NEW MEXICO LAW REVIEW

49 N.M. L. Rev. 256 (Summer 2019 2019)

Summer 2019

Child Support Cost Tables: The Case for Second Household Adjustment

R. Mark Rogers

David Standridge

CHILD SUPPORT COST TABLES: THE CASE FOR SECOND HOUSEHOLD ADJUSTMENT

R. Mark Rogers and David A. Standridge*

ABSTRACT

In theory, child support is an amount of money payable by one parent to the other to make sure that a child is cared for and shares, to some degree, the standard of living enjoyed by both parents. This theory is quantified in child support guidelines statutes where the actual amount of child support is calculated using economic data. Current guidelines for child support awards in most states are based upon economic data regarding the spending levels of intact households.

The data used in states' child support guidelines are not merely advisory as the phrase "guidelines" may suggest to many. Federal regulations require that guidelines be presumptive in child support determination.[1] That is, the presumptive award is based upon formulas which incorporate economic data on child costs. State presumptive formulas typically apply the intact family child cost data to parental incomes and number of children—and then add other factors, such as health care insurance premiums and child care costs. The presumptive award is the actual award unless one of the parties rebuts the presumption on which the award is based.

The intact family economic data used to calculate child support are misleading because of the failure to consider the economic reality of the existence of two separate households. Parents

* R. Mark Rogers is an economist who specializes in forensic economics, notably for child support, alimony, personal injury, wrongful death, and life care plan projections. He was a member of the 1998 Georgia Commission on Child Support and wrote the minority report that formed the economic foundation for replacing the state's obligor only guidelines with the current guidelines. Contact: RMRogers@mindspring.com, 678-364-9105, Rogers Economics, 141 Iron Oak Drive, Peachtree City, GA 30269, RogersEconomics.com.

David A. Standridge is an attorney practicing in the area of family law with an emphasis on complex custody and child support cases. He has practiced for over 20 years and owns the firm, Justice Legal Group. Contact: DavidS@JusticeLegalGroup.com, 505-880-8737, Justice Legal Group, 1516 San Pedro Dr. NE, Albuquerque, NM 87110, JusticeLegalGroup.com.

The authors extend a special thanks to Amanda Navarro, Esq. and Laura Milus, a law student at the University of Idaho, for editing, which significantly added to the understanding of these issues.

1. States have agreed to comply with federal regulations on child support in order to qualify for federal child support funds.

> *divorce, families split, and partners leave, and where there once was a single, intact household with two parental figures, there now are two households with separated parental figures. Consequently, this means that there is less discretionary income available across the two households because of an increased level of expense required to maintain two households rather than a single, intact household.*

This article focuses on the extra household expenses of an additional single-parent household. Whether the second parent also incurs child-related expenses is a separate issue and is not addressed herein. The key issue is determining whether there should be an adjustment of the available combined income of the parents for purposes of calculating child support when the separated/divorced parents live in two separate households. This article advocates an adjustment of the combined income for purposes of calculating child support to more accurately reflect the true economic condition of the parties and their ability to support the child. A single-adult housing expense is used as an adjustment to reflect increased "adult overhead" and its impact on available income. An adjustment including child costs would double count many (although not all) expenses that merely move from one house to the other house as parenting time shifts between parents. The issue of parenting time costs is best kept as a separate issue and is thus not addressed in this article.

Federal law requires states to adopt guidelines for determining child support obligations. State guidelines establish the presumptive amount of child support obligation due from each parent in each particular case. The use of a bright line standard of using intact family spending data for creating presumptive child support awards creates an unfair legal presumption. Creation of such a legal presumption arguably violates concepts of due process if there is no rational connection between the fact proved and the ultimate fact presumed. Use of this presumptive guideline can be arbitrary because there is usually no connection between the incomes of an intact household and a single parent household. This standard creates a substantial and unfair hurdle to rebut. Accordingly, current guidelines should be adjusted for the additional cost of a second household to accurately reflect actual ability to pay as required by Federal regulation.

OVERVIEW

Child support guidelines are enacted by states due to federal financial incentives[2] and to make child support determinations more uniform.[3] Implementation of state child support guidelines enables states to obtain federal funding from participation in federal child support programs.[4] Part of the federal regulatory requirements is that child support guidelines be based upon economic data on child costs.[5] Most states (about 40 states) establish their child support guidelines

2. *See* 45 C.F.R. § 301.15 (2018).
3. *See id.* § 301.10.
4. *See id.* § 301.15.
5. *See id.* § 302.56(h)(1).

based on the "Income Shares" model.[6] Under the Income Shares model, each party is responsible for his or her prorated share of child-rearing expenditures which come from a presumptive child cost table. The presumptive cost table has child costs rising by the number of children and by the level of combined income. The obligated parent's share of the child costs from this table becomes the base of the support award calculation. A key implication is that the noncustodial parent's obligation depends largely on the child cost amount found in the presumptive cost table.

Essentially, all states that utilize child support guidelines constructed on the Income Shares model use child cost tables based upon intact family economic data, i.e., where both parents and children live under the same roof.[7] This is due, in part, to data availability. Data are readily available for intact households, but the data available for single-parent households are very limited. Use of intact family data is also based upon the assumption that children whose parents divorced are entitled to an intact family standard of living as if the divorce had never occurred.

However, use of child cost tables based on intact family data to create child support guidelines conflicts with the federal regulatory requirement of considering the noncustodial parent's ability to pay.[8] Federal regulation mandates a balancing of the financial needs of the children and the financial ability of the parents to pay.[9] Parents in divorced or unwed situations live in separate households while intact families generally live in the same household. Thus, a parent's ability to pay is dramatically impacted if the parents are unwed or divorced because the parents are paying two mortgages/rents and two sets of household utilities instead of sharing the cost of a single mortgage/rent and a single set of household utilities. Moreover, using economic data for an intact household creates a fictional standard of living that exceeds what is achievable by the parents for themselves. Therefore, the view that a child is entitled to an intact family standard of living in a divorced or unwed situation is inappropriate and unreasonable. It is more appropriate and reasonable to base child support on a realistic ability to pay that accurately reflects available income of parents living in two separate households.

Additionally, use of the Income Shares model that relies on economic data from intact households implicates important constitutional considerations of violations of procedural due process. Procedural due process requires government officials to follow fair procedures before depriving a person of life, liberty, or property.[10] When the government seeks to deprive a person of one of those interests, procedural due process requires, at least, for the government to afford the person notice, an opportunity to be heard, and a decision made by a neutral decision maker.[11] Child support guidelines were developed at the direction of federal law.[12] As a

6. *See Child Support Guideline Models by State*, NAT'L CONF. ST. LEGISLATURES (Feb. 20, 2019), http://www.ncsl.org/research/human-services/guideline-models-by-state.aspx.

7. § 301.15.

8. *See* § 302.56(c)(1).

9. *See id.* § 302.56(h)(1)–(2).

10. *See* U.S. CONST. amend. V.

11. *See* Mathews v. Eldridge, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.").

