

Comment,  
THE MANY FACES OF CHILD  
SUPPORT MODIFICATION

The fifty states have created almost that many ways to modify child support. Parents paying child support often feel the amount is too high, set arbitrarily without enough consideration of their financial situation. Parents receiving child support often complain that the needs of their child are not being considered strongly enough. Their child's private school, or their child's extra curricular activities deserve the financial support of the non-custodial parent (NCP). A number of commentators feel the current laws impoverish women, the majority of custodial parents (CP).<sup>1</sup> Others find validity in a system that allows the NCP's obligation to pay child support end a short time after the divorce.<sup>2</sup> From the frequency of petitions for modification to the relevancy of a new spouse's income, current statutes attempt to provide the most efficient way to establish the proper amount of child support. This article will outline the methods most often employed by states when there is a request for modification of an existing child support order. This article will address areas such as the Uniform Marriage and Divorce Act's (UMDA)<sup>3</sup> standards for modification of a child support order, time limits set by the statutes, procedures for a successful review, and standards for review of IV-D agency orders.

The article will then propose ways to incorporate the most effective aspects of these systems into a method that may be used in a federalized system of child support modification. A federalized system needs objective standards, inexpensive ways to allow parents to modify support, and incentives that encourage parents to work together, not only on financial support, but also on the numerous parenting issues they face during their child's life.

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<sup>1</sup> See J. Thomas Oldham, 1994 B.Y.U. L. Rev. 841, 843 (1994).

<sup>2</sup> *Id.* at 849, citing David L. Chambers, *The Coming Curtailment of Compulsory Child Support*, 80 MICH. L. REV. 1614, 1632-33 (1982).

<sup>3</sup> 9A U.L.A 147 (1987).

## I. Story of Child Support Guidelines

In the 1980s the federal government began requiring the states to create uniform guidelines for child support orders as a condition to states receiving federal funding.<sup>4</sup> Many states formulated their guidelines after considering interests such as the state, the child, the custodial parent, and the obligor of the support.<sup>5</sup> As states began implementing guidelines, two of the numerous models of child support surfaced throughout the country. The two models that are easily recognizable in the statutes, and cases described in this article are the income-sharing model and the child's-needs model.

The income-sharing model "is designed to maintain a consistent level of child expenditure when an intact family splits into two households."<sup>6</sup> The child's needs are not considered separately here, as the child's standard of living is a function of the CP's income before the receipt of child support.<sup>7</sup> Almost every jurisdiction in America uses some aspects of the income-sharing model. This is demonstrated in the numerous cases described below where the court considers the parent's income as the basis for modification.<sup>8</sup> The problem with using this method alone is that it does not account for the parent whose income far exceeds any needs the child might have. If a parent is the CEO of a lucrative computer company, or a famous Hollywood star, it is hard to justify monthly child support payments of \$100,000 for a toddler.

A smaller number of jurisdictions combine the income-sharing model with the child's-needs model. This model, as it sounds, focuses on the needs of the child more than the resources of the parents. Under this model, states have developed requirements such as allowing a modification when the child is in need of medical support.<sup>9</sup> The problem with relying solely on this model, of course, is the possibility that the obligor will not earn the amount of money a court figures the child needs. Without at least consid-

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<sup>4</sup> IRA MARK ELLMAN, PAUL M. KURTZ, ELIZABETH S. SCOTT; FAMILY LAW: CASES, TEXT, PROBLEMS, 3d ed. 521 (Lexis 1998).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 526.

<sup>7</sup> *Id.*

<sup>8</sup> *See, e.g., infra* notes 19-30.

<sup>9</sup> *See infra* notes 47-57.

ering the earning capacity of the parents, the child's-needs approach will lead to delinquent payments and possibly an increase in the requests for modification of the amount of child support.

## II. UMDA Standard for Modification

Nearly all states have a standard that parallels that incorporated in the UMDA. According to the UMDA, modification is allowed upon a showing that the circumstances of the parties have changed such that the current order is unconscionable.<sup>10</sup> While most states have incorporated this standard into their statutes, a few states still draw the standard from case law.<sup>11</sup> The burden of proving this change in circumstances is most often borne by the moving party.<sup>12</sup> The majority of states use a variation of the words "substantial and continuing change".<sup>13</sup> A few use a variation that adds more meaning. Vermont requires "real, substantial and unanticipated change of circumstances", thereby exempting situations such as the NCP taking a lower paying job to avoid paying more support.<sup>14</sup> Nevada and a few other states only require "changed circumstances", leaving even more discretion with the trial judge.<sup>15</sup> In order to justify a modification in New Hampshire it must be established that a substantial circumstance has occurred that has resulted in the original order being "improper or unfair".<sup>16</sup> Georgia requires "a change in the income and financial status of either former spouse."<sup>17</sup> These stan-

<sup>10</sup> Oldham, *supra* note 1, at 845 *citing* UMDA § 316(a).

