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COMMENT

THE NUMBERS GAME: WHY CALIFORNIA'S CHILD SUPPORT FORMULA SHOULD BE AMENDED TO AVOID PARENTAL ABUSE

KARLY SCHLINKERT*

INTRODUCTION

Both parents have the primary obligation to support their minor children.¹ Although the prevailing notion is that only men are responsible for paying child support, in actuality 15% of people who owe support are women.² Even though women only pay a fraction of the support orders, they are more likely than men to miss or fail to meet a required support obligation.³ In California, child support obligations will typically terminate when a minor reaches maturity upon turning eighteen.⁴ However, if the child remains unmarried, living at home, and

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¹ CAL. FAM. CODE § 3900, §4053(a)-(b) (Westlaw 2014); *see generally* Santosky v. Kramer, 455 U.S. 745, 758-59 (1982) (stating that “a natural parent’s desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right.”).

² Lynnette Khalfani-Cox, *10 Things You Should Know About Child Support*, EBONY/WELLNESS & EMPOWERMENT (Aug. 1, 2012), www.ebony.com/wellness-empowerment/10-things-you-should-know-about-child-support#axzz2tGcRsS2b.

³ *See Moms Can Be Deadbeats Too*, FOX NEWS (Aug. 9, 2002), www.foxnews.com/story/2002/08/09/moms-can-be-deadbeats-too/ (showing 57% of women fail to pay their full child support order compared to only 38% of men).

⁴ CAL. FAM. CODE § 3901 (Westlaw 2014).

fully enrolled in high school, termination may not occur until the child reaches nineteen.⁵

Prior to making a support award, either a family law court or the child's parents must decide on a custodial timeshare.⁶ This timeshare is the "approximate percentage of time [a parent] has or will have 'primary physical responsibility'" for the minor child.⁷ When making this determination, the court applies the best interest standard.⁸ The best interest standard examines the "health, safety, and welfare" of the child,⁹ and includes factors such as: a parental history of abuse (toward the child, the other parent, or any cohabitant), alcohol abuse or substance use by either parent, prior court orders, and the amount of time each parent currently spends with the child.¹⁰ Once the court weighs the various best interest factors, it will award a custody timeshare. In California, custodial timeshare is a crucial factor in determining child support payments—the more time a parent has, the less that parent pays in support obligations.¹¹

There are two different types of physical custody a parent may have: sole or joint.¹² Sole physical custody involves the minor child being in the primary care of only one parent.¹³ On the other hand, joint physical custody entails each parent having a significant amount of time with the minor.¹⁴ Although in the past courts have favored joint physical

⁵ *Id.*

⁶ *In re Marriage of Rine*, 18 Cal. App. 4th 953, 958 (6th Dist. 1993).

⁷ *DaSilva v. DaSilva*, 119 Cal. App. 4th 1030, 1033 (4th Dist. 2004) (citing *In re Marriage of Drake*, 53 Cal. App. 4th 1139, 1160 (2nd Dist. 1997)).

⁸ CAL. FAM. CODE § 3011 (Westlaw 2014); see *In re Marriage of LaMusga*, 32 Cal. 4th 1072, 1087 (2004).

⁹ CAL. FAM. CODE § 3020(a) (Westlaw 2014).

¹⁰ *Id.* at § 3011 (Westlaw 2014). There is no true statutory definition of "best interest." The California code sets forth a number of factors for the court to consider, but there is no designated weight for each.

¹¹ *What Percentage Timeshare Do You Have With Your Kids?*, CALIFORNIA DIVORCE GUIDE, www.cadivorce.com/california-divorce-guide/child-custody-and-visitation/what-percentage-timeshare-do-you-have/ (last visited Dec. 31, 2013).

¹² CAL. FAM. CODE §§ 3000-3007 (Westlaw 2014); *Basics of Custody and Visitation Orders*, CALIFORNIA COURTS, www.courts.ca.gov/17975.htm (last visited Jan. 6, 2014).

¹³ *Id.* at § 3007 (Westlaw 2014).

¹⁴ *Id.* at § 3004 (Westlaw 2014). Similar to the best interest standard, there is no set definition for what "a significant amount of time" means in terms of custodial timeshare.

2014] *Amending California's Child Support Formula* 259

custody,¹⁵ under current California law there is no such preference,¹⁶ and custody is based solely on the child's best interests.¹⁷

Once the court has determined a custodial timeshare and awarded joint or sole physical custody, it will then calculate the amount of child support each parent owes. California's child support guideline is based on the formula $CS = K [HN - (H\%)(TN)]$ ¹⁸ where:

- (A) CS is child support;¹⁹
- (B) K is the amount of both parents' income allocated for child support;²⁰
- (C) HN is the higher earning parent's net monthly disposable income;²¹
- (D) H% is the amount of time the higher earning parent spends with the minor child;²²
- (E) TN is the total net monthly disposable income of both parents.²³

The results generated by this formula are presumed to be correct,²⁴ unless proven by a preponderance of the evidence to be unjust or inaccurate.²⁵ Therefore, it is crucial for parents to know just how much custodial time they are awarded, or economically "need to have,"²⁶ in order to pay the lowest possible support award.

¹⁵ See, e.g., *In re Marriage of Levin*, 102 Cal. App. 3d 981, 983 (2nd Dist. 1980) (child's mother was handicapped, and although the minor had remained primarily with the father, the court still pushed the parties toward joint custody stating that: joint "custody ha[d] quite recently been declared by the Legislature to be the preferred child custody situation.").

