INEQUITABLE DISTRIBUTION: THE EFFECT OF MINNESOTA'S CHILD SUPPORT GUIDELINES ON PRIOR AND SUBSEQUENT CHILDREN

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Introduction

Today in the United States, a substantial percentage of divorced individuals remarry and have children in second and third marriages.[1] The creation of these "multiple families" has various repercussions, such as the increased rate of poverty existing in single-parent households[2] and the increased poverty of children[3] and women.[4]

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* J.D. expected 1999, University of Minnesota; B.A. 1996, St. Olaf College. I would like to thank Pablo Petrozzi for his insightful comments and Dan Hintz for his editorial assistance. I also would like to thank Professor Jean Gerval for helping me choose this topic.

1. *See* Marianne Takas, *State Guideline Options for Addressing Subsequent Families in Child Support Guidelines*, FAIR$HARE, June 1993, at 15 ("An estimated 75 percent of divorced persons remarry, and many go on to have additional children.") [hereinafter Takas, *State Guideline Options*]; *see also* U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-20, NO. 483, HOUSEHOLD AND FAMILY CHARACTERISTICS: MARCH 1994, at v (1995) (finding 4.4 million single, divorced parents in the United States in 1994).

2. Approximately 10.5 million American households are headed by single parents. *See* U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-20, NO. 467, HOUSEHOLD AND FAMILY CHARACTERISTICS: 1992, at v (1993); Victoria Vazquez, *Evaluation of the New York Child Support Standards Act: Have the Guidelines Really Made a Difference?* 4 J.L. & POL'Y 279, 314 (1995). Of families in poverty, 60.4% are single-headed families. *See* Honorable Mary Louise Klas, *Setting Child Support—What's Fair to Children/ What Can Minnesota Children Expect?, in* THE 19TH ANNUAL FAMILY LAW INSTITUTE Section XI Part B, 24 (Minnesota State Bar Association Continuing Legal Education ed., 1998) [hereinafter Klas, *What's Fair*].

3. If children are present in a single-headed family, the likelihood of poverty increases. *See* Klas, *What's Fair, supra* note 2, at 24; *see also* U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1993, at 386 tbl. 613 (1993) (finding that the poverty rate for American children was 21.1% in 1991).

4. The U.S. Commission on Civil Rights noted that "[m]arital disruption significantly increases white women's chances for being poor and virtually determines economic hardship for black women." U.S. COMMISSION ON CIVIL RIGHTS, A GROWING CRISIS: DISADVANTAGED WOMEN AND THEIR CHILDREN 11 (1983); *see also*

Congress responded to the increased poverty in single-headed households by devising a federal child support office, which required every state to set up state child support offices and to implement child support guidelines.[5] These guidelines lead to more consistent child support awards, enabling parents that owe child support, and parents entitled to receive it, to depend on standardized criteria.[6]

Although child support guidelines help increase uniformity of child support orders, they are, in many ways, inadequate. For example, guidelines often assume that only one family is involved in the child support order. While this assumption works well in simple scenarios, the prevalence of multiple families shows the shortcomings of such guidelines.

Many state guidelines, including Minnesota's, do not take into account the needs of later-born children.[7] Because multiple families exist in many different forms and require different treatment, the guidelines should specifically delineate the appropriate ways to determine child support issues for different multiple family situations.[8] If the guidelines simultaneously consider the obli-

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ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 119, 260 (1992) (finding that the post-divorce income of women was significantly lower after separation, and the post-divorce income of men was significantly higher); Donna H. Christensen et al., *Noncustodial Mothers and Child Support: Examining the Larger Context*, 39 FAM. REL. 388, 390 (1990) (finding in a Minnesota study that women frequently earn less than men).

The poverty rates in Hispanic and Black female-headed households are 57.3% and 53.2%, respectively, while White female-headed households have a relatively lower poverty rate of 35.6%. *See* Klas, *What's Fair, supra* note 2, at 24. In 1985, White female-headed households, which account for one of every six American households, represented approximately one-half of the households below the poverty level. *See* Margaret Campbell Haynes, *A Review of Child Support Guidelines: Interpretation & Application*, 31 FAM. L.Q. 133, 135 (1996) (reviewing LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION & APPLICATION (1996)) [hereinafter Haynes, *Review*].

5. *See* Vazquez, *supra* note 2, at 283.

6. *See* Ronald B. Sieloff, *Child Support Guidelines: The Statute and its Problems*, 2 MINN. FAM. L.J. 17, 18 (1984) (stating that one of the purposes of the guidelines was to remove the mystery from how judges determine child support orders).

7. *See* Haynes, *Review*, *supra* note 4, at 154 (noting that "more than thirty states are silent on the issue . . . of subsequent children, especially children who are in an obligor's present intact family"). Respondents to an ABA telephone survey stated that "multiple family issues were one of the three most commonly mentioned reasons for requesting a mandatory adjustment to income or a discretionary deviation from the guideline amount." *Id.* at 153. "Respondents preferred a consistent approach to the issues, rather than judicial discretion." *Id.* at 154.

8. If guidelines consider multiple families, a danger exists when one formula is stringently applied, because multiple families take on many forms. It is important to note that not all multiple families can be treated in the same manner. *See* Honorable Susan Paikin, *Periodic Review and Adjustment: Modification and the*

gations a parent owes to all of his or her children, this method will lead to an improved child support system that considers the best interests of *all* children involved.

This Article explores the inadequacies of child support guidelines, particularly in Minnesota, and considers ways of more fairly distributing limited resources to subsequent and prior children. Part I provides definitions of subsequent and prior children.[9] Part II offers a brief history of the federal requirement that all states implement child support guidelines.[10] Part III introduces the various models of child support guidelines implemented by different states.[11] Part IV discusses how states determine child support issues involving multiple families.[12] Part V presents arguments influencing the discussion of the disparate treatment of prior and later-born children.[13] Part VI presents the Minnesota child support guidelines, discusses the shortcomings of the caselaw interpreting the guidelines, and describes the different methods Minnesota counties use in determining subsequent and prior children's awards.[14] Part VII contemplates possible alternatives and improvements to the Minnesota guidelines that would properly take into account multiple families and offers a proposal for change.[15] Finally, the conclusion recommends that the Minnesota legislature implement additional multiple family guidelines similar to the Texas guidelines.

I. The Meaning of "Subsequent" and "Prior" Children

A "subsequent child" refers to a child born after the parent has a first family.[16] For example, Ann and Bob marry and have

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Family Support Act of 1988, DEL. LAW., Summer 1993, at 34.

> Even assuming child support guidelines become sophisticated enough to handle multiple family cases, a pure application of a guideline to the circumstances as they exist at the time of review will likely 'reward' a support obligor who voluntarily takes on additional family responsibilities by reducing an obligation previously found due and owing to his or her first family.

Id. at 36.

9. *See infra* notes 16-19 and accompanying text.

10. *See infra* notes 20-33 and accompanying text.

11. *See infra* notes 34-59 and accompanying text.

12. *See infra* notes 60-84 and accompanying text.

13. *See infra* notes 85-106 and accompanying text.

14. *See infra* notes 107-202 and accompanying text.

15. *See infra* notes 203-236 and accompanying text.

16. *See* Erickson v. Erickson, 385 N.W.2d 301, 304 (Minn. 1986) (defining subsequent children as "[c]hildren by a subsequent marriage"); *see also* Wood v. Wood, 438 S.E.2d 788, 795 (W. Va. 1993) (describing subsequent children as children from a subsequent marriage); Rebecca Burton Garland, *Second Children Second Best? Equal Protection for Successive Families Under State Child Support Guide-*

two children named Carl and Dave. Ann and Bob divorce. Bob is court ordered to pay child support to Ann for their children. Bob is an "obligor" because he owes Ann child support; and Ann is an "obligee" because she is owed child support from Bob. The "obligor" is usually the non-custodial parent who is court-ordered to pay child support for his children. The "obligee" is usually the custodial parent who is entitled to child support from the non-custodial obligor. In our example, Bob then marries Nancy, and they have two children named Fran and Greg. Bob and Nancy divorce. Carl and Dave, the children from Bob's first marriage, are "prior children" because they were born prior to Fran and Greg. Fran and Greg are "subsequent children" because they were born subsequent to Bob's children from his first marriage. Bob's second wife, Nancy, is also an "obligee," assuming the court determines a child support award is appropriate.

In many cases the subsequent children born after the prior children are awarded support in the first child support order. However, a greater number of cases involve the determination of the prior children's child support order while the obligor lives with his[17] subsequent children. A prior child does not necessarily belong to the obligor's first family.[18]

Three scenarios involving prior and subsequent children typically occur. The first scenario, where the obligor supports prior and subsequent children but does not reside with them, is described in the example above. The second scenario is where the obligor lives with and supports his subsequent children during the determination of a child support award for his prior children. The last scenario is where the obligor supports and lives with his prior children while a child support award for his subsequent children is

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lines, 18 HASTINGS CONST. L.Q. 881, 884 (1991) ("When a couple, having children, breaks off the relationship, and, thereafter, one of the parents has additional children by a new relationship, a subsequent family is made."). Note that this definition is not completely accurate since prior and subsequent children are not necessarily children created within marriages. In fact, "[o]ne out of four children in this country are born outside of marriage." Margaret Campbell Haynes, *Child Support and the Courts in the Year 2000*, 17 AM. J. TRIAL ADVOC. 693, 698 (1994) [hereinafter Haynes, *Year 2000*]. Courts may order a non-custodial parent to pay child support once paternity is established. *See id.*

17. The male pronoun is used throughout this Article to describe the obligor because men typically are the obligors in child support cases. *See* Robert D. Null, *Tenancy by the Entirety as an Asset Shield: An Unjustified Safe Haven for Delinquent Child Support Obligors*, 29 VAL. U. L. REV. 1057, 1057 n.1 (1995) ("In 1989, 88% of all custodial parents were women . . . . Thus, the vast majority of child support obligors were men.").

18. An example of a prior child born before the first family is where the obligor had the prior child before the first family was established, and paternity was established years later.

being determined. These scenarios may arise before a child support determination or may emerge in post-decree modifications.[19]

II. Background of the Federal Requirement for State Child Support Guidelines

In 1975, Congress enacted Title IV-D of the Social Security Act.[20] The Act was passed in response to an increase in recipients of Aid to Families with Dependent Children (AFDC)[21] and to an alarmingly high percentage of parents and children who lacked child support orders or failed to receive full payments of child support.[22] The Act created the Federal Office of Child Support Enforcement and required states to set up child support offices.[23] The federal Child Support Enforcement Amendments of 1984 conditioned federal Title IV funding on each state's implementation of

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19. There are two types of post-decree modifications: (1) an upward modification, where an obligee files a motion to increase an already existing child support order; and (2) a downward modification, where an obligor files a motion to decrease an already existing child support order.

20. Child Support Enforcement Act, 42 U.S.C. §§ 651-65 (1994 & Supp. II 1997).

21. *See* Vazquez, *supra* note 2, at 282-83 ("[B]etween 1970 and 1975, the number of recipients of Aid to Families with Dependent Children (AFDC) rose by forty-seven percent. As the number of AFDC recipients increased, federal spending also rose, causing Congress to intercede in 1975 by enacting Title IV-D of the Social Security Act.").

22. One factor contributing to single-parent household poverty and child poverty is the inadequacy or absence of child support orders. *See* Haynes, *Year 2000*, *supra* note 16, at 693 ("Approximately seventy-five percent of custodial mothers in this country either lack child support orders or fail to receive full payment under such orders.") (quoting U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES P-60, NO. 173, CHILD SUPPORT AND ALIMONY: 1989 (1991)); Benjamin L. Weiss, *Single Mothers' Equal Right to Parent: A Fourteenth Amendment Defense Against Forced-Labor Welfare Reform*, 15 LAW & INEQ. J. 215, 224 n.25 (1997) ("Outside of employment, the major alternative to AFDC is support payments from the child's father. Inadequate child support enforcement is a significant cause of AFDC receipt: 'In 1991, only 56% of custodial mothers were awarded child support payments, and only half of [those] received the full amount due.'") (citing RANDY ALBELDA ET AL., THE WAR ON THE POOR 50 (1996)).

23. *See* 42 U.S.C. §§ 651-65; *see also* Haynes, *Year 2000*, *supra* note 16, at 693; Vazquez, *supra* note 2, at 282-83.

> The IV-D program provides various child support services: location of absent parents, parentage establishment, establishment and enforcement of support, and modification of support. These services are provided free of charge to custodial parents receiving Aid to Families with Dependent Children (AFDC) benefits. Any other parent is eligible for IV-D services, regardless of income, upon completion of a written application and payment of a fee not exceeding twenty-five dollars. About half of the 600,000 custodial mothers in this country who have child support orders receive services through the IV-D system.

