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# EVALUATION OF THE NEW YORK CHILD SUPPORT STANDARDS ACT: HAVE THE GUIDELINES REALLY MADE A DIFFERENCE?

Victoria Vazquez\*

*The duty of parents to provide for the maintenance of their children, is a principle of natural law. . . . By begetting them, therefore, they have entered into a voluntary obligation, to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have a perfect right of receiving maintenance from their parents.<sup>1</sup>*

## INTRODUCTION

Approximately seventy-five percent of custodial parents<sup>2</sup> and their children in the United States are victimized by the lack of child support<sup>3</sup> orders or the failure to receive full payment under

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\* Brooklyn Law School Class of 1996. The author wishes to give special thanks to Nina Tong for her countless edits and invaluable assistance in the preparation of this Note.

<sup>1</sup> Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 24 FAM. L.Q. 6 (1990) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 447-48 (1765)).

<sup>2</sup> See BLACK'S LAW DICTIONARY 384 (6th ed. 1990) (defining "custody of children" as "[t]he care, control and maintenance of a child which may be awarded by a court to one of the parents as in a divorce or separation proceeding"); see also BLACK'S LAW DICTIONARY 707 (6th ed. 1990) (defining "guardian" as "[a] person lawfully invested with the power, and charged with the duty, of taking care of the person and managing the property and rights of another person, who, for defect of age, understanding, or self-control, is considered incapable of administering his own affairs").

<sup>3</sup> Under New York law, "child support" is a sum paid pursuant to court order or decree by either or both parents or pursuant to a valid agreement between the parties for care, maintenance and education of any unemancipated

such orders.<sup>4</sup> The dilemma of child support awards has plagued this country for many years.<sup>5</sup> Child support experts have proposed many solutions; however, as seen from the media, newspapers and magazines, not everyone has been appeased.<sup>6</sup> "For too long, child

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child under the age of 21. N.Y. DOM. REL. LAW § 240(1-b)(b)(2) (McKinney 1986 & Supp. 1995).

<sup>4</sup> See Margaret Campbell Haynes, *Child Support and the Courts in the Year 2000*, 17 AM. J. TRIAL ADVOC. 693 (1994) (quoting U.S. BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, SERIES P-60, NO. 173, CHILD SUPPORT AND ALIMONY: 1989 (1991)) (discussing the recommendations of the U.S. Commission on Interstate Child Support for improvement of support enforcement). "In the United States, 40% of divorced fathers pay no child support." Judy Mann, *Family Breakdowns the World Over*, WASH. POST, Aug. 4, 1995, at E3.

<sup>5</sup> See 18 U.S.C. § 228 (1994) (enacting the Child Support Recovery Act of 1992 which gives federal officials authority to prosecute parents who live in different states from their children, and have the ability to pay child support but have refused to pay). A 38-year-old Colorado man was the first person to be indicted by a federal grand jury in Rhode Island on charges of violating the Child Support Recovery Act. *Child Support Statute Reaches Out for Colorado Man as 'Deadbeat Dad,'* PROVIDENCE J., Aug. 1, 1995, at B1; see also Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (codified at 42 U.S.C. § 667 (1988)) (requiring states to establish mandatory child support guidelines with a rebuttable presumption); Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (codified at 42 U.S.C. § 667 (1982 & Supp. IV 1986)) (requiring all states to adopt child support guidelines, although the guidelines are not mandatory upon judges); Child Support Enforcement Act, Pub. L. No. 93-647, 88 Stat. 2351 (codified at 42 U.S.C. §§ 651-54 (1970 & Supp. V 1975)) (discussing Title IV-D of the Social Security Act which tries to expedite the payment of child support awards to the noncustodial parent); New York Child Support Standards Act ("CSSA"), N.Y. DOM. REL. LAW § 240 (1-b) (laying out a guideline New York enacted pursuant to the Family Support Act of 1988).

<sup>6</sup> *Heatstroke Victim is Identified as West Virginian*, COURIER-J. LOUISVILLE, Aug. 3, 1995, at B4 (indicating that confusion arose concerning the deceased's identity as he had been living in Kentucky under an alias to avoid paying child support); Ginny McKibben, *Suicide Ends Trial for Murder Suspect in Slayings Dies in Arapahoe Jail*, DENVER POST, Aug. 3, 1995, at B1 (stating that Leon Johnson, suspected of killing his girlfriend and one of his twin sons and wounding the other child, died of a suspected suicide. Johnson was described as "bitter" about paying child support for the twins); *Social Worker Attacked*, VIRGINIAN-PILOT & LEDGER STAR, Aug. 3, 1995, at B3 (describing an attack of a social services employee by Jim Ennis who became angry about paying child support); *Man Convicted of Asphyxiating His 14-Month-Old Twins*, L.A. TIMES,

support has been a national scandal. Courts have ordered child support arbitrarily, and orders, although they have varied widely, almost uniformly have been too low."<sup>7</sup> To date, no effective means of establishing child support awards exist.

In 1975, the federal government tried to remedy this situation with the establishment of Title IV-D of the Social Security Act.<sup>8</sup> With the changing economic times and the changing needs of children, different variables needed to be taken into account; consequently, the laws of child support in New York changed. Since 1989, New York has applied the Child Support Standards Act ("CSSA").<sup>9</sup> The CSSA lays down specific rules on the allocation of child support. To ascertain the effectiveness of the CSSA, the Evaluation Project Report<sup>10</sup> ("Evaluation Report") was compiled and distributed in June, 1993. The Evaluation Report revealed inconsistent findings on the efficiency of the CSSA which is most likely due to a limited source of data. Ultimately, the Evaluation Report concluded that the guidelines have been effective.

Part I of this Note will review the controversial statutes<sup>11</sup>

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Aug. 2, 1995, at A17 (discussing the story of Stanley Kidd who was convicted of murdering his 14-month-old twin daughters just one day after an \$806.00 child support payment was deducted from his paycheck. "Prosecutors accused him of a chilling scheme to avoid child support."); Jennifer Dixon, *Child Support Reform Plan Would Threaten Deadbeats' Licenses*, PHOENIX GAZETTE, May 19, 1994, at A10 (discussing the Clinton Administration's proposal that all states be required to suspend the drivers' licenses of parents who refuse to pay child support); Thaddeus Herrick, *New Child Support System On Line*, ROCKY MOUNTAIN NEWS, Dec. 31, 1993, at 6A (discussing the implementation of a centralized state child support payment system by distributing money from noncustodial parents through one agency, rather than through district courts).

<sup>7</sup> GOVERNOR'S APPROVAL MEM. FOR C. 567 OF THE LAWS OF 1989 (McKinney 1989) [hereinafter GOVERNOR'S APPROVAL MEM.].

<sup>8</sup> Child Support Enforcement Act, 42 U.S.C. §§ 651-54.

<sup>9</sup> Child Support Standards Act, N.Y. DOM. REL. LAW § 240. Essentially, the CSSA adds both parents' income after various deductions, and applies a specific percentage to be allocated as child support awards. *Id.*

<sup>10</sup> MARILYN L. RAY & CHRIS NEMETH, NEW YORK STATE CHILD SUPPORT STANDARDS ACT: EVALUATION PROJECT REPORT 81-82 (1993) [hereinafter EVALUATION REPORT].

<sup>11</sup> See 42 U.S.C. §§ 651-54 (discussing Title IV-D of the Social Security Act); 42 U.S.C. § 667 (deliniating the Child Support Enforcement Amendments

which resulted in arbitrary child support resolutions and encouraged the federal government, and subsequently the states, to address the child support problem. Part II will examine the basic provisions of the New York Child Support Standards Act.<sup>12</sup> Part III will address the courts' compliance with the Act, the conclusions made by the Evaluation Report,<sup>13</sup> and finally, offer some recommendations to improve the effectiveness of the CSSA.

## I. BACKGROUND

Between 1970 and 1975, the number of recipients of Aid to Families with Dependent Children ("AFDC") rose by forty-seven percent.<sup>14</sup> As the number of AFDC recipients increased, federal spending also rose<sup>15</sup> causing Congress to intercede in 1975 by

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of 1984); 42 U.S.C. § 667 (discussing the Family Support Act of 1988 which mandated that each state implement guidelines); N.Y. DOM. REL. LAW § 240 (1-b) (enumerating the CSSA.).

<sup>12</sup> See *supra* note 9 and accompanying text.

<sup>13</sup> EVALUATION REPORT, *supra* note 10, at 130-44.

<sup>14</sup> Michael E. Barber, *Update on Title IV-D*, 1 AM. J. OF FAM. L. 383, 383 (1987). The Aid to Families with Dependent Children ("AFDC") at the time of its inception in 1935 was known as Aid to Dependent Children ("ADC"). Charles T. Berry, *West Virginia Child Support Guidelines: the Melson Formula*, 97 W. VA. L. REV. 809, 811 (1995). The ADC was initially formed to provide aid to children of widows and to children of divorced, separated and unwed mothers. *Id.* at 812. However, it became clear that only children of widows were receiving the required support. *Id.* at 811. This was caused by the societal stigma placed upon children of divorced, separated and unwed mothers. *Id.* Consequently, in 1968, after the landmark decision of *King v. Smith*, the number of children receiving ADC assistance increased. 392 U.S. 309 (1968). In *King*, the Supreme Court held that states could not exclude children from public welfare solely on the basis of their parental status. *Id.* at 334. Because of this increased need, Congress extended eligibility to families with dependent children. Hence, the program was renamed AFDC. See Cynthia A. Baily, *Workfare and Involuntary Servitude—What You Wanted to Know but Were Afraid to Ask*, 15 B.C. THIRD WORLD L.J. 285, 306-07 (1995) (discussing the creation of the AFDC). The AFDC "is designed to provide financial assistance to needy dependent children and the parents or relatives who live with and care for them." *Shea v. Vialpando*, 416 U.S. 251, 253 (1974).

<sup>15</sup> See Krause, *supra* note 1, at 6. (asserting that Congress' "primary goal was to reduce the federal cost of the AFDC program").

enacting Title IV-D of the Social Security Act.<sup>16</sup> Title IV-D required states to establish state child support offices known as "IV-D offices,"<sup>17</sup> and created a federal office of Child Support Enforcement.<sup>18</sup> Essentially, the purpose of the IV-D program was to expedite the payment of child support to the custodial parent. Lawmakers believed that the IV-D program would decrease federal spending because the government would be reimbursed once the noncustodial parent made payments.<sup>19</sup> The IV-D program failed

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<sup>16</sup> Child Support Enforcement Act, 42 U.S.C. §§ 651-65. Title IV-D of the Social Security Act was primarily a funding bill—75% of the cost of support enforcement and paternity proof was federally funded. Barber, *supra* note 14, at 384. Title IV-D provided financial incentives for state agencies to ensure the payment of child support to AFDC recipients. Peter Leehy, *The Child Support Standards Act and the New York Judiciary: Fortifying the 17% Solution*, 56 BROOK. L. REV. 1299, 1301 (1991). Local jurisdictions would receive an incentive equal to 25% of the welfare dollars saved. Barber, *supra* note 14, at 384. Title IV-D demanded that every state which operated a federally sponsored AFDC program also institute a corresponding support enforcement program. William Roberts, *Child Support and Beyond: Mapping a Future for America's Low-Income Children*, CLEARINGHOUSE REV. 594, 595 (1988). In AFDC cases, the federal and state governments provide support to the custodial parent initially, and those funds are recouped when the state collects monies owed from the noncustodial parent. *Id.*

<sup>17</sup> The IV-D offices provide various child support services, such as the establishment of paternity, location of a derelict parent, establishment and enforcement of child support and collection and distribution of support. Loretta D. McDonald, *Child Support Guidelines: Formulas to Protect Our Children from Poverty and the Economic Hardships of Divorce*, 23 CREIGHTON L. REV. 835, 839 (1990); Haynes, *supra* note 4, at 693. These services are provided free to custodial parents receiving AFDC benefits. 42 U.S.C. § 651. A parent not receiving AFDC is eligible for IV-D services, regardless of income, upon completion of a written application and payment of a fee. 42 U.S.C. § 654(a). A parent not receiving AFDC benefits can receive IV-D services with a payment, that is not to exceed \$25.00. *Id.*; see also McDonald, *supra* at 840 (explaining the components of Title IV-D of the Social Security Act).

