

CHILD SUPPORT COST TABLES: THE CASE FOR SECOND HOUSEHOLD ADJUSTMENT

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OVERVIEW

Child support guidelines were enacted by states due to financial incentives from federal regulations. Implementation of state child support guidelines enable states to obtain federal funding from participation in federal child support programs. Part of the requirements are that child support guidelines be based on economic data on child costs.² Most states—over 35 states—are based on the Income Shares model for child support guidelines. Essentially all Income Shares states have child cost tables based on intact family data—both parents and children live under the same roof. This is due in part on data availability. Data are readily available for intact households but the number of observations of data that are available for single-parent households is very limited. Use of intact family data also is due in part to the view that children of divorce are entitled to an intact family standard of living as if the divorce never had occurred.

However, it can be and should be argued that the use of intact family data for child cost tables conflicts with the traditional approach to child support based on the legal concept of “needs and ability to pay.” This refers to the needs of the child and ability of the parents to pay. Parents of divorce or unwed situations live in separate households. Ability to pay is reduced by having to pay two sets of mortgages or rent payments instead of one. There are two sets of household utilities (water, electricity, cable, telephone, and Internet services) instead of one set shared by both parents.

Importantly, there are strong arguments for constitutional implications including, but not limited to due process, constitutional vagueness and ambiguity, and equal protection. Arguably, all child

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² See 45 CFR 302.56.

support cases that rely upon presumptive child support obligations based on intact family child costs open Pandora's box of constitutional challenges to those support awards. Under constitutional concepts of due process, when the assumed facts of a presumption no longer exist in case facts, the presumption is rebutted or set aside. Similarly stated, the underlying facts (intact household) must be proven before the presumption can be applied (the related child support award is appropriate). In all cases for child support when the award is being established, the presumption of intact family child costs should be rebutted under due process. That is, a presumption of child costs from intact family data is unconstitutional under due process. There also is a question of equal protection. Married families spend on children according to actual available discretionary income. Child support guidelines based on intact family data require noncustodial parents to spend on children based on more discretionary income than is actually available.

Finally, the view that a child is entitled to an intact family standard of living is inappropriate and unreasonable. This gives the child the right to a standard of living that is higher than achievable by the parents for themselves when awards are being established. Each parent can only pay for a single-parent standard of living for themselves.

The consequence of child support involving nonintact households is that it is legally and economically appropriate to base child support on ability to pay that reflects available income to parents living in two separate households. Nonintact family data on child costs are not available in a statistically meaningful degree. However, intact family data can be adjusted to reflect the costs of maintaining a second household and reducing available income. This would involve a second household adjustment based on the cost of maintaining a second household for a single adult. Such an adjusted child cost table results in somewhat lower values for appropriate child costs but reasonably reflects the parents' actual ability to pay.

To conform to legal principles regarding ability to pay and underlying facts of a presumption existing before applying a presumption, states should move from presumptive child cost tables based purely on intact family data to tables based on a second household adjustment applied to intact family data. Just as important, to conform to legal requirements in federal law regarding ability to pay and economic data on child costs, states should move from presumptive child support tables that erroneously rely on intact family data and adjust child support awards based on discretionary income that takes into account second household costs.

INCOME SHARES CHILD SUPPORT GUIDELINES AND THE ISSUE OF INTACT FAMILY DATA OVERSTATING CHILD COSTS

In Income Shares states, a schedule of child costs—typically called Basic Child Support Obligations (BCSO) is based on intact family child cost data. Regarding a legal presumption for child support determination, the issue is whether such a cost schedule reflects actual case facts and reflects the parents’ true ability to pay. That is, does the available income assumed in the guidelines’ presumptive cost schedule reflect the actual available income of the parents?

BACKGROUND AND ASSUMPTIONS OF THE INCOME SHARES METHODOLOGY

Income Shares child support guidelines are a variation of child support guidelines developed by Policy Studies, Inc (Denver, CO) and are known as Income Shares.³ These guidelines are based on national research on child costs as discussed in Thomas J. Espenshade, *Investing in Children: New Estimates of Parental Expenditures*, The Urban Institute Press, Washington, D.C., 1984; David M. Betson, *Alternative Estimates of the Cost of Children from the 1980-86 Consumer Expenditure Survey*, University of Notre Dame, September 1990; and Robert G. Williams, *Development of Guidelines for Child Support Orders: Advisory Panel Recommendations and Final Report*, Policy Studies, Inc., Denver, CO, September 1987, under a grant to National Center for State Courts, Williamsburg, VA. See more recently, David M. Betson, University of Notre Dame, *Parental Expenditures on Children*, a report prepared for the State of California, April 2010. Updates by states for child cost tables for Income Shares states frequently cite these sources as the economic foundation for their child cost schedules.

