

1996

Lessons from the New English and Australian Child Support Systems

J. Thomas Oldham

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J. Thomas Oldham, Lessons from the New English and Australian Child Support Systems, 29 *Vanderbilt Law Review* 691 (2021)

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VANDERBILT JOURNAL OF TRANSNATIONAL LAW

VOLUME 29

OCTOBER 1996

NUMBER 4

Lessons from the New English and Australian Child Support Systems

"[The parental support obligation] is so well secured by the strength of natural affection that it seldom [needs] to be enforced by human laws."¹

J. Thomas Oldham *

ABSTRACT

In the last decade, both England and Australia have reformed their child support systems. While both nations desired to shift the financial burden of child support in single-parent families from society to absent parents, England and Australia enacted different administrative schemes to achieve this goal. In this Article, the author first explores the features of the English and Australian child support systems. The author then proceeds to analyze the merits of the two

1. MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 94 (1994) (quoting James Kent).

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systems and the implications for other nations in light of the two nations' relative ability to achieve underlying policy goals.

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I. INTRODUCTION

During the last few decades, much of the industrial West has witnessed substantial "family breakdown," as evidenced by an increase in both the rate of divorce and the prevalence of never-married mothers.² This trend has created more single-parent households, and such households frequently do not have adequate resources without supplementation. Contrary to Chancellor Kent's intuitive judgment set forth above, many absent parents, even those with significant resources, have not been voluntarily willing to provide children with adequate support.

England and Australia have not been immune from these social changes. Until the last decade, courts in both countries determined the amount of any child support obligation. No guidelines or formulas were promulgated. Instead, judges were given broad discretion to arrive at an appropriate award. This system had disadvantages similar to those experienced by the United States. First, a custodial parent was required to go to court to create a child support obligation. For many parents, the necessity of going to court was an expensive and intimidating prospect. Second, when judges did award child support, the awards were quite low.³ As a result, many parents did not receive an award, and when an award was obtained, the amount was frequently insufficient to support a child.⁴

2. See, e.g., Jonathan Bradshaw et al., Department of Social Security, *Support for Children: A Comparison of Arrangements in Fifteen Countries* (HMSO: London 1993); Tamar Lewin, *Family Decay Global, Study Says*, N.Y. Times, May 30, 1995, at A5.

3. See, e.g., Margaret Harrison, *Child Maintenance in Australia: The New Era*, in *ECONOMIC CONSEQUENCES OF DIVORCE* 219, 221 (Lenore J. Weitzman & Mavis Maclean eds., 1992) [hereinafter Harrison, *Child Maintenance*]; Gwynn Davis et al., *The Relationship Between Public and Private Financial Support Following Divorce in England and Wales*, in *ECONOMIC CONSEQUENCES OF DIVORCE* 311, 319-20 (Lenore J. Weitzman & Mavis Maclean eds., 1992); see also, Susan Edwards et al., *The Continuing Saga of Maintaining the Family After Divorce*, 20 *Fam. L.* 31, 35 (1990) (stating that "a large proportion of periodical payments orders are low in value and often in arrears"); *SETTLING UP: PROPERTY AND INCOME DISTRIBUTION ON DIVORCE IN AUSTRALIA* 262 (Peter McDonald ed., 1986).

4. See, e.g., Gwynn Davis et al., *The Relationship Between Public and Private Financial Support Following Divorce in England and Wales*, in *ECONOMIC CONSEQUENCES OF DIVORCE* 311, 319-20 (Lenore J. Weitzman & Mavis MacLean eds., 1992).

Until the past decade, the English and Australian policies toward family breakdown, perhaps inadvertently, made the state the primary source of support for the "broken" family. The absent parent, normally the father, was generally free to form a new family and rarely had a significant support obligation to the prior family.⁵ Child support orders were not common and were infrequently followed.⁶ For example, a recent study found that the poverty rate for children, before considering government supplements, in single-parent families was greater than 75% in both England and Australia.⁷ The increase in family breakdown made this policy more expensive. For example, single-parent families in the UK increased from six percent of all families in 1961 to fourteen percent by 1987.⁸ England's Social Security Secretary has estimated that the number of single-parent families will increase by 80,000 annually.⁹ By 1989, single-parent families comprised fourteen percent of all families with dependent children in Australia.¹⁰

5. See, e.g., Mavis Maclean, *Child Support in the U.K.: Making the Move from Court to Agency*, 31 HOUS. L. REV. 515, 528 (1994); Harrison, *Child Maintenance*, *supra* note 3, at 219. Some other countries, such as Sweden, continue such a policy. See SHEILA B. KAMERMAN & ALFRED J. KAHN, *STARTING RIGHT* 55 (1995).

6. For example, it has been estimated that in Australia, before the child support reforms, only 30% of all single parents who had a child support order received payments. Less than half of these parents regularly received the full amount ordered. See Barbara Toner, *Paying Up for Children*, TIMES (London), July 20, 1990, at 19. In England, before the creation of the Child Support Agency less than one-quarter of all parents with a support order received any support. See Ray Clancy, *One-Parent Families Struggling for Want of Maintenance Pay*, TIMES (London), June 20, 1990, at 2.

7. See LEE RAINWATER & TIMOTHY M. SMEEDING, *DOING POORLY: THE REAL INCOME OF AMERICAN CHILDREN IN A COMPARATIVE PERSPECTIVE*, LUXEMBOURG INCOME STUDY Figure 6 (International Networks for Studies in Technology, Environment, Alternatives, Development Working Paper No. 127, 1995) [hereinafter LUXEMBOURG INCOME STUDY].

8. See generally JONATHAN BRADSHAW & JANE MILLAR, DEPARTMENT OF SOCIAL SECURITY, *LONE PARENT FAMILIES IN THE UK* (1991).

9. See Julie Kirkbride, *CSA Helping to Cut Benefit, Says Lilley*, DAILY TELEGRAPH (London), Jan. 26, 1995, at 6.

10. See Margaret Harrison, *The Reformed Australian Support Scheme*, 12 J. FAM. ISSUES 430, 431 (1991) [hereinafter Harrison, *Support Scheme*]. The number of single-parent families in Australia increased from 269,000 in June 1980 to 350,000 in June 1990. See JOINT SELECT COMMITTEE ON CERTAIN FAMILY LAW ISSUES, AUSTRALIAN PARLIAMENT, *THE OPERATION AND EFFECTIVENESS OF THE CHILD SUPPORT SCHEME* 45 (1994) [hereinafter CHILD SUPPORT SCHEME]. In the United States, the percentage of families with children headed by a single parent increased from 9% in 1960 to 23% in 1990. See LUXEMBOURG INCOME STUDY, *supra* note 7, at 21.

At the same time, single-parent families were also becoming poorer.¹¹ For example, among children in a single-parent family in Australia in 1990, the poverty rate was 56.2%, even after considering government transfers.¹² Due to these changes, the public expenditures relating to these families increased substantially.¹³ During the 1980s, the percentage of Australian children living in poverty, approximately 14%, remained significantly higher than that in Western Europe, while the percentage of children living in poverty in the United Kingdom gradually increased to approximately 10%, a figure also substantially higher than most other Western European countries.¹⁴ As public spending was increased and poverty levels remained the same or increased as well, the situation was ripe for new policies.

In addition to these fiscal issues, a consensus began to emerge that a non-custodial parent should be obligated to contribute more resources to the custodial household. For example, the public became more aware of the financial problems of single-parent families and the resulting negative effects on children. These forces caused both England and Australia to change their child support systems in fundamental ways. Perhaps not surprisingly, England and Australia chose different systems. Although the Australian system has been in effect for a

11. For example, by 1987, 66% of all such families were receiving supplemental benefit in the United Kingdom. See BRADSHAW & MILLAR, *supra* note 8, at 64. In Australia, between 1974 and 1987 the number of single-parent families receiving state benefits increased from 46% to 70% of all such families. See Harrison, *Support Scheme*, *supra* note 10, at 432.

Of all English families receiving government benefits in 1981-82, 50% received child support; by 1988-89, this percentage had dropped to 23%. See SOCIAL SECURITY COMMITTEE, FIFTH REPORT, THE OPERATION OF THE CHILD SUPPORT ACT: PROPOSALS FOR CHANGE, 1994, at x (Gr. Brit.) [hereinafter FIFTH REPORT].

12. See LUXEMBOURG INCOME STUDY, *supra* note 7, at Table 3. The study assumes that a person is "poor" if the income is less than 50% of the median disposable income. *Id.* at 4. This information is from 1990. The comparable figure for the United Kingdom is significantly lower: in 1986, the poverty rate for children living in a single-parent family was 18.7%. *Id.* at Table 3. As of 1991, the comparable figure for the United States was 59.5%. *Id.*

13. One writer stated that support for single parents in the United Kingdom in 1992-93 cost 6.6 billion pounds, an increase of 170% in real terms from the expenditure level in 1978-79. Martin Wolf, *Welfare and the Family—Economic Eye*, FIN. TIMES, Sept. 26, 1994, at 24. In Australia, from 1974 to 1987 annual public expenditures increased from A\$160 million to A\$1,866 million. See Harrison, *Support Scheme*, *supra* note 10, at 432. Over 70% of single-parent families in Australia receive either full or partial payment of the sole parent pension, which is a means-tested benefit. See CHILD SUPPORT SCHEME, *supra* note 10, at 44.

14. See LUXEMBOURG INCOME STUDY, *supra* note 7, at 11. In the United States, approximately 23% of all children lived in poverty, the highest percentage of any country studied. *Id.*

longer period than its English counterpart, it is now possible to make some initial judgments about the relative wisdom of the policy choices made by each country.

II. THE NEW SYSTEMS

A. Australia¹⁵

The Child Support Agency was established in 1988.¹⁶ Under Stage 1, which was effective June 1, 1988, this agency, a unit of the Australian Tax Office, was given enforcement powers such as wage withholding.¹⁷ Recipients of the sole parent pension are required, as a condition of continuing to receive this benefit, to take reasonable action to obtain maintenance from the absent parent.¹⁸ All custodial parents may take advantage of the support enforcement services of the agency.

