CHAPTER NINE
ESTABLISHMENT OF CHILD SUPPORT OBLIGATIONS

INTRODUCTION

Child support can be a significant source of income for the family that receives it. According to Census Bureau information, poverty rates for female-headed households decrease substantially when these women begin to receive child support.[1] With the current time limits on Temporary Assistance to Needy Families (TANF) benefits, this additional source of income becomes more important than ever. Increased income flowing to the family can enable the custodial parent to enter the workforce by covering child care costs and providing a source of health care coverage. Establishing paternity and a support obligation also can connect a parent to a child and, thereby, begin or restore a relationship between the child and the noncustodial parent.

This chapter discusses the steps involved in establishing a support obligation and issues arising under child support guidelines. The section on medical support focuses on the mandates for obtaining orders for health care coverage, the National Medical Support Notice, child support insurance programs, and the Employee Retirement Security Act of 1974 (ERISA). The chapter also introduces the attorney to interstate, tribal, military, and international child support issues.

DEFINITION OF CHILD SUPPORT

Traditionally, child support has been defined as cash contributions made on behalf of a minor child pursuant to a court order or an agreement between the parents. Over the past 20 years, the definition has evolved, altered by the changes made by Congress, States, and society. It is much broader now, including aspects of medical support and other provisions to protect children. Child support orders can be established administratively in many States.

OVERVIEW OF ESTABLISHMENT PROCESS

Establishment of a child support order is vital to ensuring support for a child. Although an obligation under the law to support a child may exist, it is not enforceable without an order from a court or administrative tribunal.

Context

When parents are married, the child is presumed to be a child of the marriage, and establishment of a child support order most often occurs during

[1] TIMOTHY GRALL, CURRENT POPULATION REPORTS (U.S. Census Bureau, U.S. Dep't of Commerce, Oct. 2000).

separation or divorce proceedings. If a divorce order is silent on the issue of support, the custodial parent can later seek establishment of an order. When a child's parents have never been married, paternity must first be established before support can be ordered. Increasingly, courts are also establishing support orders in the context of other proceedings, such as child welfare or domestic violence proceedings.

Standing

The custodial relative or caretaker for the child has standing to bring an action for support. In addition, the child can file by next friend—a person appearing in, or appointed by, a court to act on behalf of a child lacking legal capacity—where circumstances so merit. The next friend can be a guardian *ad litem*–a guardian appointed by a court to represent the minor child in a particular lawsuit—or it can be a relative or family friend of competent age, acting on behalf of the child without court intervention. The Child Support Enforcement (CSE or IV-D) agency can also bring an establishment action, either because of an assignment of support rights in public assistance cases or because of a State statute giving the IV-D agency standing in IV-D cases.[2]

Jurisdiction

For a tribunal to enter a valid order for child support, there must be jurisdiction over the parties and the subject matter.

Subject matter jurisdiction. Ordinarily, subject matter jurisdiction should not be a problem in child support cases; it is merely a matter of filing the petition in the proper tribunal.[3]

Personal jurisdiction. Where the noncustodial parent is physically present in the forum State, personal jurisdiction is usually not an issue. Gaining personal jurisdiction over a nonresident noncustodial parent, however, can present challenges. The attorney should review the facts of the case to determine if there is a basis for asserting long-arm jurisdiction. Every State has enacted the Uniform Interstate Family Support Act (UIFSA), which includes

[2] In some States, there is law providing that the CSE agency is a necessary party in any proceeding involving the IV-D case. *See, e.g*., Iowa Code § 598.21(8) (2001). *See also* N.D. Cent. Code § 14-09-09.26(3) (1997) that designates the State as the real party in interest to enforce a support order of another State.

[3] *See W v. W*, 728 A.2d 1076 (Conn. Ct. App. 1999), which stated that, despite the fact that the husband claimed that he was not the father of the minor child, the trial court had subject matter jurisdiction to issue a temporary support order. The court found that the definition of 'a child of a marriage' is continually evolving regarding who is a parent and that the definition no longer creates jurisdictional limitations. Regardless of whether the child at issue is considered a child of the marriage, there is subject matter jurisdiction.

expansive long-arm provisions.[4] Federal regulations require IV-D agencies to use long-arm jurisdiction when available and appropriate.[5] Although IV-D agencies rely on caseworkers to do the majority of case preparation, most agencies require review by an attorney before filing a pleading seeking establishment based on long-arm jurisdiction. The attorney must ensure that the facts satisfy the long-arm statutory provisions as well as due process requirements.[6]

Service of process. Whether the establishment action is filed using local law or long-arm jurisdiction, service of process must be made on the respondent pursuant to the law of the forum State. Many jurisdictions allow service by certified or registered mail, return receipt requested. Others require personal service. In some States, if there is an existing case, such as one establishing paternity or granting a divorce and reserving the issue of child support, service of the pleadings can be made by regular mail.[7]

Elements of Proof

Before a support order can be established, the attorney must prove that the alleged obligor has a support obligation. In other words, the attorney must prove that the alleged obligor is the parent of the child in question, or has a parental relationship with the child, justifying establishment of a support duty. After a support duty is established, the issue then becomes the amount of support that will be ordered. The attorney must prove parental income for purposes of applying the support guidelines. Many guidelines expressly require the parties to document their incomes through income tax returns and pay stubs. In examining pay records, the CSE attorney should seek at least one year's worth of pay stubs as income can fluctuate monthly in many jobs. Pay stubs from the end of the year are particularly significant as they reveal the actual taxes paid over the course of the year and the total of all paycheck deductions. Many States also require parties to complete a standardized financial affidavit.

There are certain circumstances in which the CSE attorney might want to conduct additional discovery.[8] Where a person owns a sub-S corporation or operates a cash-based business, the attorney should carefully scrutinize the person's income and expenses. Another situation suggesting the need for careful review arises when a person's lifestyle seems to far exceed the income the person is claiming. There could be hidden income that the attorney can discover, or it might be appropriate to advocate for imputed income. A third example is when the attorney believes that the obligor is underemployed. To argue the

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[4] Unif. Interstate Family Support Act (1996) [hereinafter UIFSA] § 201 (amended 2001), 9 Pt. 1B U.L.A. 275 (1999).
[5] 45 C.F.R. § 303.7(b)(1) (2000).
[6] *See Kulko v. California Superior Court*, 436 U.S. 84 (1978). *See also* Chapter Twelve: Interstate Child Support Remedies for a complete discussion of long-arm jurisdiction.
[7] Jeanne Rubin, *Interstate Service of Process*, 14 Del. Lawyer 34 (1996).
[8] For additional discussion on discovery, see Chapter Seven: Advocacy Skills for Child Support Enforcement Attorneys.

imputation of additional income, the attorney must conduct discovery concerning the obligor's past work history, educational background, and the current job market. In high-income cases, it might be appropriate to present expert testimony from an employment consultant.

Defenses

In an establishment case, when paternity has not been determined by law, the alleged obligor can raise a nonparentage claim. Typically, genetic testing resolves such a claim.[9] When the relationship between the child and parent has already been established, there are a limited number of challenges to a petition to establish support. The fact that support is already being provided does not preclude a civil action to obtain an order for support. A decision-maker may entertain the following defenses:

- the petitioner has served the wrong person;
- the tribunal lacks personal jurisdiction over the parties;
- the child is emancipated; or
- an order of support entitled to recognition is already in place. Both the Full Faith and Credit for Child Support Orders Act (FFCCSOA) and UIFSA prohibit entry of a *de novo* order in such a circumstance.[10]

CHILD SUPPORT GUIDELINES

Guidelines for calculating child support first became a reality with passage of the Child Support Amendments of 1984.[11] This legislation broadened the effectiveness of the CSE agency by requiring States, as a condition of receiving Federal funds, to implement wage withholding after one month's delinquency, impose liens on property, and intercept tax refunds of nonpaying obligors. The 1984 legislation also required States to develop mathematical calculations to determine appropriate child supports awards.[12] Since then, child support professionals, decision-makers, and attorneys have relied on these formulas to set appropriate amounts of child support.

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[9] *See* Chapter Eight: Paternity for additional information.
[10] 28 U.S.C. § 1738B (Supp. 2001); UIFSA § 207 (amended 2001), 9 Pt. 1B U.L.A. 291-2 (1999). *See* Chapter Twelve: Interstate Child Support Remedies for a complete discussion of FFCCSOA and UIFSA. Because of the prohibition on *de novo* orders, some States have rules of civil procedure or statutes requiring that pleadings include an allegation regarding the existence of other support orders. *See* Iowa Code § 598.5(5) (2001).
[11] P.L. No. 98-378 (1984).
[12] 45 C.F.R. § 302.56(c) (2000).

The Child Support Amendments of 1984 did not require these guidelines to be binding on decision-makers. The Family Support Act of 1988[13] mandated use of guidelines, requiring that all States, as a condition of receiving Federal funds, have guidelines and use them when calculating a support amount. The guideline calculation must create a rebuttable presumption that it is the appropriate amount of support, given the parent's or parents' income, or potential income, and any specific needs of the child.[14]

Pursuant to Federal regulations, State guidelines must consider the earnings and income of the noncustodial parent. They also must have certain numeric and mathematical calculations that result in a support amount, and must provide for the child's health needs.[15]

Federal regulations provide that guidelines can be established by law or by judicial or administrative action.[16] Each State chooses its own guidelines, the use of which is binding on judges and other officials who set child support awards. A written or specific finding on the record that application of the guidelines would result in an inappropriate or unjust order is required to rebut the presumption that the application of guidelines results in the correct child support order amount. Therefore, support amounts can deviate from guidelines, but the decision-maker must state reasons, on the record, that justify the deviation.[17]

Overview of Models

There are three guideline models now being used—Income Shares, Percentage of Income, and the Melson formula. The most frequently used is the Income Shares model. The next most frequently used is the Percentage of Income model. The Melson formula is used in only a few States.[18]

Income Shares. The Income Shares model is based on the premise that both parents should share in the expenses of the family proportionate to their incomes. Under this model, the decision-maker first determines the income of each parent and consults a table to determine the basic child support obligation at that combined income level. The tables vary from State to State and are typically based on economic estimates of child-rearing expenditures—minus

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[13] P.L. No. 100-485 (1988).
[14] 42 U.S.C. § 667 (1994, Supp. IV 1998, & Supp. V 1999).
[15] 45 C.F.R. § 302.56(c)(1) –(3) (2000).
[16] 45 C.F.R. § 302.56(a) (2000).
[17] For a more in-depth discussion of the historic development of child support guidelines, *see* LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION (Aspen Law and Business, Supp. 2000) [hereinafter CHILD SUPPORT GUIDELINES] and CHILD SUPPORT GUIDELINES: THE NEXT GENERATION (M. Haynes, ed., U.S. Dep't of Health & Human Services 1994) [hereinafter GUIDELINES: THE NEXT GENERATION]. For a list of State guidelines, see Exhibit 9-1.
[18] The income shares model is used in 35 States. The percentage of income model is used in 11 States. *See* CHILD SUPPORT GUIDELINES, *supra* note 17. For access to online versions of each State's support guideline as well as relevant case law, *see* www.supportguidelines.com.

average amounts for health insurance, child care, and extraordinary medical expenses for a child.[19] The basic support amount varies based on factors, such as the number of children. The presumed basic needs of the child are met by the figure from the table; then expenses, such as work-related child care costs, health insurance premiums, and extraordinary medical expenses, are added as appropriate. The total is then prorated between the parents based on their proportionate shares of the total available income. This type of formula can be based on either gross or net parental income. The person with custody of the child is presumed to be contributing his or her proportionate share of the total support obligation directly to the child. The noncustodial parent is ordered to pay his or her proportionate share of the support obligation as the child support award.

Percentage of Income. The award under the Percentage of Income method is based on a percentage of the income of the obligor and the number of children to be supported. Other factors, such as the age of the children, might also be considered. There are two variations of the Percentage of Income method: flat percentage and varying percentage. Under a flat percentage formula, the portion of income to be devoted to child support does not vary, regardless of the income of the noncustodial parent. A varying percentage fomula provides for an increasing percentage of the obligor's net income at low- and mid-income levels, then caps it with a constant percentage after it reaches a certain level. The income of the custodial parent is not considered under either method. The calculation is done by first determining the noncustodial parent's income. The basic order is then determined by taking the appropriate percentage of that income based on the State's law. Adjustments can be made to the basic obligation for add-ons or deductions, which are discussed in detail later in this chapter.

Melson formula. The Melson formula, a hybrid of the cost-sharing and income-sharing models, requires that each parent's basic needs be met before child support is set. It is premised on the allocation of a poverty-level amount to each parent before determining the child's needs. The three underlying principles of the Melson formula are that: (1) parents are entitled to keep sufficient income to meet their basic needs to encourage continued employment; (2) until the basic needs of the child are met, parents should not be permitted to retain any more income than that required to provide the bare necessities for their own self-support; and (3) where income is sufficient to cover the parents' basic needs and those of the dependent, the child is entitled to share in any additional income and benefit from the noncustodial parent's higher standard of living. The Melson formula considers the primary needs of the child, work-related child care expenses, extraordinary medical expenses, and any standard-of-living adjustment before allocating the child's total needs between the parents based on a percentage of income of each.

[19] Robert G. Williams, *An Overview of Child Support Guidelines in the United States*, in GUIDELINES: THE NEXT GENERATION, *supra* note 17.

Income

At a minimum, Federal regulations require that guidelines must consider all earnings and income of the noncustodial parent.[20] Those guidelines that consider the incomes of both parents include the earnings and income of the custodial parent in the calculation as well. Still, the computation of income for the purposes of calculating child support varies from State to State. The State definition of income affects this computation.

Definition of income. States use varying definitions of what constitutes income. All guidelines require earned income of one or both parties to be considered when determining a support order. Typically, this income is salary. All States offer lists of resources that can be included in income; often these include commissions, bonuses, tips and perquisites, rental income, estate or trust income, royalties, interest, dividends and annuities, self-employment earnings, alimony, in-kind and fringe benefits, and lottery winnings.[21]

The CSE attorney might want to advocate for consideration of other types of income as well. When overtime or second-job income occurs regularly, a tribunal can easily determine an amount and include this in the guideline calculation.[22] When it is not a regular occurrence, an average of overtime over a period of time can be used to determine earned income. Some States, such as Kansas, Pennsylvania, Florida, and California, specifically address the issue of overtime or seasonal earnings in their statutes.[23] On the other hand, several States, such as New Hampshire, argue that overtime or second-job earnings should not be included at all.[24] Some States leave it to the courts to decide, with the standard generally being whether the income was a regular source of income when the family was intact.[25]

Commissions are considered income in most States. Again, the difficulty is in determining how long a period to use in computing an average when commission payments are sporadic. Royalties and bonuses, even severance pay, are included in most States' lists of what constitutes income, even though they might not be recurring in nature.

