Comment, IMPACT OF A CHILD'S INCOME ON CHILD SUPPORT PAYMENTS

A majority of children in the United States will live in a one-parent home for some part of their childhood.[1] More children are being raised by non-married parents, either because of divorce or births out of wedlock. Therefore, child support is an issue that many people will have to grapple with at some point in their lives. To compute child support, courts must examine several complex factors, including the parents' incomes and the standard of living the family might have enjoyed should they have remained a family living together. Other factors may be considered by the court as well, such as the impact of a child's income on the child support ordered to be paid. With respect to this factor are several considerations, such as the necessaries of the child and whether the child's income is earned or unearned. Unearned income can take several forms, such as income from the interest from a trust or income from a government agency such as Social Security or Temporary Assistance for Needy Families (TANF). All of these variations result in different outcomes when examined by the courts in child support calculations. In addition, courts have different ways of dealing with the additional factor of a child's income or resources. Normally, a child's resources will only be counted if the courts find that the calculated amount of support based off his or her parents' incomes is unjust or inappropriate for any reason. Part I will address the normal guidelines and regulations for determining child support for minor and post-majority children. Part II will discuss a child's earned income as an additional factor to be considered by courts determining child support. Part III will address a child's various unearned income as an additional factor, including Social Security and welfare.

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[1] *Center for Marriage and Families, Family Structure and Children's Educational Incomes,* Nov. 2005 *available at* http://center.americanvalues.org/?p=28.

I. Child Support

A. *Minor Children*

The general rule regarding child support is that children are not required to support themselves.[2] All parents have a duty to support their children, and child support is the shared responsibility of both parents.[3] The duty a parent has to support is nearly absolute and is adjusted only minimally considering the amount of time the parent spends with the child. Therefore, even a parent who is never around has the duty to pay support for his or her children.[4] Some courts have even stated that parental duties should consist of not only an obligation to provide financially for a child, but also to maintain a meaningful relationship with the child.[5] Divorced parents who do have meaningful relationships with their children may not always be able to spend the same amount of time as their spouse with their children because of life's circumstances, yet they are still obligated to support their children. This does not mean that each parent must pay an equal amount. Parents must discharge their obligation in accordance with their individual capacities and abilities.[6] However, the noncustodial parents are the only ones who are required to make actual child support payments because custodial parents contribute their child support directly in raising the children.[7]

The courts have held that a " minor child cannot waive his right to support."[8] Parents are responsible to feed and clothe their children.[9] For instance, a court will not require a child to buy his own clothing from an account of money awarded for injuries he sustained.[10] The court's reasoning is that when the child grows up, he has a right to receive the money that was awarded to him for his injuries, with interest, and not just a set of court

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2 *See, e.g.,* Robinson-Austin v. Robinson-Austin, 921 A.2d 1246 (Pa. Super. Ct. 2007).

3 *See, e.g.,* DeWalt v. DeWalt, 529 A.2d 508, 510 (Pa. Super. Ct. 1987).

4 *See, e.g.,* Matter of B.S.R., 965 S.W.2d 444, 449 (Mo. Ct. App. 1998).

5 *Id.*

6 *DeWalt*, 529 A.2d at 510.

7 *See, e.g.,* Nabarrete v. Nabarrete, 949 P.2d 208, 211 (Haw. Ct. App. 1997).

8 *DeWalt*, 529 A.2d at 511.

9 *See* Gaffney v. Constantine, 87 N.Y.S.2d 131, 132 (1949).

10 *Id.*

orders showing that his money was used for his basic necessities that his parents were obligated by law to provide to him. However, one court found that a child's settlement was a sufficient change in circumstances to modify child support. After the court looked at the child's estate, it concluded that the child's estate should be considered and therefore decreased his father's support obligation.[11] A distinction may be that this child won thirteen million dollars and his father had limited monthly income, and the father was still obligated to pay nominal support. This case shows that the court does take into account the parent's ability to pay support. The obligation the court looks at equals the reasonable needs of the children and the parent's reasonable expenses and earning capacities.[12] In most jurisdictions, when courts are setting the child support amount to be paid, they will always start with the guidelines to compute the amount that will best meet the child's needs without financially harming the parent.[13] In most instances the " trial court may not initially refuse to apply the . . . guidelines.[14] Even though the courts must follow the guidelines, they still have broad discretion in determining the amount of child support each parent is obligated to pay.[15]

The court decides how much each parent is obligated to pay using the best interests of the child as the paramount concern when deciding the amount.[16] For some courts best interests means securing the maximum amount of support possible.[17] Other courts consider the best interests of the child to be met when the child's reasonable needs and expenses can be afforded, and then that amount is divided between the parents. Reasonable needs consist of the needs for health, education, and maintenance, although the court must look at the reasonable needs and compare them to the financial resources of the parents and accustomed standard of living of the child.[18] The court looks at the parents' resources and the child's accustomed standard of living

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11 Rainwater v. Williams, 930 S.W.2d 405 (Ky. Ct. App. 1996).