The relevance of these reports and research related to the version of Income Shares used by states is that they provide the underlying facts for the guidelines for determining if the presumptive awards are economically appropriate when applied in specific child support cases. Income Shares child support guidelines were designed to be applicable only if the household had certain economic characteristics. These underlying economic characteristics of the household include, among others:

- The household is intact.
- The child support award is based on combined parental incomes.
- The household does not have the additional overhead that is incurred by a separated family that would reduce income available to spend on children.

³ Policy Studies, Inc. no longer significantly engages in research on child cost tables. Some personnel from PSI moved to the Center for Policy Research, Denver, CO and continued updating Income Shares cost tables for state child support guidelines. Essentially, the same methodologies are used for standard cost tables updated by the Center for Policy Research. This includes the use of intact family data.

- The cost schedule assumes that the household has income available for children based on both parents sharing adult overhead costs as found in one, combined household.

Professor David Betson's latest study on child cost corroborates that data from married (intact) households are used to estimate child costs in Income Shares child cost schedules. See David M. Betson, *Parental Expenditures on Children: Rothbarth Estimates*, University of Notre Dame, Department of Economics, a report prepared for the State of California, April 2010, p. 4.

The data used in this study are from the interview component of the CEX [BLS' Consumer Expenditure Survey] beginning in the first quarter of 2004 through the first quarter of 2009. Consumer units are interviewed for five quarters, however; only data from the second through fifth quarterly interviews are reported in the public use files. While the BLS treats each quarterly response as an independent observation, our analysis file is constructed from the quarterly files to reflect a family's annual expenditures. While any unit can have up to four quarterly interviews, some households can't be located or refuse to be interviewed and hence will have less than four interviews.

This study was intended to focus upon the spending patterns on children **in families where both parents were present**, consequently the following sample restrictions were made [emphasis added in this quote]:

- The consumer unit contained a **married** couple between the ages of 18 and 60 years old;
- The consumer unit contained six or less children;
- The consumer unit did not have any other adults (individuals 18 years old or older) present in the unit even if these adults were the children of the couple;
- The consumer unit didn't have a change in family size or composition over the period that the unit was interviewed; and
- Only consumer units with at least three completed interviews were included in the final analysis sample.

Use of Intact Family Data on Child Costs Overstates Child Costs for Situations in Which There Are Two, Single-Parent Families

The use of intact family data results in child cost schedules that reflect situations in which for any given level of combined income (of the two parents), there is only one set of adult "overhead" or adult fixed costs such as housing and utilities. Once the fixed costs of a mortgage or rent payment and utilities are paid and shared by the two parents, the remaining after-tax income can be spent on other "things"—including children. In contrast, when the two parents are divorced or unwed, there are two sets of adult overhead for the same level of combined income. There is less after-tax income after paying for housing and utilities. There is less discretionary income available combined for other things—including children.

In each of the two households, there is on average half of the income available less housing and utilities. Less income is spent on children in a divorced situation simply because in part there is less combined income after paying for adult fixed costs. A joint income standard for child support imposes a greater burden on the NCP [non-custodial parent] than the CP [custodial parent]. The NCP is forced to pay for child costs assuming less burdensome intact family overhead that is not the actual circumstance. Instead, the NCP pays child support for intact family expenditure standards but truly can only afford one-parent household spending because of higher overhead. In contrast, the CP receives intact family based child support that exceeds one-parent based child support but actually spends on the child as though the CP is in a one-parent household because that indeed is the case.

Use of intact family data is not consistent with the underlying fact of child support cases that families are not intact and do not live under the same roof with adult costs lower than if living under two separate roofs.

KANSAS' ACKNOWLEDGEMENT OF THE "DISSOLUTION BURDEN"

The state of Kansas has a presumptive child cost schedule that is based on adjusting intact family data for second household expenses. From the economists' report, this adjustment is referred to as the "dissolution burden."

The dissolution burden and corresponding mathematical adjustment, is used to recognize that instead of one intact household paying for housing, utilities, homeowners or renters insurance, etc. there are now two households each paying these expenses. The sum of each household paying for these separately is likely more than for just one joint household. Therefore, the duplicated expenses lead to less discretionary funds available to spend on individuals within the household. The dissolution burden applies equally to both households that have shared custody as well as those where custody resides primarily with one parent.⁴

CHILD SUPPORT GUIDELINES—POLICY VERSUS LEGAL PRESUMPTION⁵

As a transition to the issue of whether Income Shares child cost tables conflict with key legal concepts—such as due process—there is a question of whether the focus should be on whether guidelines are a legal presumption or mere public policy. This is an important issue since many

⁴ *Determining the 2015 Child Support Schedules*, by William T. Terrell and Jodi Pelkowski, Economists, submitted to the Kansas Child Support Guidelines Advisory Committee, 2015.