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[20] 45 C.F.R. § 302.56(c)(1) (2000).
[21] *See, e.g., Dunn v. Dunn*, 932 P.2d 268 (Alaska 1995) (income includes IRA earnings); *Fair v. Cloninger*, 937 S.W.2d 760 (Mo. Ct. App. 1997) (income includes employer-paid benefits for health and life insurance); *Otterson v. Otterson*, 571 N.W.2d 648 (N.D. 1997); *In re M.B.*, 956 P.2d 171 (Okla.Ct. App. 1998).
[22] *See, e.g., County of Placer v. Androck*, 55 Cal. App. 4th 1393, 64 Cal. Rptr. 2d 739 (Cal. Ct. App. 1997); *In re Marriage of Nelson*, 570 N.W.2d 103 (Iowa 1997) (income includes overtime and bonus pay regularly received).
[23] *See* Cal. Fam. Code §§ 4058, 4064 (1992); Kan. Sup. Ct. Admin. R. (1998); 23 Pa. Cons. Stat. Ann. § 1910.16-2(d)(3) (West Supp. 2001); Fla. Stat. Ann. § 61.30(2)(a)(2) (2000).
[24] *See* N.H. Rev. Stat. Ann. § 458.C2(IV) (1992).
[25] Minn. Stat. Ann. § 518.551 (West 2000).

Generally, most States include interest and dividend income in their definitions of income. In fact, some include capital gains as well. Most, however, exclude capital gains from the definition unless it is a recurring event.[26] North Dakota includes the reasonable value of property and services that the parent is given for less than fair market value.[27] Similarly, New York allows consideration of non-income-producing assets at the discretion of the court.[28] A California court held that the corpus of an inheritance is income for the purposes of child support, likening the inheritance to lottery winnings and categorizing both of them as a windfall to the recipient.[29]

Most States include Social Security retirement benefits, disability insurance benefits, workers' compensation benefits,[30] and educational grants or subsidies as income. However, benefits intended to assist needy families, including TANF, are usually excluded.[31] Supplemental Security Income (SSI) is the one form of income that has regularly been excluded from income for the purpose of calculating child support.[32] Arkansas' guidelines include the following benefits as income: the amount of the awards made to the disability recipient's spouse or children because of the obligor's disability, Veteran's Administration disability, workers' compensation, and unemployment compensation.[33] Other cash income can include life insurance payments, lottery or gambling winnings, prizes or awards, and spousal support.

For the business owner and other self-employed individuals, child support guidelines should be calculated on actual cash flow and not on the income reported on a tax return. Kentucky, for instance, provides that income used for the calculation will "differ from a determination of income for tax purposes" and mandates that only straight-line depreciation be used.[34] The attorney should review a business owner's income and expenses carefully. A business return might show no taxable income after depreciation of equipment, allowances for

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[26] *See Strange v. Strange*, 242 Wis. 2d 471, 625 N.W.2d 359 (2001) (capital gains are income but the court can deviate from the percentage amount if it would be fairer not to consider it).
[27] N.D. Admin. Code § 75-02-04.1 (1999).
[28] N.Y. Dom. Rel. Law § 240-1b(5)(iv)(A) (McKinney Supp. 1998).
[29] *County of Riverside v. Nevitt*, No. E026724 (Cal. Ct. App. Dist. 4 Feb. 14, 2001). *See also County of Kern v. Castle*, 895 Cal. Rptr. 2d 874 (1999); *Gardner v. Yrttima*, 743 N.E.2d 353 (Ind. Ct. App. 2001); *Connell v. Connell*, 712 A.2d 1266, 1269 (N.J. Super. Ct. App. Div. 1998); *Ford v. Ford,* No. 01A01-9611-CV-536, 1998 WL 730201 (Tenn. Ct. App.1998); *Goldhamer v. Cohen*, 525 S.E.2d 599, 603 (Va. Ct. App. 2000).
[30] *Clay v. Clay*, 1999 WL 281309 (Tenn. Ct. App. 1999) (unpublished) (a lump-sum workers' compensation settlement is income).
[31] *Marrocco v. Giardino*, 767 A. 2d 720 (Conn. 2001) (the amount that a parent receives from SSI or a public grant provides only a minimum level of support, and the fact that SSI and public assistance are excluded in the guidelines indicates a recognition that parents are not required to live at or below poverty to support their children).
[32] *But see Davis v. Office of Child Support Enforcement*, No. 99-1422, 2000 Ark. Lexis 246 (Ark. May 18, 2000) (SSI income is income for the purpose of child support).
[33] In re Administrative Order No. 10-Child Support Guidelines, Ark. C.S.G. (Jan. 28, 1998).
[34] Ky. Rev. Stat. Ann. § 403.212 (Banks-Baldwin Supp. 1996).

losses and inventory, and business expenses. This becomes particularly relevant when the parent owns a business or is frequently given in-kind payments from an employer, such as meals, lodging, tickets for sporting events, frequent flyer miles, and company-owned vehicles. Payments of this nature reduce personal expenditures and, therefore, free income for other purposes.[35]

Gross income v. net income. There is no Federal specification about whether the support guidelines should be based on the parties' gross or net incomes.[36] About half of the States use gross income.[37] The other half use net income,[38] which is not necessarily net income for purposes of income taxes. Net income is typically defined as gross income minus deductions for Federal, State, and local taxes, as well as mandatory deductions, such as mandatory contributions to retirement plans, mandatory union dues, or employment mandated uniform rentals. Some States allow for deductions of other support orders and health insurance premiums.

There are advantages and disadvantages to each approach. Gross income is easier to use and requires no calculation to determine the amount when the pay stubs or tax returns are available. With gross income, there will be fewer variations in deductions in similar cases, and the income figure will not change because of remarriage, birth of additional children, or other lifestyle changes. On the other hand, using gross income does not consider the actual income that is available to pay support.

Using net income allows the decision-maker to consider the actual income available to pay support and captures differences in the tax implications of the dependency deduction for the custodial parent. It does, however, require a more complex calculation, and it is also subject to manipulation. For example, a party might be able to manipulate the amount of net income by changing the number of exemptions claimed for Federal tax purposes. Also, some view net income as inequitable. Because it usually only recognizes mandatory deductions, it allows the working parent a deduction for retirement contributions but does not allow a parent a deduction for a voluntary pension contribution.

Imputed income. Every child support guideline allows consideration of a person's "earning capacity" when that person is voluntarily unemployed or underemployed.[39] Although there are times when the reduction in income is directly tied to avoiding the child support obligation,[40] that is not always the case.

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[35] *See Mitchell v. Mitchell*, 723 So. 2d 1267 (Ala. Civ. App. 1998) (trial court must consider all sources of income of noncustodial parent, including in-kind payments that are significant and reduce living expenses such as a company car).
[36] 45 C.F.R. § 302.56 (2000).
[37] *See* Table 2-1 in CHILD SUPPORT GUIDELINES, *supra* note 17.
[38] *Id*.
[39] *See, e.g.,* Colo. Rev. Stat. § 14-10-115(7) (2001); La. Rev. Stat. Ann. § 9:315.11 (West Supp. 2002); Ala. R. Jud. Admin. R. 32(B)(1) (2001); N.J. Ct. R., Appendix IX (West 2000).
[40] *See, e.g., Lascaibar v. Lascaibar*, 658 So. 2d 170 (Fla. Dist. Ct. App. 1995).

The parent might want to go back to school or take a different, lower-paying job because of the potential for future growth and earnings.

Some courts look at the parent's intentions in reducing income, noting that a good faith effort to accomplish some goal other than a purposeful reduction of the support obligation, is a valid reason to accept the lowered income level. Other courts, while appreciating the rights of the individual for personal growth, have found that a parent cannot act in a way that will have a detrimental effect on the child's well being.[41]

Another common scenario for the imputation of income involves a case with a noncustodial parent who fails to appear at the hearing after proper service. If the parent is employed, the CSE attorney can present evidence of wages discovered through the CSE agency's access to employer records. If the parent is not employed, but is receiving workers compensation or unemployment compensation, the CSE attorney should also have access to that information. If the parent is not working or there is no available income information, several State guidelines allow imputation of income based on minimum wage.[42]

Courts also have considered how to treat incarcerated parents. Most often, the issue of income arises in the context of modification. There is also, however, case law addressing the establishment of a support order where the noncustodial parent is incarcerated. Because of the intentional criminal act, courts are reluctant to allow the noncustodial parent to escape his or her support obligation. Courts will consider any income earned by the inmate through a work program. They can also impute income based on minimum wage where the imprisoned parent has no income or assets.[43]

Courts have also considered whether to impute income to a custodial parent who chooses not to work. Most States prohibit the imputation of income to a custodial parent of a child of "tender years."[44] The dilemma arises when the young child is not from the relationship in question but from a subsequent relationship. Some suggest that the imputation of income is appropriate because of the custodial parent has chosen to raise a subsequent family, knowing an obligation to a prior family existed.

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[41] *Goldberger v. Goldberger*, 624 A.2d 1328 (Md. Ct. Spec. App. 1993); *Smith v. Smith*, 737 So. 2d 641 (Fla. Dist. Ct. App. 1999).

[42] Minn. Stat. Ann. § 518.551 Subd. 5b(e) (2000); N.D. Admin. Code § 75-02-04.1-07(3)(a) (1999); Ind. CSG 3.A.3. *See also In re Marriage of Milano*, 23 Kan. App. 2d 858, 936 P.2d 302 (1997); *Snelling v. Strohmeyer*, 925 P.2d 77 (Okla. Ct. App. 1995); *In re Interest of Hidalgo*, 938 S.W.2d 492 (Tex. Ct. App. 1996).

[43] *See State ex rel. Jones v. Baggett*, 25 Fam. L. Rep. (BNA) 1437 (Okla. July 13, 1999); *In re Interest of M.M.*, 980 S.W.2d 699 (Tex. Civ. App. 1998).

[44] The age of children under the "tender years" doctrine varies from State to State but rarely continues beyond age 6.

In imputing income for a person who is voluntarily unemployed or underemployed, the decision-maker will usually attribute income to the individual based on his or her education and skills, work history, and earning potential commensurate with the economy.[45] Some decision-makers might only consider historical information, without speculation regarding future earnings potential.

Some States impute income by considering assets owned by the parent. This is particularly true for the self-employed who have low retained earnings and return significant income to the company. If the party has invested in assets that could be income-producing, the CSE attorney could advocate for an addition of reasonable interest and dividends to the income figure. Some States give the decision-maker discretion to consider assets that do not produce income, such as real estate, automobiles, or jewelry.[46] North Dakota, for example, includes "in-kind income," which is defined as "receipt of any valuable right, property or property interest, other than money or money's worth, including forgiveness of debt, use of property ... and use of consumable property or services at no charge or less than the customary charge."[47]

It is important to remember that satisfaction of the child's needs is the ultimate goal. While the parent might be meeting his or her own needs without apparent income, the parent must contribute to the financial needs of the child.

High-income cases. Treatment of high-income cases varies from State to State, and even from court to court. There are three main approaches. First, some support guidelines expressly address high-income cases. For example, the Illinois Percentage of Income formula provides that a noncustodial parent must pay 20 percent of his or her net income for the support of one child, regardless of the parent's income.[48] On the other hand, Virginia, which uses an Income Shares model, has a special formula that a decision-maker must use when gross income exceeds $10,000 per month.[49]

A second approach is to presume that the highest amount provided for in the guideline is the correct amount. A decision-maker can deviate from this amount based upon the actual needs of the child or after showing of the standard of living enjoyed by the family unit before the action for support was necessary.[50]

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[45] *Whitt v. Whitt,* No. 98CA 12, Lexis 6480 (Ohio App. 1998) (where a trial court determined a parent to be voluntarily unemployed or underemployed, it was appropriate for the court to impute income based on the parent's recent work history, job qualifications, and the prevailing job opportunities and salary levels in the community in which the parent resides).
[46] N.Y. Dom. Rel. Law § 240-1b(5)(iv)(A) (McKinney Supp. 1998).
[47] N.D. Cent. Code § 75-02-04.1 (1999).
[48] 750 Ill. Comp. Stat. 5/105 (Supp. 2000). In extraordinarily high-income cases, however, the court can deviate from the presumptive formula amount based on statutory criteria.
[49] Va. Code Ann. § 20-108.2(B) (Supp. 1997).
[50] Minn. Stat. § 518.551 (West 2000); N.Y. Dom. Rel. Law § 240-1b (McKinney Supp. 1998). Most States with child support charts for varying income levels advise the decision-maker to set support at least at the highest award level, but they allow for deviation upwards where appropriate.

For example, the New Hampshire statute allows for deviation where the calculation of child support for a high earner is inappropriate. The presumption, however, is that the amount awarded under the "highest end" guideline amount is correct.[51] In contrast, a Minnesota court, considering an obligor, who was a rock musician earning $116,000 per month, ordered the highest level of support under the guidelines. It stated that the highest guideline level could not be exceeded, declaring that child support should not be used to upgrade a custodial parent's standard of living.[52]

Finally, in other States, guidelines do not apply in high-income cases, leaving the decision-maker to use his or her discretion in setting a support amount.[53] Some believe that the child should live in a manner commensurate with the parent's income, while others believe there is a limit to the needs of a child.[54] For example, where both parents of a 4-year-old child were physicians earning unusually large incomes, it was deemed an abuse of discretion for the trial court to follow the guidelines and award support of 20 percent of the obligor's income.[55] The court found that the award of approximately $30,000 per year was excessive for a child of such tender years, but it observed that such an award might be proper if the child had high medical expenses or attended an expensive private grammar school. By contrast, a California appellate court held that children should "share in their parents' standard of living" and that "where the supporting parent enjoys a lifestyle that far exceeds that of the custodial parent, child support must to some degree reflect the more opulent lifestyle even though this may, as a practical matter, produce a benefit to the custodial parent."[56] To avoid such a windfall to the custodial parent, decision-makers can require funds in excess of the child's actual needs to be placed in trust for the future.

