

HIGH-INCOME CHILD SUPPORT GUIDELINES: HARMONIZING THE NEED FOR LIMITS WITH THE BEST INTERESTS OF THE CHILD

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“[N]o child, no matter how wealthy the parents, needs to be provided more than three ponies.”¹ In the recent past, many domestic relations courts have quoted this tag line when determining the child support obligations of parents who earn high incomes.² In fact, not only have courts followed the “three pony rule” to avoid potentially providing a child with too much, courts also have established awards that fall considerably short of the presumptive child support guidelines to accomplish this goal.³ In such cases, courts may consider a variety of evidence, typically focusing on the child’s current needs.⁴

When deviating from child support guidelines, a court may also consider the parents’ past expenditures on their children to determine how far from guidelines the child support award should fall.⁵ Hence, if a high-income family lived frugally prior to divorce, then the child support should be lower, whereas if a family lived lavishly, then the child support should

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1. *In re Marriage of Patterson*, 920 P.2d 450, 455 (Kan. Ct. App. 1996).

2. *See, e.g., Williams v. Williams*, 108 S.W.3d 629, 633 (Ark. Ct. App. 2003); *In re Marriage of Patterson*, 920 P.2d at 455; *King v. King*, No. 2005-CA-000978-MR, 2007 WL 2020054, at *2 (Ky.Ct. App. July 13, 2007); *Cadavid v. Nieto*, No. FM-02-2182-00, 2009 WL 972842, at *3 (N.J. Super. Ct. App. Div. Apr. 13, 2009); *Smith v. Smith*, 67 P.3d 351, 354 (Okla. Civ. App. 2002).

3. *See, e.g., In re Marriage of Lee*, 615 N.E.2d 1314, 1325–26 (Ill. App. Ct. 1993) (awarding \$3000 per month although guideline support ranged from \$3,920.36 to \$5,439.78 per month); *Midence v. Hampton*, 147 P.3d 227, 229–30, 232 (Mont. 2006) (holding that it was not an abuse of discretion for the trial court to award \$2,990 per month child support where guideline support was \$3,723 per month).

4. *See, e.g., In re Marriage of Lee*, 615 N.E.2d at 1326 (“The trial court must consider the standard of living the child would have enjoyed absent parental separation and dissolution.”); *Smith*, 67 P.3d at 354 (“[A]t least some consideration should be given to the child’s actual needs, which may include consideration of the child’s lifestyle.”).

5. *See, e.g., Strahan v. Strahan*, 953 A.2d 1219, 1225–26 (N.J. Super. Ct. App. Div. 2008) (The court derived the children’s needs from a list of costs the obligee had provided, noting, however, that “the custodial parent bears the burden of establishing the reasonableness of those expenses.”(internal quotation marks omitted)).

be higher.⁶ Moreover, as a result of such vast discretion in this area, a court may award child support below guidelines even with considerable evidence of an expensive lifestyle.⁷ In both scenarios, deviation below guidelines presents a twofold problem.

First, such discretionary decisions provide inconsistent results within and across states.⁸ Thus, parents who earn similar incomes, but live in different states or even in different regions of a state, will not necessarily pay child support at comparable rates. This is due, in large part, to the fact that states have widely varying thresholds for determining whether a parent is a high-income earner. Some states permit courts to deviate from statutory guidelines for high-income parents who earn as little as \$50,000 per year, while others do not permit courts to deviate for high-income purposes until the parent earns \$240,000 per year.⁹ Further, once a judge deviates from the guidelines, states have a large range of methods by which the support amount can be calculated. Currently, three states have no statutory provision regarding high-income child support, eleven states employ their own special calculation, and the rest generally leave the decision to the discretion of the court to varying degrees.¹⁰ With such an array of approaches to the problem, the parties to a child support dispute may be unable to accurately ascertain their rights or the likely outcome of the case. Such unpredictability can promote litigious child support proceedings, which may set the framework for future contentious proceedings and relationship problems within the family unit.¹¹

The second problem arises most frequently when the parents share physical custody of the children. Sometimes courts determine child support obligations of high-income parents that are not sufficient for the lower-

6. *Cf. Williams*, 108 S.W.3d at 636 (“Given the evidence of appellant’s affluence, exceptional generosity, and extravagant lifestyle, we cannot say the trial judge abused his discretion in setting child support in accordance with the presumptive amount derived from the family support chart.”).

7. *See, e.g., In re Marriage of Lee*, 615 N.E.2d at 1325–26 (deviating downward from guidelines despite evidence that the child’s previous lifestyle included “frequent opportunities for national and international travel,” “electronic gadgets,” and “computer equipment”).

8. *See* discussion *infra* Part I(A)(1) for a comparison of high-income cases across and within states.

9. *See* Laura W. Morgan, *Child Support in High-Income Cases: A State-by-State Survey*, FAM. L. CONSULTING <http://www.supportguidelines.com/articles/art200302.html> (last modified Mar. 19, 2003, 7:12 PM).

10. *See id.*

11. *See, e.g.,* David B. Doolittle & Robin Deutsch, *Children and High-Conflict Divorce: Theory, Research, and Intervention*, in *THE SCIENTIFIC BASIS OF CHILD CUSTODY DECISIONS*, 425, 425 (Robert M. Galatzer-Levy & Louis Kraus eds. 1999); Thomas J. Walsh, *The Rise and Fall of An Archetype: Revisions of the “Wisconsin Model” Child Support Guidelines*, 36 U. MEM. L. REV. 1013, 1025 (2006) (“[T]he unpredictability of support orders from judge to judge ma[k]e support cases very difficult to settle, causing greater expense in litigation and consumption of court calendar time.”).

earning parent to maintain the children in a lifestyle even minimally comparable to that of the high-earning parent.¹² In such cases, the child must live a dual life in order to conform to the differing socio-economic classes of his or her parents, and may experience distress or other damaging emotional responses as a result of such instability.¹³

The problems with high-income child support awards are not one-sided. Under the current system, both the parents and the children lose out—economically and socially. This Note proposes a solution that can help to increase both the clarity and predictability of high-income child support awards. The solution has two parts: (1) higher thresholds for determining who is a high-income parent and (2) post-secondary educational trusts for the children of high-income parents. This solution aims to help alleviate the policy problems arising from the current system and to preserve some limits on high-income parents' support obligations.

Part I of this Note traces the development of current child support laws and briefly describes the states' three general child support models. It also details the manifold problems that discretionary high-income child support decisions can cause: inequitable settlement, increased litigation, injured family structures, and inconsistent decisions. Part II outlines the solution. The first step of the solution is to set higher thresholds for triggering a high-income analysis. The second step is for high-income parents to contribute to post-secondary educational trusts. Finally, this Note explains that, as a result of disparate parental resources and fixed costs concerns, the solution should also apply to parents who share physical custody of their children.

12. For a look at the importance of providing a child with a lifestyle comparable to both parents, see Judith G. McMullen, *Prodding the Payor and Policing the Payee: Using Child Support Trusts to Create an Incentive for Prompt Payment of Support Obligations*, 32 NEW ENG. L. REV. 439, 441–42 (1998). There, McMullen explains that the “obligation to support one’s children is seen not only as a duty to provide the minimum funds necessary to ensure survival, but as an obligation to provide support that enables the child to enjoy a lifestyle commensurate with the parents’ respective lifestyles.” *Id.* at 441. This idea that “[t]he responsibility of the parents, to support the child . . . consistent with their own station in life, is ‘well nigh absolute’” underscores the innate force behind why a child should “share in [the] bounty” of his or her affluent parent. *Id.* at 441–42 (quoting Commonwealth *ex. rel. Kaplan v. Kaplan*, 344 A.2d 578, 579 (Pa. Super. Ct. 1975)). At its simplest, this is the way families work. To do otherwise would be to create artificial and possibly insurmountable barriers between family members.

13. See, e.g., Ira Mark Ellman & Tara O’Toole Ellman, *The Theory of Child Support*, 45 HARV. J. ON LEGIS. 107, 143 (2008).

I. CURRENT GUIDELINES AND HIGH-INCOME PROBLEMS

A. *Child Support Guidelines*

Domestic relations issues have long been the province of state common law.¹⁴ As a result, judicial decisions in the late 1800s and early 1900s regarding child support widely varied.¹⁵ Some states did not recognize child support as a legal obligation, while others only recognized a limited support duty.¹⁶ Many state courts, however, eventually began to award child support on the basis that it was in the best interests of the child.¹⁷ Many states had codified child support laws by the 1930s;¹⁸ however, this codification was a loose one—allowing judges wide discretion to determine an appropriate award.¹⁹ In 1935, the federal government made a perceptible step into the realm of child support for the first time,²⁰ enacting the Aid to Families with Dependent Children Program (AFDC).²¹ The AFDC appropriated money to any state that implemented a “plan for aid to dependent children.”²² Dependent children included, among other categories, those who had a parent that did not live with them.²³ Thus, the AFDC to some extent approximated a public version of child support by giving states the funds to provide for some of the neediest children—those who were “not being properly supported because a parent was absent and not paying support.”²⁴

Over the next four decades, the federal government promulgated few other consequential child support regulations.²⁵ The 1974 Social Services Amendments, however, ushered in a new era of federal involvement with

14. See Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029, 1036 (2007).

15. *Id.*

16. *Id.*

17. *Id.* at 1040.

18. *Id.* at 1036.

19. See Pamela Foohey, *Child Support and (In)ability to Pay: The Case for the Cost Shares Model*, 13 U.C. DAVIS J. JUV. L. & POL’Y 35, 42 (2009).

20. See Laura W. Morgan, *The Federalization of Child Support a Shift in the Ruling Paradigm: Child Support as Outside the Contours of “Family Law,”* 16 J. AM. ACAD. MATRIMONIAL LAW. 195, 202 (1999) (“Prior to 1935, the establishment of child support was viewed as particularly a state concern.”).

21. Social Security Act of 1935, Pub. L. No. 74-271 § 401, 49 Stat. 620, 627 (1935) (codified as amended at 42 U.S.C. §§ 601–617 (2006)).

22. *Id.* § 403(a).

23. *Id.* § 406(a).