12 *DeWalt*, 529 A.2d at 511.

13 Hendricks v. Sanks, 545 S.E.2d 779, 782 (N.C. Ct. App. 2001).

14 *In re* Marriage of Thornton, 802 P.2d 1194, 1195 (Colo. Ct. App., 1990).

15 Buntje v. Buntje, 511 N.W.2d 479, 481 (Minn. Ct. App. 1994).

16 *See, e.g.,* State v. White, 954 So.2d 291, 294 (La. Ct. App. 2007).

17 *Id*. at 293.

18 *Hendricks*, 545 S.E.2d at 782.

because reasonable needs are not restricted only to the bare necessities of the child.[19] The standard of living is looked at predivorce to figure what the child has become accustomed to in life because child support is meant to keep the child in a similar life. The child support should reflect the costs of raising a child and approximate, insofar as possible, the standard of living [the child] would have enjoyed had the marriage not dissolved.[20]

The second factor the court will examine is the ability of every parent to pay, based on his or her station in life, assets and resources. Many courts have decided that a parent has "an obligation to support his or her child as fully as his or her means will allow."[21] This means that the parents will not be paying the same amounts of support for their children, since the amount paid is determined by their individual earnings. The guidelines normally include not only the parent's income from salary, but also from their station in life, ability to pay and standard of living.[22] The trial court must consider every aspect of a parent's financial ability to pay support.[23] The court needs to take into account the "physical condition and social position of parties", and the separate property and income of both the husband and wife.[24] To compute each parent's financial ability to pay and the amount of support owed, the court will look at several different factors. For example, a court may have statutory guidelines to compute the correct amount for each parent. The first step is to calculate the combined parental gross income. This gross income includes salary income as well as investments and imputed income. Step two factors in a limited number of statutory deductions, such as alimony or maintenance, child support for other children and some other specified business deductions. In step three the court assess whether the percentage is rationally apportioned between the parents.[25] Therefore, each parent is paying what he or she is financially able to pay, but the child's reasonable needs are cov-

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19 Lepis v. Lepis, 416 A.2d 45, 51 (N.J. 1980).

20 C.D. v. N.M. 631 A.2d 848, 852 (Vt. 1993) (quoting VT. STAT. ANN. TIT. 15, § 650 (2008).).

21 *Matter of B.S.R.*, 965 S.W.2d at 449.

22 *In re* Marriage of Williams, 150 Cal. App. 4th 1221, 1240 (2007).

23 *E.g.,DeWalt,* 529 A.2d at 511.

24 *Lepis,* 416 A.2d at 51.

25 Graby v. Graby, 664 N.E.2d 488, 490 (N.Y., 1996).

ered and station in life will be similar to the pre-divorce circumstances.

The court computes the child support owed for families based on level of income. If the parties' combined adjusted gross income exceeds the uppermost level of the child support guidelines, the court may use its discretion in determining child support. Nevertheless, "the presumptive basic child support obligation shall not be less than it would be based on the highest level of adjusted gross income set forth in the guideline."[26] If the parties' incomes exceed the guidelines, the court should consider, among other items, the costs of food, shelter, education, and recreation at the level enjoyed before the dissolution - which is the same test used if the incomes do not exceed the guidelines. The difference occurs when one parent has substantial wealth resulting in "an order that is too low to be in the best interests of the child, based on [. . .] their reasonable needs."[27] The top priority is the best interests of the child.

Once the guidelines are used, a rebuttable presumption arises that the guidelines are correct unless the court finds the amount to be unjust or inappropriate.[28] Child support set within the guidelines is presumed to take the reasonable needs of the child and the resources of the parents into consideration. Although, if the court finds the amount to be inequitable or if it deviates from the amount, it can hear evidence to find facts related to the child's needs or parents' abilities to change the amount.[29] In many jurisdictions, the court can examine varying factors if the amount is found to be unjust, including the resources of the child. However, the extent to which it uses any of the factors, including an unemancipated child's income, in considering adjusting the support obligation, "is within the trial court's discretion, and depends on the totality of circumstances" in each case.[30]

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26 *In re* Marriage of Ludwig, 122 P.3d 1056, 1059 (Colo. Ct. App. 2005). (quoting COLO. REV. STAT. § 14-10-115 (West 2004)).

