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New Hampshire's Child Support Guidelines: Legal and Economic Background and Rebuttal Strategies[©]

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Regulatory and Legislative History

The 1988 Family Support Act, Pub. L. 100-485, 102 Stat. 2343,¹ required each state, as a condition of receipt of federal funds for child support enforcement services, to enact mandatory presumptive child support guidelines, stating:

There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case.

42 U.S.C. § 667(b)(2); accord 45 CFR. 302.56. In any judicial proceeding for support, whether an initial determination or a modification, the Guidelines are the presumptively correct amount of support to be awarded. RSA 458-C:4 II. Deviation from the Guidelines must be supported by a written finding or a finding on the record that the presumptively correct amount of support, as determined by the guidelines, is unjust or inappropriate in the particular case.

In conformance with the federal mandate, the New Hampshire Child Support Guidelines were enacted by the New Hampshire legislature, and codified at N.H. Rev. Stat. Ann. §§ 458-C:1 to :7, effective April 30, 1988, amended 1998 (hereafter RSA 458-C). The legislature sought to establish a "uniform system" for determining the amount of child support to be awarded. RSA 458-C:1. *Snedeker v. Snedeker*, 145 N.H. 19(2000); *Giles v. Giles*, 136 N.H. 540(1992).

The guideline percentages are fixed percentages of net income, vary only by the number of children, and are as follows:

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¹ Codified primarily at 42 U.S.C. §§ 666, 667.

Table 1.

No. of Children	1	2	3	4 or more
% of income	25%	33%	40%	45%

These percentages are applied to both parents' income for combined dollar costs and, after adjustments, the dollar cost amount is pro-rated between the parents in proportion to their share of combined net income. These percentages are the same regardless of the parents' income level—whether low, high, or somewhere in between.

The New Hampshire Child Support Guidelines were adopted pursuant to a federal mandate and as a means to remove children of divorced parents from poverty and, thereby, from state welfare roles. Based on official state records, the sole economic foundation for the New Hampshire guidelines is *Child Support Guidelines: Economic Basis and Analysis of Alternative Approaches*, Robert G. Williams, Ph.D., June 1987 (Hereinafter Williams).²

It should be noted that Williams based his report on the economic research of Thomas Espenshade—specifically the research published in *Investing in Children: New Estimates of Parental Expenditures*, (1984) The Urban Institute Press, Washington, D.C. Therefore, one must turn to Espenshade's research to fully understand what should be the underlying economic facts of New Hampshire's guidelines.

Introduction to Economic Background

New Hampshire's child support guidelines are a hybrid variation of child support guidelines initially implemented by the state of Wisconsin for Title IV-D cases with child cost percentages selectively taken from a child cost study by Thomas Espenshade. Espenshade's finding was that child costs declined as a share of rising net income. However, New Hampshire—as discussed below—arbitrarily converted this table into percentages that are fixed relative to net income (do not decline). In practice, the guidelines act like fixed, percent-of-obligor-only-income guidelines as developed in the state of Wisconsin. A review of both methodologies is necessary to compare the presumptive underlying facts with case facts.

Espenshade Guidelines Facets of New Hampshire's Guidelines

The fixed percentages that are applied to the parent's net income to determine the child costs are taken from an update to a 1984 child cost study by Thomas Espenshade, *Investing in Children: New Estimates of Parental Expenditures*.³

The origins of New Hampshire's selection of these percentages from the Espenshade study are found in *Department of Health & Human Services' Report on New Hampshire's Child Support Guidelines*, January 2002. This report states on page 2 that a 1987 federal advisory

² Report of the Committee to Study Child Support Issues, page 2 and Record of Children, Youth and Elderly Affairs Committee Hearings on HB 1128, January 19, 1988

³ Thomas J. Espenshade, *Investing in Children: New Estimates of Parental Expenditures*, (1984) The Urban Institute Press, Washington, D.C.

panel on child support recommended the national adoption of presumptive guidelines—although with each state determining its own appropriate guidelines. This report continues, stating that after the mandate for presumptive guidelines by the federal Family Support Act of 1988, New Hampshire enacted presumptive guidelines into law in 1988 that were "based on the "income shares" model." Additional documentation of the origins of New Hampshire's child support guideline percentages is found in *A Report on the Impact of Child Support Guidelines in New Hampshire*, prepared by the New Hampshire Department of Health and Human Services, 1992. On page 7, this report states:

New Hampshire's guidelines, along with those of 31 other states, are based on the "income shares" model developed by the Child Support Guidelines Project staff. ... The "income shares" model, developed by the project staff, was one of two models recommended by the project's Advisory Panel for adoption by the states.