Succinctly put in an Illinois case, "in determining the child support obligation of a high income parent, the court must balance competing concerns … the court must consider the standard of living a child would have enjoyed absent parental separation and dissolution. Thus, child support is not to be based solely upon the shown needs of the child."[57]

Low-income cases. Like high-income cases, low-income cases warrant special consideration. There is concern that guideline awards not force

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[51] *See Rattee v. Rattee*, No. 98-314 (N.H. Feb. 15, 2001), citing N.H. Rev. Stat. Ann. § 458-C:5 (1992). *See also Wheaton-Dunberger v. Dunberger*, 137 N.H. 504, 508, 629 A.2d 812 (1993).
[52] *Zabloski v. Hall,* 418 N.W.2d 187 (Minn. App. 1988).
[53] *See, e.g., Harris v. Harris*, 168 Vt. 13, 714 A.2d 626 (1998).
[54] *See In re Patterson*, 920 P.2d 450 (Kan. Ct. App. 1996).
[55] *In re Bush,* 191 Ill. App. 3d 249, 547 N.E.2d 590 (1989).
[56] Cal. Fam. Code § 4053(f) (1994 & Supp.1998); *In re Marriage of Kerr*, 77 Cal. App. 4th 87, 91 Cal. Rptr. 2d 3 (Cal. Ct. App. 1999) ("[C]hildren should share in the standard of living of both parents. Child support may therefore appropriately improve the standard of living of the custodial household to improve the lives of the children.").
[57] *Mulry v. Mulry*, 732 N.E.2d 667 (Ill. App. Ct. 2000).

noncustodial parents into poverty.[58] The Melson formula includes a self-support reserve for parents. Other guidelines also include a self-support reserve, based on the U.S. poverty guideline for one person, to ensure that the obligor has sufficient income to maintain a basic subsistence level and the incentive to work so that child support can be paid.[59] The competing public policy is that all parents should contribute to their children's financial needs, even low-income parents.

Guidelines tend to follow one of three approaches in setting support awards for low-income parents. One approach is to establish a minimum support amount that is a rebuttable presumption. In Virginia, for example, there is a rebuttable presumption that each obligor is responsible for a minimum child support payment of $65 a month; there is, however, an exemption for parents who are mentally or medically disabled with no potential to earn income, incarcerated with no chance of parole, or otherwise "involuntarily unable to produce income."[60] Virginia's law allows the court or administrative agency to set an amount below the $65 threshold for parents who fall into the exempted categories, as these individuals are unlikely to be able to pay. A second approach is to set a mandatory minimum support amount in low-income cases. There can be no downward deviation from the mandatory minimum.[61] At least one State appellate court has held that such an approach violates the Federal requirement that guidelines be presumptive.[62] A third approach is to leave the support amount totally within the discretion of the decision-maker.[63]

Effects of Custody on Child Support

Recognizing the benefits to the child of a relationship with both parents, joint custody and extensive visitation orders are increasingly common. With joint legal custody, the parents usually join in decision-making about important issues. With joint physical custody, children split time between homes where activities and geography permit. Some States equate joint physical custody with shared custody, where the visitation or time with the parents might be equal or at least extensive. In such circumstances, the standard guideline application could be unfair and may result in an inappropriate support amount. In fact, many States' guidelines specifically address these issues and some have special computations to deal with these arrangements.

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[58] Laura Wheaton & Elaine Sorensen, NONCUSTODIAL PARENTS, CHILD SUPPORT, AND THE EARNED INCOME TAX CREDIT (The Urban Institute 1997).
[59] *See* N..J. Ct. R., Appendix IX (West 2000).
[60] 2000 Va. Acts 376.
[61] *See, e.g.,* S.D. Codified Laws Ann. §§ 25-7-6.1 to 27-7-6.18 (Michie 1999 & Supp. 2001); Iowa Child Support Guidelines (1998); Michigan Guidelines (2000).
[62] *Rose ex rel. Clancy v. Moody*, 83 N.Y.2d 65, 607 N.Y.S.2d 906 (1993), *cert. denied*, 511 U.S. 1084 (1994).
[63] *See, e.g.,* Cal. Fam. Code § 4055(b)(7) (1994 & Supp. 1998); Ohio Rev. Code Ann. § 3119.04 (2001); W. Va. Code § 48A-1B-14 (1996 & Supp.1997); Arizona Child Support Guidelines (S. Ct. Order 96-29) (2001).

Sole custody. Generally, guidelines are based on the premise that sole custody will be awarded to one parent, with reasonable visitation periods exercised by the noncustodial parent. Most support guidelines make no adjustment unless the child is with the noncustodial parent more than 20 percent of the time.[64] Where visitation does not exceed a certain threshold, the guideline calculations are straightforward, following the formula of the guidelines.

Shared or joint custody. Most State guidelines address shared or joint custody situations, in which the child spends extensive time with the noncustodial parent. The most common approach is to establish a threshold amount of visitation in excess of the ordinary 20 percent visitation, at which level support is adjusted on a sliding scale. The assumption is that, as visitation increases to a certain level, the cost to the noncustodial parent of caring for the child increases and there is a decrease in costs to the custodial parent.[65] The threshold varies among the States. In Maryland, the formula for shared custody is used when the threshold of 35 percent of overnights is met.[66] Contrast this to Minnesota, where the basis for joint physical custody calculation is found in case law.[67]

Tennessee guidelines presumptively apply to situations in which the children live primarily with one parent but stay overnight with the other parent at least as often as every other weekend, two weeks in the summer, and two weeks total for other holidays. Consequently, when these average overnight visitations periods are not met, an amount can be added to the percentage calculated to

[64] Twenty percent typically equates to every other weekend plus 2-4 weeks for summer vacation and holidays. *See* Karen Czapanskiy, *Child Support, Visitation, Shared Custody and Split Custody*, in GUIDELINES: THE NEXT GENERATION *supra* note 17. *But see* the New Jersey Support Guideline that recognizes an "ordinary" amount of visitation but presumes no visitation; the formula accounts for each night of overnight visitation.

[65] While the shared or joint custody guidelines are based on an assumption that shared or joint custody results in increased costs in the noncustodial parent's home and decreased expenses in the custodial parent's, the reality might be different. With the expansion of fatherhood and parenting programs throughout the country, urban studies experts are monitoring these arrangements more closely. Preliminary observations could support a more likely scenario in which the custodial parent's expenses are decreased only slightly by food and activities costs for the days when the child is with the other parent, and the noncustodial parent's expenses increase significantly to provide regular accommodations for the child.

[66] Md. Code Ann., Fam. Law § 12-201(i)(1), (2) (1997).

[67] *See Blonigen v. Blonigen,* No. C7-00-1019 (Minn. Ct. App. Jan. 16, 2001) (applying the standard from *Valento v. Valento*, 385 N.W. 2d 860, 862 (Minn. Ct. App. 1986)) and *Hortis v. Hortis*, 367 N.W.2d 633, 635 (Minn. Ct. App. 1985) (a deviation from the guidelines addresses inequities in joint physical custody cases and allows parents an offset for time in which children are in parent's custody). *But see Rumney v. Rumney*, 611 N.W 2d 71, 75 (Minn. Ct. App. 2000) (court adopted the *Hortis/Valenti* formula where the child spent nearly equal time with each parent but rejected the standard for a 61%/39% shared time); *In re the Marriage of Rogers*, No. C2-99-1325 (Minn. Mar. 8, 2001) (in a case of sole custody, the percentage of time the child spends in the physical care of the noncustodial parent itself does not support deviation from guidelines. Any deviation, under *Hortis*/*Valento* or otherwise, must be supported by findings, consideration of six factors in Minn. Stat. Ann. § 518.551, subd.5(c) (1998) and the best interest of the child).

compensate the obligee for the cost of providing care during the times of the average visitation periods.[68]

Finally, some States treat shared physical custody as a deviation factor.[69] Instead of a particular formulaic method of calculating a child support amount under circumstances of shared or joint custody, some States merely allow the decision-maker to adjust the calculated support amount to reflect to current custody arrangements. Orders are less likely to be consistent under similar circumstances using this method.

Split custody. In split custody cases, each parent is awarded custody of at least one child. Of the guidelines addressing split custody, there are two approaches.[70] The most common approach involves an offset.[71] The decision-maker calculates the support that the mother would owe to the father for the support of the child in his custody. The decision-maker then calculates the support that the father would owe to the mother for the support of the child in her custody. Finally, the two sums are offset against each other. The parent who owes the greater amount pays the difference to the other parent. The second approach is used by slightly more than 10 States. In those States, split custody is considered as a deviation factor, with the support award in the discretion of the decision-maker.[72]

Add-on to the Basic Support Amount

Although the goal of guidelines is to standardize child support awards as much as possible, there are some aspects of support that are so variable that they require separate consideration. While basic needs, such as food, shelter, and clothing, remain consistent, other expenses attributable to children do not. These include child care and medical expenses.

Child care. For many custodial parents with small children, child care is essential. Whether it is a nanny, a family day care setting, center-based care, or

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[68] *See Chambers v. Amonette*, Lexis 643 (Tenn. App. 2000) (10 Tenn. Admin. Comp. § 1240-2-4-.04(b) (1997) requires the court to deviate upward in child support when the non-custodial parent exercises less than average (80 days) visitation); *Dwight v. Dwight*, 936 S.W.2d 945 (Tenn. Ct. App. 1996) *citing* 10 Tenn. Admin. Comp. § 1240-2-4-.02 (b)(7) ("…where overnight time is divided less equally between parents, the support award should be adjusted appropriately."). *See also Gray v. Gray*, No. M2000-00620-COA-R3-CV (Tenn. Ct. App. Mar. 7, 2001) (there was nothing to preclude the payment of child support by the custodial parent to the noncustodial parent if circumstances so warrant); *Record v. Record*, No. W2000-01294-COA-R3-CV (Tenn. Ct. App. Dec. 28, 2000) (allowing an increase in the guidelines support amount when visitation is not exercised).

[69] *See, e.g.,* Fla. Stat. Ann. § 61.30 (West Supp. 2002); Ga. Code Ann. § 19-6-15 (1999).

[70] *See* Table 3-5 in CHILD SUPPORT GUIDELINES, *supra* note 17.

[71] *See, e.g.,* N.Y. Dom. Rel. Law § 240(1-b) (McKinney Supp. 1998); North Carolina Child Support Guidelines.

[72] *See, e.g.,* N.H. Rev. Stat. Ann. §§ 458-C:1 – 458-C:5 (Supp. 2002); Indiana Child Support Guidelines.

after-school care, without it, many custodial parents would be unable to work and contribute to their expenses of the children. Because child care expenses vary so greatly depending on family circumstances, child support guidelines do not include them within the basic support amount. Because the amount paid for child care is easily determined and tends to be regular, however, it is simple to add it to the basic support amount.

Guidelines tend to take two approaches. Percentage of Income States usually treat child care expenses as a basis for deviating from the guideline amount. The most common approaches under the Income Shares model are either to deduct child care costs from the income of the paying parent or to add the child care costs to the basic support amount and then allocate the cost between the parents.[73] Indiana deducts the costs from the combined income of the parties.[74] In Nebraska, child care costs are not included within the basic support amount. Rather, the actual costs are divided between the parents in proportion to their parental contribution and then added to the basic support amount. The value of the Federal income tax credit for child care can be subtracted from actual costs to arrive at a figure for net child care expenses.[75]

Medical expenses. There are three categories of medical expenses: health insurance premiums; payment for the uninsured portion of regular medical expenses, such as co-payments, deductibles, and uncovered expenses; and extraordinary medical expenses.[76] Many guidelines are silent regarding what is a medical expense.

- **Health insurance**

  Federal Regulations require that child support guidelines provide for children's health care needs through "health insurance or other means."[77] Because the cost of insurance varies so greatly, it is not included within the basic guideline amount. Instead, most guidelines treat the cost of health insurance in one of two ways. The most common method is to add the actual cost of health insurance to the basic support amount and then prorate the cost between the parents based on their proportion of income.[78] The other method is to order

[73] For a chart providing a State-by-State treatment of child care expenses, *see* Table 3-3 in CHILD SUPPORT GUIDELINES, *supra* note 17.
[74] Indiana Child Support Guidelines.
[75] Nebraska Child Support Guidelines.
[76] *See* Linda H. Elrod, *Adding to the Basic Support Obligation*, in GUIDELINES: THE NEXT GENERATION, *supra* note 17.
[77] 45 C.F.R. § 302.56(c)(3) (2000).
[78] An analysis of health care provisions is contained in CHILD SUPPORT GUIDELINES, *supra* note 17. *See also Stepp v. Gray*, 58 Ark. App. 229, 947 S.W.2d 798 (1997) (Arkansas guidelines permit deduction of the insurance premium cost from the provider's income); *Franson v. Micelli*, 172 Ill. 2d 352, 666 N.E.2d 1188 (1996) (health insurance is integral to the support obligation); *McQuinn v. McQuinn*, 110 Ohio App. 3d 296, 673 N.E.2d 1384 (1996) (health care expense is to be apportioned between the parents in income shares calculation).

one parent to pay for health insurance and then deduct that cost from the paying parent's income–the approach taken by Nebraska. The Nebraska guidelines provide that the increased cost to the parent for the child's health insurance must be allowed as a deduction from gross income. The parent requesting an adjustment for health insurance premiums must submit proof of the cost of the premium.[79]

- **Uninsured medical expenses**

  Uninsured medical expense encompasses a range of items that includes co-payments, medicine costs, uncovered procedures and conditions, as well as cash payments in lieu of health insurance.

  – **Definition of medical expense -** Some States provide a definition of medical expenses. For example, they list treatment provided by medical doctors, dentists, treatment for chronic conditions and asthma, counseling, psychiatric treatment for mental disorders, and physical therapy as medical expenses.[80] Other guidelines provide that services provided by certain persons fall within the medical expense category. For example, Michigan guidelines list the following persons or organizations: chiropractors, dentists, oral surgeons, orthodontists, prosthedontists, periodontists, dental hygienists, dental assistants, medical doctors, physician's assistants, registered professional nurses, licensed practical nurses, nurse midwives, nurse anesthetists, nurse practitioners, trained attendants, optometrists, osteopaths, pharmacists, physical therapists, physiotherapists, physical therapy technicians, chiropodists, podiatrists, foot specialists, psychologists, psychological assistants, psychological examiners, clinical social workers, providers of prosthetic devices, ambulance services, advanced mobile emergency care services, clinical laboratories, county medical care facilities, freestanding surgical outpatient facilities, health maintenance organizations, homes for the aged, hospitals, and nursing homes.

  – **Inclusion within guideline -** Support guidelines that expressly address medical expenses vary in how they distinguish ordinary medical expenses from extraordinary medical expenses.

