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New York State's Child Support Guidelines: Legal and Economic Background[©]

Regulatory and Legislative History

New York State's child support guidelines were enacted to comply with federal regulatory mandates for participating in federal child support programs. The 1988 Family Support Act, Pub. L. 100-485, 102 Stat. 2343,¹ required each state, as a condition of receipt of federal funds for child support enforcement services, to enact mandatory presumptive child support guidelines, stating:

There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case.

42 U.S.C. § 667(b)(2); accord 45 CFR. 302.56. In any judicial proceeding for support, whether an initial determination or a modification, the Guidelines are the presumptively correct amount of support to be awarded. Deviation from the Guidelines must be supported by a written finding or a finding on the record that the presumptively correct amount of support, as determined by the guidelines, is unjust or inappropriate in the particular case.

The guideline percentages are fixed percentages of gross income, vary only by the number of children, and are as follows:

Table 1.

No. of Children	1	2	3	4	5 or more
% of income	17%	25%	29%	31%	35%

These percentages are applied to both parents' gross income for combined dollar costs and, after adjustments, the dollar cost amount is pro-rated between the parents in proportion to

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¹ Codified primarily at 42 U.S.C. §§ 666, 667.

their share of combined gross income. These percentages are the same regardless of the parents' income level—whether low, high, or somewhere in between.

Because the guidelines go through the mechanical process of using both parents' incomes in the calculation, New York calls its guidelines, "Income Shares." As seen below and in further discussion, the use of both parents' income is merely a charade.

**Examples of New York's "Income Shares" Guidelines
Actually Being Percent-of-Obligor-Income Guidelines**

First, it should be shown that New York's guidelines in practice are percent-of-obligor-income guidelines—not Income Shares. Importantly, if there are no deductions to either parent's income, New York's child support guidelines are percent-of-obligor-income guidelines. That is, the obligee's income has no impact on the presumptive award. Such an outcome conflicts with all professional studies on child costs which find that child costs vary by combined income (household—not just one parent) and with child costs declining as a share (percent share) of rising net income.

Table 2. Example One: One child, obligor with higher gross income

Monthly:	Obligor	Obligee	Combined
Gross income	\$3,000	\$2,500	\$5,500
Percentage to be applied to gross income	.17	.17	.17
Gross income times percentage	\$510	\$425	\$935
Child cost to be shared			\$935
Percentage share of combined gross income	.545	.454	
Share of joint child cost	\$510	\$425	
Obligor's gross income times guideline percentage	\$510		

- The child support award is the same whether one uses the joint cost sharing formula or just a percentage of the obligor's net income.

Table 3. Example Two: One child, obligor with Example One income, obligee with higher gross income

Monthly:	Obligor	Obligee	Combined
Gross income	\$3,000	\$3,500	\$6,500
Percentage to be applied to gross income	.17	.17	.17
Gross income times percentage	\$510	\$595	\$1,105
Child cost to be shared			\$1,105
Percentage share of combined gross income	.462	.538	
Share of joint child cost	\$510	\$595	
Obligor's net income times guideline percentage	\$510		

- Again, the child support award is the same whether one uses the joint cost sharing formula or just a percentage of the obligor's gross income.

- Additionally, the substantially higher gross income of the obligee has no impact on the obligor's child support obligation. This outcome occurs even at high income levels if the “ceiling” amount of \$80,000 for combined gross income is ignored by the court—which is typical. The feature that awards vary only with the obligor’s income and not family income conflicts with all valid economic studies on child costs.
- **Effectively, New York's child support guidelines are percent-of-obligor-only-income guidelines.**

**Academic Research Confirms that New York's Guidelines
Are Wisconsin-Style, Obligor Only Guidelines that
Conflict with Economic Research on Child Costs**

When New York's combined income ceiling is not binding, the dual income calculation is a charade—the presumptive guideline is a percent-obligor-income model with attendant economic flaws. From an additional, key federally funded child support study in 1990:

There is, however, an important difference between the percentage of income and income shares guidelines. Unlike the percentage of income guideline, the noncustodial parent's child support obligations do [emphasis original] vary with the income of the custodial parent.²

This difference between the percentage of income and income shares guidelines arises because under the latter guideline, the percentage of income to be paid in child support varies with the level of combined [emphasis original] parental income. ... The variation in the percentage of income to be paid in child support (as combined income changes) is, however, a key feature of the income shares guideline. If the percentage of income to be paid in child support does not vary with the level of income, then the income shares guideline is identical to the percentage of income guideline.³

Mainstream economic research shows child costs declining as a share of household net income as income rises.

First, the underlying economic study for New York's guidelines noted that child costs decline as a share of rising income. However, the Van der Gaag study focused on the policy issues related to welfare payment recovery in low income situations. The study nonetheless found that child costs declined as a share of income as income rises.

² See Lewin/ICF, Washington D.C. (1990), *Estimates of Expenditures on Children and Child Support Guidelines*, Submitted to Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services, Section 6, Page 9.

³ See Lewin/ICF, Washington D.C. (1990), *Estimates of Expenditures on Children and Child Support Guidelines*, Submitted to Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services, Section 6, Pages 10-11.

- Van der Gaag, Jacques. "On Measuring the Cost of Children," *Child Support: Technical Papers, Volume III, SR32C*, Institute for Research on Poverty, Special Report Series, University of Wisconsin, 1982, pp. 1-44.