<sup>11</sup> *See, e.g.*, Morrill County v. Darsaklis, 584 N.W.2d 36 (Neb. Ct. App. 1998); McEwen v. McEwen, 631 So.2d 821 (Miss. 1994); Lepis v. Lepis, 83 N.J. 139, 416 A.2d 45 (1980); Kaplan v. Kaplan, 466 S.E.2d 111, 113 (Va. Ct. App. 1996) *citing* Featherstone v. Brooks, 220 Va. 443, 446-47; 258 S.E.2d 513, 515 (1979); Kuhn v. Kuhn, 706 So.2d 1275 (Ala. Ct. App. 1997) *citing* Williams v. Braddy, 689 So.2d 154 (Ala. Civ. App. 1996).

<sup>12</sup> *See, e.g.*, Guyton v. Guyton, 602 A.2d 1143 (D.C. 1992); State Thru the Dept. Of Social Services v. Seals, 701 So.2d 746 (La. Ct. App. 1997).

<sup>13</sup> *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-320 (1997) (substantial and continuing change of circumstances); IDAHO CODE § 32-709 (1997) (substantial and material change of circumstances); PA. CONS. STAT. ANN. § 4352 (1997) (material and substantial change in circumstances).

<sup>14</sup> VT. STAT. ANN. tit. 15, § 660 (1997).

<sup>15</sup> NEV. REV. STAT. § 125B. 145 (1997).

<sup>16</sup> Morrill v. Morrill, 570 A.2d 387 (N.H. 1990).

<sup>17</sup> GA. CODE ANN. § 19-6-19(a) (1997).

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dards have been widely criticized because they give broad discretion to the judge, and not enough guidance to the parties.<sup>18</sup> This discretion fuels the belief that unclear standards are what discourages parents, especially the custodial parent (CP) in need of more support, from spending the time and money on a request for modification.<sup>19</sup> Almost all the case law regarding child support modification focuses on the definition of the standard. One case holds incarceration alone is not a material change in circumstances.<sup>20</sup> Ohio and Rhode Island have held that a mother's voluntary termination of employment, in order to stay home, did not constitute a change in circumstances because she had the ability to earn income.<sup>21</sup> In Massachusetts, a father's earning capacity, rather than his actual income was considered when he left his job to do missionary work in Jamaica.<sup>22</sup> In Florida, a father's voluntary decision to return to law school, even if it would bring him a higher income in the future, was not enough for a downward modification.<sup>23</sup> An example of a very narrow approach is the Montana case *In re Marriage of Conkey*<sup>24</sup>. In *Conkey*, the obligor filed a motion to modify on the basis that he had no assets, recently filed for bankruptcy, and was unemployed. The court focused on the fact that his job situation remained the same as it had been at the time of the original order, although he spent periods of time unemployed, when he was employed he made substantial income. The court also considered the fact that the obligor paid a number of bills before paying his child support.

The fact that serious health problems are often not sufficient to justify a modification is evidence of the inconsistency in this area. In Mississippi, a case was remanded to consider if a father's reduction in income due to a heart attack was a valid "substantial and material change" in circumstances.<sup>25</sup> In Wyoming a mother's health problems that prevented her from working were also not

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<sup>18</sup> Oldham, *supra* note 1, at 890.

<sup>19</sup> *Id.* at 844, citing HOMER CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 727 (2d ed., student ed. 1988).

<sup>20</sup> Rupp v. Grubb, 962 P.2d 1074 (Kan. 1998).

<sup>21</sup> Sancho v. Sancho, 683 N.E.2d 849 (Ohio Ct. App. 1996); McKenna v. Guglietto, 683 A.2d 369 (R.I. 1996).

<sup>22</sup> Bassette v. Bartolucci, 652 N.E.2d 623 (Mass. App. Ct. 1995).

