10)(A)(1988); *see supra* text accompanying notes 65-66.

85. The drafters of the Proposed Rules suggested that it was not necessary for states to absorb costs in non-AFDC cases. They stated, "We believe an additional concern may center on the recovery of costs incurred by the State under these regulations [implementing the Act's review provisions]. Recovery of costs is permissible under 45 C.F.R. § 302.33(d) in non-AFDC cases, either from the custodial parent or the absent parent." 55 Fed. Reg. 33,418.

86. 42 U.S.C. § 666(a)(10)(B)(i)-(ii); *see supra* text accompanying notes 67-68.

87. 55 Fed. Reg. 33,418.

custodial parent to shoulder the full burden of inflation until a review and an adjustment under the guidelines take place.⁸⁸

2. Effect of the Act on Orders Not Enforced by the State Child Support Enforcement Agency

The Family Support Act of 1988⁸⁹ imposes no review requirements whatsoever with respect to orders that are not enforced by state child support enforcement agencies.⁹⁰ The only recourse for parents with such orders is the traditional route of modification by petition, in a typically adversarial setting. As previously noted, parties who desire to modify a support order are in a relatively favorable position when compared to petitioners in other areas of law who have grown dissatisfied with a judicial order. However, the fact that modification is relatively *more accessible* for these parties certainly does not mean that it is *easy*, especially when they are hoping to obtain an adjustment to counteract the deleterious effects of inflation.

Of foremost significance, a petitioning parent still must make the traditional showing of changed circumstances before a court or agency will agree to a support modification. With respect to a petition based solely on a desire to preserve the purchasing power of an award, this showing may be no simple task. Although no state's guidelines blatantly deny inflation as a potential reason for modification,⁹¹ very few states specifically recognize a change in the cost of living alone as grounds for modification.⁹² Courts generally are interested in seeing proof of actual increases in specific child-related expenses, that is, a change in circumstances *of the parties*, and thus will only consider evidence of a higher cost of living in conjunction with such proof.⁹³ Even if a state does recognize a higher cost of living as a change of circumstances, the change may not meet the magnitude required to permit modification.⁹⁴

88. Additionally, as previously indicated, even relatively low inflation can take a significant toll on a fixed award over a span of a few years. *See supra* note 15 and accompanying text.

89. 102 Stat. 2343.

90. Haynes, *Federal Legislation, supra* note 62, at 1-52.

91. One could argue that, even if the exact rate of future inflation may not be anticipated at the time an order is established, the fact of future inflation is foreseeable; consequently, the effects of inflation are not sufficient grounds for asserting an unanticipated change in circumstances. *See supra* notes 54-56 and accompanying text; *see also* George, *supra* note 57, at 224. However, some states' guidelines, like those of West Virginia, specifically provide that whether the change was within the contemplation of the parties at the time of the original order is irrelevant to a showing of changed circumstances. W. VA. LEGISLATIVE RULE § 78-16-20.1 (1988).

92. Minnesota is one state that does recognize this as a valid reason for modification. According to the Minnesota guidelines, a support decree may be modified upon a showing of "a change in the cost of living for either party as measured by the federal bureau of statistics . . ." MINN. STAT. ANN. § 518.64. However, for modification to be justified, the change must still be "unreasonable and unfair." *Id.*

93. HAYNES ET AL., *supra* note 62, at VI-6.

94. For an illustration, see the standard set forth in the Uniform Marriage and Divorce Act, *supra* note 53 and accompanying text. Indiana's standard is less restrictive and more commonplace, requiring "a showing of changed circumstances so substantial and continuing as to make the terms unreasonable . . ." IND. CODE § 31-1-11.5-17(a)(1)(1993).

The uncertainty of how a court will react to evidence of inflation as an "unanticipated change in circumstances" consequently poses a potential problem for a parent wanting to modify for this reason alone. Dispelling the uncertainty will, no doubt, require her to contact an attorney, adding to the costs already associated with adversarial modification proceedings. And, of course, there is always the threat of a clear, unfavorable answer, leaving the parent with no recourse as she watches the real value of the award diminish.