Recent studies showing declining shares of income spent on children as income rises include:

- Thomas Espenshade, *Investing in Children: New Estimates of Parental Expenditures*, the Urban Institute Press, 1984.
- David Betson working with Policy Studies, Inc., Denver, CO. See Robert G. Williams, "Child Support Guidelines: Economic Basis and Analysis of Alternative Approaches," *Improving Child Support Practice, Volume One*, The American Bar Association, 1986, p. I-8.
- Mark Lino, "Expenditures on Children by Families, 2000 Annual Report, U.S. Department of Agriculture, May 2001.
- R. Mark Rogers and Donald J. Bieniewicz, "Child Cost Economics and Litigation Issues: An Introduction to Applying Cost Shares Child Support Guidelines," presented to Southern Economic Association, National Association of Forensic Economics section, November 12, 2000.
- Virginia General Assembly. See "Technical Report: The Costs of Raising Children," Virginia General Assembly, November 7, 2000, the Joint Legislative Audit and Review Commission (JLARC).
- For other types of child cost cases (non-child support), courts have accepted a completely different standard from the pattern in the child support guideline. See for example, Michael R. Ruble et al, "Patton-Nelson Personal Consumption Tables 1997-98 Update," *Journal of Forensic Economics* 13(3), 2000, pp. 303-307. This is one standard used for personal injury cases. For estimating economic losses in personal injury cases, courts have accepted well-established economic expertise that marginal and average expenditure rates decline as net income rises.

A Federal Advisory Panel Recommended that States Not Use the Guidelines Adopted by New York

Economic experts reviewing available guidelines at the time leading to enactment of the federal Family Support Act of 1988 specifically recommend against using Wisconsin-style guidelines because they are inequitable and only intended for low-income, welfare recovery situations.

In fact, the New York legislature enacted the one type of guidelines that the federal government recommended not to enact. A Federal Advisory Panel on Child Support reviewed several types of guidelines. This panel recommended that states enact either (1) the income shares model or (2) the Delaware-Melson model. Both the income shares model and Delaware-Melson models received favorable recommendations since they more closely

followed family spending patterns on child costs and generally took into account the self-sufficiency needs of low-income obligors.

The Federal Advisory Panel specifically recommended against states enacting percent-of-obligor-income or Wisconsin-style child support guidelines—the very type that New York enacted. From the technical manual issued by the Office of Child Support Enforcement, U.S. Department of Health and Human Services, entitled *Development of Guidelines for Child Support Orders: Advisory Panel Recommendations and Final Report*, September 1987:

The Advisory Panel recommends that states use either the Income Shares model or Delaware-Melson formula as the basis for their child support guidelines. [page I-15].

Second, unlike some approaches [such as percent of obligor models], both the Income Shares and Melson formula count income of both parents in determining the amount of child support awards. [page I-16].

Third both the Income Shares model and the Melson formula allow for the subsistence needs of each parent. It is neither realistic nor appropriate to expect that a parent can or should pay substantial amounts of child support until providing for his or her own basic needs. [page I-16].

The Wisconsin standard is designed to replicate an income tax. With only two primary parameters, gross income and number of children, the Wisconsin standard is ultimately intended to be applied automatically by employers under a statewide holding system. However, the administrative benefit of simplicity may be obtained at the price of some loss of equity because it does not provide special treatment for certain key factor (e.g. custodial parent income, child care expenses). Because the Wisconsin standard is designed as a constant percentage of gross income, it also has the effect of setting orders as an increasing percentage of net income, as obligor income rises. This effect is contrary to the economic evidence on actual child rearing expenditures. [From page II-126 of 1987 *Development of Guidelines*.]

Robert G Williams, Policy Studies, Inc., Denver, Colorado, for Office of Child Support Enforcement, U.S. Department of Health and Human Services, entitled *Development of Guidelines for Child Support Orders: Advisory Panel Recommendations and Final Report*, September 1987

New York Child Support Guidelines Originate from Wisconsin Welfare Case Guidelines

The simplest child support guidelines are the percent-of-obligor-income guidelines as used in Wisconsin and adopted by other states such as New York. The origin of New York's guidelines being Wisconsin's guidelines is acknowledged in New York case law. See *Cassano v Cassano*, 85 *N.Y.2d* 649; 651 *N.E.2d* 878; 628 *N.Y.S.2d* (1995), especially note 2. These guidelines were developed for welfare case applications by the Institute for Research

on Poverty at the University of Wisconsin at Madison. Wisconsin regulatory code specifically points to the origins:

The percentage standard established in this chapter is based on an analysis of national studies, including a study done by Jacques Van der Gaag as part of the Child Support Project of the Institute for Research on Poverty, University of Wisconsin, Madison, entitled "On Measuring the Cost of Children," which disclose the amount of income and disposable assets that parents use to raise their children.⁴

Van der Gaag's definition of child costs is based on income equivalence concepts rather than direct expenditures on a child. His study's definition begins with one-child costs being based on how much income a one-child couple must be compensated in order to be equally well off economically as without the child.⁵ Van der Gaag reviews others' studies based on this type of approach and "averages" their results to derive a table of child costs expressed as a percent of gross income. The State of Wisconsin took Van der Gaag's estimates as baseline cost estimates and then adjusted them downward slightly for the nominal visitation expenses of an "absent" father—as assumed to be typical for welfare cases.

Wisconsin child support guidelines are as follows:

<u>Number of Children</u>	<u>Percentage of Obligor's Adjusted <i>Gross</i> Income</u>
1	17 percent
2	25 percent
3	29 percent
4	31 percent
5 or more	34 percent.

New York's child support guidelines are as follows:

<u>Number of Children</u>	<u>Percentage of Obligor's Adjusted <i>Gross</i> Income</u>
1	17 percent
2	25 percent
3	29 percent
4	31 percent
5 or more	35 percent.

New York and Wisconsin's guidelines are essentially identical and have the same origins.

⁴ Wisconsin, State of. *Register*, January 1987, No. 373, Chapter HSS 80, page 316-1.

⁵ Jacques van der Gaag, "On Measuring the Cost of Children," *Child Support: Technical Papers*, Volume III, SR32C, Institute for Research on Poverty, Special Report Series, University of Wisconsin, 1982, pp. 18.