24. See, e.g., Morgan, *supra* note 20 at 202–03.

25. See, e.g., Ann Laquer Estin, *Federalism and Child Support*, 5 VA. J. SOC. POL’Y & L. 541, 542 (1998) (“Although some federal child support enforcement efforts were made during the 1950s and 1960s, the current system began with the Social Services Amendments of 1974.”).

child support, requiring states to establish plans to enforce child support orders and agencies to administer those plans.²⁶

Although the 1974 Amendments were a great advancement in child support jurisprudence, the problem remained that the states had not yet established guidelines for judges to use in determining child support awards. The lack of guidelines was problematic largely because the states' discretionary approaches to child support produced undesirable results, such as inefficient proceedings, insufficient awards, and inconsistent decisions.²⁷ Partly as a response to these problems, Congress passed the Child Support Enforcement Amendments of 1984 ("Amendments"),²⁸ which required states to establish standards for child support awards.²⁹ The standards were discretionary though; and the regulations stated that they "need not be binding" on the judge or other official who applied them.³⁰ Moreover, the minimum requisites for the forthcoming state guidelines required, among other things, that the guidelines "be based on specific descriptive and numeric criteria and result in a computation of the support obligation."³¹

Soon thereafter, Congress passed the Family Support Act of 1988 ("the Act") requiring all states to establish specific minimum guidelines for determining child support.³² The Act required that states make their findings with a "rebuttable presumption . . . that the amount of the award which would result from the application of the guidelines is the correct amount of child support to be awarded."³³ After the federal government's mandate, every state eventually produced child support guidelines.³⁴ Despite variations in the states' guideline structures, they have tended to produce similar results³⁵ that are far more consistent than the pre-guideline decisions.³⁶

26. Title IV-D of the Social Services Amendments of 1974, Pub. L. No. 93-647, § 452(a), 88 Stat. 2337, 2351.

27. See Foohey, *supra* note 19 at 42 ("[T]he traditional case-by-case method was inadequate and problematic: analysts believed that awards often were deficient as compared to the true cost of raising children; obligations were inconsistent, resulting in unequal treatment of similarly situated individuals; and the adjudication of obligations was inefficient without consistent standards.").

28. Child Support Enforcement Amendments of 1984; Pub. L. No. 98-378, 98 Stat. 1305 (codified as amended at 42 U.S.C. § 651(1988)).

29. *Id.* at 1321-22.

30. 45 C.F.R. § 302.56(c) (1985).

31. *Id.*

32. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (codified as amended at 42 U.S.C. § 667(a)(1988)).

33. *Id.* § 667(b)(2).

34. See Walsh, *supra* note 11, at 1029.

35. See, e.g., Jane C. Venohr & Robert G. Williams, *The Implementation and Periodic Review of State Child Support Guidelines*, 33 FAM. L.Q. 7, 30 (1999) ("[C]hild support guidelines are providing adequate and consistent award amounts overall.").

Today, the states follow one of three general guideline formulas:³⁷ the percentage-of-income model, the income-shares model, and the Melson-Delaware model.³⁸ Under each model, the obligor, the “person who owes a duty of support,” is required to pay a specified amount of money per month to the obligee, the person to whom the obligor owes that duty.³⁹

Thirty-three states employ the income-shares model.⁴⁰ This approach simply divides the total child support award according to the income of each parent. Thus, if the obligor earned 70% of the total household income, he would pay 70% of the total support amount.

Alabama follows such an approach.⁴¹ The table below provides a condensed version of Alabama’s table for determining the total amount of child support that parents should pay based on the monthly gross income of both parents and the number of children.⁴² For illustration, if divorced parents have one child, the column for the monthly payment of one child would determine the support amount. If the father earns \$1500 per month, and the mother earns \$500 per month, their combined monthly income would put them in the first row below. Since the father earns 75% of the income, he would pay 75% of \$403 per month, or \$302.25 per month. The

36. See, e.g., Joel Bankes, *Preface*, 43 FAM. CT. REV. 355, 356 (2005) (“Presumptive child support guidelines have largely fulfilled their purposes by . . . ensuring consistency in these orders across comparable circumstances.”); Robert G. Williams, *Guidelines for Setting Levels of Child Support*, 21 FAM L.Q. 281, 286 (1987) (explaining that “[e]xperience of states with guidelines has shown that they can improve the efficiency of adjudication processes for child support awards”). But see, Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 24 FAM. L.Q. 1, 10 (1990) (suggesting that “more consistent and coherent results would be achieved by setting a national standard, with adjustments for regional variations in the cost of living. Having moved as far as we have with . . . national support enforcement, continued federal deference to state-by-state discretion seems misplaced”).

37. See, e.g., Walsh, *supra* note 11 at 1029 (noting that although there are variances between the states, the three approaches are “in essence the foundation of all child support legislation in the United States”). Even among the states that follow the same guidelines, some variation in the establishment and the application of them still exists. Therefore, the three formulas that are described in this Note are not an exhaustive description of the many variations that the states have adopted over the years.

38. For a detailed background of how these guidelines developed, see *id.* at 1029 (explaining that there were originally two approaches—the percentage-of-income model and the “formula model”—and describing income shares and Melson-Delaware as two types of the latter).

39. BLACK’S LAW DICTIONARY 1181 (9th ed. 2009).

40. See Venohr & Williams, *supra* note 35, at 11 (Alabama, Arizona, California, Colorado, Connecticut, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming).

41. Administrative Office of Courts, *Child Support Information*, ALABAMA UNIFIED JUDICIAL SYSTEM, <http://www.alacourt.gov/ChildSupportInfo.aspx> (last visited Oct. 14, 2010).

42. *Id.* (follow “Rule 32, Alabama Rules of Judicial Administration (for cases filed on or after Jan. 1, 2009)” hyperlink).

remaining amount is presumably paid by the mother in her day-to-day support of the child.

Combined Adjusted Monthly Gross Income	Monthly Payment by Number of Children					
	One	Two	Three	Four	Five	Six
2000.00	403	584	687	767	844	875
4000.00	685	990	1163	1299	1429	1553
6000.00	818	1171	1363	1523	1675	1821
8000.00	944	1345	1558	1741	1915	2081
10,000.00	1075	1532	1776	1983	2182	2371

Not all income shares models are created equally. Some states base their models on net income, while others, like Alabama, base their models on gross income.⁴³ Also, Alabama's model decreases the percent of income that goes towards child support as the combined income increases, while other income-shares states use a consistent percentage regardless of income level.

Thirteen states follow the percentage-of-income model.⁴⁴ This model requires the fewest calculations. It also provides similar child support awards to the income-shares model. For instance, the first row in Alabama's table closely follows the percentage-of-income model (i.e., support for one child equals about 20% of the parents' income, two children equals about 28%, and so on). The following table illustrates Illinois' percentage-of-income child support model.⁴⁵ For example, if an obligor in Illinois has one child, and the court follows the guidelines, then the obligor would simply pay 20% of his or her net income towards child support each month.

Number of Children	Percent of Supporting Party's Net Income that Goes Towards Child Support
One	20%
Two	28%
Three	32%
Four	40%

43. See Venohr & Williams, *supra* note 35, at 11.

44. See *id.* at 11 (Alaska, Arkansas, Georgia, Illinois, Minnesota, Mississippi, Nevada, New Hampshire, New York, North Dakota, Tennessee, Texas, and Wisconsin).

45. 750 ILL. COMP. STAT. 5/505(a)(1) (2009).

Five	45%
Six or more	50%

Finally, three states, Delaware, Hawaii, and Montana, follow the Melson-Delaware model.⁴⁶ Of the three models, it is the most complicated to compute because it requires three separate calculations. Starting with each parent's income, the court subtracts a "self-support reserve," which is based on the amount of money needed for a person to subsist.⁴⁷ Next, the court determines the "children's primary support needs" amount, which, like the self-support reserve, is based on the amount of money needed for a child to subsist.⁴⁸ Finally, the court adds to the primary support amount the "standard of living allowance," which is an additional percentage based on the number of children provided for.⁴⁹

B. Problems with Discretionary High-Income Child Support Standards

The federal government required states to enact presumptive child support guidelines in part to increase the consistency of the awards. The idea was that the "greater consistency and greater predictability . . . , in turn, would reduce litigable issues and encourage settlement as well as create the perception of 'fairness' in the judicial system."⁵⁰ For the most part, this has been the result. Guideline child support formulas improve the efficiency of the courts, the adequacy of the awards, and the consistency of the outcomes.⁵¹

Consistent, clear rules are particularly important in divorce cases because a vast majority of cases settle, and never go to trial.⁵² Where clear presumptive guidelines are in place, the parties may be better able to reach reasonable agreements on child support.⁵³ Thus, the parties have little rea-

46. See Venohr & Williams, *supra* note 35, at 11 (Delaware, Hawaii, and Montana).

47. See, e.g., Robert G. Williams, *Implementation of the Child Support Provisions of the Family Support Act: Child Support Guidelines, Updating of Awards, and Routine Income Withholding*, in CHILD SUPPORT AND CHILD WELL BEING, 93, 97-98 (Irwin Garfinkel et al. eds., 1994).

48. See *id.* at 98.

49. See *id.*

50. Linda Henry Elrod, *The Federalization of Child Support Guidelines*, 6 J. AM. ACAD. MATRIMONIAL LAW. 103, 115 (1990) (footnote omitted).

51. See discussion *supra* pages 5-7 for a description of the approaches. See also Bankes, *supra* note 36 at 356.

52. See T.K. Logan, Robert Walker, Leah S. Horvath, & Carl Leukefeld, *Divorce, Custody, and Spousal Violence: A Random Sample of Circuit Court Docket Records*, 18 J. FAM. VIOLENCE 269, 269 (2003) ("Contrary to popular belief, findings from this study indicate that divorce actions were almost always settled through agreement of the divorcing parties rather than by adjudication").

53. See Bankes, *supra* note 36, at 356.

son to argue for an award that deviates from the guidelines. Yet, as the following discussion illustrates, the guidelines' benefits may be lost in high-income cases.