As previously noted, some states have implemented on their own initiative certain changes with respect to traditional modification by petition, apparently as a response to the Family Support Act's recognition of the importance of modification to truly adequate awards.⁹⁵ Though these changes go more toward criteria for modification than they do toward the actual modification process itself, they would seem, on their face, to be highly favorable to a parent seeking an adjustment. Once again, however, the extent to which these changes really improve the lot of a parent petitioning on the basis of inflation is less apparent on closer examination.

Because the Family Support Act itself did not specify the effect that the establishment of guidelines was to have on petitions for modification, many states have chosen to remain silent on the issue as well, providing no guidance on this matter in their guidelines.⁹⁶ In contrast, some states have allowed a change in guidelines to co-exist with more traditional changes of circumstances as bases to support a petition. But this approach is by no means widespread—only fourteen states have adopted it, and an additional thirteen have specifically refused to adopt it.⁹⁷ Even in those states that have adopted it, this approach provides little assistance to a parent who hopes to preserve the purchasing power of an award. It essentially forces her to bear the burden of inflation on the supporting parent's obligation for four years, until the state reviews and updates its guidelines (presumably taking inflation into account) as the Act requires.

Other states take the approach that a rebuttable presumption of changed circumstances exists if application of the guidelines results in a certain percentage or dollar variation from the original award. However, states tend to vary a great deal in the restrictiveness with which they allow for this exception, with some states requiring a variation that is quite significant.⁹⁸

Under this approach, a parent who wants to have an award updated to compensate for rising costs will not be able to receive an adjustment if the court determines that the variation from the original award measured against

95. See *supra* notes 76-78 and accompanying text.

96. HAYNES ET AL., *supra* note 62, at VI-7.

97. *Id.* One commentator has suggested:

Because the Act stresses that any modification must be pursuant to guidelines, it appears that Congress intended for guidelines themselves to constitute a "changed circumstance." States that presently provide that the enactment of guidelines does not constitute a basis for modification will likely have to amend their guidelines to eliminate such language.

Haynes, *Federal Legislation*, *supra* note 62, at I-53. As of yet, however, there has been no federal directive on this issue.

98. See *supra* note 78.

the percentage or dollar amount specified in the guidelines is not "substantial" enough. Of course, the change that the custodial parent and her children have experienced, however insignificant it is deemed by the guidelines, will surely feel quite significant as they struggle to make ends meet. Far from being in a favorable position, the parent is still forced to endure the same "catch up" process that existed under pre-guideline modification procedures: she must bear the burden of inflation on her own portion of the support obligation, as well as the father's, until the variation reaches what the guidelines deem a "substantial" level.⁹⁹

In short, the new approaches that some states have adopted have done little to ease the burdens that the Family Support Act left on non-IV-D petitioners. The problem stems largely from the fact that the Act only requires states to review and adjust their guideline formulas once every four years.¹⁰⁰ Though the purpose of this requirement was to "ensure that [the guidelines'] application results in the determination of appropriate child support award amounts,"¹⁰¹ the result with respect to changes in the cost of living is that the "appropriateness" of awards modified (or established) under the guidelines will experience some lag time. An award reviewed just prior to a formula's periodic adjustment, for cost of living changes as well as for other factors, might not be modified for inflation because the requisite showing of "changed circumstances" has not been met. The real problem, however, may not be that the value of the award has not sufficiently changed over time, but that the guidelines used to assess the need for modification simply have not kept pace with inflation.¹⁰²

Finally, even if the court does grant a modification based on a showing of changed circumstances, whatever that showing might entail, a parent with a non-IV-D order is forced to endure the same cycle of "catch up" that existed before the Family Support Act was enacted. Moreover, even parents with IV-D orders must play the "catch up" game, as any adjustment they may receive through the periodic review process will still not be protected from the effects of future inflation. Hence the custodial parent, whatever type of order she possesses, must bear the burden of inflation on her own portion of the support obligation, as well as the father's, until she is able to have the award modified again. Then she is forced to repeat this process, with its attendant expense,

99. As noted previously, a constant, relatively low inflation rate of 4% can diminish the value of an award by 22% in five years. WILLIAMS, *supra* note 15, at 95. In Maryland, even this change still would not be enough to meet the rebuttable presumption percentage of 25%. See *supra* note 78. It would probably barely meet the Minnesota requirement of both a 20% and \$50 difference. *Id.*

100. 42 U.S.C. § 667(a). At this time, no state mandates more frequent guideline review than the Family Support Act.