27 *In re* Marriage of Williams, 150 Cal.App.4th at 1240. (quoting In re Marriage of Cheriton, 92 Cal.App.4th 269,(2001)).

28 *Graby* ,664 N.E.2d at 491.

29 *Hendricks,* 545 S.E.2d at 782.

30 *In re* Marriage of Cropper, 895 P.2d 1158, 1160 (Colo. Ct. App, 1995).

When deciding whether to deviate from the guidelines, the court may consider different factors. These factors include not only the financial resources of the parties and the children, but also the children's educational needs and the standard of living that the children would have had if the marriage had not dissolved. Any additional factors that actually diminish the basic needs of the child may be considered for deductions from the basic child support obligation. For example, in determining the sum reasonable for the educational expenses of a child, some courts take into account the resources of the child.[31]

The existence of income from the child is just one of the additional factors that can be considered in determining child support. If a child has substantial income and the noncustodial parent does not, then the income may be considered since the child's needs are lessened by his income, while the parent's ability to pay is lessened and his own living expenses must be taken into account. The amount may be adjusted if the deviation is warranted.[32] But, the "trial court is not bound to deduct [. . .] the entire amount of a child's income [. . .] but must determine to what extent such income reasonably should be applied."[33]

Along the same line, "the fact that a child has resources of his own [. . .] does not relieve a parent of his or her obligation to financially support the child; rather, it is simply a factor in determining the appropriate amount of support a parent should pay."[34] In one Missouri case, the appellate court found that the father "fulfilled his obligation to provide financial support [. . ..] in that he created a fund for that purpose."[35] " The court held that where a fund has been set up by a parent from his or her own assets for the express purpose of providing for those expenses which comprise [the parent's obligation] of financial support to his or her minor child, the parent has met that obligation."[36]

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31 *See. e.g.,In re* Marriage of Ludwig, 122 P.3d at 1060.

32 *See DeWalt*, 529 A.2d at 511.

33 *In re* Marriage of Cropper, 895 P.2d at 1160.

34 *Matter of B.S.R.*, 965 S.W.2d at 449.

35 *Id.*

36 *Id.* at 449-50 (citing Slaughter v. Slaughter, 313 S.W.2d 193 (Mo.App.1958)).

Occasionally though, there are some instances when a child's resources may be used to provide for the child's basic needs, but "only if the parents are financially unable to fulfill that obligation themselves."[37] The courts may allow a child's income to be counted in the calculation of child support if doing so "would save the child from need or destitution and are in the child's [best] interest."[38] "A parent may not evade his support obligation by depleting the child's assets, unless the parent is genuinely unable to provide for the child's needs."[39] "Assets in a child's custodial account may be expended for the use and benefit of the minor in addition to, but not in substitution for, any parental [support] obligation."[40]

In general, though, for child support, a majority of courts agree that an unemancipated child should not have to support him or herself, and the fact that the child may have income does not relieve the parent of the duty to support. "The obligation [of the parent] is unaffected by the independent resources of the child."[41] If the parent can support the child, then "the child should not be forced to use his own funds to support himself."[42] This is due in part to the belief that children have the right to receive their own money once they reach the age of majority. There is a legal standard that "a parent has a stringent obligation to support a child aged eighteen or less."[43]

B. *Post Majority Support*

If a parent only has the obligation up to age eighteen, then another factor that courts must consider is the child's age. In some cases there may be a child over the age of eighteen who is still eligible for support, because he is still attending high school. In this case the court will find him incapable of supporting himself only because he is attending school; that fact is "sufficient

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37 *In re* Marriage of Drake 53 Cal.App.4th 1139, 1154 (2nd Dist. 1997) (quoting Armstrong v. Armstrong 544 P.3d 941 (Cal. 1976)).

38 Ricco v. Novitski, 874 A.2d 75, 82 (Pa. Super. Ct. 2005).

39 *Id.*

40 *Id.*

41 *DeWalt*, 529 A.2d at 511

42 *Id.*

43 *Id.* at 510.

enough to establish that he is incapable of supporting himself."[44] Conversely, in *Adcock v. Adcock*, the court found that the child who was eighteen and a half years old with his own income was not eligible for and did not need child support.[45] The court in *Adcock* did not feel that the child support was necessary. Age also becomes an issue when there is a child who is past the age of eighteen. Many jurisdictions and courts find that subject to two exceptions, a parent has no duty to support after the age of majority. One exception is that of the child who is mentally or physically disabled and will continue to be disabled after reaching the age of majority.[46] Parents then have an equal responsibility and obligation to support "a child of whatever age who is incapacitated from earning a living and without sufficient means".[47] Sufficient means is defined, at least by the court in this case, as the likelihood of a child becoming a public ward.[48] The second exception is if postminority education support has been ordered.[49] In other words, courts will still find that children who are attending college are dependent, even though they are past the age of majority.

