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POOR LITTLE RICH KIDS: REVISING WISCONSIN'S CHILD SUPPORT SYSTEM TO ACCOMMODATE HIGH-INCOME PAYERS

I. INTRODUCTION

In December 1999, a New York Supreme Court judge ordered billionaire Ron Perelman to pay \$12,825 per month to his millionaire ex-wife as child support for their four year-old daughter.¹ The girl's mother says it's not "'about money,'"² but is disappointed that the court did not order Mr. Perelman to pay the \$132,000 per month in child support that she was seeking.³ The judge said "'[t]he mother's argument assumes that . . . if [the child] is denied any imaginable luxury, she will be emotionally damaged This assumption is rubbish.'"⁴ The mother responded that she only wants "what's best for my child."⁵ So, it appears that even among the rich happiness has a hefty price tag.

Some might argue that \$12,825 per month is still an excessive child support order. Others might argue that the little girl is entitled to share in her parents' wealth and that she should receive \$132,000 per month or more. Courts continually struggle to balance these arguments when weighing the best interests of the child against what is fair to the parents. This Comment explores these arguments in the context of Wisconsin child support law with respect to high-income payers and seeks to reconcile Wisconsin's high-income child support awards.

Wisconsin may not be home to a billionaire make-up magnate,⁶ but it does host many high-income professional athletes such as the Green Bay Packers, the Milwaukee Brewers, and the Milwaukee Bucks. Wisconsin is also home to the chairmen of international corporations such as Harley-Davidson, Miller Brewing Company, Briggs and Stratton, and Northwestern Mutual Life. How would Wisconsin courts treat the Ron Perelmans of Wisconsin? This Comment discusses what

1. See Marc Peyser, *Newsmakers: Living on \$12,825 a Month*, NEWSWEEK, Dec. 20, 1999, at 84.

2. *Id.*

3. *See id.*

4. *Id.*

5. *Id.*

6. *See id.* Ron Perelman is chairman of Revlon Cosmetic Corporation.

Wisconsin's wealthy can expect from the family courts when the courts issue child support orders in high-income divorce cases.

While it is unlikely anyone is particularly sympathetic to the plights of the rich, the Wisconsin child support guidelines⁷ work a unique injustice when applied to high-income cases.⁸ Because high-income non-custodial parents cannot anticipate their child support obligation, and because they generally must pay a disproportionately high obligation, Wisconsin should revise the present child support guidelines to accommodate high-income cases better.

This Comment will first explain the background of Wisconsin's child support system and the legal doctrines behind the child support awards in Wisconsin's high-income divorce cases. Next, this Comment will discuss the problems that befall high-income non-custodial parents under the current system of calculation. Finally, this Comment will suggest ways for Wisconsin to revise its current child support system to better accommodate high-income payers.

II. THE EVOLUTION OF THE CURRENT WISCONSIN CHILD SUPPORT SYSTEM

The federal government took the first step toward improving the payment and collection of child support in 1975 when Congress established the Office of Child Support Enforcement (OCSE).⁹ The OCSE was to provide financial incentives "to states for locating absent parents, establishing paternity and support awards, and enforcing support orders."¹⁰

In 1984, Congress took yet another step toward improving child support payment and collection by enacting The Child Support Enforcement Amendment of 1984 (the Amendment).¹¹ Congress enacted the Amendment as a tool for the OCSE to use in reinforcing the importance of child support payment and collection.¹² The Amendment also sought to assist states in improving the adequacy of

7. See WIS. ADMIN. CODE § DWD 40 (1999).

8. For the purposes of this Comment, "high income" describes yearly earnings of \$50,000 or more by the noncustodial parent.

9. See LEWIN/ICF, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, ESTIMATES OF EXPENDITURES ON CHILDREN AND CHILD SUPPORT GUIDELINES 1-2 (1990)[hereinafter LEWIN/ICF].

10. *Id.*

11. See 42 U.S.C. § 667 (1992); see also LEWIN/ICF, *supra* note 9, at 1-2.

12. See LEWIN/ICF, *supra* note 9, at 1-2.

child support orders.¹³ Congress hoped the Amendment would begin to remedy the social problems associated with epidemic non-payment of child support.¹⁴

The Amendment required the states "to develop guidelines for determining support obligations."¹⁵ These guidelines must: "(1) take into account the earnings, income, and resources of the absent parent," and "(2) be based on specific descriptive and numeric criteria and result in a computation of the support obligation"¹⁶

In 1988, Congress sought to further improve the nation's child support enforcement and collection practices and enacted the Family Support Act of 1988.¹⁷ This Act required states' child support guidelines to create a rebuttable presumption that the guideline amount of child support is the correct amount, that is, the amount required to meet the child's needs.¹⁸

Pursuant to the 1984 Amendment, the Wisconsin legislature delegated the task of establishing child support guidelines to the Department of Health and Social Services.¹⁹ Effective July 1, 1987, the Wisconsin Department of Health and Social Services amended its code to include the newly created child support guidelines it established in compliance with the federal law.²⁰ The new guidelines embraced a numeric calculation system²¹ and were created as a rebuttable presumption²² in compliance with the 1984 Amendment and 1988 Act.

