Do Minnesota Child Support Guidelines "Support" Children?

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Although the dominant culture continues to look to the two-parent nuclear family as the theoretical ideal, policymakers can no longer neglect the growing number of children who must rely exclusively on their mothers for support. Our traditional system of family law has shown undue concern for fathers by permitting absentee parents to avoid any meaningful child support. Instead it has shifted the economic burden to custodial parents and taxpayers.[1] As a result, children living in single-parent families suffer daily from economic deprivation.[2] Widespread dissatisfaction with the system has resulted in a series of legislative proposals to increase the amount and improve enforcement of individual child support orders.

A central theme in these reform efforts has been the passage of child support guidelines which limit judicial discretion in setting award amounts. In 1983, Minnesota joined twelve other states by enacting its own Child Support Guidelines Statute.[3] This note analyzes Minnesota's initial experience with support guidelines and provides assistance for future reform.

State support guidelines have become increasingly important since Congress passed the Child Support Enforcement Amendments of 1984.[4] Those amendments make the trend toward guide-

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1. Judith Cassetty, *Emerging Issues in Child-Support Policy and Practice*, in The Parental Child-Support Obligation 3 (Judith Cassetty ed. 1983).

2. Gladys Kessler, *Crisis in Child Support*, Trial, Dec. 1984, at 29.

3. Minn. Stat. § 518.551(5) (1982 & Supp. 1983), *amended by* Minn. Stat. § 518.551(5) (1984).

4. Pub. L. No. 98-378, 98 Stat. 1305 (codified in scattered sections of 42 U.S.C.A. & 26 U.S.C.A. (West Supp. 1985)). The Child Support Enforcement Amendments of 1984 became law on Aug. 16, 1984. H.R. 4325, 98th Cong., 2d Sess. (1984). Under the statutes each state is to develop child support guidelines by October 1, 1987. The guidelines may be established by statute or through judicial or administrative channels. 42 U.S.C.A. § 667(a) (West Supp. 1985). Although the guidelines need

lines a national objective by requiring states to adopt child support guidelines in order to remain eligible for federal Aid to Families with Dependent Children (AFDC) funds. Although guidelines reflect many legislatures' belief that all children should receive a basic minimum of support, they fail to reflect circumstances that may entitle the child to a higher award. Therefore, use of guidelines may deprive children of fair support unless judges also consider the specific relevant circumstances of each case. Limiting judicial discretion in setting support awards may be appropriate and adequate as a *floor* principle, but not as a *ceiling*.

Part I of this note considers the problem of inadequate child support. Part II discusses the general principles courts use to determine support awards. Part III examines Minnesota's Child Support Guidelines Statute, and finally, Part IV suggests further reforms to protect children's right to adequate support.

I. The Problem

Studies portray a child support system which has failed its essential purpose. Census Bureau statistics show that one of every five children in the United States is potentially eligible for financial support from an absent parent,[5] but that many absent parents do not provide support. More than half of the eligible children were not supported in any measure by their absent parents (only fifty-nine percent of those eligible were awarded any support, and of those awarded support only forty-nine percent received the full amount, while twenty-eight percent received nothing).[6]

Nationwide statistics relating to custody of more than ten million children showed that seventy-five percent of divorced or separated mothers received *no child support at all.* Almost all of these mothers (ninety-seven percent) received less than the $250 per month estimated average cost of raising a child in a family with $1,000 per month income.[7] Most alarming is the statistic that

not be binding, they must be made available to all judges and officials who determine support amounts. 42 U.S.C.A. § 667(b) (West Supp. 1985).

5. Irwin Garfinkel, David Betson, Thomas Corbett & Sherwood Zink, *A Proposal For Comprehensive Reform of the Child-Support System in Wisconsin* [hereinafter cited as Wisconsin Reform], in The Parental Child-Support Obligation, *supra* note 1, at 263.

6. *Id.*

7. Sanford Katz, *A Historical Perspective on Child-Support Laws in the United States*, in The Parental Child-Support Obligation, *supra* note 1, at 17, 20. One may reconcile seeming disparity between statistics from this study (75% of the mothers received no support) and the Census Bureau's (57% of the children received no support) by considering the likelihood that mothers with only one child do not receive awards or payments as frequently as mothers with two or more children in their custody. This may be because mothers of only one child are more able to assume

between 1978 and 1983, in real dollar terms, child support payments decreased by fifteen percent.[8]

Minnesota children also suffer the consequences of inadequate or nonexistent child support.[9] Statistics from a 1980 Minnesota study show that single-parent families headed by women with at least one child under six are most severely burdened—half of these families live in poverty.[10] Despite low average child support awards, the payments nonetheless constitute a significant part of family income for many custodial parents.[11] These parents and children directly suffer the consequences of inadequate or nonsupport.

Minority children suffer most of all.[12] More than two-thirds of Black and Hispanic households headed by women fall below the poverty line.[13] The median income of minority families is considerably lower than the median income of white families. Regardless of their previous economic circumstances, mothers and children are usually poorer after divorce.[14]

Mothers and fathers have an equal legal duty to support their children.[15] The language of most child support statutes is gender neutral. When the parents do not live together as a family, however, these laws apply almost universally to women as obligees and men as obligors. Few children (about ten percent) live with their

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total responsibility for child support or that courts hesitate to burden fathers with child support when a child is born out of wedlock or both.

8. Bureau of the Census, U.S. Dep't of Commerce, Ser. P-23, No. 141, Child Support and Alimony: 1983 at 2 (1985) [hereinafter cited as Census Bureau].

9. Nancy Jones, *Equity and the Child Support Guidelines: Irreconcilably Inconsistent?*, 2 Minn. Fam. L.J. 22, 23 (1984).

10. *Id.* at 23 n.8 (citing Hubert H. Humphrey Inst. of Pub. Affairs, Univ. of Minn., A Statistical Look At The Economic Status of Women In Minnesota And The United States (March 1983)).

11. Annemette Sorenson & Maurice MacDonald, *An Analysis of Child-Support Transfers*, in The Parental Child-Support Obligation, *supra* note 1, at 35, 44.

12. When race is taken into account material conditions are exacerbated. While minority children share the burdens of poverty with other children of divorced families, these children suffer from the additional burdens of race and class discrimination. Minority status women who support families retain the highest rates of poverty. According to current population reports, 67% of white women but only 34% of Black and 41% of Hispanic women had been awarded child support payments as of 1984. Census Bureau, *supra* note 8, at 2.

13. Kessler, *supra* note 2, at 30.

14. U.S. Comm. on Civil Rights, A Growing Crisis: Disadvantaged Women and Their Children 11-14 (1983) [hereinafter cited as Civil Rights].

15. Lucy Yee, *What Really Happens in Child-Support Cases: An Empirical Study of Establishment and Enforcement of Child Support Orders in the Denver District Court*, 57 Den. L.J. 21, 25 (1979). Minn. Stat. § 518.17(4) (1984) states: "The court may order either or both parents" to pay support.

fathers following divorce.[16] Moreover, courts order only a small percentage of these children's mothers to pay support.[17] For that reason, this article refers to custodial parents as women or mothers and to noncustodial parents as men or fathers.

The child support problem contributes to the "feminization of poverty."[18] Commentators describe this as "a new phrase for an old problem: the large majority of poor people are women and children."[19] Increasing divorce rates and inadequate child support systems transfer the bulk of family care expenses to women. This process exacerbates broader economic discrimination against women reflected in the 59¢ that women earn for every $1.00 that men earn[20] and forces increasingly disproportionate numbers of mothers and children into the poverty class every year.[21] Alarmed by the rapidly accelerating rate of impoverishment, the National Advisory Council on Economic Opportunity predicts that if the current trend continues, women and children will make up nearly all of the poor in the United States by the year 2000.[22]

Not all concern over the child support problem focuses on the consequences for children and their parents. Efforts to reduce welfare costs generate much of the concern over inadequate child

16. Nan Hunter, *Child Support Law and Policy: The Systematic Imposition of Costs on Women*, 6 Harv. Women's L.J. 1, 2 (1983).

