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***165 FEDERAL INTENT FOR STATE CHILD SUPPORT GUIDELINES: INCOME SHARES, COST SHARES, AND THE REALITIES OF SHARED PARENTING**

Jo Michelle Beld [\[FN a1\]](#)
Len Biernat [\[FN aa1\]](#)

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I. Introduction

Presumptive guidelines for the determination of child support orders have been in effect in every state since 1990. [\[FN1\]](#) It would be hard to overstate the impact of these guidelines on the economic circumstances of millions of children and their separated parents. [\[FN2\]](#)

Child support guidelines are as complicated and varied as the families to which they apply. They reflect an intricate mix of estimated and actual expenditures on children; program provisions in related policy areas, such as child care, health care, tax policy, and welfare reform; and research on the realities of life in separated families, such as shared parenting time and multiple families. [\[FN3\]](#) They also reflect the broad requirements of federal law ***166** that every state seeking federal funding for public welfare programs must establish child support guidelines; [\[FN4\]](#) that the guidelines must serve as rebuttable presumptions of the appropriate amount of support to order; [\[FN5\]](#) that the guidelines must consider "all earnings and income of the noncustodial parent," [\[FN6\]](#) incorporate "specific descriptive and numeric criteria," [\[FN7\]](#) and include provision for the children's health care needs; [\[FN8\]](#) that the guidelines must apply to all child support orders, whether establishment or modification [\[FN9\]](#) and whether inside or outside the jurisdiction of the state's IV-D agency; [\[FN10\]](#) and that any order which deviates from guidelines must include written findings that explain what the order would have been had the guidelines been applied and why a deviation is warranted. [\[FN11\]](#)

State child support guidelines, taken as a whole, also reflect what federal law does not require. There is no requirement for the guidelines to be enacted by a specific branch of state government; [\[FN12\]](#) consequently, states vary with respect to the authority for establishing and revising guidelines. Twenty-five states have elected to establish guidelines in statute; eighteen do so through court rule; and the others do so through administrative rule. [\[FN13\]](#) Equally important, there is no requirement that states adopt a particular model or formula for the calculation of support, so long as the broad parameters listed above are incorporated in whatever approach the state chooses to use. [\[FN14\]](#) Consequently, no two states have identical guidelines, even when their underlying models are similar. State guidelines vary with respect to the income basis for the determination of support; the estimates of spending on children upon which the guidelines are based; the treatment of child care costs; the treatment of medical insurance and out-of-pocket expenditures for medical care; provisions for other children to whom the parent owes a duty of support; adjustments for parenting time; and provisions for adjusting support when the obligor is low-income. [\[FN15\]](#)

***167** Despite this variation in the specific provisions of each state's guidelines, most states have adopted one of two general models for the determination of support. The "percentage-of-obligor-income" model, used in ten states, [\[FN16\]](#) bases child support on the income of the obligor alone. In contrast, the "income shares" model, used in approximately three-quarters of the states, bases support on the combined incomes of both parents. Thirty-five states rely on a simple income shares approach, [\[FN17\]](#) while three states have adopted the more complex Melson formula. [\[FN18\]](#) The remaining three states' guidelines have some percentage-of-obligor-income features and other features consistent with income shares. [\[FN19\]](#)

In the mid-1990s, after all states had adopted percentage-of-obligor-income, income shares, or mixed guidelines models, another child support guidelines model was developed under the auspices of the Children's Rights Council. [FN20] Known as "cost shares," its proponents seek to differentiate it from both income shares and percentage-of-obligor-income models and to establish it as a "superior alternative" to either approach. [FN21] *168 No state has adopted a cost shares guideline, although legislative proposals reflecting cost shares premises have been introduced in two states. [FN22] Nevertheless, cost shares proponents are active in a number of states, not only in their advocacy of their preferred model for the calculation of child support, but also in their criticisms of existing state guidelines.

Any state seeking to revise its model for the determination of child support must consider the consistency of its proposed changes with federal intent for child support guidelines. The purpose of this article is to compare the extent to which existing income shares guidelines and proposed cost shares guidelines comply with such intent as expressed in relevant federal regulations. We restrict our analysis of existing guidelines to the income shares model because, as demonstrated above, it is without question the prevailing model for child support guidelines in the United States. We will argue that income shares guidelines are much more likely than cost shares guidelines to advance federal intent for state child support guidelines. We will also assess a variety of recent adjustments to income shares guidelines intended to accommodate the realities of shared parenting. Part II outlines federal intent for state child support guidelines. Part III describes the calculation of support under income shares and cost shares guidelines. Part IV evaluates the relationship of each model to the principal components of federal intent. Part V discusses the growing impact of shared parenting arrangements on child support guidelines. Part VI summarizes our principal conclusions and offers recommendations to the states.

II. Federal Intent for State Child Support Guidelines

Even though family law is primarily state law and not federal law, there has been a growing influence by the federal government to alter state law in order to meet federal objectives. In order to control the costs of various federal assistance programs, federal law requires states, as a condition for participation in these programs, to enact certain minimum provisions for child support collection and enforcement, including child support guidelines. However, when the federal law required states to adopt child support guidelines in order to receive federal funds, no specific model was mandated. Instead, it ordered states to review their guidelines at least once every four years, and it specified two requirements for the content and conduct of these reviews. Together, these two requirements serve as the indicators of federal intent for state child support guidelines.

The overall purpose of a state's quadrennial review of its child support guidelines is stated clearly in the relevant federal regulation:

*169 The State must review, and revise, if appropriate, the guidelines established under paragraph (a) of this section at least once every four years to ensure that their application results in the determination of appropriate child support awards. [FN23]

Of course, by itself this statement of purpose is incomplete, as it does not provide a definition of "appropriate" child support amounts. Indeed, it was the recognition of significant variation in judicial opinion regarding "appropriate" awards that was partially responsible for the decision of the U.S. Congress to require states to establish guidelines in the first place. [FN24] However, just as Congress chose not to require states to adopt a specific model for child support guidelines, it also chose not to require states to adopt a specific definition of appropriateness for the outcomes of those guidelines. Instead, it specified two areas of inquiry that states must pursue in conducting their guidelines reviews. These two areas of inquiry are the benchmarks against which states are expected to compare their guidelines in order to determine whether they yield "appropriate" orders.

The first requirement states must follow in reviewing their child support guidelines is that they must consider "economic data on the cost of raising children." [FN25] For a variety of reasons, this is no small task. States must first wrestle with the conceptualization of child costs for purposes of child support. Should such costs be defined in terms of children's basic needs, so that all children would "cost" the same irrespective of their parents' economic status? Or should such costs be defined in relation to what parents actually spend on their children, so that the "cost" of children would vary with parental income? [FN26] States must also wrestle with difficult theoretical *170 and

methodological challenges in separating out spending on children from spending on everyone else in a household. [FN27] To further complicate matters, there are differences in expenditure patterns in different regions of the U.S., in different states, and even in different regions within a single state. [FN28] And perhaps most problematic of all, existing economic studies of the cost of raising children focus on one of two types of households: two-parent married-couple families, and single-parent families in which the parent is the primary caregiver for the children. [FN29] There are as yet no comprehensive studies of two-parent spending on children by parents who do not share a household. [FN30] Consequently, states must consider how to adapt existing estimates of parental expenditures on children to the circumstances of the separated families to whom child support guidelines are designed to apply. [FN31]

In light of the general complexity of the economic literature estimating expenditures on children, and the specific complexity introduced by the need to adapt that literature for purposes of child support policy, Congress followed the recommendation of the 1987 Advisory Panel on Child Support Guidelines [FN32] and included in the 1988 Family Support Act a requirement that the U.S. Department of Health and Human Services "conduct a study of the patterns of expenditures on children in two-parent families, in single-parent families following divorce or separation, and in single-parent families in which the parents were never married." [FN33] The resulting analysis was completed in 1990. [FN34] While states were not required *171 to rely on these estimates in conducting their guidelines reviews, many have. [FN35] Those that have not used the 1990 report commissioned by DHHS have examined other estimates, sometimes nationwide and sometimes state- specific. [FN36]

It is evident from this commitment of federal resources to an examination of the economic literature on the cost of raising children, as well as from the language of the federal regulations implementing the 1988 Family Support Act, that Congress intended for states to base their child support guidelines on the cost of raising children. Congress left the selection, interpretation and adaptation of the relevant economic literature in the hands of the states, but that literature was to shape the content of the guidelines. [FN37] The regulation at [45 CFR 302.56 \(e\)](#) consequently requires states, not simply to review, but also to "revise, if appropriate," their guidelines at least once every four years.

Congress included a second requirement in its provisions for quadrennial review and revision of state child support guidelines. In addition to its analysis of the economic literature on the cost of raising children, states must "analyze case data, gathered through sampling or other methods, on the application of, and deviations from, the guidelines." The purpose of this dimension of state guidelines reviews is "to ensure that deviations from the guidelines are limited" [FN38]--in other words, to promote consistency in the establishment and modification of child support orders while preserving flexibility for unusual family circumstances. In the words of the federal Office of Child Support Enforcement (OCSE), "The intent of guidelines is for similar cases to be handled in a similar fashion, thus decreasing the variability in order amounts across similar cases." [FN39]

Consistency was an important consideration in the 1987 recommendations and final report of the Advisory Panel on Child Support Guidelines. Both the initial promulgation of guidelines and their regular use by decision *172 makers were seen as key factors in the achievement of this goal. The panel noted, "Guidelines can increase the equity of awards by providing comparable orders for cases with similar circumstances." [FN40] Further, "consistent application of the guidelines is required ... for a state to achieve a uniform standard of adequacy and equity in the establishment of child support orders." [FN41] Thus, the guidelines needed to be presumptive, rather than merely advisory, as they were at the time under the terms of the Child Support Enforcement Amendments of 1984. [FN42]

At the same time, the panel also observed, "It is generally recognized ... that there are individual cases in which the rigid application of a formula would create inequitable results. Examples of such cases might include a terminally ill obligor, a child with unusual educational or social needs, or an emancipated seventeen-year-old child." [FN43] Consequently, the panel did not recommend mandatory use of the guidelines irrespective of the facts of a given case. The guidelines needed to be rebuttable, with appropriate findings, when circumstances merited a departure. The Advisory Panel therefore recommended both to Congress and to the states that child support guidelines be both presumptive and rebuttable, as a way to "strike the appropriate balance between uniform treatment and judicial discretion." [FN44]

The language of [45 C.F.R. § 302.56](#) suggests that Congress took the advice of the panel. It is possible to deviate from the guidelines in a given case, so long as the findings indicate the amount of support that would have been

ordered had guidelines been strictly applied, substantiate the need for a deviation, and consider the best interests of the child (Paragraph (g)). But deviations, even if justified, should be limited in number (Paragraph (h)). Frequent deviations, particularly if they are associated with recurring case circumstances (such as multiple families), may indicate a need to revise or amplify a state's guidelines to further improve the consistency of support outcomes. [FN45] In the words of the Advisory Panel's final report, "A *173 properly developed guideline should be applicable to a broad range of circumstances. It should yield equitable results across a large part of the income spectrum and should address a variety of special cases, such as non- traditional custody arrangements and additional dependents." [FN46]

In short, the two dimensions of federal intent for state child support guidelines are embedded in the requirements for guidelines review. Child support guidelines must reflect economic research on the cost of raising children, and they must promote consistency in orders for similarly-situated families. We turn now to a description of the very different ways income shares and cost shares guidelines seek to realize these purposes.