⁵ Portions of this section are from a report to the State of Alabama by John Remington Graham, "Underlying Legal Principles for Sound Child Support Awards," professor, retired, Hamline University School of Law. This report was part of Appendix I to *Alabama: Economic Report on Alternative Child Support Cost Schedules and Related Issues*, by R. Mark Rogers, March 31, 2006.

states have language in guidelines to the effect that "it is state policy that . . ." for various child support issues. A frequently espoused policy is that it is the state's policy that the child is entitled to the same standard of living if the parents had not divorced. Connecticut goes so far as to also assert that the parents should bear the additional expenses resulting from maintaining two separate households, implying that these expenses should not impact the standard of living of the child.

(d) Basic principles

The Connecticut Child Support Guidelines are based on the Income Shares Model. The Income Shares Model presumes that the child should receive the same proportion of parental income as he or she would have received if the parents lived together. Underlying the income shares model, therefore, is the policy that the parents should bear any additional expenses resulting from the maintenance of two separate households instead of one, since it is not the child's decision that the parents divorce, separate, or otherwise live separately.

Although phrased as a policy, this language clearly indicates the existence of the economic reality that there are additional expenses from maintaining a second household and that this would reduce available income and spending on the child. Essentially, the natural impact of maintaining two households would be less spending on the child were it not for the imposed higher spending from child support guidelines based on a non-existent intact family household. However, the use of the word "spending" assumes that child support presumptive child cost awards (the cash transfer plus the implied obligation of the custodial parent) is actually spent on the child although economic theory says that a parent living in a single parent household will spend as a single parent instead of as a parent living in an intact household.

Turning to the questions at hand, what are legal presumptions and how do they differ from public policy? In general, A legal presumption is a legal inference that must be made in light of certain facts. Once the facts are established, the legal inference is made and retained unless rebutted. For child support cases, the legal presumption as implemented by states essentially goes so far as to act as presumed fact in court. Retaining the presumption—at least for child support determination---affect's a party's income, property, and perhaps liberty in some child support situations (arrearages). A public policy is a political decision and generally is not presented as a fact affecting an individual's case in court.

A good example of a public policy is how much in unemployment benefits a worker receives when unemployed. This is a political decision made by a state and is not used as evidence in court. There is no issue before court of loss of property, income or personal liberty as a result of the amount of benefits made available. Because it is policy, it is reasonable to expect some arbitrary values to

affect the amount of benefits set into law for this policy. A presumptive child support award is a legal presumption. It is presented in court, and again, there may be resulting issues of loss of a party's income, property, and perhaps liberty in some child support situations (arrearages). Additionally, inappropriate child support determination can affect the fundamental right of movement. Should arrearages develop (exceeding \$2,500), the obligor parent is subject to denial of a passport or renewal of a passport. From the web site for the federal agency of Administration for Children & Families:

The Passport Denial Program, which is part of the Federal Offset Program, is designed to help states enforce delinquent child support obligations. Under the program, noncustodial parents certified by a state as having arrearages exceeding \$2,500 are submitted by the Federal Office of Child Support Enforcement (OCSE) to the Department of State (DOS), which denies them U.S. passports upon application or the use of a passport service. Noncustodial parents are not automatically removed from the Passport Denial Program even if their arrearages fall below the \$2,500 threshold.⁶

Inappropriate child support determination also limits the fundamental right of movement through driver's license suspension.

P.L. 104-193, the 1996 welfare reform law, included over 50 provisions to improve the CSE [Child Support Enforcement] program. It was P.L. 104-193 that added the requirement that states have procedures to withhold, suspend, or restrict driver's licenses as a sanction for failure to pay child support.⁷

The most striking feature of child support guidelines is that they amount to *statutory presumptions* that, given certain basic facts about the resources of the parents and the number of children, a certain amount of child support determined by the presumptive formula is presumed by law to be the correct amount that should be paid by one parent to the other. The amount suggested can be rebutted by the evidence introduced in a specific case. But in the absence of such evidence, the amount presumed is the amount ordered.

In any event, these guidelines must conform to a significant body of jurisprudence on the characteristics of statutory presumptions, expounded in the twin cases of *Manley v. Georgia*, 279 U. S. 1 at 6 (1920), and *Western & Atlantic R. R. v. Henderson*, 279 U. S. 629 at 642-644 (1929). The underlying principle in both cases was thus stated in identical language: "A *statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the 14th Amendment.*"

⁶ See: <https://www.acf.hhs.gov/css/resource/overview-of-the-passport-denial-program>

⁷ "Child Support Enforcement and Driver's License Suspension Policies," Carmen Solomon-Fears, Specialist in Social Policy, Congressional Research Service, April 11, 2011, p. 2.

Overall, while a public policy can be determined on some arbitrary factors, a legal presumption should not be arbitrary. It should be based on underlying facts that exist in application of the presumption. And the presumption should be fairly rebuttable. Bright line language establishing a standard of living for a child based on intact family circumstances creates significant hurdles to rebutting the presumption.