¹⁶ *Id.*

¹⁷ CAL. FAM. CODE § 3040(a) (Westlaw 2014).

¹⁸ *Id.* at § 4055 (Westlaw 2014).

¹⁹ *Id.* at § 4055(b)(1)(A) (Westlaw 2014).

²⁰ *Id.* at § 4055(b)(1)(B) (Westlaw 2014) ("K (amount of both parent's income allocated for child support) equals one plus H% (if H% if less than or equal to 50 percent) or two minus H% (if H% is greater than 50 percent) times" certain fractions depending on total net disposable income).

²¹ *Id.* at § 4055(b)(1)(C) (Westlaw 2014).

²² *Id.* at § 4055(b)(1)(D) (Westlaw 2014).

²³ *Id.* at § 4055(b)(1)(E) (Westlaw 2014).

²⁴ *Id.* at § 4057(a) (Westlaw 2014).

²⁵ *Id.* at § 4057 (Westlaw 2014). Preponderance of the evidence is proven when "the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue instead of the other. This is the burden of proof in a civil trial in which jury is instructed to find for the party, that on the whole, has the stronger evidence, however slight the edge may be." BLACK'S LAW DICTIONARY 1182 (8th ed. 2004).

²⁶ If parents are low income, they may need to ask for more time with the child in order to lower their child support obligation. With lower support, parents save and can spend money elsewhere.

Once child support has been determined, it can only be modified (reduced, increased, terminated, or continued past a certain date) by a parent's show of a material change of circumstances.²⁷ Courts determine what constitutes a material change on a case-by-case basis.²⁸ However, courts are more inclined to recalculate and modify a support order if one parent can show a change in the other parent's income or employment status, or if one parent can show a higher custodial timeshare.²⁹

While the percentage of time element (H%) in the support equation may seem to suggest an incentive for parents to focus on and spend more time with their children, in reality it incentivizes parents to focus on their purse strings rather than their children. The child support formula encourages parents to take advantage of custodial timeshare and reduce their child support obligations by increasing visitation. This gaming of the system misleads fellow parents and creates living situations contrary to children's best interests.

This article examines the H% element of the child support equation (the amount of time the higher earning parent spends with the minor child) and how it affects children and their best interests. Part I focuses on the history of child support in America and how federal legislation has impacted California's approach to child support. Part II discusses California's child support formula and how the amount of time spent with a child affects the total amount of financial support owed; this section will focus on what constitutes a child's best interest. This article advocates for California to adopt a different formula—one that would more effectively ensure that a child's best interests are being protected.

I. THE EMERGENCE OF CALIFORNIA'S GUIDELINE FORMULA FROM FEDERAL WELFARE

Traditionally, family, labor, and assets were all forms of economic security.³⁰ These traditional means, however, failed during the Great Depression.³¹ Throughout this period of economic instability, millions

²⁷ *In re Marriage of Freitas*, 209 Cal. App. 4th 1059, 1068 (4th Dist. 2012) (citing *In re Marriage of Gruen*, 191 Cal. App. 4th 627, 638 (4th Dist. 2011)).

²⁸ *In re Marriage of Leonard*, 119 Cal. App. 4th 546, 556 (6th Dist. 2004); *see generally* *Peterson v. Peterson*, 24 Cal. App. 3d 201, 206-207 (1st Dist. 1972) (indicating that there are no set guidelines for what constitutes a sufficient change in circumstances to warrant modification of support).

²⁹ *Changing a Child Support Order*, CALIFORNIA COURTS, www.courts.ca.gov/1196.htm (last visited Jan. 5, 2014).

³⁰ *Historical Background and Development of Social Security*, SOCIAL SECURITY, www.ssa.gov/history/briefhistory3.html (last visited Oct. 28, 2013).

³¹ *Id.*

2014] *Amending California's Child Support Formula* 261

of Americans were left poor and without prospects for employment.³² As a result of this crisis, the federal government was forced to step in, repair the economy, and re-establish security and stability. To combat some of the problems caused by the Great Depression, President Franklin D. Roosevelt enacted the 1935 Social Security Act (The Act).³³ The Act was intended to assist those who needed help most: the elderly, veterans, and dependent children.³⁴ Although there were acts already in place to assist with the collection of child support,³⁵ policies originating from The Act became the driving force behind modern child support guidelines.³⁶

A. CHILD SUPPORT IN THE FEDERAL WELFARE SYSTEM

1. *Title IV of the Social Security Act and its Progression*

The Act, as signed into law, included eleven different Titles.³⁷ Each Title denoted a different federal grant that would be allotted to compliant states in order to provide general welfare for struggling Americans.³⁸ Title IV—Grants to States for Aid and Services to Needy Families with Children and for Child-Welfare Services, was a welfare program specifically created to address the needs of welfare children during the Great Depression.³⁹ Title IV set aside more than \$20 million annually for states to provide for needy children.⁴⁰ The law required any state seeking allotments to develop a federally approved disbursement plan.⁴¹

³² Jennifer Rosenberg, *The Great Depression*, ABOUT.COM 20TH CENTURY HISTORY, <http://history1900s.about.com/od/1930s/p/greatdepression.htm> (last visited Sept. 30, 2013).

³³ *Social Security Act (1935)*, www.ourdocuments.gov/doc.php?flash=true&doc=68 (last visited Oct. 29, 2013).

³⁴ *Id.*

³⁵ Jennifer Wolf, *The Origins of the U.S. Child Support System*, ABOUT.COM SINGLE PARENTS (Aug. 26, 2012), <http://singleparents.about.com/b/2012/08/26/the-origins-of-the-u-s-child-support-system.htm>.