12. *See* 42 U.S.C. § 667 (2018); 45 C.F.R. § 301.10.

requirement for federal funding, states had to adopt guidelines that would serve as presumptive child support obligations in all child support determinations.[13] These guidelines must be based on valid economic data reflecting various factors, most notably for this paper, the needs of a child and parents' ability to pay.[14] Presumptive guidelines that rely on economic data that do not accurately reflect the reality of every child support situation (i.e., separated household and parents) create a false economic picture. In essence, use of this invalid economic data by the state through presumptive child support guidelines unfairly deprives certain parents (obligors of child support) of property, and sometimes liberty, without affording an appropriate level of process.

By way of example, we consider the case of *Harjo v. City of Albuquerque*.[15] In this case a car owner brought an action against the City of Albuquerque challenging the City's car forfeiture ordinance.[16] The Federal District Court concluded that the ordinance violated procedural due process because of the burden placed on the car owner.[17] The Court stated, "The forfeiture program, however, violates procedural due process, because owners have to prove that their cars are not subject to civil forfeiture."[18] A similar line of reasoning exists here with regards to presumptive child support guidelines that rely on improper economic data. Such use of presumptive guidelines requires obligors to prove that their child support obligation is NOT subject to the presumptive award of the statute. Consequently, the legal mandate of reliance on valid economic data is violated and arguments of due process arise for essentially every case that uses these presumptive guidelines. Accordingly, these potential legal challenges question the feasibility of continuing to use traditional child support guidelines based on intact family data.

Nevertheless, a creative solution exists where intact family data can be adjusted to reflect the costs of maintaining a second (one-adult) household thereby reducing available income used for child support. This approach involves a second household adjustment based on the cost of maintaining a second, one-adult household. 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 and balances same with the financial needs of the child. To conform to legal concepts of due process, states should change from using presumptive child cost tables based on intact family data to tables based on a second household adjustment applied to intact family data. This article is divided into three sections. The first section addresses the economic concerns of the current child support models using economic data from intact families. The second section addresses due process legal challenges of the current child support environment. Finally, the third section offers a realistic solution built on legally and economically valid theories.

13. *See* 45 C.F.R. §§ 301.15, 302.56(f).
14. *See id.* § 302.56(c), (h)(1).
15. Harjo v. City of Albuquerque, 326 F. Supp. 3d 1145 (D.N.M. 2018).
16. *See id.* at 1163, 1165.
17. *See id.* at 1207.
18. *Id.* at 1151.

I. ECONOMIC CONCERNS

A. Income Shares Child Support Guidelines and the Issue of Intact Family Data Overstating Child Costs.

According to the National Conference of State Legislatures, states generally use one of three models to determine the base child support amount due.[19] By far, the majority of states utilize the Income Shares Model to determine the basic child support amount.[20] The Income Shares Model "is based on the concept that the child should receive the same proportion of parental income that he or she would have received if the parents lived together."[21] "In an intact household, the income of both parents is generally pooled and spent for the benefit of all household members, including any children."[22] In Income Shares states, the same assumption is used to establish support of children for households that are not intact.[23] Thus, a schedule of child's costs is based on intact family child cost data that is then used to establish the basic child support obligation of the parents. This basic child support obligation then becomes the legal presumption used in establishing the child support determination for each respective parent.[24] The economic concern is whether such a cost schedule reflects actual case facts and the parents' true ability to pay in a not intact household. Accordingly, the economic needs of the child must be balanced against the parents' ability to pay. This however, begs the question of whether the assumed income available for child support in the guidelines' presumptive cost schedule actually reflects the parents' available income?

B. Background and Assumptions of the Income Shares Methodology.

The foundation and analysis of the income shares model used by a majority of states is found primarily in national research on child costs.[25] The relevance and significance of these reports and research is that they provide the foundation for state child support guidelines when determining if the presumptive awards are economically appropriate as applied to specific child support cases. Income Shares child support guidelines were designed to reflect certain economic characteristics of a household.[26] The characteristics include, among others, an intact household.[27] However, an intact household assumes such household does not have the additional overhead that is incurred by a separated family. Consequently, use of an intact

19. *See Child Support Guideline Models by State*, *supra* note 6.

20. *See id.*

21. *Id.*

22. *Id.*

23. *See id.*

24. *See* 45 C.F.R. § 302.56(f) (2018).

25. *See, e.g.*, DAVID M. BETSON, ALTERNATIVE ESTIMATES OF THE COST OF CHILDREN FROM THE 1980-86 CONSUMER EXPENDITURE SURVEY (INST. FOR RESEARCH ON POVERTY, SPECIAL REPORT NO. 51, 1990); DAVID M. BETSON, PARENTAL EXPENDITURES ON CHILDREN: ROTHBARTH ESTIMATES (2010); THOMAS J. ESPENSHADE, INVESTING IN CHILDREN: NEW ESTIMATES OF PARENTAL EXPENDITURES (1984); OFFICE OF CHILD SUPPORT ENF'T, DEVELOPMENT OF GUIDELINES FOR CHILD SUPPORT ORDERS (1987).

26. *See Child Support Guideline Models by State*, *supra* note 6.

27. *See id.*

household standard assumes that the income available to spend on children has not been reduced by these additional overhead expenses.

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.[28]

"The data used in this study are from the interview component of the [BLS' Consumer Expenditure Survey] beginning in the first quarter of 2004 through the first quarter of 2009."[29]

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:

> · 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.[30]

Once the background and assumptions of the economic approach used by the majority of states (the Incomes Shares Model) are understood, the economic shortcomings of the model become clear. Additionally, use of a **"**model**"** necessarily implies that child cost data used by states are estimates of actual child costs. There is no set of data for **"**actual**"** child costs, only estimates of child costs. Different economists use different approaches, or models, for estimating child costs. The method used by the vast majority of states is the Income Shares Model, which estimates child costs indirectly and with intact family data.[31] This article**'**s focus is not on the reasonableness of the indirect estimation technique, but rather on the use of intact family data to create a presumptive child cost table for states**'** child support guidelines.

C. Use of Intact Family Data on Child Costs Overstates Child Costs for Situations in Which There Are Two Single-Parent Households.

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

---

28. *See* BETSON, *supra* note 25, at 4.

29. *Id.*

30. *Id.* (first emphasis added).

31. *See id* at 13. Though beyond the scope of this article, the current model used in Income Shares estimates of child costs is known as the Rothbarth method, named for the economist who devised the approach. *See id.* Child costs are indirectly estimated based on comparing families with and without children, then determining how much income is required to restore a family's standard of living to pre-child status. *See id.* Child costs are the amount of income needed to restore the former standard of living. *See id.*

for any given level of combined income, 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. Consequently, there is less after-tax income once each party pays for housing and utilities.

