The Two "ICS" of the 2001 Louisiana Child Support Guidelines: Economics and Politics

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* Jules F. and Frances L. Landry Professor of Law. The author served as Chairman of the Task Force to Revise Louisiana's Child Support Guidelines. She wishes to acknowledge and thank three of the most dedicated public servants it has been her pleasure to know—Lisa Woodruff-White of the Department of Social Services, Cynthia Guillory of the Louisiana District Attorney's Association, and Jessica Braun, staff attorney for the House Committee on Civil Law and Procedure. The author also wishes to thank Representatives Jackie Clarkson (lead author of House Bill No. 1398) and Emma Devillier; Senators Noble Ellington and Tom Schedler; and the faithful members of the Task Force who attended meetings and testified.
I. INTRODUCTION

Against the backdrop of the following statistical and political information, the Louisiana Legislature in 2001 deliberated the comprehensive revision of Louisiana’s child support guidelines:

1. Of the children born in Louisiana the preceding year, 45 percent were born out of wedlock.¹
2. Louisiana was ranked second among states and the District of Columbia in child poverty, first the year before.²

¹ Louisiana State Report on Out-of-Wedlock Births (on file with author).

Poor families mean poor children. Louisiana, in fact, has a greater proportion of children living in poverty—32 percent—than any other state in the nation. Only the District of Columbia has a higher percentage of children in poverty. And the number of poor children in the state is growing . . . Many poor children live in single-parent families. In 1996, 35 percent of Louisiana’s children lived in such families, well above the national average of 27 percent. These families struggle to make ends meet on one income, and most of them are headed by women. The association between poverty and single-parent households is a powerful one, and the number of children in such families is likely to grow given
3. Although divorce rates have leveled off nationally during the last five years, they remain at historically high levels and the vast majority of divorces nationally occur within the first nine years of marriage involving in many cases minor children.

4. LA Dads, an organization of Louisiana fathers who pay child support and object to many of the provisions of Louisiana law that affect them and their children, made their first political appearance.

Thus, no legislator could argue that the subject did not affect his constituents, many of whom are the most vulnerable of Louisiana’s citizens, its children. Yet, the citizens of the United States have become increasingly less child-centered in their concerns and interests and far more adult-centered; they are less interested in how the state’s high rate of births to single women ...

Id. at 5-6.


We know, for example, that while divorce has dropped since its peak rate in 1980, the United States still has the highest divorce rate among Western nations. We know that in 1998 there were 2.24 million marriages and 1.14 million divorces. We know that if present rates continue, about forty out of every one hundred first marriages will end in divorce, two and a half times the rate only four decades ago.

We also know that more than three-quarters of divorced men and two-thirds of divorced women remarry, and that this remarriage occurs on average within three years.

We know that among women under forty, upward of sixty percent of these remarriages will themselves end in divorce. We know that, for couples who divorce, the median duration of first marriages is approximately eight years; of remarriages, between five and six years; and of third marriages, about three years.

Id.


Although economic theory has been applied to issues of child support ... after divorce, what is most revealing about the economic approach is what it suggests about a transformation of attitudes toward parenthood. Particularly in the setting of divorce, these attitudes are rooted increasingly in parental self-interest and separated from more traditional conceptions of love and obligation.

Id. See also Bennett, supra note 3, at 1 (“Compared to a generation ago, American families today are much less stable; marriage is far less central; divorce, out-of-wedlock births, and cohabitation are vastly more common; and children are more vulnerable and neglected, less well-off, and less valued.”) (emphasis added). William Bennett expresses the view that “[a]dults have elevated their own desires above the pressing needs of children.” Id. at 158. In the same book, Bennett cites
policy decisions affect children and more interested in how they affect adults. Such citizen attitudes have an impact when child support guidelines are discussed; debate focuses far too often upon how the adult payor or payee is affected rather than the child, as well as upon the desire of the adult payor to "move on" with his life and concentrate his resources on his "new" family, whether biologically related or not.

These significant attitudinal changes surfaced during the legislative deliberations on the revision of the child support guidelines. When the guidelines were first proposed and debated in 1989, one discussion focused on the effect of numerical child support amounts on children because the broad consensus was that, at least where divorce was concerned, a parent does not divorce his children who deserve protection from a decision made by one or, far less often, by both of her

Mary Ann Glendon, a professor of law at Harvard University:

The American story about marriage, as told in the law and in much popular literature, goes something like this: marriage is a relationship that exists primarily for the fulfillment of the individual spouses. If it ceases to perform this function, no one is to blame and either spouse may terminate it at will. After divorce, each spouse is expected to be self-sufficient. Children hardly appear in the story; at most they are rather shadowy characters in the background...

Id. at 29-30 (quoting Mary Ann Glendon, Abortion and Divorce in Western Law 108 (1987)).


6. Bennett, supra note 3, at 5 ("Ideas have consequences, Richard Weaver famously wrote, and bad ideas have baleful consequences.").

7. Bennett, supra note 3, at 140-41 (emphasis added):

According to friends, Marianne—whom Newt Gingrich in 1994 called his 'best friend and closest advisor'—was devastated by the dissolution of her marriage. 'I am shocked that all this is happening,' she said. Months after receiving the news, Gingrich will not talk publicly about the divorce; she says he simply wants to move on.

8. To some extent the attitudinal shift that has occurred was reflected in the 1999 Act directing the review by the Department of Social Services and the Louisiana District Attorneys' Association. For example, in the Act the Legislature directed that the participants discuss the following specific subjects:

the lowering of the starting percentile for the first child and increasing the percentile based upon fairness and equity; the review of deductions used in calculating child support; the inclusion of parent’s expenses in calculating child support, and whether children of subsequent marriages should be included in determining child support, and whether there should be a limit on motions to increase child support.

parents to dissolve the family. In fact, the 2001 legislation contains language to that effect. Nonetheless, despite the worsening condition of Louisiana’s children, contrary views emphasizing adult concerns at the expense of concerns for the children were ardently expressed, views, reflecting these deep attitudinal changes. The contrast between discussions and debates in 1989 and those in 2001 were particularly striking; 2001 was the first time since their enactment that the legislature concentrated on a comprehensive review of the guidelines. What was the reason for the significant lapse in time? The Louisiana Legislature had simply failed to review and revise the guidelines every four years as it is statutorily directed to do. Act No. 1082 of 2001 constituted the culmination of the first comprehensive revision of Louisiana’s statutory guidelines and numerical schedule since their enactment.

9. La. R.S. 9:315(A) (2002), as amended by 2001 La. Acts No. 1082: The premise of these guidelines as well as the provisions of the Civil Code is that child support is a continuous obligation of both parents, children are entitled to share in the current income of both parents, and children should not be the economic victims of divorce or out-of-wedlock birth. . . . While the legislature acknowledges that the expenditures of two-household divorced, separated, or non-formed families are different from intact family households, it is very important that the children of this state not be forced to live in poverty because of family disruption and that they be afforded the same opportunities available to children in intact families, consisting of parents with similar financial means to those of their own parents.

10. Bennett, supra note 3, at 10-11 (“Scholars now speak of an ongoing trend toward a ‘postmarriage’ society, one in which commitments to spouses and children are increasingly limited, contingent and easily broken.”).

11. La. R.S. 9:315.12 (2000). This provision was reenacted in 2001 La. Acts No. 1082 and appears as La. R.S. 9:315.16 (as amended) which directs that the guidelines should be reviewed in 2004.

II. THE PROCESS

The process of review of the guidelines occurred in two official stages, a review initially requested by an act passed in 1999 and then by a legislative resolution passed in 2000. In the 1999 act, the Legislature directed the Department of Social Services ("DSS") and the Louisiana District Attorneys' Association ("LDAA") to conduct a comprehensive review and make recommendations in 2000.\(^{13}\) Their review included hearings held throughout the state for the presentation of testimony by users of the guidelines. Secondly, a resolution passed in 2000 requested continued study of the recommendations resulting from the review by DSS and LDAA by a more representative legislative task force that included legislators, judges, lawyers and a professor.\(^{14}\) The Task Force was directed to

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13. 1999 La. Acts No. 153. Section 2 requested the Department of Social Services (DSS) and the Louisiana District Attorneys' Association (LDAA) to hold public meetings on the guidelines and make the meetings known to interested parties. They were directed to submit a report to the Legislature at least sixty days prior to the beginning of the 2000 Regular Session of the Legislature. The final report was submitted on May 23, 2000, prepared by Lisa Woodruff-White of the Department of Social Services, office of support enforcement. It was a detailed, comprehensive report of the outcome of the hearings held state-wide and the supporting economic data provided by Policy Studies, Inc., as well as the recommendations of the review committee. The author of this article acknowledges the final report as a valuable resource used extensively in the research necessary to write this article.

14. H.R. Res. 70, Reg. Sess. (La. 2000). The Resolution provided that the following persons would serve on the Task Force:

(1) The speaker of the House of Representatives or his designee.
(2) The president of the Senate or his designee. (3) The chairman of the House Committee on Civil Law and Procedure or his designee. (4) The chairman of the Senate Judiciary A Committee or his designee. (5) The secretary of the Department of Social Services or his designee. (6) The executive director of the Louisiana District Attorneys Association or his designee. (7) The chairman of the Louisiana State Bar Association Family Law Section or his designee. (8) The reporter of the Louisiana State Law Institute Marriage and Persons Advisory Committee. (9) The president of the Louisiana District Judges Association or his
submit recommendations in advance of the 2001 Regular Session of the Legislature.

The recommendations of the Task Force, partially modified in response to legislative concerns expressed at interim hearings prior to the 2001 legislative session, were incorporated into House Bill No. 1398. The bill represented a combination of some of the original recommendations by DSS and LDAA and of some modified and new recommendations made by the Task Force. The bill, rather heavily amended in the House of Representatives in both the Committee on Civil Law and Procedure and on the floor, passed approximately a week before sine die and became Act No. 1082 of 2001.

The Act reflected decisions often made on the basis of political realities, and those decisions appear purely arbitrary. A perfect example were decisions affecting the guidelines’ schedule. Fundamental economic assumptions were not revised with updated data, yet even the newest assumptions were admittedly based in part upon 1973 economic data and in part upon other such data compiled and synthesized in a federally funded study conducted between the years 1980-1986. There has never been a comprehensive study conducted to gather reliable specific data on the percentage of household income an intact Louisiana family spends on children for basic necessities across a broad range of income levels. The economic data was surely not perfect going into the process and was much less perfect coming out. Sausage? Well, at least Louisiana boudin.

15. The Task Force, which had recommended the repeal of the accounting provision, La. R.S. 9:312 (2000), abandoned the repeal in favor of clarification of the provision. See Katherine S. Spaht, Report of the Task Force on the Revision of Child Support Guidelines (Jan. 24, 2001) (on file with the author) (“Eliminate the onerous burden imposed upon the custodial or domiciliary parent to account for the expenditure of child support upon demand of the non-custodial or non-domiciliary parent, which can be used to harass the custodial or domiciliary parent.”).

The revision of this provision proved to be one of the most controversial issues of child support revision bill. It was not sufficiently punitive for the Louisiana Dads organization. Ultimately, the revised accounting provision incorporated recommendations of the Task Force. See discussion in text accompanying infra notes 137-154.

16. See text accompanying infra notes 17-223.
III. LOUISIANA’S INCOME SHARES MODEL OF GUIDELINES

In 1989 when Louisiana adopted its child support guidelines in response to Congressional mandate,17 Louisiana chose the income shares model of guideline, one of four models implemented by the states in 1989.18 Thirty-three states have adopted the income shares model of guideline;19 and the remaining, either the percentage of obligor income model,20 the Melson formula model,21 or the Massachusetts/District of Columbia hybrid of the percentage of obligor income model.22 None of the states have made major changes in their guidelines initially adopted, even after review of the guidelines mandated by the Family Support Act of 1988, for the purpose of considering current economic data and patterns of judicial deviation.23

18. The four models adopted by states were “(1) Percentage of Obligor Income; (2) Income Shares; (3) Melson formula; or (4) the Massachusetts/District of Columbia hybrid of the percentage of obligor income model.” Venohr & Williams, supra note 12, at 10. Table 1 of the article compares the guidelines in each state. The income shares model was adopted in thirty-three states, while thirteen states adopted percentage of obligor’s income.
19. Robert Williams, one of the authors of the Family Law Quarterly article, is the expert who testified when Louisiana first adopted its income shares model of guideline in 1989. He is president of Policy Studies, Inc. with whom the state contracted for expert services during the review process in 1999-2000. See also infra note 28.
20. Thirteen states have adopted percentage of obligor’s income model of child support guideline, and this model is the simplest of the four formulas. Interestingly, five states apply percentages to the obligor’s gross income; and the remaining eight apply the percentage to the obligor’s net income. See Venohr & Williams, supra note 12, at 10. See also id. Table 1 at 11.
21. Three states have adopted the Melson formula. See Venohr & Williams, supra note 12, at 15-16. See also id. Table 1 at 11.
22. Two states have adopted this model of guideline. See id. at 16-17. See also id. Table 1 at 11.
The income shares model is based "on the concept that the child should receive the same proportion of parental income the child would have received if the parents lived together,"24 and the Louisiana guidelines now incorporate this enunciated policy.25 The laudable goal underlying income shares model is that the child should not suffer economically because his parents are not living together, either because of divorce or other marital disruption26 or because the couple never formed a legal unit.27 Thus, in Louisiana as in other states with an income shares model of guideline, the parents' incomes are combined to represent the total income of an intact family because "[i]n an intact household, the income of both parents is generally pooled and spent for the benefit of all household members, including any children."28 The amount of total parental income is then "matched to economic estimates of how much an intact family with the same income and number of children would spend on child-rearing expenditures."29 "A child's portion of these expenditures includes spending for goods used only by the child, such as clothing, and also a share of goods used in common by the family, such as housing, food, household furnishings, and recreation."30 This

24. Venohr & Williams, supra note 12, at 12.
27. Under La. Civ. Code arts. 238-242, the illegitimate child does not live under parental authority but under the authority of a tutor (La. Civ. Code art. 256) and has only limited rights to support. Nevertheless, the articles pertaining to the right of an illegitimate child to claim support have been ignored and are probably unconstitutional as applied to the child. See Trimble v. Gordon, 430 U.S. 762, 97 S. Ct. 1459 (1977).
29. Venohr & Williams, supra note 12, at 12.
30. Williams, supra note 28, at 1.
estimated figure forms the basic child support obligation in the schedule. Then, the basic child support obligation is prorated between the parents according to each parent’s income, and the guidelines assume that the custodial or domiciliary parent will spend his or her prorated share directly on the child.

Unfortunately, the data upon which certain of these assumptions incorporated into the guidelines were made, such as the estimates of child-rearing expenditures, were already outdated in 1989 even though they represented the most current and reliable economic estimates at the time. In the case of the estimates of child-rearing expenditures of intact families, they “were derived from a study of child-rearing expenditures by Dr. Thomas Espenshade based on data from the 1972-1973 Consumer Expenditure Survey [conducted by the U.S. Bureau of Labor Statistics].” Furthermore, because Louisiana is considered a low-income state when compared to the other forty-nine states, the estimates were adjusted downward. Some changes in Louisiana’s child support schedule were made legislatively in 1991; however, they were only at the lower end of the income spectrum. The figures at the bottom of the schedule were adjusted to reduce the amount of basic child support obligation because of “more recent estimates of child-rearing expenditures developed by Dr. David Betson.”

