Ohio's Child Support Guidelines: A Springboard or a Crutch

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I. INTRODUCTION

Ohio's Child Support Guidelines\(^1\) have become a source of confusion and frustration to practitioners throughout the state. Are the Guidelines to be applied with a strict interpretation? Where does judicial discretion fit in? The Guidelines were amended\(^2\), effective October 1, 1988, after having been in force for only one year.\(^3\) What changes were made and why? The Family Support Act of 1988\(^4\), effective October 13, 1988, may require further changes in Ohio's Guidelines. These ongoing changes in child support law, in an effort to provide adequate awards with consistency and predictability, have instead created indecision and instability in many instances.

\(^1\) 39 Ohio St. 3d xlv (1988).
\(^2\) Id.
\(^3\) The original Guidelines were effective October 1, 1987, and appear at 33 Ohio St. 3d xxvi (West Supp. 1989).
The purpose of this Note is to clarify the ramifications of Ohio's Child Support Guidelines and the 1988 Amendments. An examination of Ohio's child support law will necessarily begin with the background of federal child support legislation beginning with the Social Security Act of 1935. Mandates from this legislation, and its succeeding amendments over fifty years, are followed resulting in an examination of Ohio's Child Support Guidelines. Next, this Note focuses on the importance of judicial discretion and its role in the successful implementation of the Guidelines as well as whether Ohio's Guidelines should be used as a rebuttable presumption or merely as an advisory standard. Also analyzed are such elements of Ohio's Guidelines as calculating income, making adjustments to income, calculating each parent's share of the support obligation, defining extraordinary expenses, comparing post-divorce living standards, and modification of child support orders, including an analysis of modification decisions under the Guidelines as well as under previous Ohio case law. This Note concludes with a legislative update of federal and state child support law.

II. HISTORICAL DEVELOPMENT OF CHILD SUPPORT LAW

A. Pre-1975

Under common law, the duty to support children rested primarily with the father. The father's support duty was based on both legal and moral grounds, and included the necessities of life, such as food, clothing, shelter, medical attention, and sometimes education. Some courts extended

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6 Martens v. Martens, 8 Ohio Misc. 178, 221 N.E.2d 617 (1966) (although the father is a minor, he must support himself, his wife and his minor children).

7 Pretzinger v. Pretzinger, 45 Ohio St. 452, 15 N.E. 471 (1887) (the duty to provide for his minor children was a principle of natural law and was also a law of the land). See also In re Mogus, 73 F. Supp. 150 (W.D. Pa. 1947) (“A husband and father has not only a moral and marital obligation in the eyes of God to provide for a wife and child, but an absolute legal obligation to make or provide proper maintenance and care.”). Id. at 152; Osborn v. Weatherford, 27 Ala. App. 258, 259, 170 So. 95, 96 (1936) (a father has a natural, moral, and legal obligation to support his child, an obligation recognized and demonstrated by even the higher order of animals).

8 See Children's Hosp. of Akron v. Johnson, 68 Ohio App. 2d 17, 426 N.E.2d 515 (1980) (a parent's duty to support his children clearly includes medical expenses); Calogeras v. Calogeras, 10 Ohio Op. 2d 441, 163 N.E.2d 713 (1959) (a father's duty to furnish "necessaries" during his child's minority includes college education expenses). But see Tille v. Finley, 126 Ohio St. 578, 186 N.E. 448 (1933) (a husband is not unconditionally liable for necessaries furnished his wife). See generally 59 AM. JUR. 2D Parent and Child § 44 (1987).
the support obligation to the mother if the father did not fulfill his duty.\textsuperscript{9} Today, many states have statutes requiring either or both parents to support or help support their children.\textsuperscript{10}

Prior to 1935, states were entirely responsible for providing support to children who were left destitute by their parents' death or desertion.\textsuperscript{11} Federal involvement in this support was virtually nonexistent.\textsuperscript{12} The industrial revolution and resulting urbanization of the United States left many families at the poverty level.\textsuperscript{13} Social welfare organizations, concerned with the increasing number of people living in poverty, encouraged passage of the Social Security Act of 1935.\textsuperscript{14} Influenced by these organizations and the effects of vast unemployment due to the Depression, Congress passed the Act in 1935.\textsuperscript{15} As categories of need arose in this country, this Act was amended.\textsuperscript{16} One of these early amendments was known as Aid to Families with Dependent Children \textit{[hereinafter AFDC]}.\textsuperscript{17} This Amendment was originally intended to provide widows and children of deceased or disabled men with welfare funds, but eventually it also came to serve low-income families where the father was voluntarily absent from the home.\textsuperscript{18}

\textsuperscript{9} Kinter v. Kinter, 78 Ohio App. 324, 65 N.E.2d 156 (1946) (a wife's duty to support her minor child arises when her husband fails or is unable to support the child). \textit{See also} Hunter v. State, 10 Okla. Crim. 119, 134 P. 1134 (Okla. Crim. App. 1913) (where a father was charged with having failed to supply his child with necessary food and clothing, the court held the offense to be against his wife. The court held that the child was not injured so much as the wife "[f]or upon his failure to provide for them she must"). \textit{Id.} at 1137.

\textsuperscript{10} \textit{See}, \textit{e.g.}, \textit{OHIO REV. CODE ANN. 3103.03 (Baldwin 1988); CAL. CIV. CODE \S 196 (West 1982); 48 PA. CONS. STAT. ANN. 131 (Purdon 1983-84); MICH. STAT. ANN. \S 25-244(3) (Callaghan 1974); N.Y. DOM. REL. LAW \S 32 (McKinney 1977)}. This note will be limited to discussing Ohio law only.

\textsuperscript{11} \textit{R. HOROWITZ \& H. DAVIDSON, LEGAL RIGHTS OF CHILDREN 28 (1984).}

\textsuperscript{12} \textit{C. ADAMS \& D. COOPER, A GUIDE FOR JUDGES IN CHILD SUPPORT ENFORCEMENT (A Kaye ed. 1982)}. The only federal involvement was the imposition of criminal remedies for nonsupport.

\textsuperscript{13} \textit{Comment, The 1981 AFDC Amendments: Rhetoric and Reality, 8 U. DAYTON L. REV. 81, 82-83 (1982).}

\textsuperscript{14} \textit{Social Security Act, supra note 5}. This Act was the first attempt at providing social insurance in our country. The major scope of the Act was to provide unemployment compensation to the many unemployed workers whose jobs were eliminated by the Depression. \textit{See generally E. WITTE, THE DEVELOPMENT OF THE SOCIAL SECURITY ACT (1962).}

\textsuperscript{15} \textit{Comment, supra note 13, at 82.}

\textsuperscript{16} \textit{See infra} notes 19-20.

\textsuperscript{17} 42 U.S.C.A. \S\S 601-15 (West 1983). A family receiving AFDC funds is one which receives welfare payments under Title IV-A. State participation in this federal program was encouraged by reimbursement to the states for any funds distributed to families in need where one parent was absent from the home. \textit{Note, Congress Demands Stricter Child Support Enforcement: Florida Requires Major Reforms to Comply, 10 NOVA L.J. 1371, 1378 (1986).}

\textsuperscript{18} \textit{C. ADAMS \& D. COOPER, supra note 12, at 5}. By 1980, only about four percent of the fathers of AFDC recipients in this country were deceased or disabled; the rest were absent fathers. The welfare situation in this country had become one of nonsupport of children by absent parents rather than one of nonsupport of children by disabled or deceased parents. \textit{Id.}
The federal government was soon faced with rapidly rising AFDC costs, due in large part to deserting parents. As a result, Congress passed amendments in 1950 and 1967 to strengthen the child support legislation. Unfortunately, these efforts failed to curtail the rising child support costs.

B. 1975 Amendments

By 1975, the AFDC budget had skyrocketed. Congress, feeling it unfair that the American taxpayer should shoulder the burden of deserting fathers, passed Title IV-D of the Social Security Act. Title IV-D's purpose was to "enforce the support obligations owed by absent parents to their children and the spouse (or former spouse) with whom the children are living, locating absent parents, establishing paternity, and obtaining child and spousal support." Title IV-D was designed as a partnership between the state and federal governments and left basic responsibility for collection of child support to the states. The federal government monitored and evaluated state programs.