Stage 2, implemented in October 1989, established administrative assessment of child support; the amount due was calculated pursuant to a prescribed formula.¹⁹ Stage 2 applies only to children born after the effective date (or siblings of such children) or whose parents separated after the effective date.²⁰ Under this formula, when one parent has sole custody of all children, *i.e.*, is responsible for the children for more than seventy percent of all nights annually, the amount of child support due is a percentage of the non-custodial parent's taxable income after all appropriate offsets are subtracted with the applicable percentage varying with the number of children being supported. The percentages are eighteen percent for one child, twenty-seven

15. The Australian system is discussed in CHILD SUPPORT SCHEME, *supra* note 10. In 1992 New Zealand adopted a system that is very similar to Australia's. I will point out significant differences between New Zealand and Australia in the notes.

16. See Child Support (Registration and Collection) Act, 1988, pts. II-IV (Austl.) [hereinafter CSRCA] (describing the administration of a child support register and the collection of child support).

17. *Id.*

18. Social Security and Veteran's Entitlements (Maintenance Income Test) Amendment, 1988, § 11 (Austl.).

19. Child Support (Assessment) Act, 1989, pt. V, div. 1 (Austl.) [hereinafter CSAA].

20. In one recent case, the judge stated that, when determining the amount due for children not governed by Stage 2, he would be guided by the Stage 2 formula. In *Marriage of Beck and Sliwka*, 107 F.L.R. 289, 300 (Fam. Ct. 1992) (Austl.). The New Zealand system adopted in 1992, in many respects like the Australian system, applies to all couples, regardless when they separated. See CHILD SUPPORT SCHEME, *supra* note 10, at 621.

percent for two, thirty-two percent for three, thirty-four percent for four, and thirty-six percent for five or more children.²¹ Taxable income is determined from the most recent tax filing; any tax paid or Medicare fees paid are not deducted.²² This amount of taxable income is then updated for inflation between the year of filing and the time the award is being computed.

A judgment was made that, beyond a certain level of income, all reasonable child-rearing costs are reimbursed by the obligor, making an income cap appropriate. Also, a policy judgment was perhaps made that a non-custodial parent should not be forced to pay support above a certain level. (Of course, voluntary additional payments are permitted.) If the income of the obligor exceeds 250% of the average weekly wage in Australia, the excess income is ignored; the child support due is computed based upon a wage of 250% of the average wage.²³ Before the child support obligation is calculated under the percentages set forth above, the obligor is given a self-support reserve at the benefit level for a single adult without children, and this reserve is deducted from the obligor's taxable income.²⁴ The obligor is given an additional offset if he has additional children; however, stepchildren and new partners are ignored.²⁵ The income of the custodial parent is ignored unless the parent earns more than the average weekly Australian earnings, plus an allotment for child care costs.²⁶ Although the custodial parent rarely earns more than the average

21. CSAA, *supra* note 19, § 37. The comparable percentages in New Zealand are 18% of taxable income for one child, 24% for two, 27% for three, and 30% for four or more. See CHILD SUPPORT SCHEME, *supra* note 10, at 620.

22. CSAA, *supra* note 19, § 38.

23. *Id.* § 42. In this instance, a custodial parent could apply for a departure order to obtain more support. See *id.* § 40.

24. *Id.* § 39. This amount in 1995 was A\$8,221. Helen Rhoades, *Australia's Child Support Scheme—Is It Working?*, 7 TOLLEY'S J. CHILD L. 26, 29 (1995).

25. See Rhoades, *supra* note 24, at 34; CSAA, *supra* note 19, § 39(2). In other words, the self-support reserve is the same for single obligors, those who have remarried, and those whose new spouse has custody of children from prior relationships. A departure application may be made on account of needs of stepchildren.

Under the New Zealand system, the noncustodial parent's living allowance takes into account new partners and stepchildren. See CHILD SUPPORT SCHEME, *supra* note 10, at 621.

26. CSAA, *supra* note 19, § 44. For 1996-97, the amount is \$36,130. Letter from Grant Riethmuller to J. Thomas Oldham (July 15, 1996) (on file with author).

In New Zealand, the custodial parent's income is ignored for purposes of the formula, but may be a ground for a departure application. See CHILD SUPPORT SCHEME, *supra* note 10, at 621.

weekly wage,²⁷ the amount by which the custodial parent's income exceeds this average weekly wage and child care component is subtracted from the non-custodial parent's adjusted income before that amount is multiplied by the applicable percentage.²⁸ In most instances, the formula could be described as follows: Child Support Amount = (Adjusted Taxable Income - Self-Support Reserve) X Applicable Percentage.²⁹ If the obligor's taxable income does not exceed his self-support reserves, no child support is owed.³⁰

Due to the self-support component, the Australian system could be described as progressive because a low-income obligor pays a smaller percentage of his income in child support than non-obligor earning more. For example, for obligors earning annual salaries of \$A15,000, A\$25,000, and A\$50,000, their respective support obligations for one child, expressed as a percentage of gross income, would be 8.4%, 12.3%, and 15.1%.³¹ After deduction for tax, Medicare, and child support, such absent parents would retain a total of A\$11,625, A\$16,926, and A\$25,493, respectively.³²

Child support assessments are updated annually and become effective every July 1. Also, if the noncustodial parent's income is reduced by at least 15% during the year, that parent may apply for an immediate reduction in child support.³³

Custodial parents receiving government benefits generally must take reasonable action to obtain child support.³⁴ Parents who fear the noncustodial parent will react violently to an application for child support may request an exemption.³⁵ Approximately 8% of all custodial parents receiving a sole parent pension have qualified for an exemption from the reasonable action requirement.³⁶

Under the Child Support Act, support continues until age 18, unless before that time the obligor dies, the child marries, or the

27. A recent study found that this occurs in less than two percent of all cases. CHILD SUPPORT EVALUATION ADVISORY GROUP, CHILD SUPPORT IN AUSTRALIA: FINAL REPORT OF THE EVALUATION OF THE CHILD SUPPORT SCHEME 225 (1992).

28. The noncustodial parent's obligation cannot be reduced by more than 75% of what it would have been ignoring the custodial parent's income. See CSAA, *supra* note 19, § 44.

29. See CHILD SUPPORT SCHEME, *supra* note 10, at 76.

30. CSAA, *supra* note 19, §§ 41, 57, 66.

31. See CHILD SUPPORT SCHEME, *supra* note 10, at 309. The actual child support amounts would be \$25, \$59, and \$146, respectively. *Id.*

32. *Id.*

33. See CSAA, *supra* note 19, § 60.

34. See CHILD SUPPORT SCHEME, *supra* note 10, at 69.

35. *Id.* at 70.

36. *Id.* at 47.

child establishes a de-facto relationship.³⁷ A parent can go to court to obtain support under the Family Law Act for an additional period, if, for example, the child is attending school.³⁸ In contrast to English system, the Australian Act does not apply to all single-parent families. Stage 2 applies only if a child's parents separated after October 1989 or the child (or a sibling) was born after that date. Even so, a custodial parent of such a child is not required to seek an administrative assessment under the Act unless the family receives government benefits.

The Child Support Agency has a number of enforcement powers. The most effective power is wage withholding. A protected earnings amount has been established so that wage withholding is possible only if the obligor earns 1.5 times the current unemployment benefit.³⁹ Current law requires the Child Support Agency, as far as is practicable, to collect child support via garnishment.⁴⁰

The formula also addresses those situations where the obligor is obligated to support children in more than one household, i.e., where none of them resides in his household. In this situation, the obligation is prorated between households. For example, if the obligor is obligated to support a total of three minor children, a support order for three children will be calculated, and the support prorated between households based upon the number of children. For three children, the normal percentage is 32% of the obligor's adjusted income; the custodian with two of the three children therefore would receive 21.33% of the adjusted income, and the other custodian would receive 10.66%.

A somewhat different calculation is required if the parties have divided custody or split custody, substantial access, or shared custody. Divided custody occurs when each parent is responsible for at least one child more than 70% of nights annually. Substantial access results if the noncustodial parent is responsible for a child between 30%-40% of all nights. Shared custody, which might also be called joint physical custody, means that each parent is responsible for a child at least 40% of all nights.

In these three different situations, the child support calculation becomes more complex. First, in all of these situations, the adjusted income of *each* parent must be computed. As with the sole custody computation, this begins with each

37. CSAA, *supra* note 19, § 12.

38. See Family Law Reform Act, 1995, § 66(L) (Austl.) (amending the Family Law Act of 1975).

39. See CSRCA, *supra* note 16, § 46; Child Support (Registration & Collection) Regulations, Austl. Reg. 87 (1988) r. 3.

40. See CSRCA, *supra* note 16, § 43.

parent's taxable income. To obtain the adjusted income, the appropriate offset must be determined. The amount subtracted from taxable income for each parent depends upon numerous factors. For example, if a parent does not have at least one child in his or her sole care, *i.e.*, more than 70% of all nights, the parent is entitled to a self-support reserve for a *single* adult.⁴¹ If the parent has at least one child in sole care, the self-support reserve is that of a *married* adult.⁴² Offsets for children are also given to the parent with primary custody.⁴³ Once the appropriate aggregate offset is determined, it is then deducted from the parent's taxable income (after adjustment for inflation), to obtain the parent's adjusted income.⁴⁴ Then a hypothetical child support obligation is calculated for each parent based upon the number of children in other households supported by that parent.⁴⁵

This calculation is different from the calculation for sole custody support obligations in several ways. First, the number of children being supported may be a fraction. For example, if parents are equally sharing the custody of one child, each would be supporting .5 child. As a result, it is necessary to calculate the number of children each parent is supporting. Because these types of custody arrangements are seen as more expensive than sole custody, a different percentage formula is used.⁴⁶ Also, a child support obligation is calculated for both parents in these situations, not just one.⁴⁷ The parent with the highest hypothetical child support obligation must pay child support to the other; the amount of the obligation is the difference between the two hypothetical support amounts.⁴⁸

Some examples of such computations may be helpful. Assume parents with three children have chosen divided custody. If the mother has custody of two and the father custody of one, each parent would be entitled to a self-support reserve offset for a married adult person because each has custody of at least one child. The father would also be entitled to an offset for the one child, and the mother would be entitled to a higher offset for the two children in her custody. After these offsets are subtracted from each parent's taxable income, these respective adjusted

41. See generally JAN BOWEN, CHILD SUPPORT: A PRACTITIONER'S GUIDE 100-04, 211 (1994) (providing examples of the formulas and their application).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 101.