The numeric calculation system employed in Wisconsin is known as the "percentage-of-income standard,"²³ and in many jurisdictions is simply known as the "Wisconsin system."²⁴ The percentage-of-income

13. See 42 U.S.C. § 667(a)(1992); LEWIN/ICF, *supra* note 9, at 1-2.

14. See LEWIN/ICF, *supra* note 9, at 1-1 (illustrating the risk of poverty inherent in divorce). Primarily, Congress intended the guidelines to combat poverty among single-parent families. See *id.* Congress was concerned with the high number of divorced parents who had to apply for public assistance. See Sharon J. Badertscher, Note, *Ohio's Mandatory Child Support Guidelines: Child Support or Spousal Maintenance?*, 42 CASE W. RES. L. REV. 297, 297-99 (1992).

15. LEWIN/ICF, *supra* note 9.

16. *Id.* at 1-3.

17. Family Support Act of 1988, Pub. L. No. 100-485 (1988).

18. See 42 U.S.C. § 667(b)(2) (1992); LEWIN/ICF, *supra* note 9, at 1-3.

19. See WIS. STAT. ANN. § 49.22(9) (West Supp. 1999).

20. See Order of the Dept. of Health and Social Services Adopting Rules [hereinafter Order] (to be codified at WIS. ADMIN. CODE § HSS 80 (1987)).

21. See generally WIS. ADMIN. CODE § DWD 40 (1999).

22. See Order, *supra* note 20, at 2.

23. WIS. ADMIN. CODE § DWD 40.02(27) (1999).

24. J. Thomas Oldham, *Lessons from the New English and Australian Child Support*

standard is the simplest calculation formula by which any state determines child support obligations.²⁵ The Department of Health and Social Services based the percentage-of-income standard on a well-known study conducted by Jacques Van der Gaag for the University of Wisconsin.²⁶ The standard is premised on the notion and promotes "the principle that a child's standard of living should, to the degree possible, not be adversely affected because his or her parents are not living together."²⁷

A. Wisconsin's Calculation Guidelines

Van der Gaag's ideal is prevalent in Wisconsin child support laws and is reflected in nearly all stages of calculating the child support obligation.²⁸ Because the guideline standards endeavor to maintain children at a pre-divorce standard of living, it is not surprising that the guideline percentages are based on studies of what average two-parent households spend per year in support of their given number of children.²⁹ The Wisconsin guidelines are intended to establish the minimum amount of child support to be contributed by *each parent*.³⁰ Therefore, when determining the child support obligation, it is tacitly understood that the custodial parent shares his or her income with the child.³¹ Thus, only the noncustodial parent's income is considered when calculating child support.³²

To calculate the noncustodial parent's child support obligation, Wisconsin measures the noncustodial parent's income by deducting the parent's financial obligation for other dependents³³ and by also deducting funds received from public assistance.³⁴ The resulting

Systems, 29 VAND. J. TRANSNAT'L L. 691, 720 (1996).

25. "The percentage of income formula is by far the simplest of the child support guidelines. Support orders are calculated as a specified percentage of the noncustodial parent's income, and the order is independent of the income level of the custodial parent." LEWIN/ICF, *supra* note 9, at 6-2. See also OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, CHILD SUPPORT GUIDELINES: THE NEXT GENERATION 5 (1994) [hereinafter GUIDELINES]; see Oldham, *supra* note 24, at 720.

26. See Order, *supra* note 20, at 2.

27. *Id.*; WIS. ADMIN. CODE § DWD 40 Preface (1999).

28. See generally WIS. ADMIN. CODE § DWD 40 (1999).

29. See GUIDELINES, *supra* note 25, at 3.

30. See WIS. ADMIN. CODE § DWD 40 Preface.

31. See *id.*

32. See WIS. ADMIN. CODE § DWD 40.03 (1999).

33. In Wisconsin, a payer with multiple payees is called a "serial family payer." WIS. ADMIN. CODE § DWD 40.02(24) (1999).

34. See WIS. ADMIN. CODE § DWD 40.02(13)(I) (1999).

adjusted gross income is used to calculate the parent's child support obligation.³⁵

Under Wisconsin Administrative Code Section DWD 40, where the child support guidelines are codified, "gross income" encompasses a broad range of income producers.³⁶ For example, worker's compensation benefits,³⁷ personal injury awards,³⁸ unemployment compensation benefits,³⁹ "employee contributions to any employee benefit plan or profit-sharing" plan,⁴⁰ "contributions to any pension or retirement account,"⁴¹ "military allowances and veterans benefits"⁴² are all attributable to gross income for purposes of determining child support.⁴³ The only things *not* attributable to gross income are funds received through public assistance or as child support from a prior marriage or paternity adjudication.⁴⁴

In addition to gross income, income may be imputed to a parent for determining child support.⁴⁵ Imputed income is defined as

the amount of income ascribed to assets which are unproductive or to which income has been diverted to avoid paying child support or from which income is necessary to maintain the child or children at the economic level they would enjoy if they were living with both parents, and which exceeds the actual earnings of the assets.⁴⁶

For example, if a noncustodial parent owns a rental property and chooses not to rent it, income may be imputed to the parent for the amount of money he could earn if he rented the property.