Haynes, *Year 2000*, *supra* note 16, at 693.

numerical child support guidelines.[24] The Amendments also required states to evaluate their guidelines every four years to ensure child support calculations were set up properly.[25] These guidelines were intended to increase child support awards, increase the consistency of child support awards, create predictability of awards and lessen litigation of child support issues.[26] As a result of these federal requirements, every state enacted child support guidelines.[27]

While numerical guidelines were required, states could decide if the guidelines were binding.[28] Because of this judicial discretion, inconsistencies arose between the amounts of child support calculated under the guidelines and the amounts actually

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24. *See* the Child Support Amendments of 1984, Pub. L. No. 100-485, 102 Stat. 2343 (1988); *see also* Vazquez, *supra* note 2 at 320 (describing the types of Title IV-D funding).

> Title IV-D of the Social Security Act was primarily a funding bill—75% of the cost of support enforcement and paternity proof was federally funded. Title IV-D provided financial incentives for state agencies to ensure the payment of child support to AFDC recipients. Local jurisdictions would receive an incentive equal to 25% of the welfare dollars saved. Title IV-D demanded that every state which operated a federally sponsored AFDC program also institute a corresponding support enforcement program. In AFDC cases, the federal and state governments provide support to the custodial parent initially, and those funds are recouped when the state collects monies owed from the noncustodial parent.

Id. (citations omitted).

25. *See* Pub. L. No. 98-378, 98 Stat. 1305 (1984) (codified at 42 U.S.C.A. § 667 (1984)).

> (a) Establishment of guidelines; methods
> Each State, as a condition for having its State plan approved under this part, must establish guidelines for child support award amounts within the State. The guidelines may be established by law or by judicial or administrative action, and shall be reviewed at least once every 4 years to ensure that their application results in the determination of appropriate child support award amounts.

Id.

26. *See* Victoria M. Ho, *Support for Second Families: Stretching Financial Resources to Cover Multiple Families,* 16 FAM. ADVOC. 40, 41 (1993) ("By enacting guidelines, state legislatures have mandated that 1) courts consider the actual cost of raising children at their accustomed standard of living, 2) parents in similar situations be treated in a similar way, and 3) settlements be encouraged and judicial efficiency be improved.").

In a study of the Colorado, Hawaii and Illinois guidelines, it was found that "the average support award . . . [in the study] increased 15 percent following adoption of the guidelines. [The] analysis indicates that much of the increase is due to a reduction in zero dollar awards . . . ." Mary Louise Klas, *Equivalent Levels of Living: A Better Way to Calculate Family Support,* JUDGES' J., Fall 1992, at 14 (citing Patricia G. Tjaden et al., *Will These Children Be Supported Adequately?,* JUDGES' J., Fall 1989, at 9).

27. *See* Ho, *supra* note 26, at 40.

28. *See* Vazquez, *supra* note 2, at 284.

ordered.[29] To reduce such inconsistencies, Congress enacted the Family Support Act of 1988,[30] which required states to follow their established guidelines and added a rebuttable presumption that child support orders set by following the guidelines were accurate.[31] This presumption could only be rebutted by a court with written justification as to why applying the guidelines would lead to an unfair result in each particular case.[32] Because Congress did not require a specific guidelines model, states implemented different models and modified them as they deemed fit.[33]

III. Major Guidelines Models Implemented by States

A. Income Shares Model

The majority of states use an income shares model to determine child support amounts.[34] This model calculates child support awards by considering the income of both parents.[35] First, both

29. *See* Theodore K. Cheng, *A Call for a New Fixed Rule: Imposition of Child Support Orders Against Recipients of Means-Tested Public Benefits*, 95 ANN. SURV. AM. L. 647, 647 (1996) ("Throughout the 1980s, there was a growing consensus that the broad judicial discretion exercised in family law disputes was causing dire socio-economic consequences for the parties involved and undermining the orderly and equitable resolution of disputes in child custody, child support, alimony, and property distribution.").

30. Pub. L. No. 100-485, 102 Stat. 2343 (1988); *see also* Sharon J. Badertscher, *Ohio's Mandatory Child Support Guidelines: Child Support or Spousal Maintenance?*, 42 CASE W. RES. L. REV. 297, 310 (1992) ("In 1988, Congress further amended the Social Security Act to limit judicial discretion in making child support orders.").

31. *See* 42 U.S.C.A. § 667(b)(2) (1984).

32. *See id.*

33. *See infra* notes 34-52 and accompanying text (describing the three most common models used by states to determine child support orders).

34. *See* Haynes, *Year 2000*, *supra* note 16 at 701.

35. *See* Marianne Takas, *Improving the Income Shares Guideline*, 7 AM. J. FAM. L. 117, 117-18 (1993) [hereinafter Takas, *Improving the Income Shares Guideline*]; Robert G. Williams, *Guidelines for Setting Levels of Child Support Orders*, 21 FAM. L.Q. 281, 293 (1987).

Computing child support under the Income Shares Model involves three simple steps:

1. Income of the parents is determined and added together.

2. A basic child support obligation is computed based on the combined income of the parents. This obligation represents the amount estimated to have been spent on the children jointly by the parents if the household were intact. The estimated amount, in turn, is derived from economic data on household expenditures on children. A total child support obligation is computed by adding actual expenditures for work-related childcare expenses and extraordinary medical expenses.

3. The total obligation is then prorated between each parent based on their proportionate shares of income. The obligor's computed obligation is payable as child support. The obligee's computed obligation is retained and is presumed to be

parents' incomes are added together.[36] Then, estimates of child-related expenditures in a two-parent household are calculated based on set economic data.[37] Finally, the child support amount is prorated between each parent in proportion to the obligor's share of the aggregate parents' incomes.[38] The purpose of the income shares model is to give children the same amount of support they would have received had their parents continued to live together.[39]

B. Percentage of Income Model

The second most prevalent model is the percentage of income model, which is based on Wisconsin's child support guidelines.[40] In this model, only the non-custodial obligor's income is considered in determining child support awards.[41] A flat percentage of the obligor's income is calculated for the award.[42] The percentage rate increases as the obligor's income and number of children in-

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spent directly on the child. *See* Takas, *Improving the Income Shares Guideline*, *supra* at 117-18.

This procedure simulates spending patterns in an intact household, in which the proportion of income allocated to children depends on total family income. *See id.;* Robert G. Williams, *Guidelines for Setting Levels of Child Support Orders*, 21 FAM. L.Q. 281, 293 (1987); *see also* J. Thomas Oldham, *The Appropriate Child Support Award when the Noncustodial Parent Earns Less than the Custodial Parent*, 31 HOUS. L. REV. 585, 600-01 (1994) [hereinafter Oldham, *Child Support*] (stating that in an income shares model, "[s]upport of the child is considered a joint responsibility of both parents; each is asked to contribute based upon their respective incomes, unless one is already poor. The amount due from the noncustodial parent is reduced as the income of the custodial parent increases.").

36. *See* Takas, *Improving the Income Shares Guideline*, *supra* note 35, at 117.

37. *See id.*; *see also* Haynes, *Year 2000*, *supra* note 16, at 701 ("The income shares guideline is based on economic data concluding that as a family's income increases, the percentage of income spent on child-rearing decreases.").

38. *See* Takas, *Improving the Income Shares Guideline*, *supra* note 35, at 117.

39. *See* Vazquez, *supra* note 2, at 288.

40. *See id.* at 290; Wis. Admin. Code §§ HSS 80.01-.05 (1995); *see also* Carlton D. Stansbury, *Which Came First? The Serial Family Payer Formula*, WIS. LAW., Apr. 1995, at 18-19 (discussing Wisconsin's percentage standard and how the "serial family payer" formula, which requires the court to first consider an obligor's obligation towards a prior child, is based upon the assumption that "first in time" means "earlier born").

41. The reason that the guidelines do not take into account the custodial parent's (i.e., obligee's) income is that they historically assumed the custodial parent is an AFDC recipient. *See* Nancy K. Jones, *Equity and the Child Support Guidelines: Irreconcilably Inconsistent?*, 2 MINN. FAM. L.J. 22, 24 (1984) ("[T]he guidelines are perceived as 'welfare' guidelines . . . [for they] do not include the custodial parent's income as a factor because that income has been presumed to be a public assistance grant."); *see also infra* notes 107-10 and accompanying text (explaining the origins of Minnesota child support guidelines, which initially were only for public assistance cases).

42. *See* Vazquez, *supra* note 2, at 290.

crease.[43] The gross income of the obligor is used by some states, while the net income is used in others.[44] States using this model assume that "the custodial parent is contributing an equivalent amount of support through cash and in-kind contributions."[45] At least eight states, including Minnesota, use the percentage of income model.[46]

C. *Melson Formula*

The Melson formula is the most complex model used for calculating child support.[47] It has been enacted by only a few states,

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43. *See id.*

44. *See* Haynes, *Year 2000*, *supra* note 16, at 700-01.

45. *Id.* at 701; *see also* Vazquez, *supra* note 2, at 290 n.50. ("In-kind contributions' are the monies spent by the custodial parent directly on the child.").

46. *See, e.g.*, GA. CODE ANN. § 19-6-15 (Supp. 1998); 750 ILL. COMP. STAT. 5/505 (West Supp. 1998); MINN. STAT. § 518.551, subd. 5(b) (1998); MISS. CODE ANN. § 43-19-101 (West Supp. 1998); TEX. FAM. CODE ANN. §§ 154.125-26 (West 1996); ALASKA R. CIV. P. 90.3(a); ARK. SUP. CT. ADMIN. ORD. 10 (1998); WIS. ADMIN. CODE §§ HSS 80.01-.05 (1995).

47. *See* Oldham, *Child Support*, *supra* note 35, at 596.

> [The Melson formula] method is comprised of three steps. First, each parent is allocated all of his or her income to the extent that it is needed to provide for the parent's basic needs (the "primary support allowance"). If the obligor's income does not exceed that primary support allowance, no child support is owed. The amount, if any, by which each parent's income exceeds the respective primary support allowance is then calculated (the "excess income"). The next step is to determine who will be obligated to pay for the minimum basic support needs of the child. If only one parent has excess income, that parent will be obligated to pay all of the basic support needs of the child to the extent that the parent has sufficient excess income. If both parents have excess income, they share this basic support need responsibility based upon the relative amounts of their excess incomes. If the obligor still has excess income after deducting the child support imposed pursuant to step two, the applicable formula sets forth the percentage of any excess income the obligor must contribute as additional child support in the form of a standard of living allowance for the child. The amount of child support the obligor is ordered to pay is the sum of the obligor's portion of the child's basic support needs, plus the standard of living additional payment.

Id.; *see also* Williams, *supra* note 35, at 295 (citing FAMILY COURT OF THE STATE OF DELAWARE, DELAWARE CHILD SUPPORT FORMULA: STUDY AND EVALUATION, REPORT TO THE 132D GENERAL ASSEMBLY (1994)).

The three basic principles of the Melson Formula are:

> (1) Parents are entitled to keep sufficient income for their most basic needs to facilitate continued employment.
>
> (2) Until the basic needs of the child are met, parents should not be permitted to retain any more income than is required to provide the bare necessities for their own self support.
>
> (3) Where income is sufficient to cover the basic needs of the parents and all dependents, children are entitled to share in any additional income so that they can benefit from the absent parent's higher standard of living.

Id.

including Delaware, Hawaii and West Virginia.[48] This model allots to each parent a portion of his or her income to cover basic necessities of both parents.[49] The amount of income that the parents are allowed to keep for their fundamental needs is called the "primary support allowance."[50] If the parent exceeds his or her primary support allowance, a percentage of the excess amount is payable as child support.[51] The Melson formula has not been enacted by many states because it is viewed as being too complicated.[52]

D. Equal Living Standards Model

An additional model that has not been enacted by any state is called the equal living standards model.[53] This model equalizes the obligor's and obligee's standard of living "for the benefit of the children."[54] It deducts the basic necessities of each household from both parents' net income, adds the parents' "surplus incomes" together and divides the total sum by the number of people in both households.[55] The resulting amount is distributed between the households in proportion to the number of people living in each household.[56] The objective of the equal living standards model is

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48. *See* DEL. FAM. CT. C.P.R. 52; HAW. REV. STAT. § 576D-7 (1993 & Michie Supp. 1997); W. VA. CODE § 48A-2-8 (1995 & Supp. 1996)).

49. *See* Haynes, *Year 2000*, *supra* note 16, at 701.

50. Oldham, *Child Support*, *supra* note 35, at 596.

51. *See id.* at 597.