In a situation where there are two separate households, there is less of the gross income available for each household. Discretionary income is calculated by subtracting not one set of adult overhead, but two sets of housing and utility costs from the gross income. This results in less available income to spend on children. Less income is spent on children simply because there is less combined income after paying for adult fixed costs. [32] Using a joint income standard for an intact household to establish basic child support imposes a greater burden on the non-custodial parent ("NCP") than on the custodial parent ("CP") because the NCP is forced to pay for child costs that do not exist. [33]In other words, a higher level of intact household spending on children is not achieved in a situation in which available income is less than in an intact household. The NCP pays child support based on intact family expenditure standards, but truly can only afford support based on non-intact family expenditure standards. This limitation results from higher overhead costs incurred on due to the other parent's household. In sum, there is less discretionary combined income available for other things, including children, when there are two separate households.

In contrast, the CP receives child 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. While it may be argued that such a result is inherently consistent with federal regulations'[34] objective to give a "benefit" to the child in the form of support, this result flies in the face of the actual ability to pay. The federal regulations nowhere require a "windfall" result, but instead, contemplate a balanced approach to the consideration of appropriate economic factors impacting on the ability to pay.[35]

Use of intact family data regarding costs schedules is not consistent with the underlying reality of child support cases where families are not intact and do not live under the same roof. [36]

32. *Id.*

33. *See* Smith v. Smith, 626 P.2d 342, 344 (Or. 1980).

34. 45 C.F.R. §§ 301.0–310.40 (2018).

35. *See id.* § 302.56(c), (h)(1).

36. *Smith*, 626 P.2d at 344. ("One such circumstance is often the impossibility of maintaining the same lifestyle that the child would have enjoyed but for the dissolution. In that situation, the child must share the overall burden of the lower standard of living caused by the expense of maintaining two separate households.").

D. Rethinking the Bright Line Standard of Intact Family Spending on Children.

Is it fair to use an intact family standard of living to determine child support? 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 because 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 on the child 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 such 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. Therefore, using an intact family standard for determining payment for child costs creates a significant disparity between the basis for required payment and the actual spending.

Additionally, assuming such child support paid by the NCP is not actually spent on the child, one could argue that the use of an intact family standard results in the payment of tax-free alimony to the CP in the guise of child support. This scenario generally occurs under the intact family standard even when the custodial parent has the higher income.[37] This is unjust and inappropriate, especially when such alimony in the guise of child support is not examined for whether standards for awarding alimony are met.

The standard Income Shares cost table assumes parents have available income while sharing household costs in one household.[38] However, available income for non-intact households is less than that assumed by standard, intact family Income Shares cost tables because the available income is reduced by the second household's housing costs. Therefore, using Income Shares child cost tables (based

37. *See Child Support Guideline Models by State*, *supra* note 6.

38. *See id.*

on intact family data) to determine child support awards assumes a nonexistent available income.

For unwed situations, the divergence from reality is especially sharp. Unwed parents and the child usually never share an intact household standard of living.[39] Before and after the birth of the child, the parents and child usually live according to a single-parent household standard of living. Therefore, the child support presumption of an intact family standard of living is based upon a standard that never even existed.

E. Differences in Budget Constraints for the NCP and the CP Under Intact Family Ability to Pay.

Traditional economic principles on consumer behavior provide insight into the impact of considering the "intact family ability to pay" on the spending patterns on children of noncustodial parents versus custodial parents. The key factor limiting spending is the parent's budget constraint. A budget constraint represents all the combinations of goods and services that a consumer may purchase given current prices within his or her given income.[40] Economic principles on consumer spending behavior use the concepts of a budget constraint and a preference map (how consumers value alternative spending decisions) to analyze consumer choices.

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's spending pattern on children and available income (after paying adult overhead of housing out of after-tax income—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 difference is that the custodial parent is in a single parent household and will spend accordingly. The custodial parent's expenditures on the children are in accordance with a single parent household, which are less than the presumed

39. LINDA WAITE L.J., & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY (2000); Leslie Stratton, *Examining the wage differential for married and cohabiting men*, 40 ECONOMIC INQUIRY, 199–212 (2007).

40. *See, e.g.*, STEVEN A. GREENLAW & DAVID SHAPIRO, PRINCIPLES OF ECONOMICS 2E 28-29, 42 (2018).

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, spend on the child as if the parents have available income based on an intact household,[41] 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 divergent spending behavior creates an economic, budgetary and legal outcome based on fantasy instead of reality.

However, basing available income on two incomes in an intact household minus the extra cost of housing in a second household places both parents in similar footing regarding available income for the support of the children.

II. LEGAL IMPLICATIONS

A. Child Support Guidelines—Policy Versus Legal Presumption.[42]

Before discussing key legal concepts involved with the issues addressed in this article, it is important to recognize the difference between the legal presumption of child support guidelines and the public policy of child support guidelines. Understanding this difference is important because many states have language in child support guidelines that implicate public policy and legal presumptions.[43] Whether child support guidelines are a matter of public policy or legal presumption impacts on further legal discussion and analysis.

The first consideration is that child support guidelines outline a state's public policy concerns. Public policy often reflects the governmental purpose for a law. For example, a frequently espoused public policy regarding child support is that the child is entitled to the same standard of living he would have enjoyed if the parents had not divorced[44]. As a result, most states use the Income Shares Model to

---

41. *See id.*

42. *See generally* JOHN REMINGTON GRAHAM, UNDERLYING LEGAL PRINCIPLES FOR SOUND CHILD SUPPORT AWARDS, *originally printed in* R. MARK ROGERS, ALABAMA: ECONOMIC REPORT ON ALTERNATIVE CHILD SUPPORT COST SCHEDULES AND RELATED ISSUES 90 app. I (2006).

43. *See, e.g.*, N.M. STAT. ANN. § 40-4-11.1 (2008) as an example of delineation of policy and presumption. ("In any action to establish or modify child support, the child support guidelines as set forth in this section shall be applied to determine the child support due and shall be a rebuttable presumption for the amount of such child support." (emphasis added), and in the same statute, "The purposes of the child support guidelines are to:

(1) establish as state policy an adequate standard of support for children, subject to the ability of parents to pay;

(2) make awards more equitable by ensuring more consistent treatment of persons in similar circumstances; and

(3) improve the efficiency of the court process by promoting settlements and giving courts and the parties guidance in establishing levels of awards.").

44. *See, e.g.*, Spingola v. Spingola, 1978-NMSC-045, ¶ 24, 91 N.M. 737, 580 P.2d 958 (providing considerations relevant to determinations of child support obligations, including "what life-style the children would be enjoying if the father and mother were not divorced and the noncustodial parent had [their] level of income" and the "ability of [a parent] to furnish additional advantages to his [or her] children above their actual needs").

fulfill this public policy declaration.[45] Public policy reflects governmental goals and objectives.

However, policy does not always reflect economic reality. Economic principles establish that a household spends according to its budget constraint. 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. . . . Everyone has a budget constraint.[46]

That is, household spending is limited by available income and prices paid for goods. Economic principles clearly indicate that a custodial parent will spend according to single parent available income, which is a lower standard than the intact family standard to which a noncustodial parent is held. Hence, economic principles contradict the validity of stated public policy—ensuring that the child receives spending according to intact family available income.[47] In turn, this conflict implicates that the public policy of using an intact family standard to determine child support awards has little bearing on the real-world outcomes.

