Child Support Determinations in High Income Families – A Survey of the Fifty States

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I. Introduction

The advent of statewide guidelines has brought greater predictability and consistency to child support awards for low and moderate-income earners. For high-income earners, however, the child support calculation is less certain. Because these high earners often have income sources beyond the usual W-2 paycheck, uncertainties begin with the initial determination of what is to be included in the calculation of income available for support – does it include stock options, deferred compensation, inheritances, or gifts? Once the income to be utilized is determined, the uncertainties continue because there are multiple methods of calculating the child support obligation of a person earning beyond the limits of the state's guideline. Add to that the extraordinary judicial discretion to deviate from formulaic results, and consistency among the states and predictability dissipates.

This article presents a survey of the income determination approaches among the states and the District of Columbia, and then examines the differing methods for calculating child support in high-income cases. Part II provides a historical background of child support guidelines and their respective calculation models. In Part III, this article turns to an examination of how different jurisdictions define "income," and how their varying definitions affect child support calculations. Part IV discusses the spectrum of high-income thresholds across the nation. Part V features a nationwide survey on how each jurisdiction calculates child support in high-income circumstances. Finally, Part VI investigates the most common factors utilized by courts to decide if a deviation from the guidelines is appropriate.

II. Background

Child support obligations first emerged as a product of state common law in the early nineteenth century. At the turn of the twentieth century, the obligation began to be formalized in state law, but the lack of uniform standards and procedures on a country-wide basis accounted for widely varied judicial determina-

tions of support awards from state to state.[1] The federal government took its first major step to standardize child support in 1974 when the Social Services Amendments to the Social Security Act of 1935 were issued. Section IV-D of the new Amendments conditioned states' receipt of federal funding on their providing specific child enforcement services.[2] This system was far from perfect, as varied procedures and extensive judicial discretion still yielded inefficient proceedings and inconsistent decisions. As a result, Congress enacted the Child Support Enforcement Amendments of 1984.[3] The Amendments required state guidelines to be based upon "specific descriptive and numeric criteria," but since they did not require judges to abide by them, unpredictable decisions continued.[4]

In an effort to further eliminate the inconsistencies, Congress promulgated the Family Support Act of 1988, which established the framework from which today's child support obligations developed. This revamped legislation limited judicial discretion and required states to establish specific minimum guidelines, which became "rebuttable presumptions" for support awards.[5] Today, states have generally adopted one of three guideline models: 1) An Income Shares model;[6] 2) A Percentage-of-Income model;[7] and 3) the Melson-Delaware model.[8]

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

2 Ashish Prasad, *Rights Without Remedies: Section 1983 Enforcement of Title IV-D of the Social Security Act*, 60 U. CHI. L. REV. 197 (1993).

3 Child Support Enforcement Amendments of 1984; Pub. L. No. 98-378, 98 Stat. 1305 (codified as amended at 42 U.S.C. § 667(a)(1988)).

4 Laura Raatjes, *High-Income Child Support Guidelines: Harmonizing the Need for Limits with the Best Interests of the Child*, 86 CHI.-KENT. L. REV. 320, 320-21 (2011).

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

6 *See, e.g.,* ARIZ. REV. STAT. ANN. § 25-320 (2015); IND. R. CT. CHILD SUPPORT RULES & GUIDELINES 1 (2010) [hereinafter IND. C.S.G], http://www.in.gov/judiciary/rules/child_support/; PA. R. CIV. P. 1910.16-1.

7 *See, e.g.,* ALASKA R. CIV. P. 90.3; NEV. REV. STAT. ANN. § 125B.070 (West 2003); TEX. FAM. CODE ANN. § 154.125 (West 2009).

8 *See, e.g.,* DEL. R. FAM. CT. R. CIV. P. RULE 52(c) (West 2015). Montana's guidelines are currently based on the traditional Melson calculation. *See* MONT. ADMIN. R. § 37.62.101.

The Income Shares model is based on the premise that children should receive the same proportion of parental income that they would have received if the family had remained intact, and that the cost to the parents should be apportioned between them based on their means. While there are slightly different, state-specific Income Shares models, parents generally contribute their portion of the support in proportion to their respective percentage of the parties' combined income. The calculation involves: 1) adding the gross or net income of the parents to determine their percentage share of total income; 2) applying the total income to the relevant support table to determine the cost; and 3) prorating the support obligation between the parents based on their proportionate shares of income.

The Percentage-of-Income model is a much simpler calculation that establishes a support award based on a statutorily specified percentage of the non-custodial obligor's income. For example, Mississippi's child support guideline reads:

> The following child support award guidelines shall be a rebuttable presumption in all judicial or administrative proceedings regarding the awarding or modifying of child support awards in this state:[9]

Number of Children Due Support	Percentage of Adjusted Gross Income That Should Be Awarded for Support
1	14%
2	20%
3	22%
4	24%
5 or more	26%

Finally, the Melson-Delaware model is the most complex model due to its three separate calculations required to determine the award. First, the court will subtract a "self-support" allowance from a parent's income. Second, the court determines the "children's primary support needs." Finally, the court adds an additional "standard of living" allowance to the primary support amount to determine the total support obligation.

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9 MISS. CODE. ANN. § 43-19-101(1) (West 2013).

Currently, thirty-nine of the fifty-one jurisdictions utilize the Income Shares model for their child support calculations.[10] Recent trends illustrate the rising popularity of the model, as eight jurisdictions have shifted from the Percentage-of-Income model to the Income Shares model since 2005.[11] Commentary indicates that this change is motivated by an interest in accounting for the contributions of both parents to the support of their children, as well as providing a more flexible model to account for changed circumstances in shared custody situations.[12] Only nine states follow the Percentage-of-Income model, while three follow the Melson calculation.

Contemporary, stricter guidelines across the nation appear to be responsible for greater consistency and predictability in a majority of today's child support awards overall, but they also give rise to new inequities perhaps unforeseen by the drafters of early legislation – *grossly disproportionate awards for high income earners*. The varying guideline approaches that jurisdictions utilize for high-income support situations create inconsistent awards across the country. Concurrent issues that are compounded at the high income level are the differing definitions of "income" applied among the states and the varying components utilized as the basis for support calculations, which only exacerbate the lack of uniformity in support awards.

III. Income Available for Support

It is crucial to consider how each jurisdiction defines "income" as the basis for support, because that determination will affect every component of the calculation for the award under a

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10 *See infra* Appendix Chart. California applies a unique hybrid method that bases its calculation on each parent's net disposable income and the amount of time each parent spends with the child. CAL. FAM. CODE § 4055 (West 2013).

11 The states that have converted to the Income Shares model in the last decade include: Connecticut, Georgia, Iowa, Massachusetts, Minnesota, Tennessee, and Wyoming. The District of Columbia switched from a mixed model to a pure Income Shares model in 2007.

12 Jennifer L. Noyes, *Child Support Models and the Perception of "Fairness*," INST. FOR RES. ON POVERTY – U. WIS.-MADISON 10 (2011), http://www.irp.wisc.edu/research/childsup/cspolicy/pdfs/2009-11/Task6-CS2009-11-Noyes-Report.pdf.

state's guidelines. Scrutinizing the items that are considered income is especially important in high-income cases. Perhaps unsurprisingly, the components of income vary from state to state, which, in part, accounts for the lack of predictability of awards.

A. *Gross v. Net Income*

An initial difference in the method of support calculation is whether the state utilizes gross income or net income as the basis for its child support awards. Net income takes into consideration deductions for taxes and mandatory contributions to retirement plans; in some states, deductions are taken for premiums paid for health care insurance.[13] There is a roughly even split across the country, with thirty jurisdictions using a form of gross income[14] and twenty-one using net income.[15]

Commentary in the Indiana Child Support Guidelines illustrates the policy behind utilizing gross income as the basis for support:

> One of the policy decisions made by the Judicial Administration Committee in the early stages of developing the Guidelines was to use a gross income approach as opposed to a net income approach. Under a net income approach, extensive discovery is often required to determine the validity of deductions claimed in arriving at net income. It is believed that the use of gross income reduces discovery. While the use of gross income has proven controversial, this approach is used by the majority of jurisdictions and, after a thorough review, is considered the best reasoned.[16]

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[13] LAURA W. MORGAN, CHILD SUPPORT GUIDELINES INTERPRETATION & APPLICATION § 4.05 (2d ed. 2014). The more common method for handling health insurance and child care expenses is simply to add their cost to the obligor's basic child support obligation.

[14] Gross income jurisdictions are: Alabama, Arizona, Colorado, District of Columbia, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nevada, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Virginia, West Virginia, Wisconsin.