³⁶ Implementation of the 1935 act led to various amendments and revisions in order to refine the system. One such refinement included the Child Support Enforcement Act. This act mandated that every state create a guideline formula. See section I (A)(2) for more information.

³⁷ See generally *supra* note 30. The eleven different Titles provided assistance to the elderly, aid to the blind, tax implications for employment, public health information, introduction of the social security board, and grants for unemployment compensation.

³⁸ Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as 42 U.S.C. § 601).

³⁹ *Id.* § 401.

⁴⁰ *Id.*

⁴¹ *Id.*

Over the next forty years, the federal welfare program grew in popularity.⁴² Despite provisions established to ensure states disbursed welfare funds correctly, enforcement of such provisions stalled.⁴³ In the mid-1970s, it became clear that the needy child paradigm was shifting and a change was needed.⁴⁴ The welfare system now overflowed with children who were the product not of patriarchal death, as in the past, but of parental separation or divorce.⁴⁵ In an effort to combat lagging enforcement, in 1975 Title IV was revised and expanded.⁴⁶ These new provisions became Title IV-D and required that all federally provided funds in the program be matched by “locating nonresident parents, establishing paternity, establishing child support awards, and collecting child support payments.”⁴⁷ Title IV-D marked a drastic shift in government support programs because it now required that both parents support minor children, instead of placing the burden squarely on the federal government.⁴⁸

2. *From Welfare to State Mandated Child Support Guidelines*

President Ronald Reagan continued to push governmental family support reform following the changes of 1975. In 1984, the president pressed Congress for an even more intensive overhaul to the welfare system, resulting in the Child Support Enforcement Act (CSEA).⁴⁹ This new act further reduced government assistance for indigent families. The key CSEA provision mandated that each state create a guideline

⁴² Jay Chiu, *Is California's Uniform Child Support Guideline Formula Really More Bizarre Than Alice In Wonderland? Yes!*, 31 W. St. U. L. Rev. 311, 313 (2004).

⁴³ *Id.* (enforcing the provisions became an overwhelming problem because of the sheer number of applicants. The more people applying for aid, the less time the government had to check everyone's requirements).

⁴⁴ *House Committee on Ways and Means*, SECTION 8-CHILD SUPPORT ENFORCEMENT PROGRAM, 2, <http://waysandmeans.house.gov/media/pdf/110/cse.pdf> (last visited Nov. 1, 2013).

⁴⁵ *Id.* Originally, a majority of children were on welfare because their fathers had died; however, by the 1970s the majority of children on welfare were the product of parental separation or divorce.

⁴⁶ Family Support Act of 1974, Pub. L. No. 93-647, 88 Stat. 2351 (1975) (codified as 42 U.S.C §§ 451-460).

⁴⁷ *See supra* note 44; 42 U.S.C. §651.

⁴⁸ Marsha Garrison, *An Evolution of Two Models of Parental Obligation*, 86 CAL. L. REV. 41, 53-54 (1998).

⁴⁹ Child Support Enforcement Act of 1984, Pub. L. No. 98-378, §18(a), 89 Stat. 1305 (1984) (codified as 42 U.S.C. §667); *see also* Chiu, *supra* note 42.

2014] *Amending California's Child Support Formula* 263

formula to determine child support.⁵⁰ This guideline formula, although only advisory, was to be made available to judges when making a child support award under the welfare program.⁵¹ Support guidelines became mandatory in all welfare cases in 1988.⁵²

President Reagan's changes to federal welfare programs laid the groundwork for California's current child support system. The changes and overhauls to federal welfare led California to its current child support formula and are the reason why that formula is used in every support calculation.

B. DEVELOPMENT OF THE CALIFORNIA CHILD SUPPORT FORMULA

1. *Early Parental Duties to Pay Child Support*

In the early 1900s, child support in California was not a strict parental duty for both parents upon divorce.⁵³ If one parent was awarded sole physical custody, the other was "under no obligation to provide such children any support or education beyond" what was granted in the divorce decree.⁵⁴ The presumption was that if a parent was denied access to a child, the parent should not have to continue to provide support.⁵⁵ Conversely, if awarded sole custody, the parent was expected to support and educate the child without assistance.⁵⁶

California courts began moving away from this view in the 1960s. By the late 1960s, regardless of any agreement between the parties,⁵⁷ the notion that a parent without custody or visitation had no supportive duty was gone.⁵⁸ Courts determined that even though parents could divorce, it did not mean that parents could also divorce their children.⁵⁹ The simple

⁵⁰ Child Support Enforcement Act, *supra* 49. There were no specific instructions for states to follow when creating their formula. Instructions merely required a uniform formula so that courts throughout the state could maintain uniformity in determining child support awards.

⁵¹ *Id.*

⁵² Family Support Act of 1988. Pub. L. No. 100-485.

⁵³ *Lewis v. Lewis*, 174 Cal. 336, 339 (1917).

⁵⁴ *Id.* (Although the child's father was under no obligation to pay support, the mother still had means for remedy. The only way to ensure support, was to return to the court which granted the divorce and ask them to modify the divorce decree).

⁵⁵ *Id.* (quoting *In Ex parte Miller*, 109 Cal. 643, 648 (1895)).

⁵⁶ *Id.*

⁵⁷ *Elkind v. Bych*, 68 Cal.2d 453, 457 (1968).

⁵⁸ *Kresteller v. Super. Ct.*, 248 Ca.App.2d 545, 546-548 (1st Dist. 1967).