<sup>18</sup> Haynes, *supra* note 4, at 693.

<sup>19</sup> Barber, *supra* note 14, at 383.

to meet Congress' expectations.<sup>20</sup> As a result, in 1984, Congress enacted the Child Support Enforcement Amendments.<sup>21</sup>

The Child Support Enforcement Amendments required all states to develop monetary support guidelines by October 1, 1987.<sup>22</sup> Although the Amendments enhanced state enforcement efforts, ultimately, the states retained the discretion to decide whether to make the guidelines binding.<sup>23</sup> Consequently, the child support awards continued to be "arbitrary, inconsistent, and inadequate."<sup>24</sup>

In response to the inconsistent decisions promulgated under the Child Support Enforcement Amendments of 1984, Congress passed the Family Support Act of 1988.<sup>25</sup> This Act requires states to establish and enforce guidelines for child support award

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<sup>20</sup> Barber, *supra* note 14, at 383. One reason for Title IV-D's failure was "the lack of incentives for state government to collect on all child support orders, non-AFDC families were seldom served by the collection systems." Leehy, *supra* note 16, at 1302. In addition, "custodial parents have voiced numerous complaints against IV-D agencies including a failure to communicate case status, lost files, untrained or overburdened caseworkers, inefficiencies, and ineffective enforcement efforts." Haynes, *supra* note 4, at 694-95.

<sup>21</sup> Child Support Enforcement Amendments, 42 U.S.C. § 667 (Amendments of 1984).

<sup>22</sup> McDonald, *supra* note 17, at 840. The goal of the Amendments of 1984 was to address the inadequacy of child support awards, the inconsistency of awards in similar situations and the inadequacy of awards as compared to the actual cost of raising children. Robert G. Williams, *Guidelines for Setting Levels of Child Support Orders*, 21 FAM. L.Q. 281, 282 (1987). Under the Amendments of 1984, states were also required to adopt expedited processes to enforce and establish child support awards. McDonald, *supra* note 17, at 841. Consequently, the legislature believed that the Amendments would increase the number of settlements and therefore increase judicial economy. McDonald, *supra* note 17, at 841.

<sup>23</sup> Robert G. Williams, *An Overview of Child Support Guidelines in the United States*, in CHILD SUPPORT GUIDELINES: THE NEXT GENERATION 1, 1 (Margaret C. Haynes ed., 1994).

<sup>24</sup> EVALUATION REPORT, *supra* note 10, at 2.

<sup>25</sup> 42 U.S.C. § 667 ("Family Support Act"); The Family Support Act 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." *Id.*

amounts.<sup>26</sup> States must review their guidelines at least once every four years to evaluate their effectiveness.<sup>27</sup> The guidelines must institute a rebuttable presumption to the provided award.<sup>28</sup> Judges may not deviate from an award ordered pursuant to the guidelines, unless there is a written finding in the record that the award mandated by the guidelines would be unjust.<sup>29</sup> The courts, however, may grant variations for several reasons.<sup>30</sup> For example, in

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<sup>26</sup> The Family Support Act requirements are twofold:

(a) Establishment of guidelines; method

Each State, as a condition for having its State plan approved under this part, must establish guidelines for child support award amounts within the State. The guideline may be established by law or by judicial or administrative action, and shall be reviewed at least once every 4 years to ensure that their application results in the determination of appropriate child support award amounts.

(b) Availability of guidelines; rebuttable presumption

(1) The guidelines established pursuant to subsection (a) of this section shall be made available to all judges and other officials who have the power to determine child support awards within such State.

(2) There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. 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.

*Id.*

<sup>27</sup> 42 U.S.C. § 667(a).

<sup>28</sup> 42 U.S.C. § 667(b)(1), (2).

<sup>29</sup> 42 U.S.C. § 667(b).

<sup>30</sup> One situation that justifies straying from the guidelines, which repeatedly occurs in New York, is the adjustment for the needs of dependent children not genetically related to one of the parents. EVALUATION REPORT, *supra* note 10, at 98 fig. 9 (illustrating reasons for granting variations from the guidelines. The "needs of other children" is 5%. However, 79% of the reasons listed for variations are "other" or "nongiven." If one does not figure in the percentages of "other" or "nongiven" as reasons, "needs of other children" is in actuality about 24% of the total cases).

The guidelines are unclear as to what should be done to calculate the child support award if a nonparty child is receiving child support from one of his or her parents. N.Y. DOM. REL. LAW § 240(1-b)(f)(8). In this case, the statute



*Daniels v. Daniels*,<sup>31</sup> the appellate division awarded a substantially higher amount of child support than the guidelines allowed per week because one child was severely handicapped since birth.<sup>32</sup>

In compliance with the Federal Family Support Act, New York enacted the Child Support Standards Act ("CSSA") through the utilization of two of the four guideline formula models utilized by the states for child support allocation. These four models are the Flat Percentage Model, the Income Shares Model, the Melson Formula and the Income Equalization Model.<sup>33</sup> New York combined the Income Shares Model and the Flat Percentage Model to establish the CSSA.<sup>34</sup> In implementing this type of guideline, the

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would allow for a deviation so long as it was established in writing on the file. *Id.*; EVALUATION REPORT, *supra* note 10, at 101. The Evaluation Report also discusses other reasons cited for variations, such as financial resources of parent and child; child's expected standard of living; physical, emotional and special needs of the child; tax consequences and substantial differences in gross income; need of more child support by the custodial parent; other resources available; unreasonable percentage; assumption of marital debts by noncustodial parent; fluctuating income of noncustodial parent; desire of noncustodial parent to pay more; or inability of noncustodial parent to pay more. EVALUATION REPORT, *supra* note 10, at 98.

<sup>31</sup> 202 A.D.2d 862, 609 N.Y.S.2d 946 (3d Dep't 1990).

<sup>32</sup> *Id.* at 863, 609 N.Y.S.2d at 947.

<sup>33</sup> Approximately 15 states have adopted the Flat Percentage Model, while more than 30 states use the Income Shares Model, and only four states use the Melson Formula. *See* Haynes, *supra* note 4, at 700-01; McDonald, *supra* note 17, at 844. No state has adopted the Income Equalization Model, but a variation of this model was adopted in Vermont in 1987. *See* Haynes, *supra* note 4, at 700-01; McDonald, *supra* note 17, at 844. It is important to remember that some states have adopted these models and created certain variations to make the guidelines more effective. For example, New York has a combination of the Income Shares Model and the Flat Percentage Model. *See* McDonald, *supra* note 17, at 843-46 (discussing the components of the Flat Percentage and Income Shares Models).

<sup>34</sup> *See* McDonald, *supra* note 17, at 843-46. The Income Shares Model examines the income of both parents and then applies a standard support percentage to the varying combined income levels. The support figure is prorated between the parents based on the proportion of the parent's income to the combined parental income. *Id.* On the other hand, the Flat Percentage Model uses a strict percentage of the noncustodial parent's income to calculate support orders. Nancy Theonnes et al., *The Impact of Child Support Guidelines on Award*

goal of the New York State Legislature is to keep the standard of living of children of divorced parents as close as possible to the predivorce period.<sup>35</sup> After a review of the Evaluation Report and the CSSA, one will see that its goal is not met. Consequently, the CSSA does not resolve the child support allocation issues.<sup>36</sup>

### A. Guideline Formulas

The Family Support Act of 1988 gave the states great freedom to develop their guidelines.<sup>37</sup> When implementing the guidelines, states must consider factors such as the cost of raising a child and how that cost is divided between each parent. In computing the cost of raising a child, economists are responsible for determining what a married couple would spend on a child.<sup>38</sup> States must then find some way to divide this cost between the two parents. Currently, the various states utilize one of the four models available or variations on the models to proportion out total household income

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*Adequacy, Award Variability, and Case Processing Efficiency*, 25 FAM. L.Q. 325, 329 (1991). New York combines these two models to create the CSSA by using the combined parental income and then applying a fixed percentage according to the number of children the parents have together. N.Y. DOM. REL. LAW § 240(1-b). See EVALUATION REPORT, *supra* note 10, at 6-7 (describing the CSSA as a simple six-step process).

<sup>35</sup> GOVERNOR'S APPROVAL MEM., *supra* note 7.

<sup>36</sup> The inconsistent application of the CSSA is exemplified in *Steel v. Steel*, 152 Misc. 2d 880, 579 N.Y.S.2d 531 (Sup. Ct. 1990). In *Steel*, the judge ordered the husband to pay 100% of the child support award. In accordance with the guidelines, however, the judge should have ordered a proportionate share. *Id.* at 884, 579 N.Y.S.2d at 535. *Steel* demonstrates that there are discrepancies in how applicable the guidelines may be to a particular case. Perhaps the court in *Steel* showed leniency for extenuating circumstances, however, another court might not have shown such compassion. One must question if the guidelines are appropriate in any given situation.

<sup>37</sup> 42 U.S.C. § 667(a). See Williams, *supra* note 23, at 2 (discussing the basic requirements of the Family Support Act). The most important aspect of the Family Support Act was that it mandated that states adopt guidelines, and judges to use the guidelines. 42 U.S.C. § 667(a). Up until the passage of this Act, guidelines had only been *suggestions* for courts to follow.

<sup>38</sup> McDonald, *supra* note 17, at 842.

for the determination of the child support award.<sup>39</sup> The following section reviews the models.<sup>40</sup>

### 1. *Income Shares Model*

The most widely used formula,<sup>41</sup> the Income Shares Model, examines the income of both parents. The goal behind this model is to provide the children with the same amount of money that they would have received if their parents had continued to live together.<sup>42</sup> The Income Shares Model works by taking the combined parental income and applying standard support figures for varying

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<sup>39</sup> David Betson et al., *Trade-Offs Implicit in Child Support Guidelines*, 2 J. POL'Y ANALYSIS & MGMT. 1, 5 (1992).

<sup>40</sup> This note does not address the Maintenance Support, Rawlsian or Utilitarian Models which are not in effect in any state. See Betson, *supra* note 39, at 5-10 (discussing the Maintenance Support, Rawlsian and Utilitarian Models).

<sup>41</sup> Several factors may account for the popularity of the Income Shares Model and related child support models, such as its neutrality and empirical foundation, which thereby produce a relatively simple support calculation. Marsha Garrison, *Child Support and Children's Poverty*, 28 FAM. L.Q. 504 (1994) (reviewing ANDREA H. BELLER & JOHN W. GRAHAM, *SMALL CHANGE: THE ECONOMICS OF CHILD SUPPORT* (1993) and DONALD J. HERNANDEZ, *AMERICA'S CHILDREN: RESOURCES FROM FAMILY, GOVERNMENT AND THE ECONOMY* (1993)).

One problem with the Income Shares Model is the amount of money that a parent is required to pay. These amounts are "based only upon consumer spending, thus underestimating the amounts the middle and upper income parents actually dedicate to their children's support and security." Marianne Takas, *Improving the Income Share Guideline*, 7 AM. J. FAM. L. 117, 120 (1993). For example, if a husband was living at home with his wife when their child was born, a certain percentage of his income would go towards child rearing to ensure that the child is within the same standard of living as his or her parents. This percentage, however, is not necessarily the correct amount that the husband should be paying if he leaves the home. The idea that two parents need to spend a certain amount of their income on a child in order to keep that child within their standard of living does not reveal anything about how much a child should receive at the time of his or her parent's separation.