Key Underlying Facts of New York's Child Support Guidelines

In rebuttal of any presumption in court, an appropriate starting point is the presumption's underlying facts. One should be able to rebut the presumptive award if the underlying facts behind the presumptive calculation do not exist (do not apply) in a given case before the court. What are the key underlying facts of the guidelines as indicated by the underlying study?

New York's child support guidelines were taken from child support guidelines initially implemented by the state of Wisconsin for Title IV-D welfare cases. The underlying economic study and conditions for appropriate application of the guidelines were conducted and published by Dr. Jacques van der Gaag in 1982.⁶ The guidelines were designed to be applicable only if the household had certain economic characteristics. These underlying economic characteristics of the household are:

- The household is a low-income household. For the study, the households (both parents) averaged annual gross income of \$12,000 in 1982 dollars. In year 2003 dollars, this would be household income of \$22,881. The underlying study specifically states that at higher incomes, the applicable percentage should decline. The study also assumed the percentage would be applied only after setting aside a self-support reserve.
- The custodial parent is assumed to care for the children and not earn any income outside the home.
- The non-custodial parent is the sole income earner and the percentages applied to the non-custodial parent's income are based on tax law of 1982. Under the tax code in which the percentages are derived, the non-custodial parent that provided over half of the child's support would receive use of all child-related income tax benefits.
- The low-income characteristic also includes the fact that the guidelines were to be applied to income earners paying little or no income tax. Hence, under the appropriate low-income application, there is no need to take into account differences between gross income and net income.
- The guideline percentages were derived based on the assumption that the non-custodial parent is absent and that the children are with the custodial parent 100 percent of the time other than nominal visitation such as the equivalent of a Saturday afternoon trip to the park.

⁶ Jacques Van der Gaag, "On Measuring the Cost of Children," Child Support: Technical Papers, Volume III, SR32C, Institute for Research on Poverty, Special Report Series, University of Wisconsin, 1982. See also the Court of Appeals of New York acknowledging these origins in *Cassano v Cassano*, 85 N.Y.2d 649; 651 N.E.2d 878; 628 N.Y.S.2d (1995), especially note 2.

- The guideline percentages were to be applied with the amount of the award limited to the size of the welfare payments to the custodial household.⁷ The underlying study set a low ceiling on the amount of income on which the percentages would be applied.

As a matter of due process, one should be able to contrast case facts with these key underlying facts to rebut the applicability of these guidelines.

Additionally, case law indicates that when the underlying facts of a statutory presumption no longer exist, the presumption is unconstitutional. See *Leary v. United States*, 395 U.S. 6 at 32-37 (1969) and especially footnote 68. The underlying facts for the guidelines' presumptions are that the percentages are to be applied only in welfare cases and only up to recovering welfare payments made to the custodial parents. These underlying facts no longer exist.

Once a presumption has been rebutted, the Court should exclude the presumption from the consideration of the jury or other trier of fact in order not to deny due process of law. See *Seaboard Coastline Railroad Co. v. Wroblewski*, 138 Ga. App. 793 (1976) in which the rebuttal of a presumption forces the presumption to disappear from further consideration by the court in that case.

Documentation of the Underlying Facts for New York's Guidelines

What is the underlying study for New York's guidelines?

As noted above, New York's child support guideline model was based on economic research and tax code in the late 1970s and up to a 1982 study by Jacques Van der Gaag working for the University of Wisconsin's Institute for Research on Poverty. New York's guidelines were taken directly from Wisconsin's research.

Clearly, a review of Van der Gaag's study is necessary in order to fully evaluate the economic appropriateness of percent of obligor income guidelines. The citation for this study is: Jacques Van der Gaag, "On Measuring the Cost of Children," Child Support: Technical Papers, Volume III, SR32C, Institute for Research on Poverty, Special Report Series, University of Wisconsin, 1982.

What is the guidelines assumption regarding income of the household and basis for that?

For the study, the households (both parents) averaged annual gross income of \$12,000 in 1982 dollars. In year 2003 dollars, this would be household income of \$22,881.⁸ The underlying study specifically states that at higher incomes, the applicable percentage should

⁷ Institute for Research on Poverty, University of Wisconsin-Madison. "Documentation of the Methodology Underlying the Cost Estimates of the Wisconsin Child Support Program," Child Support: Technical Papers, Volume III, SR32C, Special Report Series, 1982, pp. 143-144.

⁸ The 2003 figure was calculated by the author by applying the ratio of the 2003 CPI to the 1982 CPI to the 1982 household income figure.

decline.⁹ The study also assumed the percentage would be applied only after setting aside a self-support reserve.

What is the basis for the guidelines being economically designed for welfare recovery situations only?

There is a key difference between how the guidelines were intended economically and how they were actually applied as legal presumptions. The original economic studies are clear on the intended application as economically designed.

Initially, the guidelines were implemented in 1983 as administrative rules for Title IV-D cases—welfare recovery cases. These guidelines became mandatory for other cases only in 1987.¹⁰

Importantly and based on early papers providing the technical foundations for Wisconsin's child support guidelines, the guidelines were originally developed for only welfare situations (note that the child support obligation is described as a "tax" since the intent was for automatic with-holding as with other taxes). As seen below, the intent was for both parents' income to be part of the formula and that there be a maximum level of benefits (child support). From one of the key technical papers describing the intent and implementation of Wisconsin's child support program¹¹:

In summary, the implementation of the Wisconsin Child Support program can be thought of as consisting of four components, each of which would have major impact on the costs of implementation of the reform. These four components are:

- *Payments made to children (B);*
- *A tax on absent parents (T_{AS});*
- *A tax on custodial parents (T_{CP}); and*
- *Savings in mean tested programs (S_{AFDC}).*

These four components can be mathematically expressed for any household as the following:

$$B = \text{MAX}(MB, T_{AS})$$

⁹ Linda Reivitz. "Percentage of Income Standard for Setting Child Support Awards," memorandum by Secretary, Department of Health and Social Services, State of Wisconsin, to members of the Wisconsin Judiciary, December 20, 1983, *Improving Child Support Practice, Volume One*, The American Bar Association, 1986, pp. I-221.