17. In a 1981 Minnesota study researchers were startled to discover only one case out of 104 in which a mother was ordered to pay support although the father was awarded custody in a number of cases. Stephen Aldrich & Jean Klein Orsello, *Support and Maintenance Awards in Three Minnesota Counties*, 1 Minn. Fam. L.J. 35, 37 (1982).

18. Diana Pearce & Harriet McAdoo, Nat'l Advisory Council on Economic Opportunity, Women and Children: Alone and In Poverty (1981) (citing Diana Pearce, *The Feminization of Poverty: Women, Work and Welfare*, Urb. & Social Change Rev., Feb. 1978).

19. *Proposed 1983 Legislative Positions*, Minn. Women Law. Newsletter, Nov. 1983, at i, viii. *See also* Pearce & McAdoo, *supra* note 18. Some commentators criticize this concept. Feminist author and professor Angela Davis argues that Black, Chicana and Indian women have long experienced poverty. Davis asserts that women and poverty did not become a valid issue until it began to affect white, middle-class women, typically white women who fall into poverty as a result of divorce. Address by Angela Davis, Minnesota Coalition for Battered Women (Nov. 15, 1984); *See also Ferraro Didn't Help Nonwhite Women, Angela Davis Says*, Minneapolis Star & Tribune, Nov. 16, 1984, at A8, col. 1.

20. Hunter, *supra* note 16, at 21. Statistics show an earnings disadvantage for all women compared to men. Black and Hispanic women are even more disadvantaged. Hispanic women earn only half and Black women only 54% of the median income of white men. Civil Rights, *supra* note 14, at 23.

21. Civil Rights, *supra* note 14, at 14. Nearly three million women with children from an absent father had incomes below the poverty level in 1983. Census Bureau, *supra* note 8, at 1, 2.

22. Kessler, *supra* note 2, at 30 (citing National Advisory Council on Economic Opportunity, Critical Choices for the 80's 19 (1980)).

support payments.[23] Minnesota's 1983 Child Support Guidelines statute[24] stemmed from this major concern. The guidelines as originally introduced applied only if the children of divorcing parties received public assistance. State Senator Linda Berglin, a principal author of the bill, maintains that a Minnesota county precipitated the change from voluntary to mandatory public assistance guidelines when the county stopped following the guidelines in AFDC cases and ordered lower support payments instead. Public assistance rolls, therefore, increased.[25] To avoid this result, the statute as finally enacted mandated use of the guidelines. In addition, the enacted guidelines applied to all dissolution cases, thereby extending the inherent fairness of the floor principle to all awards and preventing fathers whose children received AFDC from challenging the statute on equal protection grounds.[26]

Traditional judicial discretion in setting child support amounts produces inconsistent awards;[27] as a result of such extreme inconsistencies, both the parties involved and the general public perceive the system as arbitrary, irrational, and unfair.[28] Some observers feel that the system allows judges to exercise a pro-male bias against enforcing an absent father's responsibility. Moreover, many officials are simply bored with child support cases.[29] Consequently, judges and referees do not adequately consider the child's needs when they determine the support amount.[30]

A Denver study demonstrated the relative insignificance which some judges assign to child support. Two-thirds of the fathers in the study were ordered to pay less child support per month than their car payments.[31] The wide variations among individual awards in the study portray the lack of an objective standard even more pointedly. For instance, no factor explained why the same judge ordered one father to pay $120 of his $450 net monthly income to support his two children, and yet ordered another father to pay only $50 of his $900 net monthly income to support his two children. For many persons, such obvious

23. Cassetty, *supra* note 1, at 3.

24. Minn. Stat. § 518.551(5) (1984).

25. Cathy Gorlin, *New Legislation Makes Major Changes In Child Support Obligations*, Minn. Trial Law., Sept.-Oct. 1983, at 6.

26. *See infra* note 81 and accompanying text.

27. Harry Krause, Child Support in America: The Legal Perspective 15 (1981).

28. Hunter, *supra* note 16, at 1.

29. Harry Krause, *Reflections on Child Support*, 17 Fam. L.Q. 109, 111 (1983).

30. Yee, *supra* note 15, at 21, 50.

31. *Id.* at 36. The court ordered one father in this study with a $250/month car payment to pay $80/month child support. Another, with $1,000/month income and car payment of $211/month, was ordered to pay $100/month to support his two children.

inconsistencies in the award process discredit the entire child support system.

Inconsistent orders generate noncompliance as well as disrespect for the system.[32] Until recently the system depended largely on voluntary compliance to enforce child support awards. Consequently, it provided little real support to mothers and children. Three major procedural deficiencies in the system provide incentives for fathers *not* to pay. First, courts do not keep payment records—they consider that to be the mother's duty. Even if the court keeps records, nonpayment triggers no enforcement mechanism. Second, judges often exercise discretion to forgive arrearages if the father promises to pay regularly in the future (or even if he just has an "excuse"). Substantial judgments are not available to encourage fathers to keep their payments current. Third, enforcement through adversary proceedings takes time and money. Crowded court dockets and legal costs inhibit mothers from asserting their right to payments.[33]

Inequities in child support originate in the awards process and ineffective enforcement sustains, and even intensifies, the injustice. As a result, fathers' failure to make legally mandated child support payments constitutes "one of the most massive instances of lawlessness in this country."[34]

New enforcement legislation is designed to remedy this situation. The 1984 federal legislation[35] provides several financial incentives for states to encourage child support payments.[36] For example, the law requires states to expand remedies available to enforce child support awards. One remedy, available to both welfare and nonwelfare families, is mandatory income withholding when an absent parent is one month behind in child support payments.[37] Hennepin County, Minnesota hired eighteen additional employees to provide these collection services. Under the new

32. Judith Cassetty addresses the noncompliance issue with this observation: "One cannot help but wonder what our record of voluntary compliance with income-tax laws would look like if tax liability were established on a case-by-case basis, as is the child-support obligation." Cassetty, *supra* note 1, at 6.

33. Hunter, *supra* note 16, at 13-14.

34. Isabel Marcus, *The Sexual Politics of Current Child Support*, in The Parental Child-Support Obligation, *supra* note 1, at 29, 33.

35. Pub. L. No. 98-378, 98 Stat. 1305 (codified in scattered sections of 42 U.S.C.A. & 26 U.S.C.A. (West Supp. 1985)).

36. 42 U.S.C.A. §§ 655, 658(a) (West Supp. 1985). Financial incentives include federal matching of administrative costs, 90% matching for automated management systems used in income withholding and other required procedures, as well as rewards based on the amount collected in non-AFDC cases by an efficient, cost-effective state system.

37. 42 U.S.C.A. § 666(b)(3) (West Supp. 1985).

