NOTES

CIVIL RULE 90.3: JUDICIAL DISCRETION UNDER ALASKA'S CHILD SUPPORT GUIDELINE

I. INTRODUCTION

In the 1980's, the role of the Alaska trial judge in child support proceedings changed dramatically. Judges may no longer exercise unfettered discretion in awarding support on a case-by-case basis. Rather, they must determine child support in accordance with Alaska Rule of Civil Procedure 90.3 (the "Rule" or "Rule 90.3"),[1] which, in most cases, mandates adherence to a quantitative formula.[2] Where the income of the noncustodial parent is easily substantiated and custody arrangements are uncomplicated, calculation of awards under the formula is a straightforward matter requiring minimal judicial input.

In Alaska, as well as in other states, widespread discontent with the highly discretionary case-by-case method of award determination prompted the adoption of mandatory, quantitative formulas for calculating awards of child support. These guideline formulas were carefully fashioned to account for myriad circumstances affecting awards of support and to limit the instances in which trial judges may deviate from the formulas and use the traditional method. The Alaska Supreme Court responded to the latter concern in *Coats v. Finn*,[3] holding that good cause for deviation from the guideline formula of Rule 90.3(a) arises only when a party requesting deviation shows by clear and convincing evidence that manifest injustice would result from application of the formula.[4] Under this high standard, which was incorporated into paragraph (c) of the Rule in 1990, Alaska trial judges

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1. ALASKA R. CIV. P. 90.3.

2. Unless otherwise indicated by context, this note is referring to the quantitative formulas of both paragraphs (a) and (b) of the Rule whenever the term "quantitative formula," "mathematical formula" or "Rule 90.3(a)" is used. Paragraph (a) provides a formula for determining child support in sole custody cases, whereas paragraph (b) applies to cases of shared physical custody (where all children stay with one parent at any one time).

3. 779 P.2d 775 (Alaska 1989).

4. *Id.* at 777.

enjoy extensive discretionary authority only when application of the guideline formula would clearly result in a substantially unfair award.[5]

This note argues that while the guideline formula of Rule 90.3(a) was meant to ensure uniform and adequate awards, the standard for deviation from the formula set out in *Coats* is too high. A simple presumption in favor of the formula would safeguard the adequacy, uniformity and simplicity of awards without exacting too high a toll on fairness and flexibility. The trial judge's exercise of substantial discretionary power in that small minority of cases in which deviation is justified will be tempered by the balancing of equities implied in Rule 90.3(a) itself and by the social changes that prompted adoption of the Rule.

The remainder of this note is arranged in three parts. Part II will provide background information on Alaska's adoption of the child support guideline. Part III will explore those situations requiring the exercise of judicial discretion in applying Rule 90.3(a), as well as those cases suggesting the need for substantial judicial intervention and thus deviation from the formula. Part IV will examine the current restrictions on deviation from the formula and will argue for a reduction in this standard.

II. The Road to Mandatory Guidelines

A. Case-by-Case Adjudication

In Alaska, as in most other states, the cornerstone of child support adjudication traditionally had been judicial discretion.[6] Trial judges considered evidence of the cost of raising the child,[7] the lifestyle of the family prior to separation and the expenses normally incurred by the parents.[8] Two equitable principles guided a judge's disposition of the child support issue: the reasonable needs of the child, including prior station in life, and the parents' relative ability to pay support.[9]

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5. *Id.*

6. Irwin Garfinkel & Marygold S. Melli, *The Use of Normative Standards in Family Law Decisions: Developing Mathematical Standards for Child Support*, 24 FAM. L.Q. 157, 157 (1990).

7. *Id.* at 163 (budget submitted by the custodial parent was the base for beginning calculations of child support awards).

8. Diane Dodson, *A Guide to the Guidelines: New Child Support Rules Are Helping Custodial Parents Bridge the Financial Gap*, FAM. ADVOC., Spring 1988, at 4, 5-6; Garfinkel & Melli, *supra* note 6, at 163.

9. Richmond v. Richmond, 779 P.2d 1211, 1216 (Alaska 1989) (citing Pattee v. Pattee, 744 P.2d 658, 662 (Alaska 1987); Hunt v. Hunt, 698 P.2d 1168, 1172 (Alaska 1985)). *Hunt* held that the equitable principles used in the modification context, namely the total cost of supporting the children, considering the station in life to which they are accustomed, and the relative financial situations of the parents, should apply in initial award determinations. *Hunt*, 698 P.2d at 1172 (citing Headlough v.

The examination of evidence in light of these sometimes antagonistic principles allowed Alaska trial judges to tailor support orders to the equities apparent in each case and promoted responsiveness to the unique concerns of litigants.

Certain practical considerations and social presumptions, however, may have had as much influence in support award determinations as did the principles acknowledged in cases and codes.[10] "[C]ourts operated on the premise that nonresident parents were entitled to spend their money as they saw fit, with the child receiving some of what was left."[11] Additionally, the fear that an obligor parent would refuse to pay or would subsequently reduce his ability to pay may have dissuaded courts from issuing adequate support orders.[12] These unspoken premises probably affected child support decisions in Alaska as widely as in other jurisdictions.

The case-by-case approach not only suffered under the weight of such pernicious principles, but also from flaws inherent in a highly discretionary method of decision-making. The inability of parents, counsel and judges to determine the reasonable cost of raising a child undermined the adequacy of awards.[13] The use of custody, property and visitation rights as bargaining chips,[14] and the inability of courts and agencies to enforce support orders also vitiated the adequacy of support awards.[15] Furthermore, judges did not treat similarly situated

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Headlough, 639 P.2d 1010, 1013-14 (Alaska 1982); Curley v. Curley, 588 P.2d 289, 292 (Alaska 1979)); *see also* Marilyn R. Smith, *Grounds for Deviation*, FAM. ADVOC., Spring 1988, at 22, 23.

10. Legislatures frequently specified principles for courts to meet in divorce or child support cases. Smith, *supra* note 9, at 23. *See, e.g.*, ALASKA STAT. § 25.24.160(a) (1990) ("[T]he court may provide . . . for the payment . . . as may be just and proper for the parties to contribute toward the nurture and education of their children . . . .").