Dr. Betson utilized data from the national 1980-1986 Consumer Expenditure Survey and developed five different estimating models, the Rothbarth estimator model having “the most economic validity and plausibility.” Relying upon Betson’s research, Policy Studies, Inc. developed new economic tables for the Louisiana child support guidelines, which appear only in the extension of the child support schedule amounts from $10,000 to $20,000 per month combined adjusted gross income. In developing the proposed new Louisiana tables, Policy Studies derived estimates of parental income spent on children as a proportion of net income, deducted average amounts for child care and children’s health care, and converted the net income

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32. Id. at 14 (“Several states adjusted the underlying child-rearing cost estimates to reflect the relatively low family incomes of their states (i.e., Alabama, South Carolina, South Dakota, Maine, New Mexico, and Oklahoma”).
33. Id. at 14.
Dr. Betson's research provides estimates of the proportion of household consumption expenditures ascribed to children. Using the same data set from which he derived estimates of these parameters, we developed estimates of the proportion of household net income spent on children across a broad income spectrum. We aligned these estimates to Louisiana by comparing Louisiana's income distribution relative to the U.S. as a whole. We also deducted average expenditures on child care, estimated health insurance, and estimated children's extraordinary medical expenses from these proportions. (In the Income Shares model, these child-rearing costs are added to the basic child support calculation as actually incurred).

The updated Schedule includes a self support reserve which allows the obligor's income net of payment of child support and taxes to be at least equivalent to the current federal poverty guidelines for one person. The final Schedule is developed by converting it from net income to gross income using withholding tables for a single obligor.

The most recent data, upon which important assumptions for an income shares model of guideline are based, was compiled during 1980-1986, years during which the last large scale study was commissioned by the federal government to determine the percentage of income spent on child rearing expenditures. Any adjustments made to the data have been made using yearly estimates compiled and published by the U.S. Department of Agriculture. Even though the data set used in 1999-2000 by Policy Studies relied on outdated data from the Betson study, the price of commissioning a study that would have produced a more recent data set specific to Louisiana was cost prohibitive.

36. Report to Social Services, supra note 34, at 2. See Venohr & Williams, supra note 12, at 15: The Income Shares model can be based on net or gross income. More than half of Income Shares states based the child support calculation on gross income, with the remainder starting from net. The end result of the calculation differs little because the tables used in gross income states take into account the impact of federal and state income taxes, FICA, and the earned income tax credit.

37. Report to Social Services, supra note 34, at 4.

38. Two economists from Southeastern University in Hammond, Louisiana,
IV. CHILD SUPPORT SCHEDULE (TABLE): POLITICAL OUTCOME

As introduced, House Bill No. 1398 incorporated a child support schedule that was based on national figures, reflecting percentage of parental income spent on children without adjusting for the relatively low family incomes of Louisiana citizens and without incorporating a self-sufficiency reserve for the obligor. The basic child support obligation of parents at virtually all levels of combined adjusted gross income was higher than current amounts and even higher than the schedule prepared by Policy Studies for DSS and LDAA. At the hearing before the House Committee on Civil Law and Procedure, the committee members voted to adopt the schedule originally proposed by DSS and LDAA, resulting in a reduction of more than eighty percent of the existing basic child support obligation amounts.

Before the bill was heard on the floor of the Louisiana House of Representatives, a consensus emerged to retain the present schedule of combined adjusted gross income figures that ranged from $0-$10,000. Not adjusting current basic child support amounts meant that legislators could respond to constituents by saying they neither raised nor lowered child support amounts, much like the favored legislative response to questions about taxes. Unquestionably, a consensus also existed to extend the schedule of combined adjusted gross income amounts from $10,000-$20,000, a revision urged particularly by attorneys in private practice. As a result, the bill passed by the House retained the existing schedule of combined adjusted gross income amounts between $0-$10,000 as originally enacted in 1989 based on data from 1972-1973, and it extended the schedule beyond $10,000 to $20,000 combined adjusted gross income based on assumptions from 1980-1986 data, as modified by current FICA tax amounts and the current federal poverty threshold. The only other adjustment of the schedules occurred during the hearing on House Bill No. 1398 in the Senate Committee on Judiciary A. The senators amended the schedule to adjust the basic child support obligation amounts for combined adjusted gross incomes immediately below and above the $10,000 figure. The adjustments, which were minimal, in some cases one or two dollars, permitted the schedule to bridge the old and new schedule amounts. In Act No.

examined the report from Policy Studies, Inc. to evaluate its assumptions and methodologies. Although they were critical of both classifying Louisiana as a low-income state and then adjusting the schedule arbitrarily to account for the relatively low income of Louisiana residents and their calculations of the percentage of child care expenditures for four to six children (Betson-Rothbarth model), the economists testified that the only way to improve the data would be to commission a study specific to Louisiana.

1082, the legislative solution to a schedule that was based upon old economic data and assumptions and that also needed extension beyond $10,000 was fundamentally to retain the old schedule for purely political reasons and to adopt the new schedule for economic reasons.

V. TENSION BETWEEN INCREASING SPECIFICITY OF CALCULATIONS AND JUDICIAL DISCRETION

Throughout the deliberations on the revision of the child support guidelines, the participants emphasized the desire to further refine the calculation of child support amounts by increasing mathematical precision. To support the argument for greater mathematical specificity, the proponents argued that the principal purpose of the guideline legislation was to reduce variability of awards among jurisdictions and to facilitate prompt and relatively easy calculations so as to reduce litigation over child support awards. The congressional legislation requiring the adoption of guidelines by the states had as its purpose, not only of uniformity among awards but also of assuring higher child support awards to the custodial or domiciliary parent.41

When DSS and LDAA conducted state-wide user surveys and held public hearings throughout the state,42 the two principal areas in which users of the guidelines and people testifying at the public hearings strongly favored more specificity were deviations for joint and shared custody arrangements and for second and multiple families. For

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40. For an excellent discussion of this continual struggle in revising legal rules, see Mary Ann Glendon, Fixed Rules and Discretion in Contemporary Family Law and Succession Law, 60 Tul. L. Rev. 1165 (1986).

41. See Garrison, supra note 23 (arguing that the major inadequacy in child support guidelines today is that the Congressional aim to increase award levels has not been met).


43. "[A]mong user survey respondents, this issue received the lowest adequacy rating of the ten issues surveyed. Some respondents believed the guidelines should contain a specific adjustment for shared, split and other custody cases." Id. at 17. The vagueness of the criteria to apply in deviating from the guidelines if the parents had joint custody seemed to cause significant inconsistency in the way courts determine child support in cases involving joint and shared custody. The review committee found that some courts rely on jurisprudence. Others give a standard and automatic credit if the non-custodial parent expressed an interest in visiting with the child. The review committee recommends a mathematical formula to be applied in cases with court ordered visitation or custody in order to create more consistency in the way Louisiana courts deal with these
shared custody arrangements, the Report submitted by DSS and LDAA recommended a mathematical formula for calculating the deviation for shared custody, defined as a custodial arrangement in which each parent enjoys at least 102 days of court-ordered overnight custody or visitation. The report submitted by Policy Studies in 1989 at the time Louisiana's guidelines were initially adopted had proposed a mathematical formula for calculating the credit given to the parent with less overnight custody or visitation than the other parent as long as it still represented a substantial amount. Twenty-

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issues.

Id. at 18.

44. See id. at 24 ("second families" includes "the legal dependents in the household of the custodial or non-custodial parent who are not the subject of the current court action"). Additional dependents, whether in second or multiple families, were "a major issue for a substantial portion of guideline users in Louisiana. Additional dependents included new children born to the non-custodial parent and new children living in the household of the non-custodial parent." Id. As to the latter, "new children living in the household of the non-custodial parent" were not grounds for deviation under the existing guidelines. La. R.S. 9:315.1.C(2) required that the non-custodial parent owe a legal obligation to the dependent before there could be a deviation, and the non-custodial parent does not owe a legal obligation of support to stepchildren. Such a definition of "second" families would have significantly expanded the grounds for deviation from the guidelines that was simply not justified.

45. Final Report, supra note 42, at 24 ("Multiple" families is defined as "cases involving one or more families with existing child support orders or families with child support orders pending in the courts when none of the children live in a household with the non-custodial parent").

46. Id. at 19.

47. (a) In cases of shared physical custody, the basic child support obligation shall first be multiplied by one and one half (1.5), and then be divided between the parents in proportion to their respective adjusted gross incomes.

(b) Each parent's share of the adjusted basic child support obligation shall then be multiplied by the percentage of time the child spends with the other parent to determine the theoretical basic child support obligation owed to the other parent.

(c) Each parent's proportionate share of the work-related net child care costs, extraordinary adjustments to the schedule shall be added to the amount calculated under paragraph (b) of this subsection.

(d) The parent owing the greater amount of child support shall owe the difference between the two amounts as a child support obligation, minus any ordered direct payments made on behalf of the child for work-related net child care cost, the cost of health insurance premiums, extraordinary medical expenses, or extraordinary adjustments to the schedule. The amount owed shall not be higher than the amount which that parent would have owed if he or she were a non-custodial parent.
one states\textsuperscript{48} have enacted a formula for calculating the deviation for a joint or shared custody arrangement, although the states define the terms differently; and eleven more states\textsuperscript{49} provide that joint or shared custody can be grounds for deviation from the guidelines. Ultimately, this proposal was incorporated within House Bill No. 1398 but modified to define "shared" custody as equal or approximately equal physical custody of the child.\textsuperscript{50}

Defining "joint" as opposed to "shared" custody as a custodial arrangement in which the parent with less physical custody has the child overnight on 73 to 102 occasions, DSS and LDAA recommended a dollar for dollar credit, "which would relieve the non-custodial parent of his or her portion of the variable costs\textsuperscript{51}

\textit{Id.} at 18.


50. La. R.S. 9:315.9(A)(1) (2002) ("'Shared custody' means a joint custody order in which each parent has physical custody of the child for an approximately equal amount of time . . . . "). Since enactment, this provision was amended during the special session of the Louisiana Legislature in March/April, 2002. See H.B., 1st Ex. Sess., No. 27, § 1 (La. 2002). However, the definition of "shared custody" was unchanged.

51. "Variable costs" were defined as "the costs incurred only when the child is with the parent including food, transportation, and some entertainment. Variable costs are usually incurred by the non-custodial parent during custody or visitation and represent 37% of the total child-related expenditures." Final Report, supra note 42, at 20. The percentage estimated for variable costs was borrowed from the New Jersey statutes, which in turn were based upon research and models developed
associated with the children." DSS and LDAA recommended that when a parent enjoyed physical custody of or visitation with the child for 73-102 overnights, the amount of basic child support should be "multiplied by .37 (variable costs) multiplied by percent of time ordered by the court." Recognizing the validity of arguments by critics of the proposal, that is, that custody litigation would increase so as to reach the threshold number of overnights and its concomitant reduction in child support, DSS and LDAA recommended the inclusion of a penalty provision and abatement of the credit in the following circumstances:

Include penalty provision wherein non custodial parent will repay value of credit, attorney's fees and costs for failure to exercise 100 percent of court-ordered visitation, or two times the credit if failure to visit is intentional or fraudulent.

Parties must wait one year from the date of the current judgment before filing any actions to modify the order seeking credit. The right to abate the credit prescribes if not filed within one year from the date the cause of action originated (within two years of the original decree).

Despite the observation that mandatory provisions to adjust child support awards in joint and shared custody would “encourage both

by Dr. David Betson of the University of Notre Dame for the purpose of providing a mechanism for “sharing child-rearing costs between parents across a range of time sharing situations.” Id. at 19.

52. Id.
53. Id. at 21.
54. See Appendix A.

The committee elected a one year waiting period to abate the credit to cut down on hasty moves by the custodial parent to abate the credit and to ensure willful non compliance with the visitation or custody order by the non custodial parent before the abatement action. Although the committee recommends 100% compliance with the court order, examination of a full year of visitation patterns can provide the court with a more clear picture of compliance. The custodial parent may choose not to abate the credit of the non custodial parent who missed a few occasions of visitation within the year if overall his or her intentions were in good faith. These provisions are intended to reduce unnecessary litigation. The committee also wanted a simple process for the custodial parent to abate the credit if necessary. If the clerk of court is required to provide mandated forms, a pleading to abate the credit should be provided to allow custodial parents who can’t afford an attorney access to the court.

Id. at 21-22.
parents to be involved in rearing child(ren)," the Task Force and the Legislature adopted a more flexible, less mathematically precise calculation for the credit in joint custody cases.

A. Joint and Shared Custody

Louisiana's revised child support guidelines statute defines "shared custody" as "a joint custody order in which each parent has physical custody of the child for an approximately equal amount of time." As introduced on recommendation of the Task Force, the definition of "shared custody" in the bill required strictly equal physical custody in the parents under the joint custody order. Senate Committee Judiciary A amended the bill to include physical custody for an "approximately" equal amount of time to allow for the possibility that the division of physical custody might be almost equal but not exactly equal. Therefore, the official comments to this section of the guidelines reads: "The reference in Subsection (A)(3) should be interpreted as one half or an approximately equal amount of time, expressed in percentages such as forty-nine percent/fifty-one percent . . . ." Except for the change in definition of shared custody proposed by the Task Force requiring equal or approximately equal physical custody, the Task Force and Legislature adopted the formula for calculating the credit as proposed by DSS and LDAA. Worksheet B, added to Louisiana Revised Statutes 9:315.20, guides the attorney through the steps described in Section 315.9. After calculating the basic child support

56. Id. at 22.
59. See Appendix B (Worksheet B).
60. Narrowing the definition of "shared" custody to equal or approximately equal physical custody significantly reduced the number of child support cases in which the "shared" custody credit will be available. See discussion in text accompanying infra notes 73-74.
61. See discussion in text accompanying supra note 47.
62. See Appendix B (Worksheet B).
64. Worksheet B (see Appendix B) and the comments to La. R.S 9:315.9 reflect directions from the Legislature in House Concurrent Resolution No. 2 (2d Ex. Sess. 2001):
obligation as in any other case, Section 315.9 directs that the amount so determined be multiplied by one and one-half, representing the duplication of costs when both parties enjoy equal or

WHEREAS, the Louisiana Legislature revised the child support guidelines in Act No. 1082 of the 2001 Regular Session; and

WHEREAS, R.S. 9:315.9(A)(1) defines shared custody as a joint custody order in which each parent has physical custody of the child for an approximately equal amount of time; and

WHEREAS, R.S. 9:315.9(A)(3) requires each parent’s share of the adjusted basic child support obligation to be multiplied by one-half to determine the theoretical basic child support obligation owed to the other parent; and

WHEREAS, it was the intent of the Louisiana Legislature to require each parent’s share of the obligation to be cross-multiplied by fifty percent or the actual percentage of time the child spends with the other party to determine the support obligation based on the amount of time spent with the other party; and

WHEREAS, R.S. 9:315.9(A)(4) requires the addition of each parent’s proportionate share of work-related net child care costs and extraordinary adjustments to the basic support obligation previously calculated in a shared custodial arrangement; and

WHEREAS, it was the intent of the Louisiana Legislature that R.S. 9:315.9(A)(4) and (5) be read together in order to correctly calculate a support obligation in a shared custodial arrangement by deducting each parent’s proportionate share of any direct payments ordered to be made to a third party on behalf of the child; and

WHEREAS, Section 4 of Act No. 1082 of the 2001 Regular Session directed the Louisiana State Law Institute to prepare comments to the Revised Statutes and Civil Code Articles provided for in that Act for publication with the official statutes; and

WHEREAS, the Revision Comments of 2001 to R.S. 9:315.9 (comment (b)) should clearly reflect the intentions of the Louisiana Legislature regarding the calculation of child support in shared custody arrangements.