Act, the federal government will reimburse Hennepin County for seventy percent of the cost.[38] Another mandatory provision imposes a lien on the obligor's property in the amount of unpaid child support.[39] Minnesota statutes largely conform to these requirements.[40] While children benefit directly from withholding provisions, lien provisions largely benefit the obligee.[41] Income withholding increases the likelihood of timely support payments, whereas lien provisions are not readily convertible into cash. These laws, however, strongly indicate a change in public policy toward enforcement—noncompliance is no longer acceptable.[42]

II. General Principles

Child support law stems from the general moral principle that obliges parents to share their resources with their children, even if it means a sacrifice in their own standard of living.[43] So long as the family shares a single household, that sharing is presumed natural—unavoidable.[44] But the trend toward short-term marriage[45] has made the general rule much more difficult to apply. When a father does not live with his child, the question of how to calculate the amount to be "shared" inevitably arises. Physical separation requires a conscious act to share income.[46] Although the traditional rule imposed a moral duty to act without adequate legal remedy, this duty evolved into an equitable doctrine.[47]

No general agreement exists as to what should be the goals and purposes of child support. Thus, legal scholars advance competing theories of the fairest way to determine support awards. Serious social and political considerations are at issue in developing any child support formula. Protecting the child's interest is the ostensible goal of all child support law, yet other interests also come into play. An equitable allocation of the support burden be-

38. Joe Kimball, *County Hiring 18 Workers to Help Collect Child-support Payments*, Minneapolis Star & Tribune, July 3, 1984, at B4, col. 1.

39. 42 U.S.C.A. § 666(a)(4) (West Supp. 1985).

40. Minn. Stat. § 518.611(3) (1984) provides for income withholding. Minn. Stat. §§ 548.09(1), 548.091(2) (1984) contain lien provisions.

41. The custodial parent who has been able to compensate for the unpaid support will be repaid. The child who has been deprived of parental support is without remedy.

42. H. Robert Hahlo, *Child Support: A Global View*, in The Parental Child-Support Obligation, *supra* note 1, at 195.

43. *Id*.

44. Wisconsin Reform, *supra* note 5, at 263.

45. Hahlo, *supra* note 42, at 204.

46. Wisconsin Reform, *supra* note 5, at 263.

47. Hunter, *supra* note 16, at 3.

tween the parents serves the child's best interests, as well as brings a standard of "basic fairness" to the child support system. Such a standard is necessary to the political success of any government intervention program. Political success also depends on social acceptability of the method used to determine support. In their endeavors to achieve fairness and general acceptance, courts and legislatures have utilized two basic approaches: the cost-sharing approach and the resource-sharing approach. Neither approach is adequate alone.

The cost-sharing approach is the more popular of the two approaches.[48] This approach first assumes that parents are equally responsible for their children; second, it assumes that courts can objectively determine the cost of supporting a child; and finally, it mandates equal apportionment of that cost between the parents.

To implement a cost-sharing approach a court must define the "cost" of raising a child. Under one method, courts define cost as the basic necessities needed to meet minimum welfare standards. Other cost-sharing methods consider the family's relative standard of living but disagree about whether the cost should relate to the mother's or father's standard of living or some median standard. Some systems do not consider the relative cost of support because no reliable measure is available.[49] Economist Allan King disputes that claim and points to government data resources and state wrongful death statutes which set out methods of determining levels of personal consumption for family members.[50]

In any case, support awards based solely on dividing child raising costs usually result in the mother/child household living at a lower standard than the father's household and a relative increase in the father's disposable income. The disparity between households increases as the father's income rises.[51] This inequity occurs because splitting costs evenly between parents with widely disparate incomes places a heavier proportion of the burden on the mother. She is almost certainly the poorer parent, and thus, the award forces her to devote a larger portion of her income for child support. She may have little remaining for her own support, causing the entire mother/child household to live in poverty.

By contrast, the resource-sharing approach posits that the child is the "innocent party" in divorce, and therefore, child support should provide the custodial household with the same stan-

48. Cassetty, *supra* note 1, at 5.

49. Barbara Bergmann, *Setting Appropriate Levels Of Child-Support Payments*, in The Parental Child-Support Obligation, *supra* note 1, at 115.

50. Allan King, *Economists in Marital Contests*, Trial, Mar. 1984, at 46, 47.

51. Hunter, *supra* note 16, at 10, 20.

dard of living which the child would have enjoyed if her parents had remained together.[52] This approach recognizes, as social scientists suggest, that children of divorced parents are no more likely than other children to experience school or social problems provided that their economic status does not suffer. Maintaining the child's previous standard of living after divorce is not only in the child's best interest, but benefits society in general.[53]

Despite the advantages of the resource-sharing approach, courts seldom issue orders based on a pure version of the approach. The courts reason that some modification of the formula is necessary to protect the father's income. It is impossible to provide the child with a higher standard of living than her mother when they share the same household.[54] The two households that result from divorce necessarily generate more expense than the previous single household.[55] Awards assuring that the child's standard of living does not decline will allocate the entire burden of the family's increased expenses to the father.

In a comparison study of various systems, a method based on the resource-sharing approach produced the highest awards. In the first step of this method, the court computes the expenses of maintaining an additional household after divorce. Each new household's prior standard of living is then reduced by the same percentage to accommodate the extra expense. Each adult and each child suffers approximately the same level of downward readjustment, presuming that neither household can afford its previous lifestyle.[56]

Another modified resource-sharing system stresses uniformity. Under this system, all fathers with similar incomes and numbers of children to support pay the same amount of support.[57] This method is easy to apply. To determine awards, court officials simply multiply the father's income by the percentage indicated in a table (similar to the Minnesota Guidelines) using only two factors, the father's income and number of children. Emphasizing uniformity alone, however, elevates procedural efficiency above substantive fairness. Mothers and children whose inadequate awards have pushed them to the brink of poverty find no comfort in knowing that the amount is uniform among fathers. The most

52. Sorenson & MacDonald, *supra* note 11, at 36.

53. Cassetty, *supra* note 1, at 4.

54. Isabel Sawhill, *Developing Normative Standards for Child-Support Payments*, in The Parental Child-Support Obligation, *supra* note 1, at 79, 82.

55. King, *supra* note 50, at 47.

56. Hunter, *supra* note 16, at 12.

57. Sorenson & MacDonald, *supra* note 11, at 36.

equitable system—equitable for each parent and for the child—combines the cost-sharing and income-sharing approaches.

Although equalizing costs of child raising between men and women is equitable, it does not resolve the support problems of parents who lack enough resources to divide.[58] The support problem is more complex when the father acquires a second family. Although legal theory holds that assumption of additional parental obligations does not justify a reduction to an existing child support decree, the "first-family-first" theory and actual practice often diverge.[59] As a result, the single parent households which replace the traditional nuclear family require more help from government sources if the household is to live above the poverty level.[60] Reform must address these issues.

With few exceptions, child support law concludes that the child's right to share the resources of both parents is superior to the right of parents to retain them.[61] Awards are set, however, in an adversarial hearing where the child's interests are not directly represented. In the context of a power structure in which adults control children and men control women, outcomes frequently favor fathers over mothers and children.[62]

In a Denver study, the highest awards resulted when the father dealt alone with the district attorney. Lower amounts were products of the full interaction of judge, district attorney, the father, and his attorney.[63] These results challenge the notion that the adversary process is in the child's best interest. Adjudicated amounts also affect negotiated settlements. Stipulated awards reflect judicial policy in the jurisdiction, for they depend on the amount which each party's attorney predicts that the judge would award.[64] Enforcement and modification of awards, which require an adversarial proceeding, bring the same power structure into

58. Hunter, *supra* note 16, at 15.

59. Carol Bruch, *Developing Normative Standards for Child-Support Payments: A Critique of Current Practice*, in The Parental Child-Support Obligation, *supra* note 1, at 119, 126.

60. Glenn Collins, *Need Seen for Government to Offer Families More Help*, Minneapolis Star & Tribune, Oct. 28, 1984, at F16, col. 1.

61. Cassetty, *supra* note 1, at 7. The Minnesota Supreme Court expressed this attitude in Mund v. Mund, 252 Minn. 442, 445-46, 90 N.W.2d 309, 312 (1958) (parents may not, even by court adopted stipulation, absolve themselves of the obligation to support their offspring) and in Quist v. Quist, 207 Minn. 257, 260, 290 N.W. 561, 563 (1940) (the obligation to support the issue of the marriage is exactly the same after the divorce as it was before the dissolution of the marriage).