⁵⁹ *Elkind*, *supra* note 57.

conclusion, that no custody equaled no support, was no longer applicable.⁶⁰

2. *The California System Prior to President Reagan's Federal Overhaul*

Prior to the 1984 federal CSEA overhaul of child support, California placed sole discretion for its determination of support in the hands of a trial court judge.⁶¹ Family law judges were allowed to make child support awards on a case-by-case basis.⁶² However, the California Legislature realized that there was a flaw in the welfare and support system: judges wielded too much individual discretion.⁶³

In order to combat the growing trend of similarly situated people receiving vastly different amounts of support, California adopted the Agnos Child Support Standards Act (Agnos Act) in 1984.⁶⁴ Although the Agnos Act was initially intended to apply only to welfare children, in effect the law prohibited judicial discretion when making any child support award.⁶⁵ The Agnos Act streamlined child support in California by creating a strict formula for courts to follow in every support decision,⁶⁶ limiting judicial discretion as well as wildly fluctuating child support awards.

3. *Formation of California's Family Code*

Prior to 1993, family law judges awarded support based on codes which were scattered throughout the Civil Code, the Code of Civil Procedure, the Evidence Code, and even the Probate Code.⁶⁷ In 1992 California enacted the official "California Family Code" in order to

⁶⁰ See generally *Keller v. Super. Ct.*, 248 Cal. App. 2d 545 (1st Dist. 1967).

⁶¹ *Primm v. Primm*, 46 Cal. 2d 690, 694 (1958) (determining a child support "amount is in the first instance a matter resting in the sound discretion of the trial court . . . Under sections 138 and 139 of the Civil Code the court may make necessary or proper provision for the custody, care and education of the minor children of the parties but its jurisdiction to make such orders is limited to the conditions and circumstances existing at the time they are made, and the court cannot then anticipate what may possibly thereafter happen and provide for future contingencies" (citations omitted)).

⁶² This approach seemed appropriate given that judges were able to observe the live and unscripted testimony, the demeanor, and the overall presence of the parents in court.

⁶³ See Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 N.C. L. REV. 209, 212-213 (1991).

⁶⁴ Rine, *supra* note 6.

⁶⁵ See *In re Marriage of Simpson*, 4 Cal. 4th 225 (1992).

⁶⁶ *County of Tulare v. Campbell*, 50 Cal. App. 4th 847, 850 (1996); see The Agnos Child Support Standards Act of 1984, 1984 Cal. Stat. ch. 1605 § 4.

⁶⁷ Chiu, *supra* note 42, at 316.

2014] *Amending California's Child Support Formula* 265

combat inconsistencies among California judges.⁶⁸ The new code took effect on January 1, 1994.⁶⁹

The California Family Code not only made child support and other family law aspects simpler to find and more uniform, it also kept California in compliance with federal regulations.⁷⁰ California's strict guideline formula is detailed in the new family code under section 4055.⁷¹

4. *The Current Guideline Formula for Child Support and Its Characteristics*

As discussed earlier in the introduction, the current child support formula dictates that $CS = K [HN - (H\%)(TN)]$.⁷² This is a complicated formula that takes into account health insurance, union dues, various tax deductions, and other add-on expenses.⁷³ The current formula has been widely criticized. Judges have referred to the calculation as being more bizarre than Lewis Carroll's *Alice in Wonderland*,⁷⁴ and being overly complex to the point of causing great confusion.⁷⁵

Due to the complexities of using the formula, child support awards in California are almost always calculated using computer software.⁷⁶ The proposed software figure is presumed correct,⁷⁷ and further limits a judge's discretion by making it more difficult to award anything "below [the] guideline"⁷⁸ amount produced. Courts must adhere to uniform guideline calculations and depart from the formula result only in "special circumstances."⁷⁹ Even if parties agree to a child support figure below

⁶⁸ 1994 Family Code, 23 CAL. L. REVISION COMM'N REPORTS 1, 10-12 (1993).

⁶⁹ *Id.* at 9. The new codes went into effect one year later so as to give the state a one year grace period during which changes could be made if necessary.

⁷⁰ CAL. FAM. CODE § 4050 (Westlaw 2014). Reagan's Child Support Enforcement Act of 1984 required that all states have guidelines to calculate child support. Intent behind the new family code sections was to insure that California remained within all federal child support regulations.

⁷¹ *Id.* at § 4055 (Westlaw 2014).

⁷² *Id.* at § 4055(a) (Westlaw 2014).

⁷³ *Id.* at § 4059 (Westlaw 2014).

⁷⁴ *In re Marriage of Carter*, 26 Cal. App. 4th 1024, 1029 (1st Dist. 1994).

⁷⁵ *In re Marriage of Fini*, 26 Cal. App. 4th 1033, 1040 (1st Dist. 1994).

⁷⁶ There is the possibility of computing the formula by hand; however, doing so would be extremely complicated. With varying elements like K and H%, almost every attorney will use court approved software to make the calculation. One such software program is Dissomaster.

⁷⁷ CAL. FAM. CODE § 4053(k) (Westlaw 2014).

⁷⁸ *In re Marriage of Hall*, 81 Cal. App. 4th 313, 317 (4th Dist. 2000).