101. *Id.*

102. High inflation might motivate a state to update its guidelines more frequently to maintain the adequacy of awards they establish or modify. However, because of the great administrative burden of implementing a more frequent review, it is doubtful that any state would choose to do so otherwise. Nevertheless, even a low inflation rate at a constant level could seriously outdate the guidelines during those four years between adjustments. See WILLIAMS, *supra* note 15, at 95.

over and over if she hopes to ensure that the award simply retains its initial value.

III. THE USE OF ESCALATOR CLAUSES TO ADJUST AWARDS AUTOMATICALLY FOR RISING COSTS

Under traditional modification procedures, the custodial parent seeking modification for inflation faces significant obstacles in terms of the financial resources and legal sophistication she must possess, as well as the burden of proof she is typically required to meet to obtain a modification. Although one of its goals apparently was to make initiation of the modification process less onerous, the Family Support Act has not made overwhelming strides in decreasing these obstacles, particularly for parents with non-IV-D orders.¹⁰³ A parent who wishes to preserve the value of a support award still needs a mechanism that will allow her to obtain periodic adjustments, while avoiding the expense and uncertainty that persists today with respect to modifications generally, and modifications based on inflation in particular. An ideal mechanism for meeting these needs, and one that truly benefits a parent hoping to modify, is the escalator clause.

An escalator clause is "any provision in a support decree that causes the amount awarded to increase over time."¹⁰⁴ As used in the field of child support, "escalator clause" encompasses several types of clauses, all of which have received varying degrees of support or skepticism from the courts that have reviewed orders containing them.

Support orders may contain provisions that require fixed, base awards¹⁰⁵ to be automatically raised annually by a cost of living adjustment ("COLA") tied to a readily obtainable standard measure of inflation such as the Consumer Price Index ("CPI").¹⁰⁶ A variation on this sort of provision is one that automatically increases a fixed award by the lesser of the inflation rate, as measured by a fixed standard such as the CPI, or the increase in the obligor's earnings (assuming the obligor's income did not increase at the same rate as the increase in the cost of living).¹⁰⁷

Other forms of escalator clauses focus specifically on increases in the noncustodial parent's income, rather than on a fixed, objective index. One variation on this form, referred to as "open-ended" escalation, involves an original base award of a fixed amount, periodically increased by a fixed

103. See *supra* notes 79-102 and accompanying text.

104. Michael E. Gossler, Comment, *Escalation Clauses in Washington Child Support Awards*, 55 WASH. L. REV. 405, 406 (1980). The effect of the inclusion of such a clause in a support order is to shift the burden of proof for modification to the obligor parent. He would be required to request a modification if a change in circumstances has rendered him unable to pay the increase in support that the clause would otherwise automatically produce.

105. All states' new guidelines create support orders in the form of fixed, specific awards.

106. See, e.g., *Branstad v. Branstad*, 400 N.E.2d 167, 171 (Ind. Ct. App. 1980).

107. See, e.g., *In re Marriage of Stamp*, 300 N.W.2d 275 (Iowa 1980); *Falls v. Falls*, 278 S.E.2d 546 (N.C. Ct. App. 1981).

percentage of increases in the obligor parent's income.¹⁰⁸ Another involves a varying amount of base support, computed as a set percentage of the obligor's income; the award amount fluctuates with changes in the income of the obligor and is not confined to a set minimum or maximum obligation.¹⁰⁹ A final variation is similar to the previous one, except that a maximum fixed percentage or dollar amount is established to limit the range of the award.¹¹⁰

Automatic adjustment provisions in support orders gained prominence in the "pre-guideline" era, prior to the enactment of any federal legislation recognizing the importance of modification to the establishment of truly adequate and equitable orders. Recognizing the burdens modification proceedings imposed on the judicial system as well as the parties, several states' courts allowed the use of such clauses, depending on the form of escalator used. Some jurisdictions permitted parties to include them in separation agreements later incorporated in the divorce decree,¹¹¹ while others authorized courts to include them into divorce decrees on their own initiative.¹¹² The question remains whether, in light of federal policy that clearly favors the custodial parent in modification proceedings, there is any justification for an additional adjustment mechanism that similarly favors the same parent. Based on the foregoing discussion of the extent to which this new legislation benefits custodial parents, the answer is a resounding "yes."