<sup>42</sup> See Williams, *supra* note 22, at 292 (discussing the development of the Income Shares Model); McDonald, *supra* note 17, at 845 (explaining the Income Shares Model and its goal).

combined income levels.<sup>43</sup> "The support figure is prorated between the parents, based on the proportion of that parent's income to the combined parental income."<sup>44</sup>

When Congress mandated that each state enact child support guidelines, the states were not given much time.<sup>45</sup> In a hurry to enact guidelines, many states viewed the Income Shares Model as the most appropriate, in terms of fairness, because noncustodial parents would not have to pay more money than they did when they lived with their child.<sup>46</sup> Also, as child support awards seemed to be on the *too low* rather than the *too much* side, it was believed that this formula would at least increase the monetary award received by the custodial parent. Thus, even though the results might not be as perfect as the formula would predict, it appeared beneficial for both the child and the noncustodial parent.<sup>47</sup>

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<sup>43</sup> Computing child support under the Income Shares Model involves three simple steps:

1. Income of the parents is determined and added together.
2. A basic child support obligation is computed based on the combined income of the parents. This obligation represents the amount estimated to have been spent on the children jointly by the parents if the household were intact. The estimated amount, in turn, is derived from economic data on household expenditures on children. A total child support obligation is computed by adding actual expenditures for work-related childcare expenses and extraordinary medical expenses.
3. The total obligation is then prorated between each parent based on their proportionate shares of income. The obligor's computed obligation is payable as child support. The obligee's computed obligation is retained and is presumed to be spent directly on the child. This procedure simulates spending patterns in an intact household, in which the proportion of income allocated to children depends on total family income.

Takas, *supra* note 41, at 117-18; Williams, *supra* note 22, at 293.

<sup>44</sup> Haynes, *supra* note 4, at 701.

<sup>45</sup> 42 U.S.C. § 667(a). The states were given one year to adopt the new child support guidelines.

<sup>46</sup> Many states viewed the Income Shares Model as more equitable because it considers a broader range of variables such as treatment of additional dependents, use of a net versus gross income base and estimates of child rearing expenses. Williams, *supra* note 23, at 7.

<sup>47</sup> An example of a variation on the Income Shares Model can be seen in Massachusetts. Massachusetts, however, recognizes that the cost of raising a child

## 2. Flat Percentage Formula

The Flat Percentage Formula, the second most popular guideline,<sup>48</sup> is based solely on the income of the noncustodial parent. This formula sets child support at a percentage of the noncustodial parent's income depending on the number of children in need of support.<sup>49</sup> The Flat Percentage Formula assumes that both parents spend their proportional amount of income on the child, and that the custodial parent is directly contributing an equivalent amount of support through cash and in-kind contributions.<sup>50</sup>

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changes as the child grows older. McDonald, *supra* note 17, at 846-47 (quoting Developments, *Massachusetts Child Support Guidelines of 1988*, 30 B.C.L. REV. 601, 653 (1989)). Essentially, the basic child support award is increased by 10% if the age of the oldest child is 7- to 12-years-old, and by 15% if the oldest child is 13- to 18-years-old. *Id.* at 843. This allows the courts to account for variables in the cost of raising children at different ages.

<sup>48</sup> McDonald, *supra* note 17, at 843.

<sup>49</sup> Each state, which uses the formula, varies on whether to use the noncustodial parent's gross or net income. Haynes, *supra* note 4, at 702; McDonald, *supra* note 17, at 843; Williams, *supra* note 22, at 290. "Gross income" means:

all income from whatever source derived, including (but not limited to) the following items; (1) Compensation for services, including fees, commissions, and similar items; (2) Gross income derived from business; (3) Gains derived from dealings in property; (4) Interest; (5) Rents; (6) Royalties; (7) Dividends; (8) Alimony and separate maintenance payments; (9) Annuities; (10) Income from life insurance and endowment contracts; (11) Pensions; (12) Income from discharge of indebtedness; (13) Distributive share of partnership; (14) Income in respect of a decedent; and (15) Income from an interest in an estate or trust.

BLACK'S LAW DICTIONARY, *supra* note 2, at 703 (citing *Heard v. C.I.R.*, 326 F.2d 962, 966 (8th Cir. 1964)).

"Net income" is defined as the "income subject to taxation after allowable deductions and exemptions have been subtracted from gross income. The excess of all revenues and gains for a period over all expenses and losses of the period." BLACK'S LAW DICTIONARY, *supra* note 2, at 1040.

<sup>50</sup> Haynes, *supra* note 4, at 701; McDonald, *supra* note 17, at 843. "In-kind contributions" are the monies spent by the custodial parent directly on the child.

However, once again, the reason for the formula's popularity is its appearance of impartiality. The noncustodial parents, at most, will pay only the amount of their income that they would have spent on the child had they stayed with the family. The same problem exists as in the Income Shares Model—the percentages are not necessarily appropriate.<sup>51</sup> The percentages reveal the amount a parent would have to give to a child in order to maintain the same standard of living that the child should enjoy if the parents were still living together.<sup>52</sup> However, this percentage does not reveal the cost of the child's needs nor the cost of the child were the parents not together. Nonetheless, it is not surprising that so many states have adopted the Flat Percentage Model because, on first impression, it seems very objective.

### 3. *Melson Formula*

Unlike the previous two methods, the Melson Formula focuses on the basic needs of children.<sup>53</sup> Under this formula, a parent is only entitled to the income that maintains his or her position in the

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See Williams, *supra* note 22, at 291 (explaining that “each parent will expend the designated proportion of income on the child, with the custodial parent’s proportion spent directly”).

<sup>51</sup> See *supra* note 41 and accompanying text.

<sup>52</sup> See Betson, *supra* note 39, at 5-7 (computing the amount of income needed to maintain a child’s standard of living).

<sup>53</sup> Betson, *supra* note 39, at 10-11. The three basic principles of the Melson Formula are:

- (1) Parents are entitled to keep sufficient income for their most basic needs to facilitate continued employment.
- (2) Until the basic needs of the child are met, parents should not be permitted to retain any more income than is required to provide the bare necessities for their own self support.
- (3) Where income is sufficient to cover the basic needs of the parents and all dependents, children are entitled to share in any additional income so that they can benefit from the absent parent’s higher standard of living.

Williams, *supra* note 22, at 295 (citing FAMILY COURT OF THE STATE OF DELAWARE, DELAWARE CHILD SUPPORT FORMULA: STUDY AND EVALUATION, REPORT TO THE 132D GENERAL ASSEMBLY (1984)).

workforce.<sup>54</sup> The Melson Formula also grants a fixed share of the parents' income to the children.<sup>55</sup> Accordingly, the court determines each parent's net income and then subtracts a self-support reserve<sup>56</sup> to determine the available income.<sup>57</sup> In addition, the court computes each child's primary support needs, which include childcare and extraordinary medical expenses.<sup>58</sup> This amount is prorated between the parents' available net incomes. Finally, a

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<sup>54</sup> Betson, *supra* note 39, at 10-11; McDonald, *supra* note 17, at 845; Williams, *supra* note 22, at 295.

<sup>55</sup> Betson, *supra* note 39, at 10-11; Williams, *supra* note 22, at 295.

<sup>56</sup> "Self-support reserve" in New York means "135% of the poverty income guidelines amount for a single person as reported by the federal department of health and human services." N.Y. DOM. REL. LAW § 240 (1-b)(b)(6). The poverty level in 1993 was \$6,970.00 for a single individual. EVALUATION REPORT, *supra* note 10, at 65 n.74. A self-support reserve encompasses only that which is necessary to maintain oneself within the workforce including, food, clothing, medical care and job-related training. Thus, parents are not entitled to luxurious expenditures. See Berry, *supra* note 14, at 815 (discussing the definition of a self-support reserve in West Virginia).

<sup>57</sup> Betson, *supra* note 39, at 11; Haynes, *supra* note 4, at 701; McDonald, *supra* note 17, at 845.

<sup>58</sup> Betson, *supra* note 39, at 11; Haynes, *supra* note 4, at 701; McDonald, *supra* note 17, at 845. "Ordinary medical expenses" can be divided into two types: "(1) the costs of medical insurance, and (2) the ordinary, uninsured medical expenses, including deductible, co-payments, and minor expenses that are not covered by insurance." Susan A. Notar & Nicole C. Schmidt, *State Child Support Guideline Treatment of Children's Health Care Needs*, in CHILD SUPPORT GUIDELINES: THE NEXT GENERATION 51, 53 (Margaret C. Haynes ed., 1994). "Extraordinary medical expenses" are discrete, childrearing expenses which vary greatly from family to family and child to child. *Id.*; see, e.g., Schroder v. Schroder, 205 A.D.2d 986, 613 N.Y.S.2d 969 (3d Dep't 1994) (discussing the child support award for a child with Down syndrome); Slankard v. Chahinian, 204 A.D.2d 529, 530, 611 N.Y.S.2d 300, 302 (2d Dep't 1994) (holding that it was error to deduct the child's psychiatric care expenses from the basic child support amount); Sulman v. Sulman, 510 So. 2d 908 (Fla. 1987) (reversing the trial court's order denying a motion to hold a former husband in contempt for his failures to pay the expenses of his minor child's psychologist. The appellate court stated that "[r]ecognition by our state legislature and other jurisdictions of the close connection between physical and mental health leads this court to conclude that responsibility for a child's medical expenses should ordinarily include expenses related to psychological care").

fixed percentage of the absent parent's remaining surplus income is allocated to each child as a standard of living allowance.<sup>59</sup>

Few states have adopted this formula due to the belief that it is too complex because of the many variables that must be considered. In addition, it gives comparable results to the Income Shares Model.<sup>60</sup> The problem with the Melson Formula is that it is not effective when a child's parents have very different incomes and the child lives with the lower wage earning parent. In this scenario, the child is economically disadvantaged.<sup>61</sup>

#### 4. *Income Equalization Model*

The Income Equalization Model intends to protect the children's economic well-being as much as possible,<sup>62</sup> and it achieves its goal by distributing income equally between the households based on the number of people in each.<sup>63</sup> It works by subtracting a self-support reserve from both parents' net income and distributing the resultant sum between the two households in proportion to the number of people residing in each.<sup>64</sup> After the

<sup>59</sup> Betson, *supra* note 39, at 11; McDonald, *supra* note 17, at 845.

<sup>60</sup> Williams, *supra* note 23, at 7.

<sup>61</sup> Betson, *supra* note 39, at 18-19.

<sup>62</sup> Betson, *supra* note 39, at 10; Williams, *supra* note 22, at 302.

<sup>63</sup> See McDonald, *supra* note 17, at 844 (explaining the goal of the Income Equalization Model and the manner in which it is applied).

<sup>64</sup> McDonald, *supra* note 17, at 844; Williams, *supra* note 22, at 302. An example of how the Income Equalization Model works using the 1987 poverty level amounts is as follows:

Non-custodial parent B living alone with net monthly income of \$1,258. Custodial parent A with two children and net monthly income of \$974.

Child Support = [income parent B - poverty level for 1] - [income parent A - poverty level for 3] / 4

Child Support = [1258 - 458] - [974 - 774] / 4

Child Support = 800 - 200/4 = \$150 per person share of surplus income

Child Support = \$450 per month

Williams, *supra* note 22, at 303 (quoting J. Cassetty & F. Douthitt, *The Economics of Setting Adequate and Equitable Child Support Payment Awards*, 12 TEX. B. SEC. REP. FAM. L. exhibit B (1984)).



formula is applied, each household should have equivalent living standards.<sup>65</sup> Currently, no state uses the Income Equalization Model.<sup>66</sup>

## II. NEW YORK STATE CHILD SUPPORT STANDARDS ACT

Prior to the Family Support Act of 1988,<sup>67</sup> New York determined child support by considering general factors such as shelter, food, clothing, medical attention, expenses of confinement, expenses of education, payment of funeral expenses and other proper and reasonable expenses.<sup>68</sup> Under these guidelines, child support awards not only varied considerably, but they often provided inadequate support.<sup>69</sup> Consequently, the passage of the CSSA completely revamped New York's child support methodology.<sup>70</sup> Unlike the old guidelines, the CSSA is based on the

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<sup>65</sup> Betson, *supra* note 39, at 10; Williams, *supra* note 22, at 302.

<sup>66</sup> McDonald, *supra* note 17, at 845. The purpose behind the Income Equalization Model is to ensure that the standard of living of children of divorced parents stays as close as possible to the standard of living enjoyed by the children before the divorce. McDonald, *supra* note 17, at 844. No state adopted this model because our society is wary of making people relinquish almost all of the money they earn. There is a strong capitalistic belief in this country that if you work for your money, it should be yours. Thus, compared to the other models, which require that only a small portion of income be given to the care of the child, the Income Equalization Model seems inherently unfair. However, in mandating that the noncustodial parent give only a small portion of his or her income, the legislature must be aware that the standard of living of custodial parents will most likely drop.