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19 Social Security Amendments of 1950, ch. 809, § 321(b), Pub. L. No. 81-734, 64 Stat. 549 (codified as amended at 42 U.S.C.A. § 602(a)(11) (West Supp. 1989)). These Amendments to the Social Security Act of 1935 required state welfare agencies to notify law enforcement officials when a child of an AFDC family had been deserted by a parent so that the parent could be located and persuaded to support the child. Id.


21 R. Horowitz & H. Davidson, supra note 11, at 29. "In many states, however, the federal legislation only resulted in state child support enforcement agencies that looked good on paper but actually did little or nothing." Id. See also Comment, Federal Law and the Enforcement of Child Support Orders: A Critical Look at Subchapter 4 Part D of the Social Services Amendments of 1974, 6 N.Y.U. Rev. L. & Soc. CHANGE 23, 25 (1976) (inadequate child support enforcement was the result of a combination of factors including inadequate state funds to carry out the enforcement, lack of monetary incentive for compliance with the federal law, and overcrowded family courts).


25 Id.
Although Title IV-D helped establish and enforce child support orders, the nationwide support problem remained. In 1981, only $6.1 billion was collected of $9.9 billion owed in child support. The support problem remained because Title IV-D failed to dictate specifically how each state was to proceed in its support collection. Consequently, some states implemented successful support collection programs and others did not. Due to this lack of uniformity among the states, many parents avoided making court-ordered support payments because many states lacked necessary enforcement procedures or laws to collect payments.

C. Child Support Enforcement Amendments of 1984

Concerned with the grave societal and economic effects of nonpayment of child support, Congress directed the Senate Committee on Finance to amend Title IV-D of the Social Security Act. The members of Congress felt that every child in the United States who needed assistance in receiving financial support from his or her parents should be offered that assistance regardless of the child's circumstances. Congress also felt that many children were not receiving this assistance. Additionally, child support awards throughout the country were too low. As a result, many children and custodial parents were thrust into poverty or forced to suffer a seriously diminished standard of living while the non-custodial parent often experienced an improved standard of living.

The result of the mandate to the Senate Committee on Finance was the Child Support Enforcement Amendments of 1984. The 1984 Amendments almost completely overhauled Title IV-D. The Amendments required each state to implement effective enforcement procedures and to increase the overall effectiveness of their AFDC and non-AFDC programs as a condition to continued federal aid. The Amendments also attempted to establish a uniform enforcement procedure for all states to ensure increased compliance with child support orders throughout the nation.

26 Note, supra note 17, at 1380 n.67 (citing NATIONAL CHILD SUPPORT ENFORCEMENT CENTER, U.S. DEPT OF HEALTH AND HUMAN SERVICES, Secretary Heckler Announces Child Support Initiative, CHILD SUPPORT REP. (special ed.) Aug. 1984 at 2).
27 S. REP. No. 387, supra note 24, at 2397.
28 Note, supra note 17, at 1380.
29 S. REP. No. 387, supra note 24, at 2397.
30 Id.
31 Dodson, A Guide to the Guidelines, 10 FAM. ADVOC., Summer 1988, at 4, 5. "Child support award levels were perceived as unfair and as not treating similarly situated parties similarly." Id. at 4.
33 Id. at § 666(a).
34 Id.
Under the 1984 Amendments, each state was required to enact laws establishing, among other things, the following compliance procedures with respect to IV-D cases: (1) mandatory wage withholding from an absent parent’s paycheck where the arrearage reached an amount equal to one month’s support payment; and (2) state income tax refund offsets for a non-custodial parent who owed overdue child support payments. While the main thrust of the legislation was a series of mandatory remedies to improve enforcement of existing support obligations, perhaps the most significant mandate to come out of the 1984 Amendments was the requirement that each state develop a set of guidelines to be considered by judges and others authorized to order support awards.

Federal law, prior to these 1984 Amendments, required each state to have effective programs for establishing paternity, securing court orders for child support, and enforcing child support orders. Federal law did not, however, address the adequacy or reasonableness of court-ordered support payments; this was left to the discretion of the state court judges. This discretionary approach to the establishment of child support payments often led to unrealistic awards much lower or much higher than necessary to adequately provide for the needs of the child. Although the 1984 Amendments left the determination of guidelines to each state’s discretion, it was the view of the drafters of the Amendments that the mere existence alone of a mandatory set of guidelines in each state would necessarily tend to improve the reasonableness and equity of the court-ordered support payments. In recognition of the tremendous effort involved in the establishment of new state guidelines, the drafters of the 1984 Amendments allowed three years (until October, 1987) for state compliance.

III. OHIO CHILD SUPPORT LAW PRIOR TO THE 1984 AMENDMENTS

The requirements of the 1984 Amendments alerted the states to certain inadequacies in their existing child support programs and Ohio was no exception. Prior to the 1984 Amendments, support award decisions and modification decisions were based solely upon case and statutory law. An

35 S. REP. No. 387, supra note 24, at 2398. Other compliance procedures include imposition of liens against real and personal property for amounts of overdue support, making available to any consumer credit bureau, upon request, information regarding the amount of overdue support owed by an absent parent, and expediting the process for determining paternity and obtaining and enforcing child support orders. Id.

36 42 U.S.C.A. § 667 (West Supp. 1989). “Each state, as a condition for having its state plan approved under this part, must establish guidelines for child support award amounts within the state. The guidelines may be established by law or by judicial or administrative action.” Id.

37 See supra note 23.

38 S. REP. No. 387, supra note 24, at 2436.

39 Id.

40 Id. The apparent logic was that even imperfect guidelines were better than no guidelines.

example of often relied upon case law is *Martin v. Martin*\(^{42}\) in which the court held that Ohio Revised Code section 3109.05\(^{43}\) applies to modification proceedings as well as initial proceedings and that a parent's remarriage and resulting new obligations should be considered by the court along with the other factors delineated in Ohio Revised Code section 3109.05 in contemplating a change in a previous child support order.\(^{44}\) This decision was monumental as it recognized for the first time "second families" and the resulting financial obligations for the non-custodial party.

Another example of often relied upon Ohio case law is *Cheek v. Cheek*,\(^{45}\) where the court held that the determination of child support requires a two step procedure: (1) the determination of the amount necessary for the support of the child in the standard of living he or she would have enjoyed had the marriage continued; and (2) an equitable division of this amount between the parents based upon the financial resources and needs of both parents.\(^{46}\)

Regarding Ohio's statutory law, the husband has a duty to support himself, his wife, and his minor children during a marriage.\(^{47}\) "If he is unable to do so, the wife must assist him so far as she is able."\(^{48}\) If the parents are divorced, however, the court may order either or both parents to support or help support their children.\(^{49}\) Prior to 1974, the Ohio statute regarding child support was brief and vague, leaving broad discretion to the trial judge.\(^{50}\) In 1974, Ohio Revised Code section 3109.05 was clarified to include a list of relevant factors to be considered by the court in determining the amount reasonable and necessary for child support.\(^{51}\) Al-

\(^{42}\) 69 Ohio App. 2d 78, 430 N.E.2d 962 (1980).

\(^{43}\) OHIO REV. CODE ANN. § 3109.05 (Baldwin 1988).

\(^{44}\) 69 Ohio App. 2d at 80-81, 430 N.E.2d at 964.

\(^{45}\) 2 Ohio App. 3d 86, 400 N.E.2d 831 (1982).

\(^{46}\) Id. at 86-87, 440 N.E.2d at 836. The Court also found that the trial court did not err in finding a substantial change in circumstances (step one) or in deciding for a substantial increase in child support (step two), but reversed with respect to the need for a fifty percent increase in child support as there was no evidence to support an increase of this size.

\(^{47}\) See, e.g., OHIO REV. CODE ANN. § 3109.03 (Baldwin 1988) (parental duty to support children).