1. Undermining Fair Settlement

Not all divorce cases actually go to trial.⁵⁴ In fact, a large majority of them settle out of court.⁵⁵ Therefore, courts and commentators alike have posited that divorce laws should be written as clear rules so that parties can use the rules as a backdrop to determine with some degree of certainty what they are entitled to.⁵⁶ Nonetheless, much of divorce law involves murky, discretionary legal standards. These standards present a number of roadblocks for parties that wish to settle their cases.

First, when such standards are the rule, it is almost impossible to predict what the likely outcome would be if the case went to trial. Where the parties and even their lawyers have such great uncertainty, no one knows whether they have gotten a good deal, or whether they have made a decision that reflects each party's full rights and responsibilities. The parties are therefore unable to effectively bargain with one another.⁵⁷

Second, the difficulties with these standards are so great that many cases still have a number of issues adjudicated by a judge prior to the ultimate settlement.⁵⁸ For instance, "litigated disputes typically settle late, and often after judges have [ruled on a variety of matters]."⁵⁹ This approach to reaching agreements in divorce cases carries with it many of the negative factors associated with taking divorce matters all the way to trial: great expense and time for both parties, and significant emotional stress on the

54. See Marsha Garrison, *Reforming Divorce: What's Needed and What's Not*, 27 PACE L. REV. 921, 929–30 (2007) ("Researchers have found that the majority of divorcing couples resolve the terms of their divorce themselves with little conflict."); see also Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 320 (1991) ("Although we celebrate it as the centerpiece of our system of justice, we know that trial is not only an uncommon method of resolving disputes, but a disfavored one.").

55. See Logan, Walker, Horvath, & Leukefeld, *supra* note 52, at 269.

56. See, e.g., *Montenegro v. Diaz*, 27 P.3d 289, 295 (Cal. 2001) (noting that most parents are capable of reaching appropriate settlements, and that "[r]equiring a [searching] judicial inquiry . . . in order to attain finality would burden courts and parties with unnecessary expense and delay"); *Garska v. McCoy*, 278 S.E.2d 357, 362 (W.Va. 1981); Robert J. Levy, *Ellman's "Why Making Family Law is Hard": Additional Reflections*, 35 ARIZ. ST. L.J. 723, 739 (2003) ("Needless to say, we cannot do without binding rules and the search for fair rules—rules that will by and large be followed—because they constrain otherwise objectionable judicial discretion and because they guide private negotiations.").

57. Cf. Gross & Syverud, *supra* note 54, at 323 ("The parties do not know in advance how the court will evaluate the evidence. Therefore, they must guess the answer to the critical question: On which side of the line will this case fall?").

58. See Chris Guthrie, *Misjudging*, 7 NEV. L.J. 420, 447–48 (2007).

59. *Id.* at 447–48 (footnote omitted).

family members. Moreover, because the parties “often settle in the shadow of legal rulings,” the final bargains are likely to “reflect the potentially distorted judgment of a judge,” rather than the best interests of the parties and their children.⁶⁰

Third, divorce settlements already present an intrinsic and unavoidable problem—unequal bargaining between the parties. For instance, the custodial parent, the obligee, is typically the mother.⁶¹ She is also typically the parent with less earning capacity, in many cases having no income at all.⁶² Therefore, it is possible she will settle for lower child support payments to avoid protracted, expensive litigation that she cannot afford.

Moreover, as is often the case, custody and child support agreements go hand-in-hand. Thus, the concern arises as well that the obligee will agree to lower child support payments in order to remain the custodial parent.⁶³ Where the standards are unclear, the obligee’s unequal bargaining position is heightened. Whether the obligee is well-versed in family law or not, she is likely unable to accurately predict what she would be entitled to in court and she is therefore unable to know whether she has agreed to a fair settlement.⁶⁴

60. See *id.* at 448.

61. Monica J. Allen, *Child-State Jurisdiction: A Due-Process Invitation to Reconsider Some Basic Family Law Assumptions*, 26 FAM. L.Q. 293, 293 n.2 (1992) (“In 90 percent of all divorces involving children the mother retains custody. As a result, in the overwhelming majority of cases the parent seeking to impose, modify, or enforce a support obligation is the mother.” (citation omitted)).

62. Marion Crain, “*Where Have All the Cowboys Gone?*” *Marriage and Breadwinning in Postindustrial Society*, 60 OHIO ST. L.J. 1877, 1881–82 (1999) (“In 1992, 39% of all divorced women with children lived below the poverty level. Since children of divorce are typically in their mothers’ custody, they live at the standard of living of their mothers—which means that many experience poverty. The major problem of divorce for women, particularly custodial mothers, ‘is not the lack of a male presence, but a lack of a male income.’” (footnotes omitted)).

63. See *Garska v. McCoy*, 278 S.E.2d 357, 360–61 (W.Va. 1981) (“Since the parent who is not the primary caretaker is usually in the superior financial position, the subsequent welfare of the child depends to a substantial degree upon the level of support payments which are awarded in the course of a divorce. Our experience instructs us that uncertainty about the outcome of custody disputes leads to the irresistible temptation to trade the custody of the child in return for lower alimony and child support payments. Since trial court judges generally approve consensual agreements on child support, underlying economic data which bear upon the equity of settlements are seldom investigated at the time an order is entered. While *Code*, 48-2-15 [1980] speaks in terms of “the best interest of the children” in every case, the one enormously important function of legal rules is to inspire rational and equitable settlements in cases which never reach adversary status in court.”).

64. See *Garrison*, *supra* note 54 at 932–33 (“If the outcome of litigation is highly uncertain, not even experts can offer clear advice about what constitutes a good or bad negotiated settlement. Nor does a litigant have any capacity to judge whether his or her attorney has negotiated a good deal or a bad one. Indeed, the attorney herself may not know whether she has negotiated a good or bad deal; her capacity to judge success will of necessity be confined to what she learns from reported cases, her own practice experience, and her observations.”).

2. Increasing Litigation

The state of current high-income child support law may cause parties who are on the cusp of deciding whether to settle or to go to trial to opt for the latter option. As it stands, parties would have much difficulty in determining whether the decision would follow guidelines, or fall above or below guidelines (and by how much as well). One commentator has described this conundrum as follows:

[W]hen legal rules are highly discretionary and imprecise, they cast a blurred shadow that impairs each spouse's ability to determine his or her legal entitlements and reach a mutual understanding about those entitlements. Instead of consensus on case outcome, each litigant may reach very different expectations, thus exacerbating the difficulty of forging a negotiated settlement.⁶⁵

Thus, at such an impasse, negotiations are stalled and the likelihood of the case going to trial is greatly increased.⁶⁶ This is particularly the case in high-income divorce proceedings because at least one of the parties has the financial resources to sustain drawn-out court battles.⁶⁷ Therefore, high-income cases have a further increased likelihood of going to trial.⁶⁸

Moreover, the parties have an incentive to continue to fight so long as there is reason to believe they may prevail.⁶⁹ Under the current discretionary determination of high-income child support, the parties can attack one another in order to change the level of support provided. Such drawn-out battles are likely to have negative consequences on the parents and the children alike. Therefore, any workable solution should support the non-adversarial resolution of disputes.

3. Harming the Family

Divorce can be emotionally harmful to all of the family members involved. Some research has shown that there may be a number of long-term and short-term negative effects of divorce on children.⁷⁰ In particular

65. *Id.* at 925.

66. *See id.*

67. *See* Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 542 (1994) ("High income groups use lawyers with greater frequency than lower income groups: 49% of adults in the top quintile of the income scale had consulted lawyers in the three years prior to 1989, but only 27% of adults in the lowest ten percent used legal services during the same period.").

68. *See* Garrison, *supra* note 54 at 923 (noting that the contested divorce cases came from "the wealthiest segment of the total divorce pool" from New York).

69. *See id.* at 925.

70. *See, e.g.*, Doolittle & Deutsch, *supra* note 11 at 425. *But see* Michael E. Lamb, *Child Development and the Law*, in HANDBOOK OF PSYCHOLOGY: DEVELOPMENTAL PSYCHOLOGY, 559, 570

though, divorced families that are already experiencing tumultuous changes in their lives can ill afford to be faced with unpredictable outcomes in the courtroom.⁷¹ In fact, “families who litigate divorce and who utilize the court system chronically,” can cause the children involved to “align[] with one parent against the other and . . . risk . . . sacrificing a relationship with one parent to stabilize and secure the relationship with the other parent.”⁷²

Child support disputes require that the divorce be litigated. Although some children of divorcing parents are young enough to remain oblivious to their parents’ in-court disputes, older children are likely more aware.⁷³ Moreover, even if divorcing parents can avoid discussing the contentious issues with their children, children are still likely to be greatly harmed by the divorce itself.⁷⁴ As a result, any decision-making routes that may reduce the contentious nature of the divorce process could be helpful to alleviate these problems.

Child support issues that go to trial can also potentially lead to strained relationships between the obligor and the rest of the family members. The very nature of divorce proceedings pits the former spouses against one another, requiring them to point out each other’s failings.⁷⁵ Furthermore, the parties’ displeasure with the outcome of the case is almost guaranteed, since a court rarely rules completely in favor of one side. For instance, if the obligor must pay more than he believed he should, then he may feel cheated by the legal system and his ex-spouse.⁷⁶ Likewise, the obligee may feel disenfranchised by the outcome as well, perhaps believing that the child was entitled to more support than the court order provided.

(Richard M. Lerner et al. eds., John Wiley & Sons 2003) (“[C]ustody and access disputes involve conflict, but . . . such conflict in and of itself is not necessarily harmful”).

71. See, e.g., David A. Hardy, *Nevada Alimony: An Important Policy in Need of a Coherent Policy Purpose*, 9 NEV. L.J. 325, 325 (2009) (“Litigants often respond negatively when their relationships and resources are at risk”).

72. Doolittle & Deutsch, *supra* note 11 at 428.

73. See Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce*, 43 WAKE FOREST L. REV. 441, 454 (2008) (“Ideally, children should never be exposed to their parents’ conflict. Unfortunately, many children routinely overhear their parents arguing over child support and parenting time schedules.”(footnote omitted)).

74. See James R. Dudley, *Increasing Our Understanding of Divorced Fathers Who Have Infrequent Contact with Their Children*, 40 FAM. REL. 279, 279 (1991) (“The negative effects of divorce on all family members have been extensively documented. Children are usually hurt the most.” (citations omitted)).