⁷⁹ CAL. FAM. CODE § 4052 (Westlaw 2014). These special circumstances are enumerated in Cal. Fam. Code §4057 (5). Special cases include when there are multiple children with parents

the guideline support amount, the court cannot accept that number without certain party declarations.⁸⁰

California's current guideline is unique because it is a regressive formula.⁸¹ When a parent's monthly income increases, the amount of income allocated to child support decreases.⁸² A parent is now paying a smaller percentage of overall income to support.⁸³ The child support award can further be reduced depending on the H% element.⁸⁴ The timeshare requirement dictates that the higher a parent's custody timeshare percentage, the lower the child support obligation.

5. *The H% Element: Assessing the Amount of Time Spent With the Minor*

The key to calculating child support in California is the H% element. California is the only state to require this element in every single child support calculation.⁸⁵ In the mid-1980s the National Child Support Guidelines Panel emphasized that involvement by both parents should be encouraged.⁸⁶ The group recommended that child support formulas reflect this notion in their application and use.⁸⁷

Although the California Legislature does not state how the formula furthers its goal of safeguarding a child's best interests,⁸⁸ one may infer that California believes the best interests of the child depend on the frequency of contact with each parent. On its face, the H% element seems to incentivize parents to spend time with their children, but there is no reason given to include it in every child support calculation.

having different timeshares for each child, when there are special medical considerations, or various housing considerations.

⁸⁰ Hall, *supra* note 78.

⁸¹ Chiu, *supra* note 42, at 318.

⁸² See *id.* at 319; CAL. FAM. CODE § 4055 (b)(3).

⁸³ *Id.*

⁸⁴ The H% element is the amount of time the higher earning parent spends with the minor child. Cal. Fam. Code §4055 (b)(1)(D).

⁸⁵ Jane C. Venohr & Tracy E. Griffith, *Child Support Guidelines: Issues and Reviews*, 43 FAM. CT. REV. 415, 423 (2005).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Chiu, *supra* note 42, at 319.

2014] *Amending California's Child Support Formula* 267

C. HOW OTHER JURISDICTIONS APPROACH CHILD SUPPORT GUIDELINES

In keeping with the federal mandates, every state has its own child support guideline formula. There are generally three types of child support formulas: income shares, percentage-of-obligor's income, and the Melson formula.⁸⁹ Thirty-three states, including California, use a form of the income shares model; thirteen use the percentage-of-obligor income model; three use the Melson formula; and two use a hybrid of systems.⁹⁰

States such as New York,⁹¹ Nevada,⁹² and Texas⁹³ use the percentage-of-obligor income model. This formula requires the non-custodial parent to pay a flat percentage of income depending on the number of children supported.⁹⁴ This means that no matter how much custodial time or visitation the obligor has, that parent pays the same amount.⁹⁵ This type of formula was developed in order to ensure that support is fair and consistent, with the goal of giving children the same standard of living they would have had if their parents had stayed together.⁹⁶

This type of formula makes the ideal model for California. This model prioritizes what is in a child's best interest rather than give parents the pure economic incentive to spend more time with the minor in order to receive more or spend less money.

II. ANALYSIS OF CALIFORNIA'S H% ELEMENT

Parents are entitled to "frequent and continuing contact" with their minor children,⁹⁷ and courts are required to grant "reasonable visitation"

⁸⁹ Tim Graves, *Comparing Child Support Guidelines*, 34 FAM. L.Q. 149, 152 (2000).

⁹⁰ Venohr, *supra* note 85, at 417-418.

⁹¹ N.Y. DOM. REL. LAW § 240 1-b (Westlaw 2014).

⁹² NEV. REV. STAT. §§ 125B.070-.080 (Westlaw 2013).

⁹³ TEX. FAM. CODE §§ 154.001 et seq. (Westlaw 2013).

⁹⁴ Venohr, *supra* note 85; *Child Support Guidelines: Income Shares and Percentage of Income, THE FUTURE OF CHILDREN*, (1994) <http://futureofchildren.org/publications/journals/article/index.xml?journalid=63&articleid=412§ionid=2811>.

⁹⁵ Venohr, *supra* note 85, at 418.

⁹⁶ N.Y. DOM. REL. LAW §240; *see also Child Support Calculator*, HUMAN RESOURCES ADMINISTRATION, www.nyc.gov/html/hra/html/services/child_support_calculator.shtml (last visited Mar. 12, 2014).

⁹⁷ CAL. FAM. CODE § 3020(b) (Westlaw 2014); *see also* In re Marriage of Matthews, 101 Cal. App. 3d 811, 818 (1st Dist. 1980) (court will try to preserve visitation "whenever possible").

268 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 44]

so long as it is not detrimental to the child's best interests.⁹⁸ Once visitation is ordered, (the H% determined) support can be calculated. This is where the California system goes awry.

Often, a parent who requests, and is awarded, more time and lower support payments fails to actually spend more time with the child.⁹⁹ After a parent's failed commitment to spend time with the child, it is rare that the other parent will return to court to seek an adjustment to the new order.¹⁰⁰ Although the California uniform child support guideline formula seeks to ensure the best interests of the minor child,¹⁰¹ in reality the formula lends itself to parental abuse for financial gain. Parents are able to run a strict numbers game and reduce their child support costs by seeking more custodial time. However, if the timeshare element were not a part of the calculation, there is a greater likelihood that child support awards within the family law system would better serve a child's best interests.

A. COMPARING CALIFORNIA AND NEW YORK CHILD SUPPORT—JUST THE NUMBERS

Suppose a minor child is born to an unmarried couple that is no longer romantically linked. Assume that Parent 1, the non-custodial parent, earns \$65,000 gross annual income and Parent 2, the custodial parent, earns \$56,000 gross annual income. There are no other deductions, taxes, or add-on expenses.¹⁰² In New York, using the fixed percent model, Parent 1 (Father), as the non-custodial parent, will owe Parent 2 (Mother) \$828.75 per month, totaling \$9,945 per year.¹⁰³ This will be the amount whether the custodial timeshare is 10%, 30%, or even 40%. The illustrations below show how inclusion of the custodial timeshare element, as included in California, can make a huge difference in a child support award.