62. Cassetty, *supra* note 1, at 7.

63. Yee, *supra* note 15, at 49.

64. Hunter, *supra* note 16, at 6 n.31.

play. The result is a pattern of "set" awards subject to voluntary compliance.

Another purpose of child support is social control. Through economic rewards and penalties, the system enforces a specific form of social organization—the traditional male-headed nuclear family. Society uses the system to punish the parent it considers responsible for the divorce and to reward intact families.[65] Arbitrary and inconsistent support awards create the threat necessary to sustain this control. Fathers threatened with extremely *high* child support awards are constrained from leaving the family lest they "pay dearly for their action." Mothers, on the other hand, fear that both they and their children will "pay" for divorce through *low* child support awards. Faced with these threats, both parents frequently prefer the support arrangement during marriage to the unknown risks of court-awarded child support. Thus, they remain married, perpetuating gender stereotypes whereby males maintain power over females by dispensing the money.[66]

In practice, child support awards rarely attain any of the purported goals which justify them. Current systems do not meet the child's minimal needs. They do not insure that the child will either retain the standard of living she enjoyed during the marriage or share the standard of living of her parents after divorce.[67] Nevertheless, the essential purpose of support statutes continues to be the establishment of an "effective method [of child support] that is paramountly concerned with the protection of children's interests."[68] The present system's failure to carry out this intent has forced lawmakers to develop new guidelines to insure that support awards are in the best interests of the child.

III. Minnesota Child Support Law

Minnesota's child support problems parallel the national dilemma.[69] Historically, Minnesota judges had unfettered discretion

65. Conservative theorist George Gilder advocates authoritarian family relationships, recommending deliberately lower salaries for women, as well as government allowances for intact families. Hunter, *supra* note 16, at 23.

66. Marcus, *supra* note 34, at 32.

67. Support orders are typically less than half the amount necessary to provide a child with even a low-cost standard of living. Bruch, *supra* note 59, at 119.

68. Katz, *supra* note 7, at 25. The Minnesota Supreme Court recognized this importance by referring to the "basic right of minor children to support by the parents" and refusing to be bound by a parental agreement because courts "will be controlled by the welfare of the child as the paramount consideration" in Tammen v. Tammen, 289 Minn. 28, 30, 182 N.W.2d 840, 842 (1970).

69. *See supra* notes 9, 11 and accompanying text.

to determine the amount of support awards.[70] In 1951, the Minnesota Supreme Court held that "[f]ixing . . . the amount to be paid as support for minor children rests largely in the discretion of the trial court. Ordinarily, we will not disturb such award unless there is a clear abuse of discretion."[71] Beginning in 1969, however, state legislation commanded Minnesota courts to consider specific relevant factors in setting awards.[72] The 1983 and 1984 state legislatures created methods of computing and enforcing child support awards. The legislatures intended all of the changes to increase uniformity by limiting judicial discretion.

It is clear that each reform did not affect the system as the legislature intended. While concern over the growing child support problem prompted these changes, it is not apparent that the changes serve the children's best interests. For the most part, the changes address equitable distribution of the child support burden and are insufficient to accomplish the legislature's goals. Confusion surrounding application of the statutes continues the pattern of inequitably low awards and dilutes their potential benefit to children. In order to meet the children's needs effectively, the system requires further revision.

A. Child Support Guidelines

The most significant change in child support law was the enactment of the Minnesota Guidelines Statute.[73] The statute established the child support guidelines presented in the table below:

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70. Minnesota statutes prior to 1969 did not contain any specific criteria for the judiciary to consider when determining support.

71. Krusemark v. Krusemark, 232 Minn. 416, 418, 46 N.W.2d 647, 649 (1951) (citing three previous decisions). In 1957, the Minnesota Supreme Court again deferred to the trial court's award of support under a decree of divorce. Johnson v. Johnson, 250 Minn. 282, 84 N.W.2d 249 (1957).

72. The legislature has added specific relevant criteria through the years. The current statute lists five relevant factors which judges must consider in determining support. The relevant factors cited in the statute include:

(a) the financial resources and needs of the child;

(b) the financial resources and needs of the custodial parent;

(c) the standard of living the child would have enjoyed had the marriage not been dissolved;

(d) the physical and emotional condition of the child, and his educational needs; and

(e) the financial resources and needs of the noncustodial parent.

Minn. Stat. § 518.17(4) (1984).

73. Minn. Stat. § 518.551(5) (1984).

Guidelines Table[74]

Net Income Per Month of Obligor	Number of Children						
	1	2	3	4	5	6	7 or more
$400 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.						
$401 - 500	14%	17%	20%	22%	24%	26%	28%
$501 - 550	15%	18%	21%	24%	26%	28%	30%
$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 - 6000	25%	30%	35%	39%	43%	47%	50%

Guidelines for support for an obligor with a monthly income of $6001 or more shall be the same dollar amounts as provided for in the guidelines for an obligor with a monthly income of $6000.

The guidelines determine a father's monthly support obligation by matching his monthly net income with the number of children he supports. As his income increases, the percentage of income designated for child support increases to reflect the obligor's superior ability to pay. As the number of dependent children increases, the percentage of income further increases to reflect the greater cost of support.

1. Deviating from the guidelines.

The legislature originally intended the Guidelines Statute to apply only in public assistance cases,[75] but amended it in committee to apply to all obligors as a standard for awards.[76] The statute mandates consideration of the guidelines in each child support case, yet provides that the court may exceed or modify the guidelines by considering evidence relative to the specific criteria set out

74. *Id.*
75. Gorlin, *supra* note 25, at 6.
76. *Id.*

in the statute.[77]

Interpretations of the statutory requirements for deviating from the guidelines differ. If an order deviates *below* the guidelines, the requirements are clear. Both the Guidelines Statute and the Minnesota Child Support Statute[78] require "express findings of fact" to explain the departure.[79] Requirements are not as clear for departures *above* the guidelines which are specifically addressed only in the Guidelines Statute. The court may increase the award "without making express findings by agreement of the parties or by making further findings."[80]

By incorporating the guidelines into the Child Support Statute, the legislature intended to extend the statutory minimum provisions to all awards. State Senators Linda Berglin and Ronald Sieloff recall that this was the legislators' primary reason for amending the bill.[81] Two statutory provisions also support this conclusion: 1) the previous Child Support Statute remains in force and instructs courts to consider certain criteria when they determine awards;[82] and 2) the incorporating statute sets out requirements only for orders *below* the guidelines.[83]

When the Guidelines Statute went into effect, legal commentators agreed that upward deviations in non-public assistance cases did not require additional findings.[84] The only difference of opinion concerned whether the statute required express findings for upward departures in public assistance cases.[85] Several Minnesota Court of Appeals decisions, however, hold that any upward departure requires express findings.

In *Johnson v. Johnson*,[86] a non-public assistance case, the

77. *See* Minn. Stat. § 518.551(5)(e) (1984).

78. Minn. Stat. § 518.17(4), (5) (1984).

79. *Id.*; Minn. Stat. § 518.551(5) (1984).

80. Minn. Stat. § 518.551(5) (1984).

81. Interviews with State Senators Linda Berglin and Ronald Sieloff, members of the legislature when the guidelines were enacted, confirm that the "floor" was to extend to all awards. Another reason was to withstand any possible equal protection argument which fathers whose children were AFDC recipients might make if the statute applied only to those awards which involved public assistance. *See infra* note 93.

82. Minn. Stat. § 518.17 (1984).

83. *Id.* § 518.17(5).