75. See Hardy, *supra* note 71 at 325 (“The adversarial process requires parties to emphasize their virtues and their respective spouses’ flaws. The divorce proceeding is both expensive and destructive.”).

76. Cf. Judith A. Seltzer, Sara S. McLanahan, & Thomas L. Hanson, *Will Child Support Enforcement Increase Father-Child Contact and Parental Conflict After Separation?*, in *FATHERS UNDER FIRE: THE REVOLUTION IN CHILD SUPPORT ENFORCEMENT* 157, 157 (Irwin Garfinkel et al. eds., Russell Sage Foundation 1998) (Increases in child support enforcement and the amount paid may “increas[e] nonresident father’s dissatisfaction with the system.”).

4. Generating Inconsistent Decisions

The problems described above can result from the inconsistent outcomes in high-income child support cases. When the obligor's income is at one of the polar ends of the income spectrum, courts inevitably conduct a problematic balancing of interests to determine the child support award.⁷⁷ When an obligor earns too little, the available money may not be sufficient to provide for the subsistence of both the obligor and the children.⁷⁸ In contrast, when an obligor earns too much, whatever amount that may be, the guideline award may be perceived as providing the child and the obligee with an excessive amount of money.

Even though the high-income quandary does not pose the weighty concerns that are present in low-income cases (in particular, whether the child and the parent will have enough to ensure survival), it is not necessarily an easier problem to solve.⁷⁹ The problem is so complex, in fact, that there is little uniformity among the states on this issue.

In high-income cases, courts contend with competing concerns: providing the child with a lifestyle that reflects his or her pre-divorce lifestyle versus avoiding potentially requiring the obligor to subsidize the excesses of the obligee.⁸⁰ Ideally, the deviation would place a limit on the support amount at the point where the award becomes excessive and is therefore unjust or inappropriate.⁸¹ The cases compared below, however, illustrate

77. See e.g., *In re Marriage of Kern*, 615 N.E.2d 402, 405 (Ill. App. Ct. 1993) ("The guideline amounts have some inadequacies at both ends: just as following the guidelines may produce an excessive amount of support where the noncustodian is a high-income earner, following the guidelines may produce an insufficient amount of support where the noncustodian is a low-income earner" (citations omitted)).

The problems associated with determining child support in such cases have been a source of great debate and discussion. See Kathleen A. Hogan, *Child Support in High Income Cases*, 17 J. AM. ACAD. MATRIMONIAL LAW. 349, 349–50 (2001); Laura W. Morgan, *Child Support and the Anomalous Cases of the High-Income and Low-Income Parent: The Need to Reconsider What Constitutes "Support" in the American and Canadian Child Support Guideline Models*, 13 CANADIAN J. FAM. L. 161, 162–63 (1996).

78. While courts must establish support for the children of impoverished parents, the monthly award can be as low as \$20 per month, and could potentially be even lower in states that permit the judge to use discretion in determining the amount. See Morgan *supra* note 77 at 204.

79. See Gregory M. Bartlett, *Setting Child Support for the Low Income and High-Income Families in Kentucky*, 25 N.KY. L. REV. 281, 299 (1998) ("[D]etermining what is a fair and reasonable amount for the support of a child of high income parents requires a different, but not always easier, analysis for the trial judge.").

80. See, e.g., *In re Marriage of Lee*, 615 N.E.2d 1314, 1326 (Ill. App. Ct. 1993) ("In fixing the child support obligation of a high-income parent, the trial court must balance competing concerns. On one hand, [it] should not limit the amount of child support to the child's 'shown needs,' because a child is not expected to live at a minimal level of comfort while the noncustodial parent is living a life of luxury. . . . On the other hand, child support payments are not intended to be windfalls, but rather adequate support payments for the upbringing of the children.").

81. See, e.g., *id.*

the injustice that continues to pervade high-income child support cases despite courts' often careful balancing attempts. The awards in such cases, even in states following the same or similar guidelines, continue to be unpredictable and inconsistent.

The first set of cases for comparison come from Minnesota, Florida, and Maryland. At the time of the example case, Minnesota followed the percentage-of-income model;⁸² In contrast, Florida and Maryland are states that follow the income-shares model.⁸³ All of these states have statutory provisions permitting deviation where a court may consider an award from a high-income earner unjust, excessive, or inappropriate.⁸⁴

In *Joneja v. Joneja*, a Minnesota case, the father's yearly income was \$345,000,⁸⁵ and the court required him to pay approximately 8% of his income to support two children. In contrast, in the Maryland case of *Voishan v. Palma*, the father's yearly income was less than half, at \$145,000, and the court required him to pay almost 13% of his income to support two children.⁸⁶ Finally, in *Miller v. Miller*, a Florida case, the father's yearly income was \$121,500, and the court required him to pay about 11% of his income to support one child.⁸⁷ The father's income in *Joneja* was more than twice that of the fathers in *Voishan* or *Miller*. However, both of the latter fathers paid a significantly higher percentage of their income in child support than the father in *Joneja*.

Inconsistent outcomes for high-income child support are not only noticeable in states with differing calculation models. The next set of cases comes from Illinois, a state that follows the percentage-of-income model.⁸⁸ Illinois does not have a statutory provision regarding high-income child support.⁸⁹

In *In re Marriage of Lee*, the father earned between \$235,222 and \$326,387 per year, and the court required him to pay up to 15% of his esti-

82. Compare MINN. STAT. § 518A.35(2) (2008) with Venohr & Williams, *supra* note 35 at 11.

83. *Id.*

84. See Morgan, *supra* note 9.

85. 422 N.W.2d 306, 311 (Minn. Ct. App. 1988) (Crippen, J., dissenting). The obligee had no income. *Id.* There, the court affirmed the trial court's child support award of \$1,200 per month and \$1,200 of private school expenses for two children. *Id.* at 309–10 (majority opinion). Also, although this case is from the same year that the child support guidelines were officially mandated by the federal government, Minnesota already had guideline formulas in place at this point. See *id.* at 309.

86. 609 A.2d 319, 322 (Md. 1992). The obligee's yearly income was \$30,000. *Id.* There, the court affirmed the trial court's child support award of \$1,550 per month for two children. *Id.* at 322, 327.

87. 662 So.2d 391, 392 (Fla. Dist. Ct. App. 1995). The obligee had a negligible amount of income. *Id.* at 391. There, the court affirmed the trial court's child support award of \$1,122 per month for one child. *Id.* at 392.

88. See discussion *supra* Part I(A)(1) for a description of Illinois' percentage-of-income model.

89. See Morgan, *supra* note 9.

mated salary to support one child.⁹⁰ On the other hand, in *In re Marriage of Scafuri*, the father earned approximately \$450,000 per year, and the court required him to pay 16% of his salary to support three children.⁹¹ Even the high end of the *Lee* father's income range fell well below the *Scafuri* father's income. The courts' descriptions of the children's lifestyles were substantially similar in both cases. Both families went on vacations, and both spent money on extras for the children: electronic equipment in *Lee*, and lessons and camp in *Scafuri*. Moreover, the father in *Scafuri* had three children while the father in *Lee* only had one. Under Illinois' guideline table, a parent of three children should pay 32% of his income, and a parent of one child should pay 20% of his income.⁹² Yet, the two obligors were required to pay almost the same percentages of their salaries in support of their children—both of which were significantly lower than the guideline amount for only one child.

The last set of high-income cases come from Hawaii and Delaware, states that follow the Melson-Delaware guidelines.⁹³ Delaware has no statutory provision for high-income support, and Hawaii statutorily permits downward deviations where the court finds the obligor's income would create an unnecessarily high child support award.⁹⁴ Thus, while both states permit their courts to deviate from guidelines in high-income cases, neither has a high-income provision that would otherwise bear upon the outcomes in their cases.

In the Hawaii case of *Kim v. Camerlingo*, the father's yearly income ranged from \$48,000 to \$156,000 per year, and the court required him to pay between 8% and 39% of his income in support of only one child.⁹⁵ By contrast, in the Delaware case of *S.S. v. C.S.*, the father's yearly income

90. 615 N.E.2d 1314, 1325–26 (Ill. App. Ct. 1993). The obligee's yearly income was \$19,000. *Id.* at 1318. There, the court affirmed the trial court's monthly child support award of \$3,000 for one child. *Id.* at 1326. The court considered the lifestyle that the child was used to, which included, among other things, international travel and personal electronic equipment (a fax machine and computer). *Id.*

91. 561 N.E.2d 402, 408, 412 (Ill. App. Ct. 1990). The obligee had no income. *Id.* at 408. There, the court deviated downward from the guidelines, and awarded \$6,000 per month for the three children, reasoning that any more would have simply been financing the obligee's lifestyle. *Id.* at 406–07. The court also considered evidence that the children "enjoy[ed] a very comfortable lifestyle" including "restaurants, clothes, sports, lessons, vacations, camp and entertainment." *Id.* at 406. Additionally, in deviating below guidelines, the court based its decision, in part, on the now-dubious economic theory, see Ira Mark Ellman, *Fudging Failure: The Economic Analysis Used to Construct Child Support Guidelines*, 2004 U CHI. LEGAL F. 167, 181–82, that as income increases, the percent of income spent on child-rearing expenses decreases. *Scafuri*, 561 N.E.2d at 407.

92. 750 ILL. COMP. STAT. 5/505(a)(1) (2009).

93. See Venohr & Williams, *supra* note 35, at 11.

94. See Morgan, *supra* note 9.

95. No. 25036, 2004 WL 2810007, at *1 (Haw. Ct. App. Dec. 8, 2004). The court did not state the obligee's income; there, the court affirmed the trial court's support award of \$1,570 per month for one child. *Id.*

was \$519,085, and the court required him to pay only 8% of his income to support two children.⁹⁶ The *Kim* father's yearly income ranged from 9% to 30% of the *S.S.* father's income. However, the *Kim* court required the obligor to pay a potentially larger portion of his income in support for one less child.