⁹⁸ CAL. FAM. CODE § 3100(a) (Westlaw 2014).

⁹⁹ Gaia Bernstein & Zvi Triger, *Over-Parenting*, 44 U. C. DAVIS L. REV. 1221, 1248 (2011).

¹⁰⁰ *Id.*

¹⁰¹ CAL. FAM. CODE § 3011 (Westlaw 2014).

¹⁰² This would almost never be the case, but for simplicity only income was imputed.

¹⁰³ *Child Support Calculator*, HUMAN RESOURCES DEPARTMENT OF SOCIAL SERVICES, www.nyc.gov/html/hra/html/services/child_support_calculator.shtml (last visited Mar. 12, 2014). This information was calculated using the New York Department of Social Services website and entering in 1 child and Father's income of \$65,000 as the non-custodial parent.

1. *Increasing the H% in Practice*

Assume Father and Mother go to court and a judge orders custodial timeshare between the parties. Father makes \$65,000 per year with a tax filing status of single one deduction and Mother makes \$56,000 per year with a tax filing status of head of household two deductions. Also, for the sake of simplicity, assume there are no expenses, taxes, or add-ons.

Using the California formula ($CS = K [HN - (H\%)(TN)]$), and first assuming a 10/90 timeshare split with Mother having primary custody, Father would owe Mother \$782 a month, totaling \$9,384 per year.¹⁰⁴ If Father were to have the child at a 30% timeshare, he would owe Mother \$464 a month, totaling \$5,568 per year.¹⁰⁵ Finally, if Father were to have the minor at a 40% custodial timeshare, he would owe Mother \$251 per month, totaling \$3,012 per year.¹⁰⁶

2. *Changing the Game: Adding One More Day*

In California, if a non-custodial parent has visitation two days per week he will have a 28.57% timeshare.¹⁰⁷ If a non-custodial parent has the child for one more day per week, timeshare is increased to 42.85%.¹⁰⁸ Assume the same facts as above: Father earning \$65,000 per year filing single with one federal exemption, Mother earning \$56,000 per year filing head of household with two federal exemptions, and no other add-on expenses.

With a two day per week custodial timeshare Father would owe Mother \$491 per month.¹⁰⁹ However, if Father were to have custodial

¹⁰⁴ *Guideline Calculator, CHILD SUPPORT SERVICES*, www.cse.ca.gov/ChildSupport/cse/guidelineCalculator (last visited Mar. 15, 2014). First, select 1 child and click "start." Under the Dependent Information tab, in the box provided for "Time with Parent 1(%)," Father in our case, type in 10.0. Under the "Tax Information" section fill out the boxes so that the tax year is 2014 and Parent 1 is filing single with 1 federal tax exemption making \$65,000 annually (\$5,416.67 monthly), and Parent 2 is filing head out household with 2 federal tax emptions making \$56,000 annually (\$4,666.67 monthly). Leave all other boxes set to the automatic setting. Scroll down and select "Calculate Guideline Support."

¹⁰⁵ *Id.* Follow the same steps as above; however, in the box provided for "Time with Parent 1(%)," type 30.0. Input the same tax and wage information as previous, and again leave all other boxes set to the automatic setting. Then select "Calculation Guideline support."

¹⁰⁶ *Id.* Follow the same steps as above; however, in the box provided for "Time with Parent 1(%)," type 40.0. Input the same tax and wage information as previous, and again leave all other boxes set to the automatic setting. Then select "Calculation Guideline support."

¹⁰⁷ *What Percentage Timeshare Do You Have With Your Kids?*, *supra* note 11.

¹⁰⁸ *Id.*

¹⁰⁹ *See supra* note 105. Again, begin by selecting 1 child and click "start." Under the Dependent Information tab, in the box provided for "Time with Parent 1(%)" type in 28.57. Under the "Tax Information" section fill out the boxes so that the tax year is 2014 and Parent 1 is filing

270 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 44]

timeshare three days per week he would owe Mother \$184 per month in child support.¹¹⁰ By adding just one day, Father saves \$307 per month and \$3,684 per year.

3. *Adding Additional Elements: Costs and Timeshare*

Again, same facts as above: Father earning \$65,000 per year filing single with one federal exemption, Mother earning \$56,000 per year filing head of household with two federal exemptions, and no other add-on expenses. Now also assume: (1) caretaker at cost of \$13.50 per hour,¹¹¹ (2) minor is in school from 8:00 AM to 3:00 PM,¹¹² (3) Father works from 8:00 AM to 5:00 PM,¹¹³ and (4) the minor child has a bed time at 10:00 PM. The caretaker is thus needed for two hours on each of the days Father has custody of the child,¹¹⁴ and Father personally spends an added five hours with the child.

In this example, since childcare costs \$27 per day,¹¹⁵ if Father were to have custody for two days per week, childcare would cost \$54 per week and \$216 per month; this is in addition to the \$491 Father already owes under guidelines support.¹¹⁶ For two days of custodial timeshare, Father will pay a total of \$707 per month. If Father were to have custody for three days per week, childcare would cost \$81 per week and \$324 per month; this is in addition to the \$184 Father owes in guideline support.¹¹⁷

single with 1 federal tax exemption making \$65,000 annually (\$5,416.67 monthly), and Parent 2 is filing head out household with 2 federal tax emptions making \$56,000 annually (\$4,666.67 monthly). Leave all other boxes set to the automatic setting. Scroll down and select "Calculate Guideline Support."