11. *See* Garfinkel & Melli, *supra* note 6, at 163.

12. *Id.* at 163-64 (fear that nonresident parent, traditionally father, would abscond or stop working and leave child in worse position used to justify small support awards).

13. Robert G. Williams, *Guidelines for Setting Levels of Child Support Orders*, 21 FAM. L.Q. 281, 287 (1987); *see also* CHILD SUPPORT ENFORCEMENT COMM'N, REPORT TO THE HONORABLE BILL SHEFFIELD, GOVERNOR OF THE STATE OF ALASKA, at VI-1 (1985) [hereinafter COMM'N REPORT].

14. *See* Smith, *supra* note 9, at 22 (noting that child and custodial parent often have different interests where support payments are exchanged for particular property division); COMM'N REPORT, *supra* note 13, at V-2 (needs of child may be lost in parents' eagerness to resolve financial questions surrounding divorce).

15. *See, e.g.*, Charles Brackney, *Battling Inconsistency and Inadequacy: Child Support Guidelines in the States*, 11 HARV. WOMEN'S L.J. 197, 197 n.2 (1988) (citing federal income withholding, tax refund intercepts and liens on property as recently adopted tools to combat widespread noncompliance with support orders).

litigants uniformly.[16] Counsel and parties had difficulty predicting awards, and perceived inequities probably contributed to noncompliance by noncustodial obligor parents.[17] Ultimately, the inadequacy, inconsistency and complexity of child support awards became a problem of national scope, prompting legislation by the federal government.

B. Federal Law: The 1984 and 1988 Acts

The failure of the states' child support systems directly impacted federal welfare spending. Inadequate awards, devaluation of awards through inflation[18] and changed circumstances, and ineffective enforcement of support orders contributed greatly to the impoverishment of custodial parents and their dependents.[19] The economic plight of single parent families resulted in increased federal spending under the Aid to Families with Dependent Children program ("AFDC").[20]

In response to this increasing demand on AFDC, Congress passed the Child Support Enforcement Amendments of 1984 ("CSEA"),[21] which conditioned the states' receipt of AFDC monies upon adoption by each state of child support guidelines. State guidelines could be adopted by statute, rule or regulation,[22] provided they were based on numeric criteria that would determine the computation of support obligations.[23] Although the federal impetus was to promote more adequate and consistent awards by curtailing judicial discretion, "[t]he 1984 amendments required only that the guidelines serve as advisories to the determination of a child support award."[24]

16. *See, e.g.*, Andrea Giampetro, *Mathematical Approaches to Calculating Child Support Payments: Stated Objectives, Practical Results, and Hidden Policies*, 20 FAM. L.Q. 373, 377 (1986) (concluding that empirical studies support proposition that judicial discretion approach yields inconsistent results).

17. OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, DEVELOPMENT OF GUIDELINES FOR CHILD SUPPORT ORDERS, at II-5 (1987) [hereinafter DEVELOPMENT OF GUIDELINES].

18. *Id.* at II-3.

19. Brackney, *supra* note 15, at 198-99 (noting that inadequate support orders are one source of "feminization and cradlization of poverty").

20. *See* Garfinkel & Melli, *supra* note 6, at 159-60. The purpose of AFDC is to "encourag[e] the care of dependent children in their own homes . . . by enabling each State to furnish financial assistance . . . to needy dependent children." 42 U.S.C. § 601 (1988).

21. Pub. L. No. 98-378, § 18, 98 Stat. 1305, 1321-22 (codified at 42 U.S.C. § 667 (1988)) (amending Title IV-D of the Social Security Act, 42 U.S.C. §§ 651-669 (1988)).

22. 42 U.S.C. § 667(a) (1988).

23. 45 C.F.R. § 302.56(c) (1990).

24. Janice T. Munsterman, Claire B. Grimm & Thomas A. Henderson, *The Current Status of State Child Support Guidelines*, STATE CT. J., Spring 1990, at 4, 7. For

The federal Family Support Act of 1988 ("FSA")[25] strengthened CSEA by requiring "states to apply a rebuttable presumption that the child support guideline amount is correct in any given case."[26] The federal rules of the Department of Health and Human Services allowed deviation from a guideline only upon "[a] written finding or specific finding on the record of a judicial or administrative proceeding for the award of child support that the application of the guidelines established . . . would be unjust or inappropriate in a particular case . . . , as determined under criteria established by the State."[27] These rules required that the states' criteria for deviation from the guidelines "must take into consideration the best interests of the child."[28]

In combination, CSEA and FSA severely restricted judicial molding of support awards. To a large extent, discretion of trial judges in support proceedings is now limited to cases where state law justifies deviation. Alaska's transition from a discretionary system to a guideline system of child support determination, in response to these federal statutes, culminated in the promulgation of Alaska Rule of Civil Procedure 90.3.[29]

C. Alaska Rule of Civil Procedure 90.3

In compliance with CSEA, Alaska Governor Bill Sheffield appointed the Alaska Commission on Child Support Enforcement (the "Commission") on November 21, 1984 to study the state's child support program.[30] In its 1985 report to the Governor, the Commission

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a more thorough analysis of the guideline provisions of CSEA, see generally Williams, *supra* note 13.

25. Pub. L. No. 100-485, § 103, 102 Stat. 2343 (codified at 42 U.S.C. § 667(b)(2) (1988)).

26. National Center on Women and Family Law, Inc., *The Impact of the Family Support Act of 1988 on Family Law Practice*, 22 Clearinghouse Rev. 1098, 1098 (1989) (citing FSA § 103 (1988)) [hereinafter *Impact on Family Law Practice*].

27. 56 Fed. Reg. 22,335, at 22,354 (1991) (to be codified at 45 C.F.R. § 302.56(g)).