48. *Id.*

income amounts would be multiplied by a percentage from the table to obtain the hypothetical child support amounts. The mother's adjusted income would be multiplied by eighteen percent, the figure for supporting one child; the father's income would be multiplied by twenty-seven percent, the figure for two children. The parent with the greater hypothetical child support obligation would have to pay child support in an amount equal to the difference between the two hypothetical child support amounts.

In contrast, if a mother and father share the custody of one child, the process is a bit different. Each parent's respective adjusted income is again computed. In this case, the taxable income of each parent would be offset by the pension for a *single* adult, not a married adult, because neither has sole custody of at least one child. No credit is given to either for the sole custody of a child because neither has sole custody of a child.⁴⁹ After this amount is subtracted from the taxable income of each parent, the parties must look to the shared custody table to see the percentage of adjusted income that constitutes the hypothetical child support obligation of each. For two parents with equal shared custody of one child, each is supporting .5 of a child, and the percentage is twelve percent.⁵⁰ Note that for both parents this totals twenty-four percent in this situation, as opposed to the eighteen percent used for a sole custody situation, to reflect the increased costs of shared custody. Once again, the lower hypothetical amount is subtracted from the higher amount to obtain the actual child support obligation.⁵¹

Substantial access affects child support in a different way. In this situation, it is first necessary to compute the relative annual percentage of nights each parent is responsible for the child. For example, assume parents have two children, and the father has responsibility for both of them 35% of all nights. Another way of stating this is that the father is responsible for .7 child (.35 x 2), and the mother is responsible for 1.3 children (.65 x 2). To compute the amount of child support due, the adjusted taxable

49. Of course, if the couple had two children and shared the custody of one, the parent who had sole custody of one should receive an offset for a married adult, as well as an offset for the child, the amount of which would depend on the child's age.

50. Note that, in the situation mentioned in the prior note, where one parent had sole custody of one child and the parents shared custody of the other, the percentage for the parent with only shared custody would be 24% (the percentage for 1.5 children), while the percentage for the parent with the sole custody would still be 12%.

51. A relatively complicated example of the child support calculation in a split custody situation is set forth in CHILD SUPPORT SCHEME, *supra* note 10, at 605.

income amount must be calculated for both parents. For the father, this amount would be calculated by offsetting the pension for a single adult because he does not have primary custody for a child. For the mother, she would offset the pension for a married adult, as well as an allowance for each child. To obtain the hypothetical child support amount, the mother's adjusted income would be multiplied by the percentage on the table for .7 children, or fourteen percent; the father's adjusted income would be multiplied by the percentage for 1.3 children, or twenty-two percent. The actual child support award would be the difference between these two amounts.

There is some discretion under the Australian system. A "departure order" is possible if special circumstances exist.⁵² For example, the statute lists as grounds for departure the duty to maintain another person,⁵³ special needs of any person being maintained, commitments of the paying parent, or high costs of exercising access rights.⁵⁴ Also, the formula may be departed from at the time of divorce in connection with a concession in the property settlement.⁵⁵ The Family Court of Australia has jurisdiction to hear departure applications.⁵⁶ Since 1992, such applications are generally heard at first instance by a child support review officer, who is a lawyer employed by the Child Support Agency.⁵⁷ There is no charge for this review and neither party may be represented by a lawyer. If either party is dissatisfied with the ruling of the review officer, an appeal to a court is possible.⁵⁸

Departure applications are filed in approximately 10% of all assessments⁵⁹ and about half are granted.⁶⁰ When obligors obtain a departure order, the result is normally a small reduction. In contrast, recipients in many instances receive large increases when they successfully file a departure application.⁶¹ Because the free administrative departure order system has been in

52. CSAA, *supra* note 19, § 117.

53. *Id.* Courts have construed the "duty to maintain" as a legal duty, not a moral duty. See *In Marriage of Vick and Hartcher*, 105 F.L.R. 230, 235 (Fam. Ct. 1991) (Austl.). So, for example, support for stepchildren does not qualify.

54. CSAA, *supra* note 19, § 117. Some of these grounds were construed in *In Marriage of Gyselman*, 103 F.L.R. 156, 166-84 (Fam. Ct. 1992) (Austl.).

55. *See id.*

56. *Id.*

57. *Id.*

58. *See In Marriage of Perryman*, 115 F.L.R. 260 (Fam. Ct. 1993) (Austl.).

59. Letter from Justice Kay of the Australian Family Court to J. Thomas Oldham (Feb. 9, 1996) (on file with author) [hereinafter Letter from Justice Kay].

60. *See FAMILY PROGRAMS & SERVICES DIVISION, DEPARTMENT OF SOCIAL SECURITY, CHILD SUPPORT SCHEME FACTS SHEET 2* (1994) [hereinafter FACTS SHEET]; *see also, CHILD SUPPORT SCHEME, supra* note 10, at 220.

61. Letter from Justice Kay, *supra* note 59.

existence since only 1992, many participants in the child support system may not yet be familiar with the system. Representatives of the Child Support Agency predict that the percentage of cases in which a departure order is filed will gradually increase.⁶²

Custodial parents have generally applauded this new Australian scheme. Collections have increased significantly. For example, before the new system was introduced, 25 percent of all single-parent families received child support; the corresponding figure now is over 40 percent.⁶³ Even custodial parents receiving government benefits have benefited to some degree because, in contrast with the English policy, the government in this situation passes through most of the support collected.⁶⁴ Also, child support is not taxable in Australia while government benefits are. Custodial parents, thus, have some incentive to participate.

It should be noted, however, that the Australian scheme has not been without critics. The Agency has been criticized for poor service.⁶⁵ Also, many noncustodial parents have not been enthusiastic proponents of this system.⁶⁶

B. England⁶⁷

Like Australia, England has adopted an administrative system for child support assessment.⁶⁸ The courts are almost totally excluded.⁶⁹ The system, which became effective in April of 1993, differs in a number of ways from that of Australia. First, the Child Support Agency was established within the Department of Social Security rather than the tax office. Second, the basic

62. Telephone interviews with representatives of the Child Support Agencies of Australia, Canada, New Zealand, United Kingdom, & United States (Aug. 18-19, 1995).

63. FACTS SHEET, *supra* note 60, at 2.

64. See generally MARGARET HARRISON ET AL., WHO PAYS FOR THE CHILDREN? (1991). In fact, the government passes through *all* of the support collected; however, the "additional family payment" benefit received by the custodial parent may be reduced.

65. Margaret Harrison, *Child Support Reforms: The Australian Experience*, 32 FAM. & CONCILIATION CTS. REV. 176, 182 (1994).

66. See generally *id.* (discussing various complaints regarding the Agency).

67. References discussing the English child support system include DAVID GREEN, SPLITTING UP (3d ed. 1995); ROGER BIRD, CHILD MAINTENANCE: THE CHILD SUPPORT ACT 1991 (1993) [hereinafter CHILD MAINTENANCE]; EMMA KNIGHTS, ET AL., CHILD SUPPORT HANDBOOK (Child Poverty Action Group ed., 3d ed. 1995-96) [hereinafter SUPPORT HANDBOOK]. BLACKSTONE'S STATUTES ON FAMILY LAW 1995-6 (Mika Oldham ed., 4th ed. 1995).

68. See generally CHILD MAINTENANCE, *supra* note 67.

69. *Id.* at 37. A custodial parent may petition a court for a "topping up" child support amount in addition to the assessment under the administrative scheme. *Id.* Other matters could include school expenses or special needs of a child. Child Support Act, 1991, ch. 48, § 8 (Eng.) [hereinafter CSA].

system focuses upon the income of *both* parents and not solely upon the absent parent.⁷⁰ (For purposes of calculating the child support maintenance assessment, the income of new partners is ignored.)⁷¹ Third, child support obligations are derived from each parent's net income, deducting from weekly gross income all income tax due, national insurance, and 50% of any pension contributions, rather than taxable income.⁷² A self-support allowance is then subtracted from each parent's net income to arrive at the "assessable income" for each parent. The allowance includes: (i) the amount of income support personal allowance for a single person older than age 24; (ii) reasonable housing costs;⁷³ and (iii) an income support family premium or income support allowance where appropriate.⁷⁴ In sum, a parent's assessable income equals net income minus the aggregate exempt amounts.⁷⁵

To determine the amount of child support due from the absent parent, it is also necessary to calculate the "maintenance requirement" for the child or children to be supported. The maintenance requirement is intended to constitute a minimum support goal. The maintenance requirement is the total income support entitlement for the custodial parent, minus the amount of child benefit at the basic rate.⁷⁶ For an "average" custodial household where the custodial parent does not work, the income support entitlement would include allocations for each child (the amount varies by the child's age), a "family premium," a "lone parent premium" (if the custodian has not repartnered), and an adult allowance for the custodian.⁷⁷ For a household with two

70. In Australia, the custodial parent's income is considered only if that parent's income amounts to the sum of the average weekly earnings plus an amount allocated for child care. See *supra* text accompanying note 26. Very few custodial parents earn this much money.

71. See SECRETARY OF STATE FOR SOCIAL SECURITY, IMPROVING CHILD SUPPORT, 1995, CMND. 2745, at 36 [hereinafter IMPROVING CHILD SUPPORT]. This is not true for the protected income computation. *Id.*

72. See CHILD MAINTENANCE, *supra* note 67, at 82.

73. This offset has created huge complications. See *id.* at 87.

74. See *id.*

75. The English system may well have been derived from the Swedish child support calculation procedure. In Sweden, a certain self-support reserve, plus reasonable housing costs, are deducted from the obligor's after-tax income to determine the surplus income. A percentage of this surplus is then paid as child support. See generally Soren Kinlund, *Sweden*, in CHILD SUPPORT: FROM DEBT COLLECTION TO SOCIAL POLICY 82-85 (Alfred J. Kahn & Sheila Kamerman eds., 1988).