After considering all sources of income and determining the noncustodial parent's adjusted gross income, the percentage of income

35. See WIS. ADMIN. CODE § DWD 40.03 (1999).

36. See WIS. ADMIN. CODE § DWD 40.02(13) (1999) (listing such assets as contributions to employee benefit plans, pension accounts and "all other income, whether taxable or not.").

37. See WIS. ADMIN. CODE § DWD 40.02(13)(b) (1999).

38. See *id.*

39. See WIS. ADMIN. CODE § DWD 40.02(13)(c) (1999).

40. WIS. ADMIN. CODE § DWD 40.02(13)(e) (1999).

41. *Id.*

42. WIS. ADMIN. CODE § DWD 40.02(13)(f) (1999).

43. See WIS. ADMIN. CODE § DWD 40.02(13) (1999).

44. See WIS. ADMIN. CODE § DWD 40.02(13)(i) (1999).

45. See WIS. ADMIN. CODE § DWD 40.05 (1999); see also WIS. ADMIN. CODE § DWD 40.02(15) (1999).

46. WIS. ADMIN. CODE § DWD 40.02(15) (1999).

designated for child support is as follows:

- One child = 17% of adjusted gross income
- Two children = 25% of adjusted gross income
- Three children = 29% of adjusted gross income
- Four children = 31% of adjusted gross income
- Five or more children = 34% of adjusted gross income⁴⁷

While the percentage of income assessed as child support varies with the number of children being supported, the Wisconsin percentage guidelines are not income-sensitive. The percentage guidelines are intended to apply regardless of income.⁴⁸ However, because high-income families are largely unrepresented in the samples upon which studies designating the costs of child rearing are based, there is not enough information upon which to test the validity of such studies in the context of high-income divorce.⁴⁹ Therefore, it is difficult to establish and implement a formulaic guideline scheme that is fair in high-income cases.⁵⁰

This anomaly can yield ridiculous results in the case of a payer with an extremely high income. For example, under Wisconsin's guidelines, a payer who earns \$100,000 per year must pay \$25,000 per year in support of two children.⁵¹ Her child support obligation is higher than

47. See WIS. ADMIN. CODE § DWD 40.03(1) (1999); This Comment does not address the inconsistency inherent in the way the guidelines calculate the support obligation of a parent who has five children versus that of a parent who has more than five children. According to the guidelines, raising five children equates to the same financial burden as raising 8, or 10, or 12. *But see* LEWIN/ICF, *supra* note 9, at 2-13 (stating that as a family's size increases, the percentage of income the family spends on food also increases, therefore, implying it would *actually* cost more to support more than five children than it does to support five children).

48. See WIS. ADMIN. CODE § DWD 40.01(2)(1999). See also LEWIN/ICF *supra* note 9, at 6-2; Oldham, *supra* note 24. The percentage of income standard does not account for the custodial parent's income, and applies equally to all payer income brackets. Therefore, if a custodial parent is a high income earner who makes \$250,000 per year, and the noncustodial parent earns only \$30,000 per year—the noncustodial parent is still obligated to pay the set percentage. For an illustration of this situation see *Luciani v. Montemurro-Luciani*, 544 N.W.2d 561 (Wis. 1996).

49. See GUIDELINES, *supra* note 25, at 3 (emphasizing that because less than two percent of U.S. households have a combined parental income of \$150,000, it is difficult to effectively study such a small pool. See *id.*).

50. See *id.*

51. See WIS. ADMIN. CODE § 40.03(1). $\$100,000 \times .25\%$ (percent obligation for two children) = \$25,000 yearly child support obligation.

the average per capita income in Wisconsin.⁵²

To mitigate absurd or unfair results of applying the guidelines, a catch-all provision was injected into the child support statute.⁵³ This provision allows the court to abandon the percentage standard of calculation and to order a discretionary figure if applying the guidelines would garner an unfair result.⁵⁴

III. PROBLEMS ENCOUNTERED BY THE HIGH-INCOME NONCUSTODIAL PARENT UNDER THE PRESENT CALCULATION SYSTEM

A number of factors contribute to unfair or inequitable awards in high-income cases. Problems arising in high-income award calculations illustrate the infirmities in the current standard.

A. Problems With the Percentage-of-Income Standard

1. Faulty Premise

Wisconsin's percentage standard is inherently problematic because it is premised on the percentage of yearly income two-parent, intact families spend on their children.⁵⁵ The percentages would be more accurate if they were expressed as the amounts spent by a single parent earning the same amount as the non-custodial parent.⁵⁶ For example, a two-parent, two-earner family with a combined household income of \$100,000 per year, likely pays one mortgage payment each month. If those parents divorce, that same \$100,000 now must cover the expenses of two households—for example, two mortgages, two utility bills, and two tax bills.