28. *Id.* The federal rules restricting the states' statutory right to set the criteria for rebuttal were meant to ensure that "the child's best interests are a primary consideration in any decision to deviate from the guidelines amount, while allowing for other valid factors to be considered." *Id.* at 22,346. The language of the rule marks a retreat from the intrusive language of the proposed rule, which had required that "the State's criteria [for rebuttal] *must be based* on the best interests of the child." 54 Fed. Reg. 37,866, at 37,869 (1989) (proposed Sept. 13, 1989) (emphasis added).

29. ALASKA R. CIV. P. 90.3. Having adopted a presumptive formula in 1987, Alaska was already substantially in compliance with FSA before the effective date of the federal act.

30. COMM'N REPORT, *supra* note 13, at II-1.

recommended the development of a presumptive formula for the establishment and modification of support orders. After reviewing various formulas used in other states and discussed in the literature,[31] the Commission recommended adopting a variation of Wisconsin's percentage of income formula.[32] The Commission believed that this formula would best promote the goals of objective, adequate and uniform awards.[33] Additionally, the formula was simple to administer, eliminated lengthy fact-finding and allowed for prediction of awards by the parties and their counsel.[34] The Commission further recommended that deviation from the formula be allowed only upon a showing by clear and convincing evidence that applying the formula would result in manifest injustice.[35]

Effective August 1, 1987, the Alaska Supreme Court adopted[36] Rule 90.3, setting forth a statewide child support guideline based on the percentage of income formula.[37] Under this formula, courts calculate child support awards in sole custody cases[38] as a percentage of the

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31. *Id.* at VI-2 to VI-3. The Commission reviewed the Melson, Wisconsin, Cassetty, Washington and Income Shares formulas. For detailed analysis of these formulas, see DEVELOPMENT OF GUIDELINES, *supra* note 17, at II-65 to II-95. As of early 1990, thirty-two states used the income shares formula, fifteen states used the percentage of income formula or a variation thereof, and three states used the Melson formula. Munsterman, Grimm & Henderson, *supra* note 24, at 6.

32. COMM'N REPORT, *supra* note 13, at V-1. For information on the practical and theoretical aspects of the Wisconsin percentage of income method, see Thomas A. Bailey, *A Practitioner's Approach to Child Support*, WISC. BAR BULL., June 1987, at 19; DEVELOPMENT OF GUIDELINES, *supra* note 17, at II-85 to II-87. *See infra* notes 36-40 and accompanying text for a description of Alaska's variant of the percentage of income formula.

33. COMM'N REPORT, *supra* note 13, at V-1.

34. *Id.* A strong argument in favor of simple formulas is that they facilitate the updating of awards and thereby promote continued adequacy. Garfinkel & Melli, *supra* note 6, at 174-76, 178; *see* COMM'N REPORT, *supra* note 13, at VI-2.

35. COMM'N REPORT, *supra* note 13, at III-1.

36. Federal regulations specifically contemplate judicial action as one means of establishing guidelines. 45 C.F.R. § 302.56 (1990). "[T]he Advisory Panel on Child Support Guidelines recommends that states implement guidelines, if feasible, under court rules." Williams, *supra* note 13, at 311. The supreme court's constitutional authority to adopt the Rule, however, may be subject to debate. The Rule was adopted under the court's inherent authority to interpret legislation, rather than its rulemaking power. ALASKA R. CIV. P. 90.3, note.

37. ALASKA R. CIV. P. 90.3. For a brief history of the adoption of the Rule, see Cox v. Cox, 776 P.2d 1045, 1047-48 (Alaska 1989).

38. *See* ALASKA R. CIV. P. 90.3(a), (b), (f) (determination of sole as opposed to shared physical custody). Rule 90.3 does not provide a formula specifically addressed to divided custody cases (where at any one time physical custody of children is split between parents), although paragraph (b) may provide a useful starting point to determine the appropriate child support award in these cases. *Id.* cmt. V(C).

noncustodial parent's adjusted annual income.[39] The percentage varies according to the number of children to be supported: the noncustodial parent's income is multiplied by 20% for one child, 27% for two children, 33% for three children and an extra 3% for each additional child.[40] In 1990, the Rule was amended, explicitly adopting the Commission's recommendation that deviation from the formula be allowed only upon a showing by clear and convincing evidence of manifest injustice.[41] Rule 90.3 is now the standard in Alaska with which all initial and modified child support orders and agreements must comply.[42]

III. The Role of Judicial Discretion: Cases Requiring the Exercise of Discretion in Applying the Formula and Cases Requiring Deviation from the Formula

The mandatory nature of the Alaska child support guideline does not require rigid adherence to an objective formula under all circumstances. Because of complexities in the guideline formula, application of the formula itself in fashioning an award may require significant decision-making by the trial judge. Furthermore, some cases may present sufficiently unusual circumstances to justify a departure from the rigid formula of Rule 90.3(a) and thus permit a more substantial judicial molding of support orders.[43] This section will explore both types of cases.

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39. *Id.* R. 90.3(a). The phrase "adjusted annual income" is distinct from "adjusted gross income" as used in income tax law. *Id.* R. 90.3(a)(1). *See infra* notes 44-50 and accompanying text.

40. ALASKA R. CIV. P. 90.3(a)(2). *See generally* Dodson, *supra* note 8, at 10 (noting that the percentages used by the Alaska child support guidelines "are significantly lower than the Income Shares Model at all but the highest income level," and are among the lowest in states using a percentage of net income formula).

41. ALASKA R. CIV. P. 90.3(c). Exceptions to the guideline formula had been allowed upon a showing of good cause under the 1987 and 1989 versions of the Rule. *See infra* notes 59-61 and accompanying text. The 1990 amendment's expansion of paragraph (c), concerning the standard for deviation from the quantitative formula of paragraph (a), reflects the supreme court's holding in Coats v. Finn, 779 P.2d 775, 777 (1989).

In addition to the expansion of paragraph (c), the 1990 amendment slightly modifies every other paragraph of the Rule and adds new paragraphs (g) and (h) concerning travel expenses and modifications, respectively. An unofficial commentary has also been inserted after the Rule. *See* ALASKA R. CIV. P. 90.3 cmt. I(A).