Conversely, legal presumptions differ from stated public policy. In general, a legal presumption is a legal inference that must be made in light of certain facts.[48] The legal inference then is used or followed unless rebutted.[49] For child support cases, the legal presumption acts as presumed fact in court.[50] Federal regulations require that states enact child support guidelines that are considered legal presumptions.[51] 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.[52] 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). In comparison, public policy often reflects principles on which laws are enacted. This means that policy is generally a political decision and is not presented as an established fact affecting the level of support or the rights of the parents. The declared policy may reflect the principle on which the guidelines are enacted, but the enactment of the guidelines operates to create a rebuttable legal presumption. Policy is not necessarily law, but a legal presumption creates a legal inference that must be

45. *See Child Support Guideline Models by State*, *supra* note 6.

46. ROGER LEROY MILLER, ECONOMICS TODAY 475 (18th ed. 2016) (emphasis omitted).

47. *See, e.g., Spingola*, 1978-NMSC-045, ¶ 24 (providing considerations relevant to determinations of child support obligations, including "what life-style the children would be enjoying if the father and mother were not divorced and the noncustodial parent had [their] level of income" and the "ability of [a parent] to furnish additional advantages to his [or her] children above their actual needs"); *see also*, N.M. STAT. ANN. § 40-4-11.1 (2008) ("The purposes of the child support guidelines are to: (1) establish as state policy an adequate standard of support for children, subject to the ability of parents to pay . . .").

48. *See, e.g.*, N.M. STAT. ANN. § 40-4-11.1 (2008).

49. *Id.*

50. *See* 45 C.F.R. § 302.56(f) (2018); *see also* ROGERS, *supra* note 42, 90 app. I at 90.

51. *See* § 302.56(f).

52. N.M. STAT. ANN. § 40-4-11.1 (2008).

made in light of the facts of the case. Very simply put, the policy is the reason for the law, but the presumption is the law.

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.[53] Therein is a declaration that the establishment of guidelines in New Mexico establishes the state's policy for providing adequate support for children.[54] 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 New Mexico law that guidelines serve as a "rebuttable presumption" of child support.[55] Additionally, little discretion is allowed for deviating from the presumption because every decree or judgment of child support that deviates from the guideline amount must contain a statement of the reasons for the deviation.[56] This requirement flows from mandatory guideline procedure under federal regulation in which all states must comply when participating in federal child support programs.[57]

Presumptions carry far more significance in court 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 issuance of a passport or renewal of a passport.[58]

"The Passport Denial Program, which is part of the Federal Offset Program, is designed to help states enforce delinquent child support obligations."[59] 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 to the Department of State, which "denies the parents U.S. passports upon application or the use of a passport service."[60] Noncustodial parents are not automatically removed from the Passport Denial Program "even if their arrearages fall below the $2,500 threshold."[61]

Additionally, use of a presumptive child support determination may also limit the fundamental right of movement through driver's license suspension. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 included

53. *Id.*

54. *See id.* § 40-4-11.1(B)(1).

55. *See id.* § 40-4-11.1(A).

56. *See id.*

57. *See* 45 C.F.R. § 320.56(a), (f), (h)(2) (2018).

58. *See Overview of the Passport Denial Program*, OFF. CHILD SUPPORT ENFORCEMENT (Dec. 5, 2017), https://www.acf.hhs.gov/css/resource/overview-of-the-passport-denial-program.

59. *See id.*

60. *See id.*

61. *See id.*

over 50 provisions to improve the Child Support Enforcement program.[62] It was the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 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.[63] Additionally, states generally revoke or suspend business and occupational licenses based on child support arrearages.[64] These are a few real-world examples of the significance of the legal presumption in the context of child support.

The most striking feature of child support guidelines is that they amount to *statutory presumptions* and are required under federal regulation. 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. [65]

The use of presumptive child support guidelines gives rise to a significant body of jurisprudence on the characteristics of statutory presumptions, expounded in the twin cases of *Manley v. Georgia*,[66] and *Western & Atlantic Railroad v. Henderson*.[67] 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 Fourteenth Amendment.*"[68]

Overall, while a public policy may delineate some principle of action determined on some arbitrary factors, a legal presumption cannot be arbitrary.[69] A legal presumption must be based on reliable facts that are used to establish 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. Additional expense, time and effort on the part of the litigant is required for rebutting such a presumption. To overcome such a presumption, a litigant would need significant resources to employ adequately trained counsel, economists, and possibly other experts to persuade and educate the court on the economic realities. At a time when most family courts are clogged with ever increasing pro se litigants, the reality of most litigants receiving fairness in

62. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 7, 8, 21, 25, 34, and 42 U.S.C.). *See generally* CONG. RESEARCH SERV., CHILD SUPPORT ENFORCEMENT AND DRIVER'S LICENSE SUSPENSION POLICIES (2011) (describing the states' implementation of the Child Support Enforcement program in suspending licenses).

63. *See* § 42 U.S.C 666(a)(16) (2018).

64. *See License Restrictions for Failure to Pay Child Support*, NAT'L CONF. ST. LEGISLATURES (Jan. 30, 2014), http://www.ncsl.org/research/human-services/license-restrictions-for-failure-to-pay-child-support.aspx.

65. W. & Atl. R.R. v. Henderson, 279 U.S. 639, 642–44 (1929).

66. *See* Manley v. Georgia, 279 U.S. 1, 6 (1929).

67. *See W. & Atl. R.R.* 279 U.S. at 642–44.

68. *Manley*, 279 U.S. at 6 (emphasis added); *accord W. & Atl. R.R*, 279 U.S. at 642.

69. See *Manley*, 279 U.S. at 6; *W. & Atl. R.R*, 279 U.S. at 642.

overcoming such a complex presumption seems out of reach.[70] How would a typical noncustodial parent be able to understand the complexities of intact family child costs versus single parent spending—much less fully understand the concept of arguing the rebuttal of a presumption? Would such a litigant even know that the child cost table is based on intact family data? Would rebuttal in every case require comparing case specific available income and actual spending on the children? Cleary, this is asking too much of the typical litigant and the typical litigant cannot hire expensive economic experts. This is a procedural due process issue in that the burden is unfairly placed on obligors to prove that they are not subject to the presumptive guidelines based on erroneous economic data.[71]

B. The Legal Balancing Test: Needs and Ability to Pay.

The foundation for all child support determinations is balancing the needs of the child with the parents' duty and ability to pay for such needs.[72] Most states have either statutes or appellate opinions establishing this balance between the child's needs and parents' ability to pay as the foundational consideration in determining child support.

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*."[73] Consideration of this ability to pay factor is emphasized and supported by the recent case of *Jury v. Jury.*[74]

Another example case that most concisely states this standard may be *Scherberger v. Scherberger*: "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. Any award, termination, or modification of child support without concern for those issues falls short of the mandate of the law."[75]

The needs and ability to pay standard implicates 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 may be a basis for rebutting the presumptive award. Many state examples exist outlining this balancing concept.

