Child Support Cost Tables: The Case For Second Household Adjustment

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THE CASE FOR SECOND HOUSEHOLD ADJUSTMENT

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OVERVIEW

Child support guidelines are enacted by states due to financial incentives from federal regulations and in an attempt to make child support determinations more uniform. Implementation of state child support guidelines enables states to obtain federal funding from participation in federal child support programs. Part of the federal regulatory requirements is that child support guidelines be based on economic data on child costs.[2] Most states—about 40 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 where both parents and children live under the same roof. This is due, in part, to data availability. Data are readily available for intact households, but the data that are available for single-parent households is very limited. Use of intact family data also is based on the view that children of divorce are entitled to an intact family standard of living as if the divorce never occurred.

However, 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 children and the ability of the parents to pay. Parents in divorced or unwed situations live in

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[2] See 45 CFR 302.56.

separate households. Ability to pay is reduced by paying two sets of mortgages or rent payments instead of one, and 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 regarding constitutional implications including, but not limited to due process, constitutional vagueness and ambiguity, and equal protection. Arguably, all child support cases that rely upon presumptive child support obligations based on intact family child costs open a Pandora's Box of constitutional challenges. Under constitutional concepts of due process, when the assumed facts of a presumption no longer exist, the presumption is rebutted or set aside. Similarly stated, the underlying facts (intact household) must exist before the presumption is applied (the related child support amount and ultimate award). Arguably, a presumption of child costs arising from intact family data is unconstitutional under due process, and equal protection concepts. Married families spend on children according to actual available discretionary income. The use of child support guidelines based on intact family data regarding the cost of raising a child requires noncustodial parents to spend on children at a level based on assuming the existence of more discretionary income than is actually available to the noncustodial parent.

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 fictional standard of living that exceeds what is achievable by the parents for themselves. The reality is that each parent can only enjoy a standard of living based on a single-parent household.

The problem of using a child support standard involving non-intact households is that it is legally and economically more appropriate to base child support on a realistic ability to pay that reflects available income of parents living in two separate households. Unfortunately, non-intact family data on child costs are not available to a statistically meaningful degree. However, a creative solution exists where intact family data can be adjusted to reflect the costs of maintaining a second household and reducing available income. This involves 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, but more appropriate values of child costs that reasonably reflect the parents' actual ability to pay.

To conform to legal principles, states should move from presumptive child cost tables based on intact family data to tables based on a second household adjustment applied to intact family data.

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 the legal presumption for child support determination, the issue is whether such a cost schedule reflects actual case facts and the parents' true ability to pay. That is, does the assumed income available for child support 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 is that they provide the foundation for the state child support guidelines when determining if the presumptive awards are economically appropriate when applied to 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.

[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 household does not have the additional overhead that is incurred by a separated family that would reduce income available to spend on children.
- 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 <u>where both parents were present</u>**, consequently the following sample restrictions were made [emphasis added in this quote]:
>
> - The consumer unit contained a **<u>married</u>** 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 paint a false financial picture. For example, using intact family data reflects 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 intact, two parent household, the remaining after-tax income is spent on other

"things"—including children. In contrast, when the two parents are divorced or unwed, there are two sets of adult overhead expenses for the same level of combined income. There is less after-tax income after paying for housing and utilities. There is less discretionary combined income available for other things—including children.

In each of the two separate households, there is, on average, half of the income available less housing and utilities. Less income is spent on children in this situation simply because there is less combined income after paying for adult fixed costs. Using a joint income standard for an intact household to establish basic 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 that do not exist. Instead, the NCP pays child support based on intact family expenditure standards, but truly can only afford support based on non-intact family expenditure standards because of the reality of higher overhead resulting from the addition of the other parent's household. In contrast, the CP receives support at a level based on intact family expenditure standards that exceed the reality of the addition of the other parent's household. As a result, the CP is provided a level of support for an intact family as opposed to a one parent household, thereby giving the CP an economic windfall.