76. *Id.* at 80, 226.

77. *Id.* at 76. This custodian allowance is reduced as the child ages. If there is a child younger than 11, the weekly amount allocated for the custodian is 46.50 pounds. This amount is reduced to 34.88 pounds for children 12 and 13,

children, ages 9 and 12, and a custodial parent who has not repartnered, these weekly sums, respectively, would be, based on 1992/93 social security rates: 35.95 pounds, 9.30 pounds, 4.75 pounds, and 42.45 pounds, a total of 92.45 pounds. The child benefit of 17.45 pounds would then be subtracted from this amount to arrive at the maintenance requirement. In this instance, the weekly maintenance requirement would be 75 pounds.⁷⁸

Once each partner's assessable income has been determined, these amounts are added together and multiplied by 50%. If this product does not exceed the maintenance requirement, the absent parent's child support obligation is 50% of assessable income.⁷⁹ Because the minimum standard for child support, the maintenance requirement, has not been reached, the absent parent is asked to contribute a substantial percentage of net income remaining after the self-support allowances have been considered.

If 50% of the assessable incomes of both parents exceeds the maintenance requirement, the absent parent's obligation is computed differently.⁸⁰ For example, assume that the custodial parent has no assessable income. In this situation, the "basic element" of the obligor's obligation would constitute the maintenance requirement.⁸¹ Then twice the maintenance requirement would be subtracted from the obligor's assessable income. Any surplus assessable income would then be multiplied by .15, .20, or .25, depending upon whether the parent is supporting one, two, or more than two children. This product, the "additional element," is added to the basic element to determine the absent parent's total child support obligation.⁸²

The creators of the English system were concerned that the amount of child support dictated by the basic formula would sometimes impose hardship on the absent parent's household. In response, some limitations were added to the basic system. First, the system cannot lower the absent parent's household below its "protected income" level.⁸³ The protected income of the noncustodial parent's household includes: (i) an income support allowance (which would be, for those parents who had not repartnered, an allowance for a single adult older than 24, and for

and lowered again to 23.25 pounds for children 14 and 15. See SUPPORT HANDBOOK, *supra* note 67, at 187.

78. CHILD MAINTENANCE, *supra* note 67, at 77-78.

79. *Id.* at 78, 92-93.

80. *Id.* at 226-27.

81. See SUPPORT HANDBOOK, *supra* note 67, at 242-43.

82. *Id.*

83. See CHILD MAINTENANCE, *supra* note 67, at 78, 98, 228.

those who had repartnered, an allowance for a couple);⁸⁴ (ii) reasonable housing costs;⁸⁵ (iii) a family premium where appropriate;⁸⁶ (iv) an income support allowance for every child in the payor's household, including stepchildren;⁸⁷ (v) any council tax the obligor must pay for housing less any council tax benefit;⁸⁸ and (vi) eight pounds. The income of the absent parent's household may not be reduced below the protected income level by a child support obligation. To the extent that the amount of the obligation computed pursuant to the formula would have this effect, the amount of the assessment is reduced so that the absent parent may retain the protected income amount. Because the protected income amount is defined as household income, it includes the income of a new partner of the absent parent.⁸⁹

In addition to the protected income limit, the government has also recently announced another limit on child support assessments. As of 1995, no obligor may be required to pay more than 30% of his net income in child support.⁹⁰

The government also has promulgated maximum child support levels, the amount varying with the age of the child. A custodial parent may request further support from a court in addition to this maximum amount.⁹¹ This cap was recently reduced and is now, for example, 104.85 pounds per week for a child age 5.⁹²

Until 1995, the Child Support Agency attempted to update orders every year. This proved too burdensome, and as of 1995, orders will be updated every two years.⁹³

As a general rule, custodial parents in receipt of government benefits must cooperate with the Child Support Agency, *i.e.*, provide the name and address of the absent parent, or risk a reduction in benefits. An exception is provided if the custodial parent fears that cooperation would result in a risk of harm to

84. *Id.* at 99.

85. *Id.*

86. *Id.* at 100.

87. *Id.* Remember that for purposes of calculating assessable income, any stepchildren are ignored. *Id.* at 7, 159.

88. *Id.*

89. See John Eekelaar, *Third Thoughts on Child Support*, 24 FAM. L. 99, 100 (1994).

90. See IMPROVING CHILD SUPPORT, *supra* note 71, at 8. Before this change, the government estimated that about one-fifth of all absent parents paid more than 30% of their net income in child support. *Id.* at 19.

91. *Id.* at 22.

92. *Id.* The previous cap amount was 143.40 pounds per week for such a child. *Id.*

93. *Id.* at 9, 28.

him or herself or to the children.⁹⁴ To date, about 8% of all custodial parents have expressed some reluctance to cooperate on this ground; in about one-half of these cases, the government has concluded that there was good cause for non-cooperation.⁹⁵

The amount of the absent parent's basic child support obligation is determined by the Child Support Agency according to the formula described above. A custodial parent may seek a "top up" order for additional support from a court.⁹⁶ The Child Support Agency does not have jurisdiction over children older than 18; the agency also loses jurisdiction over children older than 16 who do not attend school full-time.⁹⁷ Judicial orders are available for these children.⁹⁸ In addition, the 1991 Act does not apply to the support of stepchildren; judicial orders, however, are available in rare instances for stepchild support.⁹⁹

A parent who is dissatisfied with the maintenance assessment may initiate a second-tier review. Under this procedure, another staff member of the agency computes the amount of the assessment. If a parent remains dissatisfied, he may appeal to the Independent Appeal Tribunal Service, a three-member board composed of a lawyer and two others.¹⁰⁰

Like the Australian system, the English rules address those situations where there is divided (split) custody of two or more children and where an absent parent has substantial access. In England, substantial access is defined as a minimum of 102 nights per year.¹⁰¹ If substantial access exists, the child maintenance order is affected in two ways. First, the exempt income of each parent is changed. The amount of personal allowance allocable to each child is apportioned between the parents based upon the percentage of nights each year the respective parent cares for the child.¹⁰² Then the maintenance assessment is calculated for the absent parent, according to the usual procedure. However, the actual amount due is again adjusted to reflect the percentage of time the absent parent has custody of the children. For example, if the parent with care has

94. See CSA, *supra* note 69, § 6.

95. See CHILD SUPPORT AGENCY, THE FIRST TWO YEARS, 1993-94 ANNUAL REPORT AND 1994-95 BUSINESS PLAN 11 [hereinafter THE FIRST TWO YEARS].

96. See CHILD MAINTENANCE, *supra* note 67, at 112.

97. *Id.* at 160.

98. *Id.* at 158, 160.

99. *Id.* at 159; see generally Matrimonial Causes Act, 1973, ch. 18, § 52 (Eng.).

100. Telephone interviews with representatives of Child Support Agencies of Australia, Canada, New Zealand, United Kingdom, and United States (Aug. 18-19, 1995).

101. See SUPPORT HANDBOOK, *supra* note 67, at 278.

102. *Id.* at 283.

possession of the children for 65% of all nights, the child support due would be 65% of the maintenance assessment calculated.¹⁰³

Where divided (split) custody exists under the English system, two maintenance assessments are calculated based on the normal formula. The net income for each parent, less all applicable self-support allowances, is used to calculate each maintenance assessment. The lower amount due is then subtracted from the higher amount, and the parent with the higher maintenance assessment pays the other parent the net amount.¹⁰⁴

The Child Support Act applies immediately to all custodians receiving government benefits.¹⁰⁵ The Act also applies to all separated families who did not have a support order as of April 1993.¹⁰⁶ For those not in receipt of benefits who had already obtained a child support order before April 1993, the government initially planned to apply the act to those orders by 1997.¹⁰⁷ Fee schedules for child support services will be promulgated by the Secretary of State;¹⁰⁸ however, there is no charge until April 1997.¹⁰⁹

The drafters of the 1991 Act attempted to create a system without discretion. A system for appeals of assessments was created, but grounds for such appeals were limited to a mistaken application of the formula or a mistake of law or fact. The original system permitted no discretion to deviate from the formula.¹¹⁰ Capital transfers made or obligations assumed in connection with a pre-1993 divorce were ignored. This policy was perceived to be unfair and has been one factor undermining public support for the 1991 Act.¹¹¹

In 1995, the government abandoned the idea of ignoring pre-1993 capital transfers.¹¹² Legislation will be introduced to permit review officers to exercise discretion to deviate from the formula

103. *Id.* at 287.

104. *Id.* at 256.

105. See CHILD MAINTENANCE, *supra* note 67, at 177-78.

106. *Id.* at 178.

107. *Id.* at 179; see also IMPROVING CHILD SUPPORT, *supra* note 71, at 23. See *infra* text accompanying note 207.

108. CSA, *supra* note 69, § 47.

109. See IMPROVING CHILD SUPPORT, *supra* note 71, at 8, 28. Fees were charged in 1993-94, but did not generate much revenue. See FIFTH REPORT, *supra* note 11, at xiii.

110. CSA, *supra* note 69, §§ 17-21, 24-25; CHILD MAINTENANCE, *supra* note 67, at 118-36.

111. See FIFTH REPORT, *supra* note 11, at xxiii.

112. See generally GOVERNMENT RESPONSE TO SOCIAL SECURITY COMMITTEE FIFTH REPORT (HMSO: London 1995) [hereinafter GOVERNMENT RESPONSE TO FIFTH REPORT].

for certain reasons.¹¹³ For example, if a parent made a capital transfer in connection with a pre-1993 divorce, this transfer could be considered.¹¹⁴ Substantial costs of commuting to work or to see a supported child will be additional grounds for deviation.¹¹⁵ Other possible grounds being considered are costs of stepchildren, unusually high housing costs, or a child or elderly dependent with special needs.¹¹⁶ In the interim, the government has proposed modifications to the basic formula to take into account factors such as pre-1993 capital transfers. The government has proposed that, if an absent parent made a capital transfer in connection with a pre-April 1993 divorce, the absent parent's exempt income should be increased with the amount of the increase based on the amount of the transfer.¹¹⁷ This change will reduce the level of the obligor's assessable income.