Comparing the expenditures of married couples with the expenditures of divorced single parents is like comparing apples with

52. The per capita income in Wisconsin in current (1998) U.S. dollars is \$24,475 per year. See BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 460 (1998) [hereinafter ABSTRACT].

53. See WIS. STAT. ANN. § 767.51(4m) (West Supp. 1999).

54. See WIS. STAT. ANN. § 767.51(5) (West Supp. 1999). "Upon request by a party, the court may modify the amount of child support payments determined under sub. (4m) if, after considering the following factors, the court finds by the greater weight of the credible evidence that use of the percentage standard is unfair to the child or to the requesting party" *Id.*

55. See WIS. ADMIN. CODE § DWD 40 (1999). For a discussion as to the propriety of trying to research the spending habits of separated families by studying the expenditure patterns of intact families see Marsha Garrison, *Child Support and Children's Poverty*, 28 FAM. L.Q. 475 (1994). See also Oldham, *supra* note 24, at 710-12.

56. See GUIDELINES, *supra* note 25, at 3.

oranges. The child rearing costs of intact families "do not provide statistically valid findings beyond a certain income level."⁵⁷

2. Calculation of Income Available for Child Support

Due to Wisconsin's broad definition of "gross income,"⁵⁸ and due to its method of imputing income,⁵⁹ many noncustodial parents may appear to have more income available for child support than they actually do. For example, pensions, trusts, and real estate are all held to be viable sources of child support funds.⁶⁰ Many of these assets are investments that are probably not ear-marked for the children before a divorce and may remain inaccessible for child support after a divorce. Under the guidelines, income derived from these assets becomes a post-divorce entitlement,⁶¹ although the children would not have enjoyed the benefits of the assets pre-divorce.

This manner of assessing income is inconsistent with Wisconsin's goal to maintain children at their pre-divorce standard of living. Although it is not bad to provide children with more support than they would have normally enjoyed, it is likely the children would not have enjoyed such a windfall if their parents had remained married. Therefore, it is unfair to the parent who must sacrifice interest and dividends he or she would not have otherwise provided for the children. Clearly, this disproportionately affects high-income payers, because those with high incomes are more likely to have funds available for investment.⁶²

3. Custodial Parent's Child Support Obligation

Even though Wisconsin presumes that the custodial parent

57. *Id.* When combined parental gross income approaches approximately \$150,000 per year, findings become skewed. *See id.* Family lawyers recognize the problems that result from the dearth of economic data regarding expenditures on children in dual households. The Family Law Section of the American Bar Association recently resolved "to lobby for legislation that would require the United States Department of Agriculture to produce the economic data that would assist the states in deciding the appropriate, presumptive award in cases of joint physical custody." Sandra Morgan Little, 2000 A.B.A. SEC. FAM. L. REP. 105.

58. *See* WIS. ADMIN. CODE § DWD 40.02(13) (1999).

59. *See* WIS. ADMIN. CODE § DWD 40.02(15) (1999).

60. *See* WIS. ADMIN. CODE § DWD 40.02(13)-(15) (1999).

61. *See* WIS. ADMIN. CODE § DWD 40.03(1)-(2) (1999).

62. Fifty-one percent of families earning \$100,000 or more per year own investments in real estate as compared to only 16% of families earning \$40,000 per year. *See* ABSTRACT, *supra* note 52, at 483. Thirty-two percent of families earning \$100,000 or more per year own a business as compared with only 9% of families in the \$25,000 to \$49,999 income bracket. *See id.*

contributes the same percentage of income to his child as the noncustodial parent,⁶³ the custodial parent does not have to account for the amount he spends on his children.⁶⁴ Because high-income noncustodial parents pay substantial amounts of child support that presumably meet their children's needs, the custodial parents in high-income cases may not have to actually supplement the child support with an equivalent percentage of their own incomes as is presumed under the calculation guidelines.⁶⁵ The result is that the non-custodial parent entirely bears the financial burden of supporting his child.

Also, courts do not always accommodate this presumption of contribution from the custodial parent when setting child support obligations for noncustodial payers. For example, in *Kjelstrup v. Kjelstrup*,⁶⁶ the Wisconsin Court of Appeals reversed the child support award entered in a lower court because the lower court failed to consider the custodial parent's presumed contribution to the support of the children.⁶⁷ The court of appeals emphasized the statutory language which stated that the percentage guidelines are intended to determine the amount of support to be contributed by "each parent."⁶⁸ So while the custodial parent's contribution must be considered when setting child support, it need not be substantiated or quantified. This places high-income noncustodial parents at risk of single-handedly supporting their children.

4. Standard Does Not Accommodate Statistical Realities

The percentage-of-income standard is further problematic because it fails to account for the fact that as income increases, the percentage of income spent on children declines.⁶⁹ The system's failure to account for this decline results in high-income noncustodial parents paying

63. See WIS. ADMIN. CODE § DWD 40 Preface (1999). If the noncustodial parent has two children, she owes 25% of her income as child support, and it is presumed the custodial parent provides 25% of his income to support the children. Obviously, the parents may contribute unequal dollar amounts, however, the presumption is that the percentage remains static regardless of income.