Use of intact family data is not consistent with the underlying reality 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"

Only one state—Kansas—has a cost table with a second household adjustment. 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 PRESUMPTION[5]

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 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 for maintaining a second household and that this would reduce available income and spending on the children. Essentially, the natural impact of maintaining two households would be less spending on the children but 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 award (the cash transfer plus the implied obligation of the custodial parent) is actually spent on the child. 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. Economic theory says a household spends according to its budget constraint.

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[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.

The following is a typical comment found in introductory college level microeconomics textbooks regarding the limitations from a household budget.

> Our problem here is to find out how to maximize consumer satisfaction. To do so, we must consult not only our preferences—given by indifference curves—but also our market opportunities, which are given by our available income and prices, called our budget constraint.[6]

That is, household spending is limited by available income and prices paid for goods.

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. The legal inference then is used or followed unless rebutted. For child support cases, the legal presumption acts as presumed fact in court. Essentially, the presumption works as follows: Courts presume that a basic level of child support is warranted based on the combined income of the parents. Using this presumption—at least for a child support determination---may affect 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 the level of support or the rights of the parents.

Consider this: An example of the difference between policy and presumption in the context of child support can be found in New Mexico's child support guidelines statute. In NMSA 40-4-11.1 there is a declaration that the establishment of guidelines in New Mexico establishes the state's policy that there needs to be adequate support for children. A policy is a principle of action adopted by the government.

This is a political decision made by a state and is not used as evidence in court. A great deal of discretion is given to a court to make a decision within the context of public policy. Because it is policy, it is reasonable to expect some arbitrary values to affect the amount of support set into law for this policy. On the other hand, a presumptive child support award is a legal conclusion based upon a particular set of facts. Using the New Mexico example, there is further declaration in NMSA 40-4-11.1 that New Mexico's guidelines serve as a "rebuttable presumption" of child support. There is little discretion allowed with the use of a presumption. In New Mexico, every decree or judgment of child support that deviates from the guideline amount must contain a statement of the reasons for the deviation. NMSA 40-4-11.1. Presumptions carry far more significance in court

[6] See Roger LeRoy Miller, *Economics Today*, 18th Edition, 2016, Pearson Education, p. 475.

and in people's lives than just public policy. A presumption used by the court may result in the loss of a party's income, property, and perhaps liberty in some child support situations (arrearages). Additionally, use of a presumptive child support determination can affect a person's fundamental right of movement. Should arrearages be awarded, 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.[7]

Additionally, use of a presumptive child support determination may also limit 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.[8]

The most striking feature of most child support guidelines is that they amount to *statutory presumptions.* This means that simply based on the income of the parents and number of children, the amount of basic support is determined by the statutory formula and is presumed to be the correct amount that should be paid by one parent to the other. The statutory child support amount can then only be rebutted by evidence introduced in a specific case, but in the absence of such evidence, the presumptive amount is the support ordered.

The use of presumptive child support guidelines give rise 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. 639 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.*"

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[7] See: https://www.acf.hhs.gov/css/resource/overview-of-the-passport-denial-program

[8] "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 may delineate some principle of action determined on some arbitrary factors, a legal presumption cannot be arbitrary. A legal presumption must be based on reliable facts that are used in establishing the presumption. Bright line language establishing a presumptive standard of living for a child based on intact family expenditures creates significant hurdles to rebutting the presumption. Such language denies a fair opportunity for rebuttal.

NEEDS AND ABILITY TO PAY

The foundation for all child support determinations is a balancing of the needs of the child along with the parents' duty and ability to pay for such needs. Most states have either statutes or appellate opinion clearly establishing this balance between the child's needs and parents' ability to pay as the foundational consideration in determining child support. Examples can be found in a variety of states.

In New Mexico, the statutory framework for presumptive child support awards indicates that the purpose of the guidelines is to establish an adequate standard of support, **subject to the ability of parents to pay**.(emphasis added). Consideration of this ability to pay factor is emphasized and supported by the recent case of *Jury v. Jury*, 392 P.3d 242, 2017 NMCA 036 (Ct. App. 2017) (referencing *Spingola v. Spingola*, 1978–NMSC–045, ¶ 24, 91 N.M. 737, 580 P.2d 958).