---

70. *See generally* Marsha M. Mansfield, *Litigants Without Lawyers: Measuring Success in Family Court*, 67 HASTINGS L.J. 1389 (2016) (discussing the exponential increase of pro se litigants in family court and the difficulties they face).

71. *Cf.* Harjo v. City of Albuquerque, 326 F. Supp. 3d 1145, 1207 (D.N.M. 2018) (holding that a city program allowing for the seizure of vehicles was unconstitutional when it placed the burden of proving innocence on the car owners to avoid such seizure).

72. *See* C.F.R. § 302.56(c), (h)(1).

73. N.M. STAT. ANN. § 40-4-11.1(B)(1).

74. *See* Jury v. Jury, 2017-NMCA-036, ¶ 40, 392 P.3d 242 ("[P]roviding considerations relevant to determinations of child support obligations, including 'what life-style the children would be enjoying if the father and mother were not divorced and the noncustodial parent had [their] level of income' and the 'ability of [a parent] to furnish additional advantages to his [or her] children above their actual needs.'" (quoting Spingola v. Spingola, 1978-NMSC-045, ¶ 24, 91 N.M. 737, 580 P.2d 958)).

75. Scherberger v. Scherberger, 398 S.E.2d 363, 364 (Ga. 1990) (citation omitted) (citing Clavin v. Clavin, 233 S.E.2d 151 (Ga.1977)).

Pennsylvania bases its child support determination on the needs of the child and ability of the obligor to pay child support under Pennsylvania statutory structure:

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.[76]

Louisiana Civil Code on child support includes language incorporating needs and ability to pay: "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."[77]

North Carolina's code for child support is broadly based on the needs of the child and earnings of the parents, among other factors.[78] For other factors, including accustomed standard of living of the child and parties, North Carolina's code focuses on "due regard" instead of a bright line standard.[79]

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.[80]

While some states offer theoretical grounds for rebuttal that appear to loosen a bright line standard, the presumption (including in North Carolina) generally still retains substantial hurdles for rebuttal and essentially is operationally irrebuttable for typical litigants.

As established in section one of this paper, and exemplified by these state statutory examples, many state child support guidelines define the needs of the child based 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.

An example of the strong preference for a standard of living based on intact families comes from Colorado.

> In exercising its discretion [when determining a high income award exceeding the child cost table's highest income level], the district court considers all relevant factors, including: (1) the child's and the custodial parent's financial resources; (2) the standard of living the child would have enjoyed had the marriage not been dissolved; (3) the child's physical and emotional condition and educational needs; and (4) the financial resources and needs of the noncustodial parent. § 14-10-115(2)(b); *see In re*

76. 23 PA. STAT. AND CONS. STAT. ANN. § 4322(a) (West, Westlaw through 2018 Regular Session Act 164).

77. LA. CIV. CODE ANN. art. 141 (Westlaw through the 2018 Third Extraordinary Session).

78. *See* N.C. GEN. STAT. ANN. § 50-13.4(c) (West, Westlaw through S.L. 2018-145 of the 2018 Regular and Extra Sessions of the General Assembly).

79. *See id.*

80. *Id.*

> *Marriage of Schwaab,* 794 P.2d 1112, 1113 (Colo. App. 1990); *Van Inwegen,* 757 P.2d at 1120-21; 19 Frank L. McGuane & Kathleen A. Hogan, Colorado Practice Series: Family Law & Practice § 26:17, Westlaw (2d ed. database updated May 2017).[81]

Somewhat in contrast, the example given above from North Carolina gives more attention to a lesser standard of consideration of intact family standards of living, using the phrase "due regard."[82]

Ultimately, according to federal regulation, the presumptive needs of the children are balanced against the ability to pay.[83] However, what does it mean to this balancing process if one side of the equation starts from a false, unrealistic position? As described below, it creates an unfair and unrealistic starting line.

C. Presumed Facts Inexistent in Case Facts.

The Incomes Shares child support guidelines are based on economic studies on child costs.[84] 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. Additionally, traditional case law regarding legal presumptions indicates that when the underlying facts for a presumption are either nonexistent or disproven, then that becomes a basis for setting the presumption aside or creating a new presumption.[85] This is a due process issue.

Leary v. United States illustrates the due process issue when the actual facts of a case do not conform to presumed facts. The appellant challenged a presumption that any marijuana consumed in the U.S. was marijuana that was imported.[86] Imported marijuana was illegal under federal law. The Court analyzed, as part of the constitutional challenge, the presumption found in the federal statute governing traffic of marijuana.[87] As part of that statute, possession of marijuana acted as a legal presumption of knowledge that the marijuana was illegally imported thereby leading to criminal penalties.[88] The Court evaluated whether the available evidence supported the legal presumption of knowledge on the part of the Defendant.[89] In

---

81. *In re Marriage of Boettcher*, 2018 WL 1247583 (March 8, 2018).

82. *See* N.C. GEN. STAT. ANN. § 50-13.4(c) (West, Westlaw through S.L. 2018-145 of the 2018 Regular and Extra Sessions of the General Assembly).

83. *See* C.F.R. § 302.56(c), (h)(1).

84. Jane C. Venohr, *Child Support Guidelines and Guidelines Reviews: State Differences and Common Issues*, 47 FAM. L.Q. 327 (2013). More information on the underlying economic studies is provided in JUDICIAL COUNCIL OF CALIFORNIA, REVIEW OF THE STATEWIDE UNIFORM CHILD SUPPORT GUIDELINE 2010 (2010).

85. Raymond I. Geraldson, *Effect of Presumptions*, 26 MARQUETTE L. REV. 115 (1942).

86. Leary v. United States, 395 U.S. 6, 38 n.68 (1969).

87. 21 U.S.C. § 176a.

88. *Leary*, 395 U.S. at 12. (" . . . whether petitioner was denied due process by the application of the part of 21 U.S.C. § 176a which provides that a defendant's possession of marihuana shall be deemed sufficient evidence that the marihuana was illegally imported or brought into the United States, and that the defendant knew of the illegal importation or bringing in, unless the defendant explains his possession to the satisfaction of the jury.").

89. *Id.* at 45–46. ("We therefore must consider in detail whether the available evidence supports the conclusion that the 'knowledge' part of the § 176a presumption is constitutional under the standard established in Tot and adhered to in Gainey and Romano—that is, whether it can be said with substantial

contrast to the presumption, as the Court analyzed, data at the time of trial and appeal (and more current than when the law was enacted) indicated that a significant percentage of marijuana users did not know the location of the source of their marijuana.[90] The Supreme Court found that the presumption of having knowledge of the source of the marijuana under the statute was not valid because the underlying facts of the presumption no longer existed.[91]

Although *Leary* involved presumptions within the context of criminal law, the same reasoning and applications of fundamental fairness apply in the civil context. Similarly, using the presumption of an intact family to determine child support is not valid in application. If presumed facts do not fit case facts, that may be grounds for rebuttal or statutory change—especially if this divergence fits other standards for rebuttal such "unjust or inappropriate" or "needs and ability to pay."[92] "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."[93]

D. Rules of Evidence Suggest That Basic Facts of Income Shares' Cost Assumption Do Not Exist in Application.

Many states have adopted and follow the Federal Rules of Evidence to govern the application of evidence in cases. Relating to presumed child costs, Rule 301, Presumptions in Civil Cases Generally, states:

"In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally."[94]

In explaining this rule, the Advisory Committee 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."[95] Consistent with the

---

assurance that one in possession of marihuana is more likely than not to know that his marihuana was illegally imported.")