NEEDS AND ABILITY TO PAY

The traditional standard for child support determination is a finding of the needs of the child and a determination of whether the obligor has the ability to pay an appropriate share of the child's needs. Most states still have either code or appellate opinion clearly stating that needs and ability to pay is a legal standard of support that remains either controlling or a primary factor in determining child support. Examples can be found in a wide variety of states.

The case that most concisely states this standard may be *Scherberger v Scherberger*, 260 Ga. 635, 398 S.E.2d 363 (1990):

In all cases child support must be assessed by some calculation of the needs of the child and the ability of the parent to pay. *Clavin v. Clavin*, 238 Ga. 421 (233 S.E.2d 151) (1977). Any award, termination, or modification of child support without concern for those issues falls short of the mandate of the law.

The needs and ability to pay standard is one in such that when actual case needs of the child differ from the presumptive needs of the child, then that divergence can be considered as a basis for rebutting the presumptive award. Additionally, when the actual ability to pay of one or both of the parents differs from the presumed ability to pay, then that can be considered as a basis for rebutting the presumptive award.

Pennsylvania statute bases child support determination on the needs of the child ability of the obligor to pay child support. See Pennsylvania Consolidated Statutes, 23 Pa.C.S.A. § 4322(a):

§ 4322. Support guideline.
Statewide guideline--Child and spousal support shall be awarded pursuant to a Statewide guideline as established by general rule by the Supreme Court, so that persons similarly situated shall be treated similarly. The guideline shall be based upon the reasonable needs of the child or spouse seeking support and the ability of the obligor to provide support.

Louisiana Civil Code on child support includes language incorporating needs and ability to pay. From LSA-C.C., Art. 141, Child support; authority of court:

In a proceeding for divorce or thereafter, the court may order either or both of the parents to provide an interim allowance or final support for a child based on the needs of the child and the ability of the parents to provide support.

It is not uncommon for a state to base the needs of the child on an intact family standard of living. However, some states have a strong preference for an intact family definition of needs while other states take the intact family standard of living as guidance. But these standards of needs of the children are balanced against ability to pay.

North Carolina code for child support is broadly based on the needs of the child and earnings of the parents, among other factors. For other factors, including accustomed standard of living of the child and parties, North Carolina code, however, focuses on "due regard" instead of a bright line standard.

From N.C. Gen. Stat. § 50-13.4(c):

(c) Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

AN EXAMPLE QUESTIONING A BRIGHT LINE STANDARD OF INTACT FAMILY SPENDING ON CHILDREN

Does the intact family standard of living for a child pass the common-sense standard of fairness? Let us consider a simple example.

Assume first that there are two parents that are married with one child. The mother and father each has a monthly gross income of \$4,000. The intact family standard of living for the parents and child is based on \$8,000 per month spent "under one roof." Then assume that the parents divorce and set up two separate households. Each household has a standard of living based on \$4,000 per month in income. Each parent enjoys a standard of living based on \$4,000 in monthly income. However, the intact family standard of living presumption essentially states that the child has a legal right to an \$8,000 per month income standard of living. How does the child have a right to a standard of living that is based on twice the income that each parent bases their own standard of living? How does the child have a right to a higher standard of living than both parents can provide for themselves? The intact family standard of living makes no sense in nonintact family situations. It is irrational and unreasonable.

Some might argue that the transfer of income from child support payments does provide the means for an intact family standard of living for the child. However, the payor clearly remains in a \$4,000 standard of living (or less after paying child support). Does the custodial parent use the child support payment to lift the child to an intact family standard of living? Is there any reason to expect the custodial parent to spend on the child at an intact family spending level? The custodial parent spends as if the custodial parent is in a single parent household and not in an intact family situation. The custodial parent's spending pattern on the child is this because the custodial parent actually is in a single parent household. Under the intact family standard, the noncustodial parent pays according to having \$8,000 in combined income but the custodial parent spends according to a single parent household. There is disparity between the basis for required payment and actual spending that results from an intact family standard for determining payment for child costs.

Although it is questionable (though highly likely to be inappropriate or unfair) that an intact family standard should be the basis of the children's needs, this research focuses on the ability to pay aspect. The standard Income Shares cost table is based on the parents having available income based on sharing household costs of just one household when, in fact, available income is less than assumed by standard, intact family Income Shares cost tables due to the reduction in available income from the second household's housing costs. For the establishment of child support awards using Income Shares child cost tables based on intact family data, the assumed available income of intact families does not exist.

❖ **For the establishment of child support awards using Income Shares child cost tables, the assumed available income of intact families does not exist.**

For unwed situations, the divergence of reality from the presumptive is especially sharp. Unwed parents and the child frequently never shared an intact household standard of living. Before and after the birth of the child, the parents and child frequently live according to a single-parent household standard of living. In contrast, the child support presumptive is an intact family standard of living that frequently never existed and continues to exist for the parents.