42. ALASKA R. CIV. P. 90.3 cmt. I(C); Cox v. Cox, 776 P.2d 1045, 1048 (Alaska 1989) ("Parents may not make a child support agreement which is not subject to the rule.") (footnote omitted).

43. "[T]he absence of any grounds for rebuttal [of the presumption of guideline correctness] would appear to be inconsistent with the statutory language [of FSA] and

A. Cases Requiring Discretion in the Application of the Formula

Under Rule 90.3, the initial step in calculating child support is the determination of the noncustodial parent's adjusted annual income.[44] There is some complexity in this initial step due to possible confusion with principles of federal income taxation. For instance, for child support purposes, in-kind income,[45] fringe benefits,[46] and the accelerated portion of depreciation[47] are included in gross income. These amounts are not normally included in the computation of income for federal taxation purposes.[48] In addition, adjustments to gross income under the Rule must be distinguished from tax law adjustments. Prior ordered child support or alimony[49] and the portion of withheld taxes actually due[50] may be used to reduce gross income under the Rule, while they may not constitute additional adjustments for tax purposes.[51] These complexities, and others mentioned in the commentary to the Rule,[52] present difficulties of application, but in most cases should not call for the exercise of judicial discretion.

There are situations, however, in which a judge must exercise discretion to determine the noncustodial parent's adjusted annual income. For example, "[t]he court may calculate child support based on a determination of the potential income of a parent who voluntarily is unemployed or underemployed."[53] The need for discretion may also arise when an obligor parent has experienced erratic annual income in the past. Since the relevant annual income figure used to determine the child support award is future expected income, which is usually evidenced by past income, "the court may choose to average the obligor's past income over several years."[54]

The role of judicial discretion in applying the formula is revealed in at least two other paragraphs of the Rule. In sole custody cases,

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the intent of Congress that guidelines be used as a rebuttable presumption in the establishment and modification of all orders in the State." 56 Fed. Reg. 22,335, at 22,348 (1991) (to be codified at 45 C.F.R. § 302.56(9)).

44. ALASKA R. CIV. P. 90.3(a)(1).

45. *Id.* cmt. III(A)(19).

46. *Id.*

47. *Id.* cmt. III(B).

48. *See* MICHAEL D. ROSE & JOHN C. CHOMMIE, FEDERAL INCOME TAXATION, 30-48, 156-57 (3d ed. 1988).

49. ALASKA R. CIV. P. 90.3(a)(1)(B) and cmt. III(D).

50. *Id.* R. 90.3(a)(1)(A) and cmt. III(D).

51. *See* ROSE & CHOMMIE, *supra* note 48, at 436-42.

52. *See* ALASKA R. CIV. P. 90.3 cmt. III(A)-(E).

53. *Id.* cmt. III(C).

54. *Id.* cmt. III(E); *see also* Bergstrom v. Lindback, 779 P.2d 1235, 1237 (Alaska 1989) ("[W]e believe that the superior court has discretion whether to include in income amounts voluntarily deposited into deferred income compensation accounts.").

"[t]he court may allow the obligor parent to reduce child support payments up to 50% for any period in which that parent has extended visitation over 27 consecutive days."[55] In shared custody cases, the court may find that the "percentage of time each parent will have physical custody will not accurately reflect the ratio of funds each parent will directly spend on supporting the children . . . ."[56] Such a finding would require an adjustment to the calculation of support.[57]

Although unusual income patterns and complicated visitation arrangements call for the exercise of judicial discretion under the formula, calculation of support awards in most cases is a straightforward task. In the bulk of cases, the obligor parent's adjusted annual income is multiplied by the percentage dictated in the Rule, and the resulting support award is achieved without resort to the subjective judgment of the court.[58]

B. Cases Requiring Departure from the Formula

The need for sound judicial discretion in child support adjudication is amplified when departure from the guideline formula, rather than application of the formula, is at issue. A request for deviation upward or downward[59] may be granted by the court for good cause.[60] If an exception to the guideline is granted, the award will be determined by the traditional balancing of equities.[61]

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55. ALASKA R. CIV. P. 90.3(a)(3).

56. *Id.* R. 90.3(b)(2).

57. *Id.*

58. *Id.* cmt. VI(A) (child support in great majority of cases should be awarded under 90.3(a) or (b)).

59. *See* Coats v. Finn, 779 P.2d 775, 777 (Alaska 1989) (Good cause for deviation exists where an award "substantially *exceeds* or *falls short* of the amount needed to provide for the child's reasonable needs.") (emphasis added). Courts generally have resisted upward deviation, viewing guidelines as a ceiling rather than a floor. *Impact on Family Law Practice*, *supra* note 26, at 1098.

60. ALASKA R. CIV. P. 90.3(c)(1). Deviation from the guideline formula must be limited to situations where good cause is demonstrated, as numerous exceptions would undermine the Rule and its goals of uniform and adequate awards. *See id.* cmt. VI(A); *Coats*, 779 P.2d at 777-78.

61. ALASKA R. CIV. P. 90.3(c)(1)(A), (c)(2) (A just and proper exercise of the court's discretion will "take[ ] into account the needs of the children, the standard of living of the children and the extent to which that standard should be reflective of the supporting parent's ability to pay."); *see Coats*, 779 P.2d at 776 ("Rule 90.3 does not abrogate the general rule that a non-custodial parent is obligated to contribute only a fair share of the amount required to meet the reasonable needs of the parties' minor children."); *see also* Memorandum from John Reese to Civil Rules Committee (Jan. 28, 1987), *reprinted in* ALASKA BAR ASS'N, CLE SEMINAR, THE NEW AND IMPROVED CIVIL RULE 90.3: CHILD SUPPORT FOR THE '90'S, at 86, 89 (1990) (suggesting that proposed Civil Rule 90.3 should "make it clear that the court in the proper circumstances has the power to exercise its discretion in setting support above or below the formula amounts . . . .") [hereinafter Reese Memorandum].