52. *See* Haynes, *Year 2000*, *supra* note 16, at 701 ("The Melson formula is the most sophisticated guideline as far as the number of factors expressly considered by the guideline."); *see also* Vazquez, *supra* note 2, at 293 ("Few states have adopted this formula due to the belief that it is too complex because of the many variables that must be considered.").

53. *See* MARIANNE TAKAS, THE TREATMENT OF MULTIPLE FAMILY CASES UNDER STATE CHILD SUPPORT GUIDELINES 2, 8 (1991) [hereinafter TAKAS, TREATMENT OF MULTIPLE FAMILY CASES]; *see also* Vazquez, *supra* note 2, at 290 (referring to the equal living standards model as the "Income Equalization Model").

54. Philip Eden et al., *In the Best Interest of Children: A Simplified Model for Equalizing the Living Standards of Parental Households*, *in* ESSENTIALS OF CHILD SUPPORT GUIDELINES DEVELOPMENT: ECONOMIC ISSUES AND POLICY CONSIDERATIONS 353, 359 (Ruth Zacarias ed., 1986) (stressing that the goal of the equal living standards model is to eliminate the disparity between the standards of living of the father, who typically benefits, and the custodial mother with children, whose economic situation falls tremendously, after divorce); *see* Oldham, *Child Support*, *supra* note 35, at 597 (citing Isabel V. Sawhill, *Developing Normative Standards for Child Support Payments*, *in* THE PARENTAL CHILD SUPPORT OBLIGATION (Judith Cassetty ed., 1983)).

55. Vazquez, *supra* note 2 at 293.

56. *See id.* The following is an example of the equal living standards model for a non-custodial parent, B, living alone with net monthly income of $1258, and a custodial parent, A, with two children and net monthly income of $974:

to prevent disproportionate hardship of any children or parents after a breakup.[57]

E. California's Model

The California guidelines derive the amount of child support by considering the relative incomes of both parents and the amount of time that each parent spends with the children.[58] This model differs from the income shares model because it factors in the time each parent spends with the children.[59]

IV. States' Treatment of Multiple Families

A. Situations Where Legislature Is Silent

Generally, multiple families are not addressed under state child support guidelines.[60] In fact, "more than thirty states are silent on the issue."[61] Such is the case in Minnesota.

1. Reduced Ability Approach

In states where multiple families are not built into the guidelines, a "reduced ability approach" is utilized when calculating the subsequent child's support award.[62] This approach deducts the

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Child Support = [income parent B – poverty level for 1]
– [income parent A – poverty level for 3] ÷ 4
Child Support = [1258 – 458] – [974 – 774] ÷ 4
Child Support = 800 – 200 ÷ 4 = $150 per person share of surplus income
Child Support = $450 per month

Id. (citing Williams, *supra* note 35, at 303).

57. *See* JOHN EEKELAAR & MAVIS MACLEAN, REGULATING DIVORCE 109 (1991); Susan A. Roehrich, *Making Ends Meet: Toward Fair Calculation of Child Support when Obligors Must Support Both Prior and Subsequent Children*, 20 WM. MITCHELL L. REV. 967, 974 (1994); TAKAS, TREATMENT OF MULTIPLE FAMILY CASES, *supra* note 53, at 8).

58. *See* Oldham, *Child Support*, *supra* note 35, at 596-97.

59. *See id.*

60. *See* Haynes, *Review*, *supra* note 4, at 154.

61. *Id.*

62. *Id.* (stating that "most guidelines are consistent in their treatment of existing support orders; the ordered amount . . . is deducted from the obligor's income before application of the guidelines to [cases involving subsequent children]"); *see also* State v. Hill, Nos. CO-88-1165, CO-88-1166, C4-88-1167, 1989 WL 5607, at *1 (Minn. Ct. App. 1989) ("[Minn. Stat. § 518.551 (1986)] now requires a 'reduced ability' approach, a guidelines application based on net monthly income reduced by the amount of any previous support orders that are 'currently being paid.'") (citing Hayes v. Hayes, 473 N.W.2d 364, 367 (Minn. Ct. App. 1991) (stating that the reduced ability approach is incorporated in Minn. Stat. § 518.551, subd. 5(a)); Wollschlager v. Wollschlager, 395 N.W.2d 134, 135 (Minn. Ct. App. 1986)).

amount of the prior child support order from the obligor's income.[63] As a result, the awarded figure for the subsequent family is substantially less than the prior child support order.[64]

In situations where the obligor resides with his or her subsequent family while the court determines an award for his prior children, most states' guidelines mandate the court to consider only the prior children.[65] A decision based on the interests of the subsequent children would be reversed.[66]

Courts reason that a lesser award to subsequent children is appropriate because the obligor, after his initial court-ordered child support obligation, understands his responsibility to his prior children and therefore will be held to his prior obligation even if he decides to have more children.[67] Montana calls this reasoning the "first-mortgage" approach, which deters obligors from undertaking a second family without the adequate financial means to fulfill that responsibility.[68]

2. Equal Treatment Method

A few state courts have used the equal treatment method when dealing with multiple families.[69] This method considers all

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63. *See* Haynes, *Review*, *supra* note 4, at 154.

64. *See id.*

65. *See* Ho, *supra* note 26, at 41.

66. *See id.* (citing Low v. State *ex rel.* Waltman, 602 So. 2d 435 (Ala. Civ. App. 1992); Doyle v. Doyle, 579 So. 2d 651 (Ala. Ct. App. 1991); Waldon v. Waldon, 806 S.W.2d 387 (Ark. 1991); Lamon v. Lamon, 611 N.E.2d 154 (Ind. Ct. App. 1993); Epps v. Epps, 473 N.W.2d 56 (Iowa 1991); Commissioner *ex rel.* Patricia H. v. Raymond S., 180 A.2d 501 (N.Y. 1992); Salazar v. Attorney Gen. of Texas, 827 S.W.2d 41 (Tex. Ct. App. 1992) (affirming the trial court's refusal to consider all of the obligor's children); Lahar v. Lahar, 803 S.W.2d 468 (Tex. Ct. App. 1991) (affirming the trial court's decision to consider only the children before the court, rather than consider all of the obligor's children); Weston v. Holt, 460 N.W.2d 776 (Wis. Ct. App. 1990); *In re* B.W.S., 388 N.W.2d 615, 623 (Wis. 1986)).

67. *See id.* at 42 (noting that courts may not consider the support needed for subsequent children when determining prior children's needs "in an effort to protect the rights of earlier-born children and perhaps also to discourage parents from having more children than they can support"); *see also Hayes*, 473 N.W.2d at 366 ("[A] child support obligor must favor an established obligation over a subsequently assumed obligation.").

68. Thomas P. Malone, *Modification Lives: Guidelines Don't Mean an End to Changing Circumstances*, 10 FAM. ADVOC. 42, 44 (1988).

69. *See* Homsher v. Homsher, 678 N.E.2d 1159, 1163 (Ind. Ct. App. 1997) ("Parents have the same duty to support later children as they do earlier children, and this Court will not prefer first children over subsequent children for purposes of support.") (quoting Haverstock v. Haverstock, 599 N.E.2d 617, 619-20 (Ind. Ct. App. 1992)); *see also* Martinez v. Martinez, 660 A.2d 13, 16 (N.J. Sup. Ct. 1995) (stating that the child support policy does not "substantially differentiate between children born of first or ensuing relationships").

of the obligor's children and distributes the guidelines amount to them equally.[70] In some states, such as Minnesota, the equal treatment method has been the subject of criticism.[71]

3. Subsequent Families in Modification Decrees

Some states only allow "subsequent families" to act as a defense to the obligee's request for an upward modification of the prior child support award.[72] Other state courts grant an upward modification of a prior child support obligation where the obligor's spouse contributes financially to their family, thereby offsetting the obligor's financial obligations.[73] Still other states grant obligors a downward modification of a child support obligation by considering the changed financial circumstances of the obligor and obligee.[74]

4. Deviation from Guidelines

States that do not consider subsequent children in their guidelines allow their courts to deviate from the guidelines where

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70. *See* Ho, *supra* note 26, at 40-41 ("There are two methods of determining support payments when a noncustodial parent has remarried and had additional children. The court can consider all of the children and prorate the guideline amount accordingly [using the equal treatment method] or it can consider only the children whose support is being determined.").

71. *See, e.g.*, Mancuso v. Mancuso, 417 N.W.2d 668 (Minn. Ct. App. 1988) (criticizing the equal treatment method); Wollschlager v. Wollschlager, 395 N.W.2d 134 (Minn. Ct. App. 1986) (rejecting the trial court's "equal treatment" approach).

72. *See* Haynes, *Review*, *supra* note 4 at 155; Paikin, *supra* note 8, at 36 ("[T]he majority view . . . permits use of a second family as a shield to defend against an increased support obligation, but not as a sword to decrease an existing order, absent exigent circumstances.") (citing only three cases as support); *see also* Pohlmann v. Pohlmann, 703 So. 2d 1121 (Fla. Dist. Ct. App. 1997) (upholding FLA. STAT. CH. 61.30(12) (1997)).

73. *See* Ho, *supra* note 26, at 42.

> [The obligor's] attorney must remember that the existence of [the obligor's] second family may result in an upward deviation. For example, if [the obligor's] current wife has income or financial resources that she applies to the support of [the obligor's] and her family[—]and thereby offsets [the obligor's] own obligation[—]the court may consider those resources as though they were [the obligor's].

Id. (citing FLA. STAT. CH. 61.30(12) (1997); Harris v. Superior Court, 4 Cal. Rptr. 564 (Cal. Ct. App. 1992); *In re* Dade, 281 Cal. Rptr. 609 (Cal. Ct. App. 1991); Johnson v. Johnson, 468 N.W.2d 648 (S.D. 1991); Sally R. v. Stewart R., 573 N.Y.S.2d 231 (N.Y. Fam. Ct. 1991)).

74. *See* J. Thomas Oldham, *Abating the Feminization of Poverty: Changing the Rules Governing Post-Decree Modification of Child Support Obligations*, BYU L. REV. 841, 876 (1994) [hereinafter Oldham, *Abating*]. *See generally* Garland, *supra* note 16, at 886 ("Only fourteen states allow judges to consider subsequently born or adopted children when modifying original support orders.").

consideration of subsequent children is appropriate.[75] Such judicial discretion is being questioned, however, in light of the growing number of multiple families.[76] The consensus of "state guideline review committees . . . has been that guidelines should specify consistent handling of multiple family issues, rather than leaving them to the discretion of the decision-maker."[77] In the future, more states may address multiple families in state child support guidelines, rather than leaving these issues to the discretion of judges.

B. Situations Where Legislature Provides Some Direction

A few states already include in their guidelines a formula for calculating child support owed by an obligor who supports both prior and subsequent children.[78] These state guidelines vary, depending on the policies that the state desires to further.

1. Credit for Subsequent Children Method

Some states use the "credit for subsequent children" method,[79] which deducts a certain amount for the support of subsequent children before calculating the child support award of the prior children.[80] This approach has been criticized because it mandates that the subsequent children will have a larger amount calculated for their support.[81]

2. Essential Household Needs Allocation

Montana's child support guidelines include an "essential

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75. *See* Paikin, *supra* note 8, at 36-37; *see also* MINN. STAT. § 518.551 (1998).

76. *See* Haynes, *Review*, *supra* note 4, at 153.

77. *Id.* (paraphrasing ABA CENTER ON CHILDREN AND THE LAW FOR CSR, VOL. I, EVALUATIONS OF CHILD SUPPORT GUIDELINES: FINDINGS AND CONCLUSIONS (1996) (final report to the Federal Office of Child Support Enforcement)). The following states were evaluated: Arkansas, Delaware, Florida, Massachusetts, Minnesota, Missouri, New Hampshire, New Jersey, Pennsylvania, Washington and Wisconsin. *See id.*

78. *See, e.g.*, COLO. REV. STAT. § 14-10-115 (1997); DEL. CT. R. FAM. CT. 52(c)(3) (1998); TEX. FAM. CODE ANN. §§ 154.128-29 (West 1996); WIS. ADMIN. CODE § HSS 80.04(1) (1995).

79. Takas, *State Guideline Options*, *supra* note 1, at 15 ("One method [that considers multiple families in the guidelines], currently used in Colorado, New Jersey, Oregon, and Wisconsin, among other states, may be described as the 'credit for subsequent children' method.").

80. *See id; see, e.g.*, TEX. FAM. CODE ANN. § 154.128 (deducting a "child support credit" out of an obligor's income to cover expenses of children residing with the obligor before determining the obligation or appropriate modification for the obligor's children who are before the court).