III. Income Shares and Cost Shares Guidelines: A Brief Description

Income shares guidelines were developed by the OCSE Child Support Guidelines project staff in the mid-1980s, and were subsequently recommended to the states by the Advisory Panel on Child Support Guidelines as the best available approach to the determination of child support orders. [FN47] The cost shares alternative was developed in the mid-1990s by affiliates of the Children's Rights Council (CRC), [FN48] a non-profit organization with both national and state chapters "that works to assure children meaningful and continuing contact with both their parents and extended family regardless of the parents' marital status." [FN49] Its proponents argue that cost shares guidelines are fundamentally different from income shares guidelines, principally in the estimation of child costs and the allocation of these estimated costs between the parents. [FN50] These differences, in their view, make the model superior to income shares. [FN51]

While it is true that there are important differences between the prevailing income shares model for child support guidelines and the cost shares model, there are some fundamental similarities as well. Both approaches attempt to establish a clear relationship between child support guidelines and expenditures on children by parents, although the underlying estimates for those expenditures are indeed quite different in the two models. *174 Both approaches base support on the incomes of both parents, with the cost shares model reflecting a Melson-style method of determining each parent's income available for child support. But the cost shares model makes assumptions about expenditure patterns and cost offsets in separated families that income shares models do not routinely make. This section describes in more detail the two prevailing income shares models for the calculation of child support and the cost shares alternative.

A. The Simple Income Shares Model

The fundamental premise of the simple income shares model for the determination of child support is that the children of separated parents should receive the same proportion, or "share," of both parents' incomes that they would receive if all of them lived in the same household. [FN52] When parents live together, each of them helps to meet the economic needs of their children in proportion to their respective incomes. A parent who provides 60% of the total income in a two-parent household is presumed to cover 60% of the family's expenditures on their children. This same principle is assumed to be appropriate when the parents do not live together. In its most basic form, a simple income shares child support order is calculated as follows:

- (1) Determine each parent's percentage of their combined income.
- (2) Determine the parents' combined monthly expenditures on the children.
- (3) Pro-rate the expenditures on the children according to each parent's percentage of their combined income. The obligee is presumed to spend his or her share of the obligation directly on the children. The obligor's share becomes the order for child support. [FN53]

There are numerous state variations with respect to each of these three steps. Twenty of the thirty-five states with simple income shares guidelines use gross income as the income basis of the calculation, [FN54] while the remaining fifteen states use net income, [FN55] with different deductions allowed *175 in different states. [FN56]

The determination of monthly expenditures on the children also varies. In general, the monthly expenditures amount reflects two kinds of expenses: estimated expenses, with the estimates derived from research on spending patterns in two-parent households with combined incomes similar to those of the parties; and actual expenditures for specific child costs, such as child care, health insurance, out-of-pocket medical expenses, and expenses for private or special education. Some states pro-rate one or more of these latter costs separately, [\[FN57\]](#) while others subtract one or more of them (most often health insurance premiums) from income, [\[FN58\]](#) or include one or more of them in the estimated expenses. [\[FN59\]](#) But the basic principle of apportioning the children's expenses in proportion to each parent's percentage of their combined income is the same across all income shares states.

B. The Melson Formula Income Shares Model

The Melson approach to income shares guidelines was originally developed by Judge Elwood F. Melson, Jr., in the State of Delaware and has been in effect statewide for more than twenty years. [\[FN60\]](#) Like the simple *176 income shares model, it reflects the general premise that separated parents should support their children in proportion to their respective incomes. However, unlike simple income shares, it provides explicitly for each parent's need to meet their own basic living expenses, and it distinguishes between children's basic and non-basic expenses in the calculation of a support order. A Melson formula income shares order for support is calculated as follows:

(1) Determine each parent's share of their combined income available for child support. In all three Melson formula states, a parent's income available for child support is equal to net income (variously defined) minus a "self-support reserve," or the income each parent is presumed to need to provide for his or her own basic living expenses. [\[FN61\]](#)

(2) Determine each parent's share of the children's primary needs. These primary needs include a fixed allowance for basic food, clothing, shelter, and other subsistence-level expenses, [\[FN62\]](#) plus selected actual expenses considered by the state to reflect other primary needs. Depending on the state, these may include work-related child care, [\[FN63\]](#) health insurance premiums, [\[FN64\]](#) or other special needs of the children as determined by the court. [\[FN65\]](#) After these primary needs have been summed, they are pro-rated between the parents in proportion to each parent's share of their combined income available for child support.

(3) Determine each parent's available "standard of living adjustment" (SOLA) income. The SOLA income is the income that *177 remains after subtracting each parent's share of the children's primary needs from each parent's income available for child support. In other words, it is the money that is left after the parents have met their own basic needs and the basic needs of their children. According to the administrative rule codifying the Montana child support guidelines, "The purpose of SOLA is to ensure that the child enjoys, to the extent possible, the standard of living commensurate with the parent's income." [\[FN66\]](#)

(4) Determine each parent's SOLA support obligation. This is calculated by multiplying the parent's SOLA income as determined in Step (3) by a percentage that varies with the number of children for whom support is being ordered. In Delaware, for example, these percentages are 16 percent for one child, 26% for two children, 33% for three children, 39% for four children, and an additional 4 percent for each additional child, not to exceed 50%. [\[FN67\]](#)

(5) Determine each parent's total support obligation by adding together the parent's share of the children's primary support needs and the parent's SOLA support obligation. The obligee is presumed to spend his or her support obligation directly on the children; the amount calculated for the obligor becomes the order for child support.

Advocates of the Melson formula income shares approach argue that its premises are fairer and more appropriate to the circumstances of separated families than are the premises of simple income shares guidelines. [\[FN68\]](#) By attending first to the basic needs of each parent, then to the basic needs of the children, and only then to the non-basic needs of the children, the interests of all the parties involved in a child support order are more equitably served.

C. The Cost Shares Model

The cost shares model borrows several principles from existing incomes shares guidelines but reflects a very different set of economic assumptions about expenditures on children in separated families. Cost shares guidelines use a Melson formula approach to the determination of income; rely on estimates of expenditures on children in single-parent families after offsets for "tax benefits attributable to the children;" and apply a joint *178 physical

custody cross-credit approach to the calculation of the final support obligation. [\[FN69\]](#) A cost shares order for support is calculated as follows:

(1) Determine each parent's share of their combined income available for child support. As in all three Melson formula states, a cost shares guideline subtracts a self-support reserve from a parent's net income to arrive at his or her income available for child support. The calculation of net income under cost shares includes "an imputed child support order for other biological or adopted children residing with the parent," [\[FN70\]](#) which is not present in any of the Melson formula states. In addition, the self-support reserve under cost shares is slightly higher than the highest reserve under existing Melson guidelines. [\[FN71\]](#) Apart from these differences, the cost shares approach to the determination of income available for child support is very similar to the approaches used in Delaware, Hawaii, and Montana.

(2) Determine the parents' combined "basic" expenditures on the children. Cost shares guidelines estimate expenditures on the children quite differently than do income shares guidelines. First, cost shares uses estimated single-parent spending as the standard for spending by separated parents. Where the income shares approach adds together the incomes of the parents and estimates what two-parent families with that level of income spend for children's share of housing, food, transportation, and other pooled expenses, the cost shares approach averages the parents' incomes and estimates what a single-parent family with that level of income spends for these needs. [\[FN72\]](#) Effectively, this means that the children will be allocated a share of only half the combined income of the parents. Second, "fixed expenses" incurred by either parent (i.e., expenses that do not move with the children between households) are then subtracted from this estimate of single-parent spending on the children. The exact categories of expense in the "fixed expense" component vary with different versions of the cost shares model, but may include expenditures by each parent for housing for the children, *179 [\[FN73\]](#) medical insurance premiums, [\[FN74\]](#) and court-ordered life insurance premiums. [\[FN75\]](#) The remaining amount is considered the "basic child cost" subject to apportionment between the parents.

(3) Determine each parent's "total incurred child cost." The cost shares model also makes very strong assumptions about the way in which children's expenses are distributed between parents who live in separate households. The model assumes that each parent's spending on the children is determined solely by the amount of time the children spend in each household. There is no assumption that custodial parents incur a larger share of the costs by virtue of their status as custodial parents. Consequently, each parent's "total incurred child cost" is calculated as follows:

a. Apportion the basic child cost between the parents according to each parent's percentage of parenting time. The resulting amount is presumed to be the parent's "incurred basic child costs."

b. Add to each parent's incurred basic child costs any other actual expenditures for the children by each parent. Such expenditures include the "fixed expenses" previously subtracted from the estimates of total basic costs (e.g., life insurance premiums, medical insurance premiums, housing), as well as expenses not included in the table of "basic child costs" (e.g., child care, education). The resulting amount for each parent is presumed to be that parent's total expenditures for the children.

c. Calculate the "tax benefit attributable to the children" for each parent and subtract this benefit from the parent's total expenditures for the children to arrive at the parent's "total incurred child costs." Like the definition of "fixed expenses," the definition of "tax benefit attributable to the children" may vary with different versions of the model, but the authors generally describe it as the difference between the after-tax income of the parent after receiving his or her actual *180 child-related tax benefits, and the after-tax income of the parent assuming single taxpayer/no dependents status. [\[FN76\]](#)

(4) Determine the final order for support through a cross-credit calculation. This step resembles the formula used in some states to establish support for extended parenting time, [\[FN77\]](#) but without the multiplier that is typically applied to child costs to reflect the increased cost of caring for children in separate households. [\[FN78\]](#) Each parent's obligation to the other parent is calculated by multiplying the parent's share of their combined monthly income available for child support by the other parent's total incurred child costs. The parent who owes the higher amount to the other parent is the obligor, and pays the difference between the two obligations to the other parent. [\[FN79\]](#)

In short, under cost shares guidelines, the parents are first treated as one hypothetical single parent in order to estimate their combined expenditures on their children, and then treated as two hypothetical single parents in order to calculate the net cost of the children to each of them. The child support obligation is equal to the difference between each parent's proportionate share of the presumed net cost of the children to the other parent. This is quite different from both kinds of income shares guidelines, which base the child support obligation on each parent's proportionate share of two-parent household spending on children.

Simple income shares, Melson-formula income shares, and cost shares guidelines clearly reflect contrasting

premises about the cost of raising children and how these costs should be apportioned between parents who do not live together. In the next section we consider these alternative premises against federal intent for child support guidelines.

***181 IV. Income Shares, Cost Shares, and Federal Intent For State Child Support Guidelines**

Congress intended for state child support guidelines to be tied to the economic literature on the cost of raising children and to yield consistent orders. In this section we argue that (1) existing income shares guidelines are a much better reflection than cost shares guidelines of the cost of raising children, and (2) income shares guidelines are more likely to promote consistency in child support outcomes among similarly-situated families.