64. See WIS. ADMIN. CODE § DWD 40 Preface.

65. See *id.*

66. 512 N.W.2d 264 (Wis. Ct. App. 1994).

67. See *id.* at 245-46.

68. *Id.* at 266.

69. "Expenditures on children increase with the number of children and their ages. Low-budget (income) families appear to spend a slightly higher percentage of their expenditures on their children than do high-budget (income) families." LEWIN/ICF, *supra* note 9, at 4-14. "[E]stimates indicate that expenditures on children (as a percentage of total family expenditures) decline modestly as family income increases." *Id.* at 4-21.

disproportionately more child support.⁷⁰ Currently, a noncustodial parent who has one child and earns \$200,000 per year, must pay 17 percent of his income in child support in the same manner that a noncustodial parent who earns \$30,000 must pay 17 percent of her income.⁷¹ The result is that the former parent pays his child almost \$3,000 per month while the latter pays her child approximately \$425.00 per month.

While it is understandable and even desirable that high-income parents should pay more dollar-for-dollar in child support, the percentage-of-income standard creates a discrepancy in the amount a parent *should* pay based on the child expenditure studies inherent in the guidelines, versus the amount the parent *actually* pays under the percentage guidelines.

Statistical analysis illustrates the discrepancy inherent in such child support awards. For example, according to statistics, a couple who earns \$200,000 spends approximately \$12,000 per year supporting one child.⁷² A couple who earns \$30,000 per year spends approximately \$6,000 per year supporting one child.⁷³ Under Wisconsin's guidelines, a parent who earns \$200,000 is required to pay \$34,000 per year in support of one child, while a parent who earns \$30,000 is required to pay \$5,100 in annual support of one child. Therefore, under the guidelines, the parent who earns \$200,000 must pay nearly three times more in annual child support than would the average married couple earning the same income. The parent who earns \$30,000 must pay slightly less in annual child support than would a similarly situated married couple.

While the percentage system arguably treats like-families alike⁷⁴ to the extent that all families in any given income bracket are assessed the same percentage of child support,⁷⁵ it treats divorced parents like their statistical married peers on whom the standard is based, and therefore begets incongruous results.

70. See Badertscher, *supra* note 14, at 299.

71. See WIS. ADMIN. CODE § 40.03(1). All income levels are assessed the same flat percentage rate based on the number of children the parent is obligated to support. See *id.*

72. See ABSTRACT, *supra* note 52, at 463.

73. See *id.*

74. See GUIDELINES, *supra* note 25, at 85 (stating that one goal of child support guidelines is to see that like families are treated alike).

75. See WIS. ADMIN. CODE § DWD 40.03(1) (1999).

B. Judicial Discretion: Problems Encountered by High-Income Noncustodial Parents

Although the guidelines are automatically applied,⁷⁶ there are instances when a court can deviate from the percent of income standard to set child support awards.⁷⁷

With respect to high-income child support awards in Wisconsin, the general rule seems to be that a court should be cautious in "applying the guidelines when the facts of the case bear little relationship to the statewide statistical norm that the guidelines attempt to capture."⁷⁸ But as stated before, the "statistical norm" is the pre-divorce standard of living.⁷⁹

Consistent with the guideline's public policy goals, if a child's parents earned \$1,000,000 per year before the divorce, he is entitled to maintain a \$1,000,000 lifestyle after the divorce.⁸⁰ However, Wisconsin courts seldom apply the percentage guidelines in high income cases citing unfairness⁸¹ or irrationality⁸² as reasons for their deviance. Instead judges employ discretion to arrive at what they believe to be a fair amount, or an amount more rationally related to the child's needs.⁸³

Judges may use discretion to set or modify child support awards if, after considering a battery of factors, he or she determines the guideline amount of child support to be unfair to either of the parents or the child.⁸⁴ Unfortunately, Wisconsin judges are inconsistent in their

76. See Order, *supra* note 20, at 1.

77. See WIS. STAT. ANN. 767.25(1m) (West Supp. 1999).

78. Nelsen v. Candee, 556 N.W.2d 784, 788 (Wis. Ct. App. 1996) (applying the rule set forth in Parrett v. Parrett, 432 N.W.2d 664, 669 (Wis. Ct. App. 1988)).

79. WIS. ADMIN. CODE § DWD 40.

80. For illustration, if a couple had one child and earned \$1,000,000 per year (\$50,000 attributable to the post-divorce custodial parent and the remaining \$950,000 attributable to the noncustodial parent) the noncustodial parent's child support obligation would be \$161,500 per year or approximately \$13,458 per month. It is likely that such an award of child support would be highly suspect. A Wisconsin court would likely determine the amount to be unfair to the payer as either disguised maintenance or so large as to be unrelated to the child's needs. See, e.g., Nelsen, 556 N.W.2d at 787-88.