84. Jean Gerval, *1983 Changes in Family Law*, Bench & Bar, Oct. 1983, at 9. *See also* Gorlin, *supra* note 25, at 24; Cathy Gorlin, *1983 Legislature Enacts New Family Laws*, Hennepin Law., July-Aug. 1983, at 13.

85. *Compare* Gerval, *supra* note 84, at 9 ("In public assistance cases the court may only deviate above or below the guidelines if the court makes express findings of fact. . . .") *with* Nancy Livingston, *Child Support Payments Now Easier to Compute*, St. Paul Dispatch, Sept. 13, 1983, at A1, col. 2 ("If judges or referees deviate downward . . . they have to explain in writing why they did so.").

86. 352 N.W.2d 819 (Minn. Ct. App. 1984).

trial court ordered payments substantially greater than the guidelines indicated. The court of appeals reversed and remanded on the ground that the trial court did not make "findings" to justify an upward departure, reasoning that the Guidelines Statute "specifically requires findings to justify an upward departure from the guidelines when mutual consent is not present."[87] The court of appeals made no reference as to the exact nature of the required findings. Two weeks later, however, in *Mentzos v. Mentzos*,[88] the court held that the statute requires an "express finding" to support a substantial deviation above the guidelines. These court of appeals cases set precedent: all departures require express findings.

The *Mentzos* court held that by incorporating the financial guidelines, the Child Support Statute also adopted the subdivisions governing their use,[89] including the requirement that courts issue findings whenever an award deviates from the guidelines. *Mentzos* was not, however, a unanimous decision. In her dissent Judge Huspeni noted the difference between the requirements for upward departures in the Guidelines Statute and those in the Child Support Statute and concluded that the difference was not accidental.[90] Instead, she argued that it indicated legislative intent to allow orders in excess of the guidelines without express findings in non-public assistance cases; upward departures must still, of course, reflect consideration of the relevant factors set forth in the Child Support Statute.[91] Standard rules of statutory construction support Judge Huspeni's conclusion. The Child Support Statute, which incorporated the guidelines tables for use in all cases, contains requirements for downward departures, but does not refer to upward departures. The omission indicates legislative intent to apply the requirement for upward departures only in public assistance cases.[92]

This construction correlates with the statute's legislative purpose. The guidelines were not enacted to determine awards automatically. Instead, the legislature intended to create only a "floor"

87. *Id.* at 821.

88. 353 N.W.2d 683 (Minn. Ct. App. 1984).

89. *Id.* at 684.

90. *Id.* at 685.

91. *Id.*

92. If the legislature intended to adopt all the subdivisions of the Guidelines Statute which apply in public assistance cases, repeating the requirements for downward departures would have been unnecessary. If the legislature merely intended to repeat the requirements in the Child Support Statute, the language would be the same.

or minimum support obligation for noncustodial parents.[93] By mandating a floor and not a ceiling concept, the legislature sought to increase inequitably low awards, but intended that courts vary the amount higher than the tables when individual circumstances allowed. This mechanism was to allay a general criticism of the guidelines concept: most tables do not lend themselves to consideration of individual relevant circumstances.[94] State Senator Ronald Sieloff, an attorney and member of the legislature which enacted the guidelines, condemns use of the guidelines as a rule of law without liberal deviation "when common sense suggests." Such rigid application of the guidelines "defeat[s] the purpose of the statute."[95] As Senator Sieloff indicates, the legislature envisioned courts freely ordering upward departures.

In many respects, the guidelines are not used as the legislature intended. Instead they have become the primary if not the sole determinant of awards. When asked in a newspaper interview how he uses the guidelines, family court referee Gerald Rutman quipped: "I don't have to think anymore. When a guy wants to know what his support is going to be, I just look at the chart."[96] In a more serious moment, Rutman added that he "almost always follow[s] the guidelines unless the custodial parent's income is so large that the guidelines payment appears to be unfair to the noncustodial parent."[97] Rutman reasoned that the guidelines were fair and a means of speeding up the determination of support process. Such an approach directly conflicts with the legislature's express intent that the guidelines fix the minimum amount of support awarded in most cases rather than the maximum.[98] Present use of the guidelines confirms the fear expressed by the Family Law Section Council of the Illinois State Bar. The council reluctantly endorsed limited use of support schedules, reasoning that "[d]espite repeated emphasis [to the contrary], . . . the judiciary have misapprehended the weight of support schedules, raising them to de facto presumption status."[99]

The court of appeals opinions in *Johnson* and *Mentzos* rein-

93. Telephone interviews with Linda Berglin, Minnesota state senator (Oct. 29, 1984), and Ronald Sieloff, Minnesota state senator (Nov. 21, 1984).

94. Sieloff, *supra* note 93. *See also* Livingston, *supra* note 85, at A4 (quoting Martin Swaden, chairman of the Minnesota Trial Lawyers Ass'n).

95. Ronald Sieloff, *Child Support Guidelines: The Statute and its Problems*, 2 Minn. Fam. L.J. 17, 22 (1984).

96. Livingston, *supra* note 85, at A1.

97. *Id.*

98. *See supra* note 81.

99. Kenneth Levin, *The Use (and Abuse) of Child Support Schedules in Illinois*, 71 Ill. B.J. 314, 314 (1983).

force this rigid perception of guidelines calculations. These opinions imply that awards above the guidelines are somehow suspect because they require express findings. By requiring over-justification of clearly fair increases, the court implies a presumption against increases in general. The opinions in both cases presented more than ample evidence to explain why the lower court prescribed support awards above the guidelines. In *Johnson*,[100] although the father's current net income was equal to the mother's, he was a trainee, and therefore, his projected income would sharply increase. In *Mentzos*, the father was a voluntarily unemployed musician—the lower court awarded support to encourage him to either work to support his children or lose the lien equity in the homestead also awarded through the decree.[101]

A recent Minnesota Court of Appeals decision provides assurance that judicial review will enforce the "floor" principle and reaffirms the need to consider the Child Support Statute instead of referring only to the guidelines tables when setting awards. In *Kowalzek v. Kowalzek*,[102] the lower court ordered the father to pay $150 child support per month, an amount sharply below the guidelines amount of $352. The court arrived at this figure by computing the amount the working mother would have paid under the guidelines if the father had been awarded custody. The court subtracted that amount from the father's guidelines support obligation and then awarded the mother the difference.[103] Apparently, the computation resulted from the court's misconception that the guidelines tables provided the entire amount necessary to support the child instead of the amount of the father's contribution toward support. The court of appeals reversed and remanded. It directed the lower court to consider the other four subdivisions of the Child Support Statute in conjunction with the custodial parent's income. The court criticized mechanical guidelines calculations because they ignore the five relevant factors of the Child Support Statute.[104] It noted that the Guidelines Statute limits judicial discretion to set child support awards below the guidelines without express findings of fact.

The *Kowalzek* decision is an important reminder that the Child Support Statute remains in force and requires courts to set awards only after consideration of specific relevant factors set out in the statute. Thus, awards determined by referring *only* to the

100. 352 N.W.2d at 820.
101. 353 N.W.2d at 684.
102. 360 N.W.2d 423 (Minn. Ct. App. 1985).
103. *Id.* at 425-26.
104. *Id.* at 426.

guidelines violate the Child Support Statute. The tables consider only the net income of the obligor and the number of children and ignore other important statutory factors such as: 1) the child's financial resources and needs, physical and emotional condition, and educational needs;[105] and 2) the financial needs and resources of the custodial parent and the standard of living the child had previously enjoyed.[106] Although some advocates maintain that the guidelines consider these factors inferentially, the guidelines tables do not allow significant differences in need or resources to affect the amount of the award. For example, guidelines awards do not distinguish between children who need private school tuition and those who do not.