[15] Net income jurisdictions are: Alaska, Arkansas, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Michigan, Montana, Nebraska, New Hampshire, New Jersey, North Dakota, Pennsylvania, South Dakota, Texas, Vermont, Washington, Wyoming.

[16] IND. C.S.G. 1, http://www.in.gov/judiciary/rules/child_support/index.html,

On the other end of the spectrum, advocates for the net income approach argue that it provides a more accurate depiction of an obligor's actual income available for support. "Two people with the same gross income could have different net incomes depending on their tax deductions and mandatory payroll deductions."[17]

B. *Uniform Components of Income*

Every state's support calculation begins with a determination of the obligor's "gross income," regardless of the model or whether the state ultimately uses net or gross income as the basis of the calculations. Gross income includes income or earnings from all sources, with some specific caveats and exclusions, which vary from state to state.[18] States almost universally exclude child support received for a child from another relationship.[19][20]

All states account for an obligor's salary and wages, which includes commissions, fees, tips, and severance pay.[21] Additionally, nearly every jurisdiction considers bonuses, stock incentives, profit sharing, and some forms of deferred compensation as a component of the obligor's gross income.[22] Distributions from pensions, trusts, annuities, investments, and capital gains also

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17 MORGAN, *supra* note 13, at § 4.05.

18 Some common components of income about which states differ include: overtime wages, gifts, prizes, inheritance, and different forms of deferred compensation.

19 *See, e.g.,* Ala. R. J. Admin. R. 32(B)(2)(b); ALASKA R. CIV. P. 90.3(a)(1)(C); N.M. STAT. ANN. § 40-4-11.1(C)(2)(a) (West 2008); WYO. STAT. ANN. § 20-2-303(a)(iii) (West 2013).

20 All states exclude benefits received from "means-tested public assistance programs." Public assistance program funds are received due to an obligor's eligibility for financial need programs, including, but not limited to, assistance from Medicaid, public housing, and food stamps.

21 *See, e.g.,* ARIZ. REV. STAT. ANN. § 25-320; IDAHO C.S.G. (2012), https://www.isc.idaho.gov/files/ICSG-July_1_2012.pdf; ME. REV. STAT. tit. 19-A, § 2001(5)(A) (2015); OKLA. STAT. ANN. tit. 43, § 118B(A)(2) (West 2009).

22 *See, e.g.,* GA. CODE ANN. § 19-6-15(f)(1)(A)(iv) (West 2015); 2013 MICH. CHILD SUPPORT FORMULA MANUAL (Jan. 1, 2013), http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Manuals/focb/2013MCSF.pdf.; WASH. REV. CODE ANN. § 26.19.071(3)(r) (West 2011); Tamayo v. Arroyo, 15 A.3d 1031, 1037 (R.I. 2011).

constitute income in virtually every state.[23] Funds received as alimony (from a prior spouse), Social Security benefits, veterans' benefits, and any benefit replacing earned income (such as workers' compensation, disability, or unemployment insurance benefits) similarly count towards an obligor's gross income.[24] Rents, royalties, and self-employment income fall under the scope of each state's "gross income" definition.[25]

C. *Differences Across the Nation*

In other instances, courts have been divided on whether to include several components of "income" in their support calculations. First, courts across the country have come to varying conclusions regarding whether to include an obligor's earnings from overtime work. A majority of states consider these earnings as income if the extra work is consistent, predictable, or required by the position.[26] Conversely, several courts have refused to consider a parent's overtime wages as income when the overtime was not required by the parent's employer, with the policy being that a parent should not be required to work more than a full time job when they can already provide adequate support.[27]

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[23] *See, e.g.,* FLA. STAT. ANN. § 61.30(2)(a)(7) (West 2014); MD. CODE ANN., FAM. LAW § 12-201(b)(3) (West 2012); N.H. REV. STAT. ANN. § 458-C:2(IV) (2013); N.D. CHILD SUPPORT GUIDELINE ch. 75-02-04.1(4)(b) (2008).

[24] *See, e.g.,* COLO. REV. STAT. ANN. § 14-10-115(5)(Y) (West 2014); KY. REV. STAT. ANN. § 403.212(2)(b) (West 2015); MINN. STAT. ANN. § 518A.29 (West 2014); TEX. FAM. CODE ANN. § 154.062(b)(5) (West 2013).

[25] *See, e.g.,* CONN. GEN. STAT. ANN. § 46b-215a (West 2011); D.C. CODE § 16-916.01 (2008); OHIO REV. CODE ANN. § 3119.01 (West 2012); S.D. COD. LAWS § 25-7-6.3 (2015).

[26] In *Jones v. Jones*, the Supreme Court of South Dakota found that the trial court had not abused its discretion in considering the father's overtime compensation as income for support where he had worked approximately ten overtime hours per week for two years. The court noted the "on-call" nature of his job as a mechanic, as well as the fact that overtime could almost be considered a requirement for his line of work in its conclusion that overtime should be included as income. 472 N.W.2d 782, 784 (S.D. 1991). *See also* Tatum v. Carrell, 897 So. 2d 313, 321 (Ala. Civ. App. 2004); Cole v. Cole, 139 So. 3d 1225, 1232 (La. Ct. App. 2013).

[27] By way of example, in the Colorado case, *In re Marriage of Dunkle*, the court of appeals upheld the trial court's determination that the mother's overtime earnings should not be considered as income for the support calculation because the extra hours were not required by her job. The court distinguished the mother in *Dunkle*, who worked as a nurse with an option to volunteer for

Second, and more relevant to the high-income litigant, courts across the nation have treated gifts inconsistently with respect to their inclusion in the support calculation. A majority of jurisdictions follow a similar rationale as to overtime wages, with gifts being deemed income if they are predictable and recurring.[28] For example, in *Ordini v. Ordini*, the Florida court surveyed the treatment of gifts in jurisdictions both inside and outside the state, and came to the conclusion that recurring cash gifts to the husband from his parents were income for support purposes.[29] The court noted that most states considered gifts to be income as long as they were recurring and appeared relatively permanent, as opposed to serving a temporary purpose, such as educational support.[30] The California Court of Appeals took a similar approach in *In re Marriage of Alter*, where it concluded that the $3,000 in cash per month that the obligor had received from his mother to pay his rent for over a decade should be included as income available to him for support.[31] The court pointed out the theoretical difference between the obligor's mother allowing him to live in an apartment rent-free, versus her providing the actual cash for him to pay his rent, in determining that the recurring gift should be classified as income.[32]

A minority of jurisdictions disregard the predictability analysis and have elected to exclude any and all gifts from their definitions of income.[33] *In re Marriage of Grady* presents an example of this approach. In this 2012 decision, the Washington Court of Appeals affirmed the trial court's decision to exclude

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extra hours, from a business owner whose position might require overtime in order to carry out his or her duties. 194 P.3d 462, 464 (Colo. App. 2008). *See also* Hammond v. Hammond, 651 S.E.2d 95, 96 (Ga. 2007); *In re* Marriage of Kupferschmidt, 705 N.W.2d 327, 333 (Iowa Ct. App. 2005).

28 701 So. 2d 663 (Fla. Dist. Ct. App. 1997). *See also In re* Marriage of Alter, 171 Cal. App. 4th 718, 737, 89 Cal. Rptr. 3d 849, 863 (2009); Lusa v. Grunberg, 923 A.2d 795, 806 (Conn. App. Ct. 2007).

29 *Ordini*, 701 So. 2d 663.

30 *Id*.

31 171 Cal. App. 4th 718, 737, 89 Cal. Rptr. 3d 849, 863 (2009).

32 *Id*. The court noted that her payments clearly contributed to the obligor's available cash flow, as opposed to her allowing him to live in an apartment without having to pay rent.

33 169 Wash. App. 1038 (2012). *See also* Frankel v. Frankel, 886 A.2d 136, 156 (Md. Ct. Spec. App. 2005); Suzanne D. v. Stephen W., 65 A.3d 965, 970 (Pa. Super. Ct. 2013).

the several thousand dollars per month that the mother received as a gift from her parents from her income available for support.[34] The court cited the state's support statute that specifically excluded all gifts from the definition.[35]

The Superior Court of Pennsylvania also declined to include recurring gifts that the obligor received from his father as income for support purposes.[36] In the 2013 case, *Suzanne D. v. Stephen W.*, the court noted that the payments were neither given in exchange for services rendered, nor received as a lump sum (which the statute would have qualified as income), so the payments could be considered only as grounds for a deviation, as opposed to being included in the support calculation.[37] This stark difference regarding gifts and income is a prime example of a lack of uniformity among states that contributes to differing support awards in different states for potentially similarly situated individuals.