    Some States expressly provide that the basic support amount assumes a certain amount of unreimbursed medical costs. For example, the Alabama Schedule of Basic Child Support Obligations assumes unreimbursed medical costs of $ 200 per family of four per year. These assumed costs include medical expenses not

[79] Nebraska Child Support Guidelines.
[80] Alabama, Colorado, Delaware, Florida, Indiana, Kentucky, and Maine.

covered or reimbursed by health insurance, Medicaid, or Medicare.[81] Many States set a threshold amount for what constitutes an add-on medical expense; by implication, medical expenses that do not meet that threshold are subsumed within the basic support amount. For example, in New Jersey unreimbursed health care expenditures (medical and dental) up to and including $250 per child per year are included in the schedules. "Such expenses are considered ordinary and may include items such as nonprescription drugs, co-payments or health care services, equipment or products." The fact that a family does not incur that amount of health care expense is not a basis for deviating from the guidelines. Predictable and recurring unreimbursed health care expenses in excess of $250 per child per year are added to the basic support amount.[82] In Connecticut, unreimbursed medical expenses exceeding $100 per calendar year per child are apportioned between the parties.[83] In Indiana, uninsured expenses in excess of 6 percent of the basic support obligation are considered extraordinary medical expenses resulting in an add-on to the basic amount. Presumably expenses less than the threshold for extraordinary medical expenses are considered ordinary expenses that are subsumed within the basic support amount.

Other States take the approach that the basic support amount can be adjusted by adding the cost of any noncovered medical, dental, and prescriptive medical expense.[84]

If the ordinary medical expense is subsumed within the basic support amount or treated as an adjustment to the amount, the expense is typically shared by the parents in accordance with the guideline formula. In contrast, Hawaii statutorily specifies that ordinary uninsured medical and dental expenses are the responsibility of the custodial parent.[85]

- **Extraordinary medical expenses**

  Extraordinary medical expenses are those expenses that extend beyond the ordinary expectation of medical need in a family, as contemplated by most State guidelines formulas.

[81] Ala. R. Jud. Admin. 32 (2001).
[82] *See* N.J.Ct. R., Appendix IX (West 2000).
[83] *See* Connecticut Child Support and Arrearage Guidelines regulations; Conn. Gen. Stat. Ann. § 46b-215a (West 1999).
[84] *See*, *e.g.,* Fla. Stat. Ann. § 61.30 (West Supp. 2002); Nev. Rev. Stat. §§ 125B.070 - 125B.080 (2001); Okla. Stat. tit. 43, §§ 118 - 120 (1990 & Supp. 1997).
[85] Hawaii Family Court Child Support Guidelines, Instructions, p.7.

– **Definition -** Fifteen States define "extraordinary medical expenses."[86] There seems to be several approaches, the most common of which is to define extraordinary medical expenses as unreimbursed medical expenses that exceed a certain amount per child per calendar year.[87] The next most common approach is to define extraordinary medical expenses as uninsured expenses in excess of $100 for a single illness or condition.[88] A third approach is to define extraordinary medical expenses as uninsured expenses that exceed a certain percentage of the basic obligation.[89]

  Sometimes States combine a threshold amount with an illustrative list of types of qualifying expenses. Examples of these States are Colorado, Kentucky, Missouri, North Carolina, Virginia, and West Virginia.

  Other States do not use the phrase "extraordinary medical expenses." They do, however, recognize an adjustment for certain unreimbursed medical expenses. Like those States that do expressly address extraordinary medical expenses, they usually establish a threshold based on a certain dollar amount per child per calendar year.[90]

– **Inclusion within guideline -** No State support guideline includes extraordinary medical expenses within the basic support amount. Such expenses are usually the basis for a deviation from the basic support amount or an add-on to the guideline amount.[91]

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[86] Those States are Colorado, District of Columbia, Indiana, Kentucky, Louisiana, Maryland, Missouri, New Mexico, North Carolina, Ohio, South Carolina, Vermont, Virginia, Washington, West Virginia.

[87] Kentucky - $100; Missouri - $ 100; New Mexico - $ 100; Ohio - $ 100; South Carolina - $250; Vermont - $ 200 (but statute does not state whether that threshold is per child); West Virginia - $250.

[88] Examples of this approach are found in the guidelines of Colorado, Louisiana, Maryland, North Carolina, and Virginia.

[89] Indiana – 6 percent; Washington – 5 percent.

[90] *See, e.g.*, Alabama (guideline assumes unreimbursed medical costs of $ 200 per family of four per year); Alaska ($ 500 per year but guideline does not indicate if that is an amount per child or per family); Connecticut ($100); Iowa (CP pays first $ 250 per child up to $ 500 per year for all children. Additional amounts are apportioned between parents.); Massachusetts (CP pays first $100 per child. For routine medical and dental expenses above that amount, court allocates between parties.); New Jersey ($250); Pennsylvania ($250); South Dakota ($250).

[91] *See* CHILD SUPPORT GUIDELINES, *supra* note 17, Table 3-2. *See also* Susan A. Notar & Nicole C. Schmidt, *State Child Support Guideline Treatment of Children's Health Care Needs*, in GUIDELINES: THE NEXT GENERATION, *supra* note 17.

Deviations from Support Guidelines

The issue of when deviation from guidelines is appropriate poses a challenge for States. Too many bases for deviation undermine the effectiveness of standard calculations; yet, some flexibility is necessary to prevent inappropriate orders where unusual circumstances exist. While the standard guideline calculation addresses the basic needs of a child, deviation criteria tailor the order to meet the needs of a specific child or children. When a deviation is made, Federal law requires that the decision-maker must make findings on the record that "state the amount of support that would have been required under the guidelines and include a justification of why the order varies from the guidelines."[92] The standard is the best interest of the child.[93]

Some States, such as Delaware, provide little guidance to the decision-maker by way of deviation criteria. Others, such as Florida, provide detailed and specific guidelines on what constitutes the basis for deviation.[94]

The previous section discusses extraordinary medical expenses. Two other common reasons for deviating from the guidelines relate to educational expenses and the presence of additional dependents. Increasingly, courts are also factoring in the Federal tax dependency exemption.

Educational expenses. Deviation from guidelines for educational expenses are primarily attributed to one of four costs:

- private school costs, including tuition;
- programs for special needs children;
- post-secondary or college expenses; or
- extracurricular programs and activities.

In deciding whether to award educational expenses, the decision-maker will usually look to the income of the parents and their decisions regarding educational issues when they were together. Factors can include:

- the type of schooling in which the child was enrolled in prior to the separation or divorce;
- the special needs of the child for whom support is sought;

[92] 45 C.F.R. § 302.56(g) (2000). *See also* 42 U.S.C. § 667 (1994, Supp. IV 1998, & Supp. V 1999).
[93] 45 C.F.R. § 302.56(g) (2000).
[94] Fla. Stat. Ann. § 6130 (West Supp. 2002).

- whether the parents went to private school;
- whether the parents can afford private school costs; and
- whether it is necessary to maintain the child's current status and well-being.

For example, Ohio's statute lists 16 factors that the court can consider in deciding whether to deviate from guidelines. Specifically addressing educational expenses, it states:

> "(n) The need and capacity of the child for an education and educational opportunities that would have been available to the child had the circumstances requiring a court order not arisen."[95]

Indiana's guidelines list criteria that could be relevant to justifying an award of child support for educational purposes. These include:

- whether the child would have incurred the expense when the family was intact;
- whether education of the same or higher quality is available at less cost; and
- what financial aid is available.[96]

In addition to providing for private school costs, there is also the issue of providing for tuition at a post-secondary school. Many State courts have acknowledged the need for a college education. Usually there must be an authorizing statute, prior case law, or an agreement of the parties for a court or administrative agency to require payment of support after emancipation when the child wishes to attend college. For example, an Illinois appellate court held that its courts must consider the needs of the child and the parent's ability to pay.[97] The Pennsylvania Supreme Court, however, has held that requiring the payment of college expenses is unconstitutional because it imposes an obligation on divorced parents that is not imposed on an intact family.[98] Other courts have rejected constitutional challenges.[99]

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[95] Ohio Rev. Code Ann. § 3119.23(N) (Anderson 2000).
[96] Indiana Child Support Guidelines - Commentary to Guideline 6 (1998).
[97] *Elizer v. Elizer*, 36 Ill. App. 3d 552, 344 N.E.2d 493 (1976).
[98] *Curtis v. Kline*, 542 Pa. 249, 666 A.2d 265 (1995).
[99] *See, e.g., In re Marriage of Kohring*, 999 S.W.2d 228 (Mo. 1999). For a further discussion of support beyond emancipation, *see* Duration of the Support Obligation, *infra*.

Multiple family issues. An estimated 75 percent of divorced persons remarry, and many go on to have additional children.[100] States, therefore, are increasingly recognizing the need to address multiple family issues within their guidelines.[101] Many States allow a deduction from a parent's gross income for support for another child. Most guidelines require either a court order or a written agreement setting forth the obligation before it is allowed as a deduction.[102] Some predicate the deduction on actual payment of support for the other child, not just on the existence of the obligation. One criticism of the deduction approach is that it favors prior support orders, not necessarily first-born children. Therefore, if a later-born child "gets to the courthouse" before a prior child, the deduction approach results in less income available to support the prior-born child.

What to do when the party has a new intact family and subsequent children poses more of a dilemma. Many argue that the guidelines should apply as calculated because the parent knew of the pre-existing duty when subsequent children were conceived.[103] Others suggest that life goes on and the calculation of support should be adjusted, recognizing the other obligations of the parent. Parties will continue to develop new relationships and have additional children. Ultimately, it is the decision-maker in each case who must determine whether the guidelines calculation is fair and equitable or whether deviation is appropriate.[104]

Courts often treat subsequently born children differently, depending on whether the obligor is raising the issue "offensively" or "defensively." In other words, courts are reluctant to allow an obligor to modify an order based on the need to support subsequently born children. They are more receptive to recognizing subsequent children as a defense to an obligee's motion to increase support.[105]

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[100] Thomas Espenshade, *Marriage Trends in America: Estimates, Implications and Underlying Causes*, 11 POPULATION AND DEV. R. 193 (1985).

[101] *See* Marianne Takas, *Improving Child Support Guidelines: Can Simple Formulas Address Complex Families?*, 26 FAM. L.Q. 171 (1992); Marianne Takas, THE TREATMENT OF MULTIPLE FAMILY CASES UNDER STATE CHILD SUPPORT GUIDELINES (U.S. Dep't. of Health & Human Services 1991).

[102] *See, e.g.,* Miss. Code Ann. § 43-19-101(3) (2000); S.D. Codified Laws Ann. § 25-7-6.7(6) (Michie 1999 & Supp. 2001); Mass. Child Support Guideline (1998). *See also In re C.D.,* 767 P.2d 809 (Colo. Ct. App. 1989) (payment of non-court-ordered voluntary support for pre-existing children is not a basis for deviation from the guidelines).

[103] *See Brooks v. Brooks*, 261 Neb. 289, 620 N.W.2d 670 (2001) (it was not an abuse of discretion to refuse to consider support for those children when the proposed deviation from guidelines would provide more support for the current family than the previous one).

[104] *See Mulholland v. Mulholland*, 1994 WL 271530 (Conn. Super. Ct 1994); *Matula v. Bower*, 634 N.E. 2d 537 (Ind. Ct. App. 1994); *Canning v. Juskalian*, 33 Mass. App. Ct. 202, 597 N.E.2d 1074 (1992); *Moxham v. Moxham*, 1994 WL 50764 (Neb. App. 1994); *State ex rel. Randolph v. Poteat,* 1999 WL 140835 (Tenn. Ct App. 1999).

[105] According to Morgan, Colorado, Connecticut, Delaware, Florida, Iowa, Kansas, Massachusetts, Missouri, New Mexico, North Carolina, Oklahoma, South Carolina, Utah, and Vermont specifically state that support of subsequent children can only be used defensively. CHILD SUPPORT GUIDELINES, *supra* note 17, at n. 136.

Federal tax dependency exemption. Another consideration in the determination of child support is the Federal tax dependency exemption.[106] Typically, the custodial parent is entitled to take the Federal tax dependency exemption.[107] The parent can claim the exemption if he or she provides more than half of the support for the child and the child resides with the parent in excess of one half of the year.

Federal law permits the noncustodial parent to claim the exemption when the custodial parent releases the claim to the exemption or where there are multiple sources for the child's support, none of which amount to more than one-half of the support.

Courts in most States have held that they can allocate the Federal tax dependency exemption and order parents to execute the proper Internal Revenue Service documents to effectuate the court's order. The court must determine when it is appropriate to allocate the exemption to the noncustodial parent and whether doing so will produce a tax savings and benefit by considering the parents' gross income, tax filing status, and relevant tax rules.

After the court allocates the exemption to the noncustodial parent, the issue becomes whether the guideline support amount should be adjusted. The commentary to the North Carolina Child Support Guidelines addresses the exemption and the effect of an allocation; it specifically permits deviation to increase the support amount under the circumstances.[108] Many States consider who takes the exemption as a factor in determining the appropriate amount of support. Some allow for deviation to increase the support amount and others do not. The Arkansas court held that allocation of the Federal tax dependency exemption automatically entitles the custodial parent to an upward deviation.[109]

In States where courts have held that they lacked authority to allocate the exemption, some courts have held that the noncustodial parent was, nevertheless, entitled to relief because the parent paid a substantial portion, well in excess of 50 percent, of the child's support. They have adjusted the support order accordingly.[110] Idaho amended its guidelines to specifically address the exemption, stating that the parent without the exemption is entitled to a pro rata share of the benefit in relation to the parent's share of the guidelines income.

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[106] For an in-depth analysis of the Federal tax dependency exemption, *see* CHILD SUPPORT GUIDELINES, *supra* note 17, at pp. 4-64 to 4-69.
[107] 26 U.S.C. § 152(e)(1) (Supp. 2001).
[108] N.C.C.S.G. (1998).
[109] *Fontenot v. Fontenot*, 49 Ark. App. 106, 898 S.W.2d 55 (1995). *See also Accord Rovira v. Mire*, 587 So. 2d 149 (La. Ct. App. 1991); *Johnston v. Johnston*, 722 So. 2d 453 (Miss. 1998).
[110] *Floyd v. Floyd*, 17 Va. App. 222, 436 S.E.2d 457 (1993). *Accord In re Denning*, 22 Kan. App. 2d 226, 914 P.2d 576 (1996); *Ritchey v. Ritchey*, 556 N.E.2d 1376 (Ind. Ct. App. 1990).