81. *See* Takas, *State Guideline Options*, *supra* note 1, at 15.

household needs allocation," which reserves the poverty needs of each parents' households before the child support award is determined.[82] The essential household needs allocation is "the amount a parent needs to fairly contribute to the minimum poverty level needs of his or her household (not including the children whose support is being determined)."[83] It is calculated by dividing the poverty level for the parent's household by the total number of wage earners in that household.[84]

V. Arguments Influencing the Discussion of Disparate Treatment of Subsequent and Prior Children

A. First-Mortgage and Reduced Ability Approach

Proponents of the view that prior children should be favored over subsequent children argue that the obligor should not incur the expense of an additional family unless he has the financial means to support both prior and current obligations.[85] Just as a person should not undertake a second mortgage unless he can meet the payments of the first, an obligor should not create subsequent children unless he is able to meet his obligation to prior children.[86] Favoring prior obligations over subsequent obligations is intended to deter obligors from starting a new family. Further, a downward modification of a prior child support award would be unfair because the prior family, having relied on the child support award, may have incurred financial responsibilities that may not be sustainable without the child support.[87]

B. Judicial Discretion Leads to Inconsistency

While some believe that judicial discretion resolves the problem of prior and subsequent children better than any set of guidelines because the judge can determine the best outcome on a case-by-case basis, critics of the disparate treatment of prior and subsequent children argue that judicial discretion leads to inconsistent

82. MONT. ADMIN. R. 46.30.1501-1722 (1992); *see* Takas, *State Guideline Options*, *supra* note 1, at 16.

83. Takas, *State Guideline Options*, *supra* note 1, at 16.

84. *See id.*

85. *See* Ho, *supra* note 26, at 42-43.

86. An obvious limitation exists in the analogy of mortgages to family obligations. While mortgages and children are both financial obligations, a mortgage is an obligation on a material possession, while a child is a moral and legal obligation. The first-mortgage analogy is a disturbing parallelism between material goods and human life.

87. *See* Ho, *supra* note 26, at 42.

treatment of children by the legal system.[88] According to this view, leaving the question of how to treat post-decree modification to trial judges will cause the parties not to "be able to predict the outcome of any contemplated modification action, thereby reducing the utility of guidelines in these situations."[89]

Another problem with judicial discretion is that judges may not give sufficient consideration to the needs of subsequent families. Generally, judges do not consider the very real obligations owed to subsequent families because the obligor voluntarily chose to create that second obligation even though he or she had the first obligation.[90] While this may be suitable where the obligor owes child support to both prior and subsequent children and lives with none of them, it may not be as suitable where the obligor resides with subsequent children while the court determines his prior children support order.[91]

C. Equal Protection Violation

Some critics argue that the unequal treatment of prior and subsequent children violates the equal protection clause[92] because prior children are favored over subsequent children.[93] Promoters of this view question "whether first children should have 'superior claims to their parents' resources.'"[94] The assumption that prior children should be favored may be valid where the prior children obtain an award before the subsequent children, because the prior family relies on the set child support award, and the subsequent

88. *See* Garland, *supra* note 16, at 886.

89. Oldham, *Abating*, *supra* note 74, at 877.

90. *See* Garland, *supra* note 16, at 886; *see also* interview with Mary Louise Klas, Ramsey County District Judge, in St. Paul, Minn. (Jan. 12, 1998) (notes on file with the author) (noting her adamant belief that obligors, who knowingly understand their initial obligation to their prior family, and who voluntarily undertake a second obligation, should be held to both obligations without modification of the prior obligation).

91. *See infra* Part VII.C.3 (concluding that the needs of subsequent children living with the obligor should be considered when a prior child support obligation is being determined).

92. The equal protection argument is beyond the scope of this Article. For an in-depth review of the equal protection clause and how disfavoring subsequent children may be an equal protection violation, see Garland, *supra* note 16.

93. *See id.* at 885 (noting that some argue that the obligor should meet his prior family's needs "before taking on new obligations," and believing it unfair to modify the amount which was relied upon, while others argue that subsequent children should not be treated differently from prior children just because their support order was subsequent to the prior support order).

94. *Id.* at 886-87 (citing Carol S. Bruch, *Developing Standards for Child Support Payments: A Critique of Current Practice*, 16 U.C. DAVIS L. REV. 49, 60 (1982)).

family has always survived financially on the obligor's income less the prior award amount.[95] However, the assumption is more questionable where a child support award for prior children is being determined while the obligor resides with his subsequent children, because the second family survives on the obligor's entire income.[96] Courts have disagreed as to the validity of the equal protection argument.[97] Courts that refuse to differentiate between prior and subsequent children argue that subsequent children have a constitutional right to equal treatment when child support is being determined.[98]

D. Paternalism Argument

The reduced ability approach[99] has been called paternalistic and "uncomfortably similar to the common-law argument that proposes denying rights to illegitimate children as a means of encouraging responsible adult sexual behavior."[100] By punishing an obligor who decides to start a second family despite prior obligations to his or her first family, innocent subsequent children suffer.[101] One commentator noted that "[i]t is fundamentally unjust, and arguably unconstitutional, to penalize parents for improper behavior by awarding less support to innocent children."[102] The

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95. *See infra* Part VII.C.1-3.

96. *See id.*

97. *See* Martinez v. Martinez, 660 A.2d 13 (N.J. Super. Ct. Ch. Div. 1995) (accepting the equal treatment argument). *But see* Pohlmann v. Pohlmann, 703 So. 2d 1121 (Fla. Dist. Ct. App. 1997) (rejecting the view that subsequent children's equal protection rights are being violated because they receive less child support than the obligor's prior children).

98. *See Martinez*, 660 A.2d at 16-17.

> [C]hild support, as that policy is implemented through the Child Support Guidelines, does not substantially differentiate between children born of first or ensuing relationships when modification is an issue or the right to be supported by a common, legally obligated parent is asserted . . . [a] child's right to be adequately fed, clothed, housed and educated should not primarily depend on the date of his or her birth, the family in which he or she is born. Equality before the court, child's right to be nurtured, should never be subject to such a presumptive 'time or status' litmus test.

Id.

In *Martinez*, the court granted an obligor's request for a downward modification of his prior obligation, in light of his subsequent child's birth. *See id.* at 13.

99. *See supra* notes 85-87 and accompanying text for a discussion on the reduced ability approach.

100. Ho, *supra* note 26, at 42.

101. *See* Garland, *supra* note 16, at 885 ("Judges in favor of recognizing the second family feel that 'it is unfair, and perhaps unconstitutional, to discriminate among children whose support orders happen to be entered on different dates.'") (citing Malone, *supra note* 68, at 45).

102. Ho, *supra* note 26, at 42.

paternalism argument supports the view that both subsequent and prior child support obligations should be considered together when determining modifications and further obligations.[103]

E. Policy Considerations

One policy issue that should be taken into consideration is that unequal child support awards between prior children and subsequent children could create feelings of inferiority in the subsequent children. Since they are less favored by the law, they may feel less favored and less loved by the obligor.

Another policy concern is that giving prior children preference over subsequent children may provoke divorce in the subsequent family.[104] Favoring prior children over subsequent children also may be "socially counterproductive," for it deprives the subsequent family the funds needed to survive economically.[105] In turn, this economic hardship may ultimately lead the second family to dissolution.[106]

VI. Minnesota's Child Support Guidelines

Minnesota was the first state to introduce child support guidelines.[107] The concept of child support guidelines originated in

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103. *See id.* at 43 ("The appellate courts have recognized that if a parent is forced to spend more of his or her resources supporting earlier-born children, his or her later-born children will inevitably suffer; resources must be allocated among all of the minor children.").

104. *See* Malone, *supra* note 68, at 44.

105. Garland, *supra* note 16, at 885.

106. An argument that supports the favoring of prior children is that the injustice to subsequent children may be alleviated when several years pass between the first and second divorces, because the obligor's income goes up with the cost of living. *See* interview with Mary Louise Klas, *supra* note 90 (noting that subsequent children's award may not be as inequitable as may seem at first glance of the guidelines). This argument usually applies where an obligor creates a second family several years after the prior family, and the prior family does not request an upward modification of its award. Further, it assumes that the obligor's income increases more than the cost of living, or at the same level as the standard of living. However, this explanation of why prior children should be favored over subsequent children is not justified if the obligor's wages do not increase more than the costs he or she incurs.

107. *See* MINN. STAT. § 518.551, subd. 5 (1998) as amended by 1983 Minn. Laws ch. 308, § 17. The guidelines became effective August 1, 1983. *See id.* The following section of the statute is the most pertinent to this article:

> The court shall derive a specific dollar amount for child support by multiplying the obligor's net income by the percentage indicated by the following guidelines:

the Hennepin County Welfare Department before the Minnesota Legislature enacted them.[108] The guidelines were intended to serve as "a rough standard to measure proposed settlements or support orders."[109] They were intended for public assistance cases only, but now apply to all child support cases.[110]

The guidelines are based on the percentage of incomes model, which calculates child support owed per month by multiplying the obligor's net income[111] by a percentage based on the number of

Net Income Per Month of Obligor	Number of Children						
	1	2	3	4	5	6	7 or more
$550 and Below	Order based on the ability of the obligor to provide support at these income levels, or at higher levels, if the obligor has the earning ability.						
$551-600	16%	19%	22%	25%	28%	30%	32%
$601-650	17%	21%	24%	27%	29%	32%	34%
$651-700	18%	22%	25%	28%	31%	34%	36%
$701-750	19%	23%	27%	30%	33%	36%	38%
$751-800	20%	24%	28%	31%	35%	38%	40%
$801-850	21%	25%	29%	33%	36%	40%	42%
$851-900	22%	27%	31%	34%	38%	41%	44%
$901-950	23%	28%	32%	36%	40%	43%	46%
$951-1000	24%	29%	34%	38%	41%	45%	48%
$1001-5000	25%	30%	35%	39%	43%	47%	50%

§ 518.551, subd. 5(b).

108. *See* Stephen A. Bard, *A Critical View of the 1983 Child Support Guidelines*, 2 MINN. FAM. L.J. 27, 27 (1984).

109. *Id.*; *see also* Jones, *supra* note 41, at 23-24.

> The guidelines . . . were issued by the Minnesota Department of Public Welfare in 1975 for use by welfare agencies in making support recommendations in cases where the children were supported by public assistance. The guidelines were also made available to the courts and private bar. However, because the guidelines were only recommended, strict adherence to them was discretionary. Hence, there was no uniformity in their use between counties, between judges, or between cases. On an average, the courts were ordering support in amounts below the recommended guideline figure.

Id.

110. *See* § 518.551, subd. 1(a) ("This section applies to all proceedings involving an award of child support."); Jones, *supra* note 41, at 23 n.11; *see also* Moylan v. Moylan, 384 N.W.2d 859 (Minn. 1986) (holding that the Minnesota child support guidelines apply in all cases, even modification proceedings).

111. Typically, only the obligor's income is considered when calculating the order. *See* § 518.551, subd. 5(b) ("Net income does not include . . . the income of the obligor's spouse."). The court determines the obligor's net income by deducting standard deductions from his or her gross income. *See id.* The statute defines net income as total monthly income minus the following deductions: federal income tax, state income tax, social security deductions, reasonable pension deductions, union dues, cost of dependent health insurance coverage, cost of individual or

children and the obligor's monthly net income.[112] They are intended to bring consistency and uniformity in the courts' child support orders, and to give the public a better understanding of how the court makes its determinations.[113]

A. Guidelines' Failure to Address Multiple Families

The Minnesota child support guidelines do not address how a child support award should be determined when the obligor has prior and subsequent children. They do, however, deduct prior child support orders currently being paid from the obligor's gross income to determine subsequent child support orders.[114] This reduced ability approach "almost always will provide more support for earlier children than later children."[115] Because the guidelines do not address multiple families, courts have been left to grapple with this issue.

B. Minnesota Case Law on Multiple Families

Minnesota courts struggle with the difficult issue of fairly allocating limited resources to both an obligor's prior and subsequent

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group health/hospitalization coverage or an amount for actual medical expenses, and a child support or maintenance order that is currently being paid. *See id.*

Because the guidelines originally only applied to public assistance cases, the courts did not consider the obligee's income, for there was no income to consider. This explains why Minnesota's current child support guidelines still only consider the obligor's income. Some Minnesota counties alleviate the guidelines' disregard for the custodial obligee's income by considering his or her income in determining child support awards. *See* Bard, *supra* note 108, at 28.

The family courts of Ramsey and Hennepin counties have issued policy statements on how certain problems posed in applying the guidelines will be dealt with in their courts. *See id.* The Hennepin County policy includes the following: "Where it exists, the obligee's income will also be considered." *Id.*

112. *See supra* notes 40-46 and accompanying text (explaining the percentage of incomes model).

113. *See* Sieloff, *supra* note 6, at 18.