Inheritance is a third area of difference in the categorization of income. A number of states do not include any form of inheritance in their definition of income, since it is classified as more of a shift in capital as opposed to income generated for support.[38] For example, in the 2013 South Dakota case, *Crawford v. Schulte*, the state supreme court rejected the lower court's inclusion of the father's lump sum inheritance as income for support, stating that inheritance should be treated more as an asset or capital, unlike the other types of monthly "income" enumerated in the statute.[39]

Colorado takes a different approach by classifying monetary inheritances as income, but excluding non-monetary inheritances from the support calculation.[40] On the opposite end of the spectrum, several jurisdictions classify any inheritance as income, with the rationale that support should be "based upon total family resources and all parents' resources should be considered

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34 *Grady*, 169 Wash. App. 1038.

35 WASH. REV. CODE § 26.19.071(4)(c) (2011).

36 *Suzanne D.*, 65 A.3d at 970.

37 *Id.*

38 Crawford v. Schulte, 829 N.W.2d 155, 158 (S.D. 2013). *See also* Maher v. Maher, 835 A.2d 1281, 1286 (Pa. 2003).

39 *Crawford*, 829 N.W.2d at 158.

40 COLO. REV. STAT. ANN. § 14-10-115 (West 2014); *In re* A.M.D., 78 P.3d 741, 745 (Colo. 2003).

available for support of the children."[41] By way of example, in *Connell v. Connell*, the Superior Court of New Jersey rejected the father's argument that his support obligation should be lowered due to a reduction in his salary, and that his near $500,000 inheritance should not be considered as a source of income because he used it to purchase a home, which was not an income producing asset.[42] The court reasoned that "[i]t has long been the law of this State that courts have the authority to consider the assets and other financial circumstances of the parties in addition to their income when determining child support," and concluded that inheritance fell within this classification.[43]

Despite being included in child support guidelines for many years, overtime, gifts, and inheritance are still not treated uniformly throughout the nation. Understandably, newer and more complex forms of "income," such as deferred compensation, that do not appear in state guidelines pose an additional challenge for courts as they try to incorporate these types of income into support calculations.

D. *Stock Options and Deferred Compensation*

Stock options are particularly noteworthy due both to the multitude of issues they present for the courts in valuing and defining them as assets versus income for support and because of their heightened relevance to high income earners. As stock options are a form of deferred compensation, often vesting years in the future, courts across the nation struggle to assign them annual or monthly values for current child support calculations. These difficulties are compounded by the fact that option packages can take many forms. By way of example, an isolated and quickly-exercisable option may provide a massive income spike in one year for an obligor, but may improperly skew the support award if the options are not recurring, leaving the obligor with an inappropriately large obligation based on his or her actual yearly income.

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41 Connell v. Connell, 712 A.2d 1266, 1269 (N.J. Super. Ct. App. Div. 1998); N.J. Stat. Ann. § *2A:*34-23a. *See also* IND. CHILD SUPPORT RULES GUIDELINES 2 (2016).

42 *Connell*, 712 A.2d at 1269.

43 *Id*.

Courts have to wrestle with the following questions, among others:

How should courts treat stock options as a resource for support when they do not vest for another five or ten years?

How can courts fairly assign an income figure to options to take into consideration that there is a chance that the exercising obligor cannot presently sell any of his or her elected shares, or that the shares could be completely worthless in the future?

If there is a chance that the shares might never yield any actual cash or income to their possessor, can they ever be classified as income *available* for support?

Support statutes and guidelines across the country are virtually bereft of instruction with respect to how to treat stock options for purposes of support. This leaves both value determinations and income classifications in the hands of the courts, which likely accounts for the high level of inconsistency in how stock options are treated from state to state.

There are three main valuation methods utilized by courts: the Black-Scholes method, the Binomial method, and the Intrinsic Value method. The Intrinsic Value method is the most popular because it is the least mathematically complex.[44] The Black-Scholes method "attempts to value the options as such, independently of the value of the underlying stock. The method conceptually involves an effort to determine what it would cost to hedge against anticipated oscillations in the future price of the underlying stock during the period the option remains open."[45] The Binomial method breaks down the period the option is to remain open into a series of discrete intervals and then attempts to calculate the "cost to hedge anticipated share price oscillations within each of those intervals."[46] Under the Intrinsic Value method, the value assigned to the options is the difference between the exercise price of the options and the current market value of the underlying corporate stock. The problem with all of the valuation

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44 David S. Rosettenstein, *Speculating on Stock Options and Child Support: Long on Income and Short on Value (and Theory) – A Jurisprudential Attempt at a Butterfly Straddle?*, 82 NEB. L. REV. 947 (2004).

45 *Id.* at 977.

46 *Id.* at 978.

methods is that there is no guarantee that the grantee will ever actually extract the value assigned by the court when exercised.[47]

The complexity of factoring stock options into the support calculation continues beyond the valuation process, since the courts are then tasked to determine how much, and at what point, the value can be considered "income" for support purposes. Many courts appear to apply an analysis similar to the method used for overtime and gifts, and will generally include stock options in the income calculation if they are consistent and predictable. However, there appears to be a large divide among the jurisdictions on how much of the "income" to include.[48]

On one end of the spectrum, some courts do away with the complexities caused by vesting interests altogether by counting options toward a grantee's income only once they are actually exercised.[49] For example, in *Heller-Loren v. Apuzzio*, the court held that "the ability to exercise stock options does not by itself give rise to 'income' for purposes of defendant's child support obligation, but that the actual exercise of the options may give rise to income if there is a demonstrated fair market value of the stock above the option price."[50]

Other courts have found a middle ground, and will treat options as income as soon as the grantee has the opportunity to exercise the option, even if the grantee declines to do so.[51] In *MacKinley v. Messerschmidt*, the Pennsylvania Superior Court held that the mother was not forced to exercise her options after they vested, but that the value was readily ascertainable and the amount would be considered as income available for support. The court reasoned that parents should be able to make investment decisions with their finances (so a parent cannot be forced to exercise an option), but that children should not be made to wait for support because a parent defers the "available" income.[52]

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47 *Id.* at 979.

48 *Id.* at 965.

49 Heller-Loren v. Apuzzio, 853 A.2d 997, 1006 (N.J. Super. Ct. App. Div. 2004). *See also In re* Marriage of Davis, 252 P.3d 530, 535 (Colo. App. 2011).

50 *Heller-Loren*, 853 A.2d at 1006.

51 MacKinley v. Messerschmidt, 814 A.2d 680, 682-83 (Pa. Super. Ct. 2002). *See also* Engel v. Landman, 212 P.3d 842, 851 (Ariz. Ct. App. 2009); Berthelot v. Berthelot, 796 N.E.2d 541, 546-47 (Ohio Ct. App. 2003).

52 *MacKinley*, 814 A.2d at 683.

On the opposite end of the spectrum, some courts consider past, present, and anticipated earnings from stock options, even if they will not vest for several years.[53] In the Missouri case, *Heckman v. Heckman*, the court of appeals found that the lower court did not err in deciding to include the father's stock options as income in their support calculation. The court cited the father's consistent, yearly option compensation at his company (that vested in its entirety after four years), and concluded that averaging the yearly values of the previously vested stock was an accurate and reliable depiction of the income available to the father for support. The court even acknowledged that the assigned value of the stock might be different than the actual value received when exercised, but ultimately concluded that options vesting in the future were not immune from the income calculation.[54]

To sum up the issue with this form of deferred compensation and child support, there is always a risk that the value the court assigns to the compensation will not materialize as actual cash earnings for an obligor:

> if we assume for the moment that the "value" of the option is to be treated as "income" for the purposes of fixing the child support order, there is a real possibility that the obligor will be treated as having an "income" where that "income" is an artificial construct. Indeed, if the options aren't vested, or if vested they cannot be traded, or if vested and even exercised, if the resulting stock cannot be sold, then the obligor will be treated as having income when in fact he or she does not have any income at all.[55]

IV. High Income Thresholds

High-income thresholds are another contributing factor to inconsistencies in support awards because they vary greatly from jurisdiction to jurisdiction and, because many of the thresholds are set low, the result is greater variability of judicial results and a decrease in predictability between different states. High-income earners are parents with incomes that exceed the maximum amount allotted by their state's child support guidelines. A vast

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53 Heckman v. Heckman, 422 S.W.3d 336, 342 (Mo. Ct. App. 2013), *reh'g and/or transfer denied* (Nov. 26, 2013), *transfer denied* (Feb. 4, 2014).