\(^{48}\) Id.

\(^{49}\) See, e.g., OHIO REV. CODE ANN. § 3109.05(A) (Baldwin 1988).

\(^{50}\) OHIO GEN. CODE ANN. § 8034 (Anderson 1938). The language of the old Code included such vagueness as "the court may order either or both parents to support or help support their children, and may make just and reasonable order or decree permitting the parent who is deprived of the care, custody, and control of the children to visit them as the court may direct." Id.

\(^{51}\) OHIO REV. CODE ANN. § 3109.05 (Baldwin 1988). The list of relevant factors to be considered by the court in determining the amount reasonable and necessary for child support consists of the following:

(1) The financial resources of the child;
though the Ohio legislature provided a more definite framework for support award decisions, it still allowed trial judges broad discretion to frame the size of the support payment. This broad discretion often resulted in inequitable and unpredictable awards. This inconsistency in rulings made it apparent that some guidelines were needed. The guideline requirement of the 1984 Amendments filled that need.

IV. OHIO'S CHILD SUPPORT GUIDELINES

A. Generally

In 1985, the Ohio Supreme Court Advisory Committee on Child Support Enforcement began its work to establish child support guidelines as mandated by the 1984 Amendments to Title IV-D. The Committee operated under the belief “that the Guidelines must, at the very least, enable the court system to improve the equity and uniformity of awards and to eliminate the substantial amounts of unpaid child support obligations through effective enforcement of support orders.”

(2) The financial resources and needs of the custodial parent and of the non-custodial parent, when there is only one custodian; one custodian;
(3) The standard of living the child would have enjoyed had the marriage continued;
(4) The physical and emotional conditions of the child;
(5) The financial resources and needs of both parents, when there are joint custodians;
(6) The educational needs of the child and the educational opportunities that would have been available to him had the circumstances requiring a court order for his support not arisen.

Id.

Id.

52 Id.

53 Milligan, Guidelines in Alimony and Support for Ohio, 52 OHIO B. 2009 (1979). Judge Milligan explored consistency of fiscal matters in divorce by presenting a hypothetical case (Brown v. Brown) to two hundred attorneys and judges throughout Ohio. Twenty-eight judges “decided” the case. On the issue of child support, the orders established by the individual judges ranged from $60 per month to $400 per month for the parties’ child. Id. at 2012. See also Brackney, Battling Inconsistency and Inadequacy: Child Support Guidelines in the States, 11 HARV. WOMEN'S L.J. 197, 200 (1988) (a study showed that fathers were ordered to pay anywhere from six percent to thirty-three percent of their incomes for one child and from approximately six percent to forty percent for two children — all in the same Colorado district).

54 39 Ohio St. 3d xlv (1988). The Supreme Court Advisory Committee on Child Support Enforcement was formed by Former Chief Justice Frank D. Celebrezze at the request of Senator Neal F. Zimmers, Chair of the Ohio Senate Task Force on Women Single Heads of Households. The Committee continued to work under the direction of Chief Justice Thomas J. Moyer. Id.

55 Id.
The resulting Rules of Superintendence for Courts of Common Pleas (Child Support Guidelines) became effective October 1, 1987. By October 1, 1988, amendments to the Child Support Guidelines had been adopted by the Ohio Supreme Court and were in effect. Both the Amendments and the original Guidelines are consistent with the relevant factors to be considered by the courts in determining child support payments as set forth in Ohio Revised Code section 3109.05.

The Ohio Child Support Guidelines are based on the Income Shares Model, which purports that the child should receive the same proportion of parental income as he or she would have received had the parents continued to live together. Applying this Model, Ohio's Child Support Guidelines calculate child support as each parent's share of the support order based upon their incomes.

B. Judicial Discretion

The Guidelines were designed to be applied to a broad range of cases and to be used as a starting point in establishing child support orders. They were to be considered along with appropriate statutory law in establishing support or modification orders. The Guidelines gave the court

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56 33 Ohio St. 3d xxvi (1987).
57 39 Ohio St. 3d xliv (1988). The Amendments were due to a combination of public reaction to the Guidelines and the courts' experiences in implementing them. The Guidelines were a shock to many non-custodial parents whose support payments were in many cases doubled. Judges were often strictly adhering to the Guidelines; their discretion was often not being used in deviating from the Guidelines. The Amendments are an attempt to resolve these problems by clarifying situations in which judges may deviate from the Guidelines. Interview with Judge John J. Leskovansky, Chairman of The Supreme Court Advisory Committee on Child Support Enforcement, in Youngstown, Ohio (Nov 30, 1988) [hereinafter Interview].
58 See supra note 51.
59 The Income Shares Model was developed by the Child Support Guidelines Project of the National Center for State Courts, under a grant from the U.S. Office of Child Support Enforcement. The Income Shares Model is based on identification through economic study of how much is spent by parents on children in intact families at different family income levels. Once a specific dollar amount is identified for a particular income level, that dollar amount is deemed an appropriate amount to be spent on the children after divorce. This amount is prorated between the parents in proportion to their incomes. The non-custodial parent is ordered to pay his or her share to the custodial parent as child support and the custodial parent is presumed to spend his or her amount directly on the child. Dodson, supra note 31, at 7. For more information on the Income Shares Model and the economic basis for the Ohio Child Support Guidelines, see R. WILLIAMS, DEVELOPMENT OF GUIDELINES FOR ESTABLISHING AND UPDATING CHILD SUPPORT ORDERS: INTERIM REPORT (1985). See also T. ESPENSHADE, INVESTING IN CHILDREN: NEW ESTIMATES OF PARENTAL EXPENDITURES (1984).
60 39 Ohio St. 3d xlv, xlvii (1988).
61 Id.
broad discretion in deviating from the Guidelines when their application would result in inequity to the children or one of the parties.\(^{62}\) Although broad discretion was granted to the court in deviating from the Guidelines, there was no attempt to guide the court in what might require these deviations.

The Amendments to the Ohio Child Support Guidelines clarify the language of the Guidelines by adding a list of circumstances that may be considered in deviating from the Guidelines.\(^{63}\) The circumstances are as follows:

(a) Special and unusual needs of the children;
(b) Obligation for minor or handicapped children (other than step-children) not of this marriage or relationship;
(c) Other court-ordered payments;
(d) Extended or diminished times of visitation or extraordinary costs associated with visitation;
(e) Mandatory deductions from wages (such as union dues) other than taxes, social security or retirement in lieu of social security;
(f) Tax consequences of child support, spousal support and division of marital property;
(g) Disparity in income between parties or households;
(h) Benefits either parent receives from remarriage or sharing living expenses with another;
(i) Significant in-kind contributions such as direct payment for lessons, sports equipment and clothing; and
(j) All other relevant factors included in sections 3109.05 and 3111.13 of the Revised Code and relevant case law.\(^{64}\)

The question arises as to whether the circumstances listed for possible deviation from the Guidelines are exclusive or merely a representative sample of such circumstances. The vagueness of the language leaves this question unresolved.

Because no guideline can anticipate each and every possible circumstance, no state has as yet adopted a mandatory guideline.\(^{65}\) States have chosen to treat their guidelines as either rebuttable presumptions or as advisory standards.\(^{66}\) Application of Ohio's Guidelines is unclear. The

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\(^{62}\) Id.
\(^{63}\) Id. at 1.
\(^{64}\) Id.
\(^{66}\) About half the states apply their guidelines as rebuttable presumptions and require the judge or hearing officer to make specific findings as to reasons for deviation. These states include Alaska, Arizona, California, Colorado, Dist. of Columbia, Illinois, New Jersey, and Wisconsin. States with guidelines that are advisory include Florida, Indiana, Kentucky, Michigan, and New York. Rebuttable presumptions derive from the premise that parents with approximately the same incomes and the same number of children should pay approximately the same child support, unless evidence is presented to overcome the presumption. This evidence must show that if the guidelines are imposed, either one of the parties or the child would be injured. For example, deviation from the guidelines may be allowed if a family member has extraordinary medical expenses or if one of the children has special educational needs. Smith, Grounds for Deviation, 10 FAM. ADVOC., Spring 1988, at 22-23.
Guidelines were originally to be applied as rebuttable presumptions; meaning they were to be applied unless it could be demonstrated that an inequitable outcome would result from their application.\textsuperscript{67} If the court deviated from the Guidelines it was required to provide findings of fact to substantiate the deviation.\textsuperscript{68} The 1988 Amendments to the Guidelines, however, provide for a seemingly less rigid application of the Guidelines. The Amendments specify that where the award deviates from the Guidelines, the court must only provide a brief statement substantiating its deviation.\textsuperscript{69} This change in language regarding application of the Guidelines could be viewed as an advisory standard to be considered by judges and hearing officers rather than a rebuttable presumption to be followed by them. To ensure consistency in the use of Ohio's Guidelines throughout the state, the application issue requires clarification.