<sup>23</sup> Overbey v. Overbey, 698 So.2d 811 (Fla. 1997).

<sup>24</sup> 890 P.2d 1291 (Mont. 1995).

<sup>25</sup> McEwen v. McEwen, 631 So.2d 821 (Miss. 1994).

enough to show a material and substantial change because she had health problems at the time of the divorce.<sup>26</sup>

In Arizona, gifts to a CP was enough of a change to end support payments by the NCP. The court held that the consideration of these gifts was within the trial court's discretion.<sup>27</sup> Similarly, in another Arizona case the appeals court held it was within the trial court's discretion to consider capital gains by the NCP who sold a fishing boat.<sup>28</sup> In Ohio, a trial court ruled non-recurring capital gains were enough to show a substantial change, but was overturned as an abuse of discretion upon appeal.<sup>29</sup> In New York, a personal injury settlement recovery by a NCP was enough to show changed circumstances.<sup>30</sup>

As the previous examples show, the discussion in recent cases is usually about the parent's financial situation, and not about the children's needs. One Texas case exemplifies the child's needs theory well. Using testimony of the changing needs of the children as teenagers, specifically their orthodontic needs, was enough to show a material and substantial change of circumstances.<sup>31</sup>

### III. Statutory Factors

Although, the standard and accompanying case law appears to be very subjective, most statutes include guidelines for the judge to follow. In other states, common law guidelines have been created by unusual cases. In Montana, for example, the statute describes when a party can petition the court for a modification, but leaves the standard of "changed circumstances so substantial and continuing as to make the terms [of the present order] unconscionable" almost undefined.<sup>32</sup>

An easy factor that a number of statutes rely on is a percentage change in income as a presumption of changed circumstances. Arkansas' statute says a change of the payor's income of twenty percent or more since the last modification, or of one-

<sup>26</sup> *Murphy v. Holman*, 945 P.2d 1193 (Wyo. 1997).

<sup>27</sup> *Cummings v. Cummings*, 897 P.2d 685 (Ariz. Ct. App. 1995).

<sup>28</sup> *Burnette v. Bender*, 908 P.2d 1086 (Ariz. Ct. App. 1995).

<sup>29</sup> *Yost v. Unanue*, 671 N.E.2d 1374 (Ohio Ct. App. 1996).

<sup>30</sup> *Greenier v. Breason*, 673 N.Y.S.2d 794 (N.Y. App. Div. 1998).

<sup>31</sup> *In re Marriage of Hamer*, 906 S.W.2d 263 (Tex. Ct. App. 1995).

<sup>32</sup> MONT. CODE ANN. § 40-4-208 (1997).

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hundred dollars per month or more, creates a presumption of a material change.<sup>33</sup> Utah's statute allows a court, but does not require it, to consider "material changes of thirty percent or more in the income of a parent".<sup>34</sup>

Another popular way of measuring a change in circumstances is to consider the deviation from a state's child support guidelines. This article will not consider the multitude of child support calculation worksheets, although many states have created a worksheet that incorporates the state's guidelines. Suffice it to say that in the states of Alabama, Colorado, Ohio, Utah (as long as the change is not temporary) and Vermont a ten percent deviation from the state's guidelines creates a rebuttable presumption for modification.<sup>35</sup> Utah's statute used to require a twenty-five percent deviation, but the 1997 amendments allow for only a ten to fifteen percent change depending on the number of years since the last modification.<sup>36</sup> A deviation of fifteen percent or more from the guidelines in Alaska, Arizona, Connecticut, Kentucky, Maine, North Carolina, and West Virginia creates a presumption of a change.<sup>37</sup> In Tennessee, state regulations, rather than a statute, defines their standard of "significant variance" from the guidelines to be at least fifteen percent.<sup>38</sup> In the District of Columbia, a presumption is created by a fifteen percent change, and the statute provides ways to rebut this presumption.<sup>39</sup> The rebuttal includes special circumstances that take the case outside the guidelines, or a reliance on an issue from the original order which was created before the guidelines were cre-

<sup>33</sup> ARK. CODE ANN. § 9-14-107(a) (Michie 1997); *Payton v. Wright*, 972 S.W.2d 953 (Ark. Ct. App. 1998) (clarifies it is twenty percent from last modification, not from last request for modification).

<sup>34</sup> UTAH CODE ANN. § 78-45-7.2(7)(a) (1997).