54 *Id*.

55 Rosettenstein, *supra* note 44, at 980.

majority of states grant their courts discretion to deviate from the guidelines when fashioning a support award in high-income situations. This has the potential to create additional unpredictability due to the difficulty in fashioning an award that will provide children with their pre-divorce standard of living without forcing the obligor to "subsidize the excesses of the obligee."[56]

A. *Nationally Varied Guidelines*

The theory behind child support guidelines was to increase the consistency and predictability of awards, with the idea that the heightened reliability would "encourage fair and efficient settlements of conflicts between parents and . . . minimize the need for litigation."[57] Despite the legislative steps promoting uniformity, the states feature varied guidelines. Forty-seven of the fifty-one jurisdictions (including the District of Columbia) provide income tables for support calculations, which are evidence in themselves of the lack of uniformity. By way of example, Arkansas' child support table has a $60,000 net yearly income ceiling,[58] while Utah's guidelines account for up to $1,200,000 in annual gross income.[59] This large range of thresholds sets the stage for inconsistent awards from state to state.

B. *Low Thresholds*

Lower thresholds that trigger deviations in high-income cases also play a role in the lack of uniformity of awards both within and among the states. Lower ceilings provide for added variability in judicial decisions, which, in turn, reduces predictability of awards. Thus, high income earners who are debating whether to settle or litigate may be more likely to take their cases to trial due to the uncertainty,[60] especially because at least the payor has the necessary financial resources to endure a lengthy

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56 Raatjes, *supra* note 4, at 329.

57 This child support policy is stated in CAL. FAM. CODE § 4053 (West 2013).

58 ARK. SUP. CT. R. ADMIN. ORDER 10.

59 Utah's child support income table extends to $1,200,000 of both parents' combined adjusted gross incomes. UTAH CODE ANN. § 78B-12-301 (West 2015).

60 Raatjes, *supra* note 4, at 327.

litigation process.[61] The importance of maintaining higher thresholds was recognized by the Supreme Court of Connecticut in its commentary in the case *Maturo v. Maturo*:

> The commission extended the applicable range of the schedule in 2005 to include families with a combined net weekly income of up to $4000, an increase from the combined net weekly income limit of $2500 contained in the 1999 schedule, "to promote consistency in the setting of support orders at all income levels" by taking advantage of more recent data on child-rearing costs that included higher income families.[62]

A comparison of two Texas cases with similarly situated obligors illustrates the lack of predictability that can result from a low threshold. The child support guidelines in Texas feature the second lowest ceiling at an annual net income of $90,000 and grant the courts complete discretion in allocating an award in excess of the threshold "as appropriate."[63] In *Swaab v. Swaab*, the Texas Court of Appeals affirmed the trial court's determination that the presumptive minimum award of $1,200 a month for one child was appropriate for the father who had gross earnings of $123,265 per year.[64] In a similar Texas case, *In re Marriage of Grossnickle*, the court of appeals upheld the trial court's finding that a $2,000 monthly child support award for a single child was appropriate for a father who earned a comparable annual income of $136,077.[65]

The obligors in each case had a single child and had comparable incomes. Despite this fact, the courts did not fashion similar support awards. The father in *Grossnickle* earned approximately $13,000 more than the father in *Swaab*, but had to

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61 *Id.*

62 995 A.2d 1, 9 (Conn. 2010).

63 The statute reads:

> If the obligor's net resources exceed [$90,000 per year], the court shall presumptively apply the percentage guidelines to the portion of the obligor's net resources that does not exceed that amount. Without further reference to the percentage recommended by these guidelines, the court may order additional amounts of child support as appropriate, depending on the income of the parties and the proven needs of the child.

TEX. FAM. CODE ANN. § 154.126 (West 2007).

64 282 S.W.3d 519, 527 (Tex. App. 2008).

65 115 S.W.3d 238, 245 (Tex. App. 2003).

devote 17.6% of his income to support, compared to 11.6% required of the father in *Swaab*. Even though their income available for support was roughly the same, the court in *Swaab* chose to enter an order consistent with the presumptive minimum for high income earners, while the court in *Grossnickle* upheld the trial court's decision to deviate from the same guidelines, increasing the father's award to $2,000 per month.

V. States' Treatment of High Income Support

States utilize a variety of procedures in fashioning support awards when an obligor's income exceeds the guidelines.[66] Consider this high income hypothetical that is demonstrative of the stark differences in the presumptive support awards between states that utilize different calculation methods. Assume that the obligor makes $26,000,000 annually and the obligee earns nothing. The parties have one child who spends 95% of her time with the obligee and 5% with the obligor. This table shows the support awards that would be fashioned via the application of each state's support guidelines:[67]

Illinois	$243,000 per month, presumptive amount, subject to deviation
California	$134,142 per month, and the guideline is presumptively correct
Pennsylvania	$102,526 per month, presumptive amount, subject to deviation
Connecticut	$2,089 per month, presumptive amount, subject to deviation
Texas	$1,710 per month, subject to a finding of proven needs above the guideline amount

As can be seen, the variance between just these five states is enormous.

There are twenty-nine jurisdictions that grant judicial discretion in high-income situations, albeit in different ways. Five states allow for discretion, but require the court to consider an advisory formula, while eight require a purely formulaic calcula-

66 *See infra* Appendix Chart.

67 These awards are subject to deviation as discussed in Part VI of this article.

tion. The remainder simply classify "income exceeding the guidelines" as a deviation factor for the courts to consider, or employ a unique methodology.[68] Despite their different approaches, many states encourage their respective courts to consider a standard core of factors in order to determine an appropriate award, including, but not limited to: the needs of the child in excess of the amount allotted for support; the pre-divorce standard of living enjoyed by the child and parents; and the best interests of the parties.

A. *Pure Discretion*

Eight of the states have a "pure discretion" method, granting the court complete authority to fashion a child support award via factors, and without regard for the guidelines.[69] The Alabama Court of Appeals articulated this procedure in *McGowin v. McGowin*, stating:

> In this case, the amount of the husband's child-support obligation cannot be calculated by reference to the Rule 32, Ala. R. Jud. Admin., child-support guidelines because the husband's monthly income exceeds the uppermost limits of the child-support schedule. When the parties' combined income exceeds the uppermost limit of the child-support schedule, the determination of a child-support obligation is within the trial court's discretion. . . . [and] the amount of child support should not be extrapolated from the figures given in the schedule.[70]

The court cited the guiding discretionary factors from *Arnold v. Arnold*, stating that "a trial court's discretion is not unbridled

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[68] Hawaii, Missouri, Montana, and New Hampshire all simply list "income exceeding the guidelines" as a deviation factor for the courts to consider. Illinois' guidelines instruct the courts to "deviate only where appropriate." Delaware includes high levels of income in their main support calculation. The Mississippi guidelines instruct the courts to make a determination if the stated percentages would be appropriate to apply to the obligor's income on a case-by-case basis. Nevada provides a presumptive maximum award, and New Mexico does not have any high income instruction.

[69] The pure discretion states include: Alabama [RULE 32, ALA. R. JUD. ADMIN.], California [CAL. FAM. CODE § 4057(3) (West 2013)], Kentucky [KY. REV. STAT. ANN. § 403.212(5) (West 2015)], Maryland [MD. CODE ANN., FAM. LAW § 12-204(d) (West 2012)], North Carolina [N.C. C.S.G. (2015)], South Carolina [S.C. C.S.G. (2014)], South Dakota [S.D. CODIFIED LAWS § 25-7-6.9 (2015)], and Vermont [VT. STAT. ANN. TIT. 15, § 656(d) (West 2015)].

[70] 991 So. 2d 735, 741 (Ala. Civ. App. 2008).

and . . . the amount of child support awarded must relate to the reasonable and necessary needs of the children as well as to the ability of the obligor to pay for those needs."[71]

The Maryland Court of Special Appeals expanded on this approach in its analysis in *Malin v. Mininberg*, where it found that the trial court erred in failing to factor in the appellant's alimony payments to the appellee before calculating the support obligation.[72] The parties had a combined adjusted income in excess of the guideline maximum, which was $10,000 at the time of the decision, triggering a discretion analysis.[73] In its discussion, the court noted that legislative history and case law indicated that fashioning support orders above the guidelines was left to the courts "because such awards defied any simple mathematical solution."[74] The court adopted the rationale set out in an earlier case, *Voishan v. Palma*:

> [A]t very high income levels, the percentage of income expended on children may not necessarily continue to decline or even remain constant because of the multitude of different options for income expenditure available to the affluent. The legislative judgment was that at such high income levels judicial discretion is better suited than a fixed formula to implement the guidelines' underlying principle that a child's standard of living should be altered as little as possible by the dissolution of the family.[75]

The court remanded the calculation to the trial court, advising that strict extrapolation was inappropriate in high income circumstances, and that the court should use its discretion using "any rational method that promotes the general objectives of the child support Guidelines."[76]

Kentucky is also a "pure discretion" state, as exhibited in *Downing v. Downing*, where the court of appeals found that the trial court had committed an abuse of discretion in relying on an extrapolation method for calculating the appellant's support

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71 *Id*. (quoting Arnold v. Arnold, 977 So.2d 501, 507 (Ala. Civ. App. 2007)).