An accurate reflection of the cost of raising children depends on two underlying features of child support guidelines: A complete account of the parental income available to support the children, and a valid and reliable method of estimating parental expenditures on children in relation to that income. Income shares models fare better than the cost shares model in both respects. Regarding the first, income shares guidelines are based on a representation of parental income that is both more appropriate and more accurate than the income basis for cost shares guidelines. The use of the parents' combined income in income shares models is intended to replicate how the children's economic needs would be met if the parents lived together. [\[FN80\]](#) This premise has two important effects. First, it permits the children of separated parents to share the standard of living of both parents:

To the extent that either parent has a higher than subsistence level of income, the child benefits from that higher standard. In the case of the [simple] Income Shares model, child support levels are based on observed proportions of family income allocated to children in intact households. As parental income increases, the amount of child support also increases. In the case of the Melson formula, the children receive a 'standard of living allowance' (after their basic needs are first met) based on predetermined proportions of parental income. Thus, as levels of parental income increase, child support also increases. [\[FN81\]](#)

Second, it ensures that children do not bear a disproportionate share of the reduced standard of living that results from their parent's decision not to share a household:

No approach can assure that the child will not suffer some reduction in [his or her] standard of living [when parents do not live together]. Since the child shares living situations with the parents, who suffer an unavoidable decline in living standards (in the absence of increased income), the child shares in that decline However, the Income Shares approach ... considerably mitigates the *182 impact of the household dissolution or non-formation by reserving the proportions of parental income for that child that would have been spent in the intact unit. [\[FN82\]](#)

In contrast, cost shares guidelines base child support orders on the average of the two parents' incomes. The rationale for this approach, according to the developers of the model, is to ensure that the parents do not bear a disproportionate share of the reduced standard of living that results from living apart:

The use of average income helps to guarantee a child support award that is consistent with a budget for both the [custodial parent] and the [noncustodial parent] and that is also consistent with a reasonable and sustainable standard of living for both Both the [custodial parent] and the [noncustodial parent] have higher adult overhead and spend on children accordingly. [\[FN83\]](#)

There are two significant drawbacks to the use of average income instead of combined income as a basis for child support orders. First, whatever the limitations of the intact family model as the basis for the determination of child support, it is still a more accurate representation of the way separated parents provide for their children than is the fictitious single parent created by the average-income approach. Since both parents are still financially responsible for the children, it is more appropriate to use actual two-parent income than hypothetical single-parent income as a basis for the order for support. [\[FN84\]](#)

Second, the use of average income means that cost shares child support orders would be predicated on the assumption that the parents have only half the income that they really have. [\[FN85\]](#) Since parents with lower incomes spend less money on their children, the use of half the parents' available income significantly reduces the estimate of the "cost" of the children to the parents. [\[FN86\]](#) Together, these two factors significantly compromise the *183 ability of the cost shares model to accomplish the first dimension of federal intent for child support guidelines.

Inaccurate and inadequate estimates of parental income will yield inaccurate and inadequate estimates of the cost of raising children.

There are also major deficiencies in the parental expenditure data incorporated in the cost shares model. There are at least two ways in which the cost shares estimates of these expenditures are flawed. First, having treated the two parents as a single entity to determine parental income, the cost shares model then uses estimated spending on children by single parents to determine parental expenditures. However, these estimates are less reliable than estimates of expenditures by two-parent families. The sample size for the USDA estimates of single-parent spending used in the cost shares model is only about one-third as large as the sample for the two-parent estimates. [\[FN87\]](#) Because of the small sample size, estimates of single-parent spending are nationwide only; they cannot be adjusted to account for regional variations in the cost of living or for differences between rural and urban locations. [\[FN88\]](#)

More important, the single-parent sample has considerably less income variation than the two-parent sample of families, principally because single-parent families are so much poorer than two-parent families. The USDA divides the two-parent sample of families into three income ranges, with income in the lowest third of the sample equal to \$31,000 or less per year. In contrast, the single-parent sample can only be divided into two income ranges because only 17% of single-parent families had incomes above \$31,000 per year. [\[FN89\]](#) In other words, 83 percent of single-parent families fall in the same income range as the poorest third of two-parent families. Estimates of parental spending on children are less reliable for families in *184 the lowest income ranges, [\[FN90\]](#) and these families constitute a much larger proportion of single-parent families than of two-parent families. The small percentage of single-parent families with incomes above \$31,000 would also yield less reliable estimates for the hypothetical single-parent families in this income range. A final complication is the fact that the income basis for the single-parent expenditure data in the USDA's estimates includes child support payments as well as any earned income of the parents in the sample. [\[FN91\]](#) The averaged income of the fictitious single parent assumed in the cost shares model does not include child support. This means the parents represented in the USDA's estimates are even poorer than the hypothetical single parents in cost shares, making the USDA's estimates of parental expenditures on children an even less accurate representation of spending by separated parents.

A second flaw in the estimates of parental expenditures on children in the cost-shares guideline is that the USDA's estimates of children's housing expenses are discarded in favor of estimates which appear to be derived from rental prices rather than actual family expenditures on housing. The USDA calculates children's share of family expenditures on housing (including mortgage interest, property taxes, or rent; maintenance; utilities; furnishings; and appliances) by dividing the expenses equally among the members of the household. [\[FN92\]](#) The agency relies on this per capita approach to estimating children's share of housing costs because, in its view, there is insufficient research to justify any alternative. [\[FN93\]](#) However, the USDA's annual report acknowledges that its per capita estimation method, while eminently defensible, is not without its critics. Consequently, the report includes alternative estimates of children's share of housing costs which are based on the same consumer expenditure data but which are lower than the estimates yielded by its preferred per capita estimation method. [\[FN94\]](#) The authors of the cost shares model object to the use of a simple per capita approach to children's housing costs as "unrealistically high." [\[FN95\]](#) However, for reasons they do not explain, they do not turn to the USDA's alternative estimates of children's housing costs, even though doing so would preserve consistency with the household expenditure data that underlie the estimates for all other categories of spending on children. Instead, the cost shares authors eliminate the USDA's housing expenditure estimates altogether, and *185 replace them with a vaguely-described set of estimates based on rental price determinations for government-furnished living quarters, with adjustments for utilities, maintenance, and furnishings. [\[FN96\]](#) The authors do not indicate why these estimates should be considered a more accurate depiction of children's housing costs than the USDA's expenditure-based marginal cost estimates. Since housing is by far the largest component of child costs, [\[FN97\]](#) the use of rental prices rather than household expenditure data to estimate children's housing costs significantly compromises the ability of the cost shares model to reflect the cost of raising children. [\[FN98\]](#)

Existing income shares guidelines suffer from none of these limitations. The use of combined, rather than averaged, parental income assures that support orders are based on complete income information. [\[FN99\]](#) The use of *186 expenditure data from two-parent families ensures more valid and reliable estimates of parental expenditures on children. Finally, income-shares estimates of spending on children are based entirely on consumer expenditure data; there is no tampering with the underlying data that informs the estimates. This is not to say that the estimates of parental expenditures on children used in most income shares states are without their own limitations and

drawbacks. But they are not as serious as those that characterize the estimates used in cost shares. Moreover, income shares child cost estimates can be improved without resorting to the seriously flawed cost shares alternative. [\[FN100\]](#)

Cost shares advocates argue that, in addition to parental income and parental expenditures on children, there is a third component of child costs that is neglected in income shares guidelines. This component is the "tax benefit attributable to the children," which cost shares guidelines subtract from total expenditures on the children in order to arrive at the "true" cost of the children to the parents. Proponents of cost shares assert that (1) all such benefits are intended to offset parents' expenditures on their children and (2) these offsets are received almost exclusively by custodial parents, [\[FN101\]](#) who thereby incur a "dramatic after-tax advantage" in comparison to noncustodial parents. [\[FN102\]](#) Both assertions are incorrect, and both over- simplify the relationship between two complex policy domains.

The definition of "tax benefits attributable to the children" appears to be malleable in the cost shares model. The original Children's Rights Council cost shares guideline defined such benefits as "tax savings to the custodial parent from being able to file as head of household, take tax deductions for the children, and take the child-related earned income credit." [\[FN103\]](#) A more recent cost shares paper adds the child tax credit to this list. [\[FN104\]](#) The cost shares guidelines proposal introduced in the state of Minnesota also includes the child care tax credit and "any child-related welfare benefits, such as WIC payments, for which child support is not a reimbursement to the state," in its list of "tax benefits attributable to the children." Despite their variation, what all these lists have in common is ***187** a conflation of tax provisions with very different purposes and effects. Arguably, a number of these "tax benefits," particularly those that are means-tested, are intended to supplement parental expenditures on their children, not to supplant or substitute for them. [\[FN105\]](#) Means-tested tax provisions, such as the Earned Income Tax Credit and, to a lesser extent, the child care tax credit, [\[FN106\]](#) are essentially public assistance programs administered through the tax code. As such, they are not reimbursement to the parent for money he or she has spent, but rather reparation to the children for money the parent does not have. [\[FN107\]](#) In short, not all tax provisions associated with children are intended as offsets to parental expenditures on children.

Nor do these child-related tax consequences obtain exclusively for the custodial parent, as assumed in the cost shares model. For example, a federal study of state guideline reviews noted considerable variation in both the allocation of the dependency exemption between separated parents and in the purposes to be served by such allocations. In some jurisdictions, the custodial parent was more likely to receive the exemption, but in others the noncustodial parent was more likely to receive it, and in still others the allocation was most commonly shared, either by dividing multiple exemptions or by alternating years. [\[FN108\]](#) The purpose to be served by the allocation of the dependency exemption also varies. Sometimes it is given to the noncustodial parent to encourage the payment of child support, while in other cases the allocation is given to the parent who benefits the most from taking the deduction, thereby increasing the resources available to the children. [\[FN109\]](#) Similarly, it is not necessarily the case that only the custodial parent benefits from the child care tax credit. In a number of income shares states which allocate child care costs separately from other child costs, the allocation is made after an estimated child care tax credit is subtracted ***188** from child care expenses, irrespective of whether the parent who pays for child care actually claims the credit. [\[FN110\]](#)

What these findings show is that the relationship between child support policy and federal and state tax policy is complex and variable, not just from state to state but even from case to case within a given jurisdiction. The challenge is to recognize appropriately the linkage between these family policy domains without contravening the purposes or compromising the effectiveness of either. The cost shares solution, for the reasons described above, does not rise to this challenge. Considerably more research would be needed to establish the sweeping cost shares claim that all "tax benefits attributable to the children" should be subtracted from parental expenditures on children to determine net child costs. In the absence of such research, income shares guidelines, with their more accurate determination of parental income, more valid and reliable estimates of parental expenditures on children, and (at least in some states) modest adjustments for child-related tax benefits, are a better approximation than cost shares guidelines of the cost of raising children.

Income shares guidelines, then, are more likely than cost shares guidelines to achieve the first dimension of federal intent for child support guidelines. What of the second dimension? Is one model more likely than the other to promote consistency in support outcomes for similarly-situated families? This is a difficult question to answer,

because cost shares guidelines are not in effect in any state, so there is no track record to permit direct comparisons between the two models. Nevertheless, several features of cost shares may compromise the consistency of its outcomes. Two of them are discussed below.

Federal regulations at [45 CFR § 302.56](#) focus on deviations as the principal source of potential inconsistency in child support outcomes. Deviations, however, are not the only form of departure from state child support guidelines. State guideline reviews, as well as an OCSE study of these reviews, have revealed another: orders that are inconsistent with state guidelines but are not designated as deviations and include no findings to justify the inconsistency. OCSE has termed these "discrepancies." [\[FN111\]](#) They are cause for concern, partly because they can constitute a high percentage of orders in a given jurisdiction (in one county studied by OCSE, discrepancies accounted for more than 30 percent of child support cases *189 sampled), [\[FN112\]](#) and partly because the reasons for discrepancies are often difficult to ascertain because of limited information in the case records. [\[FN113\]](#) If frequent deviations, even with findings, are contrary to federal intent, then surely unexplained discrepancies in support outcomes are even more so. Guidelines that increase the likelihood of discrepancies do not achieve the federal goal of consistency in support orders.