Although some of the language in the amended Guidelines is unclear, one thing is very clear: the key to the successful application of Ohio's Guidelines is the use of judicial discretion. Blindly following the Guidelines could result in awards that are harsh and inequitable. Judges and hearing officers must free themselves from strict adherence to the Guidelines, which are nothing more than a mathematical formula. They are but a framework and a place to begin. As situations occur which call for deviation from the "formula," judges and hearing officers must factor in the human element.

In addition to judicial discretion, successful implementation of the Guidelines depends upon responsible lawyering. Attorneys must assume responsibility for providing sufficient evidence to the court to substantiate deviation from the Guidelines if the situation calls for deviation. To say deviation is in order because a client cannot afford to pay the support order is not enough. Unless a good reason for deviation exists, the court must not deviate. Effective lawyering necessitates providing this reason to the court.\textsuperscript{70}

\textbf{C. Application of the Guidelines}

1. Generally

Basically, the Guidelines are to be applied to three possible obligor groups: (1) those with gross income of less than $500 per month; (2) those with combined parental gross income of between $500 per month and $10,000 per month; and (3) those whose combined parental gross income is over $10,000 per month.\textsuperscript{71} For obligors with gross income of less than

\textsuperscript{67} 33 Ohio St. 3d xxvi (1987).
\textsuperscript{68} \textit{Id.}
\textsuperscript{69} 39 Ohio St. 3d xlvi (1988). \textit{See also} Interview, \textit{supra} note 57.
\textsuperscript{71} 39 Ohio St. 3d xlvi, xlvii (1988).
$500 per month, the Guidelines provide for a case-by-case evaluation of resources and living expenses of the obligor, as well as the number of children due support, in determining a child support award. In determining this amount, the court must take into consideration the obligor’s need for self-support at a minimum subsistence level, but the Guidelines emphasize that a specific amount should always be ordered unless a total inability to pay is demonstrated. For cases where the combined parental gross income is over $10,000 per month, the Guidelines also provide for a case-by-case determination of child support. In cases of combined parental gross income of between $500 per month and $10,000 per month, the Guidelines provide calculated amounts of child support based upon income, adjustments to that income and each parent’s percentage of that income. The focus of this Note will be on this income group of between $500 per month and $10,000 per month to which the Guideline calculations apply.

2. Calculating Income

The first step in calculating a child support award under Ohio’s Guidelines is to determine the total annual gross income for each parent.

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72 Id.

73 Id. See Kulcsar v. Petrovic, 20 Ohio App. 3d 104, 484 N.E.2d 1365 (1984) (direct evidence of value in support of an award of only $8 per week per child in satisfaction of a father’s duty to provide for his children is not required). See also McCauley v. McCauley, No. 79-AP-727, slip op. (Ohio 10th Dist. Ct. App. Jan. 29, 1980) (to have an abuse of discretion in a child support award, there must be a showing of an inability of the non-custodial parent to contribute even a nominal sum along with a showing that the custodial parent is able to support the child without help).

74 39 Ohio St. 3d xlv, xlvii (1988), 61 Ohio B. A-25, A27 (1988). For cases where combined gross income of the obligor is higher than $10,000 per month ($120,000 per year), “[C]hild support should be determined on a case-by-case basis based on need, standard of living, all other statutory requirements of sections 3109.05 and 3111.13 of the Revised Code, and relevant case law.” Id.

75 See generally 39 Ohio St. 3d xlv (1988).

76 Id. at xlvii. Although many guidelines use the concept of net income in determining child support awards, Ohio’s Income Shares Model is based on gross income. Gross income is defined by the Guidelines as “earned or unearned” and includes but is not limited to income from salaries, wages, overtime, commissions, royalties, tips, bonuses, rents, dividends, severance pay, pensions, interest, trust income, annuities, social security benefits, workers’ compensation benefits, unemployment insurance benefits, disability insurance benefits, and spousal support actually received from a person not a party to the order.

Id. at xlvii. The amount of overtime or bonuses included in gross income is found by computing the average of the three years prior to the payment of child support. This average is then included in gross income unless it is more than the overtime or bonuses earned in the most recent year in which case the most recent year amount is used. Id. For more information on determining what should be included in income see Gold-Bikin, Defining Income is the Key to Effective Lawyering, 10 Fam. Advoc., Spring 1988, at 13. Earnings and income must be verified with sufficient documentation. Suitable documentation includes pay stubs, employer statements, receipts and expenses if self-employed, and copies of the most recent
Under the Guidelines, income is defined as "actual gross income of the parent, if employed to full capacity, or potential income if unemployed or underemployed." Income may also be imputed to any significant non-income producing assets of either parent. Additionally, included in gross income are income from self-employment, business interests whether sole proprietorship, partnership or corporation, and rents. Excluded from gross income are "benefits received from means-tested public assistance programs, including but not limited to Aid to Families with Dependent Children (AFDC), Supplemental Security Income (SSI), Food Stamps, General Relief, and child support received for children not of this marriage."


Potential income is a form of gross income as defined by the Guidelines. If a parent is voluntarily unemployed or underemployed, the Guidelines grant the trial court discretion in determining whether to impute income to that person based on potential income and probable earnings. This imputed income is then used as a basis for a child support award. Employment potential and probable earnings should be based on the obligor's recent work record, qualifications, job opportunities, and earning levels in the community. At xlvii. Imputing income is used to encourage parents to meet their child support obligations. Compare In re Dissolution of Marriage of Sandor, No. 10043, slip op. (Ohio 10th Dist. Ct. App. July 1, 1981) (a court may suspend support payments when the father loses his job) with Smith, n.k.a. Farmer v. Smith, 12 Ohio Misc.2d 22, 467 N.E.2d 913 (1983) (when attempting to lower or suspend child support payments due to loss of employment, the party fails to show a change in circumstances justifying such lowered or suspended payment where the employment was not more than a year and the party failed to show (1) that he quit for a good cause, (2) that he was laid off because of lack of work, or (3) that chances for new employment were highly unlikely). See also Hanney v. Hanney, No. OT-81-25, slip op. (Ohio 6th Dist. Ct. App. May 7, 1982) (take-home pay is not necessarily the equivalent of earning abilities of the parties when determining the amount of a child support obligation).

While investments in tax-free holdings may be beneficial for estate planning, they are not an acceptable way to avoid paying child support. Such tax-free investments may result in a lower yield, therefore, a higher return may be imputed for support purposes. The current rate for long-term treasury bills, or some other appropriate rate determined by the court, is the rate to be used for imputing such non-performing assets. See generally Gold-Bikin, supra note 76, at 14.