DIFFERENCES IN BUDGET CONSTRAINTS FOR NCP AND CP UNDER INTACT FAMILY ABILITY TO PAY

Traditional economic foundations for consumer behavior provide insight into the impact of intact family ability to pay on noncustodial parents versus custodial parents. The key factor is the parent's budget constraint.

Using a full intact family standard for child costs—based on spending patterns and available income—results in divergent effects on noncustodial and custodial parents. Consumer behavior on spending is limited by the consumer’s budget and choices between different goods and services, including spending on children and spending on other goods and services. The “budget” impact on the noncustodial parent essentially is the legal obligation of child support imposed by the court. The noncustodial parent is required to pay an intact family amount on the children—based on both an intact family spending pattern on children and intact family available income (after paying adult overhead of housing out of after-tax income—all under the assumption that both parents live under the same roof). Under standard Income Shares cost tables and child support guidelines, the noncustodial parent does not have a legal right to choose to spend on the child according to actual economic circumstances—available income is actually that of two single parents, each in a household with one income.

In contrast, the custodial parent does not have a legal requirement to spend on the children according to an intact family standard. The custodial parent generally is free from legally imposed spending other than not leaving the children in a state of abandonment. The custodial parent is allowed to act as a free consumer and to spend rationally according to financial circumstances. The key circumstance is that the custodial parent is in a single parent household and will spend accordingly. The custodial parent spends on the children according to less than an intact family standard. This is done because it is economically rational to act as if the custodial parent is in a single parent household because that actually is the situation.

There is a double standard with the legal presumption of spending on a child according to an intact family standard. The noncustodial parent must by law (the guidelines) spend on the child as if the parents have available income according to living under the same roof. The custodial parent instead chooses to spend on the child according to living with two sets of housing expenses and have less combined available income to spend on non-housing items.

However, basing available income on two incomes in an intact household less the extra cost of housing in a second household places both parents in approximately the same circumstances for available income determining the amount of spending on the children.

PRESUMED FACTS NOT EXISTING IN CASE FACTS

The Incomes Shares child support guidelines are based on economic studies on child costs. The underlying studies have certain underlying facts that are presumed to exist in actual cases. What is

important is that traditional case law on legal presumptions indicates that when the underlying facts for a presumption do not exist in application in a particular case, then that is a basis for setting the presumption aside—or rebutting it. This is a due process issue. See *Leary*, for example:

A statute based upon a legislative declaration of facts is subject to constitutional attack on the ground that the facts no longer exist; in ruling upon such a challenge a court must, of course, be free to re-examine the factual declaration.⁸

While the *Leary* case addressed a constitutional issue, the same reasoning would apply to rebuttal. If presumed facts do not fit case facts, that may be grounds for rebuttal—especially if this divergence fits other standards for rebuttal such “unjust or inappropriate” or “needs and ability to pay.”

RULES OF EVIDENCE SUGGEST THAT BASIC FACTS OF INCOME SHARES’ COST ASSUMPTIONS DO NOT EXIST IN APPLICATION

What do rules of evidence suggest regarding important issues of presumed child costs? *Federal Rules of Evidence, Rule 301, Presumptions in Civil Cases Generally* states:

Presumptions governed by this rule are given the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption establishes the basic facts giving rise to it.

The key portion is “once the party invoking the presumption establishes the basic facts giving rise to it.” Child support guidelines establish a presumption of appropriate child costs based on the number of children and incomes of the parents. The basic facts giving rise to the presumed child cost is the standard Income Shares methodology. This methodology is based on the existence of an intact family which gives rise to the child cost associated with the income of the parents. In the establishment of child support awards, in no case is the existence of an intact family proven—meaning the basic facts given rise to the presumption have not been proven. With no establishment that there is an intact family involved, there can be no resulting child costs that are reflecting intact family facts.

This requirement of establishing the basic facts is seen in rules of evidence established by numerous states. One example is found in *New Jersey Rules of Evidence, Rule 301, Effect of Presumption*:

If no evidence tending to disprove the presumed fact is presented, the presumed fact shall be deemed established if the basic fact is found or otherwise established.

⁸ *Leary v. United States*, 395 U.S. 6 at 32-37 (1969), footnote 68. See also *Block v Hirsh*, 256 US 135, 154-155, 65 L Ed 865, 870, 41 S Ct 458, 16 ALR 165 (1921); *Communist Party v SACB*, 367 US 1, 110-114, 6 L Ed 2d 625, 697, 699 (1961).

Essentially, this rule would require the establishment of the basic fact of the existence of an intact family for the presumed amount of child costs to follow. The level of child costs is dependent on the level of available income which is sharply reduced by the additional adult overhead of second household costs.