90. *Id.* at 53. ("In short, it would be no more than speculation were we to say that even as much as a majority of possessors 'knew' the source of their marihuana.").

91. *Id.* ("We conclude that the 'knowledge' aspect of the s 176a presumption cannot be upheld without making serious incursions into the teachings of Tot, Gainey, and Romano. In the context of this part of the statute, those teachings require that it be determined with substantial assurance that at least a majority of marihuana possessors have learned of the foreign origin of their marihuana through one or more of the ways discussed above.

We find it impossible to make such a determination. As we have seen, the materials at our disposal leave us at large to estimate even roughly the proportion of marihuana possessors who have learned in one way or another the origin of their marihuana. It must also be recognized that a not inconsiderable proportion of domestically consumed marihuana appears to have been grown in this country, and that its possessors must be taken to have 'known,' if anything, that their marihuana was not illegally imported.")

92. *See* Jury v. Jury, 2017–NMCA–036, 392 P.3d 242, 253.

93. *Leary*, 395 U.S. at 38 n.68.

94. FED. R. EVID. 301.

95. *Id.* 301 advisory committee's note to 1972 proposed rules.

Advisory Committee's comments, case law from around the nation also supports this interpretation of Rule 301.[96]

The key point is that the party invoking the presumption first 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.[97] The basic facts giving rise to the presumed, appropriate child cost is the standard Income Shares methodology. This methodology is based on the existence of an intact family which then relates to the child cost associated with the relative incomes of the parents. However, the existence of an intact family is never proven when child support awards are determined. This means that the basic facts giving rise to the presumption do not exist. Logically then, when an intact family is not established, there can be no resulting child costs arising from the intact family. Therefore, the presumptive child support guidelines are legally flawed.

The prong of establishing the basic facts underlying a legal presumption is also evinced in the 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."[98]

Rules such as the New Jersey's Rules presume the application of child support guidelines that rely on data created from the existence of an intact family, and in turn, establish the presumed amount of child costs associated with the intact family data. In practical terms, courts do allow challenging a specific child support award amount. However, the problem is at the starting point. Litigants must start with a presumption that is flawed. The only mechanism of relief 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. Essentially, while states may allow parties to challenge the awarded child support amount, there generally is no mechanism in individual support cases to challenge the underlying presumption used to determine the amount in the first place without resorting to complex, constitutional litigation. This is burdensome and unrealistic, especially at a time with ever increasing dockets clogged with pro se litigants.[99] This systemic flaw effectively establishes statutory frameworks that create non-rebuttable presumptions in practice. The hurdles for rebuttal are so high for the typical litigant that the presumption becomes operationally irrebuttable.

---

96. *See, e.g.*, Sowizral v. Hughes, 333 F.2d 829, 833 (3d Cir. 1964) ("Presumptions are rules of law requiring the assumption of one fact upon proof of another in absence of satisfactory evidence."); Montgomery-Ward & Co. v. Sewell, 205 F.2d 463, 467 (5th Cir. 1953) ("A presumption must rest upon proven facts and cannot be inferred from another presumption."); Lano v. United States, 183 F. Supp. 781, 782 (D.D.C 1959) ("A presumption will not be construed in such a manner as to extend its application beyond the realm of reasonable probability or certitude." (citing Fresh v. Gilson, 41 U.S. 327 (1842))).

97. Federal regulations, 45 C.F.R. 302.56(c)(1)(i), require presumptive guidelines be based on the noncustodial parent's income (optionally both parents' incomes). *See also, e.g.*, Arizona Child Support Guidelines; https://des.az.gov/sites/default/files/2015CSGuidelinesRED.pdf; s*ee also* N.M. STAT. ANN. § 40-4-11.1 (2008).

98. N.J. R. EVID. 301.

99. *See* Mansfield, *supra* note 70, at 1390.

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 Petroleum Co. v. Superior Court*:

> 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 the pertinent facts in his defense.[100]

E. No Rational Relationship 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, a challenged law must be rationally related to a legitimate government interest.[101] This level of review is different from the higher levels of scrutiny under the law, which are not the subject of this analysis. Appellate opinions on presumptions frequently focus on the rational connection (or lack thereof) between the basic facts and the presumption.[102] For Income Shares child cost schedules, the law assumes the underlying fact that the family is intact with a corresponding ability to pay. The presumption then translates into a basic child support obligation. When considering this analysis in full, several, fatal flaws are noticeable. First, the party invoking the presumption (the state or the custodial parent 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 presumed costs in an intact household and the valid governmental interest in promoting the payment of child support.[103] Contrast the use of economic data from an intact household versus separate households—the choice has no bearing on the legal obligation of providing support. The government's interests and stated public policy in promoting child support payments is accomplished even if economic data from separate households are used. In sum, there is nothing magical about using data from intact households that requires its use under the rational relationship level of review.

---

100. Bandini Petroleum Co. v. Superior Court, 284 U.S. 8, 18–19 (1931).

101. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985).

102. *See, e.g.*, W. & Atl. R.R. v. Henderson, 279 U.S. 639 (1929); Mobile, Jackson, & Kan. City R.R. Co. v. Turnipseed, 219 U.S. 35 (1910).

103. *See, e.g.*, N.M. STAT. ANN. § 40-4-11.1(B) (Westlaw through Ch. 40 of the 1st Regular Session of the 54th Legislature (2019)) ("The purposes of the child support guidelines are to: (1) establish as state policy an adequate standard of support for children, subject to the ability of parents to pay; (2) make awards more equitable by ensuring more consistent treatment of persons in similar circumstances; and (3) improve the efficiency of the court process by promoting settlements and giving courts and the parties guidance in establishing levels of awards.").

Conversely, one may argue that the use of intact family data for the establishment of presumptive child support guidelines promotes the public policies of giving the child the same standard of living he/she would have enjoyed if the parents did not divorce,[104] or that of giving the child the same standard of living he/she would enjoy at the custodial parent's house as the non-custodial parent's house.[105] However, such arguments fail in two distinct ways. First, the argument of trying to ensure relative equality of household wealth by utilizing an intact family standard of living is more of a policy issue that is separate and apart from the legal presumption issue. Federal law provides the context for the creation of the child support guidelines, which, in turn, leads to the legal presumption.[106] The existence of guidelines arises from the factors outlined in the federal regulations for establishing those guidelines. In outlining what is required for the establishment of presumptive guidelines, federal regulations do not provide for the equality of households (retaining an intact family standard of living).[107] Judicial dicta found in common law does change the clear language of the federal regulations.[108] Those regulations specify the manner in which the presumption is created (i.e., with supporting economic data) [109] and there is no directive in the federal regulations that requires an intact family standard of living in presumptive guidelines.