II. PROPOSED SOLUTION

A. *Solution Part I: Increase the Current Thresholds for High-Income Child Support*

To help establish some consistency in high-income child support jurisprudence, the first proposed step is to set the thresholds for deviation much higher. Currently the thresholds that trigger high-income deviations are too low. They also vary widely across the states.⁹⁷ By increasing the threshold level to determine who is a high-income earner, courts can ensure that current guidelines will be followed in a much larger proportion of cases. Thus, many of the inconsistency and unpredictability problems can be solved through a simple increase of the threshold.

1. Current Thresholds

As mentioned above, the current threshold yearly gross income for an obligor that triggers a high-income calculation varies significantly—from \$50,000 in Mississippi to \$240,000 in Arizona.⁹⁸ It is undoubtedly appropriate for states to devise salary thresholds according to economic data within their relevant communities.⁹⁹ Indeed, this is necessary because the average income of individuals and families varies from state to state.¹⁰⁰ Nonetheless, setting the high-income threshold within the current disparate ranges appears to be inappropriate in light of current economic data.

96. No. CN01-06678, 2003 WL 23269478, at *10 (Del. Fam. Ct. Aug. 22, 2003). The obligee's yearly income was less than \$10,000. *Id.* There, the court determined that an appropriate award was \$3,463.50 per month for the support of two children, reasoning that any more would have exceeded the reasonable needs of the children. *Id.*

97. See Morgan, *supra* note 9.

98. See *id.*

99. Cf. Molly E. Christy, Note, *Unjust and Inequitable: An Argument Against Strict Application of the Child Support Guidelines When the Obligor Parent and Child Live in Different Countries*, 20 QUINNIAC PROB. L.J. 260, 269 (2007) (arguing that the guidelines should not be adhered to in determining child support when the child lives in a country where the cost of living is substantially less than that in the U.S.).

100. See JESSICA SEMEGA, U.S. CENSUS BUREAU, MEN'S AND WOMEN'S EARNINGS BY STATE: 2008 AMERICAN COMMUNITY SURVEY, U.S. CENSUS BUREAU 4 (2009), available at <http://www.census.gov/prod/2009pubs/acsbr08-3.pdf>.

The 2008 median income for men in the United States ranged between \$36,839 in Arkansas to \$58,838 in Connecticut, for an overall median salary of \$45,556.¹⁰¹ Logically, to trigger a high-income calculation that deviates below guideline support, the father should earn a yearly income that substantially exceeds the median.

In fact, the high-income analysis may best be triggered by a yearly income even above Arizona's \$240,000 per year for two reasons. First, there is some concern that the levels of current child support guidelines already inadequately provide for the many costs of raising a child.¹⁰² Thus, there is certainly an argument that guideline levels should be higher than they currently are,¹⁰³ and that, at the very least, courts should be reluctant to deviate downward from guidelines. Therefore, the presumptive adherence to guidelines should apply to as many of the cases as possible to ensure at least minimally adequate support.

Second, current estimates on the amount of money high-income parents spend on their children may be based on faulty precepts.¹⁰⁴ In fact, one researcher has found that the econometric research upon which state child support guidelines are based "systematically undercount[s] actual consumer expenditures in higher income families—the higher the household income, the higher the proportion of the household's expenditures that will be erroneously omitted from the expenditure tabulation."¹⁰⁵ Thus, when courts deviate downward from the presumptive guidelines for high-income obligors, they further aggravate the problem of providing high-income child support awards that are too low.¹⁰⁶ Therefore, casting a wider net for families that will presumptively receive guideline support can help to ensure that more children will receive at least a minimum base level of support.

101. *See id.*

102. *See, e.g.,* Tess Wilkinson-Ryan & Deborah Small, *Negotiating Divorce: Gender and Behavioral Economics of Divorce Bargaining*, 26 *LAW & INEQ.* 109, 129 (2008) (suggesting that current child support awards do not sufficiently cover the obligations of divorced custodial mothers who must care for their children and work).

103. *See, e.g.,* Ann Laquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 36 *WM. & MARY L. REV.* 989, 1068–69 (1995) ("[R]ecent studies have concluded that, even with . . . guidelines, child support awards are too low."); Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 *N.C. L. REV.* 209, 241 (1991) ("[S]ome models embody underlying economic data which results in [child support] awards that are too low.").

104. *See* Ellman, *supra* note 91 at 181–82.

105. *See* Ellman & Ellman, *supra* note 13 at 124.

106. *See id.*

2. Proposed Thresholds

According to the 2009 U.S. Census, the mean income for the top 5% of families was \$295,388 per year.¹⁰⁷ In light of the current inadequacy of child support awards in general, and the underreporting of money spent on children by higher income families, this figure may be an appropriate starting point for states' high-income thresholds. However, because local economies differ, state agencies can set an individualized high-income level that comports with the top 5% of family incomes within their states.

To further individualize the thresholds, courts should be permitted to use discretion depending on which region of the state the family lives in. For instance, the average cost-of-living index varies greatly between cities in the United States. The cost-of-living index can show just how important it is for states to personalize their thresholds. The U.S. Census determines the cost-of-living index for "participating areas," with the "nationwide average equal[ing] 100 and each index . . . read[ing] as a percent of the national average."¹⁰⁸ Moreover, this index is based upon a number of different components, such as the cost of food, housing, utilities, transportation, and healthcare.¹⁰⁹

Thus, if a family is from White Plains, New York, where the cost of living index is 177.6, the threshold that triggers a high-income deviation should certainly be higher than for a family from Elmira, New York, where the cost of living index is only 77.2.¹¹⁰ Ideally, the states would set forth threshold income levels for all of the varying areas within the state. However, setting the minimum threshold for high-income deviation to the state's mean family income for the top 5% may be sufficient as long as

107. *Table H-3. Mean Household Income Received by Each Fifth and Top 5 Percent, All Races: 1967 to 2009*, U.S. CENSUS BUREAU (Sept. 16, 2010), http://www.census.gov/hhes/www/income/data/historical/household/H03AR_2009.xls (last visited Nov. 17, 2010).

I chose family income, rather than household income for the basis of the threshold. The U.S. Census defines "family" for income purposes as "a group of two people or more . . . related by birth, marriage, or adoption and residing together," whereas, "household" is defined as "all the people who occupy a housing unit. A house, an apartment or other group of rooms, or a single room, is regarded as a housing unit when it is occupied . . . as separate living quarters." *Current Population Survey (CPS) - Definitions and Explanations*, U.S. CENSUS Bureau, <http://www.census.gov/population/www/cps/cpsdef.html> (last modified May 10, 2010). Because a household includes people who happen to live in the same "unit," but do not necessarily share their income or expenses or even know each other, "family" income is likely a better framework to deal with in the child support context.

108. *Cost of Living Index—Selected Metropolitan Areas: Fourth Quarter 2005*, U.S. CENSUS BUREAU, <http://www.census.gov/compendia/statab/2007/tables/07s0709.xls> (last visited Oct. 8, 2010).

109. See Bert Sperling & Peter Sander, *CITIES RANKED & RATED: MORE THAN 400 METROPOLITAN AREAS EVALUATED IN THE U.S. & CANADA* 68 (Marc Nadeau & Michael Kelly eds., 2d ed. 2007).

110. See *id.* at 74.

courts are aware of the communities in which following the guidelines may be inappropriate.

For predictability and ease of administration, the higher threshold amount can be set in the statute and indexed to the rate of inflation so that there need not be legislative action every time there is an inflation change. Some states already follow a similar approach with their child support determinations. For instance, Minnesota's child support statute "requires the Supreme Court to change the dollar amount of the income limit for application of the child support guidelines on July 1 of each even numbered year, to reflect changes in the cost of living index."¹¹¹

Increasing the threshold point to trigger high-income child support calculations ensures that courts must follow the guidelines in a greater majority of the cases. As a result, child support proceedings can be more predictable, and therefore, less litigious and emotionally damaging. Finally, the higher threshold will also ensure that the trust requirement explained below will be imposed only where the obligor has an income that is so high that (1) he or she would not experience economic hardship as a result of it, and (2) an intergenerational transfer of wealth would have been more likely to happen if the parents had not gotten divorced.¹¹² Therefore, an increased threshold should not harm the obligor, and should help to reflect the lifestyle the child would have had if the parents had not divorced.

B. Solution Part II: Postsecondary Education Trust

Courts have used trusts in the child support context for a variety of purposes: to safeguard against variable income,¹¹³ to ensure that child support payments are made from a personal injury settlement,¹¹⁴ to create a

111. Amended Order: Cost of Living Adjustment to Child Support Guidelines, C9-85-1134 (Minn. May 16, 2006), available at <http://www.mncourts.gov/Documents/0/Public/administration/AdministrationFiles/Child%20Support%20Guidelines%20C9-85-1134/2006-05-16%20Amended%20Order%20Cost%20of%20Living%20Adjustment.pdf>.

112. See Frank F. Furstenberg, Jr., Saul D. Hoffman & Laura Shrestha, *The Effect of Divorce on Intergenerational Transfers: New Evidence*, 32 DEMOGRAPHY 319, 325–26 (1995).

113. See Thomas C. Quinlen, *Planning for the Future: Using Child Support Trusts to Prepare Both Father and Child for Life After Professional Sports*, 2 VANDERBILT J. ENT. L. & PRAC. 108, 120–21 (2000).

114. See e.g., *In re State ex rel. Taylor*, 904 A.2d 619, 621 (N.H. 2006).

For a detailed explanation for how trusts can be used to ensure payment of child support and the reasons for which they have been used in the child support context, see McMullen, *supra* note 12 at 454–55 (citing a number of bases for courts to require trusts in the context of child support, including safeguarding against an obligor's unpredictable income, providing postsecondary education funds for children of high-income parents, protecting the child from a parent's irresponsibility with money, and honoring parents' voluntary agreement to form a trust).

“travel trust fund” for one of the parent’s visitation expenses if the parents live far apart,¹¹⁵ and even to ensure that a portion of a lump sum worker’s compensation award could be set aside for child support where the father was uncertain to have future income.¹¹⁶ In addition, although some states still prohibit courts from requiring obligors to pay for postsecondary education, in recent years courts have been “more willing to enforce agreements between the parents that benefit the child by requiring support . . . for higher education when not required by statute.”¹¹⁷

1. The Tennessee Model: A Framework

Tennessee statutorily provides for high-income obligors to contribute to trust funds in addition to base child support.¹¹⁸ Although Tennessee’s threshold for high-income calculations is lower than the one suggested in this Note, it provides an example of a statute that permits courts to incorporate an educational trust into the child support decision. The Tennessee provision states as follows:

When the presumptive child support order exceeds the amount found by multiplying a net [monthly] income of ten thousand dollars (\$ 10,000) by the percentages set out [in the guidelines] . . . a [party] seeking support in excess of the amount provided by the applicable percentage must prove by a preponderance of the evidence that more than this amount is reasonably necessary to provide for the needs of the child.