The complexity of the cost shares model makes it a strong candidate for generating numerous and significant discrepancies in support outcomes. The cost shares formula requires decision makers to calculate net income twice for each parent--once using single taxpayer status, and a second time taking "child- related tax benefits" into account. Even if the definition of such benefits were to be significantly clarified, so that decision makers knew which specific benefits were to be included under that rubric and how to calculate each one accurately, the sheer number of computations involved increases the likelihood of error in the determination of support. [\[FN114\]](#) The calculation of the vaguely-defined "fixed expenses" incurred by each parent further increases the potential for error. The cost shares guideline also deducts from income an "imputed child support order" for other biological or adopted children living with a parent, which would require all the above calculations to be made for those other children, taking into account the income(s) of their other parent(s), as part of the process of determining the order for the children of the instant action. In short, the cost shares model is by far the most complicated of the three models discussed above, and this feature makes it less likely than either of the other two to produce consistent support outcomes.

A second feature of cost shares guidelines that would threaten the consistency of orders is the cross-credit approach to the determination of the final support order. This is a key component of the cost shares calculation, intended to adjust the support order to reflect the direct expenses of both parents during their respective shares of parenting time. On the face of it, this provision would appear to reduce the likelihood of variation in support orders when children spend time in both households. A simple mathematical calculation built right into the guidelines seems preferable to the deviation treatment accorded shared parenting in many states, since it would remove a recurring family circumstance from a state's list of deviation factors and fold it into the guidelines. [\[FN115\]](#)

*190 But the apparent consistency of support outcomes in the cost shares cross-credit calculation rests on an important assumption: that a parent with a given percentage of parenting time automatically assumes that same percentage of the children's expenses, irrespective of the parent's custodial status. The direct relationship between parenting time and parenting expenses is assumed to apply in exactly the same way across all percentages of parenting time and all parental income levels. There is good reason to question this assumption. Although there is limited empirical research on the distribution of direct spending on children in separated families, [\[FN116\]](#) there is substantial anecdotal evidence from practitioners indicating that the distribution may vary a great deal in ways that do not depend solely on the allocation of parenting time. [\[FN117\]](#) For example, a parent who lives several hours from the children's other parent may spend much more on housing, transportation and clothing for his or her children than another parent with the same income and the same allocation of parenting time but who lives in the same city as the other parent. A parent who lives in an urban area may spend much more on housing and food but much less on transportation than another parent with a similar percentage of parenting time who lives in a rural area. [\[FN118\]](#) In other words, the mere fact that a group of separated families has the same distribution of parenting time between the parents does not, by itself, mean that the families are similarly-situated. The apparent consistency in support outcomes generated by the across-the-board application of a time- sensitive cross-credit formula can mask significant inconsistency when the outcomes are compared to the actual needs and behaviors of different families with similar parenting time allocations.

The incorporation of parenting time percentages into all support calculations, in combination with the overall complexity of the cost shares model, suggests that cost shares guidelines are less likely than existing income shares guidelines to yield similar child support outcomes for families with similar characteristics and circumstances. Income shares models appear to come closer to this second dimension of federal intent than the cost shares alternative. However, the evidence is more mixed on this point than is the case with respect to the cost of raising children, principally because income shares guidelines have been evolving in an effort to respond to the complex problems posed by shared parenting. Some of the policy solutions adopted in income shares states may produce inconsistencies similar to those described above for the cost shares model. The *191 next section examines the challenges states have faced in adapting child support guidelines to reflect the many ways that separated parents share responsibility for caring for their children.

V. Changing Families, Changing Guidelines: The Growing Link Between Child Support and Parenting Time

A. Introduction

During the past decade, courts and legislatures throughout this country have reexamined the thorny issue of the connection between child support and visitation, which is now often referred to as parenting time. [FN119] This examination is the result of a reevaluation of some old legal principles. Most of the original state child support laws were based upon a standard obligor/obligee model with one parent having custody and the other having visitation rights. Many states adopted their child support guidelines based on this model, while allowing courts to deviate from the guidelines in the few instances when the parents did not meet this pattern with precision.

Historically, the husband was viewed as the breadwinner who had the duty to provide support for his dependents while the wife had the responsibility to care for the children. [FN120] These basic duties continued after the divorce when the mother usually gained custody and the father continued his duty of support. The goal was to insure that the child would have the same standard of living she had prior to the divorce. [FN121] Generally, the father was given "reasonable" visitation. The policy supporting this principle was that the child should continue to have a relationship with both parents. [FN122] Therefore, the custodial parent had a right to receive financial support for the child while the noncustodial parent had a right to visitation.

Courts were faced with resolving a dispute and providing a remedy when one of the parties violated the rights of the other. In many of these cases the parties themselves linked visitation and support when the custodial parent denied visitation when the noncustodial parent failed to pay child support or when the noncustodial parent refused to pay child support after being denied visitation. Often times the dispute was founded on the *192 parents' animosity toward each other or based on a legitimate attempt to get more time with the children or to get more child support. States eventually formalized the methods for resolving this dispute either linking the issue of support and visitation or attempting to keep them separate. The issue became more complicated as family patterns changed.

In recent years, fewer families fit into the standard custodial/noncustodial model, or a model in which the child lives with the residential parent and visits occasionally with the nonresidential parent. Many families have some type of custody or parenting time arrangement that takes the family out of the standard model. [FN123] Moreover, many families have income from both parents instead of just one, which makes guidelines based on an obligor/obligee model somewhat problematic because one parent no longer has the sole obligation of support. Most states now impose joint and several duties of support on both parents to ensure that the child receives maximum support as well as to strike a balance of fairness between the parents. Because both parents share in the responsibility for supporting their children, the economic responsibility is often divided in proportion to their respective incomes. [FN124] Finally, there seems to be an increased recognition that it costs more to maintain two households and that this has an impact on child support. These changes in family structure are causing states to reexamine some old policies that were based on a different model.

Because of the recognition of the changing family structure and more flexible parenting roles, states seem to be moving in a direction that directly links parenting time and child support. While this may be a correct response to the changing family structure, states must meet the federal intent for child support guidelines by ensuring that any process that includes an adjustment in support based on the amount of parenting time still provides appropriate child

support amounts and avoids significant variations in judicial opinions. [\[FN125\]](#) The states seem to be complying with federal intent in using the income shares model. Nevertheless, there is a growing concern that too many of these adjustments are being made with judicial discretion and should be made within some formula.

B. Denial of Visitation for Not Paying Support

The link between visitation and child support first began to surface when *193 disputes between parents over child support led to the denial of visitation, and vice versa. Parents went to court to enforce their right to child support or their right to visit their children. States approached these disputes by developing different sets of rule that either "connected" or "disconnected" the rights of the parents. [\[FN126\]](#)

Connecting rules directly link child support together so that a parent who fails to pay child support could be denied visitation, or vice versa. As an example, a parent sued for nonsupport could assert the denial of visitation as a defense. [\[FN127\]](#) In states having disconnecting rules, one parent's failure to pay support or permit visitation bears no relationship to either the duty or right of the other parent based on the theory that a parent had a right to visitation and a child had a right to support. Some states follow a hybrid approach that gives courts discretion to form a remedy. [\[FN128\]](#)

Most states are moving toward adopting disconnecting rules [\[FN129\]](#) while recognizing that the issues cannot be resolved in isolation. This seems inevitable because the parties themselves inextricably are connecting the issues together and are pushing each other into court to resolve the dispute. In some cases, a party may be unable to pay support for some legitimate reason, yet should be able to continue a relationship with the children. In other cases, a parent may not spend time with the children, yet should not be able to avoid the duty of support. States need to encourage parents to spend time with their children as well as to pay support.

To some extent, federal law and state laws have altered this issue with the requirement of mandatory withholding of child support payments along with other methods of child support enforcement. [\[FN130\]](#) The obligor will not be able to stop or reduce child support payments without the participation of the courts. States have also established other methods of resolving visitation disputes. [\[FN131\]](#)

Most of these disputes emerge from the basic residential/nonresidential model when the children reside primarily with one parent who receives support from the other parent. However, the linkage between support and visitation is even more complicated as states grapple with extended visitation *194 and joint physical custody arrangements and whether these arrangements should reduce the child support paid by the obligor.

C. State Responses to Time Sharing Between Parents

All states support the concept that both the mother and father should be involved in the lives of their children, even if the parents do not live together. This view seems to be reflected in American society by fathers becoming more active in participating in parenting activities. At the same time, all states want to ensure that children receive appropriate financial support. State law should be developed to reflect these two policies.

However, in the 1980s when states began to formulate guidelines to be used in setting the amount of child support, the focus was on the most common arrangement, sole physical custody. In the 1990s when states began to review their child support guidelines as required by federal law [\[FN132\]](#) state guideline review teams started to examine how the guideline should be applied when the parental roles do not fit the usual model of sole physical custody. [\[FN133\]](#) This review has continued as parental structure has evolved.

Embedded in the child support guidelines of all states is the presumption that one parent will have custody while the other parent will have "standard visitation." The term "standard visitation" has never been defined specifically, but it is usually estimated that the noncustodial parent is with the child about 20% of the time. [\[FN134\]](#) There seems to be little empirical information on how much time nonresidential parents actually spend with their children. Yet, there seems to be a growing consensus that 20% is a good estimate. [\[FN135\]](#) States set the basic amount of child support factoring in the expenses of visitation within this 20% of estimated normal visitation. [\[FN136\]](#) Therefore,

current state law presumes that there should not be any adjustment to the basic order when visitation falls within this percentage. [\[FN137\]](#)

When the parents have some form of parenting time allocation that exceeds the 20% threshold for the obligor, the presumption embedded in the guidelines may no longer apply. Therefore, in these circumstances, most states recognize that some adjustment in the support order should be made [\[FN138\]](#) *195 because the more time a parent spends with a child, the more likely it is that the parent will directly incur part of the child's expenses. Such parenting time arrangements may be in the form of visitation that exceeds the terms of the court order, extended or extraordinary visitation that exceeds the state threshold, or a formal order for joint physical custody with substantially equal parenting time.

Many states are permitting noncustodial parents to receive some reduction in their child support payments when they spend more time with their children and go beyond what is specified in the order. [\[FN139\]](#) States have incorporated these adjustments into their child support guidelines in an effort to encourage the involvement of both parents. However, there is a growing concern that these adjustments may not be consistent with the federal intent to provide adequate support and to limit the deviations from support guidelines.

In twenty-nine states, courts are allowed to deviate from the child support guideline to account for this extended visitation. The actual discretion of judges to deviate from the guidelines varies from state to state. Nevertheless, one of the primary concerns of Congress when adopting the guidelines requirement was that discretion often resulted in orders that were widely different for persons in similar circumstances. [\[FN140\]](#) Eight states avoid the concern about judicial discretion and require the courts to apply a different formula once the visitation reaches a certain level. [\[FN141\]](#)

Most of the states using a different formula recognize that not all child-rearing costs go down for one parent when the child spends more time with the other parent. Fixed costs such as housing and utilities do not change in proportion to the time the child is not there. These states apply a multiplier, usually 1.5, to the basic support order before making an adjustment based on additional visitation. [\[FN142\]](#) The use of a multiplier insures that support will not decrease during extended visitation and can be easily applied to guidelines using the income shares method.