81. See Nelsen, 556 N.W.2d at 788-89.

82. See e.g., Parrett, 432 N.W.2d at 668.

83. See e.g., Hubert v. Hubert, 465 N.W.2d 252 (Wis. Ct. App. 1990); Nelsen, 555 N.W.2d at 784; Parrett, 432 N.W.2d at 664; *In re the Paternity of Tukker M.O.*, 544 N.W.2d 417 (Wis. 1996).

84. See WIS. STAT. ANN. § 767.25(1m) (West Supp. 1999). Under this section, courts must consider sixteen factors when determining whether deviation from the guidelines is appropriate. See *id.* These factors include such considerations as "[t]he standard of living the child would have enjoyed had the marriage not ended in annulment, divorce or legal separation," "[t]he best interests of the child," and "[t]he financial resources of both parents."

exercise of discretion in high-income cases.⁸⁵ One purpose for establishing child support guidelines is "to ensure that similar families are treated equally"⁸⁶ However, discretionary awards are often inconsistent so that high-income payers cannot anticipate how their child support calculations may be handled by the courts.

Wisconsin case law illustrates the incongruous results derived when judges set discretionary awards. For example, in *Parrett v. Parrett*,⁸⁷ the noncustodial parent had a monthly income of approximately \$16,500.⁸⁸ When setting child support, the family court determined that applying the percentage standards would "result in a figure so far beyond the child's needs as to be irrational."⁸⁹ The court instead deviated from the statutory award of approximately \$2,800 per month and set a discretionary amount of \$1,000 per month.⁹⁰

In *Hubert v. Hubert*,⁹¹ the noncustodial parent earned over \$1,000,000 per year.⁹² Under the percentage-of-income standard,⁹³ this parent would have had to pay nearly \$21,000 per month in support of his two children. The trial judge determined that applying the percentage standard to this case would be unfair to the noncustodial parent and in his discretion, set child support at \$4,000 per month.⁹⁴

When comparing the outcomes in *Parrett* and *Hubert*, it seems ironic that the discretionary amount the court awarded in *Hubert*, is nearly double the "irrational" statutory percentage amount that a court could have awarded in *Parrett*.⁹⁵ Even more ironic, is that the court of appeals upheld the \$1,000 per month award in *Parrett* stating that it is reasonable for a "court to deviate from the percentage standards when the payer's high income would result in unnecessarily high payments."⁹⁶

However, the court of appeals reversed the *Hubert* decision on the

Id.

85. Compare *Parrett*, 432 N.W.2d at 664 with *Hubert*, 465 N.W.2d at 252.

86. GUIDELINES, *supra* note 25, at 85.

87. 432 N.W.2d 664 (Wis. Ct. App. 1988).

88. See *id.* at 666.

89. *Id.* at 668. Based on the noncustodial parent's monthly income, he would have been obligated to pay his child approximately \$2805 per month. See *id.*

90. See *id.* at 669.

91. 465 N.W.2d at 252.

92. See *id.* at 259.

93. See WIS. ADMIN. CODE § DWD 40 (1999).

94. See *Hubert*, 465 N.W.2d at 260.

95. Compare *Parrett*, 432 N.W.2d at 664 with *Hubert*, 465 N.W.2d at 252.

96. *In re the Paternity of Tukker M.O.*, 544 N.W.2d 417, 420 (Wis. 1996) (explaining the rationale behind the *Parrett* holding in the Court of Appeals).

basis that the Hubert children would have enjoyed an extremely high standard of living if their parents had not divorced, and that "[t]he family court erred when it failed to articulate why the children should not be supported 'at the economic level they would have enjoyed had there been no divorce.'"⁹⁷

If the court chooses to deviate from the statutory standards in the interest of fairness, the children are at the mercy of the court to determine an amount of support that is "fair."⁹⁸ Most often, the court deviates downward,⁹⁹ thereby awarding an amount that supports the child below the pre-divorce standard of living. It appears from the discrepancies that the courts evaluate high-income cases on a case-by-case basis. However, this approach is inconsistent with the Child Support Enforcement Amendment of 1984.¹⁰⁰ The 1984 Amendment precludes a case-by-case standard of review because guidelines must be formulaic and must apply to all cases.¹⁰¹

However, this does not mean that the guidelines must have only one formula that applies even to extremely high incomes.¹⁰² "It simply means that guidelines must specify how cases at both extremes of the income spectrum must be addressed."¹⁰³ Therefore, if courts are to use discretion in cases involving an amount beyond a certain income level, there should be a standard for achieving some predictability as to how the courts' discretion may manifest in a child support award.

IV. POSSIBLE SOLUTIONS FOR WISCONSIN'S HIGH-INCOME PAYERS

There are a number of modifications Wisconsin could make to its current child support system that would make the system more fair and predictable for high-income noncustodial parents. This section presents some of the options and suggests a new standard for calculating the child support awards of high-income parents.

97. *Hubert*, 465 N.W.2d at 257 (quoting *Sommer v. Sommer*, 323 N.W.2d 144, 146 (Wis. Ct. App. 1982)).