<sup>67</sup> 42 U.S.C. § 667.

<sup>68</sup> N.Y. FAM. CT. ACT § 416 (McKinney 1988).

<sup>69</sup> See, e.g., Tsavaris v. Tsavaris, 50 A.D.2d 602, 607, 375 N.Y.S.2d 139, 141 (2d Dep't 1975) (holding the child support award excessive and accordingly lowering it by \$20.00); O'Neil v. O'Neil, 49 A.D.2d 769, 769, 372 N.Y.S.2d 727, 728 (2d Dep't 1975) (lowering child support award from \$55.00 to \$30.00 per week); Vieira v. Vieira, 48 A.D.2d 912, 912, 372 N.Y.S.2d 987, 987-88 (2d Dep't 1975) (reducing child support from \$75.00 to \$65.00 because the court regarded the original order as excessive); Green v. Green, 47 A.D.2d 921, 921, 369 N.Y.S.2d 1009, 1009 (2d Dep't 1975) (holding that the child support award of \$300.00 per month was not warranted and awarding \$200.00 instead).

<sup>70</sup> When the CSSA first went into effect, its application to all new child support orders entered after its effective date was mandatory, but its application

“principle that children are entitled to share in the income and standard of living of their parents, whether or not they are living together, and that parents living apart from their children are still obligated to share income and resources with their children.”<sup>71</sup> In

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was only permissive in modification proceedings. On July 25, 1990, the New York Legislature amended the CSSA to make its application mandatory in all cases where a court deemed it necessary to modify an existing child support award. 42 U.S.C. § 667; Barbara Gonzo, *Modification of Child Support Awards Under New York Child Support Standards Act*, 11 TOURO L. REV. 485, 488 (1995). See *Borgio v. Borgio*, 186 A.D.2d 131, 131, 587 N.Y.S.2d 951, 952 (2d Dep’t 1992); *Howard v. Howard*, 186 A.D.2d 132, 134, 587 N.Y.S.2d 950, 951 (2d Dep’t 1992) (discussing how public policy justifies the application of the CSSA to pending appeals even though the matter was commenced prior to the effective date of the CSSA).

The CSSA was again amended in 1993 to provide that where a child receives public assistance or services from the Support Collection Unit, a party may apply for modification every 36 months. Gonzo, *supra*, at 489-90. Additionally, the amendment provides that the court should order a new support award if the old award deviates at least 10% from the amount provided by the CSSA, or the support order does not provide for the health care needs of the child. Gonzo, *supra*, at 490; N.Y. DOM. REL. LAW § 240(4).

<sup>71</sup> Memorandum from the State of New York Commission on Child Support: Some Questions Answered About the Child Support Standards Act Establishing Guidelines for Determining Child Support Obligations 2 (1987) (on file with the *Journal of Law and Policy*) [hereinafter Child Support Mem.]; GOVERNOR’S APPROVAL MEM., *supra* note 7; MEMORANDUM OF ASSEMBLYWOMAN HELEN E. WEINSTEIN FOR C. 567 OF LAWS OF 1989 (McKinney 1989) [hereinafter MEMORANDUM OF ASSEMBLYWOMAN].

The goal of the New York Legislature is served better by utilizing the Income Equalization Model rather than the CSSA. See *supra* note 66 and accompanying text. Application of the Income Equalization Model provides the child with the amount that he or she would have received had his or her parents stayed together. Williams, *supra* note 22, at 292. There are no provisions for maintaining a child’s standard of living constant pre- and postdivorce as the New York State Legislature intends through the existing CSSA. For example, if a noncustodial parent earns \$110,000.00 while a custodial parent earns \$25,000.00, and they have one child, that child is only entitled to 17% of the noncustodial parent’s combined income. In contrast, if the parents had stayed together, the child would have received the benefit of both incomes. Subsequently, the child’s standard of living will decrease significantly, while the noncustodial parent’s standard of living will either stay the same or possibly improve. When the custodial parent has a significantly smaller income than the child support obligor—the norm among American families—awards under the guidelines were

addition, the CSSA limits the arbitrariness of court ordered child support awards by curtailing judicial discretion.<sup>72</sup>

The CSSA attempts to create the same monetary situation for children as when their parents were living together, yet provide an objective standard to create a more uniform ruling on child support.<sup>73</sup> The CSSA combines the Income Shares Model and Flat Percentage Model<sup>74</sup>—the CSSA is dependent upon “a calculation of the available combined parental income as the basis for deriving the contribution the parents shall make to the support of their children,”<sup>75</sup> and it applies a strict percentage in accordance with the number of children that need support.<sup>76</sup>

The ideology behind the CSSA represents a shift towards focusing more on the welfare of the child rather than on the monetary sum allotted to meet the basic needs of the child. The CSSA’s goal promotes keeping the child’s standard of living the same after the parents’ separation.<sup>77</sup> In any event, as much as the

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found, at all levels, to ensure that children suffered a disproportionate drop in their standard of living. Garrison, *supra* note 41, at 505 (citing G. Diane Dodson, *Children’s Standards of Living Under Child Support Guidelines: Women’s Legal Defense Fund Report Card on State Child Support Guidelines Executive Summary*, in CHILD SUPPORT GUIDELINES: THE NEXT GENERATION 95, 97 (Margaret Campbell Haynes ed., 1994)).

<sup>72</sup> As there is less judicial discretion and therefore a lack of arbitrariness, the guidelines have brought benefits to the public of “perceived predictability and consistency of treatment.” Williams, *supra* note 23, at 8.

<sup>73</sup> See GOVERNOR’S APPROVAL MEM., *supra* note 7; see also MEM. OF ASSEMBLYWOMAN, *supra* note 71.

<sup>74</sup> See *supra* pp. 288-91 for a discussion of these models.

<sup>75</sup> EVALUATION REPORT, *supra* note 10, at 9.

<sup>76</sup> The percentages set out in the CSSA are based on the “average child-rearing expenditures within the intact, two-parent family; this approach has been encouraged by the federal government, which has commissioned several studies of the marginal costs of child-rearing to guide policy makers.” Garrison, *supra* note 41, at 504. The percentages applied are as follows: “(i) seventeen percent of the combined parental income for one child; (ii) twenty-five percent of the combined parental income for two children; (iii) twenty-nine percent of the combined parental income for three children; (iv) thirty-one percent of the combined parental income for five or more children.” N.Y. DOM. REL. LAW § 240 (1-b)(b)(3)(i)-(v).

<sup>77</sup> GOVERNOR’S APPROVAL MEM., *supra* note 7.

CSSA represents a significant advancement in providing for adequate child support, its covert weaknesses override fair child support awards.<sup>78</sup>

*A. How the New York Child Support Standards Act Works*

Under the New York CSSA, the court's first step in determining child support is to compute each parent's income.<sup>79</sup> The parties, therefore, must provide the court with the following proofs of income: a sworn statement of net worth, a current and representative pay stub and the most recently filed state and federal income tax returns.<sup>80</sup> The court then calculates the available parental income for child support.<sup>81</sup> The CSSA also permits both parents to subtract various expenditures from their total gross income.<sup>82</sup>

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<sup>78</sup> Leehy, *supra* note 16, at 1350. For example, in *Steel v. Steel*, the noncustodial parent's income was five and one-half times more than the amount the custodial parent was earning, yet the court was

asked to pro rate the child support obligation as if a dollar meant exactly the same to each person. This, of course, is not true. When amounts are prorated in accordance with the income, the person with the lesser income will always bear a heavier burden because that person has fewer disposable dollars from which the amount can be drawn.

152 Misc. 2d 880, 883, 579 N.Y.S.2d 531, 535 (Sup. Ct. 1990). In *Steel*, the judge ordered the noncustodial parent to pay 100%, rather than a proportionate share that is in accordance to the CSSA guideline. *Id.* *Steel* exemplifies the change towards concentrating on the best interest of the child rather than simplifying the situation by the use of formulas. However, as seen from *Steel*, depending solely on the guidelines will not always result in an appropriate child support amount.

<sup>79</sup> N.Y. DOM. REL. LAW § 240(1-b)(b)(4), (5).

<sup>80</sup> EVALUATION REPORT, *supra* note 10, at 5. See *Lapkin v. Lapkin*, 208 A.D.2d 474, 617 N.Y.S.2d 327 (1st Dep't 1990) (holding that money received by the father from his parents should be treated as income under the CSSA guidelines).

<sup>81</sup> The parties may agree to a deviation if they are made aware of what they could have received under the CSSA. N.Y. DOM. REL. LAW § 240 (1-b)(h).

<sup>82</sup> The deductions that may be subtracted from the parent's total gross income are: FICA deductions from employment income; child support actually paid to a nonparty child or spouse if court ordered or supported by a written agreement; spousal support actually paid to the other party under certain

Both parents' income<sup>83</sup> are then added, and the court multiplies this combined parental income (up to \$80,000.00) by the percentage set forth by the legislature.<sup>84</sup>

After determining the amount of child support, the computed amount is prorated in proportion to each parent's earnings in the combined parental income.<sup>85</sup> The court then orders the noncustodial parent to pay his or her prorata share of the basic child support obligation. In addition, the court must similarly prorate each parent's share of the child's reasonable future health care expenses which are not covered by insurance.<sup>86</sup> Moreover, if the custodial parent is working, receiving vocational training, or pursuing higher education, then day care expenses must be included in the noncustodial parent's prorated share.<sup>87</sup> The court also has the *discretion* to increase the noncustodial parent's share of the reasonable childcare costs while the custodial parent is seeking

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conditions; New York City or Yonkers income or earning taxes actually paid; unreimbursed employee business expenses except to the extent that these expenses reduce personal expenditures and public assistance and supplemental security income. N.Y. DOM. REL. LAW § 240(1-b)(b)(5)(vii)(A)-(H). Despite the allowance of these deductions, the court of appeals holds that any assets held by a parent may be considered income, even if the parent decides not to utilize the asset to produce income. *Kay v. Kay*, 37 N.Y.2d 632, 636-37, 339 N.E.2d 143, 146, 376 N.Y.S.2d 443, 446-47 (1975).

<sup>83</sup> N.Y. DOM. REL. LAW § 240(1-b)(c)(2).

<sup>84</sup> The percentages set out in the CSSA vary according to the number of children. *See supra* note 76 (delineating the various percentages based on the number of children eligible for support).

<sup>85</sup> For example, if the husband is contributing \$7,000.00 to the combined parental income and the wife is contributing \$3,000.00, then the combined parental income is \$10,000.00. Of this \$10,000.00, the husband contributes 70% and the wife gives 30%. Therefore, if the child support award is \$1,000.00, the husband will pay \$700 or 70%, and the wife will pay \$300 or 30%. This example illustrates the method used to prorate the child support award under the CSSA.

<sup>86</sup> N.Y. DOM. REL. LAW § 240(1-b)(c)(5). The court will determine how the money for future health care expenses is to be paid by the noncustodial parent. For example, the court can determine that payments should be made directly to the health care provider as opposed to the custodial parent. *Id.*

<sup>87</sup> *Id.* § 240(1-b)(c)(4).

employment, or if necessary to satisfy the educational expenses of the child.<sup>88</sup>

If payment of the calculated childcare amount reduces the noncustodial parent's income below the poverty income level for a single person,<sup>89</sup> then only twenty-five dollars is obligatory for basic child support.<sup>90</sup> Where the calculated child support amount decreases the noncustodial parent's income to below the self-support reserve,<sup>91</sup> but not below the poverty level, the basic child support obligation is fifty dollars per month.<sup>92</sup>

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<sup>88</sup> N.Y. DOM. REL. LAW § 240(1-b)(c)(6), (7).

<sup>89</sup> In 1993, the poverty level for a single individual was an annual income of \$6,970.00 as reported by the Federal Department of Health and Human Services. EVALUATION REPORT, *supra* note 10, at 65 n.74.