Circumstances not justifying downward deviation. Not surprisingly, most of the appellate decisions on guidelines address the question of what circumstances authorize a court to deviate from the guidelines in entering an award. Courts have ruled that the following situations did not justify a downward deviation:

- an agreement between the parties, without court approval, that provided for a sub-guideline award;[111]
- support for stepchildren when such support was not one of the five statutory considerations for deviation;[112]
- an obligor's subsequent marriage to a woman who became unemployed and who had a child from a previous marriage;[113]
- shared custody arrangements, if the child is receiving public assistance (i.e., AFDC or TANF);[114]
- out-of-wedlock birth of the child;[115]
- monthly living expenses that exceeded obligor's monthly income; and/or[116]
- a disabled child's receipt of supplemental security income benefits.[117]

Circumstances justifying downward deviation. There are fewer cases in which the courts have granted downward deviations from the guideline amount. In one case, which demonstrated extreme circumstances consisting of a deliberate conspiracy by the custodial mother and her new husband to frustrate the obligor's visitation privileges and to sabotage the obligor's relationship with the child, the court permitted a deviation.[118] Deviation was also allowed to cover the expense the noncustodial parent incurred for travel to maintain contact with

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[111] *See, e.g., Burson v.* Burson, 608 So. 2d 739 (Ala. Civ. App. 1992); *Richmond v. Pluid*, 925 P.2d 251, 252 (Alaska 1996) (parent's waiver of child support was invalid and unenforceable unless court approved and reviewed the substantive adequacy under Civil Rule 90 B). Note that an agreement between the parties can be the basis for a deviation from the guidelines if the court reviews it against the presumptive guideline and determines that the agreement is in the best interest of the child.

[112] *Donohue v. Getman*, 432 N.W.2d 281 (S.D. 1988).

[113] *Mack v. Mack,* 7 Haw. Ct. App. 171, 749 P.2d 478 (1988).

[114] *Washington Dep't of Social & Health Servs. v. Cobb,* 194 Cal. App. 3d 773, 239 Cal.Rptr. 726 (1987)

[115] *Thompson* v. *Newman*, 383 N.W.2d 713 (Minn. App. 1986).

[116] *Bakke v. Bakke,* 351 N.W.2d 387 (Minn. App. 1984).

[117] *Paton v. Paton,* 91 Ohio St. 3d 94, 742 N.E.2d 619 (2001) (Social Security disability does not constitute a financial resource of the child under Ohio law for the purpose of justifying the trial court's deviation from the basic child support schedule).

[118] *In re Boudreaux*, 247 Cal. Rptr. 234 (Cal. 1988).

the child.[119] Some courts have allowed deviation from the guideline amount based on an agreement between the parties, especially where the obligor agrees to pay expenses outside of the guideline, such as college tuition or mortgage payments.[120] Trial courts have also permitted deviation based on the "equities of the case."[121]

CONSTITUTIONALITY OF GUIDELINES

Guidelines have withstood constitutional challenges to both the Federal mandate for their use and the States' methods of enactment.[122] Courts have routinely held that child support guidelines are not substantive rules of law, but rather they are procedural in nature and fall within the rule-making ability of the court.[123] Obligors have also asserted that the legislative enactment of guidelines unconstitutionally usurps judicial authority. The flexibility of the guidelines in permitting deviations upon express written findings saves them from these attacks, however. In fact, courts have held that the legislation of these guidelines no more unconstitutionally usurps the authority of the courts than does the legislation of mandatory sentencing guidelines.[124]

Obligors have raised other constitutional challenges to guidelines, particularly along equal protection lines. For example, in a case involving remarriage and a second family,[125] the decision-maker did not subtract from the

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[119] *Wilson v. Shea*, 87 Cal. App. 4th 887, 104 Cal. Rptr. 2d 880 (2001). *See also Tibor v. Tibor*, 2001 N.D. 43, 623 N.W.2d 12 (2001).

[120] *See, e.g., Walsh v. Walsh*, 333 Md. 492, 635 A.2d 1340 (1994). Tribunals have been reluctant to set aside child support guidelines in favor of agreements that are vague and unclear. *See, e.g., Knight v. Knight ,*739 So. 2d 507 (Ala. Civ. App. 1999); *Alves v. Alves*, 1994 WL 577078 (Conn. Super. Ct. 1994). In assessing the fairness of a proposed agreement, the tribunal should consider the potential imbalance of power in the relationship and the fact that an agreement, which seems mutual on its face, might have been coerced.

[121] *Manzanares v. Manzanares,* 769 P.2d 156 (Okla. 1989). *See also Fontenot v. Fontenot*, 759 So. 2d 206 (La. Ct. App. 3 Cir. 2000) ("[A] deviation may be allowed where application of the child support guidelines would not be in the best interest of the child or would be inequitable to the parties.").

[122] *See, e.g., P.O.P.S. v. Gardner*, 998 F.2d 764 (9th Cir. 1993); *Children's & Parent's Rights Ass'n of Ohio, Inc. v. Sullivan*, 787 F. Supp. 724 (N.D. Ohio 1991) and companion case, 787 F. Supp. 738 (N.D. Ohio 1991); *Coghill v. Coghill,* 836 P.2d 921 (Alaska 1992); *Schenek v Schenek*, 161 Ariz. 580, 780 P.2d 413 (1989); *Stewart v. Winfrey*, 308 Ark. 277, 824 S.W.2d 373 (1991); *In re Guidelines for Child Support Enforcement,* 301 Ark. 627, 784 S.W.2d 589 (1990); *In re Marriage of Armstrong*, 831 P.2d 501 (Colo. Ct. App. 1992); *Dalton v. Clanton,* 559 A.2d 1197 (Del. Super. Ct. 1989); *Garrod v. Garrod*, 590 N.E.2d 163 (Ind. Ct. App. 1992); *Shrivastava v. Mates*, 93 Md. App. 320, 612 A.2d 313 (1992); *Stewart v. Stewart,* 899 S.W.2d 154 (Mo. Ct. App. 1993); *Martinez v. Martinez,* 282 N.J Super. 332, 660 A.2d 13 (Ch. Div. 1995).

[123] Linda Henry Elrod, *Epilogue: of Families, Federalization and a Quest for Policy*, 33 FAM. L. Q. 843 (1999).

[124] *See Blaisdell v. Blaisdell,* 492 N.E.2d 622 (III. App. Ct. 1986).

[125] *Feltman v. Feltman*, 434 N.W.2d 590 (S.D. 1989). See *Hawkins v. Peterson*, 474 N.W.2d 90, 96 (S.D. 1991) (cites *Feldman* and discusses that children from previous and subsequent marriages and out-of-wedlock children deserve equal protection). *See also P.O.P.S. v. Gardner,* 998 F.2d 764 (9th Cir. 1993).

obligor's income the child support he allegedly paid for children of the subsequent marriage. The obligor contended that the guidelines treated two similarly situated classes of people differently (i.e., children from the first marriage and children from the second marriage). In upholding the guidelines, the court ruled that the distinction between the two sets of children served a legitimate State interest. An Alaska court also rejected the argument that the Alaska Percentage of Income guideline violated equal protection by considering only the noncustodial parent's income.[126]

RETROACTIVE APPLICATION OF GUIDELINES

Courts have held that child support guidelines are not applicable to the *de novo* appellate review of child support orders entered before the guidelines' effective date.[127] If new guidelines were applicable, most of the cases pending on appeal would have to be remanded for redetermination and consideration of evidence relevant to criteria used in applying the guidelines.

RETROACTIVE SUPPORT

Historically, support has been sought as far back as the birth of the child. Certainly, States have sought reimbursement for public assistance expenditures for periods prior to the bringing of an action for support. Connecticut, for example, in its definition of "arrearage," includes support due for periods before an action to establish a support order, provided such amounts are based on the obligor's ability to pay during those periods, the current ability to pay, or on assistance rendered to the child during the period in question.[128] Most States use the filing date rather than the service date as the appropriate measure of the beginning of the obligation.[129] States have refused to impose a duty on a parent who has been barred from a relationship with the child during the period for which support is sought.[130] Courts have, however, imposed obligations on noncustodial parents during periods when they eluded service and location in an effort to avoid the obligation to support their children.[131] Application of retroactivity poses particular problems in relation to cases involving low-income parents, where retroactively compounding the monthly support amount can result in a large debt the parent can never repay. These factors are weighed carefully by courts in deciding whether to impose retroactive support obligations.

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[126] *Coghill v. Coghill*, 836 P.2d 921 (Alaska 1992).
[127] *In re Marriage of Olsen & Olsen,* 137 Or. App. 8, 12, 902 P.2d 217, 219 (1995*), citing In re Butcher,* 100 Or. App. 476, 786 P.2d 1293 (1990).
[128] Connecticut Child Support and Arrearages Guidelines regulation, CGSConn. Gen. Stat. § 46 (b) 215a-1(2)(C) (1999).
[129] *See, e.g., Dep't of Revenue v. Carbonaro,* 712 So. 2d 1225 (Fla. Ct. App. 1998).
[130] *See Davis v. Dep't of Revenue*, 689 So. 2d 433 (Fla. Ct. App. 1997).
[131] *See, e.g., Diane S. v. Carl Lee H.,* 472 S.E.2d 815 (W. Va. 1996).

TEMPORARY SUPPORT (*PENDENTE LITE*)

Often a proceeding for child support is delayed to complete discovery or because a party, attorney, or the court is unavailable at the time scheduled for hearing. Because the need for support is so essential, many States allow for the issuance of a temporary order for support, *pendente lite*, pending the action. Typically this amount is set based on income information that is available. For instance, usually the CSE attorney will have access to wage statements. Temporary support orders rarely remain in effect beyond one year, and some States limit the time even further.

DURATION OF THE SUPPORT OBLIGATION

Most States have a specified age of emancipation, which is implicit in all support orders. Most States use age 18, graduation from high school, or age 19, whichever comes first.[132] Some States impose a support duty until age 20 or 21.[133] Hawaii and Massachusetts allow support to age 23 if the child is enrolled in an accredited higher educational institution. Also, a court in Oregon held that support of a child in school, who was past 18 years old, was constitutional.[134]

Most States do not require support beyond the statutory age of majority (post-majority support), but they will enforce an agreement between the parents that obligates one or both parents to provide it. For example, although the age of emancipation in Mississippi is 21, the court has upheld agreements to continue support beyond emancipation.[135] Typically the agreement to pay post-majority support is not subject to modification, nor is it a basis for deviation from guidelines.[136] New Jersey, on the other hand, leaves the decision to continue support beyond the emancipation age to the discretion of the decision-maker, who reviews the need and capacity of the child for education, including higher education.[137] In case law, the following factors have been considered in awarding this post-majority educational support:

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[132] *See, e.g.*, Cal. Fam. Code §§ 4050-4076 (1994 & Supp. 1998); Delaware Child Support Formula (1998).

[133] *See, e.g., Mottley v. Mottley,* 729 So. 2d 1289 (Miss. 1999); Indiana Child Support Guidelines (1998).

[134] *Crocker v. Crocker,* 971 P. 2d 469 (Or. Ct. App. 1998); *In re Marriage of McGinley*, No. CAA101792 (Or. Ct. App. Feb. 28, 2001).

[135] *Mottley v. Mottley*, 729 So. 2d 1289 (Miss. 1999), *citing Hoar v. Hoar*, 404 So. 2d 1032 (Miss. 1981); *Crow v. Crow*, 622 So. 2d 1227 (Miss. 1993).

[136] *Ching v. Ching*, 7 Haw. App. 221, 751 P.2d 93 (1988) (a father's agreement to pay post-high school education expenses was not an exceptional circumstance that would allow the court to deviate from guidelines).

[137] *Sakovits v.Sakovits*, 178 N.J. Super. 623, 429 A.2d 1091 (1981). *See also York v. York*, 247 A.D.2d 612, 669 N.Y.S.2d 362 (N.Y. App. Div. 1998). Other States have statutory provisions, or they otherwise provide, for support beyond the age of majority when certain requisite criteria are met, such as when the child is still enrolled in high school or is enrolled in post-secondary education. These States include Alabama, Colorado, Georgia, Hawaii, Iowa, Massachusetts,

- amount of support sought;
- ability of the obligated parent to pay;
- financial situation of the custodial parent;
- commitment and attitude of the child;
- relationship between the child and the obligated parent;
- relationship of the schooling to the child's prior training and the long-range goals of the child;
- length of time between high school graduation and college entrance; and
- parents' education and expectations for the child, based on their social and economic backgrounds.

Many States impose a support obligation past the age of minority for children who are mentally or physically disabled, either by imposition of a common law duty or by statute.[138] Some States will impose the support duty only if the disability arose during the child's minority.[139]

Mississippi, Missouri, New Hampshire, New Jersey, North Dakota, South Carolina, and Utah. For state laws on duration of support, *see* Exhibit 9-2.

[138] *See* Laura W. Morgan, *The Duty to Support Adult Disabled Children,* 9 DIVORCE LITIGATION 185 (October 1997). Alabama: no statute, rule is by common law; Alaska Stat. § 25.24.140 (1996); Ariz. Rev. Stat. Ann. § 25-320(B) (Supp. 1996); Ark. Stat. Ann. § 9-12-312(a)(5)(B) (1993); Cal. Fam. Code § 3910 (West 1994); Colo. Rev. Stat. § 14-10-122(3) (1997); Connecticut: no statute, rule is by common law; Del. Code Ann. tit. 13, § 503 (1993); D.C.: no statute, rule is by common law; Fla. Stat. Ann. § 743.07(2) (West Supp. 1997); Ga. Code Ann. § 19-7-2 (Supp. 1997) (statute abrogates common-law rule of duty of support); Hawaii Rev. Stat. § 580-47(a) (1997); Idaho Code § 32-1002 (1996); 750 Ill. Comp. Stat. 5/513(1) (1993); Ind. Code Ann. § 31-16-6-6 (1997) (former Ind. Code Ann. 31-1-11.5-12(e)(2)); Iowa Code Ann. § 598.1(6) (West 1996); Kansas: no statute, rule is by common law; Ky. Rev. Stat. Ann. § 405.020(2) (Banks-Baldwin Supp. 1996); La. Civ. Code Ann. arts. 229, 230 (West 1997); Maine: no statute, rule is by common law; Md. Code Ann., Fam. Law §§ 13-101(b)(2), 13-102(b) (1997); Massachusetts: no statute, rule is by common law; Minn. Stat. Ann. § 518.54(2) (West 2000); Mo. Ann. Stat. § 452.340(4) (West 1997); Montana: no statute, rule is by common law; Nev. Rev. Stat. § 125B.200(2)(c) (1993); New Jersey: no statute, rule is by common law; N.M. Stat. Ann. § 40-4-7 (1997); N.Y. Dom. Rel. Law § 32 (McKinney 1997); N.Y. Jud. Ct. Acts Law § 413 (McKinney 1997) (interpreted as imposing no duty to support adult disabled child); N.C. Gen. Stat. § 50-13.8 (1984); N.D. Cent. Code § 14-09-08.2(4) (Supp. 1997); Ohio Rev. Code Ann. § 3103.03(B) (Anderson 1996); Okla. Stat. Ann. tit. 10, § 12 (West Supp. 1997); Or. Rev. Stat. § 109.010 (1990); 23 Pa. Cons. Stat. Ann. § 4321(3) (West 1991 & Supp. 1997); S.C. Code Ann. § 20-7-420(17) (Law. Co-op. Supp. 1996); Tennessee: no statute, rule is by common law; Tex. Fam. Code Ann. § 154.001(a)(4) (Vernon 1996); Utah Code Ann. § 78-45-2(6)(c) (Supp. 1997); Va.