98. See WIS. STAT. ANN. § 767.25(1m)-(1n) (West Supp. 1999).

99. The trial court in *Hubert* awarded only one-fifth of the statutory award. See 465 N.W. 2d at 260. The *Parrett* trial court awarded less than half of what the child was entitled to under the guidelines. See *Parrett*, 432 N.W.2d at 668-69. Finally, in *Nelsen*, the guidelines would have called for nearly \$2,800 per month in support; the court set support at \$1,900. See 556 N.W.2d at 787.

100. 42 U.S.C. § 667 (1992).

101. See GUIDELINES, *supra* note 25, at 3-4; Baedertsher, *supra* note 14, at 316.

102. See GUIDELINES, *supra* note 25, at 3.

103. *Id.*

A. *Change the Standard for Determining Income*

First, to combat the problems associated with calculating income available for child support, Wisconsin could consider incorporating the administration of child support enforcement within the tax offices. In Australia, before the Child Support Agency was annexed to the tax offices in 1988, only 25 percent of single-parent families received child support.¹⁰⁴ Now, under the new administrative arrangement, over 40 percent of such families receive child support.¹⁰⁵ This improvement is due largely to the fact that Australia uses the most recent tax filing to determine the relevant income figure for setting child support.¹⁰⁶ Such a basis for calculation facilitates determining child support accurately and overcomes the "great difficulties confirming the income of parents" who might not file income disclosure statements or who might misrepresent their incomes.¹⁰⁷

This system of calculating income under the taxing scheme could benefit high-income payers. In Wisconsin, the child support obligation is based on the noncustodial parent's gross income.¹⁰⁸ "Gross income" is defined as "all income derived from any source and realized in any form."¹⁰⁹ Statistics demonstrate how this broad definition disadvantages high-income noncustodial parents.¹¹⁰

By basing the child support obligation on taxable income rather than gross income, high-income payers are able to account for deductions they would not have under the present system.¹¹¹

B. *Incorporate an Income Cap*

In Wisconsin, there seems to be a tacit understanding among the

104. See Oldham, *supra* note 24, at 703.

105. See *id.*

106. See *id.*

107. *Id.* at 723. For a discussion of the difficulty of enforcing percentage expressed child support Orders in Wisconsin due to under-reporting and non-reporting of income by noncustodial parents see Lucy Cooper, *Percentage Expressed Orders—A Different Perspective*, 19 WIS. J. FAM. LAW 19-20 (1999).

108. See WIS. ADMIN. CODE § DWD 40.03 (1999).

109. WIS. ADMIN. CODE § DWD 40.02(13) (1999).

110. See section III *supra* (explaining that high-income payers often have assets and investments that are tax deductions but that are attributed as income for the purpose of determining child support).

111. See WIS. ADMIN. CODE § DWD 40.02(13) (1999). But see LEWIN/ICF, *supra* note 9, at 6-34 (arguing that in some circumstances (for example, when a parent is self-employed), it may be desirable to calculate income for child support differently than taxable income is calculated).

judiciary that the percentage standard does not work in high-income cases. Although the courts are inconsistent in their expression of what constitutes a "fair" award in high-income cases,¹¹² they seem to consistently feel that they will know it when they see it. Based on a survey of current case law,¹¹³ approximately \$2,000 per child, per month in child support is the point at which the Wisconsin courts begin to question the excessiveness of the award.¹¹⁴

Wisconsin might consider revising the guidelines to set \$2,000 per month as a maximum monthly award. Child support obligations could still be calculated under the existing system, however, beyond a certain income, the percentage-of-income standard would cease to be applied and the courts could award a default maximum.

Such an income cap¹¹⁵ would better accommodate high-income payers to the extent that they could accurately predict whether the percentage standard would apply to them or whether they would be obliged to pay the maximum amount of child support set forth under the guidelines.

C. Revise the Percentage Standard

Another alternative to the present calculation system is to revise the percentage system to account for the realities the present system does not address. The present system does not accommodate the fact that the percentage of income spent on children decreases as income increases.¹¹⁶ Therefore, noncustodial parents are assessed a proportionately larger percentage of income even though the actual percentage figure is static.¹¹⁷

The first step in enacting a new percentage-based system would be to research the actual spending habits of *separated* families as opposed to intact families. From this premise, one could then determine the spending habits of single-parent families within specified, and fairly narrow, income brackets. If reality conforms to the statistical analysis, the higher a single parent's income is, the lower his or her child support

112. See *supra* note 83.

113. See *id.*

114. See e.g., *Parrett*, 432 N.W.2d at 664, *Hubert*, 465 N.W.2d at 252.

115. See GUIDELINES, *supra* note 25, at 5. For a working example of such a calculation system, one might look to Minnesota. See *id.* "Minnesota sets a ceiling of \$4,000 per month, above which child support is presumptively capped at the same amount as for income of \$4,000." *Id.*

116. See *supra* Part III.A.4.

117. See *id.*

obligation would be expressed as a percentage of income.¹¹⁸

However, there are difficulties inherent in establishing expenditure guidelines based on such studies. It would be extremely difficult to research such a small pool of families.¹¹⁹ If only two percent of U.S. households earn substantial incomes,¹²⁰ the families available for study include only those within that high-earning two percent who divorce.¹²¹

Perhaps the best revision to the present calculation system that would benefit high-income parents is for Wisconsin to establish a hybrid between the present percentage system and the income cap. If the flat percentage system yields accurate results only up to a certain income level,¹²² then the system should be maintained up to the point that it is accurate. Beyond that level, however, a new percentage standard should apply to accommodate the percentage decrease in spending on children as income rises.