To evaluate gross income of such interests, gross receipts minus ordinary and necessary expenses incurred in generating such income are used. The Guidelines specifically exclude from ordinary and necessary expenses "amounts for depreciation expenses or other non-cash deductible items allowable by the Internal Revenue Service." The Guidelines also require that significant "reimbursement or in-kind payments received by a parent from self-employment, operation of a business, or rents," such as a company car, free housing, reimbursed meals, or other benefits, be included as income if they reduce personal living expenses. See also Gold-Bikin, supra note 76, at 14 (determining the true income for one who is self-employed is an art).
Use of gross income as a basis for child support awards does not represent a true reflection of a parent's disposable income and therefore the parent's ability to pay. Income taxes and social security deductions in many instances reduce a parent's available spendable income by a substantial amount. Perhaps net income would be a more accurate basis for support orders. Computation of gross income may be easier for the court but the parent may be forced to assume an unfair financial burden.\textsuperscript{81}

3. Adjustments to Income

Once total annual gross income of each parent is determined, certain adjustments to this gross income must be made before a child support award can be established. The annual amount of pre-existing court-ordered child support paid by either parent should be deducted from that parent's annual gross income.\textsuperscript{82} A second adjustment to each parent's annual gross income involves health insurance costs. If either parent carries health insurance for the children to whom support is due, the annual premium for that coverage should be deducted from that parent's annual gross income.\textsuperscript{83} The Guidelines also provide for a third adjustment to each parent's annual gross income for minor children living with either parent who were born to that parent and another parent.\textsuperscript{84} The amount of this deduction is calculated by multiplying the number of children by the federal income tax exemption and subtracting from this amount any child support received for the year. This amount may not exceed the federal tax exemption.\textsuperscript{85} A fourth adjustment to each parent's annual gross income is annual court-ordered alimony paid to a former spouse.\textsuperscript{86} These four possible adjustments to each parent's annual gross income are added together to form the total gross income adjustment and when subtracted from each parent's total annual gross income, yield each parent's adjusted annual gross income.\textsuperscript{87} Here again, an attorney must be diligent in itemizing all allowable adjustments to gross income to ensure a fair representation of a parent's income.

\textsuperscript{81} Dodson, \textit{supra} note 31, at 8.
\textsuperscript{82} 39 Ohio St. 3d xlv, liv (1988) (line 7 of the Worksheet). This court-ordered child support may be deducted as long as the party can verify it with appropriate documentation. \textit{Id.} at xlviii.
\textsuperscript{83} \textit{Id.} at liv. However, if the employer provides coverage, only the employee portion may be deducted. \textit{Id.}
\textsuperscript{84} \textit{Id.} (line 8 of the Worksheet).
\textsuperscript{85} \textit{Id.} For example, suppose one of the parents was previously married and had two children both of whom are living with this parent. Suppose also that the federal income tax exemption is $1950 per child and that this parent received $3000 in child support for the year for the two children. The adjustment, in this case, would be $900 (2 x $1950 - $3000).
\textsuperscript{86} \textit{Id.} (line 9 of the Worksheet).
\textsuperscript{87} 39 Ohio St. 3d xlv, lv (1988).
4. Calculation of Each Parent's Share of the Support Obligation

Ohio's Child Support Guidelines provide a set of worksheets and tables to be used in determining each parent's share of the child support obligation.8 Once each parent's adjusted annual gross income is established, a determination must be made as to what proportion each parent's individual income is to their combined income.9 This is done by dividing each parent's adjusted annual gross income (income minus adjustments) by their combined adjusted annual gross income (found by adding their individual adjusted annual gross incomes).90 These percentages represent each parent's share of the total annual support obligation.91

To finalize the computation of each parent's share of the total annual support obligation, a three-step process remains. First, the basic combined child support obligation is determined by referring to the Basic Child Support Schedule.92 By selecting the appropriate columns for combined adjusted annual gross income and number of children due support, this basic support obligation can be found.93 Second, annual work-related child care is added to this basic support obligation to give the total annual support obligation to be shared by the parents.94 Third, each parent's share of the support obligation (percentage found above) is multiplied by the total annual support obligation to yield each parent's support obligation.95 Although each parent is assigned a support obligation, the custodial parent is presumed to spend his or her assigned amount directly on the child and the non-custodial parent owes the calculated amount as child support.96

In the case of split custody, where each parent has custody of at least one of their children, the Guidelines provide a separate child support computation worksheet.97 A support payment is computed for each parent for the child or children in the other parent's custody and the obligations are then offset. The parent owing the larger amount pays the net amount to the other.98

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8 Id. at lii. Included in the Guidelines are a Basic Child Support Schedule, a worksheet to be used in situations of sole custody, and a worksheet to be used for split custody.

9 Since Ohio's Child Support Guidelines are based upon the Income Shares Model, a particular amount of child support must be prorated between the two parents in proportion to their incomes. In order to prorate this amount between the two parents, a determination must first be made as to each parent's income as a percentage of their combined incomes. Dodson, supra note 31, at 7.

92 39 Ohio St. 3d xlv, lviii (1988) (line 14 of the Worksheet). For example, suppose the wife's adjusted annual gross income is $22,500 and the husband's adjusted annual gross income is $31,500. Their combined adjusted annual gross income is $54,000 ($22,500 + $31,500). The wife's income as a percentage of their total income is 42% ($22,500 divided by $54,000) and the husband's income as a percentage of their total income is 58% ($31,500 divided by $54,000).

9 Id.

96 Id. at lii. Incorporated into the table is a "self-support reserve" for the obligor. This "reserve" serves as a minimal living standard, "below which the court at its discretion determines only a minimum order." Williams, supra note 65, at 294.
The annual work-related child care amount is found by deducting the federal tax credit from the annual work-related child care cost. *Id.*

For example, suppose the parents' combined adjusted gross income is $54,000, they have two children, their annual work-related child care (after deducting the tax credit) is $1,300, the wife's income is 42% of their combined adjusted gross income, and the husband's income is 58% of their combined adjusted gross income. Applying the child support schedule for two children and a combined income of $54,000, a basic combined child support obligation of $10,788 results. Adding the annual work-related child care ($1,300) to the basic combined child support obligation ($10,788) results in a total annual child support obligation of $12,088. To determine each parent's share, multiply the total annual support obligation by their respective percentages of combined income. The wife's share is $5,076.96 ($12,088 x .42) and the husband's share is $7,011.04 ($12,088 x .58).

*Id.* at xlix.

*Id.* at lvii.

39 Ohio St. 3d xlv, lvii (1988).
5. Extraordinary Expenses

Few child support guidelines provide for all expenses that could possibly occur in raising children. Once a basic child support obligation is established, additions to this amount may be necessary to cover extraordinary expenses. Extraordinary expenses may be best defined as "any large, discrete, legitimate child-rearing expense that varies greatly from family to family or from child to child."\(^9\)

"Reasonable and ordinary uninsured medical and dental expenses"\(^10\) have been included in the Guideline calculations and should not be added to the child support obligation.\(^10\) However, extraordinary medical and dental expenses have not been included in the Guidelines. Such expenses should be considered in adjusting the child support order.\(^10\) Examples of extraordinary expenses include orthodontia, psychiatric and psychological care, optical care, and special educational needs of the child.\(^10\)

Since extraordinary medical and educational expenses are often a normal part of child-rearing, the non-custodial parent must share in the obligation. If these extraordinary expenses of raising children are not provided for in the support order, the burden of their payment will necessarily fall on the custodial parent.\(^10\)

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\(^9\) Id. at xlix. See generally Goldfarb, _Dealing With Extraordinary Expenses_, 10 _FAM. ADVOC.,_ Spring 1988, at 38 (extraordinary expenses can, in some cases, exceed all other costs of raising children and should therefore be addressed in every child support order).

\(^10\) Goldfarb, _supra_ note 99, at 38. For examples of extraordinary expenses, see _infra_ note 104 and accompanying text.

\(^10\) 39 Ohio St. 3d xlv, xlix (1988).

\(^10\) _Id._

\(^10\) _Id._ It may be appropriate to prorate the extraordinary expenses between the parents based upon their respective incomes. If, however, there is a great disparity between their incomes, another method may be needed, such as exempting cases from the guidelines which involve extraordinary expenses and deciding them on a case-by-case basis, or reducing the income of the parent paying the expense by the amount paid before calculating the support award. Goldfarb, _supra_ note 99, at 38.