Despite a statutory age of minority, most States recognize that a child can become emancipated through marriage, military service, or employment resulting in the child's being self supporting.[140]

MEDICAL SUPPORT

Medical support is the legal provision of medical, dental, prescription, and other health care expenses. It can include provisions to cover health insurance costs as well as cash payments for unreimbursed medical expenses. Child support establishment addresses the health needs of children in three ways. First, there are Federal laws and regulations that require the parents to provide health insurance coverage.[141] Second, the guideline calculation can apportion the costs not reimbursed by health insurance to each of the parents.[142] Finally, the guidelines can address extraordinary medical expenses.[143] This section focuses primarily on the requirement to provide health insurance coverage and the National Medical Support Notice (NMSN).

Federal Mandates

The first connection between medical support and child support came as an attempt to recoup the costs of Medicaid provided to public assistance families under Title XIX of the Social Security Act. Two years after creation of the IV-D program, the Medicare/Medicaid Antifraud and Abuse Amendments of 1977 established a medical support enforcement program that allowed States to require that Medicaid applicants assign their rights to medical support.[144] Further, in an effort to cover children by private insurance instead of public programs, when available, it permitted IV-D and Medicaid agencies to enter into cooperative

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Code § 20-61 (1995); Wash. Rev. Code Ann. § 26.09.100(1) (1997); West Virginia; no statute, rule is by common law; Wyo. Stat. § 20-2-113(a) (1997)

[139] *See, e.g*., *Whitten v. Whitten*, 592 So. 2d 183 (Ala. 1991); *Mendoza v. Mendoza*, 117 Ariz. 603, 870 P.2d 421 (1994); *Hadden v. Hadden*, 320 Ark. 480, 897 S.W. 2d 568 (1995); *Filippone v. Lee (Filippone*), 23 Fam. L.Q.1547 (N.J. Super. Ct. App. Div., Sept.23, 1997). *But see Sininger v. Sininger*, 300 Md. 604, 478 A.2d 1354 (1984) (when the parent has the ability to provide support, the duty of support arises even when the disability commences after the child reaches majority).

[140] *See* Chadwick N. Gardner, *Don't Come Crying' to Daddy! Emancipation of Minors: When is a Parent Free at Last from the Obligation of Child Support?* 33 U. LOUISVILLE J. FAM. L. 827 (1995). *See also Guzman v. Guzman*, 175 Ariz. 183, 854 P.2d 1169 (1993); *In re Marriage of Daniels*, 296 Ill. App. 3rd 446, 695 N.E.2d 1376 (1998); *Wittwer v. Wittwer*, 545 N.E. 2d 27 (Ind. Ct. App. 1989); *Porath v. McVey*, 884 S.W2d 692 (Mo. Ct. App. 1994); *State ex rel Dep't of Health & Human Resources v. Farmer*, 26 Fam. L. Rep. 1052 (W. Va. Sup. Ct., Nov 19, 1999). *Also Dunson v. Dunson,* No. 34A02-0006-CV-375 (Ind. Ct. App. Feb. 26, 2001) (under Ind. Code § 31-16-6-6 (emancipation at age 21 unless emancipated earlier by armed services enrollment, marriage, or when not under the care of either parent or court-approved individual or agency), a 15-year-old who moved in with an aunt, and out of the parents' control, was emancipated).

[141] For a discussion of guideline treatment of health insurance costs, *see infra* pp.160 - 161.

[142] *See infra* pp. 163-164.

[143] *See infra* pp. 164-165.

[144] P.L. No. 95-142 (1977).

agreements to pursue medical child support assigned to the State. Also, State IV-D agencies were required to notify Medicaid agencies when private family health coverage was either obtained or discontinued for a Medicaid-eligible person.[145]

Today, Federal law and regulations require States to provide for children's health needs by obtaining health insurance or by other means.[146] The health insurance responsibility can be borne by either or both parents.

There have been major initiatives that have improved the medical coverage for children along the way. For instance, the Child Support Enforcement Amendments of 1984[147] added Section 452(f) to the Social Security Act.[148] This section mandated that the Secretary of the U.S. Department of Health and Human Services (HHS) issue regulations requiring IV-D agencies to secure medical support information and to obtain and enforce medical support in the form of health care coverage from the noncustodial parent, when such coverage is available at a reasonable cost.[149] In that legislation, "reasonable cost" was defined as the cost of insurance available through one's employment.[150] Also, regulations required States to incorporate children's health care needs into child support guidelines calculations.[151]

Obstacles to enforcement of medical child support, however, still remained. For example:

- Medical insurance policies contained provisions that limited the ability of a parent to add a child living outside the parent's household and not claimed as a tax dependent.

- Some plans disallowed children born to single parents or living outside a limited service area.

- Many times the parent would fail to enroll the child, sometimes because insurance premiums were too high. To hold the parent in contempt might cause the loss of a job that was the very source of support.

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[145] 45 C.F.R. §§ 303.30, 303.31 (2000).
[146] 42 U.S.C. § 652(f) (Supp. IV 1998 & Supp. V 1999; 45 C.F.R. § 302.56(c)(3) (2000).
[147] P.L. No. 98-378 (1984).
[148] 42 U.S.C. § 652(f) (Supp. IV 1998 & Supp. V 1999).
[149] 45 C.F.R. §§ 303.30, 303.31 (2000).
[150] 45 C.F.R. §§ 302.80, 303.30, 303.31. However, the meaning of "reasonable cost" has evolved. 45 CFR 303.31 (a)(1) now reads " Health insurance is considered reasonable in cost if it is employment related or other group health insurance, regardless of service delivery mechanism.".
[151] 45 C.F.R. § 302.56 (2000). Every State must have child support guidelines that presumptively determine how parents' financial obligations are set. These guidelines apply to all child support orders, regardless of whether the custodial party receives services from the State IV-D agency.

- Whether health care orders were enforceable under group health plans covered by the Employee Retirement Income Security Act of 1974 (ERISA)[152] was unclear.

Employee Retirement Income Security Act of 1974

In 1974, Congress enacted ERISA to help protect employer-provided pension and health benefits and to encourage employers to establish such plans. ERISA regulates most privately sponsored pension plans and health benefit plans. The law is important for child support purposes because it preempts State laws and regulations governing health insurance and employee benefit plans, including employer self-funded health insurance plans. ERISA also imposes requirements regarding information that must be provided to plan participants and beneficiaries, internal procedures for determining benefit claims, and standards of conduct of those responsible for plan management.

Statutory Changes Affecting Medical Coverage and ERISA

To remove some of the impediments to obtaining medical coverage, Congress enacted the Omnibus Budget Reconciliation Act of 1993 (OBRA '93),[153] which:

- prohibited discriminatory health care coverage practices;

- created "qualified medical child support orders" (QMCSOs)[154] to obtain coverage from group plans subject to ERISA; and

- allowed employers to deduct the cost of health insurance premiums from an employee's income.

Additionally, OBRA included provisions that became Medicaid State plan requirements.

In 1996, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)[155] amended the Social Security Act to require States, as a condition of receiving Federal funds, to enact a provision for health care

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[152] P.L. No. 93-406 (1994), as amended 29 U.S.C. §§ 1001– 1461. For additional information on ERISA and qualified medical child support orders (QMSCOs), *see* Carrad, *The New QDRO Handbook: A Practical Guide to Dividing ERISA, Military and Civil Service Pensions in Divorce Actions and Collecting Child Support from Employee Benefit Plans* (American Bar Association, 2000).

[153] P.L. No. 103-66 (1993).

[154] A "QMCSO" is a medical support order that creates the existence of an "alternative recipient's" right to receive benefits under a group plan. An "alternative recipient" is the child of a participant or beneficiary of a plan.

[155] P.L. No. 104-193 (1996).

coverage in all orders established or enforced by the IV-D agency.[156] Before PRWORA, the requirement to seek health insurance coverage had been mandatory for public assistance cases, while nonpublic assistance IV-D applicants could opt not to have medical support established and enforced.

But enforcement of health care costs remained problematic. Provisions in the Child Support Performance and Incentives Act of 1998 (CSPIA)[157] were enacted to eliminate barriers to establishing and enforcing medical support coverage. CSPIA requires State IV-D agencies to enforce health care coverage by use of a National Medical Support Notice (NMSN). Federal regulations[158] implement the provisions of CSPIA. A parallel regulation, developed by the Department of Labor, adopts the use of the NMSN under ERISA.[159]

Report of the Medical Support Work Group

CSPIA established the Medical Child Support Working Group to submit a report to the Secretaries of HHS and Labor recommending measures to improve health care coverage.[160] The resulting report contains 76 recommendations that would expand health care coverage for children in the IV-D system.[161]

National Medical Support Notice

Section 401 of CSPIA strengthened enforcement of medical support coverage by requiring HHS and the Department of Labor to develop a National Medical Support Notice (NMSN). The NMSN complies with ERISA's informational requirements and restrictions[162] and with Title IV-D requirements. It also contains a severable employer withholding notice to advise the employer of:

- State law applicable to the requirement to withhold;
- the duration of withholding;
- limitations on withholding, such as the Consumer Credit Protection Act;
- prioritization under State law for withholding child support and medical support, where insufficient funds are available for both; and

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[156] 42 U.S.C. § 666(a)(19)(A) (Supp. V 1999).
[157] P.L. No.105-200 (1998).
[158] 45 C.F.R. § 303 (2000) (published under authority of 42 U.S.C. §§ 652(f) and 666(a)(19), as amended by Section 401 of CSPIA, and other technical amendments).
[159] 29 C.F.R. § 2590 (2001).
[160] Section 401 of P.L. No. 105-200 (1998).
[161] The Working Group's report, *21 Million Children's Health: Our Shared Responsibility,* can be found on the Federal Office of Child Support Enforcement (OCSE) web site at http://www.acf.dhhs.gov/programs/cse/rpt/medrpt/index.html.
[162] 29 U.S.C. § 1169(a) (1999).

- the name and phone number for the appropriate division of the IV-D agency handling the withholding.[163]

The NMSN notifies the noncustodial parent's employer of the provision for health care coverage for the child. In addition, if the NMSN is properly completed and satisfies ERISA's conditions, it constitutes a QMSCO as defined by ERISA.[164] The intent is to simplify the processing of cases for employers.

States must mandate the use of the NMSN in all cases in which the noncustodial parent is required to provide health care coverage and that parent's employer is known.[165] There is an exception to using the NMSN if the order stipulates that alternative health care coverage must be provided.

Federal regulations[166] require States to have the following procedures:

- the NMSN must be used to notify employers of a health care coverage order;

- the NMSN must be transmitted to an employer within 2 business days from entry of the individual in the State Directory of New Hires;

- the employer must transmit the NMSN to the health coverage provider within 20 business days of the date of the NMSN and must withhold contributions and send them to the plan;

- the NMSN can be contested based on mistake of fact;

- the employer must notify the IV-D agency upon termination of the parent's employment; and

- the IV-D agency must notify the employer when the order becomes ineffective and must work with the custodial parent to choose a plan when options for coverage exist.

The NMSN has two parts: the Notice to Withhold for Health Care Coverage and the NMSN to Plan Administrator. The Notice to Withhold for Health Care Coverage includes information for, and the responsibilities of, the employer. The Notice to Plan Administrator provides information necessary to the Plan Administrator to treat the NMSN as a QMCSO under ERISA and to enroll the child as a dependent of the participant in the group health plan. It was also developed to comply with the requirements for group health plans under State

[163] 45 C.F.R. § 303.32 (2000).
[164] 29 U.S.C. § 1169(a) (1999).
[165] Section 466(a)(19) of Title IV-D of the Social Security Act, as amended by section 401(c)(3) of CSPIA, codified at 42 U.S.C. § 666(a)(19)(B) (Supp. V 1999).
[166] 45 C.F.R. § 303.32(c) (2000).

laws. This part also includes a "Plan Administrator Response" to notify the issuing agency of the child's enrollment or the options for coverage.

To be considered a QMCSO, the NMSN must contain the following information:

- the name of the issuing agency;
- the name and address of the employee/participant;
- the name and address of the alternative recipient, or a substituted official, if necessary; and
- identification of an underlying order.[167]

INTERSTATE CASES

Establishing support in an interstate case does not differ greatly from doing so in a local case. The CSE attorney should ensure that service of process is completed as required by the law of the State that will hear the case. The forum State's law also applies regarding calculation of the support amount, i.e., the forum State's support guidelines apply. UIFSA allows the parties to participate by telephonic communications or videoconferencing so that travel to the forum State is not necessary.[168]

TRIBAL CASES[169]

Tribal self-government has been at issue for hundreds of years. A crucial turning point was passage of the Indian Reorganization Act of 1934,[170] which guaranteed the right of Indian Tribes to organize and adopt laws for their governance.[171] In the 1950's, however, Congress passed several acts that resulted in termination of some Tribes as federally recognized, self-governing entities. In 1953, Congress enacted Public Law 83-280 (Public Law 280),[172] which authorized States to impose jurisdiction over reservations, with or without

[167] 29 U.S.C. § 1169(a) (1999).
[168] For an in-depth discussion of interstate establishment procedures, see Chapter Twelve: Interstate Child Support Remedies.
[169] For more information on tribal issues, check the OCSE web site and the following publications: OFFICE OF CHILD SUPPORT ENFORCEMENT, STRENGTHENING THE CIRCLE: CHILD SUPPORT FOR NATIVE AMERICAN CHILDREN (U.S. Dep't of Health & Human Services); JUNE MELVIN MICKENS, TOWARD A COMMON GOAL: TRIBAL & STATE INTERGOVERNMENTAL AGREEMENTS FOR CHILD SUPPORT CASES (American Bar Association Center on Children and the Law 1994); MARGARET CAMPBELL HAYNES & JUNE MELVIN, TRIBAL AND STATE COURT RECIPROCITY IN THE ESTABLISHMENT AND ENFORCEMENT OF CHILD SUPPORT (American Bar Association Center on Children and the Law 1991).
[170] 18 Stat. 596 (1934), codified at 25 U.S.C. §§ 461-479 (2001).
[171] Tribal law includes treaties, the Tribal constitution, codes, custom, and decisional law.
[172] Codified as amended at 18 U.S.C. § 1162 and 28 U.S.C. § 1360 (1993).

tribal consent. The Indian Civil Rights Act[173] narrowed the reach of Public Law 280 by requiring tribal consent (majority consent of the adult members) for State imposition of jurisdiction. Since its passage, no Tribes have consented to a relinquishment of exclusive authority over their members in Indian country. Subsequently, several acts have affirmed tribal self-governance, including the Indian Self-Determination and Education Assistance Act of 1975,[174] which authorizes Federal grants to Tribes to improve tribal governments, and the Indian Child Welfare Act of 1978,[175] which recognized the importance of tribal control over custody and adoption proceedings.