Before accepting escalator clauses as an alternative to the modification processes that exist today, however, it is important to address some of the concerns raised by critics and by courts hesitant to accept such clauses. An assessment of these concerns, particularly when balanced against the merits

108. Gossler, *supra* note 104, at 406; *see, e.g., In re Marriage of Mahalingam*, 584 P.2d 971 (Wash. Ct. App. 1978).

109. Gossler, *supra* note 104, at 406.

110. *Id.*; *see, e.g., Anneberg v. Anneberg*, 116 N.W.2d 794 (Mich. 1962); *Hagbloom v. Hagbloom*, 247 N.W.2d 373 (Mich. Ct. App. 1976) (stating that such a provision is not really an escalator clause, but a fixed maximum amount from which the paying parent may be relieved of a portion annually); *Stanaway v. Stanaway*, 245 N.W.2d 723 (Mich. Ct. App. 1976); *Edwards v. Edwards*, 665 P.2d 883 (Wash. 1983).

111. *See In re Marriage of Pratt*, 651 P.2d 456, 456-57 (Colo. Ct. App. 1982). Since the promulgation of the Uniform Marriage and Divorce Act, courts have generally been willing to recognize separation agreements. CLARK, *supra* note 29, at 772. *See also*, the UNIFORM MARRIAGE AND DIVORCE ACT, § 306, 9A U.L.A. 216 (1987), which authorizes the use of separation agreements in order to promote the amicable settlement of disputes associated with divorce. However, if a court determines that such support-related provisions in a separation agreement do not further the welfare of the child, are too vague to be enforceable, or contain some other defect that renders them unfair or inappropriate, it is free to disregard those provisions and replace them with its own. CLARK, *supra* note 29, at 772; *see, e.g., Wing v. Wing*, 549 So.2d 944 (Miss. 1989) (holding that escalator clause incorporated in divorce decree lacked the specificity necessary to be enforceable). Nevertheless, courts generally have the authority to incorporate an agreement even when it contains provisions that the court, absent such agreement, would not have the authority to impose on its own; such provisions are not invalid per se, although the court may strike them down for one of the previously stated reasons. *See, e.g., Petersen v. Petersen*, 428 A.2d 1301 (N.J. 1981); *Thrash v. Thrash*, 809 P.2d 665 (Okla. 1991).

112. *See, e.g., Ostler v. Smith*, 272 Cal. Rptr. 560 (Cal. Ct. App. 1990); *Branstad v. Branstad*, 400 N.E.2d 167 (Ind. Ct. App. 1980); *Mahalingam*, 584 P.2d at 977 (refusing to strike down the escalator included by the trial court in the divorce decree and stating that there was "no abuse of discretion when the court . . . concludes that an open-ended escalation clause would reasonably assure the child of his present as well as his foreseeable economic well-being").

of using escalators, leads to the conclusion that using escalators to preserve awards against inflation is clearly justified.

A. Assessment of Criticisms Associated with Escalators

One criticism levelled at escalators generally, whether in the form of COLA adjustors or percentage of income escalators, is that they conflict with statutory provisions for modification.¹¹³ The thrust of this objection is that "by providing a statutory procedure for modifying awards, the legislature precluded devices which automatically adjust the amount of support."¹¹⁴

Merely shifting the focus of how one looks at escalator clauses can allay this concern. Escalators can more properly be characterized as devices that *preserve* the true value of an award, rather than as mechanisms that permit a party to *modify* an order without going through the entire review and modification process.¹¹⁵ The clauses simply ensure that a fixed award maintains its purchasing power in order to promote the continued welfare of the child, in accordance with the goal of the initial award.¹¹⁶ In the case of *In re Marriage of Mahalingam*,¹¹⁷ the court dealt with this criticism by stating that the use of automatic adjustment mechanisms "does not impugn the efficacy of the [modification] statute since petitioner may at any time seek modification of the support award should a change occur in the circumstances which the court relied upon for the original decree of support."¹¹⁸