72 837 A.2d 178, 209 (Md. Ct. Spec. App. 2003).

73 *Id.*

74 *Id.* at 208 (citing Bagley v. Bagley, 632 A.2d 229 (Md. Ct. Spec. App. 1993), *cert. denied*, 637 A.2d 1191 (Md. 1994)).

75 *Id*. (citing *Voishan*, 609 A.2d 319).

76 *Id*. (citation omitted).

award when his income exceeded the guideline range.[77] The trial court used a mathematical projection by expanding on the guideline percentages, which featured a maximum of $15,000 in combined adjusted parental gross income at the time, to increase the appellant's support award when his adjusted gross income rose to $57,000 per month.[78] The court stated:

> We reject this approach and have great difficulty with using a projection of the child support guidelines as the primary basis for calculating child support. An increase in child support above the child's reasonable needs primarily accrues to the benefit of the custodial parent rather than the children. In addition, this approach effectively transfers most of the discretionary spending on children to the custodial parent. Furthermore, a strict reliance on linear extrapolation could result in vast increases in child support unwarranted by the children's actual needs. Beyond a certain point, additional child support serves no purpose but to provide extravagance and an unwarranted transfer of wealth. While to some degree children have a right to share in each parent's standard of living, child support must be set in an amount which is reasonably and rationally related to the realistic needs of the children.[79]

Additionally, the court rejected the appellant's argument that the child support award at the maximum income level should be the presumptive maximum, and vacated the contested order.[80]

B. *Discretion with Presumptive Awards*

The most common approach utilized by "discretion states" allows for judicial discretion, but establishes the support assigned at the guideline maximum as the presumptive basic award. The guidelines from seventeen of the twenty-one states with this presumption indicate that the high-income threshold should serve as the presumptive minimum award.[81] By way of example, the Dis-

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77 45 S.W.3d 449, 451 (Ky. Ct. App. 2001).

78 *Id*.

79 *Id*. at 455-56.

80 *Id*.

81 The presumptive minimum jurisdictions include: Colorado [Colo. Rev. Stat. Ann. § 14-10-115 (2014)], Connecticut [Conn. C.S.G. (2015)], District of Columbia [D.C. Code § 16-916.01(h) (2008)], Georgia [Ga. Code Ann. § 19-6-15(i)(2)(A) (West 2014)], Idaho [Id. C.S.G.], Iowa [Iowa R. Civ. P. 9.26], Louisiana [La. Rev. Stat. Ann. § 9:315.13(B)(1) (2008)], Maine [Me. Rev. Stat. tit. 19-A, § 2006(5)(B) (2015)], Massachusetts [Mass. C.S.G. (II)(C), *available at* http://www.mass.gov/courts/docs/child-support/2013-child-

trict of Columbia uses the guideline maximum as the presumptive floor for a support award:

> The guideline shall not apply presumptively in cases where the parents' combined adjusted gross income exceeds $240,000 per year. In these cases, the child support obligation *shall not be less than the amount that the parent with a legal duty to pay support would have been ordered to pay if the guideline had been applied to combined adjusted gross income of $240,000*. The judicial officer may exercise discretion to order more child support, after determining the reasonable needs of the child based on actual family experience.[82]

The guidelines in Alaska, Arizona, Minnesota, and Oregon feature slightly different language that instructs their respective courts to apply the support award at the maximum income level as a presumptive maximum award.[83] As an example of the different approach, in Alaska's statute, the guideline maximum serves as a presumptive cap to the support award:

> Paragraph (a) does not apply to the extent that the parent has an adjusted annual income of over $120,000. In such a case, the court *may make an additional award only if it is just and proper*, taking into account the needs of the children, the standard of living of the children and the extent to which that standard should reflect the supporting parent's ability to pay.[84]

Case law also is illustrative of the slightly different approaches taken by jurisdictions using presumptions in high-income circumstances. For example, the Ohio case, *Longo v. Longo*, outlines the procedure used by the majority of presumption jurisdictions that grant their courts discretion to fashion awards with the high-income threshold as a minimum award. In *Longo*, the appellant challenged the trial court's order that he

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support-guidelines.pdf], New Jersey [N.J. R. PRAC. APP. 9-F], New York [N.Y. DOM. REL. LAW § 240 (2014)], North Dakota [N.D. CHILD SUPPORT GUIDELINE 75-02-04.1-09(2)(b)], Ohio [OHIO REV. CODE ANN. § 3119.04(B) (West 2001)], Oklahoma [OKLA. STAT. ANN. tit. 43, § 118H (West 2009)], Texas [TEX. FAM. CODE ANN. § 154.126(a) (West 2007)], Utah [UTAH CODE ANN. § 78B-12-206 (West 2008)], and Washington [WASH. REV. CODE ANN. § 26.19 APP. TABLE (West 2009)].

82 *See* D.C. CODE § 16-916.01(h) (emphasis added).

83 *See* ALASKA R. CIV. P. 90.3(c)(2); ARIZ. REV. STAT. ANN. § 25-320(8)(D) (2014); MINN. STAT. ANN. § 518A.35(1)(d) (West 2007); OR. ADMIN. R. 137-050-0725, http://www.oregonchildsupport.gov/laws/rules/docs/050_0725.pdf.

84 *See* ALASKA R. CIV. P. 90.3(c)(2) (emphasis added).

pay $1,666.67 per child per month based on the parties' imputed income of $601,388.[85] The court of appeals affirmed the trial court's order, and cited the Ohio guideline that states:

> [i]f the combined gross income of both parents is greater than one hundred fifty thousand dollars per year, the court . . . shall determine the amount of the obligor's child support obligation on a case-by case basis and shall consider the needs and the standard of living of the children who are the subject of the child support order and of the parents. The court or agency shall compute a basic combined child support obligation that is *no less than the obligation that would have been computed under the basic child support schedule*.[86]

In its analysis, the court commented that:

> a review of the statute demonstrates a domestic court possesses considerable discretion in setting a child support order when the parents' combined income is above $150,000. Indeed, "the statute leaves the determination entirely to the court's discretion, unless the court awards less than the amount of child support listed for combined incomes of $150,000."[87]

The District of Columbia Court of Appeals mirrored this approach and emphasized the discretion afforded to the courts in high-income cases in *Upson v. Wallace*.[88] Both the father and mother in *Upson* appealed the magistrate judge's monthly award of $4,000 of pendente lite child support to the mother, based on the father's annual income of $2.1 million.[89] The mother challenged the award as being too low in that it "did not adequately take into account the standard of living of the biological father," while the father claimed the award was excessive and "not entered to maintain the *status quo*."[90] The court of appeals affirmed the magistrate's order and concluded its discussion of the issue by highlighting the discretionary power of the court when the obligor's income exceeds the support guidelines:

> [Father] argues that [wife] was required to prove the expenses that she incurred on behalf of [daughter]. But, we have held that the trial court is not required to base a child support award on the child's docu-

85 Nos. 2008-G-2874, 2009-G-2901, 2010 WL 2636843 *2 (June 30, 2010).

86 *Id*. (emphasis added).

87 *Id*. (citations omitted).

88 3 A.3d 1148 (D.C. 2010).

89 *Id*. The District of Columbia support guidelines govern pendente lite child support in the same manner as regular child support.

90 *Id*. at 1157.