To no one's surprise, the 1991 legislation was not greeted with great enthusiasm by all parties. Noncustodial parents (and their new partners) were perhaps inevitable critics, in that they were being asked to contribute more-significant amounts to the support of children of prior relationships. In addition, because the government retained all amounts paid by the noncustodial parent up to the amount of government benefits provided the children's household, many custodial parents did not benefit from the scheme.¹¹⁸ Indeed, after the effective date of the Act, noncustodial parents were much less inclined to make voluntary payments to the custodial household, so the custodial household might have been *worse* off after the adoption of the Act (as long as the amount of child support due did not exceed the amount of government benefits provided). Also, even if the amount of child support assessed exceeded the amount of Income Support provided, and the full amount is paid, the custodial household might still lose other valuable benefits to which they might have been otherwise entitled, such as free prescriptions and school

113. See *IMPROVING CHILD SUPPORT*, *supra* note 71, at 15.

114. *Id.* at 16.

115. Telephone interviews with representatives of the Child Support Agencies of Australia, Canada, New Zealand, United Kingdom, and United States (Aug. 18-19, 1995).

116. *Id.*

117. If the amount transferred was 5000-9999 pounds, the increase in exempt income is 20 pounds. Transfers of 10,000-25,000 pounds entitle the absent parent to an additional 40 pounds of exempt income, and transfers of more than 25,000 pounds would result in additional exempt income of 60 pounds. See *Improving Child Support*, *supra* note 71, at 20; GOVERNMENT RESPONSE TO FIFTH REPORT, *supra* note 112, at 7.

118. See FIFTH REPORT, *supra* note 11, at xxviii; see also, Glendenning et al., *The Impact of the Child Support Act on Lone Mothers and Their Children*, 7 TOLLEY'S J. CHILD L. 18, 20 (1995).

meals.¹¹⁹ Non-financial concerns have also arisen; the level of maintenance assessments under the new law have negatively affected the relationships between some parents.¹²⁰ For all these reasons, it may not be surprising that some custodial parents have resisted the application of the scheme.¹²¹

III. POLICY QUESTIONS

A. *How Much of the Obligor's Income Should be Assessed?*

As one might expect, obligors in both England and Australia have objected to the levels of transfer payments required of them under the new systems. In response, the English government has amended the child support rules to assure that no obligor pays more than 30% of net income in child support.¹²²

The Australian child support percentages were derived from research regarding expenditures on children in intact families. The goal of the system was to calculate a child support order that would replicate average spending on children in intact families. Some Australian research of this type has been conducted, but most data has come from U.S. studies. Use of these U.S. studies has been criticized. First, the Australian Parliament report on their child support system questioned whether U.S. data was representative of practices in Australia.¹²³ Indeed, the drafters of the report were troubled by the speculative and somewhat arbitrary nature of all research of this type, even Australian research.¹²⁴ The drafters urged the government to fund more reliable studies in this area. Other commentators have questioned whether studies of expenditure patterns in *intact* families have much relevance to expenditure patterns in *separated* families, in view of the different circumstances of the two types of families.¹²⁵ The amount due from an Australian

119. See FIFTH REPORT, *supra* note 11, at xxix.

120. See Glendenning et al., *supra* note 118, at 20.

121. Custodial parents resist by either fraudulently claiming that naming the noncustodial parent will be dangerous to the family, or by not returning the maintenance initiation form needed by the Child Support Agency to initiate an assessment of child support.

122. See CSA Changes, 25 FAM. L. 98, 98 (1995).

123. See CHILD SUPPORT SCHEME, *supra* note 10, at 295.

124. *Id.* at 286, 295.

125. See Marsha Garrison, *Child Support and Children's Poverty*, 28 FAM. L.Q. 475 (1994) (reviewing ANDREA H. BELLER & JOHN W. GRAHAM, *SMALL CHANGE: THE ECONOMICS OF CHILD SUPPORT* (1993), and DONALD J. HERNANDEZ, *AMERICA'S CHILDREN: RESOURCES FROM FAMILY, GOVERNMENT AND THE ECONOMY* (1993)).

obligor varies from 18% to 36% of taxable income, depending upon the number of children.¹²⁶ Under the Australian system, no absent parent may be ordered to pay more than 36% of taxable income in child support.¹²⁷

The amount of income sought from absent parents obviously has some relation to the level of public support for single-parent families. In countries with minimal public support programs for such families,¹²⁸ like Australia and the United States, the percentage chosen is relatively high.¹²⁹ In other countries with more-substantial public support programs for such families, such as Denmark or Sweden, the percentage chosen has been lower.¹³⁰ For example, a Danish absent parent with an average income of about \$40,000 pays 4% of his gross income as child support for one child.¹³¹ Similarly, in Sweden the average child support order for one child amounts to about 6% of the obligor's gross income.¹³² Germany has adopted a level of support somewhere between the levels sought in Australia and those found in Scandinavia. A German obligor is asked to pay between 10-15% of his net income as child support for two children.¹³³

126. If a departure application is granted, the order may exceed 36% of the obligor's income.

127. Note that New Zealand selected a 30% cap on taxable income. See CHILD SUPPORT SCHEME, *supra* note 10, at 620. Remember that the English cap is expressed in net (after-tax) income. See *supra* text accompanying note 90.

The proposed Canadian Guideline suggests a sliding scale of child support. For example, an obligor earning \$10,000 annually would pay 12% of gross income to support one child, while one earning \$80,000 would pay 18.6%. For three children, an obligor earning \$10,000 annually would pay 20.5% of gross earnings, compared to 37.8% of gross earnings for someone earning \$80,000. See generally FEDERAL/PROVINCIAL/TERRITORIAL FAMILY LAW COMMITTEE, REPORT AND RECOMMENDATIONS ON CHILD SUPPORT Table 1 (1995). In Canada, child support is a deduction from taxes for the payor and taxable income for the recipient. *Id.* at 6.

128. For example, one study has found that both countries allocate about four percent of their GDP to public support programs for nonaged people, the lowest percentage of all countries studied. See LUXEMBOURG INCOME STUDY, *supra* note 7, at Figure 8.

129. The percentage chosen depends upon the number of children. Of those states using the percentage of obligor's income method, most such states have chosen about 12-18% of gross income for one child and 15-25% for two. See generally Williams, *infra* note 183.

130. Denmark and Sweden devote at least 13% of their GDP to public support programs for nonaged people, a figure more than three times the figure for the United States and Australia. See LUXEMBOURG INCOME STUDY, *supra* note 7, at Figure 8.

131. See Letter from Dr. Linda Neilsen of the University of Copenhagen to J. Thomas Oldham (Nov. 21, 1995) (on file with author).

132. See Letter from Ms. Annette Wickstrom of the Swedish Ministry of Justice to J. Thomas Oldham (Jan. 11, 1996) (on file with author).

133. See generally Wolfgang Voegeli & Barbara Willenbacher, Background Notes on Divorce in the FRG (1989) (unpublished manuscript).

The percentage chosen also depends upon the goal sought. For example, if the goal is to equalize the standard of living in the two households, very large transfers would be required, at least until the parents repartnered. In the United States, the goal has been to replicate the level of spending on the child that would have resulted if the family was intact; this has required a somewhat lower level of transfer.

Another issue is whether the goal should be to replicate the expenditure patterns of intact families in separated families. If so, it might be noteworthy that some U.S. studies have found that family spending on children, as a percentage of family income, decreases as income increases.¹³⁴ Neither the Australian nor the English system incorporates such a feature. Indeed, the protected income aspects of the schemes can lead to obligors with higher incomes paying a higher percentage. In contrast, this feature occurs under the income shares guideline system commonly used in the United States.¹³⁵

B. *Should There Be a Cap on Assessable Income?*

While the Australian system is based on an income-sharing model where the payor's basic obligation is calculated as a percentage of the obligor's income, the drafters of the system did incorporate a cost-sharing component via a cap on assessable income.¹³⁶ Although any estimate of "costs" of children must vary with the income of the household,¹³⁷ it seems intuitively appealing to cap assessable income at some high level of income.¹³⁸ After this point, "reasonable" costs of the child would be satisfied; additional voluntary contributions obviously could occur but would not be required. The cap in Australia was set at 250% of average weekly earnings. Similarly, some U.S. jurisdictions have set a cap at a specific amount of monthly income.¹³⁹ England has also accepted that the amount of child support collected by the agency should not exceed a certain

134. See THOMAS J. ESPENSHADE, *INVESTING IN CHILDREN: NEW ESTIMATES OF PARENTAL EXPENDITURES* 25-29 (1984); Cf. Irwin Garfinkel & Marygold S. Melli, *The Use of Normative Standards in Family Law Decisions*, 24 *FAM. L.Q.* 157, 169 n.31 (1990).

135. See, e.g., IDAHO R. CIV. P. 6(c)(6), § 10(a); WYO. STAT. ANN. § 6-304 (Michie 1977).

136. See *supra* text accompanying note 23.

137. See generally ESPENSHADE, *supra* note 134.

138. Of course, not all commentators agree on this point. For an opposing view, see CHILD SUPPORT WORKING PARTY, *CHILD SUPPORT REVIEW* 32 (New Zealand 1994) [hereinafter *WORKING PARTY REPORT*].

139. See, e.g., TEX. FAM. CODE ANN. §§ 154.125, 154.126 (West 1996).

prescribed level, regardless of the income of the absent parent.¹⁴⁰ In all these jurisdictions, the custodial parent can go to court and ask the court in its discretion to order more child support, if additional needs can be established.