> The guidelines were enacted into law
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> 1. to generally increase the level of child support,
> 2. to bring some degree of uniformity of obligation and support to persons similarly situated,
> 3. to provide some predictability of financial obligation or support to persons contemplating dissolution or legal separation and to enable attorneys to more accurately advise clients as to the likely outcome of a dissolution or separation action as far as child support is concerned,
> 4. to eliminate the mystery to the public of how child support levels are determined by the courts,
> 5. to decrease the public costs of aid to families with dependent children by collecting greater amounts from the noncustodial parents.

Id.

114. *See* MINN. STAT. § 518.551 (1998).

115. D'Heilly v. Gunderson, 428 N.W.2d 133, 136 (Minn. Ct. App. 1988).

children.[116] At present, the only way Minnesota courts may consider subsequent families is by deviating from the guidelines and balancing the needs of the prior and subsequent children while considering fairness issues. The abundance of Minnesota case law regarding multiple families demonstrates inconsistency and failure to adequately address multiple family situations.[117] The case law also shows a need for more defined methods to determine cases involving prior and subsequent children in the future.

1. An Obligor's Prior Obligation Is Priority

In cases where the obligor who has a prior obligation later starts a subsequent family, the rule is that "a child support obligor must favor an established obligation over a subsequently assumed obligation."[118] This assumption most likely remains embodied within Minnesota child support jurisprudence because it warns obligors that they will not be relieved from their prior obligations even if they have subsequent children.

Courts also reason that prior children are favored because the Minnesota guidelines incorporate the reduced ability approach, which deducts prior child support obligations from the obligor's income when a later child support order is being determined.[119] Thus, courts conclude that "the statute is deferential to a prior support obligation."[120]

2. Subsequent Children Should Not Be Factored into the Guidelines

According to Minnesota courts, subsequent children should not be factored into the child support guidelines even though they

116. *See* Bock v. Bock, 506 N.W.2d 321, 323 (Minn. Ct. App. 1993) ("The case requires our review of law on the vexing child support topic of allowances for later born children.").

117. *See* Erickson v. Erickson, 385 N.W.2d 301, 304 (Minn. 1988) (holding that it is not necessary to consider subsequent children when modifying prior child support awards). *But see* County of Ramsey v. Faulhaber, 399 N.W.2d 617, 619 (Minn. Ct. App. 1987) ("[T]he trial court should consider . . . [the obligor's] current family obligations in determining [the obligor's] reasonable expenses."); Finch v. Marusich, 457 N.W.2d 767, 769 (Minn. Ct. App. 1980) (holding that the lower court should have considered the obligor's second family).

118. Hayes v. Hayes, 473 N.W.2d 364, 366 (Minn. Ct. App. 1991) (citing Quist v. Quist, 280 N.W. 561, 562 (Minn. 1940)).

119. *See D'Heilly*, 428 N.W.2d at 136.

120. *Id.*; *see also Hayes*, 473 N.W.2d at 366 (finding that the guidelines favor the obligor's initial child support obligation and not the obligor's subsequent obligation).

are relevant in the determination of prior child support awards.[121] This rule prohibits the application of the equal treatment approach, which groups together prior and subsequent children for purposes of the guidelines, and allows each child to receive equal amounts of support.[122] The main case cited for this proposition is *Erickson v. Erickson*.[123]

In *Erickson*, the obligor owed child support to his prior children.[124] The obligor remarried and had subsequent children.[125] The mother of his prior children then filed a motion for an upward modification of the prior child support order, which the trial court granted.[126] The Minnesota Supreme Court held that the court of appeals correctly applied the guidelines in the modification proceeding.[127] While it was unclear "whether the trial court considered the needs of the children in reaching its conclusion,"[128] the supreme court held that "[c]hildren by a subsequent marriage, while relevant to a trial court's decision, are not to be factored into the child support guidelines tables in Minn. Stat. § 518.551."[129] Since Erickson was a case about a post-decree modification, this rule applies to both modification proceedings and the determination of child support orders.

Erickson and its progeny show that in determining child support, Minnesota courts prefer prior children to subsequent children where the obligor currently owes child support to prior children, and then has subsequent children.[130]

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121. *See* Sharits v. Sharits, No. C3-96-2016, 1997 WL 133001, at *1 (Minn. Ct. App. 1997) (citing *Erickson*, 385 N.W.2d at 304); *see also Bock*, 506 N.W.2d at 325 ("If the statutory guidelines are applied to determine an obligation, the calculation must be made without regard for needs of children of a later union of the parent."); Scearcy v. Mercado, 410 N.W.2d 43, 46 (Minn. Ct. App. 1987) (noting that while subsequent children should not be factored into the child support guidelines, their families' needs may be considered when deciding the amount of an obligor's available resources).

122. *See supra* notes 69-71 and accompanying text; *see also* Memorandum from Sandra M. Torgerson to Child Support Officers (Mar. 13, 1989) (on file with the author).

123. 385 N.W.2d at 301.

124. *Id.* at 303 (finding the obligor had failed to maintain health and life insurance per the dissolution decree).

125. *See id.*

126. *See id.* at 302.

127. *See id.*

128. *Id.*

129. *Id.* at 304.

130. For cases consistent with the *Erickson* rule, see Sharits v. Sharits, No. C3-96-2016, 1997 WL 133001, at *1 (Minn. Ct. App. 1997); Bock v. Bock, 506 N.W.2d 321 (Minn. Ct. App. 1993); Hayes v. Hayes, 473 N.W.2d 364 (Minn. Ct. App. 1991); County of Ramsey v. Faulhaber, 399 N.W.2d 617, 619 (Minn. Ct. App. 1987; Isanti

3. Strict Guidelines Application in Public Assistance Cases

A strict application of the guidelines is required when the court determines a child support award for a prior child on AFDC, and the obligor supports a subsequent child.[131] Departure from the guidelines in public assistance cases is appropriate only where express findings support the deviation.[132] *Isanti County Family Services v. Swanson* illustrates this legal principal.[133]

In *Isanti*, paternity of the prior child was established.[134] The mother of the prior child then moved for child support.[135] At the time of the child support proceeding, the obligor resided with his wife and subsequent child.[136] The prior child and mother were AFDC recipients.[137] The Minnesota Court of Appeals held that: "[a]lthough the result is harsh, we do not believe the trial court erred in failing to consider the needs of a child subsequently born . . . where the first child is being supported by AFDC, or in strictly applying the support guidelines."[138]

4. Cost of Subsequent Family Is Relevant If Court Deviates from Guidelines

Even if Minnesota courts cannot factor in subsequent children's needs when calculating child support strictly by the guidelines, those needs may be considered when courts depart from the

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County Family Servs. v. Swanson, 394 N.W.2d 180 (Minn. Ct. App. 1986).

In *Hayes*, the Minnesota Court of Appeals explained that subsequent and prior children should not be grouped together when applying the guidelines. *See Hayes*, 473 N.W.2d at 367. The court reasoned that grouping prior and subsequent children together was prohibited by the *Erickson* rule and the "reduced ability approach," which is incorporated into the Minnesota child support guidelines. *Id.*

Erickson was also followed in *Sharits*, where the Court of Appeals affirmed an administrative law judge's (ALJ) strict application of the guidelines when determining an upward modification of a prior child's support order. *Sharits*, 1997 WL 133001 at *1. The ALJ increased the father's child support obligation for his prior children without deducting the financial obligation he incurred for his later-born subsequent daughter. *See id.* The court of appeals concluded that the ALJ acted appropriately because the child support deduction only applies if subsequent children's child support is being determined when the obligor has a child support order for the prior children. *See id.* The accuracy of this statement is questionable, since the guidelines indicate nothing of the sort. *See* MINN. STAT. § 518.551 (1998) (allowing an already existing child support order to be deducted from the obligor's income).

131. *See Isanti*, 394 N.W.2d at 183.

132. *See* Moylan v. Moylan, 384 N.W.2d 859, 863 (Minn. 1986).

133. 394 N.W.2d at 183.

134. *See id.* at 181.

135. *See id.*

136. *See id.*

137. *See id.*

138. *Id.* at 183.

guidelines.[139] Some Minnesota county agencies have also developed various formulas to follow when deviating from the guidelines in multiple family cases.[140]

a. Cases Prior to Bock

Before *Bock v. Bock*,[141] the seminal case on appropriate considerations in multiple family child support cases, courts noted that an obligor's subsequent children or current family may be considered by deviating from the guidelines.[142] These cases do not, however, specify when and how a court should consider the needs of the obligor's current family.

In *County of Ramsey v. Faulhaber*,[143] the obligee asked for an increase in the prior child support award where the obligor resided with his subsequent child and pregnant wife.[144] The trial court did not deviate from the guidelines, did not consider the expense the obligor incurred due to his current family and subsequent child, and granted an upward modification of the prior award.[145] The court of appeals reversed and remanded, holding that "[o]n remand, the trial court should consider . . . [the obligor's] current family obligations in determining [the obligor's] reasonable expenses."[146]

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139. *See* Bock v. Bock, 506 N.W.2d 321, 324 (Minn. Ct. App. 1993) (holding that the needs of support for an obligor's subsequent children could not be included in guidelines calculation, although the court could consider such needs in deciding whether to deviate from the guidelines); Scearcy v. Mercado, 410 N.W.2d 43, 46 (Minn. Ct. App. 1987) ("[G]uideline calculations are never made without evidence and findings taking into account the needs and resources of both parents and the child. Thus, the needs of an obligor's present family inevitably receive attention when child support is duly determined."). Minnesota courts state that the guidelines should not be mechanically applied. *See* Lindermann v. Lindermann, 364 N.W.2d 872, 875 (Minn. Ct. App. 1985); *see also* Mancuso v. Mancuso, 417 N.W.2d 668 (Minn. Ct. App. 1988) (refusing to strictly adhere to guidelines if it does not look out for the best interests of all children involved).

140. *See infra* notes 193-202 and accompanying text (discussing the different methods by which some Minnesota county agencies depart from the guidelines in child support cases involving prior and subsequent children).

141. 506 N.W.2d 321 (Minn. Ct. App. 1993).

142. *See* Ho, *supra* note 26, at 43 ("The burden of proving [a child's] unusual needs falls on the party who is seeking a deviation from the guidelines. Without proof, the court will not deviate.") (citing Finch v. Marusich, 457 N.W.2d 767 (Minn. Ct. App. 1990)).

143. 399 N.W.2d 617 (Minn. Ct. App. 1987).

144. *See id.* at 618.

145. *See id.*

146. *Id.* at 619. *See also* Ramsey County v. Shir, 403 N.W.2d 714 (Minn. Ct. App. 1987). In *Shir*, paternity of the obligor's prior child was established. *See id.* at 715. Four years later, the county moved for child support. *See id.* At the time the county was determining the prior child's order, the obligor was married with

Likewise, the Minnesota Court of Appeals in *Finch v. Marusich*[147] held that the lower court should have considered the obligor's second family.[148] In *Finch*, the obligor asked for a downward modification of his prior child support obligation in light of his responsibilities to his subsequent family.[149] Instead, the trial court increased the prior obligation to three times higher than the guidelines amount.[150] The appellate court found the trial court abused its discretion.[151] The Minnesota Court of Appeals determined that the lower court should have taken into account reasonable costs of the obligor and the subsequent family with whom he lived.[152] The court, however, did not define "reasonable costs."

In *Mancuso v. Mancuso*,[153] the court determined a child support award for the obligor's subsequent child while the obligor resided with his four prior children.[154] The *Mancuso* court held that the obligor's prior children presently in his custody should not be ignored by strictly applying the guidelines for prior children to the

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subsequent children. *See id.* The trial court strictly applied the guidelines without considering the subsequent children in a child support proceeding. *See id.* at 716. The appellate court remanded the case and stated that

> [T]he trial court must also assess . . . [the obligor's] needs and reasonable expenses. In so doing, the expenses incurred by . . . [the obligor] in raising a second family may properly be considered . . . [w]hile an obligor cannot avoid his support obligation by voluntarily incurring new liabilities, including obligations to a second family, consideration can be given to later-born children in setting child support.

Id. at 717. The court, however, does not outline the expenses to consider and when a court should consider expenses of subsequent families. *See id.*

Perhaps the language in *Faulhaber* is stronger than the language in *Shir* because in *Faulhaber*, the obligor's subsequent children were used as a defense to an upward modification. *See Faulhaber*, 399 N.W.2d at 619. Whereas in *Shir*, the subsequent children could be considered in the determination of a child support order for the obligor's prior children. *See Shir*, 403 N.W.2d at 717. This may suggest that considering subsequent children in upward modification proceedings is more acceptable to Minnesota courts than considering them in prior child support order determinations, even where the obligor resides with the subsequent children.

147. 457 N.W.2d 767.

148. *See id.*

149. *See id.*

150. *See id.* at 769.

151. *See id.*

152. *See id.*

153. 417 N.W.2d 668, 672 (Minn. Ct. App. 1988).