\(^10\) Goldfarb, _supra_ note 99, at 40. The category of extraordinary expenses includes the large unreimbursed medical bills known to many families (orthodontia and optical care are often not included in employee insurance plans). An "objective cost-based definition is clearer and more comprehensive" than a definition based on type of illness or type of medical care involved. _Id._ For example, Colorado's guidelines state "[extraordinary medical expenses are uninsured expenses in excess of $100 for a single illness or condition.]" _COLO. REV. STAT._ § 14-10-115(12)(6) (1987). See also Sterbling v. Sterbling, 35 Ohio App. 3d 68, 519 N.E.2d 673 (1987) (a child's psychological treatment and counseling, due to post-divorce interparent conflict, is an extraordinary expense and should be shared by the parents); Gorman v. Gorman, 28 Ohio App. 3d 85, 501 N.E.2d 1234 (1986) (the trial court should have specifically ordered the child's orthodontia expense); Schrago v. Schrago, No. 49347, slip op. (Ohio 8th Dist. Ct. App. Dec. 19, 1985) (in child's need for special schooling, the court ordered the father to pay $12,000 for such expense).

\(^10\) Goldfarb, _supra_ note 99, at 40.
The Guidelines list explicitly such extraordinary expenses as uninsured medical and dental expense and provide for "other expenses including private education in appropriate cases."\textsuperscript{106} The definition of these "other expenses" is unclear. The question of whether credit card debt, if an expense incurred by the family, qualifies as an extraordinary expense is unclear.\textsuperscript{107} Again, judicial discretion is necessary in deciding whether to deviate from the Guidelines in situations not expressly provided for in the Guidelines.

6. Comparison of Post-Divorce Living Standards

Once each parent's annual support obligation has been determined, Ohio's Guidelines provide for a comparison of each parent's gross household income after exchange of child support.\textsuperscript{108} "At this point, the Guidelines have done all that can be done on a standardized basis. Here, discretion at the local level must be used to translate the objectivity of the Guidelines into the reality in each case."\textsuperscript{109} A comparison of the post-divorce living standards is a viable source of justification for a deviation from the Guidelines.\textsuperscript{110} A comparison of post-divorce standards of living may reveal that the child does not enjoy the same standard of living he or she enjoyed before the marriage dissolved.\textsuperscript{111} In fact, the child may go from rags to riches upon visiting the non-custodial parent, or be forced to seek employment or cancel extra-curricular activities due to the divorce and the resulting lowered standard of living for the child.\textsuperscript{112} A dramatic disparity in standard of living results is often evidenced by the non-custodial parent's smaller household having more disposable income after the divorce than the custodial parent's larger household.\textsuperscript{113}

\textsuperscript{106} 39 Ohio St. 3d xlv, xlix (1988).
\textsuperscript{107} Interview with James M. Wilsman, Attorney at Law, in Cleveland, Ohio (Jan. 30, 1989).
\textsuperscript{108} 39 Ohio St. 3d xlvi, lv (1988) (line 19 of the worksheet).
\textsuperscript{109} "A comparison of the post-divorce standards of living is a potent source of justification for a deviation." Id. See also Logsdon v. Logsdon, No. 80AP-919, slip op. (Ohio 10th Dist. Ct. App. July 21, 1981) (it is an abuse of discretion to order the mother to pay twenty-three percent of her meager weekly income of only $110 for child support).
\textsuperscript{110} Smith, supra note 66, at 24. "Comparison of the post-divorce standards of living is also a potent source of justification for a deviation. A sharp disparity in relative living standards may result where there is also a disparity in earning capacity of the parents." Id. See also Logsdon v. Logsdon, No. 80AP-919, slip op. (Ohio 10th Dist. Ct. App. July 21, 1981) (it is an abuse of discretion to order the mother to pay twenty-three percent of her meager weekly income of only $110 for child support).
\textsuperscript{111} See supra note 59 and accompanying text.
\textsuperscript{112} Smith, supra note 66, at 24.
\textsuperscript{113} Id. at 35. One method of comparing post-divorce living standards is through economic evidence measured by recognized equivalence scales. One such equivalence scale is the Bureau of Labor Statistics Revised Equivalence Scale for Estimating Equivalent Incomes for Budget Costs by Family Type (U.S. Dept. of Labor, B.L.S. Bulletin No. 1570-2, 1968). The B.L.S. Equivalence Scale shows the percentage of the predivorce income needed to maintain the standard of living enjoyed before divorce in post-divorce households of different sizes. For example, according to the B.L.S. Scale, if divorce leaves the custodial parent with two children in one household and the non-custodial parent living alone in another,
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"The purpose of the guidelines is not to provide rigid devotion to a formula, but to ensure that children's financial needs are responsibly met by both parents." A pronounced disparity in living standards will call for judicial discretion in finding a justifiable deviation from the child support obligation assigned under the Guidelines. If the judge adheres strictly to the Guidelines and does not make appropriate adjustments, the resulting court-ordered award could be an inequity.

V. MODIFICATION OF THE SUPPORT ORDER

A. Generally

The main thrust of the Child Support Enforcement Amendments of 1984 was to improve compliance with child support orders. Statistics show, however, that compliance isn't the only matter affecting the support problem in this country. The statistics demonstrate that child support awards are often critically deficient when compared to actual costs of raising a child. A 1983 U.S. Census Bureau study indicates that the average child support order that year was $2290, or $191 per month and covered an average 1.7 children. A monthly support payment of $191 is but a fraction of the amount actually needed to raise 1.7 children. A monthly support payment of $191 covering 1.7 children has been estimated to be only twenty-five percent of what a family would spend on children in a middle-income household. These figures show an "adequacy gap" in child support orders relative to actual child-rearing expenditures. There are two components to this "adequacy gap." First,
initial child support orders are inadequate. Secondly, and more importantly, subsequent updating of child support awards is lacking in many instances. Orders that are more than a few years old are often inadequate due to such factors as inflation and changing circumstances of the parties.\textsuperscript{122}

To help eliminate this "adequacy gap," Ohio's Guidelines provide for modification of existing child support orders.\textsuperscript{123} The amended Guidelines provide that if the amount of an existing child support payment varies more than ten percent from the Guidelines, the trial court may consider this change of circumstance in determining whether all the changes of circumstance are substantial enough to warrant modification of the support order.\textsuperscript{124} The Guidelines further state "[t]he Court shall determine from applicable statutory and case law whether the change of circumstances is substantial and not contemplated at the time of the last prior order."\textsuperscript{125} However, if the court determines that a change in support is in order, it is not mandatory that the support order be modified to the amount called for in the Guidelines.\textsuperscript{126} Ohio's Guidelines do not provide for automatic periodic review and adjustment of support orders. To modify a child support order, one of the parties must petition the court for a change in the court-ordered support payment and the burden of proof is on the petitioner to show a sufficient change in circumstances to warrant a modification.\textsuperscript{127}

The change in language in the amended Guidelines is minimal, but the result of the change could be substantial. The original Guidelines stated that a variance in excess of ten percent from the Guidelines would be deemed to be a substantial change of circumstance justifying a modification. The amended Guidelines, however, give the court a choice in whether to consider the ten percent variance in its determination of whether a modification should be granted. The change in language could benefit obligors at the expense of obligees. An obligor's income could increase dramatically, therefore yielding a much higher support order

\textsuperscript{122}Williams, \textit{supra} note 65, at 284.

\textsuperscript{123}39 Ohio St. 3d xlv, xlvii (1988).

\textsuperscript{124}Id.

\textsuperscript{125}Id. See George v. George, No. 46432, slip op. (Ohio 8th Dist. Ct. App. Sept. 22, 1983) (before a child support order may be modified, changed circumstances not anticipated at the time of the original order must be shown).

\textsuperscript{126}39 Ohio St. 3d xlv, xlvii (1988). Just as in original support orders, judicial discretion should be used in deviating from the Guidelines in a modification order.

\textsuperscript{127}Brackney, \textit{Battling Inconsistency and Inadequacy: Child Support Guidelines in the States}, 11 HARV WOMENS L.J. 197, 212 (1988). See generally Development of Guidelines for Child Support Orders, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, OFFICE OF CHILD SUPPORT ENFORCEMENT (1987) (all states require a showing of changed circumstances from the original award before a modification in child support can be made. However, the states differ in the criteria for approving a modification. Delaware requires only a change of circumstances, defined as any change that would result in a different support award upon application of the guidelines. All other states require that the change be more than slight). Id. at 114.