¹⁰ See Wisconsin, Register, January, 1987, No. 373, eff.2-1-87; r. (2)(b) to (d), Register, August, 1987, No. 380, eff. 9-1-87.

¹¹ Institute for Research on Poverty, University of Wisconsin-Madison. "Documentation of the Methodology Underlying the Cost Estimates of the Wisconsin Child Support Program," *Child Support: Technical Papers, Volume III, SR32C, Special Report Series*, 1982, pp. 143-144.

$$T_{AS} = t_{AS} * \text{MIN}\{\text{MAX}(0, Y_{AS} - \text{EXMP}_{AS}), Y_{M_{AS}}\}$$

$$T_{CP} = \text{MIN}\{\text{MAX}(0, MB - T_{AS}), t_{CP} * \text{MIN}(\text{MAX}(0, Y_{CP} - \text{EXMP}_{CP}), Y_{M_{CP}})\}$$

$$S_{AFDC} = \text{MAX}\{0, AFDC - (B - CS_0)\}$$

Where

MB = the minimum benefit paid to the child,

t_{AS} = the tax rate on the absent parent,

t_{CP} = the tax rate on the custodial parent,

Y_{AS} = the taxable income of the absent parent,

Y_{CP} = the taxable income of the custodial parent,

EXMP_{AS} = income exemption for the absent parent,

EXMP_{CS} = income exemption for the custodial parent,

Y_{M_{AS}} = the maximum amount of the absent parent's income to be taxed,

Y_{M_{CP}} = the maximum amount of the custodial parent's income to be taxed,

AFDC = the AFDC benefit received before the reform, and

CS₀ = the amount of child support received before the reform.

In the above cite, one notes references to tax rates (child support obligation percentages) for both the custodial and non-custodial parents. Each has an income exemption for basic needs and there is a maximum level of income taxed.

Further corroborating these original intentions, the following comes from an early technical paper described the child support “tax” as a proportional tax—but only as applied to low benefit situations and only up to the guaranteed public benefit to the child:

A proportional tax rate structure is one in which the tax rate on all income is identical. A regressive tax rate structure is one in which the tax rate declines as income increases while the tax rate increases as income increases in a progressive tax.

Because the child support tax will not apply to income in excess of the amount required to finance the public benefit, on income above this maximum the child support tax structure can be said to be regressive. But our concern here

is with the tax rate structure up to this maximum [with a proportional tax being implemented as long as the public benefit is not exceeded].¹²

It is quite clear that the original concept for Wisconsin's child support plan included low income exemptions, ceilings on income subject to the guidelines, and was based on a modest level of publicly guaranteed benefits to the child with the state's objective as recovery of the costs of those benefits from both parents as much as was practical. These guidelines were never intended to be extended beyond low-income situations or beyond low benefit guarantees.

What is the assumption for the custodial parent's income?

The custodial parent is assumed to care for the children and not earn any income outside the home. As noted in the technical paper, "Documentation of the Methodology Underlying the Cost Estimates of the Wisconsin Child Support Program," it is clear that if the custodial parent has income that it should be part of the formula. By using obligor-only percentages, that is the same as having zero income for the custodial parent. By stating that percentages should decline as household income rises, the formula can only take into the additional custodial parent income if the custodial parent income is zero. Additionally, for welfare recovery situations, the custodial parent indeed generally had no income.

What are the assumptions related to child-related tax benefits?

The non-custodial parent is the sole income earner and the percentages applied to the non-custodial parent's income are based on tax law of 1982. Under the tax code in which the percentages are derived, the non-custodial parent that provided over half of the child's support would receive use of all child-related income tax benefits. But because the underlying studies were based on intact households, it is best to portray the child-related tax benefits as being shared as cost offsets by both parents.

- First, if there are child-related tax benefits, they are to be shared by both parents—not just the custodial parent. The percentages were gross costs from studies for intact households in which both parents shared the cost offsets.
- The low-income characteristic also includes the fact that the guidelines were to be applied to income earners paying little or no income tax. Hence, under the appropriate low-income application, there is no need to take into account differences between gross income and net income.
- In contrast to statutory application of the guidelines, if the gross percentages are applied to higher income levels, income tax rates rise sharply and the awards rise as a percentage of net. This is but just one reason the gross percentages are supposed to decline at higher income levels as stated in the underlying study. Additionally, savings rates rise at higher income levels and child costs level off at higher income levels.

¹² Institute for Research on Poverty, University of Wisconsin-Madison. *Child Support: A Demonstration of the Wisconsin Child Support Reform Program and Issue Papers*, Volume II, SR32B, Special Report Series, 1981, p. 51.

What have been key changes in child-related tax benefits since the guideline percentages were designed in 1982?

Treatment of child-related tax benefits have changed markedly since the guidelines were designed in 1982. Custodial parents are now entitled to child dependency exemptions whereas before 1984 changes the higher earning parent was able to claim the exemptions (generally the non-custodial parent). Earned income tax credits have risen significantly for children. Child tax credits have been created and expanded. These effects are discussed in more detail in R. Mark Rogers, "Treating Child-Related Tax Benefits as a Cost Offset in Child Support Cases," presentation to Eastern Economic Association Annual Meeting, National Association of Forensic Economics section, Washington, D.C., February 21, 2004. Submitted for publication, 2004.

See Appendix A for more detail on key legislation on changes in child-related tax benefits.

How did the underlying study address the issue of whether lower percentages should apply at higher income levels than for welfare recovery cases?

Van der Gaag states that child costs decline as a percentage of income.