The actual percentages from the advisory panel's income shares guideline in this report are shown in Table 2.

One should note that the guideline percentages used presumptively by New Hampshire do not conform to the underlying study. First, the presumptive percentage for one child actually lies above any of the percentages from the study. Apparently, New Hampshire used the tables that include day care and extraordinary medical expenses which not every family incurs. Second, New Hampshire uses fixed percentages across all income levels.

- The economic study that New Hampshire claims as the basis for its guidelines specifically shows child costs declining as a share of household net income as net income rises. New Hampshire arbitrarily chose fixed income percentages to apply to all income ranges without any economic study to support such a policy decision.

This distinction is important. The documented economic basis for New Hampshire's guidelines (the Espenshade and federal Advisory Panel studies) clearly shows that child costs decline as a share of net income. There is additional documentation of the importance of the divergence of New Hampshire's alleged implementation of income shares and the actual implementation. From an additional, key federally funded child support study in 1990:

There is, however, an important difference between the percentage of income and income shares guidelines. Unlike the percentage of income guideline, the noncustodial parent's child support obligations do [emphasis original] vary with the income of the custodial parent.⁴

⁴ See Lewin/ICF, Washington D.C. (1990), *Estimates of Expenditures on Children and Child Support Guidelines*, Submitted to Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services, Section 6, Page 9.

Table 2.

**Income Shares Model
Child Support as a Proportion of Net Income,
1986 Dollars⁵**

	0- 5,600	5,601- 10,650	10,651- 16,725	16,726- 28,200	28,201- 39,975	39,976- 51,875	Over 51,875
One Child	23.8	23.7	23.3	21.6	21.0	20.1	17.8
Two Children	37.0	36.7	36.1	33.5	32.7	31.2	27.7
Three Children	46.3	46.0	45.2	42.0	40.9	39.0	34.7
Four Children	52.2	51.8	51.0	47.3	46.1	44.0	39.1
Five Children	57.0	56.5	55.6	51.6	50.3	48.0	42.6
Six Children	60.9	60.4	59.5	55.2	53.8	51.3	45.6

Income ranges in year 2003 dollars:

0- 9,401	9,402- 17,880	17,881- 28,078	28,079- 47,343	47,344- 67,111	67,112- 87,089	Over 87,089
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Excludes child care costs and extraordinary medical expenses.

This difference between the percentage of income and income shares guidelines arises because under the latter guideline, the percentage of income to be paid in child support varies with the level of combined [emphasis original] parental income. . . . The variation in the percentage of income to be paid in child support (as combined income changes) is, however, a key feature of the income shares guideline. If the percentage of income to be paid in child support does not vary with the level of income, then the income shares guideline is identical to the percentage of income guideline.⁶

⁵ Robert G. Williams, *Development of Guidelines for Child Support Orders: Advisory Panel Recommendations and Final Report*, 1987, U.S. Department of Health and Human Services, Table 12, Section II, Page 70. The year 2001 dollar figures for the net income brackets were calculated by R. Mark Rogers, using the U.S. consumer price index, all-urban.

⁶ See Lewin/ICF, Washington D.C. (1990), *Estimates of Expenditures on Children and Child Support Guidelines*, Submitted to Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services, Section 6, Pages 10-11.