Good cause for deviation may be found by the court where unusual circumstances exist[62] or where the obligor parent has gross income below the poverty level.[63] Where the obligor parent has annual income in excess of $60,000, the court may make an additional award if it would be "just and proper" to do so.[64] While these three exceptions are not exclusive, the Rule indicates that deviation based on other exceptions will be rare.[65]

The exception for unusual circumstances presents the most fertile ground for deviation. The unofficial commentary to the Rule presents numerous scenarios where the exception for unusual circumstances might apply. The strongest arguments for deviation probably will arise in cases where the custody of children is divided,[66] a custodial parent with justifiably insignificant income has child care expenses,[67] children of a prior relationship who live with the obligor parent are suffering hardship,[68] or a property settlement intended to alter child support has been entered.[69] In rare cases, an agreement of the parties[70] or the presence of subsequent children[71] may justify a variation from the guideline calculation. In only the most exceptional cases will the existence of prior or subsequent debts,[72] the income of a new spouse,[73] or the age of children[74] be grounds for deviation.

62. ALASKA R. CIV. P. 90.3(c)(1)(A).

63. *Id.* R. 90.3(c)(1)(B).

64. *Id.* R. 90.3(c)(2). Additional awards made under paragraph (c)(2) are not strictly considered deviations for good cause from the formula, since paragraphs (a) and (b) do not apply to the extent that the obligor parent has adjusted annual income exceeding $60,000. *Id.* Thus, a party seeking an additional award need not prove by clear and convincing evidence that manifest injustice would result from limiting the award to the amount calculated under paragraph (a) of the Rule. The essential fact in *Coats* was that custody was divided, not that the noncustodial parent earned in excess of $60,000 annually.

65. *Coats*, 779 P.2d at 777; ALASKA R. CIV. P. 90.3 cmt. VI(A).

66. ALASKA R. CIV. P. 90.3 cmt. V(C).

67. *Id.* cmt. VI(B).

68. *Id.* cmt. VI(B)(3).

69. *Id.* cmt. VI(B)(9).

70. *Id.* cmt. VI(B)(1). An agreement of the parties is not itself an unusual circumstance justifying deviation. *See* Bergstrom v. Lindback, 779 P.2d 1235, 1237-38 (Alaska 1989) ("[A] parent may not waive the requirements of Civil Rule 90.3 by contract."). In holding that Rule 90.3 supersedes Malekos v. Yin, 655 P.2d 728 (Alaska 1982) (parents could agree to disregard court-ordered support award as long as doing so was not harmful to child), the supreme court stated: "Parents may not make a child support agreement which is not subject to the rule." Cox v. Cox, 776 P.2d 1045, 1048 (Alaska 1989).

71. ALASKA R. CIV. P. 90.3 cmt. VI(B)(2).

72. *Id.* cmt. VI(B)(5).

73. *Id.* cmt. VI(B)(6).

74. *Id.* cmt. VI(B)(7).

Other forceful arguments in support of deviation from the Rule may be offered by counsel. The court may hear arguments concerning "family size, health issues, other extraordinary expenses, seasonal income factors, or other matters of good cause which would make the percentage formula not responsive to the actual situation of the parties."[75] Counsel should also be familiar with the economic data that form the basis of the guideline.[76] "Where appropriate, counsel may then argue that certain types of expenditures should be added or, on the other hand, deleted" from the award calculation.[77]

In general, if calculation under Rule 90.3(a) would result in an award that offends the principles embodied in existing case law or statutes, then requests for deviation stand a chance of success. These principles include protection of the reasonable needs of the child, taking into consideration prior station in life, or the relative financial situation of the parents.[78] Thus, "where the custodial parent's income exceeds that of the noncustodian, a downward adjustment in the guideline amount may be appropriate . . . . Comparison of the post-divorce standards of living [might also be] a source of justification for a deviation."[79]

The commentary to the Rule suggests, however, that neither the relocation of the custodial parent[80] nor the denial of visitation[81] should justify a reduction in support. In addition, evidence pertinent to the issues of health and education costs,[82] shared custody arrangements,[83] extended visitation[84] or travel expenses[85] would not normally

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75. Reese Memorandum, *supra* note 61, at 89. For information concerning extraordinary expenses in support determinations, see Sally Goldfarb, *Child Support Guidelines: A Model for Fair Allocation of Child Care, Medical, and Educational Expenses*, 21 FAM. L.Q. 325, 330-37 (1987).

76. Dodson, *supra* note 8, at 7. Commentators have suggested that guideline percentages based on other states' guidelines may not accurately reflect the economic data on intact family spending. Dodson notes that, in Wisconsin, an effort was made to establish appropriate percentages of income for child support awards based on economic data, and percentages were then lowered because they were perceived to be "too high." "This reduction proliferates when other states model their guidelines on these guidelines rather than on the original economic data." *Id.*

For further information on the economic data underlying the percentage of income and the income shares methods of calculating child support, see *id.* at 9-10; Garfinkel & Melli, *supra* note 6, at 165-68; DEVELOPMENT OF GUIDELINES, *supra* note 17, at II-129 to II-154.

77. Dodson, *supra* note 8, at 7.

78. Smith, *supra* note 9, at 23.

79. *Id.* at 24.

80. ALASKA R. CIV. P. 90.3 cmt. VI(B)(4).

81. *Id.* cmt. VI(B)(8).

82. *Id.* R. 90.3(d).

83. *Id.* R. 90.3(b).

84. *Id.* R. 90.3(a)(3).

justify a variation, since the Rule addresses these circumstances directly.[86]

The good cause exceptions that may justify deviation from the guideline formula enhance the responsiveness of Rule 90.3 to different fact situations. The benefits and administrative costs of highly responsive child support adjudication, however, must be weighed against the goals of the Rule. Departure from the guideline formula upon a minimal showing of unfairness might sacrifice the uniformity and predictability of support awards. The level of unfairness that will justify a departure from the formula must therefore be set high enough to preserve the integrity of the Rule.