. . . .

The court may require that sums paid pursuant to this subparagraph be placed in an educational or other trust fund for the benefit of the child.¹¹⁹

In *Price v. Price*, the court applied this statute to a father whose yearly income was roughly \$230,000.¹²⁰ The trial court required the father to pay

115. *Lasich v. Lasich*, No. C040037, 2002 WL 31529039, at *2 (Cal. Ct. App. Nov. 14, 2002).

116. *See, e.g., Tyc v. Tyc*, No. FA 920513300, 1997 WL 804849, at *3 (Conn. Super. Ct. Dec. 12, 1997).

117. Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Parentage and Assisted Reproduction Problems Take Center Stage*, 39 FAM. L.Q. 879, 900 (2006).

118. *See, e.g., Laura W. Morgan, Child Support and the High Income Parent: The Uses and Misuses of the Good Fortune Trust*, 72 FLA. B.J. 102, 103–04 (1998). Morgan explained that:

[Tennessee’s] provision was applied in [a case] . . . [where] the father earned approximately \$260,000 per year. The trial court ordered the father to pay \$3,092.62 per month in support, with \$1,780.17 reserved for a trust fund established for the child’s college education. The Tennessee Supreme Court held that this was appropriate, because limiting a child to support that covers everyday expenses may be neither appropriate, nor equitable: such an automatic limit fails to take into consideration the extremely high standard of living of a parent such as [the father], and thus fails to reflect one of the primary goals of the guidelines, i.e., to allow the child of a well-to-do parent to share in that very high standard of living.

Id. (quoting *Nash v. Mulle*, 846 S.W.2d 803, 805 (Tenn. 1993)).

119. TENN. COMP. R. & REGS. 1240–2–4–.07(g)(1), (g)(2)(iii) (2008).

120. No. M1998-00840-COA-R3-CV, 2000 WL 192569, at *2 (Tenn. Ct. App. Feb. 18, 2000).

\$2,100 per month in child support and \$700 per month into an “educational trust” for the child.¹²¹ The court order also stated that any money that had not been spent out of the trust by the time the child was twenty-four would revert to the father.¹²²

In *Huntley v. Huntley*, the Tennessee Court of Appeals affirmed the trial court’s creation of a different type of trust.¹²³ There, the total child support requirement was \$6,600 per month, but the trial court required about \$3,100 of it to be paid to the mother for child support and the other \$3,500 to be paid into a non-educational trust for the benefit of the child that would revert to the father when the child turned twenty-five.¹²⁴ The court noted that under Tennessee law the trust can be established for non-educational purposes and that in this case, the parties already had set aside enough money for the child’s post-secondary educational needs.¹²⁵

In *Lee v. Askew*, the Tennessee Court of Appeals affirmed the trial court’s decision requiring the father, a professional athlete, to pay into a trust for his child.¹²⁶ There, the court rejected the father’s contention that the statute was infringing on his constitutional right to privacy.¹²⁷ At least one commentator has noted that in the case of the professional athlete, the trust can benefit the father by safeguarding both the father and the child against the day when the athlete’s likely short-lived career ends.¹²⁸

Tennessee’s approach provides a framework for how courts can use a trust when awarding high-income child support. However, this framework can be improved upon to address the policy and economic problems inherent in high-income child support decisions. For instance, in the case of the high-income parent with a consistent and reliable income, limiting the trust to purely post-secondary education uses can assuage the fear that the custodial parent will somehow unduly benefit from the additional support.

Also, framing the trust fund such that the child can spend the money in it however he or she wishes upon reaching a certain age may be inappropriate. Giving the child such broad discretion over the trust may undermine the goal of reducing tension between the family members regarding the child support arrangement. For instance, if there is no limit on how the money can be spent, the obligee could perhaps coerce the child to make

121. *Id.* at *8.

122. *Id.* at *9.

123. 61 S.W.3d 329, 333 (Tenn. Ct. App. 2001).

124. *Id.*

125. *Id.* at 338.

126. No. 02A01-9805-JV-00133, 1999 WL 142389, at *1, 3 (Tenn. Ct. App. Mar. 17, 1999).

127. *Id.* at *3.

128. *See*, Quinlen, *supra* note 113, at 121.

purchases that benefit the obligee and not the child. The parents may also argue over what the child should or should not be purchasing with this court-ordered allowance. However, if the obligor has sole discretion over how the trust can be spent outside of educational purposes, he or she can rest assured knowing that the money put into the trust will be spent only on purchases that he or she approves. This approach may help to reduce the impression that the obligor is being taken advantage of by the legal system or the obligee.

2. Framework for the Post-Secondary Education Trust

The trust should be straightforward in order to minimize contentious proceedings, increase courtroom efficiency, and maximize the long-term welfare of the child—all of which are general goals of the child support guidelines.¹²⁹ The following formula aims to meet these goals as well as the needs of the parents and the children.

The first step is to determine which obligors are high-income earners. In order for courts to only use the trust option in limited circumstances, states could use a high threshold yearly income for the obligor to be considered high-income. This number should fall somewhere in the vicinity of the top 5% of incomes in the state, as explained above. Thus, for instance, if the high-income threshold is \$300,000 gross income per year, then any obligor who earns that amount or more is a high-income earner and will be required to pay into a trust. Likewise, anyone who earns a gross income of \$299,999 per year or less would not be a high-income earner, and would not be required to pay into the trust.

Admittedly, setting a bright line cutoff for the high-income calculation could create a perverse incentive for the father to try to earn a slightly lower salary, or otherwise decrease his income level, if he or she earns just above the \$299,999 threshold. However, in states that bar dissipation of marital assets, the father may be deterred from such action, since the court may consider the father's income prior to such dissipation.¹³⁰

129. See Morgan, *supra* note 77 at 168 (“By requiring the states to establish child support guidelines, the federal government hoped to accomplish four main goals . . . : (1) increase the adequacy of child support awards; (2) increase the consistency and predictability of child support awards; (3) increase compliance through perceived fairness of child support awards; and (4) increase the ease of administration of child support cases.”).

130. See, e.g., *In re Marriage of Lee*, 615 N.E.2d 1314, 1319 (Ill. App. Ct. 1993) (explaining that “[D]issipation refers to the ‘use of marital property for the sole benefit of one of the spouses for a purpose unrelated to the marriage at a time that the marriage is undergoing an irreconcilable breakdown.’”).

Moreover, although this may appear to be a harsh cutoff, those who earn over the \$299,999 threshold will actually be getting a break compared to those in the lower salary bracket. The high-income earner will, at most, be required to pay the amount that he or she would have paid had the guidelines applied to his or her entire salary. However, in most circumstances, the high-income earner will pay less than that, as shown in the example and table below.

The second step is to calculate the base child support obligation according to guidelines for a large portion of the high-income obligor's salary. To make the trust workable for those who are very close to the cutoff, the base child support obligation of a high-income obligor who earns a gross income of \$300,000 per year or more could be based on the first \$275,000 of his or her income.

The third step is for the court to require the obligor to pay into a trust an amount that would equal the average cost of four years of tuition, fees, room, and board at a private university in the United States. However, the obligor must not be required to pay more than the amount he or she would have been required to pay had the guidelines applied uniformly to his or her entire income.

The choice of the private university tuition, fees, room, and board as the amount to be placed into the trust has two bases. First, children of high-income parents are significantly more likely than any other children to attend private universities.¹³¹ Second, the total amount that the trust would hold by the time the child is of college age is currently around \$150,000.¹³² Although this number goes up each year, like the new thresholds, it can be indexed to the rate of inflation so that there need not be legislative action every time there is an inflation change.

The total amount paid into the trust then should be significantly less than a year's salary for the obligor. Using the average cost for a person to attend a private university in the United States would ensure that the child would be able to attend such a school if he or she is admitted. At the same

131. See, e.g., SARAH BURD-SHARPS, KRISTEN LEWIS & EDUARDO BORGES MARTINS, *THE MEASURE OF AMERICA: AMERICAN HUMAN DEVELOPMENT REPORT 2008–2009* 113 (Sarah Burd-Sharps et al. eds., 2008) (“[M]ost elite colleges and universities enroll primarily children of privilege. Students from advantaged family backgrounds—those whose parents are well educated, have high-status occupations, and earn high salaries—are twenty-five times more likely to attend a “top-tier” college than students from disadvantaged backgrounds”); JEROME KARABEL, *THE CHOSEN*, 536–37 (2005) (“By 2000, the cost of a year at Harvard, Yale, and Princeton had reached the staggering sum of more than \$35,000—an amount that well under 10 percent of American families could afford. . . . Yet at all three institutions, a majority of students were able to pay their expenses without financial assistance—compelling testimony that . . . the Big Three continued to draw most of their students from the most affluent segments of American society.”).

132. See, e.g., Karabel, *supra* note 131 at 536–37.

time, it would also provide a cap on the amount of money that a very high-income obligor would ultimately be required to pay into the trust.