<sup>35</sup> Ala. Rules of Judicial Admin. r. 32(A)(3)(b) (1995); COLO. REV. STAT. § 14-10-122 (1998); OHIO REV. CODE ANN. § 3113.215 (Baldwin 1998); UTAH CODE ANN. § 78-45-7.2(6)(b) (1997); VT. STAT. ANN. tit. 15, § 668 (1997).

<sup>36</sup> See *Ball v. Peterson*, 912 P.2d 1006 (Utah Ct. App. 1996) *citing* the old statute UTAH CODE ANN. § 78-45-7.2(6) (Supp 1991), and the new statute § 78-45-7.2(6)(b).

<sup>37</sup> Alaska Court Rules R. 90.3(h)(1); ARIZ. REV. STAT. ANN. § 25-320 No. 21(b) (1997); CONN. GEN. STAT. ANN. § 46b-86(a) (1997); KY. REV. STAT. ANN. § 403.213 (Baldwin 1997); ME. REV. STAT. ANN. Tit. 19-A, § 2009 (West 1998); N.C. GEN. STAT. § 50-13.7 (1997); W.VA. CODE § 48A-1B-11 (1997).

<sup>38</sup> 20 Tenn. Admin. Reg. 28 (Aug. 1994).

<sup>39</sup> D.C. CODE. ANN. § 16-916.1(o)(3).

ated, and which would lead to an unjust result if the guidelines were applied.<sup>40</sup> A twenty percent change is enough to modify an order in Illinois, Missouri, Minnesota, New Mexico, Texas, and Wyoming<sup>41</sup>; twenty-five in Maryland, although a case from that jurisdiction held this change was meant to apply only to orders entered before the adoption of the state's child support guidelines.<sup>42</sup>

Some statutory guidelines are mandatory, reading that a judge *shall* consider the enumerated factors.<sup>43</sup> A smaller number offer a list of factors the court *may* consider.<sup>44</sup> The list of factors include: a change in needs of the child, in payer's earning capacity, in custody, in the relative wealth or assets of the parties, in the medical needs of the child, of the legal responsibilities of either parent for the support of others, or of the educational expenses of the child.<sup>45</sup> Also considered is the equitable distribution of property, consumer debts, families with more than six children, unreimbursed medical expenses, retirement pensions and union fees, travel expenses, income of the children, and alimony payments.<sup>46</sup> The list continues with the reasonable opportunity of either party to acquire future income and assets, changes in the cost of living, the financial resources of a new spouse or partner, inheritances, changes in residence of the parties, and even contempt by parties of the existing order.<sup>47</sup> While this list is long, it is by no means exhaustive, and new fact patterns arise every year, causing continued litigation and creation

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<sup>40</sup> *Id.*

<sup>41</sup> ILL. REV. STAT. ch. 750, § 5/510(a)(2)(A) (West 1997); MO STAT. ANN. §452.370.1 (Vernon 1997); MINN. STAT. ANN. § 518.64 (West 1997); N.M. STAT. ANN. § 40-4-11.4.A (Michie 1997); TEX. FAM. CODE ANN. § 156.401 (West 1998); WYO. STAT. ANN § 20-6-306 (Michie 1997).

<sup>42</sup> MD. CODE ANN., FAM. LAW § 12-202 (1997); *Walsh v. Walsh*, 635 A.2d 1340 (Md. 1994).

<sup>43</sup> *See, e.g.*, IOWA CODE ANN. § 598.21 (West 1997), MO. STAT. ANN. § 452.370.1 (Vernon 1997), N.J. R. PRAC. APP. 9-A #23, OR. REV. STAT. § 107.135(3) (1997); W.VA. CODE § 48A-2-35(d) (1998).

<sup>44</sup> *See, e.g.*, S.C. CODE ANN. § 20-7-852(C) (Law. Co-op 1997), UTAH CODE ANN. § 78-45-7.2 (7)(b); WIS. STAT. § 767.32 (1997).

<sup>45</sup> *Id.*

<sup>46</sup> *Supra* notes 36 and 37.

<sup>47</sup> *Id.*

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of new factors to consider. The disparity between the lists again reinforces the discretion given to judges in this area.