Courts interpreting the Constitution have established that irrebuttable presumptions can violate the right to due process of law by denying persons subject to the statute or rule a reasonable opportunity to present specific circumstances to rebut the presumption. The United State Supreme Court articulated this principle in *Bandini Co. vs. Superior Court*, 284 U.S. 8 18-19 (1931):

The State...may provide that proof of a particular fact, or of several facts taken collectively, shall be prima facie evidence of another fact when there is some rational connection between the fact proved and the ultimate fact presumed. The legislative presumption is invalid when it is entirely arbitrary, or creates an invidious discrimination, or operates to deprive a party of a reasonable opportunity to present pertinent fact in his defense.

NO RATIONAL CONNECTION BETWEEN PRESUMED DISCRETIONARY INCOME AND ACTUAL ABILITY TO PAY

Appellate opinions on presumptions frequently focus on the rational connection (or not) between the basic facts and the presumption.⁹ For Income Shares child cost schedules, the basic fact is that the family is intact with a corresponding ability to pay and the presumption is the child cost amount. First, the party invoking the presumption (the state or the party seeking child support) cannot prove the existence of the basic fact—the biological parents are not part of the same intact family as the child. Additionally, there is no rational connection between the basic fact of an intact household and the actual ability to pay (which would give rise to the corresponding child cost amount). There is no rational connection because the parents (including the obligor) do not have ability to pay based on the income and cost structure of an intact family but actually have the cost structure of two, separate households, leaving discretionary income sharply lower than presumed.

As noted above in *Bandini Co. vs. Superior Court*, there is a need to establish some rational connection between the fact proved and the ultimate fact presumed. However, there is no rational connection between intact family discretionary income and non-intact family ability to pay. The use of intact family data is entirely arbitrary. The use of an intact family standard is invidious—it is unfairly discriminating against an obligor and for an obligee. For most unwed situations, the presumption of child costs based

⁹ See for example *Mobile, J & K.C.R. Co. V. Turnipseed*, 219 U.S. 35, 31 S.Ct. 136, 55 L.Ed. 78 (1910) and *Western & Atlantic R. Co. V Henderson*, 279 U.S. 639, 49 S.Ct. 445, 73 L.Ed. 884 (1929).

on an intact family standard is especially arbitrary and invidious. For both divorced situations and unwed situations, the obligor is required to pay on an intact family standard while the obligee spends on single-parent actual circumstances.

Federal regulations on criteria for states establishing child support guidelines give emphasis to ability to pay. The key regulation is 45 CFR 302.56. Subsection (c)(1) gives special emphasis on ability to pay. Overall, the focus is on ability to pay, which would suggest that basing presumed child costs on intact family discretionary income would not meet the intent of regulations for basing child support on actual ability to pay.

45 CFR 302.56 reads in part:

§302.56 Guidelines for setting child support orders.¹⁰

(c) The child support guidelines established under paragraph (a) of this section must at a minimum:

(1) Provide that the child support order is based on the noncustodial parent's earnings, income, and other evidence of ability to pay that [emphasis added]:

(i) Takes into consideration all earnings and income of the noncustodial parent (and at the State's discretion, the custodial parent);

(ii) Takes into consideration the basic subsistence needs of the noncustodial parent (and at the State's discretion, the custodial parent and children) who has a limited ability to pay by incorporating a low-income adjustment, such as a self-support reserve or some other method determined by the State; and

(iii) If imputation of income is authorized, takes into consideration the specific circumstances of the noncustodial parent (and at the State's discretion, the custodial parent) to the extent known, including such factors as the noncustodial parent's assets, residence, employment and earnings history, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers, and record of seeking work, as well as the local job market, the availability of employers willing to hire the noncustodial parent, prevailing earnings level in the local community, and other relevant background factors in the case.

Federal regulations' focus on actual ability to pay has been reinforcement by similar new requirements that states not treat incarceration of an obligor as voluntary unemployment. That is, when an obligor is incarcerated, there is no ability to pay—even though some states have had policies and code allowing courts to impute income to incarcerated obligors.

¹⁰ Revised, effective January 19, 2017.
ROGERS ECONOMICS, INC., 2017

(3) Provide that incarceration may not be treated as voluntary unemployment in establishing or modifying support orders;¹¹

THE RATIONAL RELATIONSHIP TEST

A likely key issue in a constitutional challenge to the use of intact family data for presumptive cost tables is whether there is a rational relationship between intact family discretionary income and spending on children of parents living in separate residences. Some might argue that the two economic concepts trend together. But the higher presumptive dollar levels of spending on children are not supported by discretionary income that does not exist. There can be no rational relationship between levels of spending and discretionary income that does not exist.

Appellate opinion goes into detail explaining key facets of applying the rational relationship test. A example that is comparable to the issue of using intact family data in child support determinations can be found in Georgia appellate opinion, *Avant v. Douglas County*. It involves a case in which the county statutorily limits the number of goats and hogs in residential districts with limits per gross land tract. An important feature of this case is that the ordinance does not meet the rational relationship test after minimal detail is examined.