Like Referee Rutman,[107] many accept the premise that the guidelines provide a fair and reasonable support amount in most cases. Nothing could be further from the truth. Awards based principally or solely on the tables assure neither equity as measured by any of the traditional formulas nor amounts consistent with the principles which justify child support. The tables do not fulfill the objective of requiring absent parents to support their children in order to keep them out of poverty and off welfare. At the highest income levels the monthly support awards are less than federal needs standards.[108]

The guidelines also do not assure that the child will retain the standard of living she would have enjoyed had her parents' marriage continued. In fact, guidelines awards make it highly likely that the standard will substantially decline. At best, the guidelines assure only that public assistance will bring the household income up to AFDC minimums. Under usual circumstances, the mother's income will be grossly insufficient and the mother/child household standard of living will suffer accordingly.

The Minnesota Guidelines do not achieve a resource-sharing goal because they do not adequately consider the father's income over a certain amount or the mother's income. The tables exclude the mother's income as a factor in computing the award. This practice ignores contemporary reality: the mother's income is not only relevant, it is essential to the court's decision in many

105. Minn. Stat. § 518.17(4)(a), (d) (1984).

106. *Id.* § 518.17(4)(b), (c).

107. *See* Livingston, *supra* note 85 and accompanying text.

108. A mother with one child on public assistance receives $412 per month in the form of Aid to Families with Dependent Children (AFDC). At the bottom of the highest bracket, a noncustodial parent with $1,001/month net income pays $250.25/month support for one child. Unless the custodial parent has income of at least $161.75/month, public assistance must make up the difference. Jones, *supra* note 9, at 25.

cases.[109] Instead of varying the father's responsibility to accommodate the mother's responsibilities, the guidelines assign a fixed share of responsibility for support to the mother or public assistance. This attempt at resource sharing is arbitrary, inefficient, and inequitable from its inception. If the mother has nothing or not enough to furnish the remainder of support, public assistance assumes the burden—unnecessarily in cases where the obligor's ability to pay exceeds the table percentage.[110] Not considering the mother's income risks over-burdening a father with support obligations when both parents are chargeable with that duty.[111] A true resource-sharing approach considers the relative resources of both parents in assigning appropriate obligations.

Guidelines standards also fail to meet the goals of a cost-sharing formula. As discussed in the previous section, in order for the cost sharing method to achieve equity, the court must ascertain the "cost" of raising the child.[112] AFDC minimums are of questionable validity even for those children wholly supported by the state.[113] They are assuredly invalid for determining parental support obligations.

The tables do not consider the parents' contribution of childcare services. Assignment of childcare responsibilities is an aspect of gender. Society does not automatically associate a father with the caretaker role, and it does not consider him a deserter if he fails to fight (or even ask) for custody.[114] Men with custody are usually in that position by choice. Women, however, are "conditioned" to be caretakers. Mothers are therefore often obligated to take custody by default and to assume both the physical duty of daily care and the expense of childcare if they work. Unless the award is carefully structured, mothers receive no compensation.

Some costs of childcare are not recognized in awards because they are hidden. For instance, a mother suffers financial loss when she stays home with her sick child. Other costs, though visible, are also not reflected in the amount of the father's obligation. A large percentage of awards do not even cover out-of-pocket expenses for childcare while the mother works.[115] This situation unfairly harms both mother and child. Childcare expense is a

109. Hunter, *supra* note 16, at 27.

110. Jones, *supra* note 9, at 26.

111. Yee, *supra* note 15, at 26.

112. Bergmann, *supra* note 49, at 115.

113. *Id.*

114. David Chambers, *Child Support in the Twenty-First Century*, in The Parental Child-Support Obligation, *supra* note 1, at 283, 289.

115. A 1978 Current Population Survey states the average amount of child support received for one child was $1,288 per year. Sorenson & MacDonald, *supra* note

fundamental cost of raising a child and therefore courts must consider it in all awards. The most equitable formula includes out-of-pocket childcare expenses in the total support cost that courts allocate between the parents.[116]

Guidelines awards also inadequately reflect childrearing costs when an order covers two or more children. In such a case the award does not treat each child equally or uniformly. Although the order customarily divides the total award equally between children, in families with more than one child, the second child raises the total award no more than five percent. Fathers with monthly incomes over $1,000 pay $250 for one child and only an additional $50 for the second child.[117] This amount is insufficient to pay more than the additional babysitting expense for younger children or school lunch tickets for an older child. Moreover, the children may suffer if one child is no longer eligible for support, as when custody of that child is changed to the father. Some orders indicate a reduction by that child's share in the total amount rather than a reversion to the guidelines. Thus, the remaining children receive less than the guidelines amount. In these respects, the guidelines are not an equitable method of determining support.

Awards rarely acknowledge the relationship between economic inequities and the socially detrimental effects of divorce on children. While financially adequate awards do not completely free children from adjustment difficulties resulting from the separation of divorce, adequate awards can make adjustment easier.[118] Studies show that "children can deal with one stressor, but cumulative or chronic stress can have a negative impact on adjustment."[119] Sharply reducing the income of the child's household subjects the child to two stressors; the child must cope with the loss of familiar neighborhood, school, and friends, and at the same

11, at 43. Computing childcare expense at 75 cents/hour (conservative 1978 rates) totals $1,500 annual childcare expense.

116. Courts should calculate the parents' relative ability to pay by ascertaining the income of each parent and then subtracting an amount for self-support to arrive at each parent's disposable income. The total cost of child-raising would then be prorated between the parents according to the ratio which each parent's disposable income bears to the total disposable income of both parents. Bruch, *supra* note 59, at 124-25.

117. Minn. Stat. § 518.551(5) (1984).

118. Martha Cox, *Economic Support of Children by Fathers Following Divorce: Some Theoretical and Empirical Considerations*, in The Parental Child-Support Obligation, *supra* note 1, at 157, 159-68. *See also* data cited from a new report, "The State of Families," issued by Family Service American, a non-profit organization of 280 social service agencies. Collins, *supra* note 60.

119. Cox, *supra* note 118, at 168.

time, adjust to father's absence.[120] Children also suffer when financial strain is a source of depression and anxiety for their mother. When she is under financial pressure, her ability to deal with her children decreases, jeopardizing her relationship with them.

Awards based on the guidelines alone do not consider that depression and distress in children of divorced parents are as much associated with economic *decline* as with actual level of income. Such awards risk burdening children with adjustment difficulties as well as obvious material deprivation. Therefore, courts must consider the need to maintain the children's pre-dissolution standard of living if their awards are to be in the children's best interests.

2. Advantages of the guidelines.

The guidelines have some positive aspects. They provide a minimum standard for awards, statewide consistency, judicial economy, and predictability. The guidelines insure that courts will require fathers to pay *some* support. Prior to enactment of the guidelines, judicial discretion often permitted courts to refuse to award any support at all. Under the guidelines, noncustodial parents must overcome a presumption that the minimum percentage applies. The burden of proof rests on the father when he attempts to lower his support obligation below the guidelines. This benefit is particularly significant in public assistance or other cases where the father has a low net income.[121] Opposing universal application of the tables is *not* opposition to the "floor" concept, which is vital to poor women; rather, it is opposing the guidelines' failure to burden middle and upper class fathers proportionately.

The practical advantage of consistency in awards is that it fosters respect for the system. Fathers, recognizing the consistency, will comply with support orders. Because the Guidelines Statute applies throughout Minnesota, it is reasonable to assume that awards are more consistent statewide than awards made using the judicial discretion method.[122] Any real comparison, however, is impossible. No central reporting office exists to generate statistics concerning awards.[123] It is also impossible to determine whether consistency in awards contributes to voluntary compliance. Recent

120. *Id.* at 164-65.