In states that make these adjustments for extended visitation, there is no adjustment for the amount of time that the non-custodial parent spends with the child unless the amount is an excess of the 20% threshold. This also enables the custodial parents to meet their fixed costs. The issue becomes more complicated when extended visitation moves into what some states define as "shared custody." This varies from state to state ranging *196 from parenting time in excess of 30% to substantially equal time, any of which may or may not involve an order for joint physical custody. [\[FN143\]](#)

Professor Marygold S. Melli has examined the direction that states are taking in reducing child support when parenting time exceeds the threshold and has created several categories in which families could be placed. [\[FN144\]](#) When one parent has sole custody and the other person has visitation within the 20% threshold the arrangement would be considered ordinary visitation. Any adjustment to support depends on whether the basic formula already has factored in the amount of money spent by the non-custodial parent when that parent is with the child.

The next category is extended visitation when the child spends a block of time with the nonresidential parent. The block of time may vary from as little as a week to as long as a month. Some states leave the determination of support for these cases to the discretion of the court while others provide for some formulaic reduction in support. Professor Melli questioned the need for any adjustment to an order, especially if the time spent with the child was less than the 20% of ordinary visitation. [\[FN145\]](#)

Extraordinary visitation is the next classification used by states. Professor Melli found the definition to be an imprecise, handy catchall term, with the range starting at anything around ordinary visitation to considerably more than ordinary. [\[FN146\]](#) Most states continue to leave adjustments in support in these cases to the discretion of the trial court on a case-by-case basis. Obviously, the result is inconsistent decisions.

The next category is unequal shared time, when parenting time falls in ranges between 20% to 40%, with most states setting a 30% to 35% range. Most states make provisions for support reduction in this category. Like the cost

shares proposal, the provisions assume that each parent's spending on the children during parenting time can be determined solely by the amount of time the child resides in each household. [\[FN147\]](#)

Several states have established a visitation credit against child support payments for the expenses paid on behalf of the child while with the non-custodial parent. [\[FN148\]](#) This process links directly child support and parenting time so that the more time a child spends with the noncustodial parent the less child support that parent is required to pay.

Arizona has codified adjustments for the costs associated with visitation ***197** and established a table for reducing the proportionate share of the total child support of the parent who exercises visitation. [\[FN149\]](#) Missouri uses a table that is used as part of a worksheet to reduce the child support based on visitation. [\[FN150\]](#) New Jersey and Colorado have also developed visitation credits. [\[FN151\]](#)

When shared time moves above 40%, Professor Melli classifies this as dual residence. In these cases, the spending in the two household is likely to be more equal so a proportional time formula could be used with support calculated on a proportional basis with the parent with the higher income paying support to the other.

Many parenting arrangements completely break the custodial/noncustodial model and move into what is known as joint physical custody. [\[FN152\]](#) Both parents now have custody as well as a duty of support when they do not have custody. The court decree often formalizes the shared time arrangement by specifying the amount of time that each parent has with the child. The Minnesota Courts developed a formula to apply to joint physical custody arrangements that will be part of the judgment of the court. In essence, a party's support obligation is the amount determined by the child support guidelines for the period of time the other parent has custody. [\[FN153\]](#) The child support guidelines factor in the income of the obligee. [\[FN154\]](#)

Clearly, states are recognizing a need to adjust their child support guidelines to accommodate the increased costs of shared parenting. Yet, the overall policy concern remains to ensure that children receive appropriate support. As an example, Minnesota includes the item for the court to consider in addition to the guidelines: "the standard of living the child would have enjoyed had the marriage not been dissolved, but recognizing that the parents now have separate households." [\[FN155\]](#) Nevertheless, while there is a need to adjust support based on these additional costs, it is difficult for any formula to determine how much of an adjustment should be made. [\[FN156\]](#) ***198** Next we consider some of the difficulties states have encountered in their attempts to make appropriate adjustments.

D. Adjusting Child Support Guidelines to Reflect Shared Parenting: Intractable Problems and Inadequate Solutions

The reality of shared parenting in separated families has caused courts and legislators to reconsider their approaches to the link between child support and parenting time. However, the vast majority of states are giving judges the discretion to make appropriate adjustments as long as the findings indicate the amount of support that would have been ordered had the guidelines been strictly applied and substantiate the need for a deviation. [\[FN157\]](#) Under this process, as the number of shared family arrangements increase there will be a corresponding increase in the number of deviations by judges.

This may not be consistent with the intent of Congress. Therefore, the states need to set out the parameters for adjustments in support that accommodate parenting time expenses. This would ensure more consistent decisions, reduce litigation, and provide guidance to the parents when negotiating custody arrangements.

On the surface, it seems reasonable to adjust child support to reflect the expenses of shared parenting by means of a formula that reduces support obligations in direct proportion to parenting time. However, such an approach attempts to simplify a very complex problem because the expenditures of one parent do not go down in direct relation to the expenditure of the other parent. Furthermore, as discussed in Part IV, there is insufficient evidence to establish the assumption that parents with a given percentage of parenting time incur that same percentage of their children's expenses. This is a serious shortcoming, since any reduction or credit can reduce an order that may already be inadequate. In addition, a reduction may provide an incentive to set up a second household when the resources are not adequate, which will reduce further the amount of support that the child receives. This may push either or both parents below the poverty line when incomes are relatively low.

Professor Melli cites several additional problems with this approach:

First, it rewards nonresidential parents disproportionately for spending small amounts of extra time with their children. Consequently, it may encourage a nonresidential parent to seek small amounts of shared time over the threshold amount to obtain a substantial decrease in child support. Second, if ordinary visitation has already been discounted for the expenditures by the nonresidential parent in ordinary visitation, a formula based on a strict proportional time with the child doubles the discounts for ordinary visitation. [\[FN158\]](#)

*199 Furthermore, the adjustment gives a parent a financial incentive to seek a significant increase in parenting time or to establish joint physical custody when there is no indication that the child will benefit from such an arrangement. [\[FN159\]](#) The overall custody decision as well as the accompanying parenting time arrangement should be determined by what is best for the child and not what is in the financial best interest of a parent. A direct link between support and time with the children may cause the parents to lose focus on the best arrangement for the child and would encourage insincere negotiation about custody arrangements.

The custodial parent could view an extra day of visitation as a loss of economic support even if the visitation would benefit the child. The non-custodial parent might see extra visitation as the means to reduce support. Parents would be fighting over visitation while masking the fact that the dispute is really about child support. This would lead to an increase in litigation with financial resources being used for the litigation instead of for children. [\[FN160\]](#) If the original support order included some reduction based on additional visitation and the parent does not exercise the additional time, the parties could be back in litigation unless there is some type of built-in mechanism for an automatic modification.

In short, current efforts to accommodate parenting time expenses through a formulaic adjustment to state child support guidelines may help to limit deviations, but they do so at a price. The problems are especially acute for solutions that mirror the cost shares approach by basing the adjustment solely on the percentage of time the children are in the care of each parent. In essence, these solutions risk accomplishing one federal intent for child support guidelines (enhancing consistency) at the expense of the other (maintaining adequacy).

VI. Improving State Child Support Guidelines and Advancing Federal Intent: Conclusion and Recommendations

The foregoing analysis suggests that child support guidelines based on income shares premises are much more consistent with federal intent for state guidelines than are cost shares guidelines. Nevertheless, though the solutions offered by the cost shares model are inadequate, the policy problems to which they point are real, and they are increasingly difficult. As families continue to experiment with alternative ways of caring for children in separated households, they will pose new and complex dilemmas for judicial decision makers attempting to issue adequate, equitable, and consistent child support orders. As states continue to review and revise *200 their child support guidelines, they must link their consideration of the economic evidence on the cost of raising children and the need for consistency in outcomes with the complex realities of shared parenting. We conclude with several directions states should consider in confronting these challenges.

First, states which have not already done so should follow the recommendation of the federal Advisory Panel on Child Support Guidelines to adopt either a simple income shares or Melson-formula income shares guidelines model. [\[FN161\]](#) Neither the percentage-of-obligor-income model nor the cost-shares model is adequate to the policy demands outlined above. The percentage-of-obligor-income model is based on outdated assumptions about parental roles and resources. The incomes of both parents should be used to ensure that the child receives the appropriate amount of support. Moreover, the percentage-of-obligor-income model cannot be adjusted easily to account for shared parenting arrangements and all of the possible variations. This leaves adjustments to judicial discretion and inconsistent decisions. As for the cost shares model, although it includes the income of both parents, the averaging of parental income compromises the economic estimates of parental expenditure on children and, arguably, fidelity to the federal requirements concerning the relationship of child support guidelines to obligor income. The end result is that cost shares subordinates the standard of living of the child to the standard of living of the parents [\[FN162\]](#) and, for the reasons discussed above, risks increased inconsistency in support outcomes.

In contrast, income shares guidelines are based on the combined incomes of both parents, replicating how children's needs would be met if the parents lived together and ensuring that the children do not bear a disproportionate share of the parents' reduced standard of living. This fundamental premise provides the most appropriate policy foundation for state child support guidelines, whatever the economic estimates that inform the specific provisions. This is not to say that states should not give careful attention to those estimates in conducting their federally-mandated guidelines reviews. To the contrary, states should cast their nets widely in examining the economic literature, including serious consideration of the USDA's estimates of spending on children by two-parent families.

Once a state has established an income shares guideline, the next step is to develop a consistent approach to the adjustment of support to accommodate shared parenting. States need to specify the adjustment process in the context of the guidelines themselves, rather than simply referencing a *201 possible adjustment as a deviation factor, in order to ensure more consistent decisions. This is not an easy task because of the competing interests of all of the parties. Nevertheless, the state needs to define the parameters of these adjustments in order to provide guidance for those involved in the process.

There are several features of the adjustment process that states should specify. To begin with, states need to define what constitutes ordinary parenting time. The estimated 20% base may not be the correct figure in every state. In addition, the state needs to specify whether or not the ordinary expenses related to visitation have been considered in the development of the basic order. If they have, then the state should also determine if a child support order should increase if the nonresidential parent does not exercise ordinary parenting time. States also need to clarify what happens when a parent exceeds ordinary parenting time and what reduction, if any, should be made in child support. Additionally, the state needs to examine the concept of dual residence and whether or not this arrangement should have a different kind of impact on child support than one parent pays to the other.

States also need to determine how to account for the fixed costs of the residential parent if support is adjusted downward to accommodate the parenting time expenses of the other parent. The use of a multiplier is perhaps the best way to address some of these problems and works best if it commences at the point where the formula for ordinary parenting time would yield more than the formula for increased parenting time. [\[FN163\]](#) This method mitigates the days-for-dollars, problem and each parent bears an appropriate level of support. The parenting time adjustments already in effect in several states show that a multiplier is easily applied to the income shares model. Nevertheless, states should also examine the impact of any adjustment process on child support outcomes, even when the guidelines for shared parenting orders include a multiplier, to ensure that the adjustment does not incur the disadvantages of linking child support and parenting time as outlined in Part IV.

States should also give serious consideration to alternative methods of accommodating shared parenting that do not tie adjustments in support to the specific amount of parenting time allocated to each parent. For example, states could emulate the Melson formula principle of the self-support reserve and subtract from each parent's income a parenting-time expense reserve prior to determining each parent's share of income. Alternatively, states could base the parenting time adjustment on a specific category of children's expenses. A proposal currently under consideration in the State of Minnesota subtracts approximately half of the cost of children's housing from each parent's share of the children's expenses, to reserve income for *202 parenting time expenses. [\[FN164\]](#) Finally, states could base a parenting time adjustment on parental income instead of parenting time allocations. While none of these solutions is without their own limitations, they all avoid the problems associated with adjustments in support based solely on parenting time.