> mented expenses where the noncustodial parent's income exceeds the highest amount to which the Guidelines presumptively apply . . . Rather, the court can award a level of support commensurate with the income and lifestyle of the noncustodial parent. Thus, we cannot say that the court abused its discretion after considering the relevant factors, including [father's] income and lifestyle, and concluding that $4,000 per month was not an inappropriate award to support the parties' child.[91]

Another line of case law for presumption states that utilize discretion demonstrates the slightly different analysis for jurisdictions that use guideline maximums as a presumptive cap on support awards. An Arizona case *Milinovich v. Womack* is illustrative of this approach in its affirmance of the superior court's calculation of the father's monthly support obligation of $2,348.88.[92] In its analysis, the court stated that "although the trial court listed Father's [monthly gross] income as $42,000, the support calculator automatically reduced the parties' combined adjusted gross monthly income to $20,000, complying with Guideline § 8."[93] The court reiterated the common discretion factors in its discussion of the burden an obligee must meet to receive additional support:

> A party "seeking a sum greater than this presumptive amount" bears the burden of proof "to establish that a higher amount is in the best interest of the children," considering factors such as (1) the standard of living the child would have had if parents and child lived together, (2) the needs of the child in excess of the presumptive amount, and (3) any significant disparity in the respective percentages of gross income of each parent.[94]

An Alaska case, *Eggener v. Wee,* demonstrates how states with presumptive maximum awards can still use discretion to award additional support under unique, high-income circumstances.[95] In *Eggener*, the father's annual income ranged from one to two million dollars, while the mother earned approximately $50,000 per year.[96] The court cited the high-income provision of the child support statute in using its discretion to order

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91 *Id*. at 1158-59.

92 343 P.3d 924, 931 (Ariz. Ct. App. 2015).

93 *Id.*

94 *Id*.

95 No. S-13545, 2010 WL 843690, at *3 (Alaska Mar. 12, 2010).

96 *Id*.

additional support beyond the presumptive cap for the mother, stating:

> Rule 90.3(c)(2) provides in some situations that when a parent's adjusted annual income exceeds $105,000, "the court *may make an additional award only if it is just and proper*, taking into account the needs of the children, the standard of living of the children and the extent to which that standard should reflect the supporting parent's ability to pay."[97]

The court noted the financial burden on the mother in comparison with the father's high income as "clear and convincing evidence" that the presumptive maximum award would be unjust and inappropriate, thus warranting an upward deviation.[98]

C. *Discretion with a Recommended Formula*

The guidelines of five states allow for the use of discretion in high income situations, but recommend, or even require, that courts reference a provided "high income formula."[99] By way of example, Kansas' child support guidelines provide an "extrapolation formula" for income exceeding the guidelines, but state that adherence to the formula is discretionary and that it does not create a rebuttable presumption for the award.[100] However, courts must consider the formula despite its discretionary nature. In the Kansas case, *In re Marriage of Leoni*, the court of appeals stated "that the extended-income formula should generally be applied, but that the overall child support should not exceed

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97 *Id*. (emphasis added).

98 *Id*.

99 These states include: Kansas [KAN. C.S.G. APP. 2, http://www.kscourts.org/rules-procedures-forms/child-support-guidelines/2012_new/CSG%20AO%20261%20Clean%20Version%20032612.pdf], Nebraska [NEB. R. CT. § 4-203(C)], Pennsylvania [PA. R. CIV. P. 1910.16-3.1], Rhode Island [R.I. ADMIN. ORDER 07-03], and West Virginia [W. VA. CODE ANN. § 48-13-303 (West 2001)].

100 The relevant portion of the guideline reads:

> If the Combined Child Support Income exceeds the highest amount shown on the schedules, the court should exercise its discretion by considering what amount of child support should be set in addition to the highest amount on the Child Support Schedule. For the convenience of the parties, a formula is contained at the end of each child support schedule to compute the amount that is not set forth on the schedules.

KAN. SUP. CT. ADMIN. ORDER No. 261 Amend., Mar. 26, 2012.

$5,000 per month."[101] The court followed the recommended formula, but used its discretion to cap the award. This allowed for the obligor to have money for "extras" for his family if he had a strong financial year.[102]

D. *Pure Formula*

Eight states utilize a strict formulaic approach to calculating child support for an obligor's income in excess of the guideline amounts,[103] allowing for a deviation only if a challenger meets his or her burden in proving the need to deviate based on a set of enumerated guideline factors.[104] Strict adherence to the high income formulas often results in very large child support awards, because the percentage of an obligor's income allocated to support does not change whether the obligator's income is $1,200,000 or $120,000,000 per year. Thus, it is common for obligors to contest these awards on the grounds that they exceed the needs of the children. Many judicial and academic critics of the rigid application of formulas for high-income support calculations cite the "Three Pony Rule" from the Kansas case *In re Mar-*

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101 180 P.3d 1060, 1066-67 (Kan. Ct. App. 2007).

102 *Id*.

103 Pure formula states include: Arkansas [ARK. SUP. CT. R. ADMIN. ORDER 10], Florida [FLA. STAT. ANN. § 61.30(6)(b) (West 2014)], Indiana [IND. CHILD SUPPORT GUIDELINE 1], Michigan [MICH. CHILD SUPPORT FORMULA SUPP. § 2.03], Tennessee [*See* RULES OF TENN. DEPT. OF HUMAN SERVS. CHILD SUPP. SERVS. DIV. TABLE], Virginia [VA. CODE ANN. § 20-108.2(B) (West 2015)], Wisconsin [WIS. ADMIN. CODE D.C.F. § 150.04(5)], and Wyoming [WYO. STAT. ANN. § 20-2-304 (West 2013)].

104 State child support guidelines feature an array of deviation factors for the court to consider when evaluating the sufficiency of a support award. Some states have extensive lists, while others grant wide discretion as long as the factors considered are in line with the "best interests of the child," but there are a few factors that appear very frequently nationwide. First, state legislatures take unique custody circumstances into consideration in their respective guidelines, as two common deviation factors include situations where the non-custodial parent spends extensive time with their child (which likely reduces child-related expenses for the custodial parent) and situations with increased travel costs relating to adherence to a custody order or agreement. Second, many states allow for deviation from the guidelines where there are unique or additional educational and/or medical expenses for the child or for either of the parents. Finally, and by far the most common, are the catch-all instructions that courts deviate for the "special needs" of a child, or whenever a guideline award is "unjust or inappropriate," or not "in the best interests of the child."

riage of Patterson.[105] In *Patterson*, the court stated that "no child, no matter how wealthy the parents, needs to be provided more than three ponies."[106] The Three Pony Rule applies to more extreme high-income cases where the support required under the guideline is far beyond the needs of the child.

An Arkansas case, *Williams v. Williams*, is an example of a court refusing to deviate from the guideline formula, despite the obligor's argument that the award grossly exceeded the needs of his children.[107] In *Williams*, the court found the father obligor's net monthly income to be $64,875, and applied the statutory high-income percentage of 21% for two children in calculating a monthly support award of $13,624.[108] The father cited the "Three Pony Rule" in his argument that the trial judge abused his discretion in failing to deviate from the support chart because the "staggering" award exceeded the needs of his children.[109] The court of appeals affirmed the lower court's strict application of the formula, despite the father's high income, after finding that the father failed to establish sufficient grounds for deviation, and that he could afford to "maintain his children in the style and manner to which they [had] become accustomed to living during the marriage of the parties."[110] The court concluded its analysis of the issue by stating: "Given the evidence of [father's] affluence, exceptional generosity, and extravagant lifestyle, we cannot say that the trial judge abused his discretion in setting child support in accordance with the presumptive amount derived from the family support chart."[111]

E. *High Income as a Deviation Factor*

The guidelines in four states do not provide specific instructions for the calculation of high-income child support.[112] Instead,

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105 920 P.2d 450, 456 (Kan. Ct. App. 1996). *See also* Smith v. Smith, 67 P.3d 351, 354 (Okla. Civ. App. 2003); Kathleen A. Hogan, *Child Support in High Income Cases*, 17 J. AM. ACAD. MATRIM. LAW. 349, 352 (2001).

106 *Patterson*, 920 P.2d at 455.

107 108 S.W.3d 629 (Ark. Ct. App. 2003).

108 *Id*.

109 *Id.* at 298.

110 *Id*. at 304.

111 *Id*. at 305.