COLA provisions are criticized as pegging adjustments to general measures such as the national Consumer Price Index, whose reliability as an accurate gauge of inflation is not well established.¹¹⁹ For instance, the housing component of the CPI was frequently criticized as contributing to a tendency

113. Gossler, *supra* note 104, at 412; *see, e.g., Stanaway*, 245 N.W.2d 723; *Breiner v. Breiner*, 236 N.W.2d 846 (Neb. 1975). The court in *Stanaway* stated that "[a]n escalator clause violates both the spirit and the letter of this statute [governing the modification of support]," when it struck down as an escalator a clause that obligated the father to pay support in an amount equal to six percent of his gross income, but not less than \$165 per month. *Stanaway*, 245 N.W.2d at 724-25. However, the court did not criticize the sort of escalating provision upheld in *Anneberg*, 116 N.W.2d 794, which was based on a percentage of obligor income limited by a maximum amount. The Michigan court of appeals simply recharacterized this "up to proviso" as not even being an escalator clause at all, but merely a "fixed amount, a maximum, from which the paying parent may be *relieved* of a portion annually." *Stanaway*, 245 N.W.2d at 724 (emphasis in original). The implication is that, if presented with the kind of provision that the Michigan Supreme Court faced in *Anneberg*, the court of appeals would not have found it invalid per se as an "escalator."

114. Gossler, *supra* note 104, at 412.

115. *See Wilson, supra* note 16, at 147.

116. Escalator clauses that rely on COLA provisions based on some general, objective measure of inflation most clearly support this argument. *Id.* For a discussion of the nature of COLA provisions, see *supra* notes 105-07 and accompanying text. Percentage of income escalators based on increases in the noncustodial parent's income also protect awards from inflation, though perhaps less accurately.

117. *Mahalingam*, 584 P.2d 971, 977 (Wash. Ct. App. 1978).

118. *Id.*

119. *Falls v. Falls*, 278 S.E.2d 546, 556 (N.C. Ct. App. 1981). ("[I]n this case, there is absolutely nothing in the record to establish the general reliability of the particular index used The Consumer Price Index is only one of several measures of the cost of living Indeed, a number of economists believe that its structure tends to overstate the true impact of inflation").

of the index to overstate cost of living increases.¹²⁰ The Bureau of Labor Statistics, however, allayed much of the criticism when it revised the housing component of the CPI in 1983, substituting a rental equivalence measure for the previously-used mortgage rate/housing price measure.¹²¹ Further, parties frequently include COLA provisions tied to the CPI in construction and labor contracts, leases, and public benefit programs such as Social Security,¹²² attesting to the fact that concerns about the reliability of the CPI are by no means widespread.

Some critics have suggested that, even if these indices reliably measure inflation, a broad index, like the national CPI, may not accurately reflect the cost of living in the area in which the children and custodial parent live.¹²³ For an index to provide meaningful information about the actual value of a fixed award to those receiving it, a regional or local CPI will undoubtedly be a more accurate device, and can be incorporated into the clause instead.

Critics have also derided COLA provisions as failing to take into consideration "all relevant factors," namely, the range of factors used in determining the initial award. Skeptics say they allow a party to obtain an adjustment based on a general societal indicator, without showing an actual change in circumstances. For instance, some courts have argued that strict COLA adjusters¹²⁴ fail to take into account the income of the obligor, whose income may not have increased at all or may have increased at a lower rate than the change in the CPI.¹²⁵ Courts have also said that using escalators prevents parties from having to provide proof on the specific needs of the children, the cost of which may not have changed by as great an amount as the general measure of inflation on which the escalator is based.¹²⁶ Some have pointed out that COLA provisions, even if they account for the obligor's income, fail to take into account the custodial parent's income.¹²⁷ In the sense that adjustments produced under a simple COLA provision might not take these sorts of factors into direct consideration, they have been criticized as

120. George, *supra* note 57, at 228-29. This component, which measured current house prices and mortgage interest rates, was criticized as leading to an exaggeration of the inflation rate, as people do not change their housing on a monthly basis. *Id.*

121. Robert J. Samuelson, *The Economic Mirage*, WASH. POST, July 23, 1986, at G1; see George, *supra* note 57, at 229.

122. WEITZMAN, *supra* note 1, at 282; see also *In re Marriage of Stamp*, 300 N.W.2d 275, 279 (Iowa 1980) (detailing the varied use of COLA provisions).