The final step is to calculate the additional child support, and add it on to the base child support to determine the total child support obligation. This additional child support would be based upon the obligor's gross yearly income over \$275,000 minus the yearly trust payment. This is necessary to add on to the child support obligation to help ensure that the child experience a minimally similar lifestyle to that of the obligor. However, to calculate this figure, the court can use a lower multiplier than was used for the base child support amount. That way, the total support obligation can be less likely to provide the child or the obligee parent with an excessive amount of money. The following table illustrates this step:¹³³

Number of Children	Additional Child Support Calculation
One	.088 x (gross annual income above \$275,000 per year minus the yearly trust payment)
Two	.129 x (gross annual income above \$275,000 per year minus the yearly trust payment)
Three	.153 x (gross annual income above \$275,000 per year minus the yearly trust payment)
Four	.169 x (gross annual income above \$275,000 per year minus the yearly trust payment)
Five	.183 x (gross annual income above \$275,000 per year minus the yearly trust payment)
Six	.196 x (gross annual income above \$275,000 per year minus the yearly trust payment)

The following is an example to illustrate how the trust would work. Jim, the obligor, earns \$500,000 per year. Pam, the obligee, has no income. They have one child, Scott, who is ten years old. Jim and Pam live in Illinois, a percentage-of-income state. The threshold for high-income earners is set at \$300,000, so Jim is a high-income earner. Under this model, Jim is required to pay 20% of his yearly income up to \$275,000 for base child support. Therefore, Jim's base child support obligation is calculated as follows: $20\% \times \$275,000 = \$55,000$. The \$55,000 is then divided by 12 months, to arrive at a base support obligation of approximately \$4,583 per month.

133. The calculations used here are adapted from West Virginia's child support award guidelines for "[c]ombined adjusted gross incomes above fifteen thousand dollars [per month]." W. VA. CODE § 48-13-303 (2002).

The next step is to determine what amount Jim would have paid per month if the guidelines applied to his entire salary. In this case, he would have paid 20% of \$500,000, or about \$8,333 per month. Because Jim cannot be required to pay more than the difference between the support amount awarded and the amount that would have been awarded had guidelines applied uniformly to his salary, Jim's trust payment cannot exceed \$3,750 per month.

Next, the amount that will go into the trust would be \$150,000, assuming that is the average cost of four years of tuition, fees, room, and board at a private university at the time of the proceeding. If Jim pays \$1,563 per month into the trust, he will have paid the full tuition amount within eight years. Since the goal is that the total amount will be paid into the trust by the time the child is college-aged (normally eighteen), the court should require Jim to pay at least \$1,563 per month into the trust. Thus, by the time Scott turns eighteen, the trust will be paid in full. Moreover, if Jim completes payment into the trust prior to Scott's eighteenth birthday, he will be done with this portion of his obligation.

Finally, the additional child support obligation will be based upon Jim's yearly gross income over \$275,000 minus his trust obligation. Jim grosses \$500,000 per year. So, Jim's yearly gross income over \$275,000 is \$500,000–\$275,000, or \$225,000. Next, Jim's yearly trust payment ($\$1,563 \times 12 = \$18,756$) must be subtracted from his yearly gross income over \$275,000: $\$225,000 - \$18,756 = \$206,244$. Since there is only one child, the court will look to the additional child support chart and simply multiply \$206,244 by .088 to get the yearly additional amount of \$18,149. Thus, Jim's total monthly support obligation is: base support ($\$4,583$) + additional support ($\$18,149 \div 12 = \1512) = \$6,095.

Jim's monthly support payment of \$6,095 plus his trust payment of \$1,563 per month saves Jim \$675 per month that he would have paid had the regular guidelines applied to him. At the same time, the additional support amount can help Pam to provide Scott with a lifestyle more commensurate with Jim's. Moreover, the trust allows Jim to provide Scott with the educational opportunities that he may have had if Jim and Pam had not gotten divorced.

If all of the money saved in the trust is not spent on post-secondary education, it should not revert to the obligor, as the Tennessee cases have held,¹³⁴ or revert to the child for whatever purpose the child desires, as

134. See e.g. *Huntley v. Huntley*, 61 S.W.3d 329, 333 (Tenn. Ct. App. 2001).

others have suggested.¹³⁵ Instead, the obligor should simply be the trustee. That way, the obligor can dictate how the child spends the money. Ideally, this approach would help cultivate a positive relationship between the obligor and his or her children. However, on a practical level, it may also help the obligor to feel that he or she still has control over the money to some degree.

Moreover, the trust need not revert to the child or obligor upon reaching a certain age. Rather, with the obligor as trustee, the trust can last for much longer. This approach fits with contemporary family structures since children today remain economically dependent on their parents for much longer than they have in the past.¹³⁶ Also, the interest accrued on the trust as it grows can be paid directly to the father-trustee. This would give the father an incentive to agree to be the trustee, and would also ensure that the father's payments would be limited to the actual dollars put in.

From a policy standpoint, such a trust can help to meet one of the oft-cited aims of child support: to provide the child with the level of support that he or she would have had if the parents had not divorced.¹³⁷ Intergenerational transfers of wealth, which are generally only possible in higher-income families, decrease as a result of divorce.¹³⁸ One study has found that higher-income divorced parents are more likely than other divorced parents to provide an intergenerational transfer of wealth to their children.¹³⁹ However, where the divorce occurs when the child is between six and seventeen years old, the father's likelihood of transferring wealth is very low—just above 5%; the mother's likelihood of making such a trans-

135. See e.g. *In re Marriage of Chandler*, 60 Cal. App. 4th 124, 132–33, 136 (1997) (Sills, P.J., dissenting) (contending that the trial court's decision to require a post-secondary education trust that reverted back to the child should have been upheld).

136. See ROSALIE G. GENOVESE, *AMERICANS AT MIDLIFE: CAUGHT BETWEEN GENERATIONS* 32 (1997) (“Young adulthood, roughly defined as the years between 18 and 29 is a time for making decisions about work, family and marriage, for establishing families and households. In the past, graduate and professional school students were the most likely ones to remain economically dependent, relying on support from their parents until their late 20s. However, many young people today remain dependent much longer, particularly because of housing costs and other economic considerations. They also are postponing marriage. Only 65 percent of those from 25 to 35 years of age had started their own families in recent years, down from 83 percent in 1960. One interpretation is that the stages of life are being stretched out as a result of longer life expectancy.”).

137. See, e.g., *In re Marriage of Lee*, 615 N.E.2d 1314, 1326 (Ill. App. Ct. 1993) (“The trial court must consider the standard of living the child would have enjoyed absent parental separation and dissolution.”); *Smith v. Smith*, 67 P.3d 351, 354 (Okla. Civ. App. 2002) (“[A]t least some consideration should be given to the child's actual needs, which may include consideration of the child's lifestyle.”).

138. See Furstenberg, Hoffman & Shrestha, *supra* note 112, at 327.

139. See *id.* at 326–27 (Time and money transfers are “affected strongly by both the parents' and the child's incomes. A 10% increase in the parent's income raises the probability of a monetary transfer by 5.4%.”).

fer is also low—hovering around 28%.¹⁴⁰ The latter circumstance is the exact situation that the trust discussed here should be in place for: families who divorce when the children are minors.¹⁴¹

In fact, just because high-income divorced fathers pay child support does not mean that they will, therefore, provide for their children post-majority in the manner that they would have had they remained married. The aforementioned study explained that there was “absolutely no evidence that fathers who paid child support are more likely to be involved in subsequent transfers [of wealth] with their adult children. Indeed four of the estimates . . . are negative and statistically significant.”¹⁴² Therefore, a trust fund with the obligor as the trustee can help ensure that the child will be more likely to be in the financial position that he or she would have been in had his or her parents remained married.

Furthermore, “numerous studies show that ‘children of divorced parents are less likely to equal or surpass their parents’ social and economic status.”¹⁴³ Therefore, the trust may also act as a much-needed stepping stone to help the children reach levels of success similar to their high-income parent.

C. Joint Physical Custody

Joint physical custody involves the child living with both parents, rather than simply visiting with one on the weekends. Such an arrangement “refers to the sharing of residential care of the child or, in other words, regularly switching with whom the child lives.”¹⁴⁴ With joint physical custody, “both parents share physical and custodial care of the child.”¹⁴⁵

When the parents share physical custody of the children, courts often award less support to the obligee depending upon what percent of time she has the children in her home. However, as explained below, the child support award should not be decreased as a result of joint physical custody.

140. *See id.* at 328 (“The differences in transfers between mothers and fathers reflect primarily the effect of age at divorce on transfers with mothers, where all of the effects shown are statistically significant.”).

141. In fact, “the majority of children whose parents divorced were six years of age or younger when their parents separated.” Maldonado, *supra* note 73, at 454.

142. *See* Furstenberg, Hoffman, & Shrestha, *supra* note 113 at 330.

143. Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2258 (1994).

144. Eliza B. Hutchison, *Improving Custody Law in Virginia Without Creating a Rebuttable Presumption of Joint Custody*, 4 WM. & MARY J. WOMEN & L. 523, 526 (1998) (internal quotations omitted).

145. *Id.* (internal quotations omitted).

Rather, the same rules should apply because of the compelling need to balance the standard of living in the two households.

1. Disparate Parental Resources

In the case examples provided in Part II, the obligees, typically the mothers, had significantly lower incomes than the obligors. In most of those cases, the mothers had no income at all. This situation is often the result of “specialization” that occurs during the marriage.¹⁴⁶ Historically, it has been considered beneficial for families to have a mother who specializes in the home and a father who specializes in the labor force.¹⁴⁷

For high-income families, this situation does not generally become economically problematic until divorce. Upon divorce, however, the parent that specialized in the labor force likely has a solid career and has been able to steadily increase his or her salary. On the other hand, the parent that has specialized in the home is left with a markedly inferior ability to find employment, let alone to demand an equivalent salary.¹⁴⁸

Specializing in the home has in the past been the province of women.¹⁴⁹ In part as a result of this apparent specialization, they generally have received primary custody of the children upon divorce.¹⁵⁰ In such a custody situation, the children live with the mother and have a set amount of time during which they visit with the father.¹⁵¹ Yet, recently, “[c]ases in which the child spends significant amounts of time with both parents seem to constitute a small, but important, segment of custody arrangements.”¹⁵²

Although joint physical custody may solve the problem of fathers not receiving sufficient time with their children to form a relationship with them, it is by no means a panacea for the inequitable child support problems that result. For instance, one study found that “the greater affluence [of shared custody fathers] . . . was evident” in examining the disparity in living arrangements between the fathers and mothers in joint physical custody situations: seventy-three percent of fathers owned their home, while only fifty-nine percent of mothers did.¹⁵³ Although this statistic does not

146. See Hardy, *supra* note 71, at 333.

147. *Id.*

148. *Id.*

149. See Hutchison, *supra* note 144, at 527.

150. See *id.* at 528.

151. See *id.* at 523–24.

152. See Marygold S. Melli & Patricia R. Brown, *The Economics of Shared Custody: Developing an Equitable Formula for Dual Residence*, 31 HOUS. L. REV. 543, 549 (1994)

153. Marygold S. Melli & Patricia R. Brown, *Exploring a New Family Form—The Shared Time Family*, 22 INT'L J.L. POL'Y & FAM. 231, 241 (2008).

speak to the quality of the household and the reasons for this disparity, it is illustrative of the idea that the child may be living highly dissimilar lifestyles in his or her two homes.