The issue of an income cap is not important, of course, in most instances. For example, in Australia in 1994-95, twice the average weekly wage was A\$66,518. Of all the noncustodial parents governed by the Agency, 2% earned more than A\$50,000.¹⁴¹ For this reason, among others, the Joint Select Committee on Certain Family Law Issues recommended that the cap be lowered to two times the average wage level.¹⁴²

C. How Should a Child Support System Affect Low-Income Parents?

1. Low-Income Obligor

Both England and Australia attempt to accommodate the low-income noncustodial parent. In both countries, this is accomplished via the concept of a self-support reserve.¹⁴³ In Australia, if the obligor's earnings do not exceed the amount of the reserve, no support is due.¹⁴⁴ In England, such obligors owe 2.2 pounds per week. The recently completed report by the Joint Select Committee on Certain Family Law Issues has recommended an increase in the Australian self-support component.¹⁴⁵

In contrast to England and Australia, few United States jurisdictions specifically provide for the low-income obligor.¹⁴⁶ For example, the Wisconsin formula ostensibly applies to all levels of income; no self-support reserve is created. A significant difference between the Australian and Wisconsin systems is that low-income Australian obligors are permitted to retain a

140. See *supra* text accompanying notes 83-89.

141. See CHILD SUPPORT SCHEME, *supra* note 10, at 338.

142. *Id.* at 339. This is the current cap in New Zealand. See WORKING PARTY REPORT, *supra* note 138, at 31. Even at this level, less than 1% of all obligors are affected in New Zealand. *Id.*

143. In England, the protected income level also has this protective effect.

144. The Joint Select Committee on Certain Family Law Issues has recommended a minimum payment of A\$5 per week. See CHILD SUPPORT SCHEME, *supra* note 10, at 341.

145. See *id.* at 345. This amount is equal to the after-tax value of the current unemployment benefit. *Id.*

146. Some provide that the guidelines do not apply to low-income obligors, and that in such instances the judge should impose a reasonable child support obligation.

substantially higher percentage of income than those in Wisconsin.¹⁴⁷

2. Low-Income Custodial Parents

If the custodial parent is receiving government benefits, the government must choose how much it should retain of any support received from the noncustodial parent. England has chosen to keep all the support received, up to the amount of government benefits provided.¹⁴⁸ Such a policy obviously helps the government generate revenues; however, it undermines the public perception of child support programs in a number of ways. First, such a policy alienates custodial parents receiving benefits; they will not benefit if maintenance is paid, so they will have no particular incentive to create a maintenance claim. Similarly, if the custodial household will not benefit, the noncustodial parent may justifiably feel disinclined to make a payment solely to benefit the treasury.

Australia has found a more sensible solution to this problem. In Australia, a custodial parent receiving government benefits automatically receives approximately the first A\$19 of weekly support, as well as one-half of any additional support.¹⁴⁹ This policy has been expensive because approximately 75% of all child support paid to custodial parents receiving social security actually goes to such parents; the government only keeps 25%.¹⁵⁰ Still, such a policy encourages the custodial parent to assist with obtaining a maintenance order and increases the obligor's motivation to pay the support, thereby increasing the resources of the custodial household.

D. *The Effect on the Obligor's Incentives*

The English and Australian systems in some instances could have a significant effect on the obligor's incentive to earn

147. For example, one recent Australian study compared the percentage of after-tax income retained by a noncustodial parent, after paying child support, at gross income levels of A\$15,000, A\$25,000, and A\$50,000, assuming that the obligor had not repartnered and that one child was being supported. The parent earning \$50,000 retained 51% of his income in Wisconsin and 53% in Australia. In contrast, a parent earning \$25,000 retained 59% of his income in Wisconsin and 68% in Australia. If the parent had an income of \$15,000, that parent would retain 63% after taxes and child support in Wisconsin and 77% in Australia. See CHILD SUPPORT SCHEME, *supra* note 10, at 618.

148. See Patricia Hewitt, *Oz and the Art of Maintenance; Britain's Child Support Agency Is One Year Old*, INDEPENDENT (London), Apr. 5, 1994, at 16.

149. *Id.*

150. *Id.*

additional income. This incentive effect is more obvious under the Australian system because the child support obligation is calculated based upon the obligor's taxable, not after-tax, income. For example, if the obligor has three children, the child support is 32% of his taxable income. Taking tax obligations into account (the marginal tax rate in Australia is 34% for income above A\$20,700, and increases to 47% for income over A\$50,000),¹⁵¹ the obligor in this situation will retain less than one-third of each additional dollar earned until the child support income cap is reached.¹⁵² If the obligor would have to incur additional non-deductible expenses to generate additional income, those costs could further erode his incentive to earn more income. Even with two children, the noncustodial parent will keep less than one-half of every additional dollar earned.¹⁵³

John Eekelaar has noted a similar problem with the English system. Under that system, until the child support amount equals the maintenance requirement, the obligor must pay 50% of his assessable income.¹⁵⁴ Fifty percent of all additional income is then allocated to child support until the point where child support equals the maintenance requirement. If the obligor would have to incur additional expenses to earn more income, such as travel costs (which normally are not deducted before calculating assessable income), the costs could further reduce any incentive to earn more.¹⁵⁵ Eekelaar suggests that the maintenance requirement percentage be reduced from 50% to 40% to mute any effect the child support rates have on work incentives.¹⁵⁶

The government's policy regarding "passing through" child support for custodial parents receiving government benefits might also affect the obligor's incentive to pay. For example, England¹⁵⁷ and New Zealand¹⁵⁸ retain all child support paid until the government has been reimbursed for all benefit paid. Under this policy, obligors perceive child support as merely a tax to

151. See CHILD SUPPORT SCHEME, *supra* note 10, at 354.

152. In fact, the Australian Parliament report discusses examples whereby an obligor would actually have *less* net income if his income increases in those situations where the obligor would also lose government benefits by increasing income. See CHILD SUPPORT SCHEME, *supra* note 10, at 429.

153. See the example set forth in CHILD SUPPORT SCHEME, *supra* note 10, at 353, showing that the noncustodial parent kept 37.6 cents of every additional dollar earned.

154. See Eekelaar, *supra* note 89, at 100-01.

155. The government has announced that some credit will be given if the obligor's round-trip commute exceeds 150 miles per week. See Roger Bird, *Child Support: Reform or Tinkering?*, 25 FAM. L. 112, 112 (1995).

156. See Eekelaar, *supra* note 89, at 99-101.

157. See FIFTH REPORT, *supra* note 11, at xxviii.

158. See WORKING PARTY REPORT, *supra* note 138, at 33.

benefit the government, not a payment to help their children. Australia has established a more effective policy of passing through most child support.¹⁵⁹

E. *Should the Amount of Child Support Increase with the Child's Age?*

Some commentators argue that older children cost more than younger ones.¹⁶⁰ Others disagree, at least regarding those countries where there is no free or subsidized child care.¹⁶¹ If it is accepted that older children cost more, one might try to incorporate some mechanism in the child support system to increase child support as children age. Tying child support to costs of the child, however, would represent a move away from the current trend of giving a child a claim to a certain percentage of the parent's income, regardless of costs.

Australia has no procedure for automatically increasing child support for older children. In contrast, England does increase the maintenance requirement for older children. For example, the weekly income support amount for a child eight years old is 15.95 pounds. This increases to 23.40 pounds for a 13 year-old child, and is 36.80 pounds for a child 18 years old still in school.¹⁶² Some other countries, like Germany, agree that child support should increase as the child ages.¹⁶³

F. *Is a System with No Discretion Desirable?*

The English have now abandoned their attempt to create a purely administrative system with no discretion.¹⁶⁴ The government is now attempting to create a scheme whereby approximately 10% of all applicants will qualify for "departure orders" from the formula.¹⁶⁵ This system will be presented to Parliament in the near future.

159. See generally HARRISON ET AL., *supra* note 64.

160. See DAVID BETSON, ALTERNATIVE ESTIMATES OF THE COST OF CHILDREN FROM THE 1980-1986 CONSUMER EXPENDITURES SURVEY 49 (1990).

161. See generally SUPPORT HANDBOOK, *supra* note 67.

162. See *id.* at 189-90.

163. This is set forth in the "Dusseldorf table," which is a table used by most courts to determine child support. See Voegeli & Willenbacher, *supra* note 133. A few U. S. state guidelines increase child support for older children. See, e.g., D.C. Code § 16-916.1.

164. See CHILD SUPPORT AGENCY, 1995-96 BUSINESS PLAN 7-8 (HMSO: London).

165. *Id.*; telephone interviews with representatives of the Child Support Agencies of Australia, Canada, New Zealand, United Kingdom, and United States (Aug. 18-19, 1995).

The Australian experience seems similar to that envisioned by England. Either parent may file an application for a departure order for a deviation from the normal child support formula.¹⁶⁶ According to the most recent data, an application for a departure order is filed in just less than 10% of all cases, and the application is granted in about half of those cases.¹⁶⁷

The United States experience also suggests, at least to judges, that discretion is perceived as quite necessary when calculating a child support order. All states in the United States have promulgated child support guidelines, such as formulas to be used to calculate the child support obligation. The amount due pursuant to these guidelines is presumptively correct, but judges retain the discretion to adjust the amounts.¹⁶⁸ Empirical evidence to date shows that a substantial number of U.S. orders deviate from the amount that would result under the applicable guideline.¹⁶⁹

Experience to date, therefore, suggests that any acceptable system for child support awards needs to retain some element of discretion. One could debate, of course, the best way to incorporate this discretion into the system. For example, in Australia, departure applications are heard by Child Support Review Officers in an administrative hearing.¹⁷⁰ These officers are lawyers who are employed by the Child Support Agency. Although a party dissatisfied with the officer's ruling may appeal to the Family Court, appeals rarely occur.¹⁷¹

If discretion is introduced to the system, accepted grounds for deviation need to be promulgated. Grounds such as special

166. See CSAA, *supra* note 19, § 117.

167. See Rhoades, *supra* note 24, at 33.

168. See generally J. Thomas Oldham, *The Appropriate Child Support Award When the Noncustodial Parent Earns Less Than the Custodial Parent*, 31 HOUS. L. REV. 585 (1994).