Additional underlying facts from the Espenshade study conflict with typical case facts

New Hampshire's child support guidelines are a variation of child support guidelines developed by Policy Studies, Inc (Denver, CO) and known as Income Shares. For the early version of Income Shares adopted by New Hampshire, the underlying economic study and conditions for appropriate application of the guidelines were conducted and published by Thomas Espenshade in 1984.⁷ The relevance of this study for New Hampshire is that this study is the foundation for the intended economically appropriate application of the child support guidelines currently in use in New Hampshire. The guidelines were designed to be applicable only if the household had certain economic characteristics. These underlying economic characteristics of the household are:

- The household is intact. The household does not have the additional overhead that is incurred by a separated family that would reduce income available to spend on children.
- The custodial parent is assumed to care for the children 100 percent of the time and the non-custodial parent is assumed to have no parenting time costs.
- There is additional income when a child is added to the family—additional income to bring the standard of living back to its previous level.
- Tax benefits attributable to the children are not cost offsets—they are not negative costs.
- The best method of estimating child costs is to compare household consumption percentages of food (just food) before and after having an additional child.

The Espenshade Income Shares child support guideline model does not apply to the current case because:

- The family is no longer intact. Both parents must incur adult overhead living expenses (mortgage or rent, utilities, car note, etc.) that are no longer shared, thereby reducing funds available to spend on other goods—including goods for children.
- The child support award will be spent according to the economic behavior of a single-parent household—not according to that of an intact household. A child support award based on an intact family standard treats the child support burden unequally—placing a higher preference for the standard of living of the custodial parent household. Essentially, a custodial parent would receive child support based on an intact family expenditure pattern but would spend the money based on single-parent household behavior—spending less on the child and a portion on the parent.
- There is no "phantom income" as assumed by the income shares methodology beyond what the parents actually earn. The guideline cost table assumption should be rebutted

⁷ Thomas Espenshade, *Investing in Children*, Urban Institute Press, 1984. See also *Updated Child Support Schedule, State of Virginia*, April 6, 1999, by Policy Studies, Incorporated (pp. 1-2).

because the cost table is based on significantly more income than the parents earn at any given cost level. The parents do not earn what the cost table assumes.

- The child-related tax benefits are significant and are cost offsets that should be recognized in the child support determination.
- Changes in household consumption patterns of food bear no relationship to overall child costs in the instant case and that a better methodology is to examine actual expenditures on children.
- The obligor parent has substantial parenting time with the child. The obligor parent incurs significant overhead expenses in child costs and significant variable costs. In contrast with the underlying assumption of the guidelines, the child will not be with the obligee parent 100 percent of the time but is with the obligor parent significantly.

Essentially, even if New Hampshire had implemented declining percentages for child support guidelines—instead of fixed percentages—the guidelines would still be excessive due to upward biases in the methodology and due to non-recognition of parenting time adjustments and sharing child-related tax benefits.

**Examples of New Hampshire's "Income Shares" Guidelines
Actually Being Percent-of-Obligor-Income Guidelines**

First, it should be shown that New Hampshire's guidelines in practice are percent-of-obligor-income guidelines—not Income Shares. Importantly, if there are no deductions to either parent's income, New Hampshire's child support guidelines are percent-of-obligor-income guidelines. That is, the obligee's income has no impact on the presumptive award. Such an outcome conflicts with all professional studies on child costs which find that child costs vary by combined income (household—not just one parent) and with child costs declining as a share (percent share) of rising net income.

Table 3. Example One: One child, obligor with higher gross income

Monthly:	Obligor	Obligee	Combined
Gross income	\$4,000	\$3,000	\$7,000
Net income (single tax payer basis)	\$3,091	\$2,438	\$5,529
Percentage to be applied to net income	.25	.25	.25
Net income times percentage	\$773	\$610	\$1,382
Child cost to be shared			\$1,382
Percentage share of combined net income	.559	.441	
Share of joint child cost	\$773	\$610	
Obligor's net income times guideline percentage	\$773		

- The child support award is the same whether one uses the joint cost sharing formula or just a percentage of the obligor's net income.

Table 4. Example Two: One child, obligor with Example One income, obligee with higher gross income

Monthly:	Obligor	Obligee	Combined
Gross income	\$4,000	\$10,000	\$14,000
Net income (single tax payer basis)	\$3,091	\$7,083	\$10,174
Percentage to be applied to net income	.25	.25	.25
Net income times percentage	\$773	\$1,771	\$2,544
Child cost to be shared			\$2,544
Percentage share of combined net income	.304	.696	
Share of joint child cost	\$773	\$1,771	
Obligor's net income times guideline percentage	\$773		

- Again, the child support award is the same whether one uses the joint cost sharing formula or just a percentage of the obligor's net income.
- Additionally, the substantially higher gross and net income of the obligee has no impact on the obligor's child support obligation. The feature that awards vary only with the obligor's income and not family income conflicts with all valid economic studies on child costs.
- **Effectively, New Hampshire's child support guidelines are obligor only guidelines.**

Note: Calculations are based on calendar 2002 IRS tax code using standard deductions and exemptions.