This system would best be established by calculating income up to a certain amount by one percentage, and excess income above the set amount would be calculated at a lesser percentage.

For example, if a parent must pay child support for one child, the first \$50,000 of earnings would be assessed at 17 percent, and any earnings above \$50,000 would be assessed at 10 percent. The equation would be as follows to arrive at the noncustodial parent's support obligation for one child:¹²³

$$\text{Gross income} - \$50,000 \times .10 + \$8,500 \text{ (i.e., 17\% of \$50,000)} = \text{Award}^{124}$$

The following table illustrates how this calculation system would

118. It is still likely that even though a high-income payer's percentage obligation is smaller, he or she will still pay more in child support, dollar-for-dollar, than lower income brackets.

119. See GUIDELINES, *supra* note 25, at 3.

120. See *id.*

121. See *id.*

122. See *id.* (stating that "samples upon which estimates of child rearing costs are based . . . do not have enough cases represented at incomes above this level ['approximately \$150,000 per year combined gross income'] for statistically valid findings.").

123. The equation could easily be modified to determine support obligations for two or more children. For example, the equation for two children would be:

$$\text{Gross income} - \$50,000 \times .10 + \$12,500 \text{ (25\% of \$50,000)} = \text{Award}$$

The equation for three children would be:

$$\text{Gross income} - \$50,000 \times .10 + \$14,500 \text{ (29\% of \$50,000)} = \text{Award}$$

124. For clarification, the equation is: gross income, minus \$50,000, multiplied by .10, plus \$8,500, equals the award amount.

apply to incomes up to \$500,000 per year, although the system could be accurately applied beyond that income level.¹²⁵

TABLE A

Income range	Amount above \$50,000	Range of child support award	Approximate percentage of overall income
Up to \$50,000	\$0	varies	17%
\$50,001 to \$60,000	\$1 to \$10,000	\$8,500.10 to \$9,500	15.8%
\$60,001 to \$70,000	\$10,001 to \$20,000	\$9,500.10 to \$10,500	15%
\$70,001 to \$80,000	\$20,001 to \$30,000	\$10,500.10 to \$11,500	14.3%
\$80,001 to \$90,000	\$30,001 to \$40,000	\$11,500.10 to \$12,500	13.8%
\$90,001 to \$100,000	\$40,001 to \$50,000	\$12,500.10 to \$13,500	13.5%
\$100,001 to \$150,000	\$50,001 to \$100,000	\$13,500.10 to \$18,500	12%
\$150,001 to \$200,000	\$100,001 to \$150,000	\$18,500.10 to \$23,500	11.7%
\$200,001 to \$250,000	\$150,001 to \$200,000	\$23,500.10 to \$28,500	11.4%
\$250,001 to \$300,000	\$200,001 to \$250,000	\$28,500.10 to \$33,500	11.1%
\$300,001 to \$350,000	\$250,001 to \$300,000	\$33,500.10 to \$38,500	11%
\$350,001 to \$400,000	\$300,001 to \$350,000	\$38,500.10 to \$43,500	10.8%
\$400,001 to \$500,000	\$350,001 to \$450,000	\$43,500.10 to \$53,500	10.7%

125. For example, the yearly child support obligation for a noncustodial parent earning \$600,000 would be \$63,500 per year or 10.5% of adjusted gross income; a parent earning \$800,000 per year would be obliged to pay \$83,500 in child support or 10.4% of adjusted gross income; a parent earning \$1,000,000 would pay \$103,000 in child support or 10.3% of adjusted gross income.

This calculation system is effective because, if a parent earns more—even one dollar more—he or she pays more. Yet, the child is still presumptively receiving an adequate award. High-income noncustodial parents can enter court with peace of mind knowing how the award will be calculated and what the outcome will be.

V. CONCLUSION

The present Wisconsin Child Support Guidelines were enacted to comply with the 1984 Child Support Enforcement Amendment requiring states to promulgate numeric standards for calculating child support. While Wisconsin embraced the simplest form of calculation, the percentage-of-income system is largely unfair both to high-income payers and their children.

Wisconsin payers could possibly benefit from a tax-based administration of child support, or by incorporating an income cap into the present standard. However, another viable option exists in reinventing the percentage-based system to more accurately reflect Wisconsin's goals in collecting child support and the realities of single-parent and high-income spending habits. However, the best solution may be to retain the present percent-of-income standard, but extend it regressively via a flat percentage that applies to income beyond a fixed limit. The result would be a numeric standard for calculating the child support obligations of high-income payers who will ultimately benefit from consistency and predictability of child support determinations.

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