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upon application of the Guidelines. Upon a request for modification by the obligee, however, the court has a choice of whether to consider this increase in income in its decision. The court's decision of whether to consider the variation must rest upon whether the child's living standard necessitates a modification. Here again, judicial discretion is the key to an equitable outcome.

Since Ohio's Guidelines direct the court to determine from applicable statutory and case law whether a change of circumstances is substantial and not contemplated at the time of the last prior order, an analysis of case law is necessary.

B. Modification Decisions Under Ohio's Guidelines

Recent modification decisions under Ohio's Child Support Guidelines include Kocher v. Blair which held that the trial court erred in increasing the father's child support obligation for his minor child from $35 to $104.99 per week. The court reasoned that although $104.99 was the amount arrived at by applying the Guidelines, the trial court failed to consider other elements under Ohio Revised Code section 3109.05. According to the appellate court, the referee failed to consider recent changes in the father's current family. The father's current wife had terminated her employment after giving birth to their child. This recognition of second family obligations is consistent with the amended Guidelines.

Another modification decision made under Ohio's Guidelines is Strance v. Strance. In Strance, the court denied the mother's motion for an increase in child support even though application of the Guidelines would have almost tripled the original order. In refusing modification, the Court considered the following: the parties' salaries had only increased three percent since the original order; the father was paying one-half the mortgage on the home in which the mother and children lived; the mother had chosen not to take a summer teaching job; the father had substantial marital debts; and the mother, although having paid off some marital debt, had incurred much post-marital debt. Again, the court's use of discretion in deviating from the Guidelines is consistent with the intent of the Guidelines.

A third modification decision made under Ohio's Guidelines is Rohrbach v. Rohrbach. The Rohrbach court held that modification of a support order is a two-step process. "The moving party must first show a change in circumstances. Second, based on these circumstances as well as any other relevant factors, modification may be fashioned by the court." The court reasoned that in order to satisfy the first step of this...
process, under the Guidelines, the moving party is only required to show a ten percent variance between the Guidelines and the existing order. The court held that the obligee satisfied this requirement as evidenced by a fifty-four percent variance. Since neither party presented evidence warranting a deviation from the Guideline computation, the court held the support order should be increased from $300 per month per child to $460 per month per child. Rohrbach demonstrates the court’s use of the Guidelines as a rebuttable presumption. Since there was no rebuttal presented to the amount generated by application of the Guidelines, the court applied the Guidelines’ amount.

These three cases represent modification decisions in which the courts first applied the Guidelines to obtain an initial support order and then used broad judicial discretion in determining whether deviation from the initial support order was appropriate. These were not decisions in which the courts blindly applied the Guidelines; rather, consideration of the needs of the children involved and an equitable outcome between the parties was given. This is the intent of the Guidelines.

C. Modification Decisions Under Ohio Case Law

One of the leading examples of applicable Ohio case law regarding modification of a support order is Cheek v. Cheek. The two-step modification requirement in Cheek is compatible with the Guidelines. A conflict exists, however, in whether once a change in circumstances has been demonstrated the court must consider the change in its redetermination of a support order. Since the Guidelines are to be applied to modification decisions along with applicable statutory and case law, Cheek can be used as support for parties seeking modification.

Other examples of applicable case law to be considered along with the Guidelines include cases relative to, among other factors, inflation, increased and decreased wages of the parties, and remarriage and its financial responsibilities. Following is a representative sample of such Ohio case law.

Inflation, accounting for much of the “adequacy gap,” plays havoc with child support awards. From 1976 to 1986, the real value of a $500 per month support award would have been reduced to only $261. In Bright v. Collins, the court held that the rate of inflation and its effect upon...
the parents' financial resources should be considered as a change in circumstances allowing the modification of a court-ordered support obligation. The court also acknowledged inflation as a factor to be considered in a request for modification in Neukam v. Neukam. The Neukam court held that the take-home pay of the parties, the cost of living index, and the other obligations of the parties could be taken into consideration. However, in Frierott v. Frierott, the court reasoned that inflation alone is not justification for modification of a support award. The custodial parent must also experience the effect of the inflation in increased costs to support the children. In Frierott, the custodial parent did incur additional expenses for food, fuel, and education thereby justifying the modification.

These three decisions involving inflation as a possible basis for modification are examples of Ohio case law offering strong support for modification under the Guidelines. Counsel for a parent seeking a modification due to inflation must first demonstrate that a variance from the Guidelines of more than ten percent exists. Then, a showing of increased costs to the custodial parent due to inflation and the support of these cases will present a strong argument for modification.

Increased or decreased earnings of the parents are also possible grounds for a child support order modification. Employees normally increase their earnings as they mature in the work force and parents often experience their most rapidly increasing earnings as they raise their families. If child support awards are not re-evaluated based upon these increased (or decreased) earnings, fair and equitable child support awards will not result.

The Appeals Court held in Bard v. Pelunis that a requested child support increase from $35 per week to $55 per week per child, just three months after the original child support order, was proper. The father, who was receiving unemployment benefits at the time of divorce, became gainfully employed and was earning $20,000 per year and had the use of an automobile with a $300 per month fair rental value. These resources of the father constituted a change of circumstances, according to the court, requiring a modification of support. In In re Machmer, the court

147 Id. at 426, 442 N.E.2d at 829.
149 Id. at 4-5, 468 N.E.2d at 392.
151 Id. See also Nichols v. Nichols, No. 992, slip op. (Ohio 11th Dist. Ct. App. May 28, 1982) (a child support modification, based solely upon the cost of living index, was an error of the trial court. Evidence of actual increases in child care expenses is also necessary).
152 Brackney, supra note 127, at 211. "The updating procedure should go beyond correcting for inflation though; it should also reflect changes such as increases in the parents' incomes and remarriages of the parties." Id.
153 Williams, supra note 65, at 314.
155 Id.
156 Id.
decided that a fifty percent increase in the father's income and a two-
hundred-fifty percent increase in the mother's income was sufficient to
establish a substantial change in circumstances.\footnote{Id. See also Dobeck v. Dobeck, No. 45484, slip op. (Ohio 8th Dist. Ct. App. April 28, 1983) (modification of the child support award to $40 per week was found proper where the non-custodial mother had remarried and doubled her income since the original child support order).} However, in \textit{Cooper v. Cooper},\footnote{10 Ohio App. 3d 143, 460 N.E.2d 1137 (1983).} the court ruled that, although an increase in income by a parent may be grounds for modification of a support order, the relevant factors of Ohio Revised Code section 3109.05 must also be considered along with the needs of the child.\footnote{Id. at 146, 460 N.E.2d at 1142. See also Brown v. Brown, No. 48054, slip op. (Ohio 8th Dist. Ct. App. Nov. 8, 1984) (for a proper modification of an existing child support order, the moving party must show not only a change in the financial circumstances of the parties, but also evidence of the current needs of the parties' children).} The court found no grounds for a reduction of child support in \textit{Swartz v. Swartz}\footnote{12 Ohio Misc. 2d 22, 467 N.E.2d 913 (1983).} where a mother, un-
employed at the time of divorce, subsequently began earning $520 per
month. The court reasoned that the possibility of the mother's employ-
ment could have been reasonably contemplated at the time of the existing
order and therefore was not a change of circumstances.\footnote{Id. at 23, 467 N.E.2d at 914. See also Szymkowiak v. Calabrese, No. L-81-
008 (Ohio 6th Dist. Ct. App. Oct. 16, 1981) (where the father had been laid off, it is proper to deny a motion for modification of child support. Since the father would not be held in contempt for non-payment while he remains unemployed, there is no need for modification).}

Although all four cases just discussed involved increased earnings, on
first observation one might think that the decisions are in conflict. Upon
closer observation, it can be seen that the courts did nothing more than
exercise broad judicial discretion in considering the modification requests. In \textit{Cooper} and \textit{Swartz}, the courts did not blindly decide for or against
modification based solely upon increased earnings, but also considered
other relevant factors. The decisions in these cases, involving increased
income as a basis for modification, are compatible with modification de-
termination under the Guidelines and offer strong support for or against
modification.