<sup>90</sup> N.Y. DOM. REL. LAW § 240(1-b)(d). *Contra* Rose v. Moody, 83 N.Y.2d 65, 72, 629 N.E.2d 378, 381, 607 N.Y.S.2d 906, 909 (1993) (holding that a minimum award of \$25.00 was unconstitutional because it conflicted with the provision of the Family Support Act which mandates that each state provide a rebuttable presumption in its guidelines. This allowed indigents to avoid being labeled "deadbeats"), *cert. denied*, 114 S. Ct. 1837 (1994). The importance of not being labeled a *deadbeat* stems from the 1992 Federal Child Support Recovery Act which is aimed at prosecuting spouses who fail to support children living in other states. 42 U.S.C. § 228 (1994).

The federal district court in Arizona recently held the Federal Child Support Recovery Act unconstitutional and dismissed the indictments. *United States v. Mussari*, No. 95-009, 1995 WL 447266, at \*1 (D. Ariz. July 26, 1995); *United States v. Schroeder*, No. 95-010, 1995 WL 447267, at \*1 (D. Ariz. July 26, 1995). The court in *Schroeder* held that payment of child support, like possession of a firearm near schools, does not affect interstate commerce and, therefore, cannot be regulated by federal law. *Schroeder*, No. 95-010, 1995 WL 447267, at \*2. In contrast, a 38-year-old Colorado man was indicted by a federal grand jury in Rhode Island on charges of violating the Federal Child Support Recovery Act. *Child Support Statute Reaches Out for Colorado Man as 'Deadbeat Dad,'* PROVIDENCE J., Aug. 1, 1995, at B1.

<sup>91</sup> See *supra* note 56 and accompanying text.

<sup>92</sup> N.Y. DOM. REL. LAW § 240(1-b)(d). But cf. *Rose*, 83 N.Y.2d at 72, 607 N.E.2d at 381, 607 N.Y.S.2d at 909 (1993), which held that a minimum award of \$25.00 was unconstitutional. Although *Rose* only applies to the \$25.00 minimum, it can be argued that the same rationale should be applied to the \$50.00 minimum. As it is unconstitutional to have a minimum award of \$25.00 for parents below the poverty level, and because it conflicts with the Family Support Act which mandates that each state provide a rebuttable presumption in its guidelines, it would follow that a minimum award of \$50.00 for noncustodial

On the other hand, if the combined parental income exceeds \$80,000.00, the court determines the child support award based on the formula for the first \$80,000.00.<sup>93</sup> For excess income over \$80,000.00, the court may apply the factors set forth in section 240(1-b) of the New York Domestic Relations Law.<sup>94</sup>

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parents whose income would fall below their self-support reserve would also be unconstitutional because it conflicts with the rebuttable presumption requirement of the Family Support Act. In other words, having a minimum child support award contradicts the Family Support Act which allows for an opportunity "in all cases to rebut and drop the support award floor to \$0.00, when impoverished circumstances so dictate." *Id.* at 67, 607 N.E.2d at 379, 607 N.Y.S.2d at 907.

<sup>93</sup> N.Y. DOM. REL. LAW § 240(1-b)(c)(2).

<sup>94</sup> *See* N.Y. DOM. REL. LAW § 240(1-b)(f)(1)-(10). The factors provided by the statute include:

(1) The financial resources of the custodial and non-custodial parent, and those of the child; (2) the physical and emotional health of the child and his [or] her special needs and aptitudes; (3) the standard of living the child would have enjoyed had the marriage or household not been dissolved; (4) the tax consequences to the parties; (5) the non-monetary contributions that the parents will make toward the care and well-being of the child; (6) the education needs of either parent; (7) the determination that the gross income of one parent is substantially less than the other parent's gross income; (8) the needs of the children of the non-custodial parent for whom the non-custodial parent is providing support who are not subject to the instant action and whose support has not been deducted from the income provided, however, that this factor may apply only if the resource available to support the children who are subject to the instant action; (9) provided that the child is not on public assistance (i) extraordinary expenses incurred by the non-custodial parent in exercising visitation, or (ii) expenses incurred by the non-custodial parent in extended visitation provided that the custodial parent's expenses are substantially reduced as a result thereof; and (10) any other factors the court determines are relevant in each case.

*Id.*

The same factors listed in the statute can also be used to rebut the presumption that the award is unjust, whether or not the parental income is above \$80,000.00. *Id.* § 240(1-b)(f). Once the award is computed with the equation, either parent can request that it be changed if he or she feels that it is unjust based on these factors. Courts have wide discretion as illustrated by the statutory clause providing that "[a]ny other factor the court determines are relevant in each case." *Id.* § 240(1-b)(f)(1)-(10).

Alternatively, the court may apply the child support percentage to the income over \$80,000.00 if the needs of the child dictate.<sup>95</sup>

Like the Family Support Act of 1988, the CSSA allows the court to deviate from the guidelines if the court finds that the prorata share of the noncustodial parent is unjust.<sup>96</sup> Accordingly, the court must set forth, in writing, the factors it considered and reasons justifying a lower amount of support.<sup>97</sup> In addition, the parties may enter into agreements or stipulations for incorporation into an order or judgment as to why they have agreed to deviate from the guidelines.<sup>98</sup> "These agreements must contain a statement that the parties have been informed about the law's requirements and that the basic child support obligation derived by applying the percentages is the presumptively appropriate amount."<sup>99</sup> The parties may deviate from the guidelines in a written agreement, and the court must incorporate into its written explanation why there is a deviation.<sup>100</sup> Thus, if the parties enter into an agreement, they

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<sup>95</sup> "Imposing what attorneys called 'a fundamental change' in child support proceedings, the [New York] Court of Appeals ruled . . . that judges may apply the statutory formula for child support awards to parental income above [\$80,000.00] without justifying it so long as the needs of the child dictate." Gary Spencer, *Child Support Rules Interpreted*, N.Y.L.J., May 10, 1995, at 1. See *Cassano v. Cassano*, No. 102, 1995 N.Y. LEXIS 1043 (May 9, 1995) (holding that application of the statutory 17% rule to the excess income above \$80,000.00 was justified and not an abuse of discretion as there was sufficient indication in the record that no extraordinary circumstances were present). *Cassano* has set a precedent towards deciding monetary awards for amounts greater than \$80,000.00. *Id.* at \*11.

<sup>96</sup> N.Y. DOM. REL. LAW § 240 (1-b)(g).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* § 240(1-b)(h). If the negotiated amount differs from the presumptive support figure under the guidelines, the reason and the presumptive support amount must be stated. *Id.*

<sup>99</sup> EVALUATION REPORT, *supra* note 10, at 8. There are many reasons why a custodial parent would agree to a lower child support award. For example, if the custodial parent felt that the noncustodial parent would probably renege in payments, that custodial parent may be willing to take a lower award in return for a higher percentage in the division of assets. In other words, it may be more practical for him or her to take the house now, then to take the chance of not getting the child support due later.

<sup>100</sup> N.Y. DOM. REL. LAW § 240(1-b)(h).



do not have to follow the CSSA guidelines.<sup>101</sup> Consequently, while it appears that the guidelines address and make allowances for the various situations which arise when determining child support amounts, in practice they do not always result in the appropriate amount.

### III. EVALUATION OF THE NEW YORK CHILD SUPPORT STANDARDS ACT

Lack of available data concerning the success rate of the previous and present standards thwarts a successful evaluation of the child support progress.<sup>102</sup> Responding to this deficiency, New York, in compliance with the federal statute,<sup>103</sup> analyzed the CSSA in 1993 and thereby produced the Evaluation Report.<sup>104</sup> The primary questions the Evaluation Report sought to answer were whether the courts fairly and consistently implemented the policies and procedures established in the CSSA, and whether the amounts of child support established under the CSSA guidelines were adequate for New York's children in 1993.<sup>105</sup> The Evaluation Report, as the first of its kind, was restrained by the limited amount of data available. Even so, its conclusions prove relevant to the child support controversy.

This section will analyze the Evaluation Report, discuss the conclusions produced by the Evaluation Report and offer recommendations for improving the CSSA. It is important to emphasize that the Evaluation Report concentrates its analysis on the compliance with, and the efficiency of, the CSSA. The purpose of this Note is to decipher whether the CSSA complies with the New York

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<sup>101</sup> *Id.*

<sup>102</sup> See EVALUATION REPORT, *supra* note 10, at 49 (discussing how most of the cases reviewed were missing information necessary to correctly calculate how the child support obligations were determined).

<sup>103</sup> 42 U.S.C. § 667.

<sup>104</sup> The CSSA was evaluated in compliance with the Family Support Act of 1988 which requires states to evaluate their guidelines every four years. 42 U.S.C. § 667(a). The Evaluation Report was completed by a team of people which includes Marilyn L. Ray from the Finger Lakes Law and Social Policy Center, and Chris Nemeth, Joyce Robinson and Susan Vroman from Rockefeller College.

<sup>105</sup> EVALUATION REPORT, *supra* note 10, at 3.

State Legislature's goal of maintaining a constant standard of living for children, both pre- and postdivorce.<sup>106</sup> The Evaluation Report performed a study of thirty families in an attempt to answer this question.<sup>107</sup> While the guidelines may succeed in allocating a sum of money to meet the basic needs of a child, they are not sufficient in regards to the welfare of the child. The comfort and security of a child's lifestyle should not be affected by his parents' living arrangements; whether they live together or separate. Society cannot lose sight of the welfare of the child.

*A. Analysis of the Evaluation Report*<sup>108</sup>

Surveys were sent out to members of the New York judiciary concerning how they would apply the guidelines to certain hypothetical situations.<sup>109</sup> The surveys were designed to provide

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<sup>106</sup> GOVERNOR'S APPROVAL MEM., *supra* note 7.

<sup>107</sup> EVALUATION REPORT, *supra* note 10, at 115.

<sup>108</sup> The data used in the evaluation was limited because there was "[n]o systematic or complete source of information about child support orders available." EVALUATION REPORT, *supra* note 10, at 14. The second study, available after 1996, will have more pertinent statistics as the authors of the upcoming Evaluation Report can compare the data in the 1993 study to their findings. The Family Support Act mandates that the states' guidelines are evaluated every four years. 42 U.S.C. § 667(b). Accordingly, the legislature must have the CSSA reviewed again in 1996. In any event, even with the deficiencies in the existing data, usable statistics were generated from the small proportion of files obtained on child support orders. *See* EVALUATION REPORT, *supra* note 10, at 40-53 (discussing the limitations of data for analysis).

<sup>109</sup> *See* EVALUATION REPORT, *supra* note 10, at app. B (showing the questionnaires sent out to members of the judiciary). A total of 764 individuals, including family court judges, hearing examiners and judicial hearing officers were sent the report. EVALUATION REPORT, *supra* note 10, at 22. The Office of Court Administration supplied the mailing labels, however, the list was not updated and some of the individuals had retired, moved or died. EVALUATION REPORT, *supra* note 10, at 22-23. In addition, the Office of Court Administration had never made a list of judicial personnel handling cases where issues of child support arise. EVALUATION REPORT, *supra* note 10, at 22. "The inability to determine the total number of members of the judiciary who handle child support matters means that it is impossible to know the response rate for [the] survey." EVALUATION REPORT, *supra* note 10, at 23. To overcome this problem, survey recipients were asked to return it stating that they did not handle such cases.

the Project with a broad understanding of the ways in which child support awards were being determined.<sup>110</sup> Along with these surveys, a one-page questionnaire was sent to all IV-D Unit coordinators,<sup>111</sup> asking them how often they were able to obtain complete financial information required by the CSSA, and more importantly, their opinions on the effectiveness of the Act.<sup>112</sup> Finally, in order to corroborate the findings from the court files reviewed, an examination of a sample of cases identified by the Office of Child Support Enforcement was performed.<sup>113</sup>

The Evaluation Report revealed that the courts are, more often than not, noncompliant with the guidelines' mandatory add-ons.<sup>114</sup>

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EVALUATION REPORT, *supra* note 10, at 23. Consequently, the committee would know who had received the survey and who had not.

<sup>110</sup> EVALUATION REPORT, *supra* note 10, at 22.