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 too is 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.

Most often, state child support guidelines base the needs of the child on an intact family expenditure standard of living. 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. Ultimately 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 economic example.

Assume first that there are two parents that are married with one child. The mother and father each have 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 non-intact family situations. It is irrational and unreasonable as such an approach ignores economic realities.

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 result from an intact family standard for determining payment for child costs.

One could argue that the use of an intact family standard results in the payment of alimony by the noncustodial parent to the custodial in the guise of child support. This always occurs under the intact family standard even when the custodial parent has the higher income. This is unjust and inappropriate—especially when such alimony in the guise of child support is not examined for whether standards for alimony are met.

The standard Income Shares cost table is based on the parents having available income due to sharing household costs in 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 presumption 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. Thus, the child support presumption of an intact family standard of living frequently never existed.

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 an 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 presumptive child support guidelines, the noncustodial parent does not have a legal right to choose to spend on the children according to actual economic circumstances.

In contrast, the custodial parent does not have a legal requirement or obligation to spend on the children in accordance with 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 expenditures on the children are in accordance with a single parent household, which is less than the presumed expenditures associated with an intact family standard. Such conduct is economically rational as the expenditures mirror the reality of a single parent household.

This economic reality creates a double standard regarding the legal presumption of spending on a child found in an intact family standard. The noncustodial parent must, by law (the guidelines), spend on the child as if the parents have available income based on an intact household; while the custodial parent may choose to spend on the child in accordance with two sets of housing expenses that have less combined available discretionary income. This situation creates an economic, budgetary and legal consequence based on fantasy instead of reality.

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 economic circumstance of having available income for the support of the children.

PRESUMING FACTS NOT EXISTING IN CASE FACTS?

The Incomes Shares child support guidelines are based on economic studies on child costs. These studies compute the cost of raising a child based on an intact, single household. The underlying studies have certain facts that are presumed to exist in actual cases. What is important is that traditional case law regarding legal presumptions indicates that when the underlying facts for a presumption do not exist, then that is a basis for setting the presumption aside—or recreating the presumption. 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.[9]

While the *Leary* case addressed a constitutional issue, the same reasoning applies to the child support quandary outlined in this paper. 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."

[9] *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).

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

Many states have adopted and follow the Federal Rules of Evidence when it comes to the application of evidence in cases. What do the Federal 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 giving rise to the presumption has not been proven. When there is no establishment that there is an intact family involved, there can be no resulting child costs arising from the intact family fact. Logically following, the presumptive child support guidelines are flawed.

This requirement of establishing the basic facts underlying a legal presumption is seen in rules of evidence of 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.

Essentially, such rules require the establishment of the basic fact of the existence of an intact family in order for the presumed amount of child costs associated with the intact family to follow. In practical terms, courts allow for a challenge to a specific child support award amount. However, the problem is found at that starting point. Litigants must start with a presumption that is flawed. The only mechanism is to argue that the amount in that particular case be changed as opposed to understanding the inherent systemic flaw in the actual support calculations from which litigants then argue for deviation. What this essentially means is that while states may allow parties to challenge the actual support amount ultimately ordered, there generally is no mechanism in

individual support cases to challenge the underlying presumption used to derive the support amount in the first place without resorting to complex, constitutional litigation for every single child support case. This is burdensome and unrealistic, especially at a time with ever increasing dockets clogged with pro se litigants. This systemic flaw effectively establishes statutory frameworks that create non-rebuttable presumptions.