THEREFORE, BE IT RESOLVED that the Legislature of Louisiana hereby urges and requests the Louisiana State Law Institute to instruct West Publishing Company to print the Revision Comments of 2001 to R.S. 9:315.9 (comment (b)) to clarify that in the calculation of a support obligation in a shared custodial arrangement, each parent’s share of the basic support obligation shall be cross-multiplied by fifty percent or the actual percentage of time the child spends with the other parent and the parent owing the greater amount pays the difference to the other parent as support, after deducting each parent’s proportionate share of direct payments ordered to be made to a third party on behalf of the child.

Furthermore, see H.B., 1st Ex. Sess., No. 27 (La. 2002) which amended La. R.S. 9:315.9(A)(3)(5)(6) to clarify the calculation.

approximately equal physical custody, and then that sum be divided between the parents proportionately to their income. Then, multiply each parent’s share by fifty percent or other approximately equal fraction to determine “the theoretical basic child support obligation owed to the other parent.” Next, calculate each parent’s proportionate share of any add-on expenditures, such as child care costs or private school tuition. The parent owing the greater amount owes the

La. R.S. 9:315.9, cmt. (b) (2002) states:
The formula for calculating child support if custody of the child is shared requires first that the basic child support obligation be multiplied by one and one-half times approximating the duplication of costs, such as housing, food, and transportation, incurred by both parents who have physical custody for approximately one-half of the year. Only after recognition of the duplication of costs in a shared custody arrangement is the adjusted child support obligation divided between the parents in proportion to their respective adjusted gross incomes.

If the joint custody order provides for shared custody, the basic child support obligation shall first be multiplied by one and one-half and then divided between the parents in proportion to their respective adjusted gross incomes.

La. R.S. 315.9, cmt. (b) (2002):
Secondly, each parent’s share of the basic support obligation shall be cross-multiplied by fifty percent or the actual percentage of time the child spends with the other parent and the parent owing the greater amount pays the difference to the other parent as support, after deducting each parent’s proportionate share of direct payments ordered to be made to a third party on behalf of the child. This calculation reflects the fact that each parent has physical custody of the child for approximately one-half of the year.

See also La. R.S. 315.9, cmt. (a) and La. R.S. 9:315.9A(3), as amended by H.B., 1st Ex. Sess., No. 27, §1 (La. 2002).


THEREFORE, BE IT RESOLVED that the Legislature of Louisiana hereby urges and requests the Louisiana State Law Institute to instruct West Publishing Company to print the Revision Comments of 2001 to R.S. 9:315.9 (comment (b)) to clarify that in the calculation of a support obligation in a shared
difference as child support to the other spouse after deducting the payor parent's proportionate payments ordered to be made "on behalf of the child for net child care costs, the cost of health insurance premiums, extraordinary medical expenses, or other extraordinary expenses."  

Despite the recommendation of DSS and LDAA that the Legislature adopt a mathematically precise formula for determining a "credit" for the obligor parent awarded joint custody of his minor child, the Legislature rejected the precise formula in favor of a more discretionary standard for "deviation" from the guidelines. Joint custody is defined as "a joint custody order that is not shared custody as defined in R.S. 9:315.9 [shared custody]."  

Because most divorced parents do not enjoy "shared custody," it is anticipated that most divorced parents who pay child support will be seeking some relief from the support obligation under this provision, which mandates that the court consider "the period of time spent by the child with the nondomiciliary party."  

Although the same language appeared in Section 315.8 before August 15, 2001, it now represents only one of several paragraphs addressing the "deviation" from the guidelines for joint custody. The paragraph that immediately follows provides more specificity when the non-domiciliary parent has physical custody of the child for more than seventy-three days, a day defined as at least four hours of physical custody within the twenty-four hour period, which constitutes physical custody of the child for roughly twenty percent of the year.  

If the non-domiciliary parent enjoys custodial arrangement, each parent's share of the basic support obligation shall be cross-multiplied by fifty percent or the actual percentage of time the child spends with the other parent and the parent owing the greater amount pays the difference to the other parent as support, after deducting each parent's proportionate share of direct payments ordered to be made to a third party on behalf of the child.

73. La. R.S. 9:335(B) provides for the designation of a domiciliary parent in a joint custody order which fails to include an implementation plan as described in Paragraph A. The domiciliary parent is defined as "the parent with whom the child primarily resides." Most joint custody orders designate a domiciliary parent and Paragraph B governs who exercises legal and physical custody of the child. By definition, however, there can be only one domiciliary parent—the parent with whom the child primarily resides. The designation of co-domiciliary parents creates an oxymoron.

74. Id. For examples in the jurisprudence in which the court deviated from the guidelines because of a joint custody order, see Curtis v. Curtis, 773 So. 2d 185 (La. App. 2d Cir. 2000); Savoie-Moore v. Moore, 719 So. 2d 551 (La. App. 4th Cir. 1998).
75. La. R.S. 9:315.8(E)(2), cmt. (b) (2002):
physical custody of the child for the stipulated period and requests a "credit," the parent bears the burden of proving:  

(a) The amount of time the child spends with the person to whom the credit would be applied. (b) The increase in financial burden placed on the person to whom the credit would be applied and the decrease in financial burden on the person receiving child support. (c) The best interests of the child and what is equitable between the parties.

The criteria to apply in determining the "amount" of the "credit" bear a strong resemblance to the language found in Guillot v. Munn. In Guillot, the three-prong inquiry to determine whether the court should deviate from the guidelines began with whether the visitation was extraordinary, which Section 315.8(E) specifies is seventy-three “days” or more. Then the party seeking a deviation had to prove, in virtually identical language to that which now appears in Section 315.8(E)(2), that “the extra time spent with the nondomiciliary parent results in a greater financial burden on that parent and in a concomitant lesser financial burden on the custodial parent.” Lastly under Guillot, much as incorporated in the third element of Section 315.8(E), the party seeking the credit had to prove that “the application of the guidelines . . . would not be in the best interest of the child or would be inequitable to the parties.”

An adjustment in the form of a credit may be afforded the nondomiciliary parent who has physical custody of the child for more than seventy-three days, the definition of a day to be determined by the court but in no case can a day be less than four hours of physical custody of the child. Physical custody of the child for seventy-three days constitutes physical custody at least twenty percent of the year as a threshold for the discretionary adjustment permitted by this Section....

76. La. R.S. 9:315.8(E)(2), cmt (b) (2002).
79. 756 So. 2d 290 (La. 2000).
81. La. R.S. 9:315.8, cmt. (c) (2002) (“If the threshold of seventy-three days of physical custody is met, the 2001 amendment guides the court in determining whether to exercise its discretion in ordering an adjustment to child support owed by the nondomiciliary parent . . . .”).
82. Guillot, 756 So. 2d at 300.
83. Id.
had recommended a specific “credit” of 1/12, representing one month’s child support obligation; but the Legislature rejected the specific amount of the “credit,” incorporating instead the more discretionary *Guillot* standards in determining the amount.\(^4\) Worksheet A now incorporates in the last line of the form a reference to “comments” and “calculations” if ordering a credit for a “joint custodial arrangement.”\(^5\)

In evaluating the newly added sections of the child support guidelines for shared and joint custody, the provisions represent a reasonable compromise between the desire for more specificity, and thus uniformity in calculating child support amounts, and the competing desire to provide enough flexibility to the trial court so that it can respond to unique factors in an individual case. Furthermore, because joint custody will be the more frequent award upon divorce,\(^6\) the failure to provide a specific credit for physical custody of seventy-three days or more does not unnecessarily encourage more custody litigation aimed strictly at reaching the “seventy-three day” threshold.\(^7\)

A major concern of the Task Force

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84. La. R.S. 9:315.8, cmt. (d) (2002):
   The amount of the credit under Subsection (E)(3) should be based on a portion of the costs actually incurred by the nondomiciliary parent while the child is in his or her custody, while excluding the continuing expenses of the custodial parent, such as the housing related expenses of the custodial parent. In determining the amount of the credit, the court should determine the costs incurred by the nondomiciliary parent only when the child is with the nondomiciliary parent including food, transportation, and some entertainment.

See also *New Jersey Child Support Guidelines Court Appendix IX-A* (1997).

Dr. Betson’s grouping of child rearing expenditures into three categories—fixed, variable, and controlled—was modified and adopted by New Jersey, and the costs estimates associated with each category were based on U.S.D.A. estimates of child-rearing costs for housing, transportation, and food. New Jersey defines fixed costs as those incurred even when the child is not residing with the parent such as housing related expenses and represent thirty-eight percent of the total child-related expenses. Variable costs are the costs incurred only when the child is with the parent including food, transportation, and some entertainment; and these costs are usually incurred by the nondomiciliary parent and represent thirty-seven percent of the total child-related expenditures. Controlled costs are those over which the domiciliary parent has direct control such as clothing, personal care, entertainment, and miscellaneous expenses and represent twenty-five percent of the total child-related expenses. *Id.*

85. See Appendix C (Worksheet A).


87. *See Jeffrey E. Stake, Paternalism in the Law of Marriage, 74 Ind. L.J. 801 (1999)* (arguing that child support bargaining power at divorce influenced by
was that custody contests would increase for the sole purpose of reaching the threshold to obtain the credit.

B. Split Custody

In contrast to the provisions on the effect of joint and shared custody on a child support obligation, the new Section on the effect of split custody was non-controversial. The section first defines the term “split” custody as a situation in which “each party is the sole custodial or domiciliary parent of at least one child to whom support is due.” The use of “domiciliary” parent in the definition of split custody assumes that there is a true domiciliary parent, defined as the parent with whom the child primarily resides, not the oxymoronic “co-domiciliary parents.” The calculation for split custody should only apply in instances where each child resides primarily or exclusively with one parent.

Consistent with past Louisiana jurisprudence, each parent computes a total child support obligation for the child or children in the other parent’s custody using Worksheet A, which represents

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89. La. R.S. 9:335(B) (2002).
90. La. R.S. 9:335(B), cmt. (a). See also Nixon v. Nixon, 631 So. 2d 42, 44 (La. App. 2d Cir. 1994).

We conclude that the best solution in split custody arrangements is that the basic support obligation should be first determined separately for the number of children in the domiciliary custody of each parent. Any other special expenses such as health insurance or extraordinary medical expenses should be added to the basic support obligation to get the total support obligation. The amount of child support each parent owes the other is next calculated by multiplying the owed support obligation by the parent’s proportionate share of combined adjusted actual income. In this way the children will receive the presumed level of support recommended by the guidelines for the number of children living in a single household.

We note that at least two other states with child support guidelines similar to our own have adopted a similar method for calculating child support in split custody arrangements... (Iowa and Maryland).

See also Berry v. Berry, 772 So. 2d 318 (La. App. 3d Cir. 2000); Broussard v. Broussard, 672 So. 2d 1016 (La. App. 4th Cir. 1996); State v. Travers, 665 So. 2d 625 (La. App. 2d Cir. 1995); Colvin v. Colvin, 671 So. 2d 444 (La. App. 1st Cir. 1995).

91. La. R.S. 9:315.10 (2002) (“Worksheet A reproduced in R.S. 9:315.20, or a substantially similar form adopted by local court rule, shall be used by each parent to determine child support in accordance with this Section.”). See also
each parent’s theoretical support obligation. 92 Then, the parent owing the greater amount of child support owes the other parent the difference as a child support obligation. 93

VI. TENSION BETWEEN FIRST AND SECOND FAMILIES: THE TOLL OF THE DIVORCE REVOLUTION AND THE EXPLOSION IN OUT OF WEDLOCK BIRTHS

Unexpectedly from the standpoint of Louisiana state policy, debate over the revision of child support guidelines revealed an ugly reversal of attitude toward the saliency of the marriage promise and the imperative that children not suffer as a consequence of the divorce of their parents. Even though reassuring language about the premise of the guidelines now appears in the child support statutes, the attitudes of legislators and those they represent often were not consistent with the enunciated principles. For example, the articulated premise of the child support guidelines is that “[1] child support is a continuous obligation of both parents, [2] children are entitled to share in the current income of both parents, and [3] children should not be the economic victims of divorce or out-of-wedlock birth.” 94 Yet, virtually all of the testimony offered by those citizens who sought an amendment to the guidelines concerned fairness to the obligor, who it was argued could hardly make ends meet; 95 and the audience of legislators was clearly sympathetic. In the same paragraph of the guidelines, the statute opines that:

While the legislature acknowledges that the expenditures of two-household divorced, separated, or non-formed families are different from intact family households, it is very important that the children of this state not be forced to live in poverty because of family disruption and that they be afforded the same opportunities available to children in intact families, consisting of parents with similar financial means to those of their own parents. 96 Nonetheless, the public rhetoric failed to match the statutory rhetoric.

Based upon the number and content of bills other than House Bill No. 1398 introduced to modify the child support guidelines, a

Appendix C (Worksheet A).

95. See Garrison, supra note 23 (an article in which the author believes that instead of centering upon the needs of the child, present guidelines are unjustly preoccupied with the interests of the nonresident parent).
widespread opinion exists that child support sums are too high, too
difficult to reduce when the obligor has a second family and wants to
"move on,"\textsuperscript{97} and too easily enforced by heavy handed measures.\textsuperscript{98}
None of these opinions corresponds to the statutory rhetoric now
incorporated into the guidelines nor to the traditional and historical
social policy that a child should not be the victim of divorce and the
obligor could not "shed" or, at a minimum, reduce his responsibility
to his first family by incurring additional obligations to a second
family.\textsuperscript{99} Furthermore, it was understood historically that a second
wife who married a divorced man with children from his first
marriage assumed the risk that there would be insufficient resources
to adequately provide for his second family.

Within the last twenty years, children born out of wedlock who
were never part of an intact family\textsuperscript{100} were afforded the same rights

\textsuperscript{97} Consider this statement from the report submitted to the Legislature by the
Department of Social Services and the Louisiana District Attorneys' Association:
At the public hearings, some non custodial parents expressed
discontentment with this concept [deviation for second families]
because they wanted all of their children to be treated equally
regardless of when the child support order was established.
While equal treatment of all children seems to be most fair, it is
very difficult to accomplish under the income shares model.
Final Report, \textit{supra} note 42, at 31 (emphasis added). \textit{See also} Appendix A.