In addition, in examining joint physical custody cases where no child support was awarded, the same study found that, while in forty-three percent of cases the amount of money that would have been payable would have been less than fifty dollars per month, the remaining fifty-seven percent of cases that awarded no support would have awarded more than fifty dollars per month.¹⁵⁴ Such findings indicate that the obligees may also be more likely to receive inadequate support awards when they share physical custody with the obligors.

2. Fixed Costs

“The son of a king has the needs of a prince. The son of a chimney sweep must settle for the needs of a pauper. A child shouldn’t have to change from a prince to a pauper every time he returns to his mother’s home.”¹⁵⁵ This quote, in somewhat exaggerated terms, outlines the unique problem that results when one of the parents is a high-income earner, while the other earns considerably less.

When compiling econometric data for child support awards, legislatures often fail to distinguish between the immediate child care costs that are “paid by the parent currently caring for the child,” and the fixed expenses a parent incurs in having and raising children.¹⁵⁶ Immediate expenses include items like food and clothing.¹⁵⁷ On the other hand, fixed expenses include those related to housing and transportation: mortgage or rent payments, utility costs, property taxes,¹⁵⁸ and “owning and maintaining a vehicle.”¹⁵⁹

A parent must pay the fixed expenses regardless of how much time is spent in actual custody of the children. Therefore, whether the obligee has the children for ninety percent of the time, or thirty percent of the time, she must still maintain the house that her children reside in when they are with her. This cost, however, is unaccounted for in many child support decisions and guidelines.

154. *See id.* at 247.

155. Ronald F. Logar, *Wealth, A Substitute for Need: A Critical Look at Gabler-Herz*, 57-APR INTER ALIA 8, 10 (1992).

156. *See* Sanford L. Braver, *The Gender Gap in Standard of Living After Divorce: Vanishingly Small?*, 33 FAM. L.Q. 111, 127 (1999).

157. *See id.*

158. *See*, *Colonna v. Colonna*, 855 A.2d 648, 649 n.1 (Pa. 2004).

159. Melli & Brown, *supra* note 152 at 559.

Thus, in high-income joint physical custody cases, the children may travel back and forth between highly dissimilar home environments. At least one court has permitted deviation above guidelines in order to remedy the disparate living situations between parents who share physical custody of the children.¹⁶⁰ In that case, the goal was not to make the living arrangements between the parents exactly equal.¹⁶¹ Instead, the goal is generally to create a better balance between the two households. This attempt by courts to even the playing field can result in a complex and unclear balancing of parties' interests and needs. However, the ultimate goal is appropriate in light of the negative effects that an imbalanced living arrangement can have upon the children.

3. The Same Guidelines Should Apply

As explained above, joint physical custody worsens the problem of disparate living arrangements inherent in many high-income divorces. First, joint physical custody tends to play out much better on paper than in reality. For instance, one may reasonably assume that because a father has received joint physical custody, he will spend more time with his children than he would have if the mother had retained sole physical custody. However, fathers do not necessarily share physical custody even when permitted to do so by the court. In fact, the American Law Institute has noted that "[t]here is frequently little relationship between the de jure award of residential responsibility and de facto residence."¹⁶²

The fact that fathers will not necessarily help more in the caretaking of the children heightens the disparate circumstances of the parents. Because "[m]ost states allow an adjustment or deviation from the guidelines for greater time spent with the children,"¹⁶³ the father may be able to reduce his total child support obligation. The mother, on the other hand, in many cases the former homemaker, now must juggle establishing her career (which will likely be much lower-paying than the father's) and caring for her children, with even less money than she otherwise would have had.

160. See *Colonna*, 855 A.2d at 651–52.

161. See *id.* at 652 ("We specifically note that the term 'appropriate' does not mean equal to the environment the children enjoy while in the custodial parent's care, nor does it mean 'merely adequate.' The determination of appropriateness is left to the discretion of the trial court, upon consideration of all relevant circumstances.").

162. See Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role*, 31 HARV. J.L. & GENDER 1, 54 n. 265 (2008) (quoting PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 3.03 cmt. f).

163. Stephen K. Erickson, *If They Can Do Parenting Plans, They Can Do Child Support Plans*, 33 WM. MITCHELL L. REV. 827, 844 (2007).

Thus, there is a genuine concern that a father may request joint physical custody to reduce his child support obligation.¹⁶⁴

Moreover, when the child lives in two different homes, there is a greater policy reason to equalize the households of the two parents. A child experiencing two very different lifestyles—one very wealthy, and one within the middle class—may feel internally conflicted over this flux in his life. In fact, such a problem is particularly apparent where one parent has a much higher income than the other because the child is then “regularly re-exposed to the gap between his or her current living standard and that of the noncustodial parent he or she visits.”¹⁶⁵

The child may also feel a desire to live only with the high-income parent if the parents’ households are greatly disparate. The child’s feeling of being torn between two imbalanced lives could potentially cause increased discord within the family. As one commentator has noted:

The interests of the children will not be served if the amount of child support is barely enough to meet their basic needs in the lower income home, while they enjoy a luxurious lifestyle in the other home. Furthermore, the less affluent parent may feel obliged to provide a similar environment to that of the more affluent parent or run the risk that the child will prefer to make the more affluent home his or her primary residence.¹⁶⁶

Moreover, one of the most significant negative effects of divorce on children is the general instability that results.¹⁶⁷ The concern over instability usually focuses on children whose custodial parent or parents must move as a result of the divorce—causing loss of schools, peers, and familiar surroundings.¹⁶⁸ In the joint physical custody context, the fact that the child must regularly move from home to home inherently engenders some instability. However, providing the child with the opportunity to live with both parents is generally viewed as beneficial enough to outweigh this negative factor.¹⁶⁹ Nonetheless, the inherent instability in this living arrangement

164. See, e.g., Melli & Brown, *supra* note 153, at 234 (“Women’s advocates have opposed these initiatives [by father’s rights groups to have custody statutes that do not allot equal joint custody to be held unconstitutional], fearing that the fathers’ interest is in reduced child support not child care and that a presumption of shared custody ignores the real danger of domestic violence.” (footnote omitted)).

165. See Ellman & Ellman, *supra* note 13, at 143.

166. Julien D. Payne, *A Practitioner’s Guide to the Economic Implications of Custody and Access under the Divorce Act and the Federal Child Support Guidelines*, 32 REVUE GENERALE DE DROIT 1, 13 (2002) (Can.).

167. Kathryn E. Maxwell, *Preventive Lawyering Strategies to Mitigate the Detrimental Effects of Clients’ Divorces on their Children*, 67 REVISTA JURÍDICA UNIVERSIDAD P.R. 137, 140 (1998).

168. See *id.* at 140–41.

169. See, e.g., Michael T. Flannery, *Is “Bird Nesting” in the Best Interest of Children?*, 57 SMU L. REV. 295, 324 (2004) (“[W]ith respect to the instability of relocating from a primary residence to a secondary residence, although there are clearly aspects of such an arrangement that negatively affect the

may be aggravated by requiring the child to change his or her lifestyle every time he or she is shuttled to the other parent's home.

Thus, joint physical custody, as a circumstance that arises more frequently with high-income divorces, presents a compelling need that is not quite as salient in sole custody cases: the need for equalization of the living arrangements in the households. This inequality is emphasized when courts determine the amount of support based upon the amount of time each parent has the children. However, the level of support the obligee receives as a result of agreeing to joint physical custody should not be decreased. Narrowly focusing only on the percent of time a parent has a child in his or her household does not produce equitable results. There will always be fixed costs that cannot be reduced proportionately to the percent of time spent with the child. Thus, the parents' fixed costs and the child's need for stability must be accounted for in order to garner an equitable child support award.

Therefore, the solution proposed in this Note should apply to joint physical custody arrangements just as it would apply to sole custody arrangements. Likely, there may be some hesitation on this point over concerns that the additional money the obligee's family might gain by following the guidelines proposed in this Note would be a subsidy for the obligee's excesses. However, this concern is likely a red herring since the high-income obligor will still pay significantly less than if the regular guidelines applied to his salary. Moreover, insofar as the concern may be credible, it is substantially outweighed by the need to lessen the lifestyle and income gap in the child's two households.

CONCLUSION

One of the main purposes of the 1988 Family Support Act was to ensure that there would be a presumption that following the guidelines would produce an adequate support award.¹⁷⁰ The first part of the solution proposed in this Note upholds this purpose by eliminating the troublesome discretionary path high-income child support has taken. If state legislatures increase the threshold for a father to be classified as a high-income earner, they can increase courts' use of guidelines in child support cases. This increased use of the guidelines could increase predictability for the parties, which would create a disincentive for the parents to litigate the child sup-

child, children experiencing these arrangements are overall quite resilient and are not as negatively affected long-term as might otherwise be supposed.").

170. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (codified as amended at 42 U.S.C. § 667(b)(2) (2006)).

port issue. If the parties know what they are entitled to receive or are required to pay, then there would be little need for them to litigate this issue. Furthermore, increased settlement of cases can help to alleviate both the financial costs and the emotional problems associated with protracted child support litigation.

Likewise, the second part of the solution proposed in this Note also stays true to one of the purposes of child support: providing the child with the lifestyle he or she would have had if the marriage had remained intact. If courts require high-income fathers to contribute to a post-secondary education trust as a part of their child support obligation, then this added support can provide the child with the educational opportunities he or she would have had if the divorce had not occurred. Since children of divorced parents have a decreased likelihood of achieving the same economic success as their parents, they may benefit greatly from the incentive this trust would give them to complete a post-secondary education. Thus, this part of the solution serves to shelter the children from the social and economic harms of their parents' divorce by increasing the odds that more high-income obligors will suitably provide for their children.