Decreased earnings of a parent may also be grounds for a child support
modification. In \textit{In re Dissolution of Marriage of Sandor},\footnote{10 No. 948 (Ohio 11th Dist. Ct. App. Sept. 30, 1981).} the Court held
that a father's support payment obligation may be suspended when he
loses his job. This loss of employment constitutes a change in the financial
condition of the parent and may therefore warrant a modification of the
support order.\footnote{Id. No. 10043 (Ohio 9th Dist. Ct. App. July 1, 1981).} In contrast, the court held in \textit{Smith v. Smith}\footnote{13 Id.} that the
required proof of change of circumstances was not shown where the obligor
lost his job. The obligor failed to show that he quit for good cause, that
he was laid off for lack of work, or that his chances for future employment
were unlikely.\footnote{14 Id.} A final example of modification regarding decreased
earnings is *Grand v. Grand*. In *Grand*, the court ruled that a voluntary action which limits an obligor's earnings cannot be used as grounds for avoidance of a child support obligation.  

Again, these cases involving decreased earnings as a basis for modification, demonstrate careful consideration by the court. Not every parent experiencing decreased earnings will be granted modification of an existing support order. Judicial discretion is the key. Application of the Guidelines along with such case law as *Sandor*, *Smith*, and *Grand* should be considered by the court in determining modification requests based upon decreased earnings.

Another factor to be considered by the court in modification of pre-existing support orders is the remarriage of the payor and the resulting financial responsibilities. When a child support modification results in a significantly increased obligation, the impact on a second family can be devastating. The second family often pays the price of modification. The traditional concept of a parent meeting his or her first family's needs before taking on the financial responsibility of a second family becomes less persuasive when the definition of the first family's needs changes in mid-stream. The modification may result in suffering by a different class of children.

Ohio's Guidelines have given the trial court the discretion to consider second families when setting initial child support orders or modification of such orders. Relevant case law includes *Martin v. Martin* which broke ground by recognizing second families in modification decisions. In *Brown v. Brown* the court overruled the trial court's increase in support owed by the father for his two minor children, thus recognizing his second family. The court ruled that the mother had remarried, had two other children and had not shown evidence of increased expenses incurred in raising the two children.

The decisions in *Martin* and *Brown* demonstrate the courts' consideration of mitigating circumstances in determining whether to modify existing support orders. This exercise of judicial discretion along with application of the Guidelines exemplifies proper determination of modification requests.

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168 Id.
169 39 Ohio St. 3d xlvi, xlvi (1988).
171 Id.
172 Id.
173 39 Ohio St. 3d xlvi, 1 (1988). "The following are circumstances that may justify deviation from the guidelines: ... (b) obligation for minor or handicapped children (other than stepchildren) not of this marriage or relationship ...." Id.
175 See text accompanying note 44. *But see* Zimmerman v. Zimmerman, No. CA87-08-111 (Ohio 12th Dist. Ct. App. June 20, 1988) (appellant's remarriage, while amounting to a changed circumstance, does not automatically require a modification of the existing support order).
177 Id.
Ohio case law is a necessary component of modification decisions. Application of the Guidelines provides a starting point for the determination. First, a deviation of more than ten percent from the Guideline amount is required. Judicial discretion then must be applied and Ohio case law provides the basis for this discretion.

VI. LEGISLATIVE UPDATE

Congress recently passed the Family Support Act of 1988. The purpose of the Family Support Act is to (1) revise the AFDC program so that its emphasis is on work, child support, and need-based family support benefits, (2) "to amend Title IV of the Social Security Act to encourage and assist needy children and parents under the new program to obtain the education, training, and employment needed to avoid long-term welfare dependence," and (3) to improve the welfare program otherwise, as necessary, ensuring that the new program will be more effective in meeting its goals.

Support guidelines receive considerable attention in the Family Support Act. The Act mandates, among other things, that guidelines are to be used as rebuttable presumptions. In order to rebut the presumption that the amount of the award resulting from the application of the guidelines is the correct amount of support to be awarded, a "written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State," must be given. As mentioned earlier in this Note, Ohio's Guidelines may not meet this requirement concerning rebuttable presumption usage of the Guidelines.

A second requirement of the Family Support Act is that guidelines are to be reviewed every four years to ensure that appropriate child support awards will result from their application. Ohio's Guidelines provide for review and revision "as necessary or as required by law by a Supreme Court Advisory Committee on Child Support Enforcement." Here again, Ohio's Guidelines may need to be revised to meet the review requirement.

180 Id.
181 Ohio has until March 1, 1990 to submit revised guidelines to the U.S. Dept. of Human Resources. Responsibility for revision of the guidelines was transferred from the Ohio Supreme Court to the Ohio legislature in July of 1989. It was agreed by both the court and the legislature that the guidelines would be subject to frequent federal revision and would therefore be better left to the legislature. Telephone interview with Harry Franken, Communication Director of the Ohio Supreme Court (Oct. 30, 1989). House Bill 591, pending in the Ohio House of Representatives, proposes the support guidelines in their original form. H.R. 591, 118th Ohio Gen. Assemb. (1989). [Author's Note: House Bill 591 was signed into law by Governor Richard Celeste and became effective April 12, 1990].
183 See text accompanying notes 66-69.
184 Family Support Act of 1988, supra note 4, § 103(b).
185 39 Ohio St. 3d xliv, xlvii (1988).
A third requirement of the Act is that by October, 1993, or earlier if the state elects, the state must have implemented a process for the periodic review and adjustment of support orders. If appropriate, the order must be adjusted according to the guidelines. Ohio's Guidelines do not provide for periodic review and adjustment of support orders.

Although the Family Support Act mandates the above provisions for periodic review of all support orders, it does not provide for how states should accomplish this formidable task. The Act leaves to the states the task of developing procedures for review and updating. A process for updating awards could involve the state in notifying parents of the new requirement and obtaining new income and other information regarding reapplication of the guidelines to the existing order. Also necessary would be the recalculation of all support awards based on the new information submitted by the parents and possibly a hearing to give either party the opportunity to contest the facts. Whether Ohio's courts and child support agencies, already saddled with overloads, are prepared to take on this Herculean administrative burden remains to be seen. Ohio's child support law is far from settled.

VII. CONCLUSION

Although child support law in Ohio is still unsettled, it was strengthened tremendously by its Child Support Guidelines in 1987 and the recent Amendments to the Guidelines. The Guidelines provide a starting point for determination of child support orders and modification of such orders. They must be used as a springboard for child support decisions, not as a crutch. The Guidelines are to be used in conjunction with statutory law, case law, and judicial discretion. At times, strict application of the Guidelines may be perfectly just. But divorce and child support involve very intense human feelings and circumstances that must necessarily pull and stretch the Guidelines. To achieve an equitable balance between the needs of the child and the needs of the parents, judges and hearing officers shoulder a tremendous responsibility in weighing those needs. Attorneys also share this responsibility. Unless a good reason for deviation from the Guidelines exists, a court must not deviate. Effective lawyering demands providing this reason to the court.

Ohio's Guidelines need refinement. However, even with refinement, child support law in Ohio will never be "justice by formula." The human element must be factored in. Support law in this state will not reach its full potential until judges and others in decision-making roles free themselves from a strict interpretation of the Guidelines. They must use the law and not let the law use them. Child support decisions are not black and white but involve many shades of gray. "The purpose of Guidelines is not to provide rigid devotion to a formula, but to ensure that children's financial needs are responsibly met by both parents."

Lois J. Cole

186 Family Support Act of 1988, supra note 4, § 103(c).
187 Id.
188 Id.
189 Williams, supra note 65, at 320.
190 Id.
191 Smith, supra note 66, at 23.