154. *See id.* Another case that addresses the same multiple family scenario is *In re* Wallace, No. C5-97-262, 1997 WL 585899, at *3 (Minn. Ct. App. 1997). The *Wallace* court found that the trial court erred in not considering the needs of the obligor's prior children when setting the child support amount for subsequent children. *See id.* "Where the best interests of two older children may be jeopardized to serve the interests of one child, it may not be just to enforce a rigid and mechanical application of the guidelines." *Id.*

obligor's subsequent children.[155] The *Shir* court also criticized the equal treatment method, which would allocate the obligor's available resources to all of his children, pro rata.[156]

In short, Minnesota courts prior to *Bock* sometimes considered the needs of the obligor's current family when determining child support awards and the appropriateness of child support modifications.[157] Minnesota courts especially consider the needs of prior children when a subsequent child support award is being determined.[158] The language of the cases, however, never clearly states *what* should be taken into account when a court decides to consider subsequent children. The cases also do not clarify in which multiple family situations a court should consider subsequent children or the obligor's current family. These questions were partially answered in *Bock v. Bock*.[159]

b. The Bock *Formula*

The Minnesota Court of Appeals in *Bock v. Bock* attempted to derive a formula for courts that deviate from the guidelines to address the needs of prior and subsequent children.[160] In *Bock*, the obligor had a prior child within a marriage.[161] After he and his first wife divorced, he owed child support to the prior child.[162] He

155. *See Mancuso*, 417 N.W.2d at 676.

156. *See* 403 N.W.2d at 717.

157. Minnesota courts have been less likely to grant downward modifications in light of an obligor's subsequent family with whom he resides. *See* Williams v. Williams, 22 N.W.2d 212, 213 (1946) (finding that a second marriage is not a valid excuse for a downward modification of a prior child support obligation); *see also* County of Washington v. Kusilek, No. CX-96-800, 1997 WL 3389, at *2 (Minn. Ct. App. 1997) (finding that downward modification for prior children because of a subsequent child "was not supported by the necessary statutory findings"). However, the consideration of subsequent children in downward modifications has occurred in a few cases. *See* Nerud v. Nerud, No. C5-91-1558, 1992 WL 77545, at *2 (Minn. Ct. App. 1992) ("Increased expenses solely attributable to subsequent children can constitute a change of circumstances sufficient to justify modification of child support.") (citing Mark v. Mark, 80 N.W.2d 621, 624-25 (Minn. 1957)); Finch v. Marusich, 457 N.W.2d 767, 767 (Minn. Ct. App. 1990) (considering subsequent children in a downward modification proceeding was appropriate). In *Nerud*, the court granted a downward modification of the obligor's prior child support order in light of his increased expenses due to his subsequent children. 1992 WL 77545 at *2.

158. *See* Mancuso, 417 N.W.2d at 672 (ruling that father's pre-existing obligation to support children from first marriage should be considered in determining child support for child from second marriage).

159. 506 N.W.2d 321 (Minn. Ct. App. 1993)

160. *See id.* at 325.

161. *See id.* at 323.

162. *See id.*

later remarried and had subsequent children.[163] Years later, the first wife filed for an upward modification of the prior child support award.[164] The court attempted to answer the "question of what calculations are to occur if the trial court should deviate from the guidelines to consider the needs of subsequent children"[165] by providing the following:

> (1) the trial court has to find the obligor's total ability to contribute to dependent children, taking into account the obligor's [sic] income and reasonable expenses exclusive of child care; (2) the court should then find the total needs of all of the obligor's children, and if these needs are less than the obligor's ability to pay, the needs may become the obligor's maximum child care contribution; (3) the court should make specific findings on the needs of the child or children benefiting from the current support determination; and (4) the court must exercise discretion to fairly determine the current support obligation and the contribution left available for other children, keeping in mind the general standard that the obligation now determined normally should be in an amount at least equal to the contribution for a subsequent child.[166]

In considering these four elements, the *Bock* court requires that courts: (1) reduce the obligor's expenses by the financial contributions made by others in the obligor's household; (2) reduce the needs of the subsequent children according to the other parent's contributions; and (3) apportion expenses for shared benefits between the obligor and children when assessing the expenses of the obligor (aside from the subsequent children's costs).[167]

Despite *Bock*'s effort to provide courts with more direction in cases involving prior and subsequent children, it fails to set forth a clear formula. The court uses vague concepts such as the obligor's "reasonable expenses," "shared" benefits, "total needs" of all children, and "specific findings on the needs" of the children before the court, none of which the court explicitly defines.[168] Further, the *Bock* court still gives courts "discretion to fairly determine" the allocation of the obligor's resources.[169] The *Bock* formula's ambiguous, impractical and numerous factors fail to provide courts clear direction in multiple family cases.

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163. *See id.*

164. *See id.*

165. *Id.*

166. *Id.*

167. *See id.* Examples given by the court of "shared benefits" include housing and transportation. *Id.* Other examples that fall under this category most likely include food and utilities.

168. *Id.*

169. *Id.*

*c. Post-*Bock *Decisions*

Some Minnesota courts put forth a good faith effort to follow the elements laid out in *Bock*.[170] Other Minnesota courts follow *Bock* in name only.[171] The different treatment of *Bock* in these post-*Bock* cases indicate that *Bock* did not succeed in providing a clear and useful formula in multiple family situations.[172]

In sum, the Minnesota Court of Appeals in *Bock* tried to clarify the steps a court must take in determining child support where the obligor has subsequent and prior children.[173] Although *Bock* came closer to deriving a formula to use in multiple family situa-

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170. *See, e.g.*, County of Washington v. Kusilek, No. CX-96-800, 1997 WL 3389 (Minn. Ct. App. 1997). In *Kusilek*, the Minnesota Court of Appeals found an ALJ's decision to deviate downward from the guidelines in setting the obligor's child support order for prior children was "not supported by the necessary statutory findings." *Id.* at *2. The court walked through the *Bock* elements, finding that the ALJ did not comply with many of them. *See id.* at *1-2.

171. *See, e.g., In re* Wallace, No. C5-97-262, 1997 WL 585899, at *3 (Minn. Ct. App. 1997). The *Wallace* court found that the trial court erred in not considering the obligor's prior children when determining a subsequent child's support order. *See id.* Although the court cited to *Bock* for the proposition that support for children in multiple families should be "fair and even-handed . . . to all children dependent" on the obligor, it did not go through the four *Bock* elements, asserting that the present case was factually distinguishable. *Id.* The court remanded to the trial court "for reconsideration of [the obligor's] obligation to support her two older children from a prior marriage." *Id.* at *4; *see also* Rudnik v. Helm, No. C8-96-1783, 1997 WL 118114 (Minn. Ct. App. 1997). In considering subsequent children, the court stated that "[t]he deviation process must involve comparing contributions to all children of that obligor." *Id. at *2.* The court then pointed to two calculations that *Bock* requires: (1) the total ability of the obligor to contribute to all of his children; and (2) the reduction of the obligor's expense by the financial contribution of the subsequent children's other parent. *See id.* Although the court points out some of the elements of *Bock*, it does not go through all of the *Bock* elements. This suggests that Minnesota courts view *Bock* as giving a laundry list of all relevant considerations that do not necessarily need to be considered. *Bock*'s language, however, seems to require courts to consider all of the listed calculations. 506 N.W.2d at 325.

172. Other Minnesota cases have mentioned *Bock*. *See* State of Ohio v. Benko, No C0-96-871, 1996 WL 665894, at *2. The *Benko* court stated that a court must look to the factors of section 518.551, subdivision 5(b) of the Minnesota Statutes in deciding whether to depart from the guidelines. *See id.* If the court decides to deviate, the court must consider the four *Bock* factors. *See id.*

In Henagin v. Henagin, No. C0-96-336, 1996 WL 410366 (Minn. Ct. App. 1996), the court found that "the record compels deviation" where the obligee requested an upward modification on a prior support order and the obligor resided with his subsequent children and wife. *Id.* at *3. The court said that the trial court erred by first deducting $172.50 from the obligor's income for his subsequent children, then applying the guidelines for the prior children. *See id.* The court reasoned that the trial court violated the *Erickson* rule. *See id.* The court required the trial court to consult *Bock* and section 518.551, subdivision 5 of the Minnesota Statutes in determining whether an upward modification was appropriate. *See id.*

173. *See Bock*, 506 N.W.2d 321.

tions than had courts before it, its ambiguous language and numerous factors do not provide a practical solution.[174] Minnesota courts need a straightforward and precise formula to aid decisions in cases involving child support awards and prior and subsequent children.

5. Subsequent Child Support Awards Cannot Exceed Prior Child Support Awards

Although subsequent children may be considered in determining a prior child support award when courts deviate from the guidelines, the Minnesota Court of Appeals in *D'Heilly v. Gunderson*[175] held that the guidelines "[do] not permit an allotment for . . . [a subsequent] child which exceeds support obligations for previous children."[176] This means that subsequent children cannot receive higher awards than prior children.[177] For example, if the child support order for two prior children is $400, the court must set one subsequent child's order at $200 or less. The *D'Heilly* court found this conclusion appropriate because the guidelines embrace the reduced ability approach.[178]

Even though trial courts are given broad discretion in determining child support awards,[179] *D'Heilly* and other Minnesota courts have tried to limit the deference that trial courts give to

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174. *See id.*

175. 428 N.W.2d 133 (Minn. Ct. App. 1988).

176. *Id.* at 136. The *D'Heilly* rule was misinterpreted in Nerud v. Nerud, No. C5-91-1558, 1992 WL 77545, at *2 (Minn. Ct. App. 1992) ("[A] trial court may reduce an obligor's net monthly income for expenses attributable to subsequent children as long as prior children receive a *greater* share of available support.") (emphasis added).

177. *See D'Heilly*, 428 N.W.2d at 136.

178. *See id.* The court does not consider that the reduced ability approach might only be appropriate where the obligor does not live with his prior or subsequent children, and owes support to both. *See id.* It is possible that the only situation that the legislature is addressing with its reduced ability approach is one where the obligor lives with none of his children. *See id.*

179. *See* Sharits v. Sharits, No. C3-96-2016, 1997 WL 133001, at *1 (Minn. Ct. App. 1997) ("An ALJ is afforded broad discretion in child support cases, and we must affirm an administrative decision absent a clear abuse of that discretion."); Desrosier v. Desrosier, 551 N.W.2d 507, 509 (Minn. Ct. App. 1996) (stating that a trial court has broad discretion in deciding the child support amount); Korf v. Korf, 553 N.W.2d 706, 708 (Minn. Ct. App. 1996) (noting that a decision will not be overturned unless the trial court abuses its broad discretion); LaFrenier-Nietz v. Nietz, 547 N.W.2d 895, 897 (Minn. Ct. App. 1996) (according broad discretion to the trial court); Rutten v. Rutten, 347 N.W.2d 47, 50 (Minn. 1984) (noting that the trial court is given broad discretion in such matters); *see also* Reck v. Reck, 346 N.W.2d 675, 677 (Minn. Ct. App. 1984) (identifying child support as "well within the discretion of the trial court") (citing Peterson v. Peterson, 231 N.W.2d 85, 86 (Minn. 1975)).

subsequent children.[180] In *D'Heilly*, the court found that "the trial court abused its discretion by relying excessively on the needs of the subsequent child."[181] Likewise, in *Hayes v. Hayes*[182], the Minnesota Court of Appeals held that the trial court gave too much deference to a subsequent child when the court deducted the subsequent child support order from the obligor's income, and then determined the prior children's award from the obligor's reduced income.[183] The problem arising from these cases is that the point at which a court excessively defers to a subsequent child is undefined. This makes it difficult for courts to know how to appropriately consider subsequent children without engaging in undue deference to them.

Under unusual circumstances, courts may depart from the *D'Heilly* rule.[184] The *Hayes* court suggested that support orders for large families may justify a departure from *D'Heilly*.[185] The reason for this departure is due to the "per capita economy" that large families experience, which makes the guidelines amount very generous.[186] A second reason for departure of the *D'Heilly* rule is "substantial income" of a parent.[187]

D'Heilly places an upper boundary on the amount subsequent children may be awarded in relation to the obligor's prior children.[188] This upper boundary is incorporated in the *Bock* elements.[189] However, *D'Heilly* does not set forth a clear formula that courts should follow when the obligor has subsequent and prior

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180. *See* Hayes v. Hayes, 473 N.W.2d 364, 365 (Minn. Ct. App. 1991) (concluding that the trial court abused its discretion); *D'Heilly*, 428 N.W.2d at 136 (remanding to trial court with instructions as to which factors to take into consideration); *see also* Roehrich, *supra* note 57, at 996 n.179 (citing various Minnesota decisions in which trial court discretion has been limited).