¹¹⁰ *Id.* Follow the same steps as above; however, in the box provided for "Time with Parent 1(%)," type 42.85. Input the same tax and wage information as previous, and again leave all other boxes set to the automatic setting. Then select "Calculation Guideline support."

¹¹¹ *San Francisco Babysitters*, CARE.COM, www.care.com/san-francisco-babysitters (last visited Feb. 7, 2013) (starting salary for a baby sitter in San Francisco, California is \$13.50).

¹¹² *Middle Schools*, SAN FRANCISCO PUBLIC SCHOOLS, (2014), www.sfusd.edu/en/schools/middle-schools.html. This website leads to a list of middle schools in the San Francisco area. By clicking on the "more info" link for each school, each school's hours are individually shown. Class times differ, but they generally hover around a start time of 8:00 AM and an end time of 3:00 PM.

¹¹³ *American Time Use Survey*, BUREAU OF LABOR STATISTICS, www.bls.gov/tus/charts/ (last visited September 25, 2013) (adults over the age of 18 work on average 8.8 hours a day). Since the average is 8.8 hours, for this problem we will round down to 8 hours a day, for a 40 hour work week.

¹¹⁴ Since the child gets out of school at 3:00 PM and Parent 1 gets off of work at 5:00 PM, there are two hours during which a babysitter will be needed.

¹¹⁵ Calculated multiplying the caretaker cost by the number of hours he or she is needed by Father.

¹¹⁶ *See supra* note 110.

¹¹⁷ *See supra* note 111.

2014] *Amending California's Child Support Formula* 271

For three days of custodial timeshare Father will only pay a total of \$433 per month. By adding one day, *only five hours* of actual personal time with the minor, Father saves \$274 dollars per month and \$3,288 per year.

So long as a parent wants time with the child a court is obligated to accommodate as best it can.¹¹⁸ Parents who may not necessarily have the child's best interests at heart can easily fight and gain more custodial time in order to reduce support. However, if Father (or any other non-custodial parent) looks at his or her purse strings and abuses the court system to lower out-of-pocket expenses, a child's best interests cannot be upheld.

Time should not function as a bargaining chip in child support cases, but rather as an important part of raising a child. With 85% of brain development occurring by the time a child is five years old,¹¹⁹ it is imperative that time is spent ensuring the child's best interests and brightest future.

B. HOW PARENTING TIME AFFECTS CHILDREN: QUALITY V. QUANTITY

Parenting is not about spending large quantities of time with a child, but rather, it is about the quality of time a parent spends with the child.¹²⁰ Different "high quality" activities, activities which are educationally centered and focus on cognitive stimulation and verbal engagement, can equate to improved cognitive development in children.¹²¹ These activities include piano lessons, sports, and reading. Alternatively, "lower quality" activities, activities which are less focused on verbal and cognitive stimulation, may be detrimental to brain development in children.¹²² These activities include internet use, television, and video games. Not only do these lower quality activities negatively impact cognitive development, but doctors and psychologists suggest that too

¹¹⁸ See Cal. Fam. Code § 3100(a) (Westlaw 2014).

¹¹⁹ Michael Higham, EARLY CHILDHOOD EDUCATION IMPORTANCE, 85% OF BRAIN DEVELOPS BEFORE 5 (Apr. 11, 2013), <http://ivn.us/2013/04/11/early-childhood-education-importance-85-of-brain-develops-before-5-2/>.

¹²⁰ Amy Hsin, *Parent's Time with Children: Does Time Matter for Children's Cognitive Achievement?*, SOC INDIC RES 93:123, 125 (2009). Hsin suggests that differences in the quality of time a parent spends with their child may contribute to differing socioeconomic outcomes.

¹²¹ *Id.*

¹²² *Id.*

272 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 44]

much time spent in front of a screen can lead to damaging social behavior and take an emotional toll on children.¹²³

When a parent fights to lower child support payments by increasing custodial time, there is no indication of what that parent will do with these extra hours. This lack of structure can often lead children to spend time on lower quality activities that impair and harm cognitive development. Children, on average, watch television for nearly seven hours a day.¹²⁴ Using facts from earlier, if a child gets out of school at 3:00 PM and goes to bed at 10:00 PM, those remaining seven hours are, for the average child, filled with television.

For many parents and caretakers, this type of activity is the only type of “parenting” they know or can afford.¹²⁵ A working parent is given the same rights as a non-working parent,¹²⁶ and custody cannot be denied on the grounds that one parent has to work while the other can stay at home.¹²⁷ Both parents are equally entitled to custody of a minor child.¹²⁸ Given the glaring problems with California’s child support formula, parents and the legislature must assess how these lower quality activities are affecting the quality of parental timeshares.

Technology is not a substitute for parenting. Using the caretaker illustration above, spending one extra day with a child who is likely to just be placed in front of a television can save a parent \$3,288 a year. California invites this type of parenting and lifestyle by requiring the H% element in every child support formula. If parents are unable to provide stimulating high quality activities, the increased H% functions opposite to a child’s best interests.

¹²³ *Too Much Time Online*, IKEEPSAFE, www.ikeepsafe.org/be-a-pro/balance/too-much-time-online/ (last visited Dec. 26, 2012) (children ages 8-18 average 44.5 hours a week in front of a screen).