112 These states include: Hawaii [HAW. REV. STAT. § 576D-7 (West 1997)], Missouri [MO. S. CT. R. FORM 14(G)(3)], Montana [ADMIN. R. MONT.

they simply list "income above the guidelines" as a deviation factor for the courts to consider, which essentially grants courts in those states the same discretion as the true "discretion states" described above. The analysis of the Supreme Court of New Hampshire in *In re Feddersen* is illustrative of this approach:

> In this case, having properly determined that the petitioner's present income included the $3.4 million settlement, the trial court committed no error by calculating the petitioner's child support obligation based upon his present income. Further, after applying the uniform child support guidelines percentage, the court exercised its statutory discretion to deviate from the guidelines to account for the petitioner's '[s]ignificantly high . . . income.'[113]

F. *Melson States*

Three states use a variation of the Melson formula, which operates as a rebuttable presumption for a support award.[114] Under this approach, there is no table maximum or support cap, so a challenger must show the court that the award exceeds the necessities and standard of living the child experienced prior to the parents' separation. The Family Court of Delaware outlined the analysis for high-income situations under the Melson approach in *M.D.C. v. L.A.E.*:

> Where . . . the incomes of the parents are so substantial as to produce a result through application of the Melson Formula which rebuts the Formula's applicability, the court should begin by determining the enhanced needs of the children. By this we mean more than just mere essentials. The court should determine what amount it [sic] necessary for the children to share in the heightened standard of living of their more affluent parent. It should then determine what amount of child support would be required in light of those enhanced needs and order that amount paid. In allocating that amount between the parents, the court should consider the relative earning abilities of the parents to participate in that level of support and to allocate their respective pay-

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37.62.126], and New Hampshire [N.H. REV. STAT. ANN. § 458-C:5(I)(b)(1) (2007)].

113 816 A.2d 1033, 1038 (N.H. 2003).

114 The Melson states include: Delaware [DEL. CHILD SUPPORT FORMULA EVALUATION AND UPDATE], Hawaii [HAW. REV. STAT. § 576D-7 (West 1997)], and Montana [MONT. ADMIN. R. 37.62.126, 37.62.128]. Note that Montana and Hawaii use a variation of the Melson formula to establish a presumptive support award, but list high income as a deviation factor, so they were included in both the "High Income as a Deviation Factor" and "Melson States" sections.

> ments accordingly. . . . [E]very order for child support, however derived, must be equitable.[115]

Despite the differences in the calculation method, the Melson states clearly echo the same discretion factors in high-income situations as a majority of jurisdictions nationwide.

VI. Common Discretion Factors for High Income Situations

Nearly all jurisdictions grant their courts some form of discretion to fashion appropriate child support awards in high income scenarios, regardless of their respective support calculation methods. As mentioned above, many of these guidelines simply instruct the court to "use its discretion," with limited guidance or factors for judicial consideration.[116] However, the states that provide additional guidance suggest a common core of factors that are often considered together in evaluating the appropriateness of a high-income deviation.

A. *Best Interests of the Child*

Most jurisdictions provide that courts should base their awards for income in excess of the guideline maximums on "the best interests of the child."[117] For example, the Louisiana Court of Appeals used this standard as its rationale for rejecting the mother's challenge of her child support award in *Finn v. Jackowski*.[118] In *Finn*, the trial court ordered the father to pay the mother $775 per month in child support, plus one half of the costs for daily care and uncovered medical expenses for their

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115 No. CN07-03551, 2008 WL 4698531, at *5 (Del. Fam. Ct. June 11, 2008).

116 See IOWA R. CIV. P. 9.26, stating "For combined net monthly incomes above $25,000, the amount of the basic support obligation is deemed to be within the sound discretion of the court"; MD. CODE ANN., FAM. LAW § 12-204(d) (West 2010), stating "If the combined adjusted actual income exceeds the highest level specified in the schedule in subsection (e) of this section, the court may use its discretion in setting the amount of child support"; MASS. C.S.G. (II)(C), stating "The child support obligation for the portion of combined available income that exceeds $250,000 shall be in the discretion of the Court."

117 *See, e.g.,* GA. CODE ANN. § 19-6-15(b)(8) (West 2014); LA. REV. STAT. ANN. § 9:315.13(B)(1); OHIO REV. CODE ANN. § 3119.04(B) (West 2001).

118 779 So. 2d 917 (La. Ct. App. 2000).

child.[119] The mother challenged the award on two grounds. First, she claimed that the trial court erroneously considered the father's legal obligation to support his other three children who lived with him.[120] Additionally, she argued that the award was "excessively low" since the parties earned $3,450 above the monthly guideline maximum at the time, and urged the court to extrapolate beyond the high-income threshold.[121] The court rejected the mother's challenges, stating:

> *The primary concern has always been simply that the best interest of the children be the overriding consideration in exercising discretion to determine a child support obligation, when the combined gross income is in excess of the child support guidelines*. In this case, the trial judge has chosen to set the basic child support amount at the minimum, and to supplement this amount with contributions from [father] to help with the cost of daily care, special diet and uncovered medical expenses. She did this because she felt that this was the most appropriate way to attend to the best interests of all of [father's] children. She carefully considered all of the factors relevant to the income and expenses of the parties in this case. We do not find that the trial judge abused her discretion in not extrapolating from the guidelines to arrive at the basic child support obligation.[122]

The Supreme Court of Georgia emphasized the focus on the best interests of the child as a deviation factor in determining awards for high-income parents in *Fladger v. Fladger*.[123] In this 2014 case, the court evaluated the trial court's upward deviation of $2,000 per month from the father's presumptive obligation under the guidelines, since his $54,166 gross adjusted monthly income nearly doubled the support schedule maximum.[124] The trial court reasoned that "the presumptive amount of child support would be inappropriate and that the best interest of the children will be served by deviation due to the respondent's high income."[125] The supreme court ultimately remanded the calculation because the trial court failed to include the written findings on why the presumptive amount would be unjust or unfair, but essentially agreed with its analysis, stating:

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119 *Id*.
120 *Id*.
121 *Id*.
122 *Id*. at 922 (emphasis added).
123 765 S.E.2d 354, 354 (Ga. 2014).
124 *Id*.
125 *Id*. at 356.

> This implication may be supported by the reasonable assumption that, in the absence of evidence to the contrary, the basic amount of child support for families with a combined income of $30,000 per month—the maximum income for which the guidelines set a basic child support obligation—will not afford the "same economic standard of living" enjoyed by the children whose best interest is at issue here, who previously lived in a household with a combined income of almost $60,000 per month.[126]

The dissent criticized the majority's "needlessly literalistic construction of the child support statute" and argued that "[t]he result here takes the worthy goal of statutory compliance to the extreme and, in so doing, delays resolution of the parties' divorce and disserves the children whose best interests the majority claims to be protecting."[127]

B. *Parties' Standard of Living*

Another common factor requires the courts to consider the pre-divorce standard of living of the child and parties so the child can enjoy the lifestyle he or she was accustomed to prior to the divorce or support proceedings.[128] In *Bean v. Bean*, the New York Supreme Court found that the lower court "properly considered the high standard of living that the child would have enjoyed had the parties remained married" in fashioning a monthly support award of $7,083.33 for the parties' one child.[129] The father's income exceeded one million dollars annually, triggering judicial discretion for the amount exceeding the guideline maximum of $80,000 at the time of the decision. In its calculation of the father's support obligation, the court noted that the family had enjoyed a "lavish" lifestyle featuring multi-million dollar homes and country club memberships, as well as the fact that the father had fired the mother from the family business, leaving her with a significantly diminished earning capacity.[130]

While several jurisdictions are critical of purely formulaic support calculations for high-income earners,[131] some stand by

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126 *Id*. at 357.

127 *Id*. at 358 (Hunstein, J., dissenting).

128 *See, e.g.,* ALASKA R. CIV. P. 90.3(c)(2); IND. C.S.G.; S.D. CODIFIED LAWS § 25-7-6.9.

129 53 A.D.3d 718, 725, 860 N.Y.S.2d 683 (2008).

130 *Id*.

131 *See Finn*, 779 So. 2d 917; *Bean*, 860 N.Y.S.2d 683.

the method with the policy being that the calculation will preserve the pre-divorce standard of living for the child.[132] In the Wisconsin case, *Ladwig v. Ladwig*, the father challenged the trial court's strict application of the state guideline percentage to his $900,000 yearly income, arguing that the $8,544 monthly support obligation exceeded his children's needs.[133] The court of appeals rejected the father's argument and affirmed the award, reasoning that the guidelines were designed to preserve the children's pre-divorce standard of living, and that support awards for high income earners can exceed what the children "actually need."[134] The court explained that "even when a guideline-based amount seems large on its face, the large award may be appropriate to maintain a child in a predivorce lifestyle."[135]

C. *Needs of the Child*

Courts that exercise discretion in above-guideline cases are commonly instructed to consider the needs of the child in order to calculate an appropriate level of support.[136] High-income situations pose a challenge for courts, which must carefully fashion an award that provides for the actual needs of a child, while avoiding an excessive award that would essentially amount to a wealth transfer between parents.[137] This challenge contributes to inconsistent awards in various jurisdictions because they differ on how to quantify the "needs" of a child.