181. 428 N.W.2d at 135.

182. 473 N.W.2d at 364.

183. *See id.* at 365. (finding that the reduced ability approach should only deduct prior child support obligations, not subsequent child support obligations).

184. *See* Kotzenmacher v. McNeil, No. C5-92-999, 1992 WL 314984 at *2 (Minn. Ct. App. 1992) ("The *D'Heilly* rule . . . is not absolute.").

185. *See Hayes*, 473 N.W.2d at 366 (listing a prior support order for a large family as an "unusual circumstance"); *see also Kotzenmacher* 1992 WL 314984, at *2 (citing *Hayes*, 473 N.W.2d at 364).

186. *Hayes*, 473 N.W.2d at 366; *see also Kotzenmacher*, 1992 WL 314984, at *2 (finding a departure from *D'Heilly* is appropriate where the amount set by guidelines is too much). This concept addresses economies of scale.

187. *Kotzenmacher*, 1992 WL 314984, at *2 ("*D'Heilly* implicitly recognized substantial income as another 'unusual circumstance' allowing departure from the general rule, noting that the reduced-ability calculation almost always produced reduced obligations for later-born children of 'low or moderate income obligors.'").

188. *See D'Heilly*, 428 N.W.2d at 136.

189. *See* Bock v. Bock, 506 N.W.2d 321, 325 (Minn. Ct. App. 1993).

children.[190]

In sum, like the legislature, Minnesota case law on the issue of multiple families offers no consistent guidance for fairly allocating limited resources between prior and subsequent children. Although the *D'Heilly* court held that subsequent children cannot be awarded more than prior children,[191] it did not state precisely how a court should determine child support where prior and subsequent children are involved. Even though *Bock* sets out factors to consider when subsequent children are involved, it does not give a precise method by which the factors can be achieved.[192] Minnesota courts need more guidance from the legislature for cases involving an obligor who has prior and subsequent children.

C. *How Different Minnesota County Agencies Deviate from the Guidelines When Determining Awards Involving Prior and Subsequent Children*

In an attempt to develop a clear method used to deviate from the guidelines when prior and subsequent children are involved, some Minnesota county agencies use specific formulas. According to a 1996 study involving thirty-four Minnesota county child support agencies, fifteen counties do not deviate from the guidelines when subsequent children are involved but instead let the ALJ decide the appropriate amount of child support.[193] When counties deviate from the guidelines by considering subsequent children, three main approaches have been used in determining child support awards.[194]

1. Gaffney Method

The modified reduced ability approach, otherwise known as the Gaffney method, (1) determines the amount the prior children would have received according to the guidelines had no subsequent children been involved; (2) deducts that amount from the obligor's

190. *See* 428 N.W.2d at 136.

191. *See id.*

192. *See* 506 N.W.2d at 325.

193. *See* Theresa Farrell-Strauss, Survey Results, Re: Subsequent Children—Support Amount (June 27, 1996) (unpublished manuscript, on file with the author) [hereinafter Farrell-Strauss, Survey Results].

194. *See id.* The survey information does not make clear whether the methods are used for setting awards for prior or subsequent children. It also does not mention whether the methods are used in upward modifications of prior child support awards when the obligor has subsequent children. These clarifications should be made in the future to understand better how Minnesota counties deal with specific multiple families and specific adjudications.

net income; (3) calculates the subsequent children's amount from the reduced net income, and adds that amount to the prior children's amount; and (4) divides the amount found in step (3) by the total number of the obligor's children.[195] This method differs from the default reduced ability approach used in the Minnesota guidelines, in that the unmodified reduced ability approach merely deducts the appropriate amount from the guidelines table for prior children from the obligor's net income and does not consider subsequent children for which the obligor is currently responsible.[196] The modified reduced ability approach most likely is called such because the set award under this method is only slightly lower than the unmodified reduced ability approach.[197]

2. Dakota County Approach

The second approach, called the Dakota county approach, sets the prior child's award by (1) deducting the obligation to the prior children out of the obligor's net income just as the reduced ability approach would; (2) aggregating the obligor's total number of children and then deducting that percentage out of the obligor's net income; (3) dividing the amount found in step (2) evenly per child; (4) multiplying the amount in (3) by the number of children up for the child support award; and (5) dividing the sum of steps (1) and (4) by the number of prior children up for the award.[198] It

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195. *See id.* Five counties, including Becker, Crow Wing, Rock, Stevens and Wadena, reported using the modified reduced ability approach as follows:

(1) *MODIFIED REDUCED ABILITY APPROACH*: This approach is similar to the formula authorized by statute for prior obligations where a child support order being paid is deducted in arriving at net income.

A. $1000 Net Income × 29% Guidelines for 2 Children = $290
B. $1000 Net Income – 290 Less Support for prior children = $710
C. $710 Reduced Net Income × 19% Guidelines for one child = $135
D. $135 + $290 divided by 3 = $142 per capita support, or $284 for the two prior children.

Id.

196. *See* MINN. STAT. § 518.551 (1998). "A [c]hild [s]upport or [m]aintenance [o]rder that is [c]urrently [b]eing [p]aid" is deducted from the obligor's net income, but non-court ordered child expenses are not considered. *Id.*

197. *See* Farrell-Strauss, Survey Results, *supra* note 193.

198. Five Minnesota county agencies, including Dakota, Kandiyohi, Nobles, Rock and Wilkin, reported using the Dakota County approach. *See id. But see* Telephone Interview with Phil Dalseth, Attorney at Dakota County (Sept. 21, 1997) (notes on file with the author). Mr. Dalseth reported that the Dakota county approach has been long abandoned. Instead, deviations are now made by administrative law judges on a case-by-case basis. *See id.* Although this approach is not being used in Dakota county, it is still worth considering because it reduces the harshness of the reduced ability approach that is incorporated in the guidelines while considering all children involved. *See id.*

DAKOTA COUNTY APPROACH: This method calculates support under a

determines support under the guideline's reduced ability approach, and by the equal treatment approach, then sets the support order in between the two.[199]

3. Mower County Approach

The Mower County approach, calculates the child support award for prior children by first subtracting the amount for subsequent children from the obligor's original net income.[200] Critics of this approach, which is also known as the "deduction from income approach," argue that it "put[s] the second family first."[201] A few responding counties use other formulas.[202]

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straight guidelines approach and by an equal treatment approach and then sets support half way in between:

A. $1000 Net Income x 29% Guidelines for 2 Children = $290
B. $1000 Net Income x 34% Guidelines for 3 Children = $340
C. 2/3 of $340 = $227 per capita calculation
D. $290 + $227 ÷ 2 = $258 support for prior children

Farrell-Strauss, Survey Results, *supra* note 193.

199. *See* Farrell-Strauss, Survey Results, *supra* note 193.

200. Eight other counties, including Aitkin, Benton, Brown, Lake of the Woods, Pipestone, Rock, Stearns and Steele, use the Mower County approach. *See id.*

MOWER COUNTY APPROACH: This is a reduced ability approach which factors out an amount for the subsequent child before calculating support for the prior children.

A. $1000 Net Income x 29% Guidelines for 2 Children = $710
B. $710 Reduced Net Income x 19% Guidelines Subsequent Chil dren = $135
C. $1000 Original Net Income – 135 Support for Subsequent Chil dren = $865 Reduced Net Income
D. $865 Reduced Net Income x 27% Guidelines for 2 Children = $234 Support for Prior Children.

Id.; *see also* Takas, *State Guideline Options*, *supra* note 1 at 15. (stating that Colorado, New Jersey, Oregon and Wisconsin use a "credit for subsequent children" method, which "allows non-custodial parents a credit for the support of subsequent children, which is deducted from that parent's income base before determining the support amount for the children in the case at bar").

201. Haynes, *Review*, *supra* note 4, at 154. *But see* Roehrich, *supra* note 57, at 1006 (asserting that the Mower County method should be applied in situations where "an obligor brings a motion to reduce a prior child support award").

202. *See* Farrell-Strauss, Survey Results, *supra* note 193. Clearwater, LeSueur and Morrison reported using methods other than the modified reduced ability approach, the Dakota County approach or the Mower County approach. *See id.*

Another formula used by Minnesota courts when calculating the award obligation to prior children when subsequent children are involved is the trial and error approach. *See* Memorandum from Anne Martineu, Determining Child Support When Subsequent Children Are Involved 2 (Jan. 1993) (on file with *Law & Inequality: A Journal of Theory and Practice*). The following is pertinent text:

Trial and Error Approach. Under this approach the judge selects reasonable expense amount for support of the subsequent children and deducts it from the net income before calculating support for the prior child. The expense amount deducted is adjusted as necessary to comply with *O'Heilly* and *Hayes* and to achieve a fair result based on the facts. This method,

VII. Proposal for Change

As demonstrated, the different approaches taken to fairly allocate child support between subsequent and prior children vary significantly from state to state, and even within the counties of Minnesota. The fair allocation of limited resources to prior and subsequent children is clearly one of the thorniest issues in family law matters. Therefore, any proposed change in policy should be handled cautiously.

A. Possible Solutions That Should Be Rejected

1. Use The Current Guidelines Until National Child Support Guidelines Are Implemented

One option is that the Minnesota legislature should take no action and wait until national child support guidelines are enacted by Congress. The benefits of having national child support guidelines includes increased uniformity and better control over obligors who cross state lines.[203]

However, even assuming that national child support guidelines are implemented, the issue of fair allocation of child support between prior and subsequent children will remain unresolved if the national guidelines do not address multiple families.[204] And even if national guidelines would address multiple families, other problems exist with implementing national child support guidelines. States would lose control over an area that has traditionally been controlled by the states, creating a federalism issue.[205] Also,

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used by an administrative law judge, was approved by the Court of Appeals in an unpublished opinion, *Nerud v. Nerud* (Minn. Ct. App., filed April 21, 1992)[:]

> $1000 Net income – 100 Expense for Subsequent Child
> = $900 Reduced Net Income × .27 Guidelines for two Children
> = $243 Support for Prior Children

Id.

Used in *Nerud v. Nerud*, this approach allows the judge discretion to estimate reasonable expenses for the subsequent child, deduct this estimate from the obligor's net income, and then multiply the reduced net income by the flat percentage rate found in the guidelines to find the support award for prior children. No. C5-91-1558, 1992 WL 77545, at *2 (Minn. App. Ct. 1992).

203. *See* Margaret Campbell Haynes, *Understanding the Guidelines and the Rules: How States Are Responding to the Federal Mandate*, 16 FAM. ADVOC. 14, 19 (1993).

204. *See id.* (stating that the Commission on Interstate Child Support, which was created by the Family Support Act of 1988 to "recommend improvements to establishing and enforcing interstate child support awards," recommends that states "expressly state a multiple-families policy").

205. *See* Linda Henry Elrod, *The Federalization of Child Support Guidelines*, 6 J. AM. ACAD. MATRIM. LAW. 103, 130 (1990) ("A more serious worry of many is that

no perfect child support model has been implemented by any of the states, so enacting national child support guidelines may be premature.[206]

Finally, the likelihood of a national child support guidelines is questionable, since the pursuit of such guidelines has lessened.[207] In the meantime, the multiple family issue needs to be directly addressed by Minnesota.

2. Modify the Guidelines By Using an Income Shares Approach

It has been proposed that the Minnesota legislature should change the child support guidelines model from a percentage of incomes model to the more prominent incomes shares model. The income shares model considers the income of both parents in determining child support amounts,[208] rather than considering only the obligor's income, as the percentage of income model does.[209]

Critics of the income shares model argue that while it is ideal theoretically, in reality it does not create different results from the percentage of income model.[210] In fact, a study that compared the two models indicated that the income shares model, in some cases, actually allocates less money to children than the percentage of income model.[211] Further, changing the percentage of income model to income shares model may not be appropriate now, for this proposal has already been rejected by the legislature because it is too complicated, and the administrative burden of completely restructuring the guidelines is too large. An income shares model may be

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Congress will use child support as the means to move into other areas that have traditionally been the province of the states, such as custody and visitation issues.").

206. *See* Haynes, *Year 2000*, *supra* note 16, at 701 ("Because of the flux in state guidelines and the lack of any perfect model, the Interstate Commission believed that to propose a national child support guideline would be premature.").

207. According to Honorable Mary Louise Klas, a Minnesota trial judge, the push for national child support guidelines has dwindled, making it less likely that national guidelines will be implemented. *See* Telephone Interview with Mary Louise Klas, Dakota County Judge (Jan. 8, 1998) (notes on file with the author).

208. *See supra* notes 34-39 and accompanying text for review of the income shares model.

209. *See supra* notes 40-46 and accompanying text for a review of percentage income model.