169. See generally CENTER FOR POLICY RESEARCH, THE IMPACT OF CHILD SUPPORT GUIDELINES: AN EMPIRICAL ASSESSMENT OF THREE MODELS 69 (1989); LEWIN/ICF, ESTIMATES OF EXPENDITURES ON CHILDREN AND CHILD SUPPORT GUIDELINES (1990) (submitted to the Office of the Assistant Secretary for Planning and Evaluation, U.S. Dept. of Health and Human Services); Marygold Melli & Judi Bartfeld, *Use of the Wisconsin Percentage-of-Income-Standard to Set Child Support: Experience in Twenty Counties*, 11 WIS. J. FAM. L. 62 (1991); MARILYN RAY, NEW YORK STATE CHILD SUPPORT STANDARDS ACT EVALUATION PROJECT REPORT 1993, 54 (1994); Kathryn D. Rettig et al., *Impact of Child Support Guidelines on the Economic Well-Being of Children*, 40 FAM. REL. 167, 170 (1991); Nancy Thoennes et al., *The Impact of Child Support Guidelines on Award Adequacy, Award Variability, and Case Processing Efficiency*, 25 FAM. L.Q. 325, 339-40 (1991).

170. See Letter from Justice Joseph Kay of the Australian Family Court to J. Thomas Oldham (Nov. 1, 1995) (on file with author) [hereinafter Nov. Letter from Justice Kay].

171. *Id.*

needs of the supported child are needed. Other possible grounds would be more controversial, like the income or needs of a parent's new partner or the needs of a noncustodial parent's stepchild.

If a system with some discretion is adopted, a related question is whether departure determinations should be published to provide guidance to parents considering a departure application. This practice has been suggested in Australia.¹⁷²

G. *Should the Property Settlement Affect Child Support?*

Divorce settlements have been traditionally regarded as a package.¹⁷³ The move toward an administrative child support system has separated the property settlement from the child support determination. In England, the property settlement is totally separate from the child support award.¹⁷⁴ This separation reduces the incentive for parties to use the property settlement as a means of providing for children. Studies indicate that, if child support is part of a negotiable package, parties have more flexibility to arrive at a mutually beneficial result.¹⁷⁵

The Australian system has attempted to allow divorce bargaining to some degree. The child support formula does not take property settlements into account, but such property settlements are an appropriate ground for deviation from the formula.¹⁷⁶ To help the Child Support Agency determine what portion of any property settlement comprises indirect support, the Family Law Act of 1975 has been amended to provide that a court order should specify the portion of the order that comprises indirect maintenance.¹⁷⁷

Although some argue that it is desirable to separate property settlements from child support,¹⁷⁸ others regard this as an artificial distinction.¹⁷⁹ Some have been concerned that the recent increase in child support levels, coupled with the

172. See CHILD SUPPORT SCHEME, *supra* note 10, at 231.

173. See generally GWYNN DAVIS ET AL., SIMPLE QUARRELS (1994) (outlining the realities of the divorce process).

174. Although pre-1993 capital settlements may be grounds for departure under the new policies announced in 1995, property settlements finalized after April 1993 will not be a ground for departure.

175. See generally Judith Selzer & Irwin Garfinkel, *Inequality in Divorce Settlements: An Investigation of Property Settlements and Child Support Awards*, in CHILD SUPPORT ASSURANCE 79, 80 (Irwin Garfinkel et al. eds., 1992).

176. See CSAA, *supra* note 19, § 117.

177. See Family Law Act, 1975, § 77(A) (Austl.), amended by Family Law Amendment Act, 1987, § 42 (Austl.).

178. See CHILD SUPPORT SCHEME, *supra* note 10, at 503.

179. See *id.* at 504-05.

separation of child support from property division, will decrease the percentage of property received by the custodial parent at divorce. If a decline in property transfer at divorce occurs, it could affect the financial stability of the custodial household.¹⁸⁰ For example, some have questioned whether the new English child support formula will undermine the English practice of giving the custodial parent the home after divorce.¹⁸¹

H. *Should the Custodial Parent's Income Be Considered?*

No consensus exists regarding the significance of the custodial parent's income. In some U.S. jurisdictions, the custodial parent's income is considered only as a possible ground for deviation from the applicable guidelines.¹⁸² Most U.S. jurisdictions agree with England that the custodial parent's income should be considered as part of the formula; both the "income shares" and "Melson" procedures consider the income of both parents when arriving at the presumptive award amount.¹⁸³ Once the custodial parent's earnings exceed a reasonable self-support component, it may be equitable to consider any additional income.

The compromise adopted in Australia was to consider the custodial parent's income only if it exceeds the sum of the average weekly earnings plus a child care allotment.¹⁸⁴ Pursuant to this approach, the income of only about 2% of all custodial parents is considered. This has been perceived by many as an unfair policy; a Family Court judge has predicted that the household level for consideration of a custodial parent's income probably will be lowered.¹⁸⁵ The Australian Family Court has proposed that the floor income level for the custodial parent be lowered substantially, but that each dollar of income over this amount

180. Australian courts are directed to consider a parent's probable level of child support liability when making the property division. See Family Law Act, 1975, § 79(4) (Austl.). Anecdotal evidence in Australia suggests that, despite this provision, property divisions have not been substantially affected by the new child support system. See CHILD SUPPORT SCHEME, *supra* note 10, at 506-08.

181. See Sara McConnell & Liz Dolan, *Divorce*, TIMES (London), Mar. 5, 1994, at 29.

182. See, e.g., WIS. ADMIN. CODE § 80.01-.05 (1989); TEX. FAM. CODE ANN. § 14.052-.057 (West 1991). This is also the New Zealand approach. See WORKING PARTY REPORT, *supra* note 138, at 42.

183. See generally Robert G. Williams, *An Overview of Child Support Guidelines in the United States*, in CHILD SUPPORT GUIDELINES: THE NEXT GENERATION 1 (Margaret C. Haynes ed., 1994).

184. See CHILD SUPPORT SCHEME, *supra* note 10, at 320.

185. See Nov. Letter from Justice Kay, *supra* note 170.

reduce the noncustodial parent's adjusted income for purposes of the child support calculation by only fifty cents.¹⁸⁶

I. *The Virtues of Simplicity*

A number of different procedures for calculating child support obligations have evolved during the past fifteen years. These procedures differ greatly in levels of complexity. For example, the simplest scheme is what might be referred to as the "Wisconsin system," the formula used in the state of Wisconsin.¹⁸⁷ This formula calculates the noncustodial parent's obligation based solely on that parent's gross income.¹⁸⁸ One of its most desirable characteristics is its simplicity. It has been perceived by many in the United States as being too simple; only about one-third of U.S. jurisdictions calculate a child support obligation relying solely on the income of the noncustodial parent. In most states, child support is calculated based on the income of both parents.

The Australian system resembles the Wisconsin system insofar as it, in most instances, focuses solely on the income of the noncustodial parent in calculating child support. The Australian system differs from Wisconsin in some ways by focusing on taxable rather than gross income, by subtracting a self-support component from taxable income before multiplying the adjusted income amount by the applicable percentage, by specifying an income cap for child-support awards, and by incorporating a procedure for considering the income of high-income custodial parents.¹⁸⁹ Still, the Australian system remains relatively simple.

In an attempt to achieve greater fairness, the English system is much more complicated. First, in calculating assessable income, all taxes and 50% of all pension contributions are deducted from gross income.¹⁹⁰ The formula also permits the deduction of "reasonable" housing expenses. For purposes of the exempt income calculation, the exemption includes interest and principal payments; for protected income, the exemption only includes interest.¹⁹¹ Until 1995, when the noncustodial parent

186. See CHILD SUPPORT SCHEME, *supra* note 10, at 324. The Joint Select Committee on Certain Family Law Issues also endorsed this suggestion. *Id.* at 331.

187. See CHILD SUPPORT SCHEME, *supra* note 10, at 613.

188. *Id.*

189. *Id.*

190. *Id.* at 624.

191. See CHIEF CHILD SUPPORT OFFICER, 1994-95 ANNUAL REPORT 11 (HMSO: London) [hereinafter OFFICER REPORT].

had repartnered, an amount allocable to the other partner's share of housing costs was deducted from the absent parent's housing deduction.¹⁹² When the obligor has repartnered, the protected income amount includes an allotment for the new partner and any children or stepchildren; for purposes of calculating assessable income, however, new partners and stepchildren are ignored.

Not surprisingly, the English system has encountered substantial problems due to its complexity. In 1993-94, the Chief Child Support Officer reviewed sample cases and found that in 40% of such cases the amount due had been miscalculated.¹⁹³ In 1994-95, another review of sample cases found that 23% were miscalculated, and that in 28% of the other cases, there was inadequate information in the file to determine whether the amount calculated was correct.¹⁹⁴ The goal of the Agency for 1995-96 is for 75% of orders to be calculated correctly.¹⁹⁵

As indicated above, the English system reflected a substantial change in societal norms regarding personal responsibility and continuing family obligations. A well-administered program would still have been quite controversial. The current level of miscalculated awards has caused the Child Support Agency to be even more unpopular in addition to undermining public confidence in the Agency's calculations. For example, in 1993-94, a second-tier review of the maintenance assessment was sought in 5% of all cases, and 14% of these reviews were appealed.¹⁹⁶ In 1994-95, a second-tier review was sought in connection with 10% of all maintenance assessments, and 24% of these were appealed.¹⁹⁷ To date in 1995-96, a second-tier review was sought in 20% of all assessments, and 23% of these reviews were appealed.¹⁹⁸ Of the cases appealed, the Child Support Agency second-tier review was upheld in only 40% of the cases in 1994-95 and in only 25% of the cases to date in 1995-96.¹⁹⁹ With this

192. See *IMPROVING CHILD SUPPORT*, *supra* note 71, at 21.

193. See *CHILD SUPPORT AGENCY, 1994-95 ANNUAL REPORT 6* (HMSO: London) [hereinafter *ANNUAL REPORT*].

194. See *OFFICER REPORT*, *supra* note 191, at 4. Child Support Agency personnel estimated to the author that approximately six of ten orders are now correct. A study of cases during the last two months of 1994-95 found that 27% of awards were incorrect, 7.5% were invalid, illegal or unenforceable, and that in 14.2% of the cases inadequate information was available to determine whether the award was accurate. See *ANNUAL REPORT*, *supra* note 193, at 48.