The federal requirement for each state to revisit its child support guidelines on a regular basis provides a genuine opportunity for continued policy innovation and improvement. Many states have capitalized on the quadrennial review requirement to one degree or another, using the review process to draw attention to ongoing policy problems, conduct research on an array of alternatives, and develop recommendations for change. Some of these recommendations eventually make their way into state rules or statutes. [\[FN165\]](#) Informed and imaginative review teams can help to improve the fit between state child support guidelines and the realities of life in separated families. In doing so, they can make a real difference for the families the guidelines are intended to serve. There is no better reason to undertake this work.

[FNa1]. Associate Professor of Political Science at St. Olaf College and Child Support Guidelines Consultant to the Minnesota Department of Human Services, September 1998-May 2003.

[FNaa1]. Professor of Law, Hamline University and Member, Minnesota House of Representatives, 1997 to present. The views expressed in this article are those of the authors and do not necessarily represent the official position of the Minnesota Department of Human Services or the Minnesota State Legislature.

[FN1]. Jane C. Venohr & Robert G. Williams, The [Implementation and Periodic Review of State Child Support Guidelines](#), 33 FAM. L.Q. 7, 9 (1999).

[FN2]. "The result of the enactment of child support guidelines in every state is that judges are now required to use the state's child support guidelines as a presumption of the appropriate amount of support in every child support case rather than rely on his or her own discretion as to what constitutes 'the best interests of the child,' the touchstone of child support under pre-guidelines statutory and common law." Laura W. Morgan & Mark C. Lino, [A Comparison of Child Support Awards Calculated Under States' Child Support Guidelines with Expenditures on Children Calculated by the U.S. Department of Agriculture](#), 33 FAM. L.Q. 191, 192 (1999).

[FN3]. U.S. Dep't of Health & Human Servs., EVALUATION OF CHILD SUPPORT GUIDELINES, FINAL REPORT, VOL. I: FINDINGS AND CONCLUSIONS, ch. 3 (1996) [hereinafter EVALUATION OF GUIDELINES I].

[FN4]. [Pub. L. No. 98-378, § 18, 98 STAT. 1305](#) (1984).

[FN5]. [Pub. L. No. 100-485, § 103, 102 STAT. 2343](#) (1988); [42 U.S.C. § 667\(b\)\(2\)](#) (1991); [45 C.F.R. § 302.56\(f\)](#) (2003).

[FN6]. [45 C.F.R. § 302.56\(c\)\(1\)](#) (2003).

[FN7]. [45 C.F.R. § 302.56\(c\)\(2\)](#) (2003).

[FN8]. [45 C.F.R. § 302.56\(c\)\(3\)](#) (2003).

[FN9]. [45 C.F.R. § 302.56\(a\)](#) (2003).

[FN10]. [45 C.F.R. § 302.56\(a\)](#) (2003).

[FN11]. [45 C.F.R. § 302.56\(g\)](#) (2003).

[FN12]. [45 C.F.R. § 302.56\(a\)](#) (2003).

[FN13]. National Conference of State Legislatures, Which Branch of Government Establishes Each States' [sic] Child Support Guidelines, available at <http://www.ncsl.org/programs/cyf/branch.htm> (accessed July 18, 2003).

[FN14]. EVALUATION OF GUIDELINES I, supra note 3, ch. 1, at 2.

[FN15]. See generally, LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION 1 § 1.03(a) (2002).

[FN16]. Alaska, Arkansas, Illinois, Mississippi, North Dakota, Tennessee, and Texas base support orders on the net income of the obligor. Georgia, Nevada, and Wisconsin base support on the obligor's gross income. See Morgan & Lino, supra note 2; Venohr & Williams, supra note 1, at 11.

[FN17]. Alabama, Arizona, California, Colorado, Connecticut, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. Morgan & Lino, supra note 2, at 192. The simple income shares model is described more fully in Part III.

[FN18]. Melson-formula income shares models, described in Part III, are in effect in Delaware, Hawaii, and Montana. The Melson formula is often listed separately as a third child support model in its own right. See Venohr & Williams, supra note 1, at 9; see also Morgan & Lino, supra note 2, at 192. However, Morgan characterizes the Melson formula as "a more complicated version of the income shares model" which "reflects several public policy judgments. First, the Melson Formula explicitly recognizes that support of others is impossible until one's own basic support needs are met. Second, the Melson Formula model reflects the public policy that further enhancement of the parents' own economic status should not be allowed until the parents jointly, in proportion to their incomes, meet the basic poverty level needs of their children. Finally, the Melson Formula model, by incorporating a Standard of Living Adjustment (SOLA), reflects the policy judgment that parents should share their additional incomes with their children, improving their children's standard of living as their own standard of living improves." Morgan, supra note 15, at § 1.03(d)(1).

[FN19]. District of Columbia, Massachusetts, Minnesota.

[FN20]. Donald J. Bieniewicz, Child Support Guideline Developed by Children's Rights Council, in CHILD SUPPORT GUIDELINES: THE NEXT GENERATION 104-125 (Margaret Campbell Haynes, ed., 1994)[hereinafter THE NEXT GENERATION].

[FN21]. R. Mark Rogers, Notes and Charts from a Seminar Presentation to 13th National Conference of the Children's Rights Council, The "Cost Shares" Child Support Guideline: A Working, Superior Alternative to Current Guidelines (Bethesda, Md., May 5, 2001), www.guidelineeconomics.com/analysis/RMR_published.html (accessed July 18, 2003).

[FN22]. See R. Mark Rogers <http://www.guidelineeconomics.com/index.html> (accessed July 18 2003).

[FN23]. [45 C.F.R. § 302.56\(e\) \(2003\)](#).

[FN24]. A 1996 study of state child support guidelines by the federal Office of Child Support Enforcement indicates clearly that inconsistency in order amounts was one of the problems Congress sought to resolve by requiring states

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to adopt child support guidelines: "Historically, determining a child support award was at the discretion of the decisionmaker [T]he decisionmaker's discretion often resulted in awards that were widely different for persons of similar circumstances. [One study] discovered that child support awards made by a single district court were 6.0% to 51.7% of an obligor's income for one child and from 5.6% to 40.0% of an obligor's income for two children. Motivated by such findings, in 1984, Congress required every State seeking Federal funding for public welfare programs to establish child support guidelines." EVALUATION OF GUIDELINES I, *supra* note 3. ch. 1, at 1 (citing Lucy Marsh Yee, What Really Happens in Child Support Cases: An Empirical Study of Establishment and Enforcement of Child Support Orders in the Denver District Court, 57 DENV. L.J. 21, 36 (1979)).

[FN25]. [45 C.F.R. § 302.56\(h\) \(2003\)](#).

[FN26]. This was a significant issue in the consideration of child costs in the 1998-99 review of Minnesota's child support guidelines. The members of the Advisory Task Force charged with assisting in the guidelines review differed sharply in their conceptualization of "basic needs," and the Task Force ultimately decided to define child costs in terms of "what parents spend" rather than in terms of "what children need." See Jo M. Beld, Child Support Guidelines Review Advisory Task Force Final Report 6 (Minn. Dep't of Human Servs. 2001). In this respect, Minnesota was typical; most states define "child costs" principally, if not exclusively, in terms of parental expenditures on children. See U.S. Dep't of Health and Human Servs., EVALUATION OF CHILD SUPPORT GUIDELINES, FINAL REPORT VOL. II: FINDINGS OF STATE GUIDELINE REVIEWS, STATE GUIDELINE STUDIES, AND UNSTRUCTURED INTERVIEWS, 6-9 (1996) [hereinafter EVALUATION OF GUIDELINES II].

[FN27]. "The vast majority of a family's expenditures cannot be attributed directly to any one of the family's members. As a result, very strong assumptions must be made before empirical estimation can proceed, no matter which estimator is chosen." Burt S. Barnow, Economic Studies of Expenditures on Children and Their Relationship to Child Support Guidelines, in THE NEXT GENERATION, *supra* note 20, at 22.

[FN28]. For this reason, the U.S. Department of Agriculture's annual report on expenditures on children in the U.S. provides estimates not only for the U.S. as a whole, but for the urban West, urban Northeast, urban South, urban Midwest, and rural areas nationwide. See MARK LINO, EXPENDITURES ON CHILDREN BY FAMILIES, 2001 Annual Report, Misc. Pub. 1528-2000, at 10 (U.S. Dep't of Agric., Ctr. for Nutrition Policy & Promotion 2002).

[FN29]. LINO, *supra* note 28, at 10.

[FN30]. Letter to Jo Beld, Child Support Guidelines Review Project Consultant, Minnesota Department of Human Services from Mark Lino, Senior Economist, U.S. Department of Agriculture (Feb. 28, 2001) (on file at the Minnesota Department of Human Services).

[FN31]. Barnow, *supra* note 27, at 25.

[FN32]. ROBERT G. WILLIAMS, DEVELOPMENT OF GUIDELINES FOR CHILD SUPPORT ORDERS: ADVISORY PANEL RECOMMENDATIONS AND FINAL REPORT PART I, 23-24 (U.S. Department of Health & Human Services, Office of Child Support Enforcement 1987).

[FN33]. [Pub. L. No. 100-485 § 128 102](#) Stat. 2343 (1988).

[FN34]. DAVID BETSON, ALTERNATIVE ESTIMATES OF THE COST OF CHILDREN FROM THE 1980-86 CONSUMER EXPENDITURE SURVEY: Final Report to the U.S. Department of Health & Human Services, Office of the Assistant Secretary for Planning and Evaluation, Spec. Rep. No. 51 (U. of Wis. Inst. for Research on Poverty 1990).

[FN35]. Venohr & Williams, *supra* note 1, at 23.

[FN36]. EVALUATION OF GUIDELINES II, *supra* note 26, at 7.

[FN37]. The Office of Child Support Enforcement was quite deliberate in making this expectation clear. In its initial draft of the federal regulations implementing the child support guidelines provisions of the Family Support Act, OCSE had not specified that a state had to change its guidelines in response to the findings of its quadrennial review. When asked to clarify this point, OCSE responded, "[T]he intent of four-year review of guidelines is to ensure that the guidelines remain relevant to the needs of children. Consequently, we have added a requirement that guidelines be modified, if appropriate, at least once every four years." Office of Child Support Enforcement, <http://www.acf.dhhs.gov/programs/cse/pol/at-9102.htm> (accessed July 18, 2003).

[FN38]. [45 C.F.R. § 302.56\(h\) \(2003\)](#).

[FN39]. EVALUATION OF GUIDELINES I, *supra* note 3, ch. 2, at 1.

[FN40]. WILLIAMS, *supra* note 32, part II, at 7.

[FN41]. *Id.* at 13.

[FN42]. Although some states established presumptive guidelines in response to the Child Support Enforcement Amendments of 1984 (see EVALUATION OF GUIDELINES I, *supra* note 3, ch. 1, at 1), advisory guidelines alone were sufficient to maintain compliance with federal law. [Pub. L. 98-378](#), 102 Stat. 1305 (1984).

[FN43]. WILLIAMS, *supra* note 32, part II, at 7.

[FN44]. *Id.* at 13.