"With the two exceptions mentioned above [in Van der Gaag's study], the percentage increase needed [in compensating income for child costs] declines with income." See Jacques Van der Gaag, "On Measuring the Cost of Children," Child Support: Technical Papers, Volume III, SR32C, Institute for Research on Poverty, Special Report Series, University of Wisconsin, 1982, p. 20.

The two exceptions were studies that found that at very low income levels only, child costs initially increased as a share of income until past extreme poverty levels. Again, Van der Gaag adds:

"A final word on the effect of the income level. It can be shown for the constant utility approach (Barten, 1964, Muellbauer, 1977) the percentage of compensating income decreases if the income (utility) level increases." See Jacques Van der Gaag, "On Measuring the Cost of Children," Child Support: Technical Papers, Volume III, SR32C, Institute for Research on Poverty, Special Report Series, University of Wisconsin, 1982, p. 21.

Note: "The cost of a child is defined as the additional income needed if one child is added to a childless couple. The additional income will keep the household at the same level of economic well-being as it was before the addition of a child." See Van der Gaag, 1982, p. 19.

Are there any additional studies that indicate that child costs decline as a share of gross income and even net income?

Recent studies showing declining shares of income spent on children as income rises include:

- Thomas Espenshade, *Investing in Children: New Estimates of Parental Expenditures*, the Urban Institute Press, 1984.
- David Betson working with Policy Studies, Inc., Denver, CO. See Robert G. Williams, "Child Support Guidelines: Economic Basis and Analysis of Alternative Approaches," *Improving Child Support Practice, Volume One*, The American Bar Association, 1986, p. I-8.
- Mark Lino, "Expenditures on Children by Families, 2000 Annual Report, U.S. Department of Agriculture, May 2001.
- R. Mark Rogers and Donald J. Bieniewicz, "Child Cost Economics and Litigation Issues: An Introduction to Applying Cost Shares Child Support Guidelines," presented to Southern Economic Association, National Association of Forensic Economics section, November 12, 2000.
- Virginia General Assembly. See "Technical Report: The Costs of Raising Children," Virginia General Assembly, November 7, 2000, the Joint Legislative Audit and Review Commission (JLARC).
- For other types of child cost cases (non-child support), courts have accepted a completely different standard from the pattern in the child support guideline. See for example, Martine T. Ajwa, et al., "Estimating Personal Consumption With and Without Savings in Wrongful Death Cases," *Journal of Forensic Economics* 13(1), Winter 2000, pp. 1-10. This is one standard used for personal injury cases. For estimating economic losses in personal injury cases, courts have accepted well-established economic expertise that marginal and average expenditure rates decline as net income rises.

How do income taxes enter the issue of whether lower percentages should be used at high income levels?

The guidelines assume that the obligor is low income and pays little or no income tax. Because the guidelines were originally intended to apply only to welfare recovery situations, no consideration was given to progressive income tax rates—that is higher income tax rates as taxable income rises. The IRS publishes the progressive income tax rates in the Instructions for Form 1040.

Table 4.

From IRS 2003 Instructions for Form 1040:

<u>Schedule X—Use if your filing status is Single</u>			
If the amount On Form 1040, Line 40, is” <u>Over --</u>	But not <u>over--</u>	Enter on Form 1040, <u>line 40</u>	of the amount <u>over--</u>
\$0	\$7,000 10%	\$0
7,000	28,400	\$700.00 + 15%	7,000
28,400	68,800	3,910.00 + 25%	28,400
68,800	143,500	14,010.00 + 28%	68,800
143,500	311,950	34,926.00 + 33%	143,500
311,950	-----	90,514.50 + 35%	311,950
<u>Schedule Z—Use if your filing status is Head of household</u>			
If the amount On Form 1040, Line 40, is” <u>Over --</u>	But not <u>over--</u>	Enter on Form 1040, <u>line 40</u>	of the amount <u>over--</u>
\$0	\$10,000 10%	\$0
10,000	38,050	\$1,000.00 + 15%	10,000
38,050	98,250	5,207.50 + 25%	38,050
98,250	159,100	20,257.50 + 28%	98,250
159,100	311,950	37,295.50 + 33%	159,100
311,950	-----	87,736.00 + 35%	311,950
Source: "2003 Tax Rate Schedules," p. 74, 2003 Federal Form 1040 Instructions.			

What is the impact of converting the presumptive gross income percentages to percentages of obligor net income?

New York's guideline awards rise as a share of obligor net income and conflict with all studies on child costs (see above cited studies). Actual child costs rise in dollar value but decline as a share of net income. There is no economic basis for these before-tax percentages. Child cost studies show child costs declining as a share of net income as net income rises.

What do the guideline percentages assume regarding the non-custodial parent's visitation and visitation costs?

The guideline percentages as a matter of the underlying economics assume that the non-custodial parent has no visitation or no parenting time costs for typical cases. For very low income cases, the assumption is somewhere between nominal visitation (such as a trip to the park on Saturdays) or no visitation costs.

What is the basis for these conclusions regarding visitation assumptions?

First, Van der Gaag's study covered intact families. The children are in one household. That means all of the child costs fall in one household based on the underlying study. That would be the custodial parent household.

However, when Wisconsin implemented its guidelines, Van der Gaag's percentages from his study were lowered marginally—allegedly for visitation costs. These were visitation costs for an “absent parent” in welfare recovery circumstances. For example, for one child Van der Gaag estimates child costs to be 20 percent of gross income at low income levels. Wisconsin implemented 17 percent. For two children, Van der Gaag estimated child costs to be 27 percent of gross income at low income levels; Wisconsin implemented 25 percent for two-child costs.