Wisconsin-Style Guidelines Facets of New Hampshire's Guidelines

New Hampshire's guidelines are a variation of percent-of-obligor-income income guidelines that were originally developed at the University of Wisconsin by Dr. Jacques van der Gaag. The underlying economic study and conditions for appropriate application of percent-of-obligor-income guidelines were conducted and published by Dr. Jacques van der Gaag in 1982.⁸ These guidelines were designed to be applicable only if the household had certain economic characteristics. These underlying economic characteristics of the household are:

- The household is a low-income household. For the study, the households (both parents) averaged annual gross income of \$12,000 in 1982 dollars. In year 2003 dollars, this would be household income of \$22,881. The underlying study specifically states that at higher incomes, the applicable percentage should decline. The study also assumed the percentage would be applied only after setting aside a self-support reserve.
- The custodial parent is assumed to care for the children and not earn any income outside the home.

⁸ Jacques Van der Gaag, "On Measuring the Cost of Children," Child Support: Technical Papers, Volume III, SR32C, Institute for Research on Poverty, Special Report Series, University of Wisconsin, 1982.

- The non-custodial parent is the sole income earner and the percentages applied to the non-custodial parent's income are based on tax law of 1982. Under the tax code in which the percentages are derived, the non-custodial parent that provided over half of the child's support would receive use of all child income tax benefits.
- The low-income characteristic also includes the fact that the guidelines were to be applied to income earners paying little or no income tax. Hence, under the appropriate low-income application, there is no need to take into account differences between gross income and net income.
- The guideline percentages were derived based on the assumption that the non-custodial parent is absent and that the children are with the custodial parent 100 percent of the time.
- The guideline percentages were to be applied with the amount of the award limited to the size of the welfare payments to the custodial household.⁹ The underlying study set a low ceiling on the amount of income on which the percentages would be applied.

The Wisconsin child support guideline model does not apply to the typical child support case because:

- The household income (combined for both parents) in question is not low income. Lower percentages are economically appropriate at higher incomes as stated in the underlying economic study.¹⁰
- The obligee parent (the mother) has a significant income. The underlying study states that when the obligee parent earns income, that both parents' income should factor into the child support determination and with lower percentages.¹¹
- Since 1984, federal tax code generally gives the custodial parent the child-related tax benefits but this change is not reflected in the child support guidelines.¹² No changes have been made in the basic percentages since the original study.

⁹ Institute for Research on Poverty, University of Wisconsin-Madison. "Documentation of the Methodology Underlying the Cost Estimates of the Wisconsin Child Support Program," Child Support: Technical Papers, Volume III, SR32C, Special Report Series, 1982, pp. 143-144.

¹⁰ Linda Reivitz. "Percentage of Income Standard for Setting Child Support Awards," memorandum by Secretary, Department of Health and Social Services, State of Wisconsin, to members of the Wisconsin Judiciary, December 20, 1983, *Improving Child Support Practice, Volume One*, The American Bar Association, 1986, pp. I-221.

¹¹ Institute for Research on Poverty, University of Wisconsin-Madison. "Documentation of the Methodology Underlying the Cost Estimates of the Wisconsin Child Support Program," Child Support: Technical Papers, Volume III, SR32C, Special Report Series, 1982, pp. 143-144.

¹² The Deficit Reduction Act of 1984 significantly affected domestic relations taxation in the areas of alimony, property divisions and transfers, and dependency exemptions. For custody decrees subsequent to 1984, this act allocated the dependency exemption to the custodial parent in all cases unless the custodial parent signed a written declaration each year that the non-custodial could claim the dependency exemption. See Steven D. Kittrell. "An Overview of the 1984 Domestic Relations

- The child support obligor pays substantial amounts in taxes each year, in contrast to the assumption of little or no taxes. This high marginal tax rate is in sharp contrast to the underlying study's assumption of close to zero.
- The obligor has substantial parenting time with the child. The obligor incurs significant overhead expenses in child costs and incurs significant variable costs. In contrast with the underlying assumption of the guideline, the child is not with the obligee 100 percent of the time but is with the obligor significantly. The underlying study states that under shared parenting, adjustments should be made in the award.¹³
- This case is not a welfare case and the guidelines are not intended by the underlying studies to be applied outside of situations in which the award is limited to low benefits.