¹²⁴ Dorothy M Neddermeyer, *T-U-R-N OFF the TV, Video Games, DVR*, VENTURESTREET, www.promatcher.com/articles/T-U-R-N-OFF-the-TV-VIDEO-GAMES-DVR-1488 (last visited Mar. 10, 2014).

¹²⁵ *Relationships: Electronic Babysitters*, JUSTIN’S LINK, www.links.net/vita/swat/course/thesis/rships/ebabysit.html (last visited December 15, 2013) (referencing Aletha C. Huston, et. Al, *Big World, Small Screen* (1992)).

¹²⁶ *Marriage of Burchard*, 42 Cal.3d 531 (1986). In *Burchard*, the California Supreme Court decided that a working mother is no less of a parent, and no less committed to raising her child, than a father who was able to spend more time at home with the minor.

¹²⁷ *Marriage of Loyd*, 106 Cal.App.4th 754 (5th Dist. 2003). The *Loyd* court determined that the *Burchard* ruling extended to working fathers.

¹²⁸ CAL. FAM. CODE § 3010(a) (Westlaw 2014).

2014] *Amending California's Child Support Formula* 273

C. ADOPTING A PERCENTAGE-OF-OBLIGOR MODEL WOULD BOTH PROVIDE PEACE OF MIND AND FURTHER PUBLIC POLICY

In a perfect world parents would stay together, children would grow up in a happy and stimulating environment, and child support would not even have to exist. Sadly, this is not our reality; anywhere from 40% to 50% of all marriages now end in divorce.¹²⁹ And even when the marriage ends in divorce, a child must continue to be supported according to the parents' "station in life."¹³⁰

1. *The Problem with California's Income Shares Model*

Parents frequently refer to visitation time as "my time;" however, visitation is actually the child's time. When California enacted the new family code in 1992, and decided that the amount of time a parent spends with the child was critically important, the state did not appear to have fully considered the adverse effects of the H% element.

A judge's decision to award increased visitation between a parent and a child is a difficult one. There is no way to truly know if increasing time is in a child's best interest. There is no way to know what a parent's true intentions are behind seeking more custodial time. Judges have to ask themselves many questions without even meeting the child and in some cases only speaking with the parents in court for twenty minutes.¹³¹ It is nearly impossible for a judge to make a determination about the child's best interests when the judge has to award a timeshare percentage, settle on child support, and resolve any other small lingering matters, in such a short amount of time.¹³²

¹²⁹ Samara O'Shea, *How Many Marriages Actually End in Happily Ever After?*, HUFF POST DIVORCE (June 16, 2012, 02:15 AM), www.huffingtonpost.com/samara-oshea/marriage-has-a-25-chance-_b_1568936.html (February 8, 2013).

¹³⁰ CAL. FAM. CODE § 4053(a) (Westlaw 2014).

¹³¹ Superior Court of California, County of San Francisco local court rule 11.7 (D)(3). In San Francisco custody, visitation, and child support are all heard on the law and motion calendar. Law and motion hearings in family court are only given 20 minutes in which to argue their case and for the judge to make determinations.

¹³² *See generally Id.* Custody is typically handled during a short cause hearing on the law and motion calendar. If, however, the parties take the issue to trial, there may be more time.

274 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 44

2. *Changing the California Formula and Adopting the Percentage-of-Obligor Model*

California should change its child support formula. If the H% element were no longer required in every calculation, a child's best interests may actually be prioritized—not a parent's or even the State's.

Implementing a simple percentage-of-obligor's income system, similar to that of New York and other states, would be a great improvement for California. A percentage-based calculation like that used in New York would award the same amount of child support whether a parent has a timeshare of 10% or 49%. Adopting a percentage-based formula would ensure that parents come to court and seek a higher custodial timeshare because they genuinely desire to spend more quality time with their child—because it removes the economic incentive. If California were to remove the ability for parents to play a math game when determining support, a child's best interests would better be served.

Some parents may disagree with this solution since, looking at the examples provided above, the percentage model may lead to a higher support award. Adoption of a percentage-based formula, however, helps ensure that minor children have access to the support to which they are legally entitled.¹³³ Although some parents may argue that base support to the primary custodial parent should decrease because spending more time with a child means having more expenses, this is how the current support system functions, and the system is broken.¹³⁴

CONCLUSION

The California child support system easily lends itself to financial abuse. The guideline calculation for determining child support awards is complicated and fraught with criticism.¹³⁵ While some parents may legitimately fight for time with children out of love, other parents are currently incentivized to fight for more time simply to reduce the amount of support they will owe. If an unfit parent seeks more time with the minor, as legally permitted, it can affect many different facets of the

¹³³ See CAL. FAM. CODE § 4053 (Westlaw 2014).

¹³⁴ See generally Kelley Weiss, *California Child Support: Non-Custodial Parents Owe \$19.2 Billion* (June 21, 2011, 06:12 AM) HUFF POST DIVORCE, www.huffingtonpost.com/2011/04/21/california-child-support-_n_852341.html. California parents currently owe 20 billion dollars in child support. California makes up 18% of total outstanding child support in America.

¹³⁵ See Tim Graves, *Comparing Child Support Guidelines*, 34 FAM. L.Q. 149, 152 (2000).

2014] *Amending California's Child Support Formula* 275

child's life. In order to preserve what is in a child's best interests, California should adopt a new guideline formula similar to that of New York. By doing away with the H% element and adopting a percentage-of-obligor model, children can again become the focus of child support.