A factor that is being considered more frequently is the need for medical support orders. The changes in Medicaid funding, and the expense of private health care coverage has created an increased awareness in the courts of the need for medical coverage for children. The need for medical coverage is often a presumption of a change in circumstances. In Delaware, a court is required to consider the need for medical support in any modification that is brought before it.<sup>48</sup> Alabama requires all modification orders to “at a minimum, provide for the children’s health care needs”.<sup>49</sup> Alaska includes health insurance payments in the definition of support.<sup>50</sup> The Arkansas statute states that a change in the NCP’s health insurance is a presumption of a “material change of circumstances”.<sup>51</sup> In Delaware, a court is required to consider whether medical child support should be ordered or modified.<sup>52</sup> In Florida, there may be a change in circumstances if there is a finding that medical insurance is reasonably available.<sup>53</sup> A presumption of substantial change of circumstances occurs in Minnesota if health coverage is *not* available as ordered previously.<sup>54</sup> Inadequate health coverage is considered a change substantial enough to require a modification in Ohio.<sup>55</sup> Illinois allows modification, without showing a substantial change of circumstances, upon showing of need to provide for health care needs of a child under the order through health insurance, or other means.<sup>56</sup> Massachusetts and Washington allow for the same.<sup>57</sup> Finally, in Tennessee, even if a change in the amount of child support is not necessary, “health care needs shall also be a basis for modification”.<sup>58</sup>

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<sup>48</sup> DEL. CODE ANN. tit. 13, § 513(d)(3) (1997).

<sup>49</sup> Ala. Judicial Admin., r. 32(A)(ii)(4) (1995).

<sup>50</sup> Alaska Court Rules r. 90.3(h)(1) citing to (d)(1).

<sup>51</sup> ARK. CODE ANN. § 9-14-107(b) (Michie 1997).

<sup>52</sup> DEL. CODE ANN. tit. 13, § 513(d)(3) (1997).

<sup>53</sup> FLA. STAT. ANN. § 61.14 (West 1997).

<sup>54</sup> MINN. STAT. ANN. § 518.64(b)(3) (West 1997).

<sup>55</sup> OHIO REV. CODE ANN. § 3113.215(4) (Baldwin 1998).

<sup>56</sup> 456 ILL. REV. STAT. ch. 750, § 5/510(a)(2)(B) (1997).

<sup>57</sup> MASS. GEN. LAWS ANN. ch. 208, § 28 (West 1997); WASH. REV. CODE ANN. § 26.09.170(5)(a) (West 1997).

<sup>58</sup> TENN. CODE ANN. § 36-5-101(a)(1) (1997).



#### IV. Best Interest of the Child

A small number of states have begun incorporating the “best interest of the child” standard into the requirements for modification. In Florida, there are three circumstances pursuant to which a court has jurisdiction to modify the amount. The first is when the modification is in the best interest of the child.<sup>59</sup> The others are at the time a child reaches majority, or when there is a substantial change in the circumstances of either parent.<sup>60</sup> In Kansas, any modification can be made “as required by the best interest of the child,” even if it has not been three years since the last order or modification.<sup>61</sup> Utah’s statute requires the judge to take the child’s best interest into account, but still requires at least a difference of fifteen percent before an adjustment of the amount of support.<sup>62</sup>

#### V. Time Limits

Many states implemented a provision into their statute to address the issue of the custodial parents who had to take time off work to attend court hearing after court hearing for the parent who continuously files for a modification with little foundation except the financial strain the obligor feels it is putting on his family. About one-fifth of the states have a limit on how often a party can file for a modification. Most of these statutes forbid a modification within a certain amount of time, unless the moving party can show a substantial and continuing change.

Georgia’s statute, for example, forbids a modification by a wife within two years of her most recent petition for modification, and forbids modification by a husband within two years of his most recent petition for all child support judgments filed before July 1, 1977.<sup>63</sup> The revision for judgments filed after July 1, 1977 is similar, but forbids the modification within two years of the final order of modification rather than the petition.<sup>64</sup> Indiana prohibits a party from filing a petition for modification

<sup>59</sup> FLA. STAT. ANN. § 61.13(1)(a) (West 1997).

<sup>60</sup> *Id.*

<sup>61</sup> KAN. STAT. ANN. § 38-1121(c) (1997).

<sup>62</sup> UTAH CODE ANN. § 78-45-7.2(7)(c) (1997).

<sup>63</sup> GA. CODE ANN. § 19-6-18(a) (1997).

<sup>64</sup> GA. CODE ANN. § 19-6-19(a) (1997).