123. See, e.g., *Herron v. Herron*, 457 N.E.2d 564, 571 (Ind. Ct. App. 1983); *Falls*, 278 S.E.2d at 558.

124. See *supra* text accompanying notes 105-06.

125. *Wing v. Wing*, 549 So.2d 944, 947 (Miss. 1989); *Edwards v. Edwards*, 665 P.2d 883, 886 (Wash. 1983).

126. *Wing*, 549 So.2d at 947; *In re Marriage of Peters*, 651 P.2d 262, 263-64 (Wash. Ct. App. 1982). In response to this criticism, one commentator has argued: "The question should not be whether the Price Index *actually* reflects the annual increase in the cost of the children's needs, . . . [but] whether these figures are so inaccurate as guidelines that to use them would create an injustice for any of the parties involved." Wilson, *supra* note 16, at 150 (emphasis in original).

127. *Peters*, 651 P.2d at 263-64.

constituting a modification without a sufficient showing of changed circumstances.¹²⁸

These concerns can be at least partially allayed if the escalator is tied to changes in the father's income. If his income has not kept pace with changes in the cost of living, the award can be adjusted instead by the percentage of increase in his income. With respect to evidence of the children's needs, COLA provisions inherently take the needs of the child into consideration, as their purpose is simply to adjust a fixed award to maintain its buying power against changes in the cost of living. By using a regional or local CPI, the parties can closely approximate the changes in the cost of living in their general area and, therefore, the change in value of the award as it relates to the needs of the children. In addition, such provisions do correspond to the income of the mother, in the sense that she necessarily bears the burden of inflation on her own portion of the support obligation;¹²⁹ the use of a COLA provision merely prevents her from having to bear the burden on the father's portion as well.

Escalators based on a percentage of obligor's income have also been disparaged as not considering all relevant factors. They are clearly geared more toward the factor of the obligor's income than toward other "relevant factors" such as the needs of the children or the custodial parent's income.¹³⁰ Further, they are less closely tied to adjustment for inflation than are COLA provisions because they incorporate neither a general measure of rising costs nor a determination of actual increases in child rearing expenses for a given family. Inflation may only be partially responsible for the increases in a father's income.

The concern that percentage of income escalators fail to take into account all relevant factors is less forceful now that many states establish initial orders by using formulas based on a percentage of income approach, looking only at the obligor's income.¹³¹ Moreover, because increases in the father's income are due in part to increases in the cost of living, this sort of escalator does take into account, although less directly than COLA provisions, the needs of the children. And, again, use of these clauses does not neglect a consideration of the mother's income, as she necessarily bears the burden of inflation on the support she directly gives to her children.

128. See *Falls v. Falls*, 278 S.E.2d 546, 557 (N.C. Ct. App. 1981) ("We find the cost of living escalator in this case to be infirm because it focused exclusively on circumstances of the children and a cost of living index while ignoring the changing or unchanging ability to pay of the parents."); *Peters*, 651 P.2d at 263-64 (holding that escalator clause based on CPI violated modification statute by allowing modification without showing of changed circumstances of the parties and especially by failing to tie increases in support to noncustodial parent's income).

129. See *supra* note 16.

130. See, e.g., *Hunter v. Hunter*, 498 N.E.2d 1278, 1286-89 (Ind. Ct. App. 1986); *Stanaway v. Stanaway*, 245 N.W.2d 723, 725 (Mich. Ct. App. 1976); *Breiner v. Breiner*, 236 N.W.2d 846, 849 (Neb. 1975); *Picker v. Vollenhover*, 290 P.2d 789, 801 (Or. 1955); *Karim v. Karim*, 290 N.W.2d 479, 481-82 (S.D. 1980); *Edwards v. Edwards*, 665 P.2d 883, 886 (Wash. 1983).