\textsuperscript{98} LA Dads simply articulated this more broadly held view of the issue of
child support. At least one father who owed child support was sued in tort by his
former wife: "A divorced mother stated a claim for conspiracy and fraud against
her ex-husband, his new wife, and his employer for their scheme to hide the ex-
husband's income in the form of sham salary to the new wife plus bonuses that
were not reported as income." Linda D. Elrod & Robert G. Spector, \textit{A Review of
the Year in Family Law: Redefining Families, Reforming Custody Jurisdiction and
\textit{See also} Bryce Christensen, \textit{Deadbeat Dads or Fleeced Fathers? The
that child support is a poor substitute for a father bound in marriage to the mother).

\textsuperscript{99} La. Civ. Code art. 142, cmt. (b):
[A] special substantive rule that is often applied in situations
where a party seeks a modification or termination of a child
support award has been any 'voluntary act by a parent that renders
it difficult or impossible to perform the primary obligation of
support and maintenance of his children' cannot be countenanced
as a ground for release of the parent, in whole or in part, from that
obligation . . . This article is not intended to change the prior
jurisprudential approach.

\textsuperscript{100} Bennett, \textit{supra} note 3, at 13.
In 1994, for the first time in American history, more than half of
all firstborn children were conceived or born out of wedlock--the
culmination of a long-term trend. Among teenagers, that trend is
as children of divorce\textsuperscript{101} who, by contrast, had been a part of an intact family and deserved to be maintained in the same standard of living enjoyed while the parents were married.\textsuperscript{102} The equivalent treatment afforded to illegitimate children resulted from a series of United States Supreme Court decisions,\textsuperscript{103} yet the average American citizen has in his own opinions continued to distinguish the entitlement of a child born as the result of a "one-night stand" from the entitlement of a child conceived and born during a twenty-year marriage. Surely the expectations of the mother in those two scenarios were entirely different. At the same time, the culture emphasized the virtue of individualism and freedom from constraint, which encouraged adult entitlement to the ephemeral personal "happiness and fulfillment."\textsuperscript{104}

The divorce rate sky-rocketed,\textsuperscript{105} and the birth rate plummeted,\textsuperscript{106} even more alarming: today, over three-quarters of all births to teenagers occur outside of marriage, while in fifteen of our nation's largest cities, the teenage out-of-wedlock birth rate exceeds ninety percent.

\textit{Id.} at 28-29.

Both reflecting and helping to shape public sentiment, the law is, in the memorable word of Justice Holmes, "the witness and external deposit of our moral life. . . . Family members can now sue one another, children born outside of marriage have the same legal rights as those born in marriage, and the legal differences between formal and informal marriage have been blurred."\textit{Id.} (emphasis added). \textit{See id.} at 88 ("Throughout history, every human society has recognized this 'principle of legitimacy [father is necessary to full legal status of the family.']. No longer. The twenty-first century moderns have set sail upon uncharted social waters.") (emphasis added).


While the legislature acknowledges that the expenditures of two-household divorced, separated, or non-formed families are different from intact family households, it is very important that the children of this state not be forced to live in poverty because of family disruption and that they be afforded the same opportunities available to children in intact families, consisting of parents with similar financial means to those of their own parents.

\textit{See, e.g.}, Caban v. Mohammed, 441 U.S. 380, 99 S. Ct. 1760 (1979); Trimble v. Gordon, 430 U.S. 762, 97 S. Ct. 1459 (1977); Gomez v. Perez, 409 U.S. 535, 93 S. Ct. 872 (1973); Levy v. Louisiana, 391 U.S. 68, 88 S. Ct. 1509 (1968); Succession of Brown, 388 So. 2d 1157 (La. 1980). \textit{See also La. Civ. Code art. 141, cmt. (e)}; Bennett, supra note 3, at 82 ("[O]ne-third of all births are to unmarried women. Among whites, the proportion of out-of-wedlock births to all births was 2.3 percent in 1960; it is 26.7 percent today. Among blacks, the number increased from over twenty percent in 1960 to almost seventy percent today").

\textit{104.} Bennett, supra note 3, at 20 ("Today, however, marriage is based much more on certain intangible, subjective benefits, including feelings of love, emotional fulfillment and physical attractiveness.").

\textit{105.} \textit{See supra} notes 2-3.

\textit{106.} Bennett, supra note 3, at 14 ("It is true that . . . fertility has been on the
such that at this moment in American history it would be fair and accurate to characterize our culture as "adult oriented" rather than "child oriented." This teutonic shift in cultural attitudes swept away with it the child centeredness of our public policy, a fact which manifested itself during the legislative deliberations on child support.

In the report submitted by DSS and LDAA, the subject matter of "additional dependents" was subdivided into two different categories: multiple families, "involving one or more families with existing child support orders or families with child support orders pending in the courts when none of the children live in a household with the non-custodial parent;" and second families, defined as including "the legal dependents in the household of the custodial or non-custodial parent who are not the subject of the current court action." Not surprisingly, based upon the testimony at the public hearings and the distributed surveys, the issue of how to treat additional dependents was a "major issue for a substantial portion of guidelines users in Louisiana." All of the issues surrounding "additional dependents" concerned the appropriate reduction in an existing child support order, which obviously benefitted the payor as well as the subsequent dependents and their other parent.

A. Second Families

The child support guidelines have provided since 1989 that legal dependents in the home of the obligor constitute grounds for decline for several centuries—but since 1975, for the first time in our history we have been hovering right at or below the rate necessary to replace the population, and are likely to remain there.

108. Id. at 30-31. However, as the report explained, [T]here is no distinction between children of the first and second family. The determining factor is the date the support order is obtained and not necessarily the date of the child(ren)'s birth. In many instances the second family in time is the first family to establish a child support order. Child(ren) in the home, at the time the child support is set, are a basis for deviation whether they are born of the first family or second family. For example, suppose the first marriage resulted in divorce but no child support is set in the divorce proceeding. If the first family returns to court to set support after the non-custodial parent has a subsequent family, the non-custodial parent is entitled to a deviation for the subsequent family [if living in the household]. Likewise, the non-custodial parent is entitled to a deviation for the first family when a child, born of a sexual relationship which occurred during or before to [sic] the first marriage, seeks support. There is a 'race to the court house' for families to get the benefit of 100% of gross income when the order is established.

109. Id.
deviation from the child support guidelines.\textsuperscript{110} Dissatisfaction with
the lack of specificity in calculating the amount of the deviation,
should one be permitted, motivated the review committee formed by
DSS and LDAA to propose a method of giving the noncustodial or
nondomiciliary parent credit for second families:

The review committee recommends that the court be required
to perform a guideline calculation for child(ren) in a second
family, thereby causing the custodial parent or non custodial
parent to get a credit for his or her portion of the child support
for the child(ren) in the home before calculating child support
for the child(ren) before the court.\textsuperscript{111}

In other words, the review committee proposed treating all of the
children of the noncustodial or nondomiciliary parent equally,
regardless of whether the children were issue of an earlier marriage
to whom the obligor first owed an obligation. Such a proposal would
have significantly damaged not only the perceived security of the
marriage promise but also the historically articulated policy that a
parent can not relieve himself of his responsibilities to children of his
marriage by voluntarily incurring new obligations to a subsequent
family.\textsuperscript{112} The review committee’s proposal reflected the steady
erosion of responsibility to the first family occurring in our divorce

dependents who are not the subject of the action before the court and who are in
that party’s household.").

\textsuperscript{111} Final Report, supra note 42, at 31. The committee was willing to make the
following concession that "[n]ew dependents would not be grounds to recalculate
preexistent child support orders unless there exists a change in circumstance to
modify the existing child support order or the multiple family adjustment is
applicable." \textit{Id.}

The review committee also offered another alternative for calculating child
support where a second family was involved.

Another alternative considered by the review committee was to
subtract 70% of a dummy order for the children in the home of the
custodial or non custodial parent. South Carolina uses this
method in multiple family cases and has determined that
subtracting 70% of the existing or dummy order has an equalizing
effect between the two sets of children. South Carolina, like
Louisiana, is an income shares state with an income distribution
similar to Louisiana so 70% could work for Louisiana. This
approach could also be applied to existing orders in multiple
family cases. The review committee only presents this formula as
a possible alternative to the other methods recommended herein.
The committee strongly recommends a fair and equitable
mandatory numerical formula be included in the child support
provisions for cases with additional dependents.

\textit{Id.}

\textsuperscript{112} La. Civ. Code art. 142, cmt. (b).
culture and the adoption of the current cultural philosophy as most aptly summarized—"it's time to move on."

The legislative task force rejected the recommendation of the review committee, and the result was retention of the legal obligation to support additional dependents as grounds for a deviation from the guidelines. Retaining discretion in the trial judge to deviate from the guidelines permits the judge to take into account, without the restraint of inflexible rules, such equities as the relationship between the obligor and the legal dependents within his household and the relationship between the obligor and the other parent asserting the claim for child support. Therefore, using the same hypotheticals as the review committee report, the judge may consider the chronological birth order of the children who are the subject of the litigation and those who are legal dependents within the household—which children were first in time. In addition, the judge may consider whether the obligor was married to the parent asserting the child support claim or not, which for the average Louisiana citizen is a relevant inquiry. It should rightly make a difference if the claimant is a former spouse to whom the obligor was married for years and the children in his household are children of a second liaison or second marriage, or if the claimant is a person with whom the obligor had an affair and the children within the household are children of his marriage to their mother.

To do otherwise threatens the very core of the marriage promise; misguided compassion and desire to achieve equality of treatment for children should not obscure the destructive consequences of failure to make reasonable, common-sense distinctions. Treating children born of a marriage identically to children born out of wedlock in the narrow context of child support risks reducing societal commitment to the children of divorce. Such treatment has already eroded public support by muting the powerful argument that only children of divorce can make: they should be supported economically at a level sufficient for them to enjoy the same standard of living they would have enjoyed had their parents stayed married. No such argument could ever be made consistently for illegitimate children because their parents may never have lived together to establish a standard of living for the household. Furthermore, the equally powerful moral argument of the custodial or domiciliary parent, who was married to the obligor, that he or she relied upon the promise made by the obligor in marriage is likewise muted. Society may correctly sympathize with a parent who was married to the obligor yet feel

113. La. R.S. 9:315.1(C)(2) (2002) ("The legal obligation of a party to support dependents who are not the subject of the action before the court and who are in that party's household.").
little sympathy for a parent who had an illicit affair, or a one-night stand, with the obligor. The express language of the guidelines treats these very different human situations similarly; the only possibility for equitable distinctions among people as differently situated as those in the hypotheticals lies in the few instances in which the court has discretion to deviate. Rather than reduce grounds for deviation, the discretion of the court should be safeguarded so that no further damage to marriage and the welfare of children occurs.

The legislature did make one specific accommodation for second families (second family chronologically, thus subsequent\(^\text{114}\)) that permits an obligor to take a second job or work overtime to provide for his second family.\(^\text{115}\) The child support guidelines recognize that

\(^{114}\) The proposal by the review committee for “second families” identified the second family as the second family in court, not chronologically. See discussion in supra notes 111-12.

\(^{115}\) The original recommendation had been that of the review committee composed of representatives of the Department of Social Services and the District Attorneys’ Association. The Task Force, which had rejected the recommendation of the review committee as to second families and a specific calculation, concurred in the recommendation of the review committee as to income from second jobs and overtime when obtained for the purpose of providing for the second family and the obligee sought a modification of an existing child support order.

During the hearings conducted throughout the state, DSS and LDAA reported the following concerns expressed by members of the public and users of the guidelines:

The participants at the public hearings were concerned with whether, second jobs and overtime should be included as income in the calculating of child support. Many non custodial parent participants objected to the use of second jobs and overtime as income and did not want to be taken back to court for a redetermination of child support each time they worked overtime or a second job to meet their obligations. Likewise, several user survey respondents suggested income from second jobs and overtime should not be included as income in calculating child support or that a cap should be placed on the amount counted. These respondents felt overtime was not guaranteed and second jobs were worked to meet financial obligations, including child support and the guidelines penalize hard workers.

Currently under the guidelines, gross income includes income from any source, including that from second jobs and overtime. The courts may exclude extraordinary overtime or income attributed to seasonal work.

Some states have passed legislation which still includes second job and overtime income, but places a limit on the total number of working hours per week which can
as a defense to an action to modify an existing child support order the
obligor who “has taken a second job or works overtime to provide for
a subsequent family” may request and the court may give
consideration to the interests of a subsequent family. Nonetheless, the
obligor bears the burden of proving that “the additional income is
used to provide for the subsequent family.” This special defense,
assertable only if the obligee has filed an action to modify an existing
child support order, is unobjectionable because it is exceedingly narrow
and closely tailored to accomplish protection of the children of the
second family without in any significant way adversely affecting the
children of the first family. Furthermore, the content of this section
reaffirms that the obligor’s principal duty is to the family he created
first in chronological order from which he is not permitted to evade by
incurring additional obligations in the nature of duty to a second
family. The obligor may only ask the court to consider the interests of
his second family if he has secured additional employment or
remuneration to provide for the children of the second family. If the
children of the first family are children of the obligor’s marriage, then
the promise of marriage is not undermined; its saliency is affirmed.

B. Multiple Families

By definition, the number of situations in Louisiana of the
“multiple family,” “consisting of children none of whom live in the
household of the noncustodial or nondomiciliary parent but who have
existing child support orders,” is not large but creates difficulty under
the income shares model. Pre-existing child support obligations are
subtracted from the gross income of the noncustodial or nondomiciliary

be included in support calculations. Many only consider
the second job and overtime income when it is consistent
and regular or if it is a condition of employment. It is
excluded if it is speculative, uncertain to continue, or
places a hardship on the parent.

Final Report, supra note 42, at 23.
The court may consider the interests of a subsequent family as a
defense in an action to modify an existing child support order
when the obligor has taken a second job or works overtime to
provide for a subsequent family. However, the obligor bears the
burden of proof in establishing that the additional income is used
to provide for the subsequent family.

Id.
117. Id.
118. La. R.S. 9:315.1(C)(3) (2002). An example would be Brencombe County
five children with three different women).
parent prior to the calculation of child support for the children before the court. The review committee proposed a mandatory mathematical calculation be applied "when the deduction of multiple child support orders causes [the] non-custodial parent's adjusted gross income to fall below minimum income levels on the guideline schedule."