Regarding the nominal adjustment for visitation, key economic features of the study—and intended application—render the nominal visitation adjustment as effectively non-existent. Three economic facets come into play:

- First, at low income levels, the data generally relied upon from the Consumer Expenditure Survey is known to understate income. This leads to overstating child costs as a share of income.
- Additionally, lower percentages are intended to be used at income levels above poverty levels. By not using lower percentages as income rises, the percentage based award excess over actual child costs overwhelms the minor adjustment for visitation.
- Finally, many of the studies relied upon by Van der Gaag were the equivalent of per capital allocation of household costs for children—which then becomes the child cost estimate. These studies relied upon the discredited Engel type of income equivalence estimation for child costs based on comparing changes in household consumption of food for families with and without children.

For these three compelling reasons, there is no effective parenting time adjustment in the presumptive percentages at low income levels and certainly not at income levels above poverty levels when lower percentages should be used but are not part of the presumption.

How much is the visitation adjustment worth per month at low income levels?

For one child with the father at minimum wage, the visitation adjustment is \$25 per month as shown below.

Table 5.

Example of dollar value of visitation adjustment by
Wisconsin to Van der Gaag's percentages:

One child costs:

Van der Gaag percentage:	20
Implemented percentage (in Wisconsin, not GA):	<u>17</u>
Difference, percentage:	3

For a year 2004 minimum wage worker, monthly gross income is approximately \$824 per month (based on 40 hour work week and 48 weeks per year). The visitation discount is \$25 per month (\$824 times .03). This amount clearly cannot cover "standard visitation."

However, after adjusting for upward bias in Van der Gaag's estimate, there is no effective discount for visitation. At higher income levels, not only is there no effective visitation adjustment but retaining fixed gross income percentages, the awards exceed actual costs by increasingly higher amounts as income rises.

How old are the economic data on child costs for Van der Gaag's study?

One's first impression is that Van der Gaag's study is a little over 20 years old in terms of data on child costs. However, his study's child cost figures were composites of a dozen earlier studies—he conducted no new, independent research. Most data were from the 1960s and 1970s. However, one study upon which Van der Gaag's numbers are based comes from a 1950 publication by A. M. Henderson using 1937 data and another study by S. Dubnoff using data from 1860 through 1909! New York's guidelines are based on child cost data no less than 25 years old and in part as much as 140 years old. See Table 1 and References in Van der Gaag's study.¹³

**Appendix A:
History of Recent Changes in Child-Related
Tax Benefits in the U.S.**

Since the early 1980s, key changes to Federal tax code were made in acts during 1984, 1986, 1993, 1997, and 2001 that dramatically affected which parent—custodial or non-custodial—is entitled to child-related tax benefits and the magnitude of those benefits.

Tax Code Changes in 1984

The Deficit Reduction Act of 1984 significantly affected domestic relations taxation in the areas of alimony, property divisions and transfers, and dependency exemptions.¹⁴ For

¹³ Jacques Van der Gaag, "On Measuring the Cost of Children," Child Support: Technical Papers, Volume III, SR32C, Institute for Research on Poverty, Special Report Series, University of Wisconsin, 1982.

¹⁴ See Pub. L. No. 98-369 (1984).

custody decrees subsequent to 1984, this act allocated the dependency exemption to the custodial parent in all cases unless the custodial parent signed a written declaration each year that the non-custodial could claim the dependency exemption.¹⁵ Previously, the parent paying over half of a child's support could claim the exemption regardless of custodial status. In non-intact families, the person who previously could claim this exemption typically was the non-custodial parent prior to 1985. This change in tax code was subsequent to when Wisconsin-style child support guidelines were first derived based on obligor gross income in 1981-82 and earlier.

Tax Code Changes in 1986

The Tax Reform Act of 1986 had a notably divergent impact on custodial versus non-custodial taxpayers.¹⁶ Most of the tax code changes were effective in 1988 although there was a transitional period in 1987 for some of the tax code changes. There was a clear divergence in treatment between single taxpayers and head of household taxpayers. Prior to the change, for the 1986 tax-rate schedule, the minimum 11-percent bracket started at \$2,480 in taxable income for both categories—that is, the zero bracket amount (ZBA) was the same for custodial and non-custodial parents. This also is the standard deduction (taxpayers pay a zero tax rate on this amount of income). With the implementation of the new tax code, the standard deductions for 1988 for heads of household and for single individuals diverged significantly at \$4,400 and \$3,000, respectively.¹⁷

The Act also boosted the earned income credit substantially with the rate and base of the earned income credit to 14 percent of the first \$5,714 of an eligible individual's earned income with phase-out income levels also raised. With these changes combined, the 1986 Act benefited a custodial parent substantially more than a non-custodial parent. Based on wage and salary gross income, the income tax threshold in 1988 for a single individual taxpayer was \$4,950, compared to \$3,760 under prior law—a difference of \$1,190. Based on the same type of income, the income tax threshold in 1988 for a head of household taxpayer with one dependent was \$12,416, compared to \$8,110 under prior law—a difference of \$4,306. For a head of household with three dependents, the difference was \$5,566.¹⁸

Tax Code Changes in 1993

The Omnibus Budget Reconciliation Act of 1993 added two new marginal tax rates that affect higher-income individuals.¹⁹ First, there is a 36-percent rate applicable to taxpayers with taxable incomes (for calendar tax year 1993) in excess of \$140,000 for married individuals filing joint returns, \$115,000 for unmarried individuals filing as single, and \$127,500 for unmarried individuals filing as head of household. Starting in 1995 these income thresholds were indexed for inflation. Notably, these rates were not in effect when

¹⁵ Steven D. Kittrell. "An Overview of the 1984 Domestic Relations Tax Provisions," *Improving Child Support Practice, Volume Two*, The American Bar Association, 1986, page IV-57.

¹⁶ See Pub. L. 99-514 (1986).

¹⁷ U.S. Department of the Treasury, Internal Revenue Service, Form 1040, 1988, p. 17.