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within twelve months from the most recent order if the order is not based on “changed circumstances”.<sup>65</sup> Montana also has a twelve month minimum after the most recent order before either party can petition the court for modification.<sup>66</sup> California’s statutory language forbids more than one modification within any twelve month period.<sup>67</sup> This statute includes an exception for a petition based on “a significant decrease in the income of the moving party”.<sup>68</sup>

New Hampshire, Texas, Kansas, Maine and Hawaii are among the states with the most stringent time limitations. New Hampshire Maine, and Hawaii allow a modification after three years of the most recent support order.<sup>69</sup> Texas has a three year limit *and* change of twenty percent or one-hundred dollars per month from the current guidelines unless there is a material and substantial change.<sup>70</sup> Kansas forbids modification within three years unless the modification is in the best interest of the child.<sup>71</sup> Delaware is a slightly less stringent requirement of two and one-half years.<sup>72</sup>

## VI. Procedure

The typical procedure for modifying child support includes finding an attorney that the party can afford, filing a petition in the court in which the original child support order was entered, and months of waiting through the already crowded dockets for a hearing. The expense of this process is extraordinary. Although, this seems discouraging to the average single mother in need of more support, some states have devised creative ways to keep child support modification out of the court system, or at least make the court system more friendly to the parents. Some au-

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<sup>65</sup> IND. CODE § 31-16-8-1(1) and (2)(B) (1998).

<sup>66</sup> MONT. CODE ANN. § 40-4-208 (1997).

<sup>67</sup> CAL. FAM. CODE § 4700.1(d) (West 1997).

<sup>68</sup> *Id.*

<sup>69</sup> N.H. REV. STAT. ANN. § 458-C:7 (1997); HAW. REV. STAT. § 576D-7(c) (1997).

<sup>70</sup> TEX. FAM. CODE ANN. § 156.401(a) (West 1998).

<sup>71</sup> KAN. STAT. ANN. § 38-1121(c) (1997).

<sup>72</sup> *Matthews v. Matthews*, 1998 WL 425598 (De. Fam. Ct. 1998) (trial court decision based on hearing of case by Master) *quoting* Delaware Child Support Formula: Report of the Family Court Judiciary, August 1, 1994, at 11.

thors have noted the increase in parties who are attempting family law issues without a lawyer. Although, this could be attributed to an interest in "self help", it is most likely due to inability to pay the fees associated with these actions.<sup>73</sup>

Delaware and the District of Columbia are to be commended for requiring communication between parties before action in court. In Delaware, parties are asked to exchange financial report forms every twelve months.<sup>74</sup> The parties must also exchange information in writing when one party may have a change in circumstances "which might materially affect the existing support or medical support order. . ." <sup>75</sup> In DC, parties must exchange "relevant information on finances and dependents every three years" and are "encouraged to update child support orders voluntarily."<sup>76</sup>

California created a statutory system for simplified modification.<sup>77</sup> This system shows a true effort to create a system for easy use. No attorneys can be involved in the system.<sup>78</sup> California has also developed a system to "phase in" an increase in the amount of support when modifying an order issued before July 1, 1992.<sup>79</sup> This rule acknowledges the NCP's need to re-arrange financial obligations.<sup>80</sup> An Oregon case attempted to address the possibility of a NCP's income changing for only a period of time. Under the trial court's interpretation of the modification statute, a father's obligation was cut by one-half for six months because of health problems and a change in jobs. On appeal, however, the case was remanded to recalculate the amount of support following the guidelines, and the court could not impose an arbitrary period of time.<sup>81</sup> Although, this case was not successful, there are fact patterns, such as seasonal employment, that may lend themselves to temporary modifications as attempted here.

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<sup>73</sup> See Oldham, *supra* note 1, at 841, 888, *citing* Suzanne Northington, Pro Per Behavior, CAL. LAW., May 1994, at 29.

<sup>74</sup> DEL. CODE ANN. tit. 13, § 513(c)(1) (1997).

<sup>75</sup> *Id.*

<sup>76</sup> D.C. CODE ANN. § 16-916.1(o)(1) (1981).

<sup>77</sup> CAL. FAMILY CODE § 4700.1 (West 1997).

<sup>78</sup> *Id.* at (c).

<sup>79</sup> CAL. FAMILY CODE ANN. § 4076(a) (West 1998).

<sup>80</sup> *Id.* at (a)(1).