Constitutional jurisprudence establishes that non-rebuttable presumptions violate the right to due process of law by denying persons subject to the statute or rule a reasonable opportunity to present specific facts that 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

Further analysis requires a discussion of the rational relationship principle in the context of constitutional jurisprudence. To pass rational basis review, the challenged law must be rationally related to a legitimate government interest. This level of review is different from the higher levels of scrutiny under the law, but of which is not the subject of this analysis. Appellate opinions on presumptions frequently focus on the rational connection (or not) between the basic facts and the presumption.[10] For Income Shares child cost schedules, the basic fact is that the family is intact with a corresponding ability to pay. The presumption is then the child cost amount that translates into a basic child support amount. When considering this analysis in full, we see several, fatal flaws. First, the party invoking the presumption (the state or the party seeking the child support award) cannot prove the existence of the basic fact—the biological parents are not part of the same intact family as the child. Second, a legitimate argument exists that there is no rational connection between the use of costs in an intact household and the valid governmental interest in promoting the payment of child support. Contrast the use of economic data from an intact household versus separate households has no bearing on the legal obligation of providing of support. The government's interests in promoting child support payments is accomplished even if

[10] 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).

using economic data from separate households. In sum, there is nothing magic about data from intact households that requires its use under the rational relationship level of review.

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 (fact presumed) and non-intact family ability to pay (fact proved). The use of intact family data is entirely arbitrary. The use of an intact family standard is invidious—it is unfairly discriminatory against an obligor and in favor of an obligee. For most unwed situations, the presumption of child costs based on an intact family standard is especially arbitrary and invidious. For both divorced situations and unwed situations, the obligor is required to pay support at a level of an intact family while the obligee spends in accordance with a single-parent household.

Federal regulations establishing criteria for states establishing child support guidelines give special 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 does not meet the intent of the regulations in basing child support on actual ability to pay.

45 CFR 302.56 reads in part:

> §302.56 Guidelines for setting child support orders.[11]
>
> (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,

[11] Revised, effective January 19, 2017.

> 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 is reinforcement by similar new requirements that states not treat incarceration of an obligor as voluntary unemployment. Thus, the fact that an obligor is incarcerated must be recognized as a reason for an inability to pay.

> (3) Provide that incarceration may not be treated as voluntary unemployment in establishing or modifying support orders;[12]

The point of this regulation is to establish that the underlying foundation of the regulations pertaining to the establishment of state child support guidelines is to not only focus on the needs of the child but to consider the ability to pay as an integral part of the calculations. This is pertinent when it's necessary to determine "how" a court determines and considers the ability to pay when this consideration is tied to presumptive figures that are based on inaccurate facts of intact families.

THE RATIONAL RELATIONSHIP TEST

A 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 a legitimate governmental interest.

Appellate opinion goes into detail explaining key facets of applying the rational relationship test. An 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 of the challenged zoning code 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.

[12] Revised 45 CFR 302.56, effective January 19, 2017.

> 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.

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 because it essentially creates a false sense of reality. The use of intact family data is arbitrary and clearly unreasonable. It is unreasonable to base child support awards on discretionary income that does not exist.

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 non-intact 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 always 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. 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.

The *Sweat* decision did not address the issue of whether the use of fixed percentages of gross income was unreasonable. The *Sweat* decision did not examine the lack of relationship between discretionary income and gross income at the appellate level thereby leaving unsettled an important legal issue. Like Georgia, many, if not most, states give little guidance or direction on this issue of the rational relationship test associated with intact economic data as it pertains to child support levels.

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 and a governmental interest.

Appellate opinion on the constitutionality of certain facets of child support guidelines has not fully addressed the issue of using intact family data as arbitrary, unreasonable, and irrational as it is used to create a presumptive child support obligation. 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. Again, it is unreasonable to base child support awards on discretionary income that does not exist and does not further a legitimate governmental interest. The same governmental interest can be protected in other ways that do not violate constitutional principles of arbitrariness, vagueness and reasonableness. Federal litigation may be the option available when states are unable or unwilling to address these important federal constitutional issues. This may include—among other actions—asking federal agencies to stop disbursing federal monies to states when regulations of child support programs are not met.

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.

[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).

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

- The needs and ability to pay standard is the traditional "foundational" 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 non-intact families for child support determination is arbitrary, constitutionally vague 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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