131. ELLMAN ET AL., *supra* note 5, at 488; Susan C. Blackwell, Comment, *Child Support Guidelines in Texas: A Step in the Right Direction*, 20 TEX. TECH L. REV. 861, 888-89 (1989).

Escalator clauses, particularly percentage of income escalators, have also been objected to as producing an obligation that is speculative and changing, while the needs of children are persistent and constant.¹³² For example, the Supreme Court of Nebraska, in *Christoffersen v. Christoffersen*,¹³³ rejected a provision that set the award at \$70 per month when the father earned \$175 per month, and \$50 per month when his monthly earnings were less than \$175.¹³⁴ The court stated that support awards "should be certain and definite, based upon present conditions, and not made to depend upon uncertain and speculative contingencies of hypothetical earnings or income."¹³⁵

Once again, however, to the extent that one views escalators as simply preserving the basic award, rather than actually changing it, the support obligations they produce are less conditional. To be sure, COLA provisions are easier to support on this basis than are percentage of income escalators, which do not base increases on some objective measure of inflation. Yet, to ensure that the children's basic needs are not neglected, another solution would be to set a base amount below which the support award may not extend.

Some critics assert that escalator clauses will ultimately promote what they are intended to reduce: litigation.¹³⁶ For instance, if the components of a COLA provision are not spelled out clearly enough, such as the measure of inflation to be used¹³⁷ or the basis (net or gross income) for determining the obligor's increase in income,¹³⁸ the parties may end up in court to determine the correct interpretation of the clause.

The obvious response to this concern is that careful drafting, with attention to detail, would greatly reduce the threat of litigation.¹³⁹ An effective escalator clause will clearly define the components that are to form the basis for the calculations (such as the measure of inflation or the type of income, whether net or gross) and indicate precisely what conduct is expected of the parties (such as submission of tax returns or other sources indicating level of income).¹⁴⁰ In addition, the clause will be constructed with an eye toward the sorts of escalators that a particular jurisdiction has favored or disfavored in the past. Clear, skillful, and detailed drafting will consequently lessen the threat of disputes between the parties over the meaning of the provision and

132. See, e.g., *Hunter*, 498 N.E.2d at 1289; *Christoffersen v. Christoffersen*, 39 N.W.2d 535, 536 (Neb. 1949); *Picker*, 290 P.2d at 801.

133. *Christoffersen*, 39 N.W.2d 535.

134. *Id.* at 536.

135. *Id.*

136. George, *supra* note 57, at 226.

137. See, e.g., *Wing v. Wing*, 549 So.2d 944, 947-48 (Miss. 1989) (referring to a party dispute over which index was intended by the COLA provision's reference to "consumer price index").

138. George, *supra* note 57, at 226.

139. *Id.*

140. For an example of a carefully drafted clause, see *infra* note 142.

over the amount of support that is due. Further, it will diminish the possibility that a court might find the provision too vague to be enforceable.¹⁴¹

*B. Advantages of Escalator Clauses
Under the Current Child Support System*

Balancing concerns about escalator clauses against the benefits that inure from their use under the current modification scheme reveals a strong case for recognizing their validity and their viability as a means of dealing with rising costs. They relieve the child support system, as well as parties hoping to adjust awards for inflation, of the burden of requests for review and petitions for modification based solely on inflation. In addition, they provide more hope to the parent who wants to adjust an award to counteract inflation than she would otherwise find in the current modification system. By facilitating the adjustment of awards to counteract inflation and thus preserving the actual value of the award, escalator clauses consequently foster the well-being of the supported child.

The inclusion in the original order of a mechanism that automatically adjusts the award to protect against the significant, foreseeable threat of inflation relieves the child support system of the burden of requests for review and petitions for modification based solely on this factor. The scarce resources of time and money that courts or agencies must expend through reapplication of entire guideline formulas or hearings to determine changed circumstances can thus be conserved for other purposes.