<sup>81</sup> In re Marriage of Cofsky, 955 P.2d 777 (Or. Ct. App. 1998).

## VII. COLA

In order to avoid the expensive system of petitioning the court for a modification, some states have incorporated a cost of living adjustment (COLA) provision into original support orders.<sup>82</sup> In a few states courts have upheld COLA provisions in a separation agreement.<sup>83</sup> COLA provisions have definite advantages, including a saving of court time.<sup>84</sup> COLA's are also helpful in ensuring that the calculation reflects the local economic conditions.<sup>85</sup> Minnesota's statute allows the parties to choose the inflation index by which the original order will be amended.<sup>86</sup> The statute also offers provisions on opting out of a COLA provision. The court can waive the COLA requirement, or a motion for modification can include a clause to reduce or suspend the COLA provision, if the obligor's occupation or income does not provide for a cost of living adjustment.<sup>87</sup> Washington state has rejected COLA provisions unless the provision explicitly provides for any problems with the obligor's finances.<sup>88</sup> In *In re Marriage of Trout*<sup>89</sup>, Colorado forbid an adjustment based solely on the obligor's cost of living raise. In this case, the COLA increase was written into the original order, creating a presumption dependent only on the obligor's income. This holding requires that other factors must be considered before support is increased, almost always guaranteeing an expensive trial.

It is important to note that a COLA provision is not meant as a substitute for modification, but rather as a "means of merely retaining the real value of the initial order."<sup>90</sup> Nearly all states

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<sup>82</sup> See Minn. Stat. Ann. § 518.641 (West 1997), IOWA CODE ANN. § 252H.21 (1997) (for IV-D cases only), N.Y. FAM. CT. ACT. § 413-a (McKinney 1997)

<sup>83</sup> Morgan v. Ackerman, 964 S.W.2d 865 (Mo. Ct. App. 1998).

<sup>84</sup> Oldham, *supra* note 1, at 853.

<sup>85</sup> *Id.*

<sup>86</sup> MINN. STAT. ANN. § 518.641 (1) (West 1997).

<sup>87</sup> MINN. STAT. ANN. § 518.641(1) and (5) (West 1997).

<sup>88</sup> 841, 851 *citing* Edwards v. Edwards, 665 P.2d 883 (Wash. 1983)(en banc).

<sup>89</sup> 897 P.2d 838 (Colo. Ct. App. 1994).

<sup>90</sup> Oldham, *supra* note 1, at 850 *citing* generally H.P.A. v. S.C.A., 704 P.2d 205 (Alaska 1985); Brevick v. Brevick, 628 P.2d 599 (Ariz. Ct. App. 1981); Branstad v. Branstad, 400 N.E.2d 167 (Ind. Ct. App. 1980); In re Marriage of Stamp, 300 N.W.2d 275, 279-80 (Iowa 1980); Hempton v. Hempton, 329 N.W.2d

have addressed the issue of contractual agreements in the original order, and reject the idea that a contractual agreement prevents modification. For example, a Kentucky case notes parties cannot by agreement preclude or limit modifications of child support.<sup>91</sup> In Massachusetts, a court held that more than a material change in circumstances is necessary to modify a separation agreement that “by its terms, is to survive with independent legal significance”.<sup>92</sup>

A provision similar to a COLA are percent of income orders, which emphasize the income-sharing model explained above. Although, it is not too common, a few cases upheld the amount of child support as a percent of the NCP’s income.<sup>93</sup> This type of order seems to focus much more on the parents’ situation rather than the needs of the children. When the NCP’s income is so high as to clearly exceed the children’s needs, the likely response will be more time-and money-consuming court procedures.

## VIII. IV-D Provisions

Title IV-D of the Social Security Act of 1975 created a system through which the federal government could regulate state service. When states show they meet the requirements requested by the federal government, the state agencies are given federal funds to help run the services, such as child support enforcement offices. The federal requirements for child support modification through an IV-D agency come from the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).<sup>94</sup> Each state has a choice between three systems for review:

- 1) Periodic review through evaluation of economic data
- 2) Use of a COLA adjustment
- 3) Automated system using wage or State income tax data.<sup>95</sup>

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514 (Mich. Ct. App. 1982); *Bradley v. Earl*, 491 N.Y.S.2d 709 (App. Div. 1985); *Roya v. Roya*, 494 A.2d 132, 133-34 (Vt. 1985).