<sup>111</sup> There are 58 IV-D Unit coordinators who perform services such as determining paternity, locating derelict parents, establishing and enforcing child support and its collection and distributing of support. *See supra* notes 14-17 and accompanying text. All 58 IV-D coordinators responded to the survey. EVALUATION REPORT, *supra* note 10, at 24.

<sup>112</sup> EVALUATION REPORT, *supra* note 10, at 24.

<sup>113</sup> The Office of Child Support Enforcement handles child support cases for children who are on public assistance, as well as child support cases in which the custodial parent requests the office's assistance. EVALUATION REPORT, *supra* note 10, at 25.

It is difficult to judge the reliability of the statistics based on the lack of information or data needed to make these determinations. *See LaPorta v. LaPorta*, No. 93-08262, 1995 N.Y. App. Div. LEXIS 6258 (2d Dep't June 12, 1995) (discussing the insufficient record which prevented the court from making a ruling); *Juneau v. Juneau*, 206 A.D.2d 647, 649, 614 N.Y.S.2d 615, 616-17 (3d Dep't 1994) (holding that the record was insufficient to support an award of child support); *Mahady v. Megerell*, 625 N.Y.S.2d 834, 834-35 (Fam. Ct. 1995) (discussing the hearing examiner's order that respondent's weekly adjusted gross income be \$218.00. "No findings were made with respect to how that amount was determined"). There is little or no beneficial data available for the time period before the implementation of the guidelines with which to compare the results from the CSSA. If there were accessible data on the awards granted for child support, one could compare and thereby determine how effectively the guidelines work. From the information available, however, it is almost impossible to ascertain whether the guidelines have made an improvement for any children.

<sup>114</sup> EVALUATION REPORT, *supra* note 10, at 80-81. An "add-on" is a condition, discretionary or mandatory, which allows the court to increase the

First, although the guidelines require the court to award childcare costs, the files lack the information as to whether the judges actually award these costs.<sup>115</sup> Necessary childcare is a mandatory add-on when the custodial parent works or is seeking education that will lead to employment.<sup>116</sup> However, if the parent is merely seeking employment, it is at the discretion of the court whether to make the noncustodial parent pay childcare costs.<sup>117</sup> Consequently, the Evaluation Report found that "[n]o cases were found in which this discretionary add-on has been ordered."<sup>118</sup> In addition, even in cases where childcare is mandatory, the Evaluation Report estimated that thirty-one percent of the sample of those files available qualified for childcare awards, but only six percent actually had awards listed.<sup>119</sup> These statistics imply that either judges are not stating in the record that they are ordering childcare awards or judges are not adhering to the law by ordering childcare costs.

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amount of child support as determined by the formula. See EVALUATION REPORT, *supra* note 10, at 80 (discussing the mandatory and discretionary add-ons under the CSSA).

<sup>115</sup> EVALUATION REPORT, *supra* note 10, at 81.

<sup>116</sup> N.Y. DOM. REL. LAW § 240(1-b)(c)(4). See *Vlak v. Nelissen*, 206 A.D.2d 521, 521-22, 615 N.Y.S.2d 66, 66 (2d Dep't 1994) (holding that when the custodial parent is receiving higher education that will lead to employment, childcare expenses are to be prorated between both parents); *Slankard v. Chahinian*, 204 A.D.2d 529, 611 N.Y.S.2d 300 (2d Dep't 1994). In *Slankard*, the court held that the lower court erred when

it subtracted child care expenses from the basic child support amount and when it directed that the former husband and the former wife bear 15% and 85% of his cost, respectively. Where, as here the custodial parent is working, child care expenses shall be prorated in the same proportion as each parent's income . . . .

*Id.* at 530, 611 N.Y.S.2d at 301 (quoting N.Y. DOM. REL. LAW § 240(1-b)(c)(4)(quotation ommited)).

<sup>117</sup> N.Y. DOM. REL. LAW § 240(1-b)(c)(6).

<sup>118</sup> EVALUATION REPORT, *supra* note 10, at 83.

<sup>119</sup> EVALUATION REPORT, *supra* note 10, at 82. See *Lauria v. Lauria*, 187 A.D.2d 888, 889, 590 N.Y.S.2d 559, 560 (3d Dep't 1992) (holding that the trial court erred by deviating from the CSSA guidelines by excusing the noncustodial parent from paying his proportionate share of child's day care costs during work hours before and after school).

In regard to the mandatory add-on of health care costs not covered by insurance, the Evaluation Report also revealed that courts have not prorated these expenses in the same proportion as each parent's income is related to the combined parental income.<sup>120</sup> Because health care costs are mandatory add-ons, all orders should include health care coverage; however, according to the Evaluation Report, only thirty percent of the cases ordered specific payments on children's health care costs not covered by insurance.<sup>121</sup> Furthermore, in forty-eight percent of those cases, the health care costs were shared equally by both parents, even though one parent's income was likely higher than the other parent's.<sup>122</sup> The Evaluation Report stated that in only eighteen percent of the cases were the health care costs shared in proportion to each parent's respective income.<sup>123</sup>

The present or future educational needs of children is another discretionary add-on.<sup>124</sup> While courts are not required to record in the file the amount awarded for education, an exact amount was listed in one percent of the cases.<sup>125</sup> Although education is a discretionary add-on, it seems reasonable that if a noncustodial parent can afford to send his or her child to school, he or she should be required to do so in conjunction with the custodial parent. In today's society, where education is looked upon as a basic need in life to survive, the law should require the courts to

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<sup>120</sup> EVALUATION REPORT, *supra* note 10, at 82-83. See, e.g., *Vlak*, 206 A.D.2d at 522, 615 N.Y.S.2d at 66-67 (holding that the trial court improperly failed to order the noncustodial parent to provide for his child with health insurance coverage).

<sup>121</sup> EVALUATION REPORT, *supra* note 10, at 82. See, e.g., *Lauria*, 187 A.D.2d at 889-90, 590 N.Y.S.2d at 560-61 (holding that the lower court erred in excusing the noncustodial parent from paying his proportionate share of the child's health care).

<sup>122</sup> EVALUATION REPORT, *supra* note 10, at 83. It is unlikely that in 48% of the cases, parents shared similar incomes. The Evaluation Report does not state how disparate the parents' incomes are; however, where the parents involved had similar incomes, ordering each to pay half was a fair judgment.

<sup>123</sup> EVALUATION REPORT, *supra* note 10, at 83.

<sup>124</sup> N.Y. DOM. REL. LAW § 240(1-b)(c)(7).

<sup>125</sup> EVALUATION REPORT, *supra* note 10, at 84.

add-on educational costs when a parent can afford to do so in order to insure that this important need is met.<sup>126</sup>

Finally, the Evaluation Report concluded that child support orders varied from the CSSA in approximately seventy-eight percent of all cases and in eighty-one percent of cases where the guidelines applied.<sup>127</sup> Even when a variation was ordered, most courts failed to provide specific reasons for their variation.<sup>128</sup> Although courts may deviate from the amount mandated by the guidelines after consideration of the ten factors,<sup>129</sup> the courts are

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<sup>126</sup> Because the child resides with the custodial parent, the various costs incurred by the child, including education, are assumed to be taken care of by the custodial parent. See *Friedman v. Friedman*, No. 55347, 1995 N.Y. App. Div. LEXIS 6965, at \*1 (1st Dep't June 27, 1995) (holding that the noncustodial parent is responsible for the tuition of private, religious education of both children through age 21 since religion was "an integral part of the family lifestyle." However, the noncustodial parent was granted reprieve in college expenses due to the assumption that the children will attend college. If the children attend college, the custodial parent will have to return to court to modify the order).

The guidelines' purpose is to ensure that children do not unfairly bear the economic burden of their parents living apart. Sanford S. Dranoff et al., *Child Support Standards Act*, in *NEGOTIATING, DRAFTING, AND MODIFYING MARITAL AGREEMENTS* 75, 77-78 (1990). See *GOVERNOR'S APPROVAL MEM.*, *supra* note 7. For instance, in *Cohen v. Rosen*, the mother appealed the separation agreement nine years later due to her daughter's college expenses. 207 A.D.2d 155, 621 N.Y.S.2d 411 (3d Dep't 1995). The court "ultimately concluded that special circumstances warranted an award of college expenses." *Id.* at 157, 621 N.Y.S.2d at 412. The court also found "no basis in the record for disturbing Family Court's determination to award college expenses or its appointment of those expenses based on the application of the formula set forth in the Child Support Standards Act." *Id.* at 158, 621 N.Y.S.2d at 413. Thus, the custodial parent, able to bear the educational costs, is unfairly penalized because the noncustodial parent, with the comparable financial income, is not held accountable.

<sup>127</sup> EVALUATION REPORT, *supra* note 10, at 140. See *Bohnsack v. Bohnsack*, 185 A.D.2d 533, 586 N.Y.S.2d 369 (3d Dep't 1992) (holding that the lower court erroneously calculated the child support award); *Marcello v. Marcello*, 166 A.D.2d 558, 560 N.Y.S.2d 841 (2d Dep't 1990) (holding that the lower court's award of \$50.00 was too low because the court failed to take into account the noncustodial parent's earning potential).

<sup>128</sup> EVALUATION REPORT, *supra* note 10, at 140.

<sup>129</sup> See *supra* note 94 (listing the factors outlined in the CSSA).

required to list the reasons for their deviations.<sup>130</sup> Even though many cases lack reasons for divergence, it is presumptive to conclude that the courts may not have had a valid reason.<sup>131</sup> In a system where child support previously was at the discretion of the court, it is not surprising to find that many courts are not enumerating their reasons for noncompliance. Factors that lead the court to order larger or smaller awards may be omitted from the record, however, it is important that courts "provide the ultimate facts which support [their] conclusions of law in order to enlighten the parties and to make more effective the review of judgments on appeal."<sup>132</sup> The courts were not adhering to this aspect of the guidelines which is another factor that adds to the child support dilemma. In order to amend this problem, judges must delineate the reasons for a particular amount awarded<sup>133</sup> that will decrease the ambiguity found in their decisions.

### *B. Conclusions of the Evaluation Report*

The Evaluation Report concluded with several findings on the effectiveness of the CSSA. The first conclusion set forth by the Evaluation Report is that the courts were not properly collecting the proofs of income<sup>134</sup> which the parties are required to give to the courts.<sup>135</sup> Fifty-five percent of the cases reviewed failed to

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<sup>130</sup> N.Y. DOM. REL. LAW § 240 (1-b)(f)(1)-(10).

<sup>131</sup> EVALUATION REPORT, *supra* note 10, at 103-04.

<sup>132</sup> *Cassano v. Cassano*, No. 102, 1995 N.Y. LEXIS 1043, at \*10 (May 9, 1995) (quoting 4 WEINSTEIN-KORN-MILLER, N.Y. CIV. PRAC. ¶ 4213.07).

<sup>133</sup> See cases cited *supra* note 113. In addition, lack of verified information in the file inhibits subsequent action on the order. EVALUATION REPORT, *supra* note 10, at 133. If the required information is recorded in the files, it is later available for clarification on what factors a child support order was based upon should one of the parties move to object or appeal or to later modify an order of child support "without this essential information it may be difficult, if not impossible to assess such a claim." EVALUATION REPORT, *supra* note 10, at 133.

<sup>134</sup> Proofs of income include a sworn statement of net worth, a current and representative pay stub and the most recently filed state and federal income tax returns. N.Y. DOM. REL. § 240(1-b)(c)(1); EVALUATION REPORT, *supra* note 10, at 5.

<sup>135</sup> EVALUATION REPORT, *supra* note 10, at 131. The CSSA provides that

include any of the proofs of income required from the noncustodial parents, while sixty-seven percent of the files lacked all of the proofs of income for custodial parents.<sup>136</sup> Sixty-four percent of the files lacked all of the required proofs of income for one or both of the parties.<sup>137</sup>

These statistics, however, fail to take into consideration that the courts need not record parental income information if the couple seeks a "default divorce."<sup>138</sup> This accounts for the high percentage of files which lack the required financial information because any divorce that is obtained as a result of a default will not have this information.<sup>139</sup> In addition, separation agreements do not require attached financial proof. Consequently, while the courts are complying with the separation laws, they are unable to enforce the child support guidelines. The statistics regarding proofs of income, therefore, indicate that the courts are not using the proper income basis to calculate the child support. If the courts do not have access to the proper income amount, they cannot adequately determine child support awards; therefore, even if the judges use the formula correctly, child support awards will not be within the guidelines mandated by the CSSA.