Instead of forcing the parties to resort to modification or review processes, the judge or administrator (depending on which entity is establishing the order) could include in the order a simple formula¹⁴² that the court or agency personnel¹⁴³ could administer upon the submission of pertinent information by the parents. Notifications could be mailed to the parents, either

141. See *supra* note 111.

142. The following is a COLA provision that the Supreme Court of Iowa approved in *In re Marriage of Stamp*, 300 N.W.2d 275, 276-77 (Iowa 1981):

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 data is available, provided that [the obligor's] gross income for the like period has increased by at least the same percentage. If [obligor's] gross income increased by a lesser percentage, then the payments to [obligee] shall increase by this lesser percentage. In the event [obligor] claims the benefit of the above limitation, he shall submit copies of his federal tax returns or other sufficient proof of income to [obligee] for the relevant years. If the parties are unable to stipulate to the correct adjustment amounts, either may request that the Court determine the same, either itself or by appointment of a special master. The cost of such proceedings shall be shared equally by the parties and any adjustment made shall relate retroactively if necessary to the appropriate anniversary date.

Although lengthy, the adjustment provision is thorough, simple to understand, and easy to apply. A regional or local measure of inflation could be substituted for the national CPI, provided that it was recognized as a reliable measure of the cost of living.

143. Wilson, *supra* note 16, at 148.

to alert them that an adjustment was due that would require the submission of relevant information, if necessary, or to inform them of any pending increase in the support obligation.¹⁴⁴ As one commentator has noted, these tasks of simple calculation and notification are "both inexpensive enough in the computer age."¹⁴⁵ This process would relieve the custodial parent of the burden, in terms of time and money, of requesting a review or petitioning for modification simply to preserve the value of what the father is already obliged to pay. It would also relieve her of the uncertainty associated with asking for a modification based simply on an increase in the cost of living,¹⁴⁶ at least if she does not have a IV-D order. Finally, it would enable her to avoid the expensive cycle of "catch up," because any adjustment she might receive through periodic review or through the petition process would still not be protected against the effects of future inflation, and thus would require her to go through the modification process again and again.¹⁴⁷

The use of an escalator to adjust for inflation in no way infringes on the rights of either party to request a modification, if they believe that changes in certain conditions should change the result that the escalator would otherwise produce.¹⁴⁸ The effect of an escalator is simply to shift the burden of proof away from the party who is benefitting from the escalation, usually the custodial mother who is merely trying to preserve the value of the award in order to ensure the well-being of the children whom it supports.

By fostering the well-being of supported children through the adjustment of outdated awards, escalator clauses are consonant with the policies on which the Family Support Act is based. The goal underlying the Family Support Act's imposition of a guideline requirement was to increase the adequacy and equity of support awards, which were often quite inadequate and inequitable when established under discretionary standards.¹⁴⁹ The Act also recognized the importance of modification to ensure the continued adequacy of initial awards, although the actual effects that it had on the modification process were less than extensive.¹⁵⁰ By facilitating the adjustment of awards to preserve their actual value, the use of escalator clauses comports with the Act's policy of ensuring the well-being of the children who are supported by these awards.

CONCLUSION

Overall, escalator clauses are an effective and efficient means of dealing with the effects of inflation on child support awards. On balance, the

144. See James B. McLindon, *Separate but Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351, 402-03 (1987); Wilson, *supra* note 16, at 149.

145. McLindon, *supra* note 144, at 403.

146. See *supra* note 89-102 and accompanying text.

147. Wilson, *supra* note 16, at 140; see *supra* text immediately following note 102.

148. ELLMAN ET AL., *supra* note 5, at 488; see, e.g., *In re Marriage of Mahalingam*, 584 P.2d 971, 977 (Wash. Ct. App. 1978).

149. See *supra* notes 19-25 and accompanying text.

150. See *supra* notes 60-102 and accompanying text.

advantages they present for custodial parents as well as for the child support system tend to outweigh any concerns that their use may raise. In a system that, despite improvements, provides custodial parents and supported children with minimal protection against inflation, particularly if their orders are not enforced by a child support enforcement agency, the continued use of escalators is clearly justified.