IV. THE STANDARD FOR DEVIATION FROM THE GUIDELINE FORMULA: *COATS V. FINN*

Coats v. Finn[87] is important to attorneys who litigate child support issues because its holdings set the parameters for successful requests for deviation from the Rule. *Coats* sets the evidentiary requirements for deviation, introduces the manifest injustice standard, and confirms the court's commitment to the equitable principles embodied in prior law.

As previously noted, the Rule has always allowed a court to vary a support award for good cause.[88] Earlier versions of the Rule listed categories of cases which might warrant a departure from the formula, but gave no standard explicitly limiting the trial court's authority to grant requests for deviation. *Coats* changed this by establishing a standard to be applied when a party requests a deviation from the formula. The current Rule, reflecting *Coats*, allows the court to deviate from the guideline formula only "upon proof by clear and convincing evidence that manifest injustice would result if the support award were not varied."[89]

In *Coats*, custody of the children was divided. The daughter spent alternate weeks with each parent, while the son spent only two evenings during alternate weeks with his father.[90] At issue was the amount of the father's obligation for the support of his son. The mother proposed two alternative calculations, one based on the sole custody provision of the Rule and the other based on a shared custody

85. *Id.* R. 90.3(g).

86. *See* Coats v. Finn, 779 P.2d 775, 777 n.6 (Alaska 1989) (issues already factored into the guideline are not themselves enumerated exceptions).

87. *Id.*

88. ALASKA R. CIV. P. 90.3(c)(1); *see supra* note 41.

89. ALASKA R. CIV. P. 90.3(c)(1).

90. *Coats*, 779 P.2d at 776.

analysis.[91] Under either proposal, the resulting award would have been greater than under the father's suggested calculation. Without specifying which of the mother's alternative calculations was applicable, the trial court "adopted as [its] own the [mother's] argument and analysis on the child support amount issue."[92]

The father appealed on the ground that the award was unreasonable. The Alaska Supreme Court acknowledged that deviation was possible where a support award calculated under the Rule produced an unfair result. The court affirmed the trial court's decision, however, holding that "[i]n the absence of clear and convincing evidence to the contrary, we are unable to say that the $1000 award substantially exceeded [the father's] fair share of the amount needed to satisfy [the son's] reasonable needs."[93] The court's emphasis on the needs of the child and on the fair contribution of the obligor parent was meant "to harmonize Rule 90.3 with the prior case law."[94]

This section will examine the burden and standard of proof under *Coats*, the introduction of the manifest injustice standard, and the harmonization of the Rule with equitable principles established in prior law.

A. The Burden and Standard of Proof Under *Coats v. Finn*

Under Alaska law, a presumption in favor of one party will shift the burden of production to the objecting party, but will not shift the burden of persuasion.[95] Thus, the presumption in favor of child support awards based upon the guideline would shift the burden of production to the party seeking deviation from the guideline, but the burden of persuasion would seem to remain with the party seeking the guideline award. This general rule of evidence regarding presumptions applies in all civil actions and proceedings unless a statute, rule or judicial decision provides otherwise.[96] Although Rule 90.3 is silent as to which party bears the burden of persuasion in requests for deviation, *Coats* holds that "the reasons for the departure [from the guideline] must be supported by specific findings, and the burden of persuasion is on the objecting party."[97] *Coats* thus shifts the burden of persuasion to the party requesting deviation from the formula.

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91. *Id.* at 776 n.1.
92. *Id.* at 776 n.2.
93. *Id.* at 778.
94. *Id.*
95. ALASKA R. EVID. 301.
96. *Id.*
97. *Coats*, 779 P.2d at 777.

Coats further bolsters the presumption in favor of guideline calculations by adopting a heightened standard of proof. Civil cases ordinarily apply the preponderance of the evidence standard, which requires the party bearing the burden to produce evidence leading the trier of fact "to find that the existence of the contested fact is more probable than its nonexistence."[98] *Coats*, however, establishes that departure from the formula must be based on clear and convincing evidence.[99] Under the clear and convincing standard, the trier of fact "must be persuaded that the truth of the contention is 'highly probable.' "[100] This heightened standard of proof,[101] together with the requirement that the party requesting deviation bear the burden of persuasion,[102] forms a strong presumption in favor of guideline awards.

Other states that have experimented with a heightened standard of proof in the deviation context have subsequently abandoned this approach. For example, Wisconsin, one of the leading states in guideline development, and the state that Alaska used as a model, has lowered its standard of proof.[103] At the time of the Alaska Commission Report, Wisconsin law had allowed deviation from percentage standards upon a showing of unfairness by clear and convincing evidence.[104] Shortly after the effective date of Alaska's Rule 90.3, however, the Wisconsin legislature lowered its standard of proof to a preponderance of the evidence.[105] The lower standard was considered

98. CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 339, at 957 (Edward W. Cleary ed., 3d ed. 1984) [hereinafter MCCORMICK].

99. *Coats*, 779 P.2d at 777.

100. MCCORMICK § 340, at 959-60 (quoting J.P. McBaine, *Burden of Proof: Degrees of Belief*, 32 CAL. L. REV. 242, 246, 253-54 (1944)).

101. A heightened standard of proof in the context of deviations from the quantitative formula may have only a slight effect. Because evidence of unusual circumstances is often subject to proof by reliable documentary evidence, it is likely that authenticated documentary evidence would satisfy even the highest standard of proof. For example, the extraordinary expenses of a handicapped child are often supported by relevant documentary evidence of past expenditures. The heightened standard under *Coats*, then, may prove not to be a substantial obstacle for a party requesting deviation.

102. The effect of shifting the burden of persuasion in requests for deviation may also be minimal. *See generally*, MCCORMICK § 336, at 947 n.6 (burden of persuasion has become largely a technique of wording instructions to juries); *id.* at 947 ("Judges, trying cases without juries, pay only lip service to [the burden of persuasion] . . . .").

103. The change in Wisconsin law is of interest because in adopting the clear and convincing evidence standard, *Coats* took judicial notice of the Child Support Enforcement Commission's report to Governor Sheffield, which in turn had based its recommendation, at least in part, on the Wisconsin guideline. *Coats*, 779 P.2d at 777 n.7; *see supra* notes 31-34 and accompanying text.