210. *See* Telephone Interview with Reid Raymond, Associate Attorney at Hennepin County (Oct. 2, 1997) (notes on file with the author) (arguing that changing the current Minnesota guidelines will not benefit anyone simply because the results of the current guidelines will be similar to income share guidelines results); *see also* Klas, *What's Fair*, *supra* note 2 (describing how income shares model is not as good as it appears).

211. *See* Interview with Mary Louise Klas, *supra* note 90.

appropriate in the near future, however, if American women continue to increase their presence in the work force.[212]

3. Switch to Melson Model and "Essential Household Needs Allocation"

Marianne Takas proposed that child support guidelines should incorporate the Melson formula and an "essential household needs allocation," which considers the financial needs of both prior and subsequent children.[213] The benefit of this model is that it considers new spouses, subsequent children and the obligor and obligee.[214] It allocates the poverty level needs to the subsequent families before it allocates the poverty level needs to the children before the court.[215] Then, the excess resources are split between the different households.[216]

A criticism of this proposal is that it provides support for subsequent families before it considers the needs of the children before the court.[217] Further, changing the Minnesota child support guidelines to the Melson formula with the essential household needs allocation may be too complicated because of the Melson formula's complexity.[218] A complete restructuring of the Minnesota child support guidelines may also be too burdensome administratively.

4. Use County Methods When Deviating From the Guidelines in Multiple Family Situations

The Gaffney approach, the Dakota County approach or the Mower County approach may be used when the obligor supports both prior and subsequent children. The Dakota County approach is the best approach of the three because it is more fair to both prior and subsequent children. This approach is a mid-point between the prohibited equal treatment method, and the reduced

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212. *See* MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW: CASES AND MATERIALS 72 ("According to the Bureau of Labor Statistics, between 1990 and 2005, the number of . . . white females [in the labor force will increase] 19% . . . black females—33%, . . . Asian females—75%, and Hispanic females—80%.").

213. Takas, *State Guideline Options*, *supra* note 1, at 15.

214. *See id.* at 16 ("Adjusting for both new spouses and subsequent children, and of both the custodial and non-custodial parent, it performs more equitably in hypothetical calculations than other existing methods.").

215. *See id.*

216. *See id.*

217. *See id.*

218. *See supra* notes 47-52 and accompanying text (noting the complexity of the Melson formula).

ability method.[219] The Gaffney approach gives a result that is very similar to the reduced ability approach, which favors prior children too much.[220] On the other end of the spectrum, the Mower County approach favors subsequent children too much, and does not consider prior children enough.[221]

Although the Dakota County approach may be the best approach of the three because it strikes a balance between the Gaffney method and the Mower County approach, the Dakota County approach should nonetheless be rejected. It is not followed by the county that it was named after. Further, the simplicity of etching a multiple family guidelines into the existing guidelines may be a better solution.

B. The Solution That Should Be Accepted

1. Add Multiple-Family Guidelines Similar to Texas Guidelines

The Texas child support guidelines consider all of the obligor's children even if they reside in more than one household.[222]

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219. *See* Farrell-Strauss, Survey Results, *supra* note 193.

220. *See id.*

221. *See* Roehrich, *supra* note 57, at 1006. Roehrich proposed the use of the Mower County approach where the obligor files a motion to decrease his prior child support order. *See id.* Although she argues that "[t]his formula attempts to partially equalize the support awarded for all of the obligor's children," it is too generous to subsequent children. *Id.* Roehrich also proposed that the Minnesota legislature implement a multiple family formula. *See id.* at 1007. The multiple family formula was created by The Child Support Guidelines Committee Formula. *See id.* at 1003-05. This formula supposedly provides support equally to all of the obligor's children. *See id.* at 1005. The proposal does not, however, include any shortcomings of the formula.

222. See section 154.128 of the Texas Family Code, which provides:

> Computing Support for Children in More Than One Household.
>
> (a) In applying the child support guidelines for an obligor who has children in more than one household, the court shall apply the percentage guidelines in this subchapter by making the following computation:
>
> (1) determine the amount of child support that would be ordered if all children whom the obligor has the legal duty to support lived in one household by applying the schedule in this subchapter;
>
> (2) compute a child support credit for the obligor's children who are not before the court by dividing the amount determined under Subdivision (1) by the total number of children whom the obligor is obligated to support and multiplying that number by the number of the obligor's children who are not before the court;
>
> (3) determine the adjusted net resources of the obligor by subtracting the child support credit computed under Subdivision (2) from the net resources of the obligor; and
>
> (4) determine the child support amount for the children before the court by applying the percentage guidelines for one household for the number of

The court first determines the award amount that would be granted had all the obligor's children lived in the same household.[223] Then, the court takes that award amount, divides it by the total number of the obligor's children, and multiplies this number by the number of children not before the court.[224] This amount is called the "child support credit," which is subtracted from the obligor's net resources.[225] Finally, the court refers to the percentage guidelines, finds the appropriate percentage for the number of children who are before the court and the obligor's net resources, and multiplies the percentage with the net resources to find the child support award.[226] These computations may be used either "for the establishment or modification of a support order."[227]

Alternatively, the Texas guidelines include multiple family adjusted guidelines, which list percentages of net resources according to the number of children the obligor has a duty to support, other than the children before the court, and the number of children to be covered under the child support award.[228] Texas

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children of the obligor before the court to the obligor's adjusted net resources.

Id.

223. *See* § 154.128(a)(1).

224. *See* § 154.128(a)(2).

225. § 154.128(a)(3).

226. *See* § 154.128(a)(4).

227. § 154.128(b).

228. *See* § 154.129.

Alternative Method of Computing Support.

In lieu of performing the computation under the preceding section, the court may determine the child support amount for the children before the court by applying the percentages in the table below to the obligor's net resources:

MULTIPLE FAMILY ADJUSTED GUIDELINES
(% OF NET RESOURCES)

Number of other children for whom the obligor has a duty of support	Number of children before the court						
	1	2	3	4	5	6	7
0	20	25	30	35	40	40	40
1	17.5	22.5	27.38	32.2	37.33	37.71	38
2	16	20.63	25.2	30.33	35.43	36	36.44
3	14.75	19	24	29	34	34.67	35.2
4	13.6	18.33	23.14	28	32.89	33.6	34.18
5	13.33	17.86	22.5	27.22	32	32.73	33.33
6	13.14	17.5	22	26.6	31.27	32	32.62
7	13	17.22	21.6	26.09	30.67	31.38	

courts may use this guidelines table if they deem the lower percentages of the multiple family adjusted guidelines are more appropriate to use than the percentage guidelines.

The Texas guidelines are beneficial because they offer two definite methods by which courts may determine child support cases where the obligor supports both prior and subsequent children. However, a major problem with Texas Family Code section 154.128 is that it puts the children who are not before the court first, in that it deducts a "child support credit" from the obligor's income before the appropriate amount is determined for the children before the court.[229] The child support credit basically works like the reduced ability approach—the problem is that it may apply to both prior and subsequent children, depending on which children are before the court. Minnesota courts are reluctant to allow the reduced ability approach to hurt prior children.[230]

The multiple family guidelines table appears to be more attractive. With lower percentages than the first percentage guidelines, it considers both prior and subsequent children without favoring either group.[231] Further, a table that considers both prior and subsequent children would increase consistency of multiple family outcomes, and increase administrative ease.

One concern of implementing a multiple family guidelines table is that its easy application may be too simplistic. For example, the Texas guidelines allot the same costs to each of the obligor's children.[232] While this may seem fairer to subsequent children because equal costs are allocated to all of the obligor's children, it may be problematic where the actual costs associated with the different households are very different. Nonetheless, generally the assumption of equal costs may be acceptable in furthering the guidelines' goals of consistency and efficiency.

Another concern of implementing guidelines similar to the multiple family Texas guidelines is that it may provide more support to subsequent children, which is prohibited by *D'Heilly*.[233] Minnesota's implementation of a multiple family guidelines similar to Texas' should include a cap on the award amount allotted to

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Id.

229. Takas, *Child Support Guidelines, supra* note 1.

230. *See* Mancuso v. Mancuso, 417 N.W.2d 668, 673 (Minn. Ct. App. 1988).

231. *See* § 154.129.

232. *See* § 154.128(a)(2).

233. D'Heilly v. Gunderson, 428 N.W.2d 133, 133 (Minn. Ct. App. 1988). *See also* Takas, *Child Support Guidelines, supra* note 1 (criticizing the "subsequent child credit" as sometimes placing the subsequent children's needs before the prior children).

subsequent children so that it never exceeds the prior children's award if *D'Heilly* is not overturned.

Another concern of the Texas guidelines is that it permits a downward modification of a prior child support obligation based on the costs of the subsequent children to the obligor.[234] This benefit to subsequent children will devastate prior children, for lowering the prior child support award will take away money the prior family relied upon to meet financial responsibilities. In addition, if courts grant downward modification to obligors, proper notice and a hearing must be given to prior families to avoid due process problems.

C. How to Implement the Accepted Solution

Because the makeup of multiple families varies considerably, different situations must be addressed differently. One of the biggest problems in dealing with the issue of child support and multiple families is the failure to separate, distinguish and address the different scenarios involved with multiple families. Therefore, the following proposal is organized by different multiple family scenarios.

1. Non-Custodial Obligor Owes Child Support for Both Prior and Subsequent Children

Where the obligor lives with none of his children and owes child support to his prior children, and the court is determining child support for his subsequent children, Minnesota courts should follow the original Minnesota child support guidelines. This means that the reduced ability approach should be followed, which determines the subsequent children's child support order from the obligor's income, less the prior support order.

Even though the subsequent children will be awarded a substantial amount less than the prior children's award, the reduced ability approach should apply because the prior family is relying on its child support award. Further, the subsequent family, while still intact, always lived on the obligor's income (and possibly the

234. *See* Oldham, *Abating*, *supra* note 74, at 876 (pointing out that some states, such as Texas, Oregon and Ohio, allow downward modifications of prior child support orders due to subsequent children) (citing TEX. FAM. CODE. § 14.055(j) (West Supp. 1994)).

Texas case law states that "[a] support order may be modified only as to subsequent child support obligations." Willis v. Willis, 826 S.W.2d 700, 702 (Tex. Ct. App. 1992) (citing Richey v. Bolerjack, 594 S.W.2d 795, 799 (Tex. Civ. App. – Tyler 1980, *no writ*) ("Under the family code an order providing for support may be modified only as to subsequent child support obligations.") (citations omitted).

income of the obligor's spouse) less the prior family's child support award. In unusual circumstances, such as "substantial income" or less household costs due to an extremely large family, deviation may be appropriate. However, generally, the guidelines should be followed in this particular scenario.

2. Determination of Subsequent Children Award While Obligor Resides with Prior Children

A multiple family guidelines should be implemented and followed when the court determines child support for subsequent children while the obligor lives with his prior children. This approach will be fairer to both prior and subsequent children by considering the obligor's obligation to subsequent children, yet will still be consistent with *D'Heilly*'s requirement that a child support order for a subsequent child may never be higher than a child support order for a prior child.[235]

3. Determination of Prior Children's Award While Obligor Resides with Subsequent Children

The multiple family guidelines should also be used where the court determines a child support award for prior children while the obligor lives with his subsequent children. This would also apply to paternity cases, where the father has a prior child, later marries and has subsequent children, paternity is established years later while the father still lives with the subsequent family, and the mother wants child support for the prior child. All of the obligor's children should be considered in this situation. This method complies with the *D'Heilly* notion that subsequent children should not be allocated more money than the prior child.[236]

If the obligor requests a downward modification of the prior child support award because of the costs he incurred by having subsequent children, the downward modification should be denied, for the prior family has relied on the court-ordered obligation, and the obligor chose the financial responsibilities of both families. Further, excluding the multiple family guidelines from applying in this situation is necessary since Minnesota Courts generally do not allow a downward modification of a child support obligation in light of a second family.

However, if the obligee requests an upward modification of the prior child support award, the costs of the obligor's subsequent

235. *See* 428 N.W.2d at 136.
236. *See id.*

family should be relevant in determining the appropriateness of an increase. Obligors should be able to use their financial obligations to subsequent families as a defense to an upward modification of their prior children's child support award. These guidelines will provide Minnesota courts with a consistent and precise way of dealing with cases and post-decree modifications involving multiple families.

VIII. Conclusion

While the current Minnesota child support guidelines lend themselves to efficient application because of their simplicity, they fail to adequately address and provide courts guidance when determining child support awards and post-decree modifications when the obligor has multiple families. Guidelines for multiple families that consider both prior and subsequent children should be implemented for the use of determining child support awards and post-decree modifications when the obligor supports both prior and subsequent children. This suggestion will increase the consistency of courts in Minnesota and more fairly allocate the obligor's limited resources to prior and subsequent children.