The formula proposed by the review committee was prepared by Policy Studies:

Step 1: Determine income eligibility; Step 2: Determine income available for support, Gross income - (net equivalent of 85% of the poverty level = $618 per month). This is called Multiple Family-adjusted income; Step 3: Complete Columns 1 and 3 in table below [calculation of weight by family size]; Step 4: Add column 3. This is total family weight; Step 5: Divided Multiple Family-adjusted income (calculated in step 2) by family weight (calculated in step 4). If the amount is less than $68, use $68 as child weight ($68 is the recommended minimum order amount); Step 6: Calculate the support order for each family size. Support for one child family = 1 x child weight ... Support for two child family = 1.47 x child weight ... Support for three child family = 1.76 x child weight ... Support for four child family = 1.95 x child weight ... Support for five child family = 2.11 x child weight ... Support for six child family = 2.26 x child weight. ...
Discussions in the Task Force of the formula proposed for multiple families by the review committee focused on the frequency of such multiple family scenarios, the ease of applying the formula and implementing the complementary procedural proposals, and the desirability of maintaining the trial judge's discretion in such situations. The Task Force concluded that the frequency of such multiple family scenarios did not justify a complicated mathematical formula or significant changes to procedural rules to permit modification of existing child support orders. Furthermore, because cases of multiple families rarely occurred, the Task Force recommended retaining discretion in the trial judge to fashion a deviation from the guidelines when such situations arise. As enacted by the Legislature, in multiple families' cases should the existing child support orders reduce the noncustodial or nondomiciliary parent's income below the lowest income level on the schedule.

18. Betson's findings were extended to four, five and six-child households using the multipliers shown in Table 1-3 of the Economic Basis for Updated Child Support Schedule prepared by Policy Studies, Inc. and assumptions using the Rothbarth and Espenshade estimates on expenditures. The multipliers are rationally based on the economic data provided by Policy Studies, Inc. and are consistent with the assumptions on which the child support guidelines are based.

Modifications to the multiple family adjust formula could be made to ensure the non-custodial parent maintains a self support reserve of at least 80% to 85% of the federal poverty level income which is consistent with the child support schedules proposed by the review committee and discussed on pages 15 to 17 of this report.

The application of the multiple family adjustment should not lead to child support orders less than the minimum child support obligation of $68.00 per month or $165.00 for multiple children in the same household. If application of the adjustment results in orders less than the minimum child support amounts, the court should deviate from the guidelines and the mandatory adjustment to determine a fair and adequate child support award. These deviation provisions should comply with the deviation provisions recommended in the minimum child support provisions discussed on pages 32 and 33 of this report.

Inclusion of the Multiple Family Adjustment detailed herein or a similar adjustment in the child support provisions would give the court a consistent method to calculate adequate and fair child support orders for all children of the non custodial parent.

Id. at 29-30.

123. See supra note 122.

124. Defined by La. R.S. 9:315.1(C)(3) (2002) as “a case involving one or more families, consisting of children none of whom live in the household of the noncustodial or nondomiciliary parent but who have existing child support orders.”
($600) then "the court may use its discretion in setting the amount of the basic child support obligation, provided it is not below the minimum fixed by Revised Statutes 9:315.14 ($100)."

VII. MINIMUM CHILD SUPPORT ORDER

For the first time in Louisiana history, there is now a minimum child support order fixed by law. A minimum child support order had originally been recommended by the review committee of DSS and LDAA even though "[o]verall, Louisiana survey respondents expressed the view that child support is too high especially for low income obligors." The review committee recommended a minimum child support order because "[a] minimal child support amount for income levels below the guidelines would ensure children receive sufficient support for the basic necessities."

By enacting a minimum child support amount, Louisiana joins twenty-seven other states. Even in those states where the amount is

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127. Final Report, supra note 42, at 32.
129. Final Report, supra note 42, at 32.
low, thus insufficient to provide adequately for the costs of rearing children, the minimum amounts "are token amounts to establish the obligor's duty to support his or her children" and set "a regular payment pattern." With only two statutory exceptions, Louisiana sets the minimum child support award at $100, one of only three states with the highest amount for a minimum child support award. The review committee had recommended $68 per month, but the Task Force raised the amount to $100. At the hearing in the House Committee on Civil Law and Procedure, the committee amended House Bill No. 1398 to restore the $68 amount recommended by the review committee. However, when the bill reached the House floor for debate, an amendment was offered by Representative Warren Triche to restore the Task Force recommendation of $100 per month. Representative Triche, who prepared for his amendment by purchasing groceries representing the daily amount of $68 per month (approximately $2.30), succeeded in convincing House members that the higher amount was appropriate by removing each item from the grocery bag to demonstrate what little food the sum would purchase. At the end of his presentation, he dramatically smashed a bag of potato chips with the Speaker's gavel because the chips exceeded the daily allowance. The amendment restoring the minimum child support order to $100 passed overwhelmingly.

VIII. RIGHT TO ACCOUNTING FROM RECIPIENT

The right of the obligor to obtain an accounting of the expenditure of child support from the recipient proved to be one of the most

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132. Id.
133. La. R.S. 9:315.14 (2002) ("In no event shall the court set an award of child support less than one hundred dollars, except in cases involving shared or split custody as provided in R.S. 9:315.9 and 315.10.").
134. La. R.S. 9:315.14, cmt. ("This section is new and establishes for the first time a minimum child support order of one hundred dollars. The only exceptions to the minimum order provided for in the legislation are cases of shared or split custody provided for in R.S. 9:315.9 and 315.10 .... ").
135. The other two states are Nevada and South Dakota. See supra note 130.
136. Representative Triche's notes revealed the following prices: "Daily servings: bread .10; soup .96; Vienna sausage .40; apple juice .80 = $2.26. For $2.50 a day the child could have milk, cereal, chips, coke and Spaghetti O's." His list also reflected the child's portion of the following expenditures: "Alka Seltzer, toothpaste, bandages, deodorant, lens cleaning cloth, Tylenol, tissue paper = .98." Representative Warren Triche, Notes for Use During Debate on House Floor Amendment (May 30, 2001) (on file with the author).
contentious issues of the child support debate. Louisiana is only one of ten states with a statute requiring that the recipient of child support account to the payor who requests an accounting, a statutory remedy enacted in Louisiana in 1997. Although the review committee had not raised the issue of the accounting provision, the Task Force, composed of attorneys in private practice, did. The Task Force recommended the repeal of the accounting statute because it had been used in two cases in the New Orleans area to harass the recipient of child support. Furthermore, the judges who served on the Task Force testified that they had never had a single demand filed by an obligor for an accounting. Indeed, there have been no reported cases of the courts of appeal interpreting the statute. However, when the Task Force presented its report to the members of the Senate Committee on Judiciary A and the House Committee on Civil Law and Procedure before the legislative session, the legislators objected to the repeal. Expressing the view that the statute, if clarified, assured the proper balancing of interests between the payor and the recipient of child support, the members of the two legislative committees who were in attendance supported retention of the accounting statute.

House Bill No. 1398 contained a clarification of the accounting statute that was modified throughout the legislative process. The statute, which permits the payor to file a rule to show cause for an accounting, now requires that he prove good cause “based upon the expenditure of child support for the six months immediately prior to the filing of the motion.” If the payor proves good cause, the

138. La. R.S. 9:312, cmt. (a) (2002) (“Louisiana, one of only ten states to do so, permits the obligor who pays child support to seek by contradictory motion an accounting from the obligee of the expenditure of such payments on behalf of the child . . . .”)


139. H.R., Reg. Sess., No. 70 (La. 2000) provided that the Task Force was to report to the Legislature sixty days prior to the beginning of the 2001 Regular Session of the Legislature.

140. The House Committee on Civil Law and Procedure and the Senate Committee on Judiciary A.

141. La. R.S. 9:312, cmt. (a) (2002):

Louisiana, one of only ten states to do so, permits the obligor who pays child support to seek by contradictory motion an accounting from the obligee of the expenditure of such payments on behalf of the child. The amendments direct the court to consider the expenditure of child support payments during the six
accounting "ordered by the court after the hearing shall be in the form of an expense and income affidavit for the child with supporting documentation and shall be provided quarterly to the moving party." To reduce the opportunity for the payor to use the accounting statute for purposes of harassment, the statute now provides that:

[t]he movant shall pay all court costs and attorney fees of the recipient of child support when the motion is dismissed prior to the hearing and the court determines the motion was frivolous, or when, after the contradictory hearing, the court does not find good cause sufficient to justify an order requiring the recipient to render such accounting and the court determines the motion was frivolous.143

Senate Bill No. 456 by Senator Mike Michot from Lafayette was introduced at the behest of the LA Dads organization. The Senate bill would have amended the accounting statute to permit the court to order an accounting from the recipient of at least seventy-five percent of the child support sum received.144 The accounting, if so ordered, required the submission of "receipts, when practical, or other documentation or affidavits evidencing the expenditure." The bill also proposed the following explicit language about the expenditures:

142. La. R.S. 9:312 (2002) ("The order requiring accounting in accordance with this Section shall continue in effect as long as support payments are made or in accordance with the court order.").
143. La. R.S. 9:312(C), cmt. (b) (2002) ("The movant shall pay court costs and attorney fees of the person who receives child support if (1) either the motion for an accounting is dismissed before the hearing or the court fails to find good cause for an accounting and (2) the motion is frivolous.") (emphasis added). See La. R.S. 9:312(D) (2002) ("The provisions of this Section shall not apply when the recipient of the support payments is a public entity acting on behalf of another party to whom support is due.").
On a motion, in a court of competent jurisdiction, by any obligor, except as provided for in R.S. 9:312 (F)(2), ordered to make child support payments pursuant to court decree, by consent or otherwise, the court may order the obligee to render an accounting of the manner in which at least seventy-five percent of the sums received are expended.
145. Id. (amending La. R.S. 9:312(B)).
"All expenditures of child support payments shall be made with the sole intention of benefitting, directly or indirectly, the child or children for which the child support payments were ordered. None of the child support payments shall be expended for alcoholic beverages or tobacco products." The explicit statements about the proper purpose of child support expenditures were followed by unique potential punishments of the payee: the court could (a) "[r]educe the amount of the child support payments to the obligee," or (b) "[r]equire the obligee to open a demand deposit or checking account in the name of the obligee at a federally insured financial institution under such terms and conditions as the court may require." The bill passed the Senate Committee on Judiciary A and languished on the Senate calendar until it was withdrawn. Senator Michot withdrew the bill after an unsuccessful attempt to amend House Bill No. 1398 to add the contents of Senate Bill No. 456 as a substitute for the proposed revision of the accounting statute recommended by the Task Force. Ultimately, the defeat of the heavy-handed provisions of the LA Dads’ proposed accounting statute proceeded from the belief by a majority of the Senate Committee members that the provisions of House Bill No. 1398 more carefully calibrated the respective interests of the payor and the recipient of child support. The Task Force had already compromised before the Legislature convened by withdrawing the recommendation to repeal the accounting statute in recognition that the obligor had a legitimate interest in assuring that his payments are used responsibly to benefit his child. Furthermore, unlike the Michot bill, House Bill No. 1398 recognized the legitimate concerns and interest of the recipient of child support to be free of harassment from the obligor, especially in cases where the sum paid in child support was meager. Of course, the

146. Id. (amending La. R.S. 9:312(C)).

147. Id. (amending La. R.S. 9:312(D)(2)) (“If a reduction is ordered under Subsection (D)(1)(a) of this Section, the court may order the amount of the reduction to be paid by the obligor directly to such vendor or vendors as the court may direct for expenses benefitting the child or children.”).

148. Id. (amending La. R.S. 9:312(D)(1)). See also id. (amending La. R.S. 9:312(D)(3)):

If an account as provided in Subsection (D)(1)(b) of this Section is ordered, the amount of child support provided for in the court decree shall be deposited into the account. This amount shall include the contribution allocated to each party. All expenditures from this account shall be made in accordance with Subsection (C) of this Section. The court shall order an accounting of the expenditures from this account, as provided in Subsection (B) of this Section. The accounting shall also include a copy of the monthly statement from the financial institution on the account. Any funds remaining in the account upon the termination of the child support decree shall be paid to the child.
source of contention concerning the proper expenditure of child support is the fact that the sum is the property not of the minor child but of the recipient, the parent who is his custodial or domiciliary parent.\textsuperscript{149} In \textit{Simon v. Calvert},\textsuperscript{150} the court reached the conclusion that support owed to a child had to be considered, as a practical matter, the property of the custodial parent so that it would not be necessary for that parent to qualify as natural tutor or tutrix before asserting a claim for child support.\textsuperscript{151} Furthermore, once appointed and qualified as tutor or tutrix all of the rules on tutorship would apply, including the requirement of court approval to dispose of the sum paid in child support\textsuperscript{152} and annual accountings.\textsuperscript{153} According to the court, the costs of the tutorship proceedings would exceed the amount received as child support.\textsuperscript{154} It comes as no surprise that an obligor may resent the idea that he must pay a former spouse money owed on account of his obligation to his child as much as the realization that he cannot control the expenditure of his own money for purposes he believes are in the best interest of his child. Nonetheless, conscientious custodial or domiciliary parents ordinarily provide money that represents the difference between child support payments and the expenditures necessary or simply desirable for the child. These parents need some protection from the additional expense of

\textsuperscript{149} La. Civ. Code art. 141, cmt. (g):
A parent's obligation of support is owed to his child, but the child is usually an unemancipated minor in divorce actions and therefore does not have the procedural capacity to sue. C.C.P. Art. 683 (1992). Thus the usual practice has been for the parent who expects to be the child's custodian or domiciliary parent to raise the child support issue in the divorce proceedings . . . .

\textit{See also} Simon v. Calvert, 289 So. 2d 567, 570 (La. App. 3d Cir. 1974) ("The cited code articles and cases do not state that child support payments are to be considered as the minor's interest, or minor's funds, or obligations in favor of the minor, or minor's property.").

The same is true of past due child support. See State v. Durigneaud, 763 So. 2d 723 (La. App. 4th Cir. 2000). \textit{See also infra} note 151.

\textsuperscript{150} 289 So. 2d 567 (La. App. 3d Cir. 1974) ("The effort to distinguish the \textit{Walder} case is based on the premise that child support is a property right owned by the children."). \textit{Id.} at 569-70.

\textsuperscript{151} La. Civil Code art. 141, cmt. (g):
Under Civil Code article 105 . . . either party may take this step [regarding child support] without being appointed tutor of the child . . . . \textit{(See Dubroc v. Dubroc . . . . and . . . . R.S. 9:315.8(D))}, under which the child support award is to be made payable directly to the appropriate parent. When that is done, the payor of support may discharge his obligation only by making the required payments to that parent . . . .

\textsuperscript{152} La. Code Civ. P. art. 3271.

\textsuperscript{153} \textit{Id.}

\textsuperscript{154} "Many tutorships would cost more to administer than would be available for child support." Simon, 289 So. 2d at 570.
defending the propriety of how the monthly sum paid in child support is spent and from the potential for harassment that such a right to an accounting may present. Without this protection, a custodial or domiciliary parent could easily come to the conclusion that the meager amount received in child support is not worth the trouble of a potential demand for an accounting, a conclusion that ultimately fails to serve the best interest of the child.