¹⁸ U.S. Congress, Joint Committee on Taxation. Joint Committee Print, # JCS-10-87, "General Explanation of the Tax Reform Act of 1986," (Joint Committee on Taxation 'Bluebook'), May 4, 1987, p. 16.

¹⁹ See Pub. L. No. 103-66 (1993).

the Wisconsin-style guidelines were implemented and there now are differing thresholds for custodial versus non-custodial parents.

Tax Code Changes in 1997

The Taxpayer Relief Act of 1997 provides a \$500 (\$400 for taxable year 1998--\$500 per year thereafter) tax credit for each qualifying child under the age of 17.²⁰ A qualifying child is defined as an individual for whom the taxpayer can claim a dependency exemption and who is a son or daughter of the taxpayer (or a descendent of either), a stepson or stepdaughter of the taxpayer or an eligible foster child of the taxpayer. These tax credits cannot be claimed by a non-custodial parent unless given written permission by the custodial parent. For a custodial parent with moderate or high income and two children, these tax credits result in a little over \$80 per month per child in additional after-tax income.²¹

Tax Code Changes in 2001

The Economic Growth and Tax Relief Reconciliation Act of 2001 boosts the custodial parent's after-tax advantage even more.²² The new law lowers from 15 to 10 percent the tax rate for the first \$12,000 of taxable income on a joint return, \$6,000 for singles, \$10,000 for heads of household, and \$6,000 for married persons filing separate returns. The creation of the 10 percent bracket provides tax savings of up to \$600 for married couples; \$300 for singles and \$500 for heads of household. Lowering the tax rate on the lowest income bracket also lowers the average rate for those earning above that bracket. In addition to the greater benefits to custodial parents from lowering the tax on the lowest income bracket, the Tax Relief Act of 2001 doubles the size of child credits over its life span. The per child credit rose from \$500 in 2000 to \$600 in 2001. The per child tax credit subsequently rises to \$700 in 2005, \$800 in 2009, and \$1,000 in 2010. Custodial parents' after-tax advantage that is solely attributable to custody of children rises sharply as a result of the Tax Relief Act of 2001.

Appendix B: Favored Income Tax Treatment for Custodial Parents

The child-related tax benefits received by custodial parents include:

- head of household tax payer status,
- child dependency exemptions,
- child tax credits,
- child care tax credits, and
- higher earned income credits for low-income working custodial parents.

²⁰ See Pub. L. No. 105-34 (1997).

²¹ U.S. Congress, Joint Committee on Taxation, Joint Committee Print, # JCS-23-97, "General Explanation of Tax Legislation Enacted in 1997," (Joint Committee on Taxation 'Bluebook'), December 17, 1997, p. 19.

²² See Pub. L. No. 107-16 (2001).

Before quantifying the magnitude of these child-related tax benefits, what are some of the specifics of these benefits?

Differences in Tax Treatment between the Custodial Parent and the Non-custodial Parent

The Internal Revenue Service generally attributes child-related tax benefits to the custodial parent in divorced and unwed situations. The custodial parent is entitled to head of household status while the non-custodial parent typically has single tax payer status. Child-related tax benefits are summarized in Federal Form 1040 from the Internal Revenue Service for calendar tax year of 2003:

- The standardized deduction (line 37, Form 1040), for a head of household taxpayer (the custodial parent) was \$7,000 compared to \$4,750 for a single person (the non-custodial parent). This is a bonus of \$2,250 in deductions for the custodial parent.
- The custodial parent only is able to claim the dependent exemptions as a legal right (lines 6c and 39, Form 1040). The value of each dependent exemption is \$3,050 for tax year 2003.²³
- For low income and moderately low income working parents, custodial parents receive dramatically more favorable treatment than do non-custodial parents in terms of the size of earned income credits under Federal income tax law, calendar 2003 code.

The annual earned income credit was as much as—

- \$382 if you did not have a qualifying child (non-custodial parent),
 - \$2,547 if you had one qualifying child, or
 - \$4,204 if you had two qualifying children.
 - Under special circumstances there are additional credits for a third child.
- The Taxpayer Relief Act of 1997 gave custodial parents a tax credit of \$400 per child up to two children and additional credit for a third child under special circumstances. The credit went to \$500 per child in 1999.
 - The Economic Growth and Tax Relief Reconciliation Act of 2001 boosted the custodial parent's after-tax advantage even more. The new law lowered from 15 to 10 percent the tax rate for the first \$12,000 of taxable income on a joint return, \$6,000 for singles, \$10,000 for heads of household, and \$6,000 for married persons filing separate returns. The creation of the 10 percent bracket provides tax savings of up to \$600 for married couples; \$300 for singles and \$500 for heads of household. Lowering the tax rate on the lowest income bracket also lowers the average rate for those earning above that bracket. In addition to the greater benefits to custodial parents from lowering the tax on the lowest income bracket, the Economic Growth and Tax Relief Act of 2001 doubles the size of