<sup>91</sup> *Tilley v. Tilley*, 947 S.W.2d 63 (Ky. Ct. App. 1997).

<sup>92</sup> *McCarthy v. McCarthy*, 633 N.E.2d 405, 406 (Mass. App. Ct. 1994).

<sup>93</sup> *Moskaloner v. Moskaloner*, 1996 WL 257468 (Wash. Ct. App. 1996) (unpublished opinion); *Harris v. Harris*, 714 A.2d 626 (Vt. 1998).

<sup>94</sup> 42 U.S.C. § 666(a)(10) (1997 Supp.)

<sup>95</sup> *Id.*

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As every child support enforcement office in the country is overworked, the restrictions for modification through a IV-D agency are usually more strict than modification by the parties. Many states require the same percentage change in income as for a standard modification.<sup>96</sup> Other states, such as Indiana, Delaware, West Virginia, Utah and California do not have a separate statute describing modification through an IV-D agency. Across the board, there is a requirement that IV-D orders be reviewed at least every three years.<sup>97</sup>

## IX. Proposals for Federalization

In the last few decades of the twentieth century, a number of federal laws have been enacted addressing family law issues.<sup>98</sup> There are already a number of areas of child support which have federal laws governing them. The Uniform Interstate Family Support Act (UIFSA) regulates child support orders entered between citizens of two different states.<sup>99</sup> As discussed above, support orders though IV-D agencies are regulated through PRWORA.

One commentator has offered an extensive list of ways to improve the child support modification system by making it more objective. The first, discussed above, is to establish an objective standard for child support modification.<sup>100</sup> The commentator suggests a balance between the judge's discretion and a rule would be too rigid.<sup>101</sup> The commentator also suggests limits, such as the time limits suggested above, are a step in the right direction.<sup>102</sup> Further, this commentator validates contractual limitations parties choose to enter into themselves should be en-

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<sup>96</sup> See, e.g., COLO. REV. STAT. § 26-13-121(3)(c) (1998) (citing the standard in COLO. REV. STAT. § 14-10-122); Conn. Gen. Stat. Ann. § 17b-745 (1997).

<sup>97</sup> See, e.g., FLA. STAT. ANN. § 61.30(c) (West 1997); N.J. Stat. Ann. § 2A:17-56.9a (West 1997); Tenn. Code. Ann. § 36-5-103(f)(1)(A) (1997).

<sup>98</sup> See Monroe Inker, *Changes in Family Law: A Practitioner's Perspective*, 33 Fam. L. Q. 519 (Fall 1999).

<sup>99</sup> 42 U.S.C. § 666.

<sup>100</sup> Oldham, *supra* note 1, at 841, 869-70.

<sup>101</sup> *Id.* at 870-73.

<sup>102</sup> *Id.* at 873-74.

forceable within some legal limits.<sup>103</sup> A federalized system should certainly provide for information sharing, and other procedures that save court time and encourage parents to work together.<sup>104</sup> A system that includes automatic reviews, as some IV-D agencies do, will also increase the efficiency of the child support modification system.<sup>105</sup>

## X. Conclusion

Children in our country have an extensive list of needs. They need not only financial stability, but also parents who love them, and are able to co-exist as adults in the child's life. Whether the answer is to create a federalized system of guidelines for divorcing or never married parents, or if the answer is to require more alternative dispute regulation systems, it is time to focus on the child's needs, and not each parent's desire to take the other parent for all they have. Recent developments in the law, including California's simplified procedure,<sup>106</sup> or local court rules for alternative dispute resolution before a modification hearing,<sup>107</sup> are helping. Some scholars even encourage parents to bargain with each other regarding the property settlement and the child support amount, perhaps working out concessions dependent upon both areas.<sup>108</sup> Law makers and practitioners should think out of the box in this area to find that balance of parent's desires, and the needs of their children to make the child support modification system efficient and beneficial to all parents.

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<sup>103</sup> *Id.* at 882-884.

<sup>104</sup> *Id.* at 891.

<sup>105</sup> *Id.*

<sup>106</sup> CAL. FAMILY CODE § 4700.1 (West 1997).

<sup>107</sup> *See, e.g.*, Mo. Sup. Ct. Rule 88 (does not include mediation for child support modification), Ca. R Monterey Super. and Mun. Cts. Rule 10.14.

<sup>108</sup> Oldham, *supra* note 1, at 891.