In another situation concerning low-income cases, the Evaluation Report indicated that forty-eight percent of the poverty cases, and only ten percent of the self-support cases, fell within the

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where parties failed to give the required financial information to determine gross income, "the court shall order child support based upon the needs or standard of living of the child, whichever is greater." N.Y. DOM. REL. LAW § 240(1-b)(k). Prospectively, it was thought that the stricter requirement in the CSSA would prevail in greater compliance. EVALUATION REPORT, *supra* note 10, at 34 n.51. As these statistics from the Evaluation Report reveal, however, this provision did not make a difference.

<sup>136</sup> EVALUATION REPORT, *supra* note 10, at 132.

<sup>137</sup> EVALUATION REPORT, *supra* note 10, at 132.

<sup>138</sup> EVALUATION REPORT, *supra* note 10, at 14-15. A "default divorce" occurs when the parties come to an agreement to get a divorce, and they then concede to a separation agreement. Subsequently, one party allows the other party to proceed with the divorce without answering the complaint.

<sup>139</sup> Noncompliance with the required proofs of income for noncustodial parents was highest, 74%, in default cases. EVALUATION REPORT, *supra* note 10, at 133.



guideline range.<sup>140</sup> The Evaluation Report suggests that self-support cases deviated from the range to a greater extent than the poverty cases because it is more difficult for judges to determine self-support cases<sup>141</sup> because "self-support" is not clearly defined.<sup>142</sup> On the other hand, poverty level cases are easier to determine because the only qualifier is whether a person's income level falls below a set amount. Thus, the guidelines will often negatively affect those just above the poverty level.

Moreover, the Evaluation Report revealed a disparate correlation between child support amounts and different income groups.<sup>143</sup> According to the data, fifty-one percent of noncustodial parents in the poverty range and sixty-seven percent of those in the self-support range were paying more than the amount they should have paid.<sup>144</sup> These statistics suggest that parents who cannot afford to pay child support are forced to default on their payments, which adds to the child support problem.<sup>145</sup>

The Evaluation Report also analyzed, in thirty intact families,<sup>146</sup> the range of estimates for average expenditures.<sup>147</sup> The Evaluation Report based its statistics on different custodial and noncustodial income numbers, ages of children and utilization of

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<sup>140</sup> EVALUATION REPORT, *supra* note 10, at 66.

<sup>141</sup> The results obtained from the survey sent to the state judiciary help explain why self-support cases deviated more than poverty cases. "Only ten of the 153 respondents recognized the potential for a self-support reserve amount . . . Of those, five correctly recognized that the non-custodial parent was eligible for a self-support reserve calculation, while five thought [that the noncustodial parent] failed to meet eligibility criteria for this consideration." EVALUATION REPORT, *supra* note 10, at 66-68.

<sup>142</sup> The different variable account for the judges difficulty determining self-support cases. For example, the amount of money a person must retain to support his or her minimal needs to maintain his or her position in the workforce will vary according to factors such as food consumption and transportation costs.

<sup>143</sup> EVALUATION REPORT, *supra* note 10, at 137.

<sup>144</sup> EVALUATION REPORT, *supra* note 10, at 137.

<sup>145</sup> However, these awards may be lower than those given previously to the implementation of the guidelines, but once again, because of the lack of data prior to the guidelines, it is hard to determine if there has been a change.

<sup>146</sup> "Intact families" means two-parent households.

<sup>147</sup> EVALUATION REPORT, *supra* note 10, at 117.

childcare.<sup>148</sup> The Evaluation Report found that of the thirty families, fourteen (or forty-seven percent) did not receive a comparable amount of child support to that of an intact family.<sup>149</sup> In fact, these families received child support amounts below the average expenditure range.<sup>150</sup> While nine families (or thirty

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<sup>148</sup> EVALUATION REPORT, *supra* note 10, at 119-23. The findings were compared to child support orders in these 30 families to determine whether the orders required the noncustodial parent to spend a similar amount to what that parent would have spent if the family were still intact. EVALUATION REPORT, *supra* note 10, at 119-23. In effect, the guidelines often generated amounts which were outside the range of average expenditures of the intact family. EVALUATION REPORT, *supra* note 10, at 119-20.

For example, if one family earning a combined income of \$1,500.00, has two children, the amount of the child support award would be \$3,450.00. See EVALUATION REPORT, *supra* note 10, at 119 (showing a chart of a comparison of income spent on child support to estimates of spending for children in households with both parents). According to two types of estimators, the Rothbarth and the Engel, the average expenditures for the intact family would be 34% and 41% of the gross income respectively. The Rothbarth calculates the average expenditures of this family to be \$5,400.00 while Engel finds it to be \$6,135.00. EVALUATION REPORT, *supra* note 10, at 119-24. Even if one takes the average of these two estimates (\$5,767.50), the guidelines' mandated amount is still not sufficient by more than \$2000.00.

Engel and Rothbarth developed methods of estimating expenditures on children under various circumstances. For instance, the Engel estimator, developed in the nineteenth century, based average expenditures on family size in conjunction with food consumption. EVALUATION REPORT, *supra* note 10, at 107-08; Burt S. Barnow, *Economic Studies of Expenditures on Children and Their Relationship to Child Support Guidelines*, in CHILD SUPPORT GUIDELINES: THE NEXT GENERATION 18, 21 (Margaret C. Haynes ed., 1994). On the other hand, the Rothbarth estimator, developed in 1943, assumes that "well-being could be measured by income spent on 'luxuries' such as alcohol, tobacco, entertainment and candy." EVALUATION REPORT, *supra* note 10, at 107-08; Barnow, *supra* at 21.

<sup>149</sup> EVALUATION REPORT, *supra* note 10, at 126.

<sup>150</sup> Consequently, where the amount fell below range, the Evaluation Report indicated that this drop was most likely due to the fact that these families were receiving support from the AFDC. EVALUATION REPORT, *supra* note 10, at 128. However, this explanation is not reassuring because the lack of sufficient child support amounts will decrease the likelihood of the custodial household leaving public assistance. EVALUATION REPORT, *supra* note 10, 128. In contrast, the Women's Legal Defense Fund, which compiled a report on overall state

percent) received amounts of child support that were within the range, seven families (or twenty-three percent) received amounts above the range.<sup>151</sup>

The Evaluation Report also found that the courts, in practice, do not order child support awards within the range established by the CSSA for the applicable cases.<sup>152</sup> Eighty-one percent of the cases studied fell outside the amount mandated by the guidelines.<sup>153</sup> Of the eighty-one percent, fifty-percent of those cases fell below the amount mandated by the guidelines, while thirty-one percent were higher than the amount set by the guidelines.<sup>154</sup> Surprisingly, the data revealed that as the income of the noncustodial parent increased, the percentage of cases below the mandated

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guidelines, found that the "state child support guidelines failed to ensure many children whose parents live separately a minimum decent standard of living, even when public assistance was taken into account and when family income was sufficient to meet this goal." G. Diane Dodson, *Children's Standards of Living Under Child Support Guidelines: Women's Legal Defense Fund Report Card on State Child Support Guidelines Executive Summary*, in CHILD SUPPORT GUIDELINES: THE NEXT GENERATION 95, 98 (Margaret C. Haynes ed., 1994). Thus, while the Evaluation Report may attribute the lower income amounts generated by the guidelines to supplemental aid by AFDC, this might not be an accurate or acceptable assumption. *Id.* The Women's Legal Defense Fund is a national, nonprofit advocacy organization that works at the federal and state levels to develop and promote policies that help women achieve equal opportunity, quality health care and economic security for themselves and their families. *Id.*

<sup>151</sup> EVALUATION REPORT, *supra* note 10, at 126. Where the amounts were above the range, the Evaluation Report explained that this was most likely due to the custodial parent having significant year-round childcare expenses. EVALUATION REPORT, *supra* note 10, at 125-26.

<sup>152</sup> EVALUATION REPORT, *supra* note 10, at 134-35. See *Bohnsack v. Bohnsack*, 185 A.D.2d 533, 586 N.Y.S.2d 369 (3d Dep't 1992) (holding that the lower court erroneously calculated the child support award); *Marcello v. Marcello*, 166 A.D.2d 558, 560 N.Y.S.2d 841 (2d Dep't 1990) (holding that the lower court award of \$50.00 was too low because the court had failed to take into account the noncustodial parent's earning potential).

<sup>153</sup> EVALUATION REPORT, *supra* note 10, at 135. Many were within 2.5% of the guideline in either direction. However, 31% of the orders fell more than six percentage points from the acceptable range, with most of these orders in the downward direction. EVALUATION REPORT, *supra* note 10, at 57.

<sup>154</sup> EVALUATION REPORT, *supra* note 10, at 135.

guideline award generally increased; and as the income of the noncustodial parent decreased, the percentage of cases within and above the guideline award generally increased.<sup>155</sup> Thus, while the CSSA's goal is to maintain children's standard of living constant pre- and postdivorce,<sup>156</sup> the Evaluation Report found that this will not always be the case, even if the guidelines are followed. As illustrated by the Evaluation Report, forty-seven percent of the thirty cases studied which were applicable to the guidelines fell below the range of average expenditures when the guidelines were applied.<sup>157</sup>

In its conclusion, the Evaluation Report found that "the guidelines appear to perform quite reasonably."<sup>158</sup> However, if we consider that about fifty percent of families will be receiving child support amounts that are below the range of average expenditures of intact families, the guidelines cannot be portrayed as "performing reasonably." The Evaluation Report regarded this issue as problematic, concluded that "the state could alter its guidelines to assure that awards are always within range . . . however . . . more complex guidelines may further complicate the task of properly applying the law. . . . [W]e recommend that the state act with caution before modifying the current child support guidelines."<sup>159</sup> As shown by the Evaluation Report, while the guidelines have improved the child support problems in so much that awareness has increased, the courts are not complying with the stipulations, particularly in regards to collecting proofs of income, recording their reasons for awarding a certain amount for child support and ordering awards of child support within the range established by the CSSA.<sup>160</sup>

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<sup>155</sup> See EVALUATION REPORT, *supra* note 10, at 55 (illustrating cases that fell below the amount mandated by the guidelines).

<sup>156</sup> GOVERNOR'S APPROVAL MEM., *supra* note 7.

<sup>157</sup> EVALUATION REPORT, *supra* note 10, at 126.

<sup>158</sup> EVALUATION REPORT, *supra* note 10, at 128.

<sup>159</sup> EVALUATION REPORT, *supra* note 10, at 129.

<sup>160</sup> EVALUATION REPORT, *supra* note 10, at 126-29.

*C. Solution*<sup>161</sup>

In 1992, more than three years after the passage of the 1988 Family Support Act, the Bureau of Census estimated that there were 10.5 million single-parent households, up from 3.8 million in 1970 and 8.8 million in 1985.<sup>162</sup> The Evaluation Report found, more importantly, that many single-parent households had income levels below the federal poverty level guidelines, and that one of the underlying factors contributing to this predicament was the "absence of child support orders and the inadequacy of the amounts of child support when ordered."<sup>163</sup> Based on these findings, the need for stronger child support standards is evident. When parents divorce, children should not have to suffer economic hardship simply because their parents reside in different homes and the state fails to properly enforce the child support laws.<sup>164</sup>

The legislature must correct the problems with the CSSA. It is clear from the Evaluation Report that the CSSA is not working as

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<sup>161</sup> Solutions have been offered to the child support guideline problems. *See, e.g.,* Donald J. Bieniewicz, *Child Support Guideline Developed by Children's Rights Council*, in *CHILD SUPPORT GUIDELINES: THE NEXT GENERATION* 104, 104-05 (Margaret C. Haynes ed., 1994). Bieniewicz's article proposes a new guideline, which ensures that both the economic and emotional needs of the children are met. Bieniewicz's guideline is more accurate than any guideline currently in use in that it makes greater use of actual data on the cost of providing for children. It also allows parents to challenge and rebut the numbers normally used in the guideline for calculating costs of childcare when appropriate. The guideline also acknowledges and credits the costs of direct parenting by both parents. Finally, the guideline more effectively maintains work incentives. What Bieniewicz's model fails to address, however, is second families of either parent, but the Children's Rights Council acknowledges that multiple approaches are possible, provided that the objective is to strike a balance such that each and every child of a parent is treated as having an equal call on the resources of the parent. *Id.*

<sup>162</sup> EVALUATION REPORT, *supra* note 10, at 1 (quoting U.S. BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, HOUSEHOLD AND FAMILY CHARACTERISTICS: 1992, SERIES P-20, NO. 467 (1993)).