Courts are split regarding how to deal with the support and income of a post majority child. Some courts state that child support is not meant to punish, and therefore if the child and custodial parent have enough income to make the noncustodial parent's obligation excessive, then his or her obligation must be lowered.[50] Other courts look at different factors to determine if the support should continue, including the ability of the child to work, the age of child, the financial condition of each of the parents, and if the child is self sustaining.[51] Finally, some courts will look at the estate of the noncustodial parent, and find that that party has the earning capacity and income to continue to pay

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44 *Robinson-Austin*, 921 A.2d at 1247-48 (citing Blue v. Blue, 616 A.2d 628 (Pa. 1992)). .

45 Adcock v. Adcock, 229 So.2d 925, 925 (Ala. Civ. App. 1970).

46 *See e.g.,* Sheeley v. Chapman, 953 So.2d 1252, 1259 (Ala. Civ. App. 2006).

47 *In re* Marriage of Drake, 53 Cal. App. 4th at 1154.

48 *Id.*

49 *See e.g., Sheeley*, 953 So.2d at 1256.

50 *Com. ex rel.* Platt v. Platt, 323 A.2d 29, 31 (Pa. Super. Ct. 1974).

51 *In re* Marriage of Lieberman, 426 N.W.2d 683, 685 (Iowa Ct. App., 1988).

without undue hardship, thus that parent should continue to pay.[52] Undue hardship in this sense does not imply absence of personal sacrifice, because many parents sacrifice to send their children to college. A parent's ability to pay is a big factor in the analysis because a parent cannot be ordered to pay for educational expenses that they cannot afford.[53] If a court does consider a child's income, the extent to which it should be applied "is a question of fact to be determined by the totality of circumstances in each case."[54] "The court is not required [. . .] to deduct the entire amount of a child's income from the educational costs or the basic child support obligation."[55] The court "must determine whether, and to what extent, such income reasonably should be applied to reduce the need for parental support."[56] Different courts may apply the child's income differently, with some determining "that the child's assets should be preserved for educational expenses after the age of twenty-one or personal expenses while in college."[57] In summary, post-minority support is calculated using all relevant factors, which include the parents' and the child's incomes, and if the child has a disability. Regardless of the jurisdiction, emancipation of a child of any age will result in a termination of the support obligation since the child is no longer considered to be a dependent.

II. Child's Income as an Additional Factor

The main rule is still that a parent's duty to support a child is not always relieved if the child has income of his or her own; the child's income merely becomes a factor that can be used to determine child support in most states. For example, in Illinois, the financial resources of a child may be considered, but the court has discretion on whether it wants to consider them.[58] The courts in Ohio, though, are required to consider the financial resources and the earning ability of the child when determining child sup-

52 *Sheeley,* 953 So.2d at 1256.

53 *In re* Marriage of Lieberman, 426 N.W.2d at 685.

54 *In re* Marriage of Ludwig, 122 P.3d at 1060.

55 *Id.*

56 *Id*.

57 *Id*.

58 *See e.g., In re* Marriage of Frazier, 563 N.E.2d 1236 (Ill.App. Ct. 1990).

port.[59] Likewise, the courts in Missouri are not allowed to completely disregard the child's income and assets; it is a factor that should be considered in the determination of the child support obligation to make sure the amount is appropriate.[60] West Virginia has a unique way of deciding what child's income to consider; it orders a deduction from the needs of a child for any unearned income of that child, but West Virginia does not count earned income in the calculation.[61] Indiana's statute for relevant factors in setting the child support amount does not mention the child's income at all.[62]

Generally, when courts do consider a child's income they will only consider a child's "significant independent financial means."[63] In contrast, a "child's nominal earnings, [such as those from a paper route,] will not have any relevance to the parent's support obligation."[64] The reasoning is simple: a child's income may affect that child's needs, which in turn may affect the guidelines and support. In other words, the income will reduce the child's needs and thus according to the balancing act done in determining child support will cause a deduction in the obligated child support. The child's income is only considered a factor since the courts do not want to penalize a child for being responsible enough to make money to help support his family.[65] If the noncustodial parent's obligation were lowered based on any income to the child, the penalization of the child could occur in several different, and unsatisfactory ways: one is that the child would have to work even more to help his family make ends meet; or two is that the standard of living the child is accustomed to may have to be lowered to account for the decrease in the family's income. Neither of these situations meets the goals of child support.