IX. CLARIFICATIONS OF THE GUIDELINES

A. Modifications of Child Support Awards

An action to modify or terminate child support requires that the party seeking the modification or termination show "a material change in circumstances of one of the parties between the time of the previous award and the time of the motion for modification."155 The addition of the word "material" was purposeful; the amendment was intended to overrule Stogner v. Stogner156 in which the Louisiana Supreme Court "held that any change in circumstances is sufficient to justify a reduction or increase in child support, a conclusion extended to spousal support by the court of appeal in Council v. Council."157 The parallel article providing for a modification of spousal support was also amended to add the word "material."158

Material does not mean substantial. The Official Comments to Section 311 define material as "a change in circumstance having real importance or great consequences for the needs of the child or the ability to pay of either party."159 Nothing in the definition of material requires qualitatively that the change be substantial, merely significant, something more than any change in circumstance. The threshold consideration of materiality of the change in circumstance is intended to impose a greater burden than existed after Stogner upon the party seeking the change as a deterrent to frequent, costly litigation over a child support award for alleged insignificant changes in a party's circumstances. As ample demonstration of the motivation of deterrence, another paragraph in the Section permits the court to order the mover to pay court costs and reasonable attorney fees of the other party if the court determines that the motion was frivolous and if the court finds either that good cause does not exist for a change in

156. 739 So. 2d 762 (La. 1999). See also Glorioso v. Glorioso, 776 So. 2d 536 (La. App. 4th Cir. 2001).
child support or that the motion to modify child support is “dismissed prior to a hearing.”

B. Income of New Spouse

Income as defined by the child support guidelines may include:

[T]he benefits a party derives from expense-sharing or other sources; however, in determining the benefits of expense-sharing, the court shall not consider the income of another spouse, regardless of the legal regime under which the remarriage exists, except to the extent that such income is used directly to reduce the cost of a party’s actual expenses.

The review committee, composed of appointees from DSS and LDAA, recommended clarification of “expense sharing” as a component of the definition of income for the purpose of achieving greater consistency in application of the guidelines. The “clarification” of expense sharing proposed by the review committee would have required the consideration of the benefits of expense sharing only if the parent was not employed to full capacity.

The Task Force rejected the recommendation because the current “expense sharing” provision of the guidelines, which only considers the income of a second spouse as the parent’s income if some portion of the income pays his expenses, already represented a relatively recent constriction of the definition of “income.” Before the recent amendment to the definition of the benefits of expense sharing, the entirety of the income of a second spouse could be considered income of the parent without regard to whether the income was actually used to reduce the expenses of the payor. The recommendation of the review committee would have further reduced the income of the remarried parent used to calculate the sum the child was to receive, even though the economic benefit to the parent could be proven.

Despite having always included the benefits of expense sharing upon remarriage as “income,” the guidelines had never specifically provided

160. La. R.S. 9:311(E) (2002): If the court does not find good cause sufficient to justify an order to modify child support or the motion is dismissed prior to a hearing, it may order the mover to pay all court costs and reasonable attorney fees of the other party if the court determines that the motion was frivolous.

See also La. R.S. 9:311(E), cmt. (b); 9:311(F) (2002) (“The provisions of Subsection E of this Section shall not apply when the recipient of the support payments is a public entity acting on behalf of another party to whom support is due.”).


for obtaining the evidence of either the second spouse's income or the manner in which that income was spent to reduce the payor's actual expenses. To facilitate such evidence, when relevant, the Task Force recommended and the Legislature adopted an amendment to the Section of the guidelines that specifies what constitutes evidence of the gross income of the parties. The amendment directs that spouses of the parties are to provide any *relevant* information "with regard to the source of payments of household expenses upon request of the court or the opposing party, provided such request is filed in a reasonable time prior to the hearing."163

C. Net Child Care Cost Calculation

In response to a perceived need by the profession, principally for convenience, the review committee composed of members of DSS and LDAA recommended that the chart contained in Internal Revenue Form 2441 be reproduced in the guidelines. The definition of "net child care costs" in the guidelines is "the reasonable costs of child care incurred by a party due to employment or job search, minus the value of the federal income tax credit for child care."164 The rationale for including the chart in the guidelines was that an attorney would not need to consult the Internal Revenue Code. Ultimately, the Task Force recommended making specific reference to the Internal Revenue Code Form in the section of the guidelines providing for the addition of "net child care costs"165 and providing the Internet cite to the form in the official comments.166

D. Expenditures for Private or Special School

Not surprisingly, because the subject was of principal interest to attorneys in private practice, the clarification of extraordinary expenses in the nature of the "add-on" to child support for expenses of special or private education was a recommendation of the Task Force rather than the review committee of DSS and LDAA. The guidelines prior to amendment by Act No. 1082 of 2001 merely provided for the addition, at the discretion of the court, to the basic

163. La. R.S. 9:315.2(A) (2002) ("Failure to timely file the request shall not be grounds for a continuance.").
165. La. R.S. 9:315.3 (2002) ("Net child care costs shall be added to the basic child support obligation. The net child care costs are determined by applying the Federal Credit for Child and Dependent Care Expenses provided in Internal Revenue Form 2441 to the total or actual child care costs.").
child support obligation of "any expenses" for attending a private or special school to meet the "particular educational" needs of the child.167 Lawyers engaged in private practice, particularly those in cities in South Louisiana where the parochial school system is historically well established and the public school system is often deficient, were concerned about the variation of judicial interpretation about what constitutes "any expenses for attending private school."168

After considerable discussion within the Task Force, the recommendation to the Legislature was to specifically include tuition, registration fees, and book and supply fees "required for attending a . . . private elementary or secondary school."169 Not only were the types of expenses very specific and somewhat limited, but also the expenses had to be required for attending a private school, which constituted a further restriction. For example, a voluntary enrichment activity like piano or guitar lessons offered through the school would not qualify as an expense for tuition, registration, or book or supply fees nor would the activity constitute an expense required for attending a private school.170

In recognition of the prevailing jurisprudence interpreting this provision of the guidelines, the Task Force also recommended and the Legislature adopted the deletion of proof that the private or special elementary or secondary school be necessary to meet the "particular educational" needs of the child. The judiciary had little difficulty in applying the statutory criteria in instances in which the child attended a special elementary or secondary school; the child's special needs, physical or mental, demonstrated that the special school was necessary to meet the child's particular educational needs. However, proof of a child's particular educational need for a private elementary or secondary school consisted almost invariably of the child's historical attendance at a private school and the need for stability in the child's educational environment. Most of the jurisprudence concluded that the child's educational history and need for stability to serve her best interests were sufficient to satisfy proof of the child's "particular educational" need for private school.171

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167. La. R.S. 9:315.6 (2002) ("By agreement of the parties or order of the court, the following expenses incurred on behalf of the child may be added to the basic child support obligation: (a) Any expenses for attending a special or private elementary or secondary school to meet the particular needs of the child . . . . ").
168. See, e.g., Settle v. Settle, 635 So. 2d 456, 464 (La. App. 2d Cir. 1994) (father paid his proportion of all expenses, "including tuition, registration fees and after school enrichment expenses").
170. Id.
171. See, e.g., Sawyer v. Sawyer, 799 So. 2d 1226 (La. App. 2d Cir. 2001); Holland v. Holland, 799 So. 2d 849 (La. App. 2d Cir. 2001); Kelly v. Kelly, 775
interpretation of the child’s need guaranteed that there would be continuity in the child’s educational instruction and peer relationships and no need for the child’s adjustment to the additional disruption of changing schools. In an attempt to conform the clause, “the particular educational” needs of the child, to its judicial interpretation, the recommendation of the Task Force was to delete the qualifying language which preceded “need.”172 As the official comment explains: “The needs of the child met by the special or private school need not be particular educational needs but may include such needs of the child as the need for stability or continuity in the child’s educational program.”173

E. Income of the Child

Under the child support guidelines, income of the child may be deducted from the basic child support obligation provided that the income can be used “to reduce the basic needs of the child.”174 Excluded from such income is “income earned by a child while a full-time student, regardless of whether such income was earned during a summer or holiday break.”175 When surveying the users of the guidelines, DSS and LDAA discovered that some courts in Louisiana considered benefits from public assistance programs, as well as various social security benefits, as income to the child.176 For purposes of calculating gross income of a parent, the child support guidelines exclude “child support received, or benefits received from public assistance programs, including Family Independence Temporary Assistance Plan, supplemental security income, food stamps, and general assistance.”177 The review committee recommended that “benefits received from public assistance programs, including Family Independence Temporary Assistance Program, Supplemental Security Income (SSI), food

So. 2d 1237 (La. App. 1st Cir. 2000); Martin v. Martin, 716 So. 2d 46 (La. App. 3d Cir. 1998); Valure v. Valure, 696 So. 2d 685 (La. App. 1st Cir. 1997); Campbell v. Campbell, 682 So. 2d 312 (La. App. 1st Cir. 1996); Broussard v. Broussard, 672 So. 2d 1016 (La. App. 4th Cir. 1996); Trahan v. Panagiotis, 654 So. 2d 398 (La. App. 3d Cir. 1995); Buchert v. Buchert, 642 So. 2d 300 (La. App. 1st Cir. 1994); Settle v. Settle, 635 So. 2d 456 (La. App. 2d Cir. 1994); Jones v. Jones, 628 So. 2d 1304 (La. App. 3d Cir. 1993); Widman v. Widman, 619 So. 2d 632 (La. App. 3d Cir. 1993).

172. La. R.S. 9:315.6(1) (2002) (“Expenses of tuition, registration, books, and supply fees required for attending a special or private elementary or secondary school to meet the needs of the child.”).


175. La. R.S. 9:315.7(B) (2002).


stamps, or any means-tested program\textsuperscript{178} be excluded as income to the child.

At the public hearings and during deliberations before the Legislature, there was significant disagreement over how to treat social security benefits when they were paid directly to the child because of a disability of the custodial or domiciliary parent or of a stepparent.\textsuperscript{179} As a consequence, the Legislature chose not to resolve the disagreement over social security payments but simply to add a new paragraph that excludes public assistance payments made directly to the child, including Family Independence Temporary Assistance Programs and food stamps,\textsuperscript{180} as income of the child.

\textbf{F. Deviations When Gross Income Exceeds $20,000}

Just as the court is given discretion in setting child support if the parents combined adjusted gross income is less than the lowest sum on the schedule,\textsuperscript{181} the court is also given discretion to set child support where the parents' combined adjusted gross income exceeds the highest figure on the schedule, which now is $20,000 per month.\textsuperscript{182} In exercising its discretion in such cases, the court is directed to set the amount of the basic child support obligation "in accordance with the best interest of the child and the circumstances of each parent as provided in Civil Code Article, but in no event shall it be less than the highest amount set forth in the schedule."\textsuperscript{183} The comment to this Section further clarifies the significance of the reference to Civil Code article 141:

Article 141, which governs the award of child support at divorce, contains first principles: child support is to be determined based upon the needs of the child as measured by the \textit{standard of living enjoyed by the child while living with his intact family and the ability to pay of each of the parents . . . .} \textsuperscript{184}

\begin{itemize}
\item \textsuperscript{178} \textit{Id.}
\item \textsuperscript{179} Final Report, \textit{supra} note 42, at 34.
\item \textsuperscript{180} La. R.S. 9:315.7(C) (2002) ("The provisions of this Section shall not apply to benefits received by a child from public assistance programs, including but not limited to Family Independence Temporary Assistance Programs (FITAP), food stamps, or any means-tested program."). \textit{Compare with} La. R.S. 9:315(4)(d)(i) (2002).
\item \textsuperscript{181} The only exception to full discretion in setting the sum of child support is that the sum ordered to be paid not be lower than the minimum child support order of $100. La. R.S. 9:315.1(C)(1)(a) (2002).
\item \textsuperscript{182} La. R.S. 9:315.1(C)(1)(b), 9:315.13(B) (2002).
\item \textsuperscript{183} La. R.S. 9:315.13(B) (2002).
\item \textsuperscript{184} La. R.S. 9:315.13(B), cmt. (2002) (emphasis added). \textit{See also} La. Civ. Code art. 141, cmt. (b);
\end{itemize}
The comments to Article 141 explain the jurisprudence that the article intended to codify and then contrast the first principles of this article with the statutory guidelines. Clearly, the guidelines emphasize the parents' ability to pay by adopting their combined adjusted gross income as the main factor in calculating child support. The comments suggest that such an approach is consistent with prior jurisprudence, acknowledging however that "the prior jurisprudence usually claimed to give primacy to the factor of the child's need." Obviously, the guidelines are not based upon a consideration of achieving the same standard of living the child enjoyed while living with his parents because the economic assumptions made in the schedule and the self-sufficiency reserve for low-income obligors are inconsistent. Thus, a conscious consideration of the standard of living the child enjoyed before the divorce or that the child would enjoy with the noncustodial or nondomiciliary parent occurs only when the recipient seeks a

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Those statutory guidelines should therefore be followed in all such cases as an initial matter, with resort being had to these Articles when necessary for the sake of clarity, or when a party seeks to overcome the rebuttable presumption in favor of results achieved under the statutory guidelines that is provided by R.S. 9:315.1(A), or when the court deviates from those guidelines under R.S. 9:315.1(B) and (C), or when the guidelines are inapplicable, or in any other situation where resort to first principles is necessary.

185. La. Civ. Code art. 141, cmt. (b) ("This Article and the other Articles in this Section of the revision are essentially codifications of the fundamental principles governing child support that have been followed in prior jurisprudence....").
186. La. Civ. Code art. 141, cmt. (e) ("Under R.S. 9:315.2, 315.8, and 315.3, the factor of the parents' ability to provide support, that is, their 'combined adjusted gross income,' is the primary factor and the starting point in determining the 'total child support obligation' and hence the amount of child support to be awarded....").
187. Id.
188. Id. The comments cite Garcia v. Garcia, 438 So. 2d 256 (La. App. 4th Cir. 1983) and Ducote v. Ducote, 339 So. 2d 835 (La. 1976).
189. See discussion in text accompanying supra notes 24-39.
Assessing a child's 'need' on the basis of his parents' standard of living was of course tantamount to basing the child support decision primarily on the parents' income, as is now done expressly in the statutory child support guidelines (modified to a degree by the consideration, built into the tables in R.S. 9:315.14, that the percentage of income spent on a child decreases as income increases).
deviation from the guidelines by a resort to first principles to increase the sum paid on behalf of the child\textsuperscript{191} or explicitly, when the combined adjusted gross income of the parents exceeds $20,000 per month.\textsuperscript{192} In the latter case, relying upon the jurisprudence codified in Article 141,\textsuperscript{193} the court should not hesitate to fix an award of child support high enough to approximate the standard of living the child enjoyed before his parents' divorce or that he would enjoy if living with the noncustodial or nondomiciliary parent.\textsuperscript{194} By abandoning implicitly the principal focus of child support as the needs of the child measured by the standard of living he did or would enjoy, the Legislature, through the income shares model of guidelines, shifted the focus to the respective income of the spouses, including the protection of a minimum standard of living for the low-income payor. Therefore, even though the basic principles articulated at the

\textsuperscript{191} La. R.S. 9:315.1(B) and (C) (2002).

\textsuperscript{192} La. R.S. 9:315.13(B). See Sawyer v. Sawyer, 799 So. 2d 1226, 1233 (La. App. 2d Cir. 2001) ("The court determined that the parent's gross income exceeded $10,000 a month [highest amount in schedule before August 15, 2001]. Consequently, the court in its discretion may consider the child's lifestyle and needs.").