[FN45]. Robert G. Williams, An Overview of Child Support Guidelines in the United States, in THE NEXT GENERATION, *supra* note 20, at 11. In response to objections that the case data requirement would impose an "unreasonable burden on the judicial and administrative systems," OCSE replied that "any legitimate review of guidelines would include analysis of case data on the application of their guidelines ... to determine if the guidelines are adequate or should be modified in any way and that deviations are limited and justified." OCSE did modify the language of 302.56(h) to permit the use of sampling techniques in order to make the case data analysis more manageable, but it retained the requirement that the case data analysis be conducted as an essential component of guidelines reviews. Office of Child Support Enforcement, *supra* note 37.

[FN46]. WILLIAMS, *supra* note 32, part II, at 7.

[FN47]. *Id.* part I, at 15.

[FN48]. Bieniewicz, *supra* note 20.

[FN49]. See <http://www.childrens-rights.org/> (accessed July 21, 2003).

[FN50]. R. Mark Rogers, Cost Shares v. Income Shares, <http://www.guidelineconomics.com/costshares/compare.html> (accessed July 21, 2003).

[FN51]. Rogers, *supra* note 21.

[FN52]. WILLIAMS, *supra* note 32, part II at 67-68. Interestingly, cost shares advocates do not consistently convey the correct definition of "income shares." Rather than "the share of the parents' combined income the children should receive," they appear to believe that the term refers to the share of the obligor's income which the obligee should receive: "Income Shares, as its very name implies, includes alimony within child support." See Rogers, *supra* note 50.

[FN53]. See Venohr & Williams, *supra* note 1, at 12; see also MORGAN, *supra* note 15.

[FN54]. See Venohr & Williams, *supra* note 1, at 10 (Alabama, Arizona, Colorado, Idaho, Indiana, Kansas, Louisiana, Maine, Maryland, Montana, New Mexico, North Carolina, Oklahoma, Oregon, Road Island, South Carolina, Utah, Virginia, West Virginia).

[FN55]. See *id.* at 12 (California, Connecticut, Florida, Iowa, Michigan, Nebraska, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, South Dakota, Vermont, Washington, Wyoming).

[FN56]. For example, Connecticut guidelines provide for up to eight deductions, including federal tax, state tax, social security or mandatory retirement. Medicare tax, health insurance premiums for persons other than the child of the action, mandatory union dues or fees, other non-arrearage maintenance and support payments, and an imputed support obligation for other "qualified" children. St. of Conn. Comm. for Child Support Guidelines, Child Support and Arrearage Guidelines 1 (1999), <http://www.jud.state.ct.us/external/news/childsupport.htm>. (accessed July 21, 2003). Deductions in Washington state guidelines, like those in Connecticut, include federal and state taxes, contributions or deductions for federal insurance, mandatory pension payments, and court-ordered spousal support payments, but they do not include health insurance premiums for persons other than the child of the action or deductions for other qualified children. They do include state industrial insurance premiums and up to \$2,000 per year for voluntary pension payments. State of Washington Child Support Schedule. Wash. Rev. Code § 26.19.

[FN57]. For example, in North Carolina, actual expenditures prorated separately between the parents include after-tax work- or job-search-related child care costs, the children's portion of health insurance premiums, out-of-pocket medical expenses exceeding \$100 per year, special or private education expenses, and the cost of transportation between the parents' homes. North Carolina Child Support Guidelines (2002), <https://nddhacts01.dhhs.state.nc.us/GuideLines.jsp>. (accessed July 21, 2003).

[FN58]. For example, in Nebraska, health insurance premiums for the children are a deduction from income, while

after-tax work or education-related child care costs are apportioned separately. Nebraska Child Support Guidelines, <http://court.nol.org/rules/childsupp.htm>. (accessed July 21, 2003).

[FN59]. In Wyoming, all expenses are assumed to be included in the estimated expenses prorated between the parents. Necessary child care, special health or educational expenses, and parenting time transportation costs are all listed as deviation factors. Wyo. Stat. Ann. § 20-6-30 (2002).

[FN60]. See Family Court of the State of Delaware, Delaware Child Support Formula Evaluation and Update, Report of the Family Court Judiciary 1 (2002), <http://courts.state.de.us/family/formula02.pdf>. (accessed July 21, 2003).

[FN61]. In all three Melson formula states, the self-support reserve is at or near the federal poverty guideline for a one-person household. In Delaware, it is currently \$850 (approximately 120% FPG). Family Court of the State of Delaware, Instructions for Child Support Calculation, Form 509 I-2, <http://courts.state.de.us/family/509i.pdf>. (accessed July 21, 2003) [hereinafter Delaware Guidelines]. In Hawaii, the self-support reserve is \$743 per month, "based on the 1996 Federal Poverty Guidelines for minimum food, clothing, shelter and other essential needs." Hawaii Family Court Child Support Guidelines, Instructions 5 (1998), <http://www.hawaii.gov/jud/Oahu/Family/CSGdline.pdf>. (accessed July 21, 2003) [hereinafter Hawaii Guidelines]. In Montana, the self-support reserve, or "personal allowance," is 130% of the federal poverty guidelines and is "a contribution toward, but not intended to meet the subsistence needs of parents." Montana Child Support Guidelines, Admin R. Mont. 37.62.114 (1998) [hereinafter Montana Guidelines].

[FN62]. In Hawaii, for example, the amount is \$250 per child. Hawaii Guidelines, *supra* note 61.

[FN63]. Work-related child-care is included in the primary support obligation in all three Melson formula states.

[FN64]. Included in the primary support obligation in Hawaii and Montana, but deducted from income in Delaware.

[FN65]. Montana and Delaware. Montana Guidelines, *supra* note 61, at 37.62.11-12.

[FN66]. Montana Guidelines, *supra* note 61, at 37.62.128.

[FN67]. Delaware Guidelines, *supra* note 61, at Form 509 I.

[FN68]. MORGAN, *supra* note 15, at § 1.03(5)(ii), <http://www.supportguidelines.com/book/chap1b.html> (accessed July 21, 2003).

[FN69]. Karen Czapanskiy, Child Support, Visitation, Shared Custody, and Split Custody in THE NEXT GENERATION *supra* note 20, at 46.

[FN70]. Minn. S. File 600, 83d Sess. § 1(2)(g)(2) (Feb. 27, 2003).

[FN71]. The self-support reserve under the cost shares approach (133% FPG) is higher than the self-support reserve

used in Montana (130% FPG), the Melson state with the highest self-support reserve. Montana Guidelines, *supra* note 61, at 37.62.114.

[FN72]. Rogers, *supra* note 21, at 5.

[FN73]. R. Mark Rogers & Donald J. Bieniewicz, *Child Cost Economics and Litigation Issues: An Introduction to Applying Cost Shares Guidelines 12-13* (2001), www.guidelineeconom-ics.com (accessed July 21, 2003); see also Bieniewicz, *supra* note 20.

[FN74]. Rogers, *supra* note 21, at 5.

[FN75]. Minn. S. File 600. 83d Sess. § 1(2)(g)(1)(9) (Feb. 27, 2003).

[FN76]. Rogers & Bieniewicz, *supra* note 73, at 20-21.

[FN77]. The definition of "extended" parenting time varies among the states, and not all states with provisions for such parenting time arrangements use a cross-credit formula. See National Conference of State Legislatures (undated), *State Treatment of Shared Parenting Time*, [http:// www.ncsl.org/programs/cyf/shared.htm](http://www.ncsl.org/programs/cyf/shared.htm) (accessed July 21, 2003).

[FN78]. Laura W. Morgan, *Child Support Guidelines and the Shared Custody Dilemma*, 10 (1) *DIVORCE LITIG.* 213 (1998), [http:// www.childsupportguidelines.com/articles/art199906.html](http://www.childsupportguidelines.com/articles/art199906.html) (accessed July 21, 2003).

[FN79]. The proposed Minnesota statute states, "Depending on relative incomes, each parent's share of the children's time, and the size of the child- related tax benefits, either parent may be the obligor parent. The court shall designate which parent is the obligor and which is the obligee separately from which is noncustodial and which is custodial or jointly custodial." Minn. S. File 600, 83d Sess. § 1(2)(16) (Feb. 27, 2003).

[FN80]. According to the Final Report of the Advisory Panel on Child Support Guidelines, "In an intact household, the income of both parents is generally pooled and spent for the benefit of all household members, including any children. The Income Shares model calculates support as the share of each parent's income estimated to have been allocated to the child if the parents and child were living in an intact household." WILLIAMS, *supra* note 32, part II, at 67-68.

[FN81]. *Id.*, part 1, at 15-16.

[FN82]. *Id.*, part II, at 68-69.

[FN83]. Rogers & Bieniewicz, *supra* note 73, at 24.

[FN84]. The cost shares approach appears to attribute the reduced standard of living of separated parents to the spending the parents must do to provide for the children. But what distinguishes the spending of separated parents from the spending of cohabiting parents is that (absent an order for maintenance) they do not spend their pooled

resources on each other as they would if they lived together. It is this, not spending on children, that accounts for the reduction in the parents' standard of living.

[FN85]. The averaging of parental income in the cost shares model may not comply with the federal requirement that state child support guidelines "take into consideration all earnings and income of the noncustodial parent." [45 C.F.R. § 302.56\(c\)\(1\) \(2003\)](#). In contrast, income shares guidelines go beyond the federal requirement by including all earnings and income of both parents.

[FN86]. The exact amount of the reduction depends on the method used to estimate parental spending on children, the number of children in the family, and the specific incomes of the parents, since the relationship between parental income and parental expenditures on children is not linear. Nevertheless, for families at most income levels, the amount of money parents spend on their children is directly related to parental income. See Betson, *supra* note 34; see also LINO, *supra* note 28. According to estimates prepared for the State of Minnesota by the U.S. Department of Agriculture, two-parent families with a combined monthly income of \$6000 spend 26.2% of their income (\$1572) on two children for all expenses except child-care and health care. Parents with only half that amount of income (\$3000 per month) spend about one-third less (36.3% of their income, or \$1089). Letter and accompanying economic estimates to Jeannette Augustson, Senior Planner, Minnesota Department of Human Services from Mark Lino, Senior Economist, U.S. Department of Agriculture (August 26, 2002) (on file at the Minnesota Department of Human Services).

[FN87]. This problem is not unique to the USDA's estimates, because the USDA bases its estimates on the same consumer expenditure data used in most estimates of expenditures on children, i.e., the interview portion of the Consumer Expenditure Survey (CES) conducted by the Bureau of Labor Statistics in the U.S. Department of Labor. The USDA estimates are based on pooled 1990-92 CES data, with samples of 12,850 husband-wife households and 3,395 single-parent households. A similar ratio of single-parent to two-parent sampling characterizes other CES years. LINO, *supra* note 28, at i.

[FN88]. *Id.* at 8, 25.

[FN89]. *Id.* at 8-9.

[FN90]. Letter and accompanying economic estimates from Mark Lino, *supra* note 86.

[FN91]. LINO, *supra* note 28, at 8.

[FN92]. *Id.* at 2, 5.

[FN93]. For a good discussion of alternative estimation methods and the USDA's reasons for rejecting them, see *id.* at 17, 18.

[FN94]. *Id.*

[FN95]. Rogers & Bieniewicz, *supra* note 73, at 14.