The court can use its discretion in deciding whether to deviate from the guidelines and by what amount, and this is done on

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59 Frost v. Frost, 618 N.E.2d 198, 205 (Ohio Ct. App. 1992).

60 Lewis v. Dept. of Soc. Serv's., 61 S.W.3d 248, 256 (Mo. Ct. App. 2001).

61 Uldrich v. Uldrich, 474 S.E.2d 593, 598 n.7 (W.Va. 1996).

62 Kyle v. Kyle, 582 N.E.2d 842, 845 (Ind. Ct. App. 1991) (citing Ind. Code § 31-1-11.5-12(a) (West 1991).).

63 Laura Morgan, *The Child's Independent Income as a Deviation Factor under Child Support Guidelines*, 14 No. 4 DIVORCE LITIG. 61 (April 2002).

64 *Buntje*, 511 N.W.2d at 481 n.1.

65 Burks v. Burks, 293 So.2d 923, 924 (La. Ct. App. 1974).

a case by case basis.[66] The individual facts of a particular case may determine if the obligation should be lowered, or if the income should count in the calculation at all. One option for the court is to deduct the entire amount of the child's income from the child support obligation. In one Colorado case, the court decided that the daughter's entire paycheck should be offset against the obligation, despite the fact that she deposited a set amount into a savings account each pay period.[67] But, since child support deductions are decided on a case by case basis, the court then looked at the daughter's condition (she was handicapped), and found many expenses that are not listed in the guidelines, which raised the child's needs, so the court departed from the guidelines when calculating the obligation to take into account all of the everyday costs the mother incurred.[68]

Another option the court has is to just deduct a portion of the child's income, or based on the income, the court may decide to stop the child support obligation altogether. In *C.D. v. N.M.*[69] the children's income was substantial enough to not only meet all of their needs, but it was almost equal to what their father's income was. Therefore, there was no need for him to pay child support because they were able to enjoy the same standard of living as before the divorce without the required support. Another example of a child's income terminating child support is when the parent does not have any resources. If a child has income that exceeds his needs, and the father is unable to provide for those needs, the child support obligation stops and the child's estate will and can be used to provide for the child's needs.[70] A child's income should only be counted though, when it is consistent and predictable, which is the same requirement for a parent's income.[71]

66 *See In re* Marriage of Cropper, 895P.2d at 1160.

67 *Id.*

68 *Id.*

69 631 A.2d 848, 852 (Vt., 1993).

70 Marriage of Frazier, 563 N.E.2d at 1238.

71 Morgan, *supra*, note 63.

III. Counting a Child's Unearned Income

A. *Social Security*

When a child receives social security dependency payments, through either the parent's retirement or disability, the court can count that social security payment to the child in three different ways. The court can either credit the child support obligation with the social security amount, the court can use its discretion on a case by case basis, or the court can choose not to credit the obligation at all.

An overwhelming majority of states choose to credit the support obligation with the Social Security the child receives. The main reason why a court may choose to do this is that the benefits that are being paid to the child are drawn from the money that was earned by the obligor when he was working and thus should be credited towards the parent who receives Social Security.[72] The benefits being received by the children were earned and are not a gift; they are the benefit of the earnings of the contributing parent, even though they are paid directly to the child.[73] Because they are earned benefits, some courts will allow a dollar for dollar credit of the obligation of child support. This is true even if the benefits are for disability, as long as they were first earned.[74] Some courts will go so far with the credit that if a mother chooses to receive Social Security for her child from his stepfather instead of biological father, the biological father can still use the credit he would have received had the child received his benefits and have his liability for support extinguished.[75]

Some courts see Social Security payments as an issue that needs to be addressed on a case by case basis, with the court having broad discretion. Louisiana's statute reads that the income of a child "may be considered as a deduction from the basic child support"[76] amount, and courts have found that the use of the word "may" enables them to use discretion in deciding whether to give a credit.[77] Other courts have found that because

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72 Holtgrewe v. Holtgrewe, 155 S.W.3d 784, 786 (Mo. Ct. App. 2005).