\textsuperscript{194} The approximation of the standard of living the child would enjoy if living with the noncustodial or nondomiciliary parent is especially apt where the child's parents were never married so established no standard of living but the obligor (noncustodial or nondomiciliary parent) is wealthy and himself enjoys a very high standard of living, such as a professional athlete or musician. See Conner v. Conner, 594 So. 2d 1039, 1041 (La. App. 3d Cir. 1992) ("If the parents are divorced and the children are living with their mother, the children are entitled to the same standard of living as if they resided with their father whenever the financial circumstances of the father permit.").
The beginning of the guidelines include as a premise that "children should not be the economic victims of divorce or out-of-wedlock birth,"\textsuperscript{195} the general application of the guidelines does not in fact implement that premise. Only if the obligee obtains a deviation from the guidelines that takes into account the standard of living or if the court utilizes the standard of living as a consideration in the exercise of its permissible discretion (combined adjusted gross income exceeds $20,000 per month) do the guidelines actually attempt to assure that the child does not become an economic victim of divorce.

In the original House Bill No. 1398, this section of the guidelines, which permits the court to set child support for parents whose combined adjusted gross income exceeds $20,000 per month, also included specific authority for the judge to order a portion of the amount set as child support be placed in trust for the child. Although the court may enjoy such inherent authority, the Task Force believed that specific authority would encourage judges to exercise such power and would introduce the important device of a trust as protection for the child's property. The Task Force believed that the trust could be the perfect vehicle to assure that when the child's expenses are the greatest, after the age of eighteen while attending college and when no parental obligation exists to educate the child,\textsuperscript{196} the excess child support deposited in the trust could be used to defray these expenses. The proposed authority was discretionary, and the trust authorized was specifically "a spendthrift trust for the educational or medical

\textsuperscript{195} La. R.S. 9:315(A) (2002):
While the legislature acknowledges that the expenditures of two-household divorced, separated, or non-formed families are different from intact family households, it is very important that the children of this state not be forced to live in poverty because of family disruption and that they be afforded the same opportunities available to children in intact families, consisting of parents with similar financial means to those of their own parents.

\textsuperscript{See also} Krampe v. Krampe, 625 So. 2d 383 (La. App. 3d Cir. 1993).

\textsuperscript{196} La. Civ. Code art. 229 (emphasis added):
Children are bound to maintain their father and mother and other ascendants, who are in need, and the relatives in the direct ascending line are likewise bound to maintain their needy descendants, this obligation being reciprocal. This reciprocal obligation is limited to life's basic necessities of food, clothing, shelter and health care, and arises only upon proof of inability to obtain these necessities by other means or from other sources.

\textsuperscript{See} La. Civ. Code art. 230(B):
It [alimony] includes the education, when the person to whom the alimony is due is a minor, or when the person to whom alimony is due is a major who is a full-time student in good standing in a secondary school, has not attained the age of nineteen, and is dependent upon either parent.

\textsuperscript{See also} La. R.S. 9:315.22 (2002).
needs of the child." The legislation was likewise specific as to the management and administration of the trust, the beneficiary of the trust, and the termination date, which was "when the child reaches the age of twenty-one, unless the parties agree to a later date." Objecting to the provision, LA Dads successfully sought the deletion of the trust provision ostensibly because of the potential for imposing additional costs on the payor in the form of the institutional trustee’s fees. Of course, the payor in such cases would have been wealthy, and the fees may not have been unreasonable in view of the payor’s resources. Unfortunately, deletion of the trust provision eliminated recognition of the idea that the parent of a minor child would ordinarily be conserving resources for the child’s higher education were the family intact. The explicit authority to create a trust would have permitted the court to protect the future of the child whose family was no longer intact by use of the substitute vehicle of a trust.

G. Federal and State Tax Dependency Deduction

Act No. 1082 simply amended the provision concerning allocation of the tax dependency exemption to provide that the party “who receives the benefit of the exemption for such tax year shall not be considered as having received payment of a thing not due if the dependency deduction allocation is not maintained by the taxing authorities." As the official comment to the section explains, this language previously appeared in Louisiana Revised Statutes 9:337 (B). The Legislature repealed Section 337(B) as a part of Act No. 1398 (La. 2001) (adding La. R.S. 9:315.13(B)(2)).

May order that a portion of the amount awarded be placed in a spendthrift trust for the educational or medical needs of the child. The trust shall be administered, managed, and invested in accordance with the Louisiana Trust Code. The trust instrument shall name the child as sole beneficiary of the trust, shall name a trustee, shall impose maximum spendthrift restraints, and shall terminate when the child reaches the age of twenty-one, unless the parties agree to a later date. The trustee shall furnish security unless the court, in written findings of fact dispenses with security.

The guideline schedule presumes the custodial parent claims the tax exemption(s) for the child(ren), unless the appropriate tax forms are completed each year to allow the noncustodial parent to claim the exemption. However, the child support guidelines were not updated based on the 1999 personal income tax rates, which are slightly less than the rate in effect when the child support schedule was developed in 1989.

May order that a portion of the amount awarded be placed in a spendthrift trust for the educational or medical needs of the child.
of Act No. 1082\textsuperscript{201} because that section duplicated subject matter contained in the child support guidelines.

However, Act No. 501 of 2001,\textsuperscript{202} not a product of the Task Force, amended the section substantively to provide that the nondomiciliary parent whose child support obligation “exceeds seventy percent of the total child support obligation shall be entitled to claim the federal and state tax dependency deductions every year if no arrearages are owed by the obligor.”\textsuperscript{203} Until August 15, 2001, an obligor whose child support obligation equaled or exceeded fifty percent of the total child support obligation was entitled to claim the federal and state tax dependency deduction if after a contradictory motion, the judge found both of the following: “(a) No arrearages are owed by the obligor; (b) The right to claim the dependency deductions ... would substantially benefit the non-domiciliary party without significantly harming the domiciliary party.”\textsuperscript{204} After August 15, this same paragraph applies only to the nondomiciliary parent whose child support obligation is between equal to or greater than fifty percent and “equal to or less than seventy percent.”\textsuperscript{205} For the nondomiciliary parent whose child support obligation exceeds seventy percent of the total child support obligation he “shall be entitled to claim the federal and state tax dependency deductions every year if no arrearages are owed by the obligor.”\textsuperscript{206}

The new amendment mandating the entitlement of the nondomiciliary parent to the dependency deduction ignores some economic assumptions incorporated into the child support schedule; the schedule incorporates a consideration of the expenses of the parties, “such as federal and state taxes.”\textsuperscript{207} In the conversion of net income to gross income in setting guideline schedule amounts the following assumption is made: “all income is assumed to be earned by a noncustodial (nondomiciliary) parent with no dependents.”\textsuperscript{208} At the same time, the guideline schedule also makes “adjustments for federal and state and local taxes and FICA.”\textsuperscript{209} As the Policy Studies report declares, “Obviously, these assumptions ignore situations where not all income is fully taxable ... where both parents have

\textsuperscript{201} La. R.S. 9:315.18, cmt. (c) (2002) (“Subsection D added in 2001 simply contains the substance of R.S. 9:337 (B), which was repealed in Act No. 1082.”).
\textsuperscript{202} La. R.S. 9:315.18, cmt. (b) (2002) (“Subsection C was added by 2001 Acts No. 501.”).
\textsuperscript{207} La. R.S. 9:315(A) (2002).
\textsuperscript{208} Final Report, supra note 42, at 25-26 (emphasis added).
\textsuperscript{209} Id.
income and claim different numbers of dependents, and where other taxes . . . further reduce net income. Most importantly, Louisiana’s schedule “presumes that the noncustodial parent does not claim the tax exemptions for the child(ren) due support.” The new paragraph added to Section 315.18 is inconsistent with the assumptions of the schedule and thus liberates a sum of the nondomiciliary’s income, in the form of the benefit of the dependency deduction, from the obligation of child support. This provision should be repealed because it is inconsistent with the assumptions of the schedule and because it releases the nondomiciliary parent from a portion of his obligation to support his child.

H. Use and Occupancy of the Family Home

Because the economic assumptions of an income shares model of child support guideline include the cost of housing, the Task Force recommended that the explicit reference to the court’s consideration of the use and occupancy of the family home in determining child support be repealed. Furthermore, the Task Force recommended other amendments to the use and occupancy provision that clarified language in the two paragraphs concerning use of community movables and immovables. Both amendments, which clarify and

210. Id.
211. Id. at 41:

212. See discussion in text accompanying supra notes 29-30.
213. La. R.S. 9:374(A) (2002) (“The court shall consider the granting of the occupancy of the family home in awarding spousal support.”). See La. R.S. 9:374(B) (“If applicable, the court shall consider the granting of the occupancy of the family home and the use of community movables or immovables in awarding spousal support.”).

As the comment explains: “The amendments to Subsections A and B eliminate references to the court’s consideration of the use and occupancy of the family home or the use of community movables and immovables in awarding child support. The child support guidelines incorporate the consideration of the cost of housing.” La. R.S. 9:374, cmt.

214. Reference to the use of community movables and immovables was removed from La. R.S. 9:374(A) which governs the court’s granting of use and occupancy of the family home when it is separate property of the other spouse. Paragraph B of the same section was amended to add the reference to use of community movables and immovables in the same paragraph with use and
correct the statute permitting the court to grant use and occupancy of the family home, were overdue.

X. UNRESOLVED ISSUES: POST-MINORITY EDUCATION

Of all the issues surrounding child support and protection of the child from the harsh economic consequences of his parents' divorce, support for a child's post-minority education has proved the most controversial. Yet, in at least one empirical study, the failure to provide such support to a child during her college years leaves indelible scars, especially when the parent who had means to provide support provided it instead to his stepchildren.

Children who would have received financial help for their college educations should not, at age eighteen, feel they're paying for their parents' divorce with the forfeiture of their future careers. This is intolerable injustice. The children will never forgive their parents for this betrayal nor should they. If parents cannot afford to pay for college, children understand that just fine. But if a parent has the means to help pay tuition but says he or she is not "obligated," then the child has every right to be furious—at the parent and even more at a society that has sanctioned the child’s heavy loss with its divorce laws. When a stingy parent gives priority to a new family—new spouse, new children, new life—the child of divorce is doubly wounded.215

Interestingly, the authors of this study suggest, for families with the economic means, that a trust would be an appropriate mechanism to provide resources for the education of the child of divorce during her college years.216 Recognizing that few states have legislation that permits

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occupancy of the family home that is community property:
When the family residence is community property or the spouses own community movables or immovables, after or in conjunction with the filing of a petition for divorce or for separation of property in accordance with Civil Code Article 2374, either spouse may petition for, and a court may award to one of the spouses, after a contradictory hearing, the use and occupancy of the family residence and use of community movables or immovables to either of the spouses pending further order of the court.
216. See discussion in text accompanying supra notes 196-98. See also Legacy of Divorce, supra note 215, at 309 ("For families with the means to do so, trust funds would assure that children are able to get the education they deserve.").
a court to order support for college, the principal author of the study comments,

Surely all children deserve the same legal protection and the financial and emotional support and encouragement that is critical to their future. The children who would benefit from such legislation, as usual, have no voice, no constituency, no power to influence their futures. But the rest of us can and should speak up for them.

Despite numerous attempts over the last ten years to extend the child support obligation beyond age eighteen, the Legislature has consistently rejected such proposals. At the same time, the

217. “Although a few states have enacted legislation that enables the court to order support for college under certain circumstances, most states have no laws that extend child support beyond age eighteen.” Legacy of Divorce, supra note 215, at 309. See Elrod & Spector, supra note 98, at 750-51.

218. Legacy of Divorce, supra note 215, at 309.

219. The most recent attempt was in 1999 by Representative Jack Smith (H.B. 1649, Reg. Sess. (La. 1999)). The bill amended La. Civ. Code art. 130(B), among other provisions, to include the following language:

It may include the education, when the person to whom the alimony is due is a major who is a full-time student in good standing in any professional or technical training program designed to prepare the child for gainful employment or in an accredited undergraduate college or university, has not attained the age of twenty-three, and is dependent upon either parent.

Also in 1999, for the second time, the Persons Committee of the Louisiana State Law Institute presented a policy question to the Council of the Institute phrased as follows:

Should support for a child be extended beyond minority for educational purposes under some or all of the following circumstances: (A) If the law specifies a maximum age for eligibility (i.e., 23), (B) Taking into account: (1) The reasonableness of the expectation of the child for post secondary school, education or training in light of the background, values and goals of the parent, (2) The amount of money sought, and the types of education or training contemplated, (3) The ability of the parent to pay that amount, (4) The financial resources of both parents, (5) The child’s aptitude for and commitment to the education or training in question, (6) The child’s ability to earn income during the school year or vacation, (7) The availability to the child of financial aid from other sources, (8) The nature of the child’s relationship to the paying parent, including mutual affection . . . and the child’s responsiveness to the parent’s advice and guidance, (9) Whether the parent would have contributed to the cost of post minority support if the child had been living with him.

Legislature maintained forced heirship for children under twenty-four, rather than eighteen, because they deserved protection from the premature death of a parent whose support they might otherwise be denied. Virtually all of the arguments in opposition to imposing the obligation to support a college-aged child involve control by the parent who is the payor. Legislators argue that if the parent is living, the child should have to appeal to the parent and be subject to any conditions the parent imposes on his willingness to support the child's pursuit of higher education. Furthermore, they continue, the parent is the best judge of whether the child is "college material," not a judge. Finally, the legislators argue that the adult child would benefit from working his or her way through school with low-paying service jobs, ignoring the possibility that the child may be burdened with enormous debt upon graduation.

A small triumph did occur during the legislative session in 2001. Representative Sydney Mae Durand introduced and passed a bill that extended support for a child's education beyond the age of eighteen if the child has not attained the age of twenty-two and "has a developmental disability as defined in R.S. 28:381." The Act nonetheless limits the education for which the child may claim support to a secondary school, not college, assuring that a child with a developmental disability may receive support for completion of high school even though he is over the age of nineteen. Admittedly it is a small step, but it marks one more instance of recognition that nothing is magical about a child's reaching the age of eighteen; support for education may, and should, extend beyond that age. Furthermore, it recognizes that some children may take longer to complete what we now consider an educational minimum (high school diploma), recognition of an obligation to support a child in accordance with his or her individual needs.

222. La. Civ. Code art. 230(B)(2) (as added by 2001 La. Acts No. 408): "It includes the education, when the person to whom the alimony is due has not attained the age of twenty-two and has a developmental disability as defined in R.S. 28:381." The same act adds a new paragraph to La. R.S. 9:315.22:

D. An award of child support continues with respect to any child who has a developmental disability, as defined in R.S. 28:381, until he attains the age of twenty-two, as long as the child is a full-time student in a secondary school. The primary domiciliary parent or legal guardian is the proper party to enforce an award of child support pursuant to this Subsection.