Second, and more importantly, the equality of households approach (retaining an intact family standard of living) flies in the face of economic principles because maintaining an intact family standard of living for all parties is not economically possible. As addressed above, household income and wealth are not necessarily appropriate measures of children's material well-being. Economic studies on household consumption routinely treats consumption as a function of income. It has been increasingly recognized that consumption expenditures are a more direct measure of children's material well-being than family income or wealth. Accordingly, simply working towards an equality of income or household wealth misses the economic boat of the true measure of well-being. As such, the equality of wealth in the households is a red herring that fails to provide a rational relationship to the clearly stated governmental interest outlined in federal law.

As noted above in *Bandini*, a rational connection between the fact proved and the ultimate fact presumed needs to be established.[110] 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 and without any evidentiary basis from the case before the court. The use

104. *See, e.g.*, Spingola v. Spingola, 1978-NMSC-045, ¶ 11, 91 N.M. 737, 580 P.2d 958 ("Consideration should be given to what life-style the children would be enjoying if the father and mother were not divorced and the non-custodial parent had his present level of income.").

105. *See, e.g.*, Dufresne v. Dufresne, 10-963 pp. 7–8 (La. App. 5 Cir. 5/10/11); 65 So.3d 749, 755 (*"*Where, it was financially possible, the children who reside with their mother are entitled to the same standard of living as if they reside with their father.").

106. *See* 45 C.F.R. § 302.56 (2018).

107. *See id.*

108. *Spingola*, 1978-NMSC-045, ¶ 11 ("Consideration should be given to what life-style the children would be enjoying if the father and mother were not divorced and the non-custodial parent had his present level of income.").

109. 45 C.F.R. § 302.56 (2018).

110. Bandini Petroleum Co. v. Superior Court, 284 U.S. 8, 18–19 (1931).

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.[111]

Federal regulations establishing criteria for states to establish child support guidelines not only focus on the needs of the child but also on the parents' ability to pay. The key federal regulation gives special emphasis on the ability to pay.[112] The focus on the ability to pay suggests that basing presumed child costs on intact family discretionary income does not meet the regulations' intent of basing child support on actual ability to pay. The regulations read in part:

> (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:
> (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.[113]

This provision establishes that the regulations used to establish state child support guidelines require that the NCP's ability to pay be an integral part of the child support calculation. This is pertinent when analyzing how a court determines and considers the ability to pay when this consideration is tied to presumptive figures that are based on inaccurate economic facts of intact families.

Although involving significantly different facts, *Avant v. Douglas County* is analogous to using intact family data in child support determinations.[114] In *Avant*, the county statutorily limited the number of goats and hogs in residential districts

111. *See*, *e.g.*, N.M. STAT. ANN. § 40-4-11.1 (2008).

112. 45 C.F.R. § 302.56(c)(1), (h)(1) (2018).

113. *Id.* § 302.56(c)(1).

114. Avant v. Douglas Cty., 319 S.E.2d 442 (Ga. 1984).

with limits per gross land tract.[115] Notably, the ordinance in *Avant* did not meet the rational basis test after minimal details of the challenged zoning code were examined.[116] In *Avant*, plaintiffs were charged with violating a zoning ordinance which provided that goats and hogs were "not to exceed a total of one animal per gross acre for a total of three per gross tract(s)."[117] However, the defendants' tract consisted of approximately 21 acres, and they had annually raised anywhere from one to 70 hogs on the property.[118] The Court then reasoned that where "a zoning ordinance is applicable to residential districts containing large, i.e., 21-acre tracts, it is unconstitutionally unreasonable and irrational [to limit] the number of animals per tract without taking into consideration the size of the tract."[119]

As the individual's right to the unfettered use of his property confronts the police power under which the 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.[120]

In this case there was an extremely general relationship between regulating the agricultural use of residential properties and the general welfare. However, there was 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. In this particular case, the ordinance was unconstitutional because it did not bear a reasonable and rational relationship to the public purpose.

Notably, as evidenced by *Avant*, a key part of the analysis of whether the statute was arbitrary, thereby violating due process, is whether the statute is unreasonable.[121] Likewise, 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. This is because such a presumption essentially creates a false sense of reality without any reasonable relationship to the stated policy of wanting to ensure proper support of children. The use of intact family data is arbitrary and clearly unreasonable considering the circumstances in which these cases arise. It is unreasonable to base child support awards on discretionary income that does not exist.

In addition to overstating the ability to pay, the intact family standard is unreasonable because it grants the custodial parent a right to a higher standard of living than the parent can achieve for him or herself. This is because the custodial parent will continue to spend as a single parent household even though the child support presumption is that the custodial parent will spend as an intact household. Due to sharply higher "adult overhead" costs, there is a substantial difference between what non-intact households can afford to spend on children and what intact family household can spend based on the same combined gross income.

---

115. *See id.* at 443.
116. *See id.*
117. *Id.*
118. *See id.*
119. *Id.*
120. *Id.* (quoting Barrett v. Hamby, 219 S.E.2d 399, 402 (Ga. 1975)).
121. *See id.*

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 between the statute's purpose and governmental interest. For example, in *Georgia Department of Human Resources v. Sweat*, the Georgia Supreme Court addressed the issue of whether child support guidelines based on fixed percentages of gross income pass the rational relationship test.[122] Gross income and spending on children are proportional 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 represent amounts spent on children.[123]

Sweat did not address the issue of whether the use of fixed percentages of gross income was unreasonable.[124] Nor did *Sweat* examine the lack of relationship between discretionary income and gross income, thereby leaving unsettled an important legal issue.[125] Additionally, *Sweat* did not address the reasonableness of basing levels of support on economic data pertaining to intact family costs.[126] Like Georgia, many if not most states, give little guidance or direction regarding the rational relationship test associated with intact economic data as it pertains to child support levels.

Other states have fallen short of proper depth of analysis for whether there is a reasonable and rational relationship between the underlying facts and case facts. In *County of Stearns v. Barnell*, the Minnesota Court of Appeals addressed the issue of whether its then percent of obligor net income guidelines were constitutional.[127] However, the appellate court gave only cursory analysis for evaluating the rational relationship of the guidelines.[128] There was no detailed review of the underlying facts of the guidelines and whether the underlying facts existed in application:

> Under the rational basis test, legislation will not be set aside if any state of facts reasonably may be conceived to justify it. With these principles in mind, it is clear from a reading of Minnesota's child-support guidelines that they permit attention to the unique circumstances of each case, and the legislature was well within its constitutional authority in determining to maximize the recovery of child support, in respecting custodial care without placing a dollar value on it, and in assessing a presumptive level of need for children.
>
> Appellants have not established that they are similarly situated with respondents. Because of this and because the guidelines statutes are not lacking in rational bases and do not implicate a fundamental right or a suspect classification,

---

122. *See* Ga. Dep't of Human Res. v. Sweat, 580 S.E.2d 206, 210 (Ga. 2003).