104. Act of July 17, 1985, ch. 29, sec. 2361, § 767.25(1m), 1985 Wis. Laws 480 (amended 1987).

105. Act of Aug. 6, 1987, ch. 37, Sec. 1, § 767.25(1m) (intro.), 1987 Wis. Laws 546-47 (codified at WIS. STAT. § 767.25(1m) (Supp. 1990)).

easier to apply and consistent with the level of proof used in deciding other issues in divorce proceedings.[106] Wisconsin lawmakers had concluded that practical difficulties in the application of the clear and convincing standard outweighed the increment of protection gained by use of that higher standard.[107]

B. Manifest Injustice Under *Coats v. Finn*

Coats not only clarifies the burden and standard of proof in requests for deviation from the guideline formula, but also introduces the manifest injustice standard. Although neither *Coats* nor the Commission Report explicitly defines "manifest injustice," the meaning of the phrase may be gleaned from an analysis of *Coats* and an inquiry into cases decided under the criminal sentencing guideline.

Coats states that "[i]nclusion of a 'good cause' exception does not mean . . . that the trial court is free to abandon the formula in every case."[108] Rather, "departure therefrom must be based on . . . evidence that *manifest injustice* would result if the formula were applied."[109] The court further notes that good cause for variation arises when application of the formula would produce an "unfair result."[110] In the deviation context, "an unfair result is an award which *substantially* exceeds or falls short of the amount needed to provide for the child's reasonable needs,"[111] or "which requires the non-custodial parent, unreasonably, to contribute *substantially* more or less than his or her fair share of the amount needed to satisfy the child's reasonable needs."[112] Under *Coats*, then, only an application of the formula of Rule 90.3(a) that would result in manifest injustice (apparently defined as substantial unfairness) is good cause for deviation.

The examples provided in *Coats* of substantially unfair awards provide some insight into the probable impact of the manifest injustice standard. Where the child support guideline dictates that a noncustodial parent must pay more than a fair share of the child's reasonable needs, the trial judge is not authorized to deviate from the formula. Rather, a deviation is permitted only when the guideline demands *substantially* unfair payments from the noncustodian. Likewise, upward deviation is permitted only when the guideline provides *substantially* low payments to a custodial parent.

106. Telephone interview with Gordon Anderson, Senior Attorney, Wisconsin Legislative Council (Nov. 21, 1990).

107. *Id.*

108. Coats v. Finn, 779 P.2d 775, 777 (Alaska 1989).

109. *Id.* (emphasis added).

110. *Id.*

111. *Id.* (emphasis added).

112. *Id.* (emphasis added).

Although the meaning of "manifest injustice" has not been litigated in the context of the child support guideline, proper interpretation of the phrase has been a central issue in cases decided under the criminal sentencing guideline.[113] In *Lloyd v. State*,[114] the court of appeals held that "obvious unfairness" accurately defined manifest injustice, and that "a sentence that would 'shock the conscience' . . . adequately characterizes the manifest injustice standard."[115] The court failed to see any substantial difference between the definitions since each characterization, "like the manifest injustice standard itself, is highly subjective."[116] Criminal cases subsequent to *Lloyd* have held "plainly unfair" sentences to be manifestly unjust.[117]

Characterizing the manifest injustice standard in the criminal sentencing context as "plain unfairness," "obvious unfairness" and "shocking to the conscience" emphasizes the subjective nature of the standard. Although the standard is probably equally subjective under the child support guideline,[118] its adoption in *Coats* still bolsters the presumption of guideline correctness by preventing judicial intervention in cases where the guideline award can be proven to be only unfair, rather than substantially unfair.

C. Harmony with Prior Law

While Rule 90.3 may initially appear to mark a departure from established principles, *Coats* makes it clear that the Rule does not abrogate the traditional balancing of the child's reasonable needs with the obligor parent's relative ability to pay support.[119] Rather, awards calculated under the Rule are strongly presumed to have achieved the correct balance between these principles. When in extraordinary cases

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113. Resort to criminal cases for insight into the meaning of the manifest injustice standard is not unjustified, since under both guidelines the standard allows a subjective judgment by the trial judge when the limits imposed by a guideline would result in unacceptable levels of unfairness. *Compare Coats*, 779 P.2d at 777 (application of standard in context of deviation from child support guideline) *with* Lloyd v. State, 672 P.2d 152, 154 (Alaska Ct. App. 1983) (application of standard in presumptive sentencing context). Furthermore, the *Lloyd* court noted that the manifest injustice standard, while subjective, did not bestow absolute discretion on the trial judge. *Lloyd*, 672 P.2d at 155 n.3.

114. 672 P.2d 152 (Alaska Ct. App. 1983).

115. *Id.* at 154.

116. *Id.*

117. *See, e.g.*, Kirby v. State, 748 P.2d 757, 762 (Alaska Ct. App. 1987); Smith v. State, 711 P.2d 561, 569 (Alaska Ct. App. 1985).

118. An argument could be made that "substantial unfairness" imports a modicum of objectivity into the test that is otherwise lacking under the manifest injustice standard. Unlike "shocking" or "obvious," the term "substantial" may be said to have quantitative overtones.

119. *See supra* note 61.

this presumption is proven incorrect, the Rule allows for judicial balancing of the equities. The operation of traditional principles within the guideline and the reversion to these principles in cases of deviation reveal the degree to which the Rule conforms with prior law.

The federal statutes that mandated the development and the use of child support guidelines did not dictate the models or the principles on which the state formulas should be based.[120] Although commentators had suggested models that would ensure equal standards of living in the custodial and noncustodial households, most states "chose to focus on improving the expenditure-based practice courts had been using."[121] Both the income shares formula used in the majority of states and the percentage of income formula used in Alaska were based on economic analyses of spending patterns in intact families.[122]

Adopting formulas based on spending in intact families initially seems to be a fundamental reworking of equitable principles. The income shares formula "attempt[s] to provide post-divorce children with the percentage of the parents' income which married couples expend on their children at the same income level, rather than setting awards based upon need."[123] The percentage of income formula presumes that "the proportion of income parents devote to their children in intact families is relatively constant across income levels," and that application of the formula "should result in a non-custodial parent paying approximately what the parent would have spent on the children if the family was intact."[124] Both approaches seem to substitute consumption patterns in intact families for inquiry into the reasonable needs of children.