73 Miller v. Miller, 890 P.2d 574, 577 (Ala. 1995).

74 *Holtgrewe*, 155 S.W.3d at 786.

75 Bradley v. Holmes, 561 So.2d 1034, 1036 (Miss., 1990).

76 LA. REV. STAT. ANN. §9:315.7 (2008).

77 Phillips v. Phillips, 673 So.2d 333, 335 (La. Ct. App. 1996).

there is no express provision in their guidelines to give a credit, then it is up to their discretion and will be decided based on the child's standard of living.[78]

The third school of thought is that of not allowing a credit at all. The main reason that the courts choose this theory is that a parent should not have the duty of support discharged because the child is entitled to a benefit from some other source and the child should be entitled to the same amount of parental income he or she would receive had the marriage not dissolved. This would include their Social Security dependency benefits and the financial support from both parents.[79] A child of a divorce should not be subjected to a lower standard of living simply because of the divorce. To absolve a parent of a duty to support because of the extraneous source of income would likely lower that standard of living.[80] In addition, the child's income should only be counted if the guidelines compute an obligation amount that is either unjust or inappropriate, and Social Security payments to dependent children do not in any way reduce the parent's benefits nor do they increase the parent's financial burden.[81] This second rationale comes back to the same basic principle that children should not suffer a decrease in their standard of living simply because their parents are no longer together.

B. *Supplemental Social Security Income*

Supplemental Security Income (SSI) is a social welfare program that was enacted in Title XVI of the Social Security Act and provides payments to those who are aged, blind, and disabled.[82] To be eligible for SSI, a family must establish the requisite level of need since SSI benefits are paid to families with disabled children that qualify under the Act to make sure that the child's needs are met and the child is able to survive.[83] Congress included disabled children under the Act because it believed that "disabled children who live in low-income households

78 Pederson v. Pederson, 1 P.3d 974, 974 (N.M.App., 2000).
79 *In re* Marriage of Thornton, 802 P.2d at 1194.
80 *See Id.* at 1196.
81 *Graby*, 664 N.E.2d at 490.
82 *Kyle*, 582 N.E.2d at 846.
83 *Id.*

are [. . .] among the most disadvantaged of all Americans, and that justifies them receiving special assistance so that they may become self-supporting members of society.[84] Congress wanted to differentiate these children from children who receive money from "programs for families with children [. . .]because [it finds] their needs are often greater than the needs of a nondisabled child."[85] In other words, SSI benefits can be used to compensate for the additional financial burden of a physical or mental disability. SSI is meant to supplement other income to counterbalance that burden, but SSI is not meant to substitute for it.[86]

Because SSI is only meant to be supplemental and not substitionary, a noncustodial parent's child support obligation should not be impacted if a child receives SSI. SSI benefits are "gratuitous contributions from the government" and do not reduce any obligation by either parent.[87] Not only does the receipt of SSI not lower support obligations, but if a child begins to receive SSI after a divorce is final, the receipt of SSI will not constitute a change in circumstances.[88] Jurisdictions do not lower support obligation due to SSI receipt for another reason as well; they do not wish to burden the public if the parents are able to provide their child with support.[89] The principle that SSI does not affect child support is true as long as the SSI being received is in the disabled child's name. If the SSI benefits are received for a minor child of a disabled parent, the benefits can then be considered an alternative source of payment from that parent, and the amount should be credited toward the payment of the child support obligation.[90]

C. *Temporary Assistance for Needy Families*

Temporary Assistance for Needy Families (TANF) was formally known, and possibly still more popularly known, as welfare. A family may qualify for TANF benefits if its income is below a certain limit, and then the family members are eligible

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84 *Id.* (quoting Pub. L. No. 92-603, 1972 U.S.C.C.A.N. 4987). .

85 *Id.*

86 *Lewis*, 61 S.W.3d 248 at 260.

87 *Kyle*, 582 N.E.2d at 846.

88 Hammett v. Woods, 602 So.2d 825, 829 (Miss., 1992).

89 *Id.*

90 *Id.* at 828.

for monthly government checks and medical care. When a parent signs up for TANF she is not allowed to receive child support benefits at the same time, unless that family is still under the income limit for their family size with the support. Likewise, the state may recover any child support that one parent pays to another in order to be reimbursed for the TANF payments.[91] Beyond that, if a child receives public assistance, it should not be considered to offset the noncustodial parent's support obligation.[92] The reasoning behind the refusal to offset is simple: it would not make sense to reduce a parent's support obligation based on the public assistance that the child receives because of that parent's failure to pay an adequate amount of support.[93] Equally, a parent is not allowed to refuse or oppose a child support action simply because he or she is receiving public benefits.[94] It would be unfair to reward a parent that is not paying support by lowering that parent's support obligation, which would be the case if the obligation was lowered by the receipt of public assistance.