From *Avant v. Douglas County*, 253 Ga. 225; 319 S.E.2d 442 (1984):

Douglas County brought this complaint against the Avants to enjoin them from violating a section of the county zoning code providing that in R-2 single-family residential districts goats and hogs are "not to exceed a total of one animal per gross acre for a total of three per gross tract(s)." This ordinance also prohibits the pen or lot in which the animals are housed from being located closer than 200 feet to a private residence on adjoining property.

The evidence shows that the Avants' tract consists of approximately 21 acres, and since they began acquisition of this tract in 1966 they have raised anywhere from one to 70 hogs on the property per year.

. . .

We hold that where, as here, a zoning ordinance is applicable to residential districts containing large, i.e., 21-acre tracts, it is unconstitutionally unreasonable and irrational in limiting the number of animals per tract without taking into consideration the size of the tract. "As the individual's right to the unfettered use of his property confronts the police power under which zoning is done, the balance the law strikes is that a zoning classification may only be justified if it bears a substantial relation to the public health, safety, morality or general welfare. Lacking such justification, the zoning may be set aside as arbitrary or unreasonable ..." *Barrett v. Hamby*, supra, 235 Ga. at 265.

¹¹ Revised 45 CFR 302.56, effective January 19, 2017.

While there is an extremely general relationship between regulating the agricultural use of residential properties and the general welfare, there is no reasonable relationship between the definition of a gross tract and the public purpose of this ordinance as stated in the overall limitation of three of the animals per tract. The ordinance is unconstitutional because it does not take into account the size of the tract. It is unreasonable to not do so.

Notably, a key part of the arbitrary standard for violations of due process is the unreasonable facet. It is unreasonable and irrational for presumptive child support dollar amounts to be based on an intact family's ability to pay and not on ability to pay based on separate households. The use of intact family data is arbitrary and clearly unreasonable. In addition to overstating ability to pay, the intact family standard is unreasonable because it grants the child a right to a higher standard of living than either parent can achieve for themselves. There is a substantial difference in what nonintact households can afford to spend on children from what intact family household can spend based on the same combined gross income but sharply higher "adult overhead" costs.

Constitutional challenges to child support guidelines in the past have resulted in appellate opinions that do not address the reasonableness issue of the assumed relationship. As an example, the Georgia Supreme Court in *Georgia Department of Human Resources v. Sweat* [276 Ga. 627; 580 S.E.2d 206 (2003)] addressed the issue of whether child support guidelines based on fixed percentages of gross income pass the rational relationship test. Gross income and spending on children move in the same direction but that is the extent of the relationship. But does gross income reasonably reflect ability to pay specific dollar amounts of child support without delving into other factors? Due to rising income tax rates and changes in spending patterns with rising income (lower spending rates on children at higher incomes), gross income does not reliably tie in with dollar levels spent on children. There is no reliable rational relationship across a wide range of circumstances (low income versus high income) even though the Georgia Supreme Court found fixed percentage gross income guidelines passed the rational relationship test. This appellate court ignored evidence that the presumption was unreasonable and irrational. The appellate court essentially overturned findings of fact by the trial court on unreasonableness without authority to do so.¹²

¹² Findings of fact cannot be set aside by the appellate court unless found to be clearly erroneous." *City of Atlanta v. McLennan*, 240 Ga. 407, 409(2), 240 S.E.2d 881 (1977). See also *Cannon v. Coweta County*, 389 S.E.2d 329. Similarly, even where the standard of proof is the "clear and convincing evidence" test, the factfinding and weighing of evidence is to be done in the trial court and the appellate court's role is to defer to the lower court in the area of factfinding. *In the Interest of E.C.*, 225 Ga.App. 12, 19, 482 S.E.2d 522 (1997).

The *Sweat* decision did not address the issue of whether the use of fixed percentages of gross income was unreasonable and, therefore, should not be used as precedent for child support guidelines passing the rational relationship test.

Likewise, discretionary income for intact families does not reflect a reasonable and reliable rational relationship between ability to pay for parents living in separate households.

Another appellate opinion that dodges correct analysis of a rational relationship regarding child support is *Wayne S. Stillman, v. State of Colorado* and *Bill Owens, Governor*, 87 P.3d 200 (2003). This appellate opinion dismisses a complaint (among others) that Colorado's guidelines are arbitrary without looking into the nature of using intact family data.

Additionally, we conclude that, because it [the state's child support guidelines] approximates the amount of parental income that the child would have received in an intact family, application of the guidelines is not arbitrary, capricious, fundamentally unfair, or coercive.