Average spending on children in intact families at particular income levels is pertinent, however, to the determination of the reasonable needs of a child. At lower income levels, there is little danger that consumption patterns will reflect anything more than expenditures on essentials. In this situation, analysis of spending probably provides an accurate picture of a child's minimal needs. At higher income levels, the pattern of intact family spending likely includes purchases of luxury items. Contrary to the initial assumption, the inclusion of such expenditures does not place the economic analysis underlying the guideline formula at odds with traditional equitable principles, since prior law explicitly recognized standard of living as important to the determination of support awards. The guideline formulas of Rule 90.3

120. Dodson, *supra* note 8, at 5.

121. *Id.* at 6.

122. *See, e.g.*, Garfinkel & Melli, *supra* note 6, at 166.

123. Heather R. Wishik, *Economics of Divorce: An Exploratory Study*, 20 FAM. L.Q. 79, 101 (1986) (citing LENORE J. WEITZMAN, THE DIVORCE REVOLUTION (1985)).

124. ALASKA R. CIV. P. 90.3 cmt. II.

thus do not abandon the principles recognized under prior law, but instead balance the traditional equities in light of economic evidence and social reality.

Rule 90.3 should be seen, then, as an improvement on the case-by-case method of determining support. The child support guideline accounts for both the child's reasonable needs and the relative financial situation of the parents without tipping the scales against the child. The economic data and analyses on which Alaska's child support guideline is based provide a rational, if imperfect, method for determining a child's reasonable needs.[125] Furthermore, the financial stake of the public[126] in the obligor's payment of support instills a social presumption that the child is primarily entitled to the available earnings of the obligor. Improvements in the enforcement of child support obligations[127] alleviate judges' concerns that higher support awards will result in nonpayment by the obligor parent.[128] These considerations alter the balancing used in the traditional method of support determination, which was unduly favorable to the obligor parent, and thereby allow for fairer support awards.

The improvement in the adequacy of support awards must extend both to awards calculated under the guideline formula and to awards determined under the good cause exception of Rule 90.3(c). Just as traditional principles are balanced in light of new economic evidence under the formula, so must they be balanced by the trial judge in cases of deviation[129] in order the reach the fairest possible awards.

125. *See* Coats v. Finn, 779 P.2d 775, 776 & n.5 (Alaska 1989). Although economic analysis of intact family spending offers a better approximation of the cost of raising a child than does the traditional budget estimate by the custodial parent, the studies that ground the current guidelines in the states have been criticized. *See, e.g.*, Dodson, *supra* note 8, at 7 ("[E]xpenses for children may increase after a divorce, and almost no data exist on expenditures for children in single-parent households . . . . Little current data are available on average family expenditures for child care and extraordinary medical expenses, particularly in single-parent families."). Commentators have noted that:

> none of the [economic] studies . . . takes into account the forgone family income in a two-parent family that results from a parent — usually the mother — not working or taking a job that pays less than she can command in the market in order to have time to care for the children.

Garfinkel & Melli, *supra* note 6, at 168.

126. Garfinkel & Melli, *supra* note 6, at 162. *See supra* notes 18-20 and accompanying text (discussing impact of failure of child support systems on federal welfare spending).

127. *See supra* note 15.

128. *See supra* notes 10-12 and accompanying text.

129. *See* ALASKA R. CIV. P. 90.3(c)(1) ("The court must specify in writing . . . the amount of support which would have been required but for the variation . . . .").

D. Criticism of the Current Standard for Deviation

The corrective impact of the guideline formula on the balancing of equities grounding child support determinations suggests that the standard for deviation from the formula should be reduced. A lower standard for deviation would have only a minimal effect on the adequacy of child support awards, since Alaska trial judges weigh the equities in cases of deviation in light of the awards dictated by the quantitative formula. The uniformity and simplicity of support awards will be preserved as long as a simple presumption in favor of guideline correctness is maintained.

The devices used by Rule 90.3(c) to bolster the presumption of guideline correctness should be abandoned. A strengthened presumption is unnecessary because proper deviation from the quantitative formula will not undermine the main objectives of the Rule. For this reason, the court should reconsider its holding in *Coats* that the burden of persuasion rests on the party requesting a deviation from the guideline formula. The burden of persuasion should remain with the party seeking the support order. The presumption in favor of guideline correctness would then comport with the general rule of evidence regarding presumptions in civil actions, with only the burden of production being shifted to the party seeking deviation.[130] Likewise, the clear and convincing evidence standard of proof for overcoming the presumption of guideline correctness should be reduced to proof by a preponderance of the evidence, and the manifest injustice standard should be replaced by an unfairness standard. Each of these heightened standards unnecessarily introduces practical difficulties of application into litigation involving requests for deviation.

V. CONCLUSION

Admittedly, the fashioning of a quantitative formula to determine child support awards and the setting of criteria for rebuttal of the presumption in favor of the formula involve difficult policy decisions. Fairness and flexibility must be balanced against the need for adequate, consistent and predictable initial and modified awards. The administrative costs of a more flexible system must also be factored into the policy debate. Nevertheless, the current version of Rule 90.3 inhibits the balancing process by severely limiting deviations from the guideline formula. Setting such a high standard for deviation excessively restricts litigation on the issue of guideline fairness, undermining the flexibility of the Rule and limiting the compilation of data essential to the review and improvement of the guideline formula. These effects are especially regrettable in Alaska, where the levels of

130. *See supra* notes 95-97 and accompanying text.

support demanded by the guideline formula are relatively low and where, unlike other states,[131] the supreme court has recognized the viability of upward deviation. It seems inconsistent, and unfortunate, for the court to both recognize the potential for upward deviation and to severely limit the opportunities for such deviation.

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131. *See supra* note 59.