In fact, not only will the noncustodial parent's support obligation not be lessened, but the parent would then become obliged to pay the state back for any assistance his or her child received. A parent will be liable to reimburse the state for the amount that the child received in benefits, unless the parent can prove that he or she was unable to pay support during a time period.[95] The reason for the exception relates back to child support taking into account the parent's resources at the time of the award. Further, if the amount of benefits the child receives is in excess of the child support guidelines, the parent will only have to reimburse the amounts he would have been liable for under the guidelines.[96] Along these same lines, a parent cannot refuse to pay child support with the reason that paying would cause the child's public assistance to end. At least one court has refused that argument, stating that public assistance is paid to substitute

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91 John Bourdeau, et al, *Social Security and Public Welfare*, 81 C.J.S. Social Security and Public Welfare § 223 (2007).

92 Morgan, *supra* note 63.

93 *Id.*

94 Bourdeau, *supra* note 91.

95 *Id.*

96 *Id.*

the missing parent's support to provide for a child's needs.[97] If a parent is no longer missing, it is the parent's duty to provide for the child, and the substitutionary public assistance has no reason to continue.

D. *Trusts and Stocks*

To decide whether a child's trust can be used in determining a support amount, the first aspect to consider is the type of trust that is set up and the intent of the settlor of the trust.[98] The main type of trust examined by courts in this context is a special needs or disability trust, which is one that is set up from funds to help a child who is disabled and ensures that the child has sufficient income for a lifetime. Most courts do not even consider the income that a child may receive from a special needs trust when calculating child support. In *Lewis v. Department of Social Services*, the court stated that to do so and to find that trust available for everyday needs would be "contrary to the intent and purpose of [the] trust."[99] The matter is further explored in *Ricco v. Novitski*, where the court found that a special needs trust should not be considered when determining whether to deviate from child support guidelines.[100] The court explained that the purpose of the trust is to supplement not supplant the resources that are available to the child for basic needs, and the court found that it would be contrary to public policy to allow the father in that case to underwrite his support obligation with the trust assets since that would deplete the trust.[101] The trust enabled the father to not have to pay extra, but did not enable him to pay less because of its existence, especially because he had sufficient funds to be able to pay his support obligation. This theory relates back to the balancing act of a child's needs versus the parent's ability to pay. Alternatively, if there had been no restrictions on the funds in the special needs account, then the child who receives funds from a personal injury settlement may have to use those funds to help support him or herself.[102]

97 *Thornton*, 802 P.2d at 1196.
98 *Lewis*, 61 S.W.3d 248 at 256.
99 *Id* at 258.
100 *Ricco*, 874 A.2d 75 at 84.
101 *Id.* at 83.
102 *Lewis*, 61 S.W.3d 248 at 258.

Courts at times examine a second type of trust, one that is not meant to supplement the income of a disabled child. Courts generally find that income from these trusts is clearly relevant when calculating child support. However, the court can complete the balancing act and determine whether the parent has sufficient means to pay support, regardless of the child's income from trust accounts. A child's financial position should not be lowered by using his or her own assets simply because a divorce occurred.[103] Other courts will look at the income that is received from the interest of the trusts as income that will decrease the child's basic needs, and therefore should decrease the child support obligation of the parents.[104] The court can find that interest to actually be income, and can use that income as a deduction from the guidelines, using whatever figure it deems reasonable. However, the parent's income must also be computed when figuring this out. In *In re the Matter of Marriage of Short*, the father argued that because his children receive interest from their trusts in an amount that is greater than the support award, he does not have a support obligation.[105] The court found two reasons for rejecting this argument. First, the trust did have a restriction in its specific language, which stated that no distributions should be made that will discharge any support obligation from the Trustee.[106] Second, the father had substantial income and assets and did not show that he would be adversely affected by paying the ordered child support.[107] When evaluating the effect of a trust, the court must first decide if there are any restrictions placed on it, and then consider the child's needs versus the parent's ability to pay.

Stocks held in a child's name with a trustee named will work similarly. There are not many cases involving children who own stocks. In *Newman v. Newman*, the father was the custodian of his children's stocks and he used the dividends from their stocks to pay his child support.[108] The trial court found that this was acceptable since the stocks were given to the children with the

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103 *In re* Marriage of Lieberman, 426 N.W.2d at 685.