121. Levin, *supra* note 99, at 315.

122. *See supra* notes 27-33 and accompanying text.

123. Berglin, *supra* note 93.

changes in enforcement methods would seem to have a more immediate impact on payment.

Efficiency is a frequently cited attribute of the guidelines. Judicial economy results because officials need only two items of data to make the computation: the obligor's net income and the number of children. This procedure is a timesaver. Moreover, parties who assume that the tables provide a concrete, fair amount are less likely to appeal. Attorneys are spared the often dreaded task of negotiating the amount of support. Despite arguments based on judicial efficiency, it is not clear that the judiciary approves of the change. In fact, State Senator Sieloff reported that the judiciary's response to the guidelines was generally negative. He deemed this response "justifiable" in part, but also characterized it as a reaction based on the unavoidable conflict between equal branches of government.[124] Interestingly, Sieloff notes that those judges most in favor of the guidelines are also more willing to depart from them.[125] These courts are willing to accept the minimal limitation on judicial discretion that the legislature intended. For them the guidelines serve only as a threshold for the actual award, which is determined after judicial consideration of *all* relevant factors in the Child Support Statute.

Another much-touted advantage of guidelines is their predictabilty. But predictability is only advantageous if the predicted amount is fair and adequate. The guidelines assure neither. Any advantage of predictability lies primarily with the obligor, and deprives children of their right to adequate support from an absent parent without affording them a full hearing to consider what constitutes a fair amount. The need for fairness requires consideration of all factors of the Child Support Statute and diminishes the value of predictability alone.

A common criticism of the guidelines is that they set support too high.[126] At the lower end of the scale, an obligor with $500/month income would pay $70/month support for one child, and proponents of fathers' interests argue that the remaining $430 is insufficient for the obligor to live on.[127] These proponents fail to consider that this amount is *more* than the $412 public assistance allowance for a mother and one child. It is also more than the $400 intermediate budget for a single person estimated by current United States Bureau of Labor Statistics.[128] As long as such a dis-

124. Sieloff, *supra* note 95, at 21.
125. *Id.*
126. *Id.* at 19.
127. *Id.*
128. Jones, *supra* note 9, at 25.

parity exists between actual support costs and the amount the father contributes, he should make certain compromises and sacrifices to accommodate a fair support contribution.[129]

One Minnesota lawyer warns that a dangerous "side effect" of the guidelines is their tendency to produce lower support orders than previous law. He cited the pervasive "climate of uniformity" which "create[s] a reluctance to make upward departures even where the financial circumstances might warrant."[130] The warning rings true. Judicial reluctance to make appropriate upward departures risks depriving children of parental support the statute is designed to provide and therefore outweighs any advantages of the guidelines.

3. 1984 revisions.

The 1984 legislature revised two details of the Guidelines Statute. Both changes appear regressive. First, the legislature limited the amount of the obligor's monthly income subject to the table. The previous table subjected all the obligor's net monthly income to the calculation—the revised table limits the calculation to the first $6,000.[131] The apparent reason for this change was an assumption that awards computed on incomes above $6,000 are *per se* excessive. Application of the limit under certain circumstances, however, shows that such an assumption is false. Calculating the amount for a second child at that level results in only $300 monthly support—barely sufficient to provide full-time day care.

The second change allows the court, when determining whether it should follow the guidelines, to consider debts which the obligor owes to private creditors and incurred either for support of the child or the obligee or the generation of income.[132] Under prior law the court could not consider any of the obligor's debts to private creditors[133] because "child support payments take precedence over personal investment or luxury purchases."[134] Allowing consideration of debts incurred for support of the child or obligee or for the generation of income may have just the opposite effect. Such consideration provides an incentive for fathers to

129. *Id.*

130. Stephen Baird, *A Critical View of the 1983 Child Support Guidelines*, 2 Minn. Fam. L.J. 27, 29-30 (1984).

131. Minn. Stat. § 518.551(5) (1984).

132. *Id.* § 518.551(5)(b).

133. Minn. Stat. § 518.551(5)(b) (1982 & Supp. 1983), *amended by* Minn. Stat. § 518.551(5)(b) (1984). A court of appeals decision held that the pre-1984 Guidelines Statute expressly forbade consideration of debts owed to private creditors in establishing child support. Bakke v. Bakke, 351 N.W.2d 387, 388 (Minn. Ct. App. 1984).

134. Bakke v. Bakke, 351 N.W.2d 387, 388 (Minn. Ct. App. 1984).

leave those debts unpaid and to spend available cash for personal items during the interim between the end of the marital relationship and the support hearing.

B. Modification of Existing Awards: COLA Adjustments

Child support awards order fathers to make payments over an extended period of time, often for twenty years or more. Continuing awards at a fixed amount during inflationary periods deprives children of needed parental support. The system must therefore accommodate adjustment for differences in purchasing power so that the award maintains the same level of support throughout the period.

Until 1983, the system required mothers to petition the court for an order increasing an insufficient award. Recognizing that modification through such a motion was an inefficient and ineffective procedure, the 1983 legislature provided for cost-of-living adjustment (COLA) of child support awards.[135] The right to biennial adjustment of the amount of support based on the inflation rate applies to both new support awards and orders based on motions for enforcement or modification of previous awards. Although the legislation improved the procedure, it is not a complete solution.

The COLA statute effectively overruled the precedential rule that increases in child support based on escalating inflation rates are not available. In *Heaton v. Heaton*,[136] the Minnesota Supreme Court ruled that inflation was not in itself a basis for increasing a support award. The *Heaton* court applied the "change of circumstances test" and concluded that inflation affected the mother, father, and child equally. Therefore, no reason existed to increase the support level.[137] The court adopted the trial court's reasoning that "since the incomes of the parties had increased by approximately the same percentages over the years since the divorce, there was no substantial change in circumstances."[138] The fallacy of that judicial observation assuredly provided impetus for statutory COLA provisions in the 1983 changes. In effect, the prior rule allocated the entire burden of inflated child support costs to the mother.[139] The child certainly shared this burden if the mother could not compensate for the inflation rate with income from other sources.

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135. Minn. Stat. § 518.641 (1984).
136. 329 N.W.2d 553 (Minn. 1983).
137. *Id.* at 555.
138. *Id.* at 554.
139. *See, e.g., id.* at 555.

Although COLA provisions offer a more equitable solution to this problem, their value is often illusory. A guaranteed right to biennial adjustment accrues in each award determination. Actual increase, however, is not guaranteed. If the court finds that the obligor's income or occupation does not provide COLA or that another step-increase has the effect of COLA, the court will waive the requirement. The obligee may also waive the requirement in the decree.[140]

Moreover, even decrees with COLA provisions do not assure an automatic increase. Some obligees may be unaware of the right and duty to request biennial adjustment.[141] Other obligees, aware of the right, may forgo asserting it because they feel incompetent to file the biennial notice petitions themselves and hesitate to incur legal expense to do so. The mother may also determine that the procedure will not prove cost beneficial if the father asserts his right to a hearing and establishes that his income does not warrant an increase. Aside from procedural defects, the primary reason why COLA benefits may be illusory is that increases will be insufficient if they are based on awards which are inequitably low. Unless the original award is fair, the inequity continues notwithstanding adjustments for the inflation rate.

Despite these shortcomings, COLA provisions are generally equitable. Awards must consider inflation to provide the same level of support for the duration of the order. The COLA concept carries out the principles of cost-sharing or resource-sharing so long as the order is in force. Similarly, the principles of assuring the child of either a minimum standard of living or the same standard of living she would have enjoyed if the parents had not divorced demand increases in support to match inflation.