<sup>163</sup> EVALUATION REPORT, *supra* note 10, at 1.

<sup>164</sup> GOVERNOR'S APPROVAL MEM., *supra* note 7.

the legislature intended, nor has there been absolute compliance with these guidelines.<sup>165</sup> The New York CSSA is based on the "principle that children are entitled to share in the income and standard of living of their parents, whether or not they are living together, and that parents living apart from their children are still obligated to share income and resources with their children."<sup>166</sup> This goal, however, is not suitable to the methodology used by the legislature.<sup>167</sup> In the typical family where the custodial parent earns significantly less than the child support obligor,<sup>168</sup> the noncustodial parent, the Income Shares Model and the Flat Percentage Model do not protect the child from suffering a disproportionate drop in his or her standard of living.<sup>169</sup> If a proportionate standard of living is truly the goal of the legislature, modifications need to be made on the existing guidelines. One solution is reformatting the guidelines to reflect the Income Equalization Model.<sup>170</sup>

The goal of the Income Equalization Model is to ensure that the standard of living of children of divorced parents stays as close as possible to the standard of living enjoyed by the children before the divorce.<sup>171</sup> This formula subtracts from each parent's income the poverty level of support for each person in the two households,<sup>172</sup> and the remaining money is distributed in proportion to the number of people in each household.<sup>173</sup> This formula ensures that both households are as financially equal as possible. Under this formula, there is not a considerable drop in the child's standard of living in comparison to the noncustodial parent whose standard of living

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<sup>165</sup> See *supra* note 133 and accompanying text.

<sup>166</sup> See Child Support Mem., *supra* note 71, at 2.

<sup>167</sup> See *supra* note 71 and accompanying text.

<sup>168</sup> "A number of studies have found that after parents divorce or families split, children often fall into poverty while fathers' standards of living generally improve." Dodson, *supra* note 150, at 95.

<sup>169</sup> Garrison, *supra* note 41, at 505. See *supra* pp. 288-94.

<sup>170</sup> See *supra* note 71 and accompanying text.

<sup>171</sup> McDonald, *supra* note 17, at 844; see *supra* note 66 and accompanying text.

<sup>172</sup> McDonald, *supra* note 17, at 844; Williams, *supra* note 22, at 302.

<sup>173</sup> See *supra* note 71 and accompanying text.

would inevitably increase.<sup>174</sup> This formula, however, does not take into account allocation for childcare expenses or children's medical expenses. These expenses, therefore, must be mandatory deductions from the net income of the custodial and noncustodial parents.<sup>175</sup>

One advantage that the Income Equalization Model has over the present model is that it takes into account what happens when one spouse remarries and nonparty children need to be accounted for. Nonparty children are taken into account by the use of total net income of each household unit, rather than solely relying on the income of the custodial and noncustodial parents. Consequently, a current spouse of either parent is considered in the formula for purposes of applying the poverty level exclusion. Subsequently, income from that spouse is also included in the total income of that unit. Similarly, if a parent has other dependents, such as children from previous marriages, they also are included in the calculation.<sup>176</sup> Hence, as the formula inherently addresses these problems, parents will not have to repeatedly go back to court for award amendments.

If adopting a new model is not feasible, the legislature must make adjustments in the already existing guidelines to meet its goal.<sup>177</sup> The legislature should address the percentages used in the child support guidelines.<sup>178</sup> The Evaluation Report indicates that the guidelines have not noticeably increased the amounts in child support to meet the average expenditures of the intact family; thus, it appears that the percentages used are outdated and need to be increased.

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<sup>174</sup> Under the Income Shares Model, the child's standard of living will drop considerably. See *supra* note 41 and accompanying text.

<sup>175</sup> Williams, *supra* note 22, at 303.

<sup>176</sup> Williams, *supra* note 22, at 302-03.

<sup>177</sup> GOVERNOR'S APPROVAL MEM., *supra* note 7; MEMORANDUM OF ASSEMBLYWOMAN, *supra* note 73; see McDonald, *supra* note 17, at 845 (explaining the goal of the Income Shares Model as maintaining the amount of money the child would have received from the noncustodial parent had he or she not left the home).

<sup>178</sup> Dodson, *supra* note 150, at 100.

The percentages currently used are based on the child rearing cost analysis overview by Jacques Van der Gaag.<sup>179</sup> His data reflects child rearing costs of intact families instead of postdivorce, two-household families. The cost of maintaining one home between two people is significantly less than each parent having to maintain a separate household. Unfortunately, the New York percentages are still below the percentages recommended by Van der Gaag.<sup>180</sup> Thus, while the Van der Gaag percentages are below the actual cost of raising a child in a single-parent home, New York's percentages are even lower. As discussed earlier, the Evaluation Report found in its study of thirty families that the guidelines, when applied, did not adequately provide amounts that met the range for average expenditures for intact families.<sup>181</sup> Fourteen out of the thirty families fell below the range. Applying this information to the fact that single-parent households are economically more expensive than two-parent households, the interpretation of those findings are drastically worse. The guidelines fail to acknowledge the economic

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<sup>179</sup> Leehy, *supra* note 16, at 1318-19. Jacques Van der Gaag examined the conclusion derived from 11 childrearing cost analyses previously performed. In order to obtain estimates of the cost of a child, Van der Gaag focused on household consumption patterns. While calculating the costs of a child, Van der Gaag assumes that families which spend an equal percentage of their income on food or other commodities are equally wealthy. "In order to calculate the cost of raising a child one need only know how much more income a family with one child must earn in order to spend the same percentage of that income on the commodity in question as a childless couple." Leehy, *supra* note 16, at 1318 n.111 (citing Jacques Van der Gaag, *On Measuring the Costs of Children in III Child Support Technical Papers*, INSTITUTE FOR RESEARCH ON POVERTY, SPECIAL REP. SERIES NO. SR32C).

<sup>180</sup> "The guideline percentages set forth in the CSSA formula are 32% below Van der Gaag's estimate for the first child, 33% below that for the second, 41% below that for the third, and 44% below that for the fourth." Leehy, *supra* note 16, at 1319. The CSSA views extraordinary health care and day care as add-ons while Van der Gaag includes those costs in his data; this may account for some of the discrepancy, but because extraordinary medical expenses "would simply not be a consideration in the vast majority of child support cases," it is insufficient to account for such a large discrepancy from the statistics found in the Evaluation Report. Leehy, *supra* note 16, at 1320.

<sup>181</sup> See *supra* pp. 310-12.



variable of a one-parent household versus a two-parent household as being more expensive.<sup>182</sup>

The percentages adopted by New York "fail to adequately reflect the costs of childcare as we know it today."<sup>183</sup> In *Steel v. Steel*,<sup>184</sup> asserting that "the family cannot live in two households for the price of one," the court refuted the use of strict percentages by awarding a larger child support amount than the one calculated.<sup>185</sup> This factor of single households, as opposed to multiple, should not depend upon a judge's economic insight. Instead, the legislature needs to review the cost of raising a child in a one-parent household to provide a more realistic view of the amount of child support needed.

The legislature needs to make childcare awards for custodial parents who are seeking employment, as well as awards for future educational costs mandatory add-ons. Childcare is one of the main focuses of child support. Custodial parents cannot find jobs if they cannot afford to have day care for their child, whether it is a babysitter or an established day care center. Thus, the childcare provisions of the CSSA need revision by the legislature. As mandatory add-ons, custodial parents would be able to seek employment without having to worry about managing the expensive costs of childcare.<sup>186</sup> Also, if costs of education become a mandatory add-on, they can be computed into the child support amount. Children who want to attend school, having noncustodial parents who can afford the educational costs, would be able to do so without financial hardship.

Finally, the legislature needs to enact a mandatory add-on to child support awards for children contingent upon their age and

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<sup>182</sup> Barnow, *supra* note 148, at 26.

<sup>183</sup> Leehy, *supra* note 16, at 1320.

<sup>184</sup> 152 Misc. 2d 880, 885, 579 N.Y.S.2d 531, 535 (Sup. Ct. 1990).

<sup>185</sup> *Id.*, 579 N.Y.S.2d at 535.

<sup>186</sup> The goal of the CSSA is to maintain a child's standard of living. Dodson, *supra* note 150, at 99. By making childcare costs a discretionary add-on, the legislature ignores the income lost by the custodial parent to supplement childcare responsibilities and, consequently, income which would enhance the child's standard of living. *Id.*

their increased needs.<sup>187</sup> In *Berg v. O'Leary*,<sup>188</sup> the appellate division commented that "[a]lthough the dissent attempts to trivialize the mother's case by referring to her 'lament' that she would like to provide her daughter with more than three sweaters per year, this ignores the obvious fact that this growing child's needs simply cannot be met on a weekly contribution of \$25."<sup>189</sup> It is obvious that a child of sixteen is a greater expense than a child of two months. If New York considered the increase of child support expenses in relation to a child's age, a parent would not have to return to court to have the award amount increased every time the child's needs changed because of age.<sup>190</sup>

## CONCLUSION

The Evaluation Project Report of 1993 suggests that if the courts implement and comply with the guidelines, child support awards would inevitably be appropriate. However, in keeping with the goal of maintaining a child's standard of living pre- and postdivorce, this would not occur. The Report also concluded that not all families are even guaranteed an amount of child support that would meet the average amount of expenditures of an intact family. In view of this finding, a single-parent household would inevitably fare worse.

It is evident that the CSSA does not carry out the goal intended by the legislature. Consequently, the model on which the CSSA is

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<sup>187</sup> Massachusetts uses a mandatory add-on based upon the child's needs and age. McDonald, *supra* note 17, at 846-47. Under the Massachusetts formula, the basic child support award is increased by 10% if the age of the oldest child is under 12-years-old, and by 15% if the oldest child is 13- to 18-years-old. McDonald, *supra* note 17, at 847.

<sup>188</sup> 193 A.D.2d 732, 597 N.Y.S.2d 733 (2d Dep't 1993).

<sup>189</sup> *Id.* at 734, 597 N.Y.S.2d at 734.

<sup>190</sup> See *Cheng v. Mcmanus*, 178 A.D.2d 906, 908, 577 N.Y.S.2d 944, 946 (3d Dep't 1991) (holding that increased cost of providing for two teenagers did not warrant an increase in child support); Peter Pae, *Court Ups Cook Payment; Child Support Doubled to \$5000 Monthly*, WASH. POST, Aug. 4, 1995 at D1 (discussing Suzanne Cooke, ex-wife of Redskins professional football team owner Jack Kent Cooke, increase in child support payments because of the increased costs of raising her daughter due to her age).

based should be reevaluated. If the guideline model is not changed, the legislature must improve the CSSA by increasing the percentage taken from the combined parental income to reflect the amount it presently costs to raise a child in a single-parent household, and the discretionary add-ons should be made mandatory.<sup>191</sup> With these changes, the child support guidelines should begin to become more effective in helping maintain a child's standard of living and, more importantly, the child's well-being.

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<sup>191</sup> Linda H. Elrod, *Adding to the Basic Support Obligation*, in CHILD SUPPORT GUIDELINES: THE NEXT GENERATION 62 (Margaret C. Haynes ed., 1994) "Those who draft guidelines should strive to apportion the reasonable and necessary expenses [medical, childcare and educational] associated with rearing a particular child through the use of supplemental or additional orders above the guidelines amount." *Id.*