104 Stelly v. Stelly, 820 So.2d 1270, 1272 (La. Ct. App., 2002).

105 Marriage of Short, 964 P.2d 1033, 1038 (Or.App., 1998).

106 *Id.*

107 *Id.*

108 123 Cal.App.3d 618 (Cal. Ct. App. 1981).

only restriction that they must be used for their health, education and welfare, which his child support payments covered.[109] However, the appellate court found that as the custodian he had the same responsibilities that a trustee would have, namely that he must "hold and preserve the custodial property for the benefit of the minor."[110] The property, in this case the stocks, must be used for the support, education and benefit of the minor, and once the minor reaches the age of majority, passed over to that minor.[111] The court said that there is discretion in determining the amount of child support to be paid and a child's resources may be considered, The court qualified this by noting that if a custodian is paying his support with the dividends it is not for the benefit of the children, but only satisfies his own personal obligation.[112] The court found that a custodian may not satisfy any personal debts with the funds, but must only use them for the benefit of the children.[113]

E. *Uniform Gifts to Minors Act/Uniform Transfers to Minors Act (UGMA/UTMA)*

A final source of income for children is the assets they may hold under UGMA/UTMA. The Uniform Transfers to Minors Act, and its predecessor the Uniform Gifts to Minors Act, were established to offer an easier way of making inter vivos gifts of money to children than the more complex requirements of establishing a trust for the child.[114] UTMA, which is very similar in nature to UGMA, makes it easier to transfer money and stock to children, which is especially important when the amounts are smaller.[115] Besides being easier to establish and maintain, UTMA differs from trusts because the assets that are transferred become the property of the minor to whom they were transferred, rather than belonging to the trust, and once the transfer is completed, it is a gift to the minor and the donor retains no rights

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109 *Id.*

110 *Id* at 620.

111 *Id.*

112 *Id.* at 621.

113 *Id.*

114 Joanne Ross Wilder, *Spending the Children's Money: A Critical Look at Custodial Accounts*, 20 J. Am. Acad. Matrim. Law. 127, 127 (2006).

115 *Id.*

to the transferred property.[116] The custodian of the transfer does retain the power to spend the money with some restrictions, but courts have found that if the donors treats the money as if it were their own, then the donative intent is lost and there is no completed transfer.[117] If the property is properly transferred under UGMA/UTMA then the gift "is irrevocable and the property is indefeasibly vested in the minor" to whom it is passed.[118] Since the property is vested in the minor, it becomes the asset of the minor and the court cannot use the minor's assets when dividing up marital property during a dissolution, unless it is a factor considered if the guidelines are unjust. Following that, the property belongs to the child, and therefore the parent and custodian may not use it for their own benefit.

The parent's obligation is independent of the child's assets, and "UGMA funds may not be used to fulfill the [. . .] support obligation where the parent has sufficient means to" support the minor on their own.[119] The court will not allow unlimited use of the child's assets to pay for support, because that would be a self-serving use, and the property is supposed to belong to the child.[120] However, the court in some jurisdictions may consider the child's assets under UGMA if the parent has insufficient funds, just as the parents can for any other assets of a child. In other jurisdictions, there is a harder line, and UTMA funds are never to be used to fulfill a support obligation.[121] If a parent does misappropriate the funds, by using them to pay for the parent's obligated support, the court shall order that parent to reimburse the child for those funds and may be removed as the custodian of the funds.[122]

IV. Conclusion

Courts have broad discretion in deciding how they compute a child support obligation, but underlying that discretion is always the best interests of the child. The best interests of the child

116 *Id.* at 128.
117 *Id*.
118 *In re* Marriage of Ludwig, 122 P.3d at 1060.
119 Sutliff v. Sutliff, 528 A.2d 1318, 1320 (Pa. 1987).
120 *Id.* at 1322.
121 Shinkoskey v. Shinkoskey, 19 P.3d 1005, 1009 (UtahCt. App. 2001).
122 *In re* Marriage of Rosenfeld, 668 N.W.2d 840, 845 (Iowa 2005).

are shown in the balancing act of considering the child's reasonable needs and necessities, which are based on their quality of life and standard of living before the dissolution, and weighing these against the financial means and assets of the parents involved. After the courts view the balance, other factors then may be taken into consideration if the factors can be shown to make the amount computed unjust or inappropriate. A child's income and resources are one of these special factors that may be considered, but a child should not have to support himself, since it is the parents' obligation to support the child. The income of the child should only be considered if it is consistent and substantial enough to make a difference in the fairness of the award.

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