IV. Minnesota Child Support Law For The Future

Child support law in Minnesota has not achieved equity, and the results are far-reaching. Ironically, its inequitable effects most severely burden the child whom the system purports to protect. Many suggestions for improving both the awards process and enforcement measures seek to reform the system to more adequately provide basic support for all children.

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140. Minn. Stat. § 518.641(1), (5) (1984).

141. Welfare officials, however, will file public assistance petitions for COLA routinely, but the public coffers will retain any increases. For information explaining explicit procedures for "tracking" eligible COLA cases and assuring that the requisite notice to obligor is duly given, see Dept. of Pub. Welfare, State of MN, 1983 Legislation on Cost of Living Adjustment (COLA) in Child Support Orders 83-55 (July 29, 1983).

Some proposed reforms require innovative and thorough changes in the national child support system. If adopted, these programs would go far toward guaranteeing a humane upbringing for children who are presently without adequate support from an absent parent. Although the proposals vary, they generally include a "floor" for support, and almost all programs also provide for widespread public childcare services.[142] One commentator proposes an extension of social insurance benefits, such as those received by children of deceased or disabled workers, to all children who lose parental support for any reason. Under this plan, the level of support would be based on standards determined by a commission formed for that specific function. No benefits would be payable when actual parental support or alternative benefits equal or exceed the standard, but if these sources fall short, the insurance program would pay benefits equal to eighty percent of the difference.[143]

Other suggestions resemble supplemental family income programs in Sweden and France under which the government pays a fixed family allowance to all parents who have children.[144] Although a social insurance plan of this dimension would be costly, it would produce many benefits. Economic benefits would include eliminating the societal costs of raising an increasing proportion of succeeding generations in poverty. The emotional and psychic benefits would be boundless. Unfortunately, today's political climate of retrenchment dictates that broad federal social insurance plans do not offer a realistic solution.

Improving existing Minnesota child support laws, however, is realistic. Of first importance is assessment of the Guidelines Statute. Cases from the court of appeals indicate that courts are not applying the guidelines as the legislature intended.[145] The *Kowalzek* decision in particular demonstrates how grafting the Guidelines Statute to the Child Support Statute has created ambiguity,[146] requiring additional legislation to clarify its meaning. The statute does not provide for a follow-up study (as did the Minnesota Sentencing Guidelines) because funding was unavailable.[147] No statewide data is available on child support awards,[148] although

142. Hunter, *supra* note 16, at 27.

143. Harold Watts, *A Proposal for the Reform of the Child-Support System*, in The Parental Child-Support Obligation, *supra* note 1, at 257-61.

144. Hunter, *supra* note 16, at 25.

145. *See supra* notes 86-104 and accompanying text.

146. 360 N.W.2d at 423.

147. Berglin, *supra* note 93.

148. *Id.*

data already gathered on 1980-81 awards in three Minnesota counties is available for comparison with awards made under the guidelines.[149]

Minnesota is using child support guidelines. Therefore it is exempt from the requirement of the 1984 federal law.[150] That law requires states to appoint commissions to study child support standards and determine whether additional state or federal legislation is needed. In light of the scope and importance of the issue, relying on this technicality to avoid study by a state commission would disadvantage Minnesota's child support program. The legislature originally designed the Minnesota guidelines to deal with the specific problems of welfare families and then extended the guidelines to apply to all families without a careful study. The circumstances surrounding adoption of the guidelines particularly indicate that further study is necessary.

Congress recognized that development of fair child support guidelines was no easy task when it enacted the 1984 legislation.[151] Conflicting congressional opinions about the guidelines approach to setting awards resulted in a delayed effective date—states have until October 1, 1987 to establish guidelines but enforcement measures are effective October 1, 1985.[152] During this time the commissions are to study carefully the concerns which prompted the federal legislation. Concerns include unfairly low support awards (and more rarely high ones), disparity of awards despite similar situations, and the economic situation of custodial parents and children contrasted with non-custodial parents.[153] For all these reasons, a commission would also be appropriate in Minnesota.

A commission to evaluate child support concepts offers potential benefits for children. The amount and extent of potential benefits depend on keeping the commission's primary focus on the needs of children and fashioning a child support system capable of meeting those needs. A commission must address the conflict between complex social values which arises each time a court awards child support. The most influential factor explaining why the present system produces inequitable awards is its propensity to slight the child's right to parental support in order to defer to the

149. Aldrich & Orsello, *supra* note 17. *See also Support and Maintenance Awards in St. Louis County*, 1 Minn. Fam. L.J. 115 (1982).

150. Diane Dodson & Robert Horowitz, *Child Support Enforcement Amendments of 1984: New Tools for Enforcement*, 10 Fam. L. Rep. (BNA) 3051, 3061 (1984).

151. *Id.* at 3059.

152. *Id.* at 3055, 3059; Pub. L. No. 98-378, 98 Stat. 1305 (codified in scattered sections of 42 U.S.C.A. & 26 U.S.C.A. (West Supp. 1985)).

153. Dodson & Horowitz, *supra* note 150, at 3059.

father's "due process" rights. If society is generally unwilling to require that fathers support their children in the same manner after divorce, it must be willing to provide alternative means of fair support for the children.

Initially, unless the legislature remedies the existing statutory ambiguity of its own volition, a commission should explore remedial measures to insure use of the present Minnesota guidelines as only a floor for awards. Because the AFDC childrearing costs inherent in the guidelines are associated with minimal standards, using the guidelines as the sole determinant of support awards legitimates and rationalizes social inequality.

Establishing realistic estimates of actual child raising costs at various income levels is the logical second consideration for a commission. Courts risk ordering an inequitable support award regardless of the method used to determine the award unless the child raising cost used is accurate. Availability of valid child raising cost figures is also vitally important to enable a commission to evaluate objectively existing and proposed standards for child support awards. Childcare is one of the most significant childrearing costs. Therefore, it is essential to the children's welfare that a commission contemplate a childcare system which is not wholly dependent on the mother's earnings. A public daycare program making daycare accessible to all families, either through government reimbursement or sliding scale charges, is the best solution to this critical problem. Expanded subsidies for childcare will require the united efforts of all levels of government to develop a coordinated child support system.

Restructuring the COLA provisions would strengthen this important and necessary component of the child support system. Commission proposals that all orders provide for automatic biennial adjustments and that obligors bear responsibility for giving notice if circumstances do not warrant a particular increase would encourage fathers to continue to contribute their proportionate share of their children's support.

In order to conduct a thorough study, the commission must also consider whether each facet of the child support system is best implemented by statutory, administrative, or judicial means. No one approach works best in every instance. For example, the statutory approach seems most appropriate to implement uniform, automatic procedures such as the guidelines' floor concept, COLA provisions, and public childcare programs. On the other hand, the judiciary appears best suited to provide case-by-case analysis required in determining the actual amount of individual awards—

both initially and when modifying existing awards due to changed circumstances. An administrative approach might be used most effectively to supplement the other approaches. For instance, requiring officials to complete family financial statements which become a part of the record in each child support award would facilitate review of awards. The combination resulting from using the approach most appropriate to the procedure incorporates a series of checks and balances, an important element in any effective governmental system.

Allocating child support costs between parents without considering the mother's income as the Minnesota guidelines do is patently arbitrary. Minnesota's Child Support Statute requires courts to consider the mother's income when they determine how much support the father is to pay. Thus, a commission must investigate methods for courts to carry out this statutory directive. A formula based on the parents' relative ability to pay and apportioning child support according to each parent's disposable income[154] appears to be both efficient and equitable for mother, father, and child.

System reform must acknowledge that the state assumes a parental role in child support decisions. Appropriate reforms, therefore, must enable the state to act the way parents should—in the best interest of the child.

154. *See supra* note 116 and accompanying text.