[FN96]. Id. None of the information available from R. Mark Rogers' papers or Web site material provides much detail about the specific procedures used to estimate children's housing costs. The original source introducing the cost shares model and referenced in subsequent cost shares papers (Bieniewicz, supra note 20; Rogers & Bieniewicz, supra note 73) cites a survey of rental prices for one-and two-bedroom apartments in urban Indiana, conducted by a retired Purdue University faculty member, as the basis of its housing cost estimates. More recent versions of cost shares use "housing cost data from the latest U.S. Department of the Interior's 'Regional Quarters Rental Survey Covering Government-Furnished Quarters Located in the Southeast Survey Region,' February, 1997. This is an extensive survey of market values of private housing to provide a basis for determining market rents to charge government employees for government-furnished housing." R. Mark Rogers. Cost Shares Background (undated), <http://www.guidelineeconomics.com/costshares/background.html> (accessed July 21, 2003). The cost shares papers do not explain how the market rental price information derived from the DOI Southeastern regional survey is converted into estimates of children's housing costs, except to indicate that marginal (rather than per capita) estimation methods are used and that the estimates include utilities, maintenance, and furnishings, based on cost ratios between these expenses and rental costs established by the Bureau of Labor Statistics.

[FN97]. Housing accounts for approximately 40% of family expenditures on children. See Lino, supra note 28. at 19-25.

[FN98]. Ironically, the authors of cost shares claim that one reason the economic basis of cost shares is superior to the economic basis of income shares is because the cost shares estimates of child costs are based on "actual spending data on children" rather than "an indirect 'estimation' of child costs." Rogers, supra note 21. But the cost shares estimates of children's housing costs could hardly be more indirect. These estimates are based on judgments about "reasonable" rental prices to charge government employees in the southeastern U.S. The process of determining a "reasonable" rent is at best an inexact science. According to the DOI handbook explaining its procedures for determining rental prices, "reasonable rents are derived from an analysis of the market rents of private comparable properties in the established communities nearest to concentrations of Government housing." (U.S. Department of Interior, March 1997, Quarters Handbook, "Monthly Base Rental Rate Determination," § 10.3.A.) These comparable properties may include "houses, apartments, mobile homes, and trailer spaces." (§ 10.B. (3)(a)). However, "the process of arriving at the (monthly base rental rate) of a structure can be influenced by real estate appraisal principles, statistical limitations or administrative principles and considerations. Often there may be a conflict among these three which necessitates a trade-off ... [and which] may result in a less than ideal application of any one of the three principles." (Sec. 10.3. A.)

[FN99]. [45 C.F.R. § 302.56\(c\)\(1\) \(2003\)](#), requiring state child support guidelines to "take into consideration all earnings and income of the noncustodial parent."

[FN100]. The USDA's estimates of two-parent family expenditures on children offer many advantages over the expenditure estimates incorporated in most income shares guidelines. Jo M. Beld, [A New Approach to the Determination of Child Support in Minnesota: The 'Shared Responsibility' Child Support Guidelines](#), 28 WM. MITCHELL L. REV. 791, 849 (2001). An income shares proposal currently under consideration by the Minnesota state legislature uses USDA estimates of two-parent family expenditures on children as the basis of its schedule of basic support. Minn. S.File 758, 83d Sess. (March 10, 2003).

[FN101]. Rogers & Bieniewicz, supra note 73, at 8.

[FN102]. Id. at 10.

[FN103]. Bieniewicz, supra note 20, at 109.

[FN104]. Rogers & Bieniewicz, *supra* note 73, at 9.

[FN105]. In fact, according to the IRS, the Earned Income Tax Credit "is intended to offset the cost of Social Security taxes and to provide an incentive to work." See IRS Reminds Taxpayers of Earned Income Tax Credit Eligibility, FS-2003-9, (Jan. 2003), <http://www.irs.gov/news-room/article/0, id=106331.00.html>. One review of the cost shares model notes that including the Earned Income Tax Credit in the list of "tax benefits attributable to the children" may compromise the ability of the EITC to achieve its principal purposes of increasing work effort and reducing poverty. See Jane C. Venohr & Tracy E. Griffith, Report on the Michigan Child Support Formula 65 (Pol'y Studies Inc. 2002).

[FN106]. The amount of the child care tax credit as a percentage of child care costs varies inversely with the income of the parent. IRS, Form 2441, Part II, Line 8.

[FN107]. To the extent that "tax benefits attributable to the children" are defined to include public assistance programs such as the EITC, this feature of cost shares would also run counter to the provision in virtually every state's child support guidelines excluding public assistance from the calculation of child support. See MORGAN, *supra* note 15, § 2.03[f].

[FN108]. EVALUATION OF GUIDELINES I, *supra* note 3, ch. 3, 37.

[FN109]. *Id.*, ch. 3, at 38.

[FN110]. Examples include Kansas (Kansas Child Support Guidelines V. Specific Instructions for the Worksheet, D.5, <http://www.kscourts.org/ctruls/csapp5.htm>), Montana (Montana Guidelines, *supra* note 61, at 37.62.123), and Oregon (Oregon Child Care Credit Computation, Worksheet E), <http://www.dcs.state.or.us/forms/sed109e.pdf>.

[FN111]. EVALUATION OF GUIDELINES I, *supra* note 3, ch. 2 at 1.

[FN112]. *Id.*, ch. 2, at 7.

[FN113]. *Id.*, ch. 2, at 9.

[FN114]. The argument here is similar to the one in favor of basing child support guidelines on gross income as recounted by the Advisory Panel on Child Support Guidelines: "Use of gross income substantially reduces the need for computations (and potential for error) by court personnel, attorneys, and parties." WILLIAMS, *supra* note 32, part II at 41.

[FN115]. National Conference of State Legislatures, State Treatment of Shared Parenting Time (2000), <http://www.ncsl.org/programs/cyf/shared.htm> (accessed July 22, 2003).

[FN116]. Morgan, *supra* note 78.

[\[FN117\]](#). Beld, supra note 26.

[\[FN118\]](#). LINO, supra note 28.

[\[FN119\]](#). Minnesota changed all statutes that referred to visitation to parenting time in 2000. Act of April 27, 2000, Ch. 444, 2000 LAWS OF MINN. 981 (providing parenting time instead of visitation).

[\[FN120\]](#). At common law, the father was primarily liable for the support of his minor children and arose from his corresponding right to his children's earnings and services. See [Greenwood v. Greenwood, 28 Md. 369 \(1868\)](#).

[\[FN121\]](#). Uniform Marriage & Divorce Act, § 309, 3 U.L.A. 400 (1987) (The act does allow the court to order either or both parents to pay support to maintain the standard of living the child would have enjoyed had the marriage not been dissolved).

[\[FN122\]](#). Greg Geisman, [Strengthening the Weak Link in the Family Law Chain: Child Support and Visitation as Complementary Activities, 38 S.D.L. REV. 568, 572 \(1993\)](#).

[\[FN123\]](#). The 1995 Census Bureau report for the year 1991 showed that 73% of noncustodial mothers and 58% of noncustodial fathers had extensive visitation or joint custody. EVALUATION OF CHILD SUPPORT GUIDELINES I, supra note 3, ch. 3 at 39; see also Joan B. Kelly, Current Research on Children's Post-Divorce Adjustment: No Simple Answers, 31 FAM. & CONCILIATION CTS. REV. 29, 41 (1993).

[\[FN124\]](#). WILLIAMS, supra note 32, part I, at 4.

[\[FN125\]](#). See generally, Part II.

[\[FN126\]](#). See generally, Karen Czapanskiy, [Child Support and Visitation: Rethinking the Connections, 20 RUTGERS L.J. 619 \(1989\)](#).

[\[FN127\]](#). Id.

[\[FN128\]](#). Minnesota provides a number of remedies for denial of parenting time, including compensatory parenting time, awarding costs and attorney fees, and any other remedy that the court finds in the best interest of the children. [Minn. Stat. § 518.175 \(2002\)](#).

[\[FN129\]](#). Czapanskiy, supra note 126, at 622.

[\[FN130\]](#). Child Support Enforcement Amendments of [1984, Pub. L. No. 98- 378](#), 98 STAT. 1305.

[\[FN131\]](#). See [Minn. Stat. § 518.1751 \(2002\)](#) (providing for the use of parenting time expeditors to resolve disputes). A few states have guidelines for visitation. See, e.g., [Utah Code Ann. § § 30-3-35, 30-3-35.5 \(1998\)](#).

[\[FN132\]](#). See generally, Part II.

[\[FN133\]](#). Marygold S. Melli, [Guideline Review: Child Support and Time Sharing by Parents, 33 FAM. L.Q. 219, 220 \(1999\)](#).

[\[FN134\]](#). MORGAN, supra note 15.

[\[FN135\]](#). Melli, supra note 133, at 223.

[\[FN136\]](#). MORGAN, supra note 15, at 3-36.

[\[FN137\]](#). There is some dispute over the 20% estimate and whether states actually do make this basic assumption when designing their guidelines. See Venohr & Williams, supra note 1, at 29.

[\[FN138\]](#). Id.

[\[FN139\]](#). Stephanie Walton, Reducing Child Support for Extended Visitation, 7(36) LEGISBRIEF (National Conference of State Legislatures, 1999).

[\[FN140\]](#). See supra note 24.

[\[FN141\]](#). Id.

[\[FN142\]](#). See generally, Part IV.

[\[FN143\]](#). MORGAN, supra note 15, at 4.

[\[FN144\]](#). Melli, supra note 133, at 222.

[\[FN145\]](#). Id. at 225.

[\[FN146\]](#). Id. at 226.

[\[FN147\]](#). See generally, Part III.

[\[FN148\]](#). Robert Scott Merlin, The [New Line 11 Visitation Credit: The Non- Custodial Parent Wins While the Child Loses, 55 WASH. U.J. URB. & CONTEMP. L. 317 \(1999\)](#).

[FN149]. Ariz. Rev. Stat. § 25.320 (2001).

[FN150]. Mo. [Civ. P. Forms, Form No. 14](#), line 11, in Mo. Ct. R. 385 (West 1999). A fundamental problem with the Missouri system is that the state does not include a multiplier to reflect the cost of two households, which would make it more logical before having a credit, See Merlin, supra note 148, at 347.

[FN151]. N.J.R. Prac. App. 9 (West 2003); [Colo. Rev. Stat. Ann. § 14-10- 115 \(West 1997 & Supp. 1998\)](#).

[FN152]. This is distinguished from joint legal custody in which both parents share in making the major decisions relating to the health, education, and welfare of the children.

[FN153]. [Valento v. Valento, 385 N.W.2d 860 \(Minn. App. 1986\)](#); [Hortis v. Hortis, 367 N.W.2d 633 \(Minn. App. 1985\)](#).

[FN154]. [Minn. Stat. § 518.551 \(2000\)](#).

[FN155]. [Minn. Stat. § 518.551 \(c\)\(3\) \(2002\)](#).

[FN156]. MORGAN, supra note 15. Courts in Louisiana look at whether the visitation is above ordinary and the financial impact that the increased visitation has on the nondomiciliary parent. Diana Cross, [Preserving Continuity and Fairness: The Louisiana Supreme Court Limits Deviation from Child Support Guidelines](#), 47 LOY. L. REV. 885, 900 (2001).

[FN157]. See supra note 139, at 7.

[FN158]. Melli, supra note 132, at 228.

[FN159]. Merlin, supra note 148, at 343.

[FN160]. MORGAN, supra note 15, at 11.

[FN161]. WILLIAMS, supra note 32, part I, at 15.

[FN162]. See generally Part IV.

[FN163]. Id.

[FN164]. Minn. S. File 758, 83d Sess. (March 10, 2003).

[FN165]. EVALUATION OF GUIDELINES II, supra note 26.

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