See also In re M.W.T., 12 S.W.3d 598 (Tex. App. 2000).
XI. Conclusion

In a post-modern age that too willingly sacrifices the vital interests of children for the desires of adults, the revision of child support laws carries inherent risks. The substance of arguments in the debate over the appropriate level of child support and the appropriate weight to ascribe to the conflicting interests of all parties involved in or affected by such litigation has changed significantly in the last decade. Increasingly, fractured American families that reflect high incidences of divorce, illegitimacy, cohabitation, and fatherlessness strain the legal system's ability to achieve justice in any single factual scenario. What is desperately needed once again is a genuine consensus that the principal focus of concern for child support is the welfare of the child who is seeking support.224

For Louisiana, the test of effectiveness of the revision of child support guidelines should consist of the following questions:

Will it improve the quality of life of children who receive child support?

Will it encourage payors to exercise more physical custody?

Will it encourage respect for the law as a fair resolution to the intractably unfair problem of children who do not live in the same home with both their father and mother?

Will it foster respect for the marriage promise and the historically accepted societal view that parents are always financially responsible for children?

If the answer to any of the questions is “no,” the guidelines are a failure because they have failed the children of Louisiana.

224 In her article, Child Support Policy: Guidelines and Goals, 33 Fam. L.Q. 157 (1999), Professor Marsha Garrison argues that the following goals are realistic and attainable and will solve the problems of award inadequacy and disparate standards of living: (1) maintenance of the child’s pre-separation living standard, (2) equalization of living standard loss, (3) continuity of expenditure and (4) poverty avoidance and a minimum “decent standard of living” for the child. All of these goals focus on the child. See also Child Support: The Next Frontier (J. Thomas Oldham and Marygold S. Melli eds., 2000) (a provocative collection of articles, one of which is by Professor Martha Albertson Fineman, Child Support Is Not The Answer: The Nature of Dependencies and Welfare Reform).

The author proposed in a position statement for the Communitarian Network that each member of a family have an equal property interest in certain property acquired after marriage. See Katherine S. Spaht, The Family As Community: Implementing the "Children-First" Principle, Marriage in America: A Communitarian Perspective 235-56 (Martin K. Whyte ed., 2000).
Appendix A

TENTATIVE RECOMMENDATIONS OF THE COMMITTEE TO REVIEW CHILD SUPPORT GUIDELINES

The last review of child support guidelines in 1991 resulted in the Legislature adopting only the recommendations that lowered child support awards.

1972-1973 economic data was used to create the figures in the guideline tables when the guidelines were originally enacted in 1989.

Recommendations Benefitting Child

1. Set a minimum child support award of $68.00/month.
   Endorse

2. Child’s income does not include Social Security benefits paid to the child because of the custodial or domiciliary parent’s disability and benefits received from public assistance or means-tested program.
   Endorse

3. Extension of the guideline tables to $20,000/month adjusted gross income.
   Endorse if special section advises that above $20,000 the judge may also consider a sum above the guideline amount that recognizes the standard of living the child would enjoy if he lived with the noncustodial or nondomiciliary parent. (as per comments to La. Civ. Code art. 141)

Recommendations That Do Not or May Not Benefit Child

1. Multi-family (as opposed to second family) situations where more than one child support award rendered against obligor because children live in different households and reduce income below minimum level on the schedule: permit new alternative mathematical formula to divide equitably income among all obligor’s children.
   Problem: Don’t know how this recommendation would work in combination with second family recommendations (infra).

2. Lowers basic obligation at low income levels to insufficient amounts—$850 AGI yields $182 today, reduced to $165 (all from Policy Studies Institute). Overall, amounts for 1-2
children increase slightly, but amounts for three or more children lowered throughout schedule.

**Problem:** Has cost of rearing a child risen slightly since 1972-73 and rearing three or more risen less than in 1972-73?

3. Exclude benefits of expense sharing (i.e. income of second spouse if used to pay expenses of obligor spouse) unless parent not employed to full capacity (unemployed or underemployed). For first time completely shelters benefits of expense-sharing. In hypothetical situation, favors second spouse over children of obligor.

**Problem:** Will reduce some of the child support awards currently made.

4. Second families (presently a reason for deviation if present clear and convincing evidence that inequitable to obligor): permit obligor to credit (a “dummy” child support award using his income and that of spouse or co-habitant) expenses for dependents living in his household—i.e., adopted stepchildren, biological children with second spouse or co-habitant—by deducting that sum from obligor's adjusted gross income before calculating his income for purposes of fixing a support award for children of a first marriage. Only exception is if award to first children already made—subsequent adoption or birth after award not used to reduce award.

**Problem:** The exception ultimately means that the credit depends strictly upon the timing of the rule for child support and the timing of adopted or biological children in household with obligor. If the rule comes first, no credit and no reduction for subsequent children in household. However, if children in household (living with a mistress and their biological child) comes first and then the rule, payor gets benefit of credit. No clear position on rule to reduce for change in circumstances (other than subsequent children). Would proof of change permit recalculation using credit for subsequent children?

This proposal communicates more generally a preference for second families and repudiates the long-standing public policy that, at least as to married parents, you cannot relieve yourself of your first responsibilities (voluntarily undertaken by marriage) by voluntarily undertaking new responsibilities. In other words, you cannot divorce your children.
5. Joint or shared custody would invoke new specific calculation (rather than limited discretion as now under R.S. 9:315.8 E) on the basis of number of child's overnight visits with noncustodial or nondomiciliary parent:
   (a) Less than 73 nights, no credit;
   (b) 73-102 nights, credit of parent's child support obligation \( \times .37 \) (variable costs) \( \times \) percentage of time order by court;
   (c) 103 nights, dollar-for-dollar credit for noncustodial parent based on percentage of time with child. Upon a change in visitation or failure to exercise visitation, party wishing to change credit bears burden; penalty.

Problems: (a) the extent to which expenses of visitation already incorporated in guidelines; (b) shift in bargaining power (or leverage) with a specific target for nondomiciliary parent; (c) penalty provision requires subsequent litigation; (d) no equivalent of statement that court must consider and balance interest of domiciliary parent because of continuing expenses.

6. Overtime and second job of obligor to provide for a subsequent family permit obligor to shield this income from children of a former marriage.

Problem: Combined with second family credit creates far greater detriment to children of first marriage. Children of second family benefit twice (and in some cases first).
Appendix B

Obligation Worksheet B

(The worksheet for calculation of the total support obligation under R.S. 9:315.9)

<table>
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<th>B. Respondent</th>
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1. MONTHLY GROSS INCOME (R.S. 9:315.2(A))
   a. Preexisting child support payment.
   b. Preexisting spousal support payment

2. MONTHLY ADJUSTED GROSS INCOME
   (Line 1 minus 1a and 1b)

3. COMBINED MONTHLY ADJUSTED GROSS INCOME
   (Line 2 Column A plus Line 2 Column B)
   (R.S. 9:315.2(C))

4. PERCENTAGE SHARE OF INCOME
   (Line 2 divided by line 3) (R.S. 9:315.2(C))

5. BASIC CHILD SUPPORT OBLIGATION
   (Compare line 3 to Child Support Schedule)
   (R.S. 9:315.2(D))

6. SHARED CUSTODY BASIC OBLIGATION
   (Line 5 times 1.5) (R.S. 9:315.9(A)(2))

7. EACH PARTY'S THEORETICAL CHILD
   SUPPORT OBLIGATION (Multiply line 4 times line 6 for each party)

8. PERCENTAGE with each party

9. BASIC CHILD SUPPORT OBLIGATION FOR TIME WITH OTHER PARTY
   (Multiply line 7 times line 8) (R.S. 9:315.9(A)(4))

   a. Net Child Care Costs (Costs minus Federal Tax Credit) (R.S. 9:315.3)
   b. Child's Health Insurance Premium Cost (R.S. 9:315.4)
   c. Extraordinary Medical Expenses (Uninsured only) (Agreed to by parties or by order of the court) (R.S. 9:315.5)
   d. Extraordinary Expenses (Agreed to by parties or by order of the court) (R.S. 9:315.6)
   e. Optional: Minus extraordinary adjustments (Child's income if applicable) (R.S. 9:315.7)
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<tr>
<td>11.</td>
<td>EACH PARTY'S PROPORTIONATE SHARE of Expenses/Extraordinary Adjustments (Line 4 times line 10) (R.S. 9:315.9(A)(3))</td>
<td>$</td>
</tr>
<tr>
<td>12.</td>
<td>DIRECT PAYMENTS made by either party on behalf of the child for work-related net child care costs, health insurance premiums, extraordinary medical expenses, or extraordinary expenses (R.S. 9:315.9(3))</td>
<td></td>
</tr>
<tr>
<td>13.</td>
<td>EACH PARTY'S CHILD SUPPORT OBLIGATION (Line 9 plus line 11 and minus line 12)</td>
<td>$</td>
</tr>
<tr>
<td>14.</td>
<td>RECOMMENDED CHILD SUPPORT ORDER (Subtract lesser amount from greater amount in line 13 and place result under greater amount) (R.S. 9:315.9(2))</td>
<td>$</td>
</tr>
</tbody>
</table>

Comments, calculations, or rebuttals to schedule or adjustments.

Prepared by _____________________________ Date _____________________________
Appendix C

Obligation Worksheet A
(The worksheet for calculation of the total support obligation under R.S. 9:315.8 and 315.10)

<table>
<thead>
<tr>
<th>Court</th>
<th>Parish</th>
<th>Louisiana</th>
</tr>
</thead>
<tbody>
<tr>
<td>Case Number</td>
<td>Div/CtRm</td>
<td>and</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Petitioner</th>
<th>Respondent</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Children</th>
<th>Date of Birth</th>
<th>Children</th>
<th>Date of Birth</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>A. Petitioner</th>
<th>B. Respondent</th>
<th>C. Combined</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>MONTHLY GROSS INCOME (R.S. 9:315.2(A))</td>
<td></td>
<td></td>
</tr>
<tr>
<td>a.</td>
<td>Preexisting child support payment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>b.</td>
<td>Preexisting spousal support payment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2.</td>
<td>MONTHLY ADJUSTED GROSS INCOME</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(Line 1 minus 1a and 1b)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3.</td>
<td>COMBINED MONTHLY ADJUSTED GROSS INCOME (Line 2 Column A plus Line 2 Column B), (R.S. 9:315.2(C))</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4.</td>
<td>PERCENTAGE SHARE OF INCOME (Line 2 divided by line 3), (R.S. 9:315.2(C))</td>
<td>%</td>
<td>%</td>
</tr>
<tr>
<td>5.</td>
<td>BASIC CHILD SUPPORT OBLIGATION</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(Compare line 3 to Child Support Schedule), (R.S. 9:315.2(D))</td>
<td></td>
<td></td>
</tr>
<tr>
<td>a.</td>
<td>Net Child Care Costs (Cost minus Federal Tax Credit), (R.S. 9:315.3)</td>
<td>+</td>
<td></td>
</tr>
<tr>
<td>b.</td>
<td>Child's Health Insurance Premium Cost, (R.S. 9:315.4)</td>
<td>+</td>
<td></td>
</tr>
<tr>
<td>c.</td>
<td>Extraordinary Medical Expenses (Uninsured Only) (Agreed to by parties or by order of the court), (R.S. 9:315.5)</td>
<td>+</td>
<td></td>
</tr>
<tr>
<td>d.</td>
<td>Extraordinary Expenses (Agreed to by parties or By order of the court) (R.S. 9:315.6)</td>
<td>+</td>
<td></td>
</tr>
<tr>
<td>e.</td>
<td>Optional. Minus extraordinary adjustments (Child's income if applicable) (R.S. 9:315.7)</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>6.</td>
<td>TOTAL CHILD SUPPORT OBLIGATION (Add lines 5, 5a, 5b, 5c and 5d; Subtract line 5e) (R.S. 9:315.8)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>7.</td>
<td>EACH PARTY'S CHILD SUPPORT OBLIGATION (Multiply line 4 times line 6 for each parent)</td>
<td>$</td>
<td>$</td>
</tr>
<tr>
<td>8.</td>
<td>DIRECT PAYMENTS made by the noncustodial parent on behalf of the child for work-related net child care costs, health insurance premiums, extraordinary medical expenses, or extraordinary expenses.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>9. RECOMMENDED CHILD SUPPORT ORDER</th>
<th>$</th>
</tr>
</thead>
</table>

(Subtract line 8 from line 7)

Comments, calculations, or rebuttals to schedule or adjustments if made under 8 above or if ordering a credit for a joint custodial arrangement.

Prepared by __________________________ Date __________________________
Appendix D

Multiple Family Adjustment

Step 1: Determine income eligibility

Step 2: Determine income available for support. Gross income – (net equivalent of 85% of the poverty level = $618 per month). This is call Multiple Family-adjusted income.

Step 3: Complete columns 1 and 3 in table below.

<table>
<thead>
<tr>
<th>Number of Families Non custodial Parent Is Responsible for That Have:</th>
<th>Weight by Family Size</th>
<th>Total Family Weight (Column 1 × Column 2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>One child</td>
<td>1.0</td>
<td></td>
</tr>
<tr>
<td>Two children</td>
<td>1.47</td>
<td></td>
</tr>
<tr>
<td>Three children</td>
<td>1.76</td>
<td></td>
</tr>
<tr>
<td>Four children</td>
<td>1.95</td>
<td></td>
</tr>
<tr>
<td>Five children</td>
<td>2.11</td>
<td></td>
</tr>
<tr>
<td>Six children</td>
<td>2.26</td>
<td></td>
</tr>
</tbody>
</table>

Step 4: Add column 3. This is total family weight.

Step 5: Divide Multiple Family-adjusted income (calculated in step 2) by family weight (calculated in step 4). If the amount is less than $68, use $68 as child weight ($68 is the recommended minimum order amount)

Step 6: Calculate the support order for each family size.

- Support for one child family = 1 × child weight (calculated in step 5)
- Support for two child family = 1.47 × child weight (calculated in step 5)
- Support for three child family = 1.76 × child weight (calculated in step 5)
- Support for four child family = 1.95 × child weight (calculated in step 5)

---

Support for five child family = $2.11 \times \text{child weight (calculated in step 5)}$
Support for six child family = $2.26 \times \text{child weight (calculated in step 5)}$

Example 1:

Obligor gross monthly income = $1,200. He has four children by three different women. Two have one child each. One has two children.

Step 1: Assume he meets this criteria.

Step 2: $1,200 - $618 = $582 = \text{Multiple Family-Adjusted Income}$

Step 3:

<table>
<thead>
<tr>
<th>Number of Families Non custodial Parent Is Responsible for That Have:</th>
<th>Weight by Family Size</th>
<th>Total Family Weight (Column 1 \times Column 2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2 One child</td>
<td>1.0</td>
<td>2</td>
</tr>
<tr>
<td>1 Two children</td>
<td>1.47</td>
<td>1.47</td>
</tr>
</tbody>
</table>

Step 4: 3.47 = family weight

Step 5: $582 \ (\text{Multiple Family-Adjusted Income from step 2}) / 3.47 \ (\text{from step 4}) = $167.72$

Step 6: Support for 1st family with one child = $167.72$
Support for 2nd family with one child = $167.72$
Support for 3rd family with two children = $246.55$