This opinion does not even address the specific issue of the arbitrariness of using intact family income and spending data. Stating that there is an approximate relationship between the guidelines and intact family spending on children is not the same as saying that use of intact family data is not arbitrary, not unreasonable, and not irrational. That issue of whether using intact family data is wrong simply was not addressed.

The bottom line is that appellate opinion on the constitutionality has not properly addressed the issue of using intact family data is arbitrary, unreasonable, and irrational. The choice of using intact family data is purely arbitrary and completely contrary to facts in child support cases in which the biological parents live in separate households. It is arbitrary and unreasonable to base ability to pay for non-intact families on data for ability to pay from intact families.

SOLUTIONS TO THE PRESUMPTION OF INTACT FAMILY CHILD COST SCHEDULE'S CONFLICT WITH THE FACT THAT CHILD SUPPORT IS APPLIED TO NON-INTACT FAMILY SITUATIONS

There are two economic solutions to the presumption of intact family child costs not fitting case facts of divorced or never married parents:

1. Use single-parent child costs based on an average of the two parents' incomes, or
2. Make adjustments to the intact family data to reflect the additional adult overhead from two single-parent households compared to one intact household.

Use of single-parent data is the more economically sound approach. The child cost schedule should be based on single-parent household data and on an average of the two parents' incomes. Average income is the maximum standard of living that can be sustained in both households.

The problem with this first approach is that there are very few data for single-parent households, especially for moderately high and high incomes. It essentially is not a statistically viable approach.

Regarding the second approach, the Income Shares intact family data on child costs can be at least partially corrected for the additional adult overhead of a second household to be maintained after divorce or in unwed situation. One can deduct the cost of a second mortgage (or rent) and utilities from combined net income. The same child cost study can be used but the net income used should be redefined for this adjustment. The lower adjusted net incomes are associated the same gross income amounts, resulting in lower child cost percentages associated with the various gross income brackets.

Adjusting a standard Income Shares cost schedule for a second household's expenses may be a more "comfortable" approach, given that it keeps the traditional Income Shares cost schedule as its starting point. Additionally, adjusting an intact family data cost schedule for the added cost of a second household is not a novel idea. Kansas has built in such a calculation in its presumptive child cost schedule. Kansas uses a variation of the Income Shares methodology. As noted in the Kansas guidelines:

The [child cost] schedules also include a built-in reduction from average expenditures per child (the dissolution burden), because of the financial impact on the family of maintaining two households instead of one.¹³

It should be noted that the use of a second household adjustment to the standard Income Shares child cost table does not result in a full equivalent of single parent household spending on a child. The resulting cost table still reflects intact family spending but at a level reflecting available income with two sets of adult overhead for housing.

SUMMARY OF WHY CHILD COST TABLES SHOULD USE A SECOND HOUSEHOLD ADJUSTMENT TO INTACT FAMILY DATA ON CHILD COSTS

➤ CONFLICT WITH NEEDS AND ABILITY TO PAY

¹³ See Kansas Judicial Branch, Rules Adopted by the Supreme Court, Rules Relating to District Court, Administrative Order 180, Re: 2003 Kansas Child Support Guidelines, Kansas Child Support Guidelines, II(C).
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- ❖ The needs and ability to pay standard is the traditional “final” factor that determines child support awards in most states.
 - ❖ Use of intact family data (without adjustment) overstates parents’ ability to pay in child support determination.
 - ❖ The intact family standard for child costs gives children an inappropriate right to a higher standard of living (needs) than the parents living under a single-parent standard.
- **CONFLICT WITH REBUTTAL BASED ON UNDERLYING FACTS NOT EXISTING IN CASE**
- ❖ Case law on general issues of due process indicates that a legal presumption should be set aside for situations in which the facts underlying the presumption do not exist in the case to which the presumption is being applied. See *Leary v. United States*, 395 U.S. 6 (1969).
 - ❖ In Income Shares states, the guidelines presume that the parents live in the same household and have an ability to pay accordingly, and do not incur expenses for a second household.
 - ❖ When these assumptions no longer hold true, then the presumption should be set aside.
 - ❖ Also, this issue (the underlying facts do not exist in application) is a variation of the “unjust and inappropriate” issue. It would be unjust and inappropriate to apply a presumption in a situation in which key underlying facts do not exist in application.
 - ❖ The use of intact family data as a presumptive of ability to pay in nonintact families for child support determination is arbitrary and unreasonable.
- **USE OF INTACT FAMILY STANDARD AS “POLICY” DENIES FAIR OPPORTUNITY FOR REBUTTAL**
- ❖ Bright line language establishing a standard of living for a child based on intact family circumstances creates significant hurdles to rebutting the presumption. This denies a fair opportunity for rebuttal—a due process issue.

DEVELOPING AN INCOME SHARES COST SCHEDULE ADJUSTED FOR SECOND HOUSEHOLD EXPENSES

This issue is notably technical and data oriented. It is discussed in a separate, forthcoming paper.

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