Almost all American Indian Tribes and Alaska Native Village governments have some type of established court systems or administrative procedures to handle disputes and to enforce tribal law. Many of these provide for one or more means of child support collection from their members or for children who are Tribe members. In fact, in some situations, the tribal court might have exclusive jurisdiction to establish paternity and/or a child support order.[176] Many tribal codes state that, in civil matters, the tribal court shall apply tribal law that is not contrary to the laws of the United States. When there is no applicable tribal ordinance, custom, or usage, the tribal court can use relevant Federal or State laws as a guide.

Where the cause of action arose is also relevant to the determination of jurisdiction. In a State that asserts jurisdiction over Tribes under Public Law 280, courts for the Tribe and the State have concurrent jurisdiction, assuming tribal law recognizes the cause of action. Where the State does not have civil jurisdiction under Public Law 280, State court jurisdiction over civil actions arising in Indian country is very limited. (A State court, however, might be the only forum for civil actions involving a non-Indian or for those in which the action arose outside of Indian country.)

Although Federal legislation has addressed the general jurisdictional authority of Tribes, and the limitations on their authority, specific references to child support establishment and enforcement have been minimal. Until passage of PRWORA, Title IV-D of the Social Security Act did not mention Tribes or Native Americans. Federal policy, however, was clear that State Child Support Enforcement (CSE or IV-D) agencies had to provide IV-D services to Indian children, based on an application for IV-D services or the receipt of public assistance. As a practical matter, because of jurisdictional issues, many Native American children could only receive IV-D assistance if there was a cooperative agreement between the State and relevant Tribe. Challenges existed in the

[173] P.L. No. 90-284 (1968), codified at 25 U.S.C. §§ 1301-1341 (2001).
[174] P.L. No. 93-638 (1975), codified at 25 U.S.C. §§ 450-450n (2001).
[175] P.L. No. 95-608 (1978), codified at 25 U.S.C. §§ 1901-1963 (2001).
[176] For example, the Eastern Band of the Cherokee Indian Tribe can collect support through several different proceedings. Support amounts are set based on State child support guidelines. The Tribal court has a cooperative agreement with North Carolina, which provides child support workers to the Cherokee Court as well as collection and record-keeping services.

relationships between these entities, such as recognition of the sovereignty of the tribal government and tribal lands; jurisdictional issues; and tribal standards, practices, laws and customs that were different from, and sometimes conflicted with, those of the State.

Current Federal law allows for the continued use of cooperative agreements to further child support efforts.[177] There are now a number of intergovernmental agreements between American Indian Nations and States that provide child support protection to Native American children, resulting in increased cooperation and understanding that has increased the number of Native American children who receive support.[178] The technical amendments to PRWORA in the Balanced Budget Act of 1997[179] provide for direct funding to Tribes and agreements between States and Tribes. They also authorize Tribes to operate their own CSE programs, allowing them to meet Native American children's needs with services that comply with CSE requirements while preserving tribal customs, values, and culture. The statute allows direct funding to an Indian Tribe or tribal organization.[180]

Consultation with Tribes and tribal organizations gave Tribes the opportunity to articulate their perspectives in meeting CSE requirements within the context of their communities, cultures, and customs. The comprehensive Tribal Child Support Enforcement Interim Final Rule and Proposed Rule were published in the Federal Register on August 21, 2000.[181] The interim final rule enables Tribes and tribal organizations currently operating a comprehensive Tribal CSE program directly or through agreement, resolution, or contract, to apply for, and receive direct funding upon approval. The proposed regulations address the requirements and related provisions.

These regulations take into account the special government-to-government relationship between Tribes and the Federal Government, the fact that tribal programs are new and State IV-D programs have been operational for 25 years, and the fact that tribal programs will be part of the nationwide CSE system.

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[177] 42 U.S.C. § 654(33) (Supp. V 1999).

[178] For instance, there are informal agreements between the Seminole Tribe of Florida and the State of Florida and between the Shoshone and Arapahoe Tribes and the State of Wyoming. The Navajo Nation provides child support services in New Mexico with financial assistance from the State and with matching funds (FFP) from the Federal Government.

[179] P.L. No. 105-33 (1997).

[180] 42 U.S.C. § 655(f) (Supp. 2001). "Tribal organization" and "Indian Tribe" are defined in the Indian Self-Determination and Education Assistance Act of 1975, P.L. No. 93-638 (1975), codified at 25 U.S.C. § 450-450n (2001)

[181] Comprehensive Tribal Child Support Enforcement Programs: Interim Final Rule, 65 Fed. Reg. 50,785 (proposed Aug. 21, 2000) (to be codified at 45 C.F.R. Pt. 310); Comprehensive Tribal Child Support Enforcement Programs: Proposed Rule, 65 Fed. Reg. 50,800 (proposed Aug. 21, 2000) (to be codified at 45 C.F.R. Pt. 309).

A number of Tribes have applied for direct funding under the interim final rule. With the publication of the final rule, many more Tribes will be able to apply for these direct grants.

UIFSA also recognizes the sovereignty of the tribal government and the tribal Court in its definition of State:

> "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes: (i) an Indian Tribe; and (ii) a foreign jurisdiction that has enacted a law or established procedures for issuance and enforcement of support orders which are substantially similar to the procedures under this Act ….[182]

The 1996 amendments to UIFSA make it clear that reciprocity is not required between States and Indian Tribes, unlike the provision made for foreign nations.

Further, the Full Faith and Credit for Child Support Orders Act[183] (FFCCSOA) defines "State" to include "Indian country (as defined in section 1151 of title 18)." This means that throughout FFCCSOA provisions, wherever the term "State" appears, it must be read to include "Tribe" as well. For CSE efforts to succeed in Indian country, it is important for States and Tribes to work together. States should cooperate in giving full faith and credit for tribal child support orders. Likewise, Tribes should cooperate with States in giving full faith and credit for State child support orders.

MILITARY PERSONNEL[184]

This discussion focuses on the unique challenges facing the CSE attorney in successfully prosecuting a child support case against a military obligor. The considerations begin with locating the military parent and include the special challenges that involve service of process, statutory protections given the military, and discovery of the member's financial status.[185] The issues inherent in these endeavors are compounded by the fact that each branch of the service has its own regulations and procedures.

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[182] UIFSA § 101(19) (renumbered in 2001 as § 102(21)), 9 Pt. 1B U.L.A. 257-8 (1999). *See also* UIFSA § 101(19) cmt, 9 Pt. 1B U.L.A. 258 (1999).
[183] 28 U.S.C. § 1738B(b) (Supp. 2001.
[184] Additional information about seeking support from military personnel can be found in A CASEWORKER'S GUIDE TO CHILD SUPPORT ENFORCEMENT AND MILITARY PERSONNEL, (U.S. Dep't of Health & Human Services 2000) [hereinafter CASEWORKER'S GUIDE]. This publication includes information on locate assistance, military addresses and contacts, and practice tips.
[185] *See also* Margaret Campbell Haynes, *Enforcement Related to Particular Groups*, in ENFORCING CHILD AND SPOUSAL SUPPORT (M. Dobbs, ed., Clark Boardman Callaghan 1995 and Supp.) [hereinafter ENFORCING CHILD AND SPOUSAL SUPPORT].

Locating Military Personnel

Locating active-duty military personnel can sometimes be difficult. That difficulty is compounded when the individual's Social Security Number (SSN) is unknown. Whenever possible, use the individual's full name and SSN in any contact with the military. Information can be found through a recruiter, through the World Wide Military Locator Services,[186] or from the Federal Parent Locator Service, which searches the Department of Defense database and can obtain home addresses for most members of the military.

Service of Process

The basis for jurisdiction over military personnel is the same as it is for nonmilitary persons. Military personnel generally retain the domicile they had at the time they joined the service. If that residence is out-of-state, the CSE attorney should treat the case as an interstate one (i.e., try to proceed through long-arm and, if that is not available or appropriate, use UIFSA's two-state process.)

The best and easiest way to serve military personnel is by mail, if State law allows for such service. Certified or registered mail can be sent to the military address; both the Army Post Office (APO) and the Fleet Post Office (FPO) addresses may be used.[187] The appropriate official in the area where the person is stationed, such as the sheriff or marshal, can also make service of process.

The Soldiers' and Sailors' Civil Relief Act

The Soldiers' and Sailors' Civil Relief Act (SSCRA)[188] is a protective act for U.S. military personnel on active duty, but it is not intended to be a shelter from facing family responsibilities. The SSCRA permits stays of civil court proceedings whenever military service prevents the party from asserting or protecting a right. Because it applies only to judicial proceedings, administrative processes to enforce child support can continue whenever possible. The Department of Defense (DOD) revised its regulations in this area to provide that "when a service member requests leave on the basis of need to attend hearings to determine paternity or to determine an obligation to provide child support, leave shall be granted, unless (a) member is serving in or with a unit deployed in a contingency operation or (b) exigencies of military service require denial of such a request."[189]

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[186] These addresses can be found in A CASEWORKER'S GUIDE, *supra* note 184.
[187] For service of process on military base in the U.S. or on ships, *see* 32 C.F.R. § 516.1(e) (2001) (Army) and 32 C.F.R. § 720.20 (2001) (Navy and Marine Corps). *See* Chapter Twelve: Interstate Child Support Remedies for additional information on long-arm jurisdiction.
[188] *See* 50 U.S.C. App. 500-548, 560-593 (1990 & Supp. 1993).
[189] DOD Directive 1327.5 section 6.25.

When a stay is requested, it might be because the individual has insufficient leave or cannot afford the travel. Arrangements can be made to have the individual participate telephonically.

The SSCRA allows for the stay of proceedings for the length of military service plus 3 months after discharge. It affords military personnel relief against default judgment, by providing the potential to reopen the judgment. If such a judgment is obtained against an individual on active duty, without submission of an affidavit from the petitioner required by the SSCRA, the judgment is voidable upon the respondent's showing that presentation of any defense was prejudiced by the military service.

Determining the Support Amount

For calculating the support obligations of military personnel, it is best to apply support guidelines, setting support based on basic military pay. Military pay consists of basic pay, and it also can include a Basic Allowance for Housing (BAH), a Basic Allowance for Subsistence or Separate Rations (BAS or Sep Rats), special skill pay (e.g., flight pay), and bonuses. Army, Navy, Marine, and Coast Guard directives specify an amount of appropriate support. The figures, however, are to be used only when there is no court order or agreement between the parties as to support.

As of January 1998, BAH replaced the Basic Allowance for Quarters (BAQ) and the Variable Housing Allowance (VHA). The amount of BAH varies depending on family status, but the amount of the difference was never intended to constitute full support for families.

In general, all pay and allowances should be considered in setting support. If there is no BAS/Sep Rats, the individual lives on base and eats free. This "in-kind" payment also can be considered as income as well for guidelines purposes. In addition, the allowances are not taxable. If State guidelines are based on gross income, it might be appropriate to adjust the income figure.

Because of the tax considerations, the tax return of military personnel may not accurately reflect actual income. The Leave and Earnings Statement (LES) is the best measure of actual income and can provide other useful information—such as State of domicile, leave accrued, and number of dependents—that can be helpful in the course of litigation.

INTERNATIONAL CASES

PRWORA authorizes the Secretary of State, in consultation with the Secretary of HHS, to enter into agreements for child support establishment and enforcement.[190] The United States has entered into such agreements with

[190] 42 U.S.C. § 659A (1994, Supp IV 1998, & Supp. 1999).

several countries and is in the process of negotiating arrangements with others. As Federal declarations are established, they are listed in the Federal Register. The Department of State is the chief negotiator of Federal child support arrangements with other countries.

PRWORA also authorizes States to enter into agreements with foreign jurisdictions that are not yet considered Federal reciprocating countries. By entering into such agreements, States clear the way for registration and enforcement of foreign orders. It is up to each State to authorize an appropriate entity to determine reciprocity in the State; in many States, the designee is the attorney general. OCSE encourages States to enter into reciprocal agreements and to provide CSE services to any eligible individual who requests them,[191] and to treat international cases as IV-D cases for purposes of providing services and seeking incentives and Federal funding. States should proceed with action as if the case were a IV-D case.

UIFSA, which has been adopted in all 54 States and territories, defines "State" to include foreign jurisdictions that have enacted laws or established procedures for the issuance and enforcement of support orders that are substantially similar to UIFSA, the Uniform Reciprocal Enforcement of Support Act (URESA), and the Revised Uniform Reciprocal Enforcement of Support Act (RURESA).[192] When there is an order issued by a tribunal in a reciprocating country, the State must respond to a request for assistance the same way it would for a sister State, and it must follow UIFSA procedures for registration and enforcement.

If there is a reciprocal arrangement, a CSE attorney can initiate an establishment action to another country, using appropriate UIFSA forms. The pleadings can then be sent to the Central Authority for the particular country.[193]

It is not necessary to translate the pleadings from English. The Federal Office of Child Support Enforcement (OCSE) is currently developing a model set of international child support forms to which the Central Authority in each country would agree to accept. Some forms are now available from OCSE.

Where no agreements are in place, a U.S. court can issue "letters rogatory" requesting foreign judicial assistance with service of process or

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[191] Office of Child Support Enforcement, U.S. Dep't of Health & Human Services, Policy Information Question (PIQ 92-06) (Apr. 14, 1992). *See also* Office of Child Support Enforcement, U.S. Dep't of Health & Human Services, Policy Information Question (PIQ 99-01) (Aug. 16, 1999) (addresses seeking Federal matching funds for reimbursement of expenditures in these cases).