Rebuttal Strategies for New Hampshire's Child Support Guidelines

A number of strategies are appropriate for legal and economic rebuttal of the presumptive award. For rebuttal, it is necessary to show that a presumptive award is unjust and inappropriate from an economic perspective. See 45 CFR 302.56.

- First, one can contrast actual case circumstances with the underlying assumptions of the Espenshade study and also the Van der Gaag study from Wisconsin. Due process requires that presumptions be set aside when the underlying facts do not exist in application.
- From an overall perspective, comparing after-tax, after-child support income of both parents typically shows a sharp inequity in which the custodial parent has a significantly higher standard of living even when the custodial parent has the lower gross income without child support. This comparison may not apply for cases in which the obligor has very high income and the custodial parent has modest income.
- For high income cases, one can compare the presumptive percentage with the underlying percentages from the Espenshade study. One might also use government data to show that the parent's income is high income based on income distribution tables.
- For any case, one can show that presumptive percentages and Espenshade percentages are excessive based on various economic studies. One can then argue that the court should allocate child costs based on one or more of the following: affidavit based child costs of both parents, updated Income Shares cost tables based

Tax Provisions," *Improving Child Support Practice, Volume Two*, The American Bar Association, 1986, page IV-57.

¹³ Linda Reivitz. "Percentage of Income Standard for Setting Child Support Awards," memorandum by Secretary, Department of Health and Social Services, State of Wisconsin, to members of the Wisconsin Judiciary, December 20, 1983, *Improving Child Support Practice, Volume One*, The American Bar Association, 1986, pp. I-221.

on the research of David Betson, or Cost Shares cost tables developed by R. Mark Rogers Economic Consulting. Such allocation should take into account child-related tax benefits as cost offsets to be shared. Importantly, both parents' child costs should be taken into account by having each parent share the other's child costs on the same basis.

- One can argue for deviations based on quantifying specific deviation factors and still use the guideline percentages. One can specifically quantify parenting time adjustments and child-related tax benefits. Also, one can make the same deviation arguments but use Espenshade percentages instead of the presumptive percentages.
- For miscellaneous comparisons to show that presumptive awards are inappropriate, one can calculate the salary equivalent income of the child support award to both the custodial parent and non-custodial parent. Child support is non-taxable for income taxes for the recipient but is taxable for the one paying child support.

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**Addendum:
Statutory Factors for Deviations from Presumptive Award**

RSA 458-C:5 is captioned “Adjustments to the Application of Guidelines Under Special Circumstances.” It identifies nine specific circumstances and a tenth “catch-all” under which the Guidelines may not be equitable:

- (a) Ongoing extraordinary medical, dental or education expenses, including expenses related to the special needs of a child, incurred on behalf of the involved children;
- (b) Significantly high or low income of the obligee or obligor;
- (c) The economic consequences of the presence of stepparents, stepchildren or natural or adopted children;
- (d) Reasonable expenses incurred by the obligor parent in exercising visitation or physical custodial rights, or expenses incurred by such parent in extended visitation or physical custodial rights, provided that the reasonable expenses incurred by the obligee parent for the minor children can be met regardless of such adjustment;
- (e) The economic consequences to either party of the disposition of a marital home made for the benefit of the child;
- (f) The opportunity to optimize both parties' after-tax income by taking into account federal tax consequences of an order of support;
- (g) State tax obligations;
- (h) Split or shared custody arrangements;
- (i) The economic consequences to either party of providing for the voluntary or court-ordered postsecondary educational expenses of a natural or adopted child;
- (j) Other special circumstances found by the court to avoid an unreasonably low or confiscatory support order, taking all relevant circumstances into consideration. RSA 458-C:5 I(a)-(j)