Some courts will base their calculation on a child's actual or proven needs and expenses, while others consider maintaining the high standard of living children have experienced as a basis for determining their "needs." For example in the Oklahoma case, *Smith v. Smith*, the court accepted the father's argument that the trial court erred in calculating his support obligation by multiplying the parties' combined gross monthly income of $52,434 by the statutory percentage for the highest income cate-

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132 Ladwig v. Ladwig, 785 N.W.2d 664, 673 (Wis. 2010).

133 *Id*. Wisconsin calculates support for high-income earners using the "pure formula" method discussed above.

134 *Id.* at 674.

135 *Id*.

136 *See, e.g.,* ARIZ. REV. STAT. ANN. § 25-320(D)(1) (2014); N.J. STAT. ANN. § 2A:34-23 (2014); S.D. CODIFIED LAWS § 25-7-6.9.

137 Hogan, *supra* note 105.

gory, rather than considering the actual needs of the child.[138] The Oklahoma Court of Appeals agreed that this was an improper procedure for calculating the above-guideline award because its excessiveness constituted an improper transfer of wealth.[139] The court reduced the original award of $4,300 per month, using the child's living expenses as the foundation for its calculation:

> Mother submitted an exhibit detailing the child's monthly expenses which totaled $3,355.90 per month. A child's reasonable living expenses could justify a child support award in excess of an extrapolation for income exceeding the guidelines. However, we find it was an abuse of the trial court's discretion to award child support in an amount greater than even the liberal amount of expenses of the child asserted by Mother. We therefore modify the child support calculations. Using the living expenses submitted by Mother, $3,355.90, Father's 88% share of that amount is $2,953.19 per month. Any greater amount would simply be a transfer of wealth from Father to Mother.[140]

In contrast, the Supreme Court of New York has taken a far more theoretical approach in calculating the child's "needs" for purposes of support in high-income situations.[141] In *Anonymous v. Anonymous*, the court awarded a mother $12,825 per month in child support, and directed the father to pay $60,000 per year for a nanny, as well as 100% of the single child's educational, medical, extracurricular, and camp costs.[142] The court noted that the trial court appropriately fashioned the award to enhance the child's personal development, provide for her education, and maintain her physical and mental health.[143] This more theoretical approach is evident in the court's conclusion, stating that "consideration of the child's actual needs with reference to the prior standard of living continues to be appropriate in determining an award of child support on parental income in excess of [the guideline maximum]."[144]

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138 67 P.3d 351, 355 (Okla. Civ. App. 2003).

139 *Id*.

140 *Id*.

141 Anonymous v. Anonymous, 286 A.D.2d 585, 586, 729 N.Y.S.2d 890 (2001).

142 *Id*.

143 *Id*.

144 *Id*.

VII. Data

The data presented here represent a more concise reference to the issues described above, as well as other facts of note on the topic of high-income support. The facts were taken from the support guidelines of all fifty-one jurisdictions:

- Thresholds for high income support (converted into yearly amounts):
  - ° Min: $60,000 (net) per year (Arkansas)
  - ° Max: $1,200,000 (gross) per year (Utah)
- Guideline model utilized by state:
  - ° Income Shares → 39
  - ° Percentage-of-Income → 9
  - ° Delaware-Melson Formula → 3
- How each state defines income for respective support calculation:
  - ° Gross income → 30
  - ° Net income → 21
- Court's treatment of income exceeding each state's respective guidelines:
  - ° Discretion (total) → 29
    - ■ Pure → 8
    - ■ Presumptive Award with Discretion → 21
  - ° Discretion + Formula → 5
  - ° Pure Formula → 8
  - ° Other → 9

VIII. Conclusion

The aim of enacting child support guidelines was to promote predictability and uniformity among similarly situated litigants. Where the litigants include high-income earners, however, that predictability and uniformity is substantially hampered. In these high-income cases, the courts exercise a significant amount of discretion in fashioning the "correct" child support award. Clearly, courts have tremendous ability to deviate from the formulaic results obtained under a strict application of the guidelines. For attorneys representing high earning parties, the potential for deviation presents enormous opportunities for advocacy.

IX. Appendix Chart

Jurisdiction	Income Avail. for Support	Guideline Model	High Income Threshold	Treatment of Income Above the Guidelines
Alabama	Comb. Adj. Gross Income	Income Shares	240,000	Pure Discretion
Alaska	Adj. Annual Income	Percentage of Income	120,000	Discretion with a Presumptive Award
Arizona	Comb. Adj. Gross Income	Income Shares	240,000	Discretion with a Presumptive Award
Arkansas	Net Income	Percentage of Income	60,000	Pure Formula
California	Annual Gross Income	Income Shares	N/A	Pure Discretion
Colorado	Comb. Adj. Gross Income	Income Shares	360,000	Discretion with a Presumptive Award
Connecticut	Combined Net Income	Income Shares	208,000	Discretion with a Presumptive Award
D.C.	Comb. Adj. Gross Income	Income Shares	240,000	Discretion with a Presumptive Award
Delaware	Net Income	Melson	N/A	Other
Florida	Combined Net Income	Income Shares	120,000	Pure Formula
Georgia	Comb. Adj. Gross Income	Income Shares	360,000	Discretion with a Presumptive Award
Hawaii	Gross Income	Melson	156,000	Other
Idaho	Comb. Adj. Gross Income	Income Shares	300,000	Discretion with a Presumptive Award

Illinois	Net Income	Percentage of Income	N/A	Other
Indiana	Comb. Adj. Gross Income	Income Shares	520,000	Pure Formula
Iowa	Comb. Adj. Net Income	Income Shares	300,000	Discretion with a Presumptive Award
Kansas	Comb. Adj. Gross Income	Income Shares	186,000	Discretion & Formula (rec.)
Kentucky	Comb. Adj. Gross Income	Income Shares	180,000	Pure Discretion
Louisiana	Comb. Adj. Gross Income	Income Shares	360,000	Discretion with a Presumptive Award
Maine	Comb. Gross Income	Income Shares	400,000	Discretion with a Presumptive Award
Maryland	Comb. Adj. Actual Income	Income Shares	180,000	Pure Discretion
Massachusetts	Comb. Available Income	Income Shares	250,000	Discretion with a Presumptive Award
Michigan	Combined Net Income	Income Shares	120,000	Pure Formula
Minnesota	Combined Gross Income	Income Shares	180,000	Discretion with a Presumptive Award
Mississippi	Adj. Gross Income	Percentage of Income	100,000	Other
Missouri	Comb. Adj. Gross Income	Income Shares	360,000	Other
Montana	Total Comb. Avail. Inc.	Melson	N/A	Other
Nebraska	Combined Net Income	Income Shares	180,000	Discretion & Formula (rec.)

Nevada	Gross Income	Percentage of Income	177,792	Other
New Hampshire	Comb. Adj. Net Income	Income Shares	125,000	Other
New Jersey	Combined Net Income	Income Shares	187,200	Discretion with a Presumptive Award
New Mexico	Comb. Gross Income	Income Shares	360,000	Other
New York	Comb. Gross Income	Percentage of Income	141,000	Discretion with a Presumptive Award
North Carolina	Comb. Adj. Gross Income	Income Shares	300,000	Pure Discretion
North Dakota	Net Income	Percentage of Income	300,000	Discretion with a Presumptive Award
Ohio	Comb. Gross Income	Income Shares	150,000	Discretion with a Presumptive Award
Oklahoma	Comb. Gross Income	Income Shares	180,000	Discretion with a Presumptive Award
Oregon	Comb. Adj. Gross Income	Income Shares	360,000	Discretion with a Presumptive Award
Pennsylvania	Comb. Adj. Net Income	Income Shares	360,000	Discretion & Formula (rec.)
Rhode Island	Comb. Gross Income	Income Shares	360,000	Discretion & Formula (rec.)
South Carolina	Comb. Adj. Gross Income	Income Shares	360,000	Pure Discretion
South Dakota	Combined Net Income	Income Shares	240,000	Pure Discretion
Tennessee	Comb. Adj. Gross Income	Income Shares	339,000	Pure Formula

Texas	Net Resources	Percentage of Income	90,000	Discretion with a Presumptive Award
Utah	Comb. Adj. Gross Income	Income Shares	1,200,000	Discretion with a Presumptive Award
Vermont	Comb. Avail. Income	Income Shares	300,300	Pure Discretion
Virginia	Comb. Gross Income	Income Shares	420,000	Pure Formula
Washington	Combined Net Income	Income Shares	144,000	Discretion with a Presumptive Award
West Virginia	Comb. Adj. Gross Income	Income Shares	180,000	Discretion & Formula (rec.)
Wisconsin	Gross Income	Percentage of Income	150,000	Pure Formula
Wyoming	Combined Net Income	Income Shares	154,800	Pure Formula