[192] UIFSA § 101(19)(B) (renumbered in 2001 as § 102(21)) 9 Pt. 1B U.L.A. 257-8 (1999). *See Thompson v. Thompson*, 893 S.W.2d 31 (Tex. Civ. App. 1995) and *Cowan v. Moreno*, 893 S.W.2d 119 (Tex. Civ. App. 1995) for a discussion of what constitutes "substantially similar" procedures.

[193] Central Authority addresses are listed at www.hcch.net. Reciprocal agreements for each State are listed in the online version of the Interstate Referral Guide (IRG), located on the OCSE web site at http://acf.dhhs.gov/programs/cse/.

obtaining evidence. “Letters rogatory” are requests from one court to another, and they can also be used to enforce an order or to collect a judgment. Instructions and procedures for letters rogatory can be obtained from the Department of State.[194]

UIFSA extends personal jurisdiction broadly over nonresidents;[195] however, service of process must be obtained. Service of process can be a difficult process when the respondent resides in a country without reciprocity. There are several conventions or treaties that assist in this matter. The Department of State, Office of Overseas Citizen Services, has compiled a general circular on these conventions. They include the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, which is commonly used to serve process in Europe; the Inter-American Convention on Letters Rogatory; and the Hague Service Convention. Each member nation has a designated Central Authority to receive requests, serve process, and certify whether service is made.

Great strides have been taken in international child support establishment and enforcement. UIFSA and Federal reciprocity arrangements facilitate the process.[196]

[194] Contact the Office of Overseas Citizens Services, U.S. Department of State, 221 C Street, N.W., Washington, DC 20520-0002. *See also* http://www.travel.state.gov.
[195] UIFSA § 201 (amended 2001), 9 Pt. 1B U.L.A. 275 (1999).
[196] For additional information, *see* Gloria deHart, *International Enforcement of Support* in ENFORCING CHILD AND SPOUSAL SUPPORT, *supra* note 185.

CHAPTER NINE

TABLE OF STATUTES AND AUTHORITIES

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Model Codes

Exhibit 9-1, Child Support Guidelines

Citations by State

Alabama	Ala. R. Jud. Admin. 32 (Supp.1997)
Alaska	Alaska Civ. R. 90.3 (2000)
Arizona	Ariz. C.S.G. (S. Ct. Admin. Order 96-29), Ariz. Rev. Stat. Ann. § 25.320 (2001)
Arkansas	In re: Administrative Order No. 10, Ark. C.S.G. (1998)
California	Cal. Fam. Code §§ 4050-4076 (1994 & Supp.1998)
Colorado	Colo. Rev. Stat. §§ 14-10-115 to -122 (1997)
Connecticut	Conn. C.S. and Arrearage Guidelines, Conn. Gen. Stat. §§ 46b-215a-1 to -5 (1999)
Delaware	Del. Fam. Ct. Civ. Pro. R. 52 (1998)
District of Columbia	D.C. Code Ann. § 16-916.1 (1998)
Florida	Fla. Stat. Ann.§ 61.30 (2000)
Georgia	Ga. Code Ann. § 19-6-15 (Supp. 1997)
Hawaii	Hawaii C.S.G. (1994)
Idaho	Idaho R. Civ. Pro. 6(c)(6) (2000)
Illinois	750 I.L.C.S. 5/505, 750 I.L.C.S. 5/510 (Supp. 2000)
Indiana	Ind. C.S.G. (1998)
Iowa	Iowa C.S.G. (2000)
Kansas	Kan. C.S.G. (Sup. Ct. Order No. 128) (1998)
Kentucky	Ky. Rev. Stat. Ann. § 403-210 to -213 (Supp. 1996)
Louisiana	La. Rev. Stat. Ann. §§ 9:315 to 9:315.15 (1991 & Supp. 1998)
Maine	Me. Rev. Stat. Ann. tit. 19-A, §§ 2001-2010 (1997)
Maryland	Md. Code Ann., Fam. Law, §§ 12-201 *et seq*. (1991 & Supp. 1997)
Massachusetts	Mass. C.S.G. (1998)
Michigan	Mich. C.S.G. (Eleventh Revision 2000)
Minnesota	Minn. Stat. Ann. §§ 518.551, 518.5511, 518.5512, 518.553 (2000)
Mississippi	Miss. Code Ann. §§ 43-19-101 to –103 (2000)

Missouri	Mo. Sup. Ct. R. 88.01, Civil Procedure Form 14, Mo. Rev. Stat. § 452.340 (1998)
Montana	Admin. Rules of Mont.37.62.101 (1998)
Nebraska	Neb. C.S.G. (2001)
Nevada	Nev. Rev. Stat. Ann. §§ 125B.070 to .080, 125B.145 (2001)
New Hampshire	N.H. Rev. Stat. Ann. §§ 458-C:1 to :7 (1998)
New Jersey	N.J. Rules of Court Appendix IX (2000)
New Mexico	N.M. Stat. Ann. § 40-4-11.1 to -4-11.6 (1994 & Supp.1997)
New York	N.Y. Dom. Rel. Law § 240(1-b) (Supp.1998)
North Carolina	N.C. C.S.G. (1998)
North Dakota	N.D. Admin. Code §§ 75-02-04.1 to -04.10 (1999)
Ohio	Ohio Rev. Code Ann. §§ 3119.01 *et seq.*(2001)
Oklahoma	Okla. Stat. Ann. tit. 43, §§ 118 to 120 (1990 and Supp.1997)
Oregon	Or. Admin. Reg. 137-50-320 to -490 (2001)
Pennsylvania	Pa. R. Civ. Pro. 1910.16-1 to -5, 1910.19 (1998)
Puerto Rico	Regulation Number 4070 (December 8, 1989).
Rhode Island	R.I. C.S.G. (Fam. Ct. Admin. Order Nos. 87-2, 92-4, 97-8) (1997)
South Carolina	S.C. Soc. Serv. Reg. 114-4710 to -4750, S.C. Code Ann. § 20-7-852 (Supp.1999)
South Dakota	S.D. Codified Laws Ann. §§ 25-7-6.1 to -6.17 (1992 and Supp.1997)
Tennessee	Tenn. Comp. R. & Regs. Dep't Human Services §§ 1240-2-4-.01 to 1240-2-4-.04 (1997)
Texas	Tex. Fam. Code Ann. §§ 154.001 to .309 (2000)
Utah	Utah Code Ann. §§ 78-45-7 to -7.21 (1996 & Supp.1997)
Vermont	Vt. Stat. Ann. tit.15, §§ 653-657 (Supp.1997)
Virginia	Va. Code Ann. §§ 20-108.1, -108.2 (Supp.1997)
Washington	Wash. Rev. Code Ann. §§ 26.19.001 to .100, 26.09.9095 (Supp.1998)
West Virginia	W. Va. Code Ann. §§ 48A-1A-2 to -32, 48A-1B-2 to -16 (1996 & Supp.1997)
Wisconsin	Wis. Stat. Ann. § 767.25 (1995), DWD 40 (1999)
Wyoming	Wyo. Stat. §§ 20-6-301 to -304 (1997)

Exhibit 9-2, Age of Majority for Child Support Purposes/Duration of Child Support Obligations

STATE	TERMINATION OF SUPPORT	POST-MAJORITY EDUCATION
Alabama	Graduation from high school	Post-majority support, for a child's college education, can be granted upon request. *Ex Parte Bayliss*, 550 So. 2d 986 (Ala. 1989); Ala. Code § 30-3-1.
Alaska	18; 19 if the child is in high school, or the equivalent, and is residing with the custodial party	Courts may not require post-majority college support. *H.P.A. v. S.C.A.*, 704 P.2d 205 (Alaska 1985).
Arizona	18 or graduation from high school	No statutory or case law duty, absent an agreement.
Arkansas	18 or graduation from high school	No statutory or case law duty, absent an agreement.
California	18; if the child is in high school, until 19 or high school graduation, whichever occurs first	No statutory or case law duty, absent an agreement.
Colorado	19 or judicial determination	Colo. Rev. Stat. § 14-10-115(1.5)(b) allows a court to order parental contribution to post-secondary education, but must terminate child support. For orders after 7/1/97, specific conditions must exist for such an order.
Connecticut	18	No statutory or case law duty, absent an agreement.
Delaware	18; if the child is in high school, until 19 or high school graduation, whichever occurs first	No statutory or case law duty, absent an agreement.

The information in this exhibit is based on research conducted in June 1999 by the Center for the Support of Families and Laura W. Morgan, Esq., National Legal Research Group.

District of Columbia	21 or emancipation	D.C. Code Ann. § 16-916 provides that children are entitled to support until age 21.
Florida	18; 19 if the child will graduate from high school by that age	No statutory or case law duty, absent an agreement. A court can compel support if the child is found to be dependent; however, attending college does not automatically equal dependency. *Slaton v. Slaton*, 428 So. 2d 347 (Fla. Dist. Ct. App. 1983).
Georgia	18; 20 if the child is still in school	Ga. Code Ann. § 19-6-15(e) provides that a court may continue support until age 20 for a child in college.
Hawaii	18; 23 if the child is enrolled in accredited higher education	Hawaii Rev. Stat. § 580-47.
Idaho	18; 19 if the child is enrolled in formal education	No statutory or case law duty, absent an agreement.
Illinois	18	Courts may require post-majority payment of support and educational expenses as long as the adult children are full-time students (college, graduate school, professional education, or other training after graduation from high school). 750 ILCS § 5/513.
Indiana	21 or emancipation	Support may include sums for college education.
Iowa	18 or as ordered by the court	Iowa Code §§ 598.1(8) and 598.21.5A permit child support until age 21 if the child is regularly attending an accredited school, is a full-time college student, or has been accepted for admission for the next term.
Kansas	18, but automatically extended to the end of the school year in which the child reaches age 18; 19 by agreement	No statutory or case law duty, absent an agreement.
Kentucky	18; 19 if the child is in high school	No statutory or case law duty, absent an agreement.

Louisiana	18; if the child is in high school, until 19 or high school graduation, whichever occurs first	No statutory or case law duty, absent an agreement.
Maine	18; if the child is in high school, until 19 or high school graduation, whichever occurs first	No statutory or case law duty, absent an agreement.
Maryland	18	No statutory or case law duty, absent an agreement.
Massachusetts	18; 21 if the child is domiciled with a parent; 23 if the child is enrolled in an educational program	Mass. Gen. Laws Ann. ch. 208, § 28 permits the court to order payment of educational expenses, until the child reaches age 23, excluding costs beyond an undergraduate degree.
Michigan	18; support may be ordered until age19½ for completion of high school; beyond that age by agreement	No statutory or case law duty, absent an agreement.
Minnesota	18; 20 if the child is in high school	No statutory or case law duty, absent an agreement.
Mississippi	21	No statutory or case law authority to order a parent to pay college expenses post-majority, except by agreement of the parties. *Mottley v. Mottley*, 729 So. 2d 1289 (Miss. 1999).
Missouri	18; if the child is in high school, until age 21 or high school graduation, whichever occurs first; 22 if the child is in college or vocational school	Mo. R. Civ. Proc. 88.01; Mo. Rev. Stat. § 452.340.5.
Montana	18; 19 if the child is in high school	No duty, absent an agreement or a provision in the divorce decree.
Nebraska	19	No statutory or case law duty, absent an agreement.
Nevada	18; 19 if the child is in high school	No statutory or case law duty, absent an agreement.

New Hampshire	18 or high school graduation, whichever occurs later	The Superior Court can order a child's divorced parents to provide a reasonable contribution toward the costs of post-secondary education if it is equitable in light of the parties' circumstances. *LeClair v. LeClair*, 137 N.H. 213, 624 A.2d 1350 (1993).
New Jersey	Termination pursuant to a petition at, or after, the age of majority	A court can order parents to pay college expenses, when the child shows scholastic aptitude and the parents can afford it. *Newburgh v. Arrigo,* 88 N.J. 529, 443 A.2d 1031 (1982); *Khalaf v. Khalaf,* 58 N.J. 63, 275 A.2d 132 (1971); N.J. Stat. Ann. § 2A:34-23a.
New Mexico	18 or emancipation	No statutory or case law duty, absent an agreement.
New York	21 or emancipation, as determined by the court	The court lacks authority, absent an agreement, to order a parent to pay college expenses after a child reaches age 21. *Cohen v. Cohen*, No. 98-04573, 1999 N.Y. App. Div. Lexis 3842 (April 12, 1999).
North Carolina	18; if the child is in high school, until 20 or high school graduation, whichever occurs first	No statutory or case law duty, absent an agreement.
North Dakota	18; if the child is in high school, until 19 or high school graduation, whichever occurs first	N.D. Cent. Code § 14-09-08 allows a court to order support for college expenses.
Ohio	18; if the child is in high school, until 19 or high school graduation, whichever occurs first	No statutory or case law duty, absent an agreement.
Oklahoma	18 or graduation from high school	No statutory or case law duty, absent an agreement.
Oregon	18; 21 if the child is in school at least half-time	Or. Rev. Stat. §107.275(1)(e); *In re Marriage of Eusterman*, 41 Or. App. 717, 598 P.2d 1274 (1979).
Pennsylvania	18 or graduation from high school whichever occurs later	No statutory or case law duty, absent an agreement. *Curtis v. Kline*, 542 Pa. 249, 666 A.2d 265 (1995).

Rhode Island	18	No statutory or case law duty, absent an agreement.
South Carolina	18 or graduation from high school	A court may order college support. *West v. West,* 309 S.C. 28, 419 S.E.2d 804 (1992); *Risinger v. Risinger*, 273 S.C. 36, 253 S.E. 652 (1979).
South Dakota	18; 19 if the child is in high school	No statutory or case law duty, absent an agreement.
Tennessee	18 or graduation from high school	No statutory or case law duty, absent an agreement.
Texas	18 or graduation from high school, whichever occurs later	No statutory or case law duty, absent an agreement.
Utah	18 or graduation from high school	Utah Code Ann. § 15-2-1 provides that, in divorce cases, courts may order support to age 21.
Vermont	18 or graduation from high school	No statutory or case law duty, absent an agreement.
Virginia	18; if the child is in high school, until 19 or high school graduation, whichever occurs first	No statutory or case law duty, absent an agreement.
Washington	18; a court may order post-secondary support	Wash. Rev. Code § 26.19.090 grants the court discretionary authority to award college support based on specified factors.
West Virginia	18; if the child is in high school, until 20 or high school graduation, whichever occurs first	W. Va. Code § 482-2-15d prohibits an award of post-majority college expenses.
Wisconsin	18; if the child is in high school, until 19 or high school graduation, whichever occurs first	No statutory or case law duty, absent an agreement.
Wyoming	18; if the child is in high school, until 20 or high school graduation, whichever occurs first	No statutory or case law duty, absent an agreement.

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