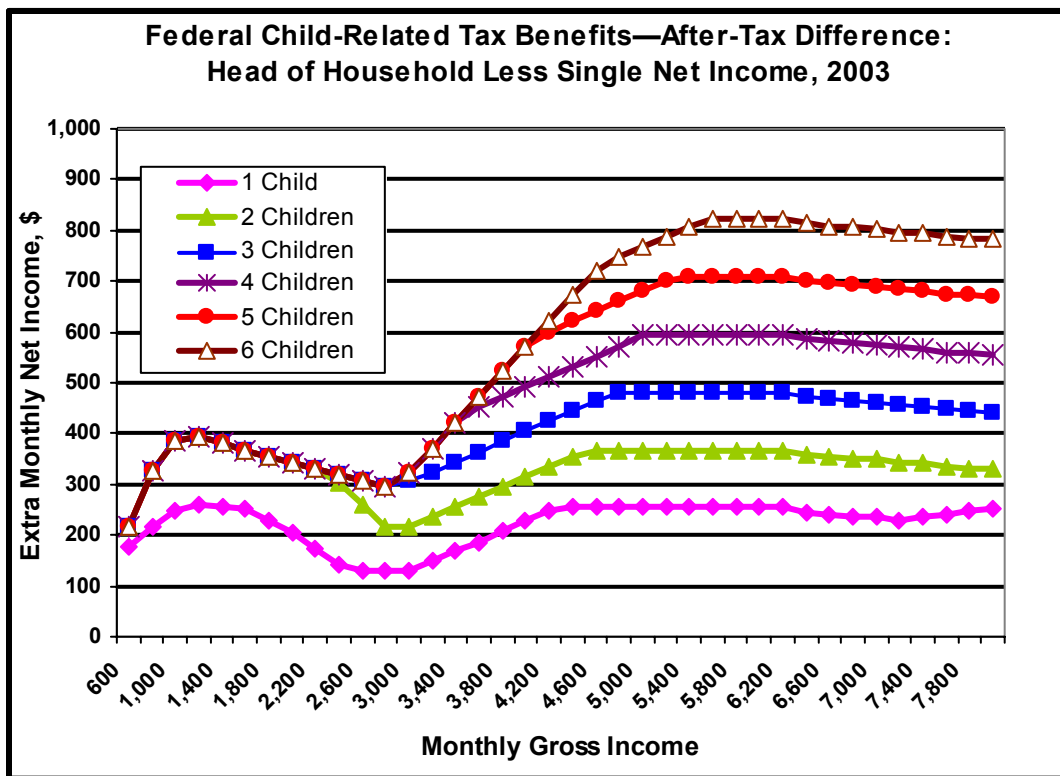
²³ An exception is for unwed situations. In never married situations, the exemption can be claimed by the parent paying more than 50 percent of the child costs—not necessarily the custodial parent. Nonetheless, in unwed situations only the custodial parent is able to claim head of household status (when still unmarried) while the non-custodial parent cannot.

child credits over the transition period of this act. The per child credit rose from \$500 in 2000 to \$600 in 2001. The per child tax credit subsequently rises to \$700 in 2005, \$800 in 2009, and \$1,000 in 2010.

- The marginal tax rate increases for head of household taxpayers take effect in at higher income threshold levels than for single, non-custodial parents. This is seen in Schedule X and Schedule Z, 2003 1040, Forms and Instructions, Department of the Treasury, page 74.

Child-Related Tax Benefits Expressed as Extra After-Tax Income: Total Benefits

**Child-Related Tax Benefits Typically Include:
Head of Household Status, Exemptions, Child Tax
Credits, and Earned Income Credits**

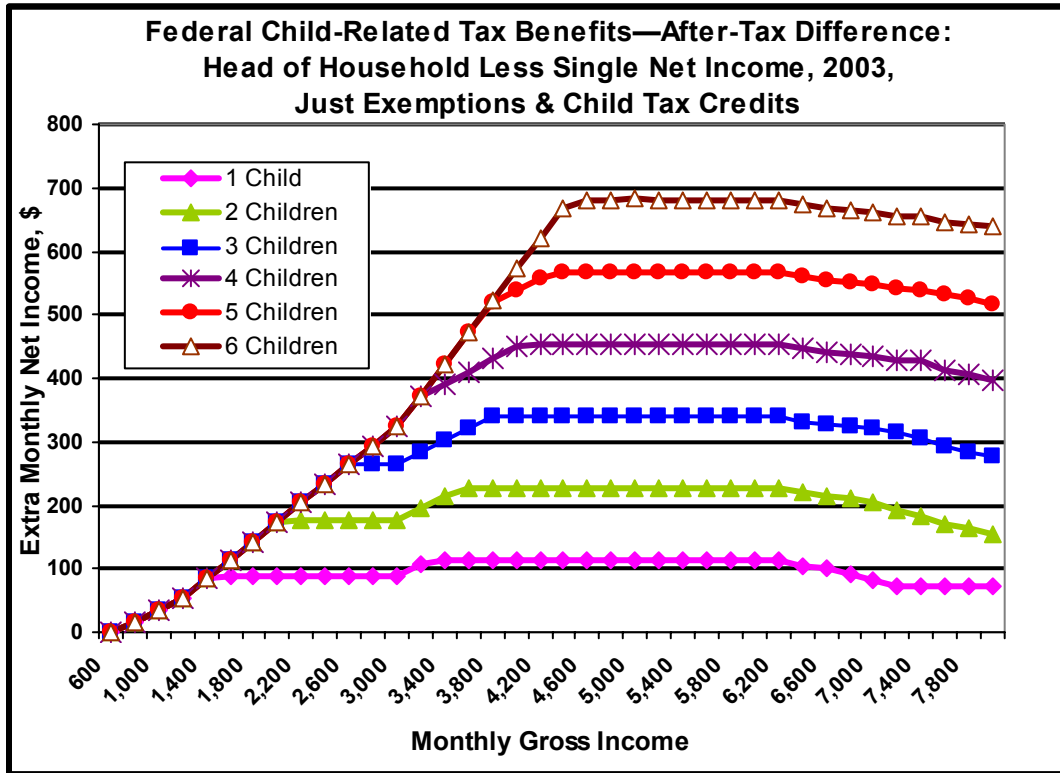


- **Child-related tax benefits are a very significant offset to total child costs—typically worth \$250 to \$500 in extra monthly after-tax income for the custodial parent.**

Note: These benefits do not include child care tax credits, WIC, or Food Stamps.

Child-Related Tax Benefits Expressed as Extra After-Tax Income:

Using Just the Exemptions and Child Tax Credits



- Even if only the child exemptions and tax credits are considered, the extra after-tax monthly income from child-related tax benefits is quite substantial—about \$100 per child per month.