123. A concise summary of early studies on child cost patterns related to income and number of children can be found in ROBERT G. WILLIAMS, "DEVELOPING STANDARDS FOR CHILD SUPPORT PAYMENTS: A CRITIQUE OF CURRENT PRACTICE," I-6 through I-9, IMPROVING CHILD SUPPORT PRACTICE, VOLUME ONE, The American Bar Association, 1986.

124. *See Sweat*, 580 S.E.2d at 210 (Ga. 2003).

125. *See id.*

126. *See id.*

127. *See* Cty. of Stearns v. Barnell (*In re* Doll), 693 N.W.2d 455, 460 (Minn. Ct. App. 2005).

128. *See id.* at 461–462.

appellants have not carried their burden to show a violation of the equal protection clause.[129]

In *Stillman v. State*, the Colorado Court of Appeals did not address the issue of ability to pay using intact family data but instead narrowly focused on the issue of whether divorced parents are treated disparately.[130] Additionally, the court simply assumed that use of intact family data is not arbitrary rather than delving into whether such data reflects ability to pay in actual cases:

> We also agree with the trial court that father has not shown that he is similarly situated to parents who are married and have not divorced or separated. Nevertheless, even if we accept the argument that a divorced or separated parent is treated disparately by the imposition of a child support obligation, we conclude that the statutory distinction made by [section 14-10-115 of the *Colorado Revised Statutes*] does not violate such parent's right to equal protection. A distinction between sets of parents based on marital status is rationally related to the legitimate state interest to insure [sic] that children of divorced or separated parents receive support despite the divorce or separation. As stated in *Crocker,* the legislature could rationally assume that many divorced or separated parents will no longer be able to work together to make responsible decisions about how to support their children.
>
> Additionally, we conclude that, because it 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.[131]

Appellate opinions regarding the constitutionality of certain facets of child support guidelines have not fully addressed the issue of using intact family data as arbitrary, unreasonable, and irrational as it is used to create presumptive child support obligations.[132] 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.

The governmental interest of adequately providing for children by parents can be protected in other ways that do not violate constitutional principles of arbitrariness, vagueness, and reasonableness. Federal litigation may be the only 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.

---

129. *Id.* at 463 (citation omitted).

130. *See* Stillman v. State, 87 P.3d 200, 202 (Colo. App. 2003) (citation omitted) (citing *In re* Marriage of Crocker, 971 P.2d 469 (Or. Ct. App. 1998), *aff'd*, 22 P.3d 759 (Or. 2001)).

131. *Id.*

132. *See generally Stillman*, 87 P.3d at 202; CAPRA v. W. Sullivan, 787 F.Supp. 738 (USDC OH 1992); In Re Marriage of Smith, 7 P.3d 1012 (Ct. App. CO 1999).

III. POTENTIAL SOLUTIONS

A. 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 problem resulting from using a presumption of intact family child costs which does not represent cases where the parents are divorced or have never married:

1. Using single-parent child costs based on an average of the two parents' incomes; or

2. Making adjustments to the intact family data to reflect the additional adult overhead costs generated by two single-parent households.

Using single-parent data is the more economically sound approach. The child cost schedule should be based on single-parent household data and on the average of the two parents' incomes. Average income is the maximum standard of living that can be sustained in both households. Rephrased, if combined income were redistributed so that both households have the same income, this would be total income divided by two, or average income of the two parents. Redistributed income can be higher than average income for one parent only if the other parent's income is less than average.

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. Moreover, using an average may still result in unfair or unjust awards when a custodial parent earns substantially more than the noncustodial parent. Such an average may still result in the noncustodial parent paying more than necessary to the custodial parent.

As to 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 that results after divorce or where the parents have never wed.[133] The cost of a second mortgage (or rent) and utilities could be deducted from combined net income. The same child cost study can be continued to be used but the net income used should be redefined after this adjustment.

Adjusting a standard Income Shares cost schedule for a second household's expenses may be a less radical approach, given that it keeps the traditional Income Shares cost schedule as its starting point. Nevertheless, 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 and thus its guidelines provide that: "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."[134] However, it should be noted that using a second household adjustment to the standard Income Shares child

133. The issue remains that case circumstances diverge from the use of intact family data to derive presumptive child cost tables. Again, this use of husband-wife household data is documented in DAVID M. BETSON, PARENTAL EXPENDITURES ON CHILDREN: ROTHBARTH ESTIMATES (2010).

134. KAN. R. CSG. GUIDELINE II(C).

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.

B. Kansas' Acknowledgement of the "Dissolution Burden"

Only one state—Kansas—has a cost table with a second household adjustment.[135] The state of Kansas has a presumptive child cost schedule that is based on adjusting intact family data for second household expenses.[136] From the economists' report, this adjustment is referred to as the "dissolution burden."

> The *dissolution burden* and [its resulting mathematical adjustment are] used to recognize that instead of one intact household paying for housing, utilities, homeowners or renters insurance, etc. there are now two households paying these expenses[each]. 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.[137]

C. Summary of Why Child Cost Tables Should Use a Second Household Adjustment to Intact Family Data on Child Costs.

The second household adjustment is a forward-thinking approach that overcomes the current legal and economic challenges associated with the current state of child support guidelines throughout the country. Traditionally, states struggle balancing the foundational factors of a child's needs against the parents' ability to pay when establishing child support guidelines.[138] In weighing these factors, states rely on data that are not completely accurate. It's akin to mixing apples and oranges. The foundation of states guidelines for calculating child support is built on the costs of raising a child in an intact, one household family.[139] Such reliance overstates parents' ability to pay. This leads to the creation of troublesome legal presumptions that are ripe for due process challenges. Legal presumptions should be set aside when the underlying facts of the presumption do not exist. Using guidelines that rely on data from intact families practically creates a complex and tangled web of legal presumptions that the average litigant finds very challenging to overcome and rebut without the use of expensive, complex legal and economic tools. In practice, this creates significant hurdles for overcoming the presumption and thereby denies litigants a fair opportunity for rebuttal. This results in a due process problem. However, the problem may be solved through the implementation of a cost schedule that adjusts for second household expenses. Only one state is currently addressing

---

135. *See id.* GUIDELINE IV(D).

136. *See id.*

137. WILLIAM T. TERRELL & JODI PELKOWSKI, DETERMINING THE 2015 CHILD SUPPORT SCHEDULES 4 (2015), http://www.kscourts.org/Rules-Procedures-Forms/Child-support-guidelines/PDF/Child%20Support%20Determination%20Economist%202015.pdf.

138. *See Child Support Guideline Models by State*, *supra* note 6.

139. *See id.*

this problem, Kansas.[140] Adherence to economic data and the pursuit of legal fairness, however, should compel states to embrace the forward-thinking approach of the State of Kansas.

140. *See* KAN. R. CSG. GUIDELINE IV(D). The issue of how to create a second household expense adjustment is notably technical and data oriented. It is discussed in a separate, forthcoming paper.