195. See *CHILD SUPPORT AGENCY, 1995-96 BUSINESS PLAN 13*.

196. Child Support Agency, Adjudication Chart (Eng.) (on file with author).

197. *Id.*

198. *Id.*

199. *Id.*

degree of error in assessments, it seems unlikely that the current system can survive.²⁰⁰

The English child support formula is incredibly complex. Even an intelligent audience can quickly become lost trying to understand it. For example, it was reported that when the House of Commons Social Security Select Committee received a two-hour briefing explaining the child support formula, the committee members still did not completely understand it.²⁰¹

In addition to having great difficulty accurately calculating maintenance assessments, the English Child Support Agency has been plagued with various administrative problems.²⁰² Some of these problems are to be expected, such as complaints of inadequate staffing, lack of response to letters, lack of response or rude response to telephone inquiries, etc. Perhaps more troubling is the speed, or lack thereof, of the assessment process. For example, in March 1995, 50% of the outstanding maintenance applications were more than one year old and not resolved.²⁰³ Perhaps some of this delay is due to the formula's complexity.

The English experience strongly suggests that complexity of the child support formula can be a disadvantage, particularly if, as is increasingly common, the system is to be administered by non-lawyers. The English attempt to adjust the formula in some ways to fit the personal circumstances of the parents, while a laudable goal, may be too complicated. For example, it has been suggested that the housing element of the formula be replaced by an estimate of reasonable housing costs for the region, thereby avoiding the complicated calculations regarding housing obligations.²⁰⁴ The use of the amount of income reflected on the most recent tax filing, as employed by New Zealand and Australia, could clarify the base income amounts.

200. The Child Support Agency appears to be competing with the Poll Tax as the biggest blunder of the recent conservative governments. See *Last Chance for the CSA*, DAILY TELEGRAPH (London), Jan. 24, 1995, at 18 (referring to the CSA as "one of the Government's worst nightmares").

201. See Rosie Waterhouse, *Family Formula for Chaos; As a New Boss Takes Over the CSA*, Rosie Waterhouse Asks Where It Went Wrong, INDEPENDENT (London), Sept. 4, 1994, at 6.

202. See *Last Chance for the CSA*, *supra* note 200 (referring to the "administrative chaos" of the CSA).

203. See ANNUAL REPORT, *supra* note 193, at 11. The government has agreed that some means of simplifying the calculation of housing costs must be found. See GOVERNMENT RESPONSE TO FIFTH REPORT, *supra* note 112, at 5.

204. See FIFTH REPORT, *supra* note 11, at xvii.

J. *Obtaining Information Regarding Income*

The English are experiencing great difficulties confirming the income of parents. The English Child Support Agency, not a part of the tax office, begins the process by asking obligors to file income disclosure statements, a "maintenance enquiry form".²⁰⁵ Many absent parents are not filing these statements, and this seems to be causing problems in the system. The Australian system does not seem to have these problems for two reasons. First, the system is a part of the tax office, and second, the relevant income figure is the amount set forth on the most recent tax filing, as adjusted for inflation. This contrast between the English and Australian experience suggests that it may be good policy to place child support systems within tax offices, or at least give them access to information from the tax office. The English are apparently considering making the Child Support Agency a part of the tax office.²⁰⁶ Another potential solution to the English problem is to consider the income information on the most recent tax return, as adjusted for inflation, as the presumptively correct income amount.

K. *Should Child Support Agencies Assume Responsibility for All Child Support Obligations?*

England and Australia have adopted different policies regarding the percentage of orders to be administered by the agency. England attempted to apply the new system to all parents regardless of whether the parents received government benefits or whether the parents had separated or divorced before the effective date of the new law. In contrast, Australia only applied its rules prospectively to couples who separated after the effective date of the law or to children who were born after that date. Stage 2 procedures are mandatory only if the parent receives government benefits.

The English discovered that it was administratively burdensome to assume responsibility for establishing and collecting child support obligations for all broken families. The English have now suspended efforts to apply the new system to families where and a support order was in effect before the

205. See generally SUPPORT HANDBOOK, *supra* note 67. Actually the custodial parent first files the Maintenance Application Form, and then the Maintenance Enquiry Form is sent to the absent parent.

206. See David Brindle, *Plan to Attach CSA to Inland Revenue*, GUARDIAN (London), Feb. 2, 1996, at 6.

adoption of the new system or government benefits are not being paid to the custodial family.

L. *Have the New Administrative Systems Had a Significant Effect?*

In Australia, before the Stage 1 changes became effective, child support was being received by only 34% of all separated families.²⁰⁷ Of those parents receiving the sole parent pension, only 25% were receiving child support.²⁰⁸ In contrast, 48% of the parents who began receiving the sole parent pension after the effective date of the Stage 2 reforms either were receiving child support or had applied to the Child Support Agency for such support. Also, the administrative orders, on average, were A\$5.50 higher per week than court orders granted during that period.²⁰⁹ By June 1993, 40.3% of custodial parents receiving the sole parent pension were receiving child support.²¹⁰ The enactment of the child support legislation in Australia, and the publicity surrounding it, appears to have significantly affected the average amount of child support awarded. For example, in 1988 the average amount of court-ordered maintenance was A\$26 per week. By 1992-93, the average weekly administrative award was A\$48 and the average court award had increased to A\$42.²¹¹

The Australian Child Support Agency has stated that 56% of the obligations which it has responsibility for collecting are paid in a timely manner.²¹² Of these cases (approximately 104,000), about 61,000 are collected via garnishment and the remainder by voluntary payment.²¹³

During the first few years of the Australian Child Support Agency's existence, however, the agency did not help a substantial number of custodial parents. A study conducted in 1991-92 found that 66% of all custodial parents were receiving no child support; of those parents receiving support, the median weekly payment was A\$28.²¹⁴ Low wages of many noncustodial parents contribute to this problem; about 81% of noncustodial parents

207. See CHILD SUPPORT SCHEME, *supra* note 10, at 20 (citing a study by the Australian Institute of Family Studies).

208. *Id.* at 21.

209. *Id.* (citing THE CHILD SUPPORT SCHEME: ADEQUACY OF CHILD SUPPORT AND COVERAGE OF THE SOLE PARENT PENSIONER POPULATION (Child Support Evaluation Advisory Group ed., 1990)).

210. *Id.* at 46.

211. *Id.* at 50.

212. *Id.* at 209.

213. *Id.*

214. *Id.* at 40 (citing a study by the Australian Institute of Family Studies).

reported income to the Child Support Agency that was below the average annual Australian wage (A\$33,259 for 1994-95).²¹⁵

M. *Should the Child Support Award Be Affected By the Level of Visitation?*

England and Australia both change the child support obligation when the noncustodial parent is responsible for a child at least 30% of all nights during the year.²¹⁶ Increased visitation frequency results in lower child support payments for the noncustodial parent. Because the reduction in child support does not occur until the 30% level is attained, parents sometimes struggle over whether contact will amount to just less than 30% or a little more than 30%.²¹⁷ The Joint Select Committee on Certain Family Law Issues in Australia recently concluded that it would be too complicated to try to change this "cliff effect" of the substantial access system.²¹⁸

Discussions of the relationship between visitation and child support frequently pertain to when child support should be *decreased* due to greater levels of access. Little attention is paid to whether child support should be *increased* when access is limited or nonexistent. If the rationale for reducing child support due to high visitation levels is that this reduces costs that would otherwise normally be borne by the custodial parent, is it not equally true that if the noncustodial parent does not visit, the custodial parent will bear higher costs? Are child support formulas geared to the assumption that visitation will be at "normal" levels, which is presumably about 15% of all nights? Noncustodial parents who do not have possession of the child for at least a specified number of nights per year could be charged a surcharge of some kind. This surcharge would be fair to the custodial parent. To the extent that continuing contact with both parents benefits the child,²¹⁹ such a policy might also encourage the noncustodial parent to have more contact with the child. Of course, such a policy might also give the custodian an incentive to make access more difficult, creating undesirable incentives.

215. *Id.* at 43.

216. In Australia, the level used is 30% (109 nights); in England the level is 104 nights, presumably arrived at by multiplying two days a week by 52. *See id.* at 381.

217. *See id.* at 380-82.

218. *Id.* at 382.

219. This obviously is a somewhat controversial topic. Some studies conclude that continuing contact with the noncustodial parent is beneficial. *See generally* AUSTRALIAN INSTITUTE OF FAMILY STUDIES, ECONOMIC CONSEQUENCES OF MARRIAGE BREAKDOWN.

N. *What Should Be Done About Stepchildren in the Noncustodial Parent's Household?*

The New Zealand system increases the noncustodial parent's self-support reserve if there are stepchildren in the household.²²⁰ The English system does not incorporate stepchildren into the basic formula for assessable income, but the calculation of protected income includes an amount for stepchildren.²²¹

When considering this issue, an Australian Parliamentary committee noted arguments for the policy of recognizing the costs of stepchildren. The committee commented that, since 60% of all custodial parents receive no child support, in many cases it is likely that the stepfather will have to contribute to the support of stepchildren. The committee concluded, however, that adopting the New Zealand approach would add too much complexity to the scheme; it recommended that Australia continue to ignore stepchildren in the formula.²²² Most U.S. guidelines also ignore stepchildren in the obligor's household when calculating child support due. The customary rationales given are that biological parents should have support responsibilities, not stepparents, and that parents should not be able to reduce support obligations to children by repartnering with another who already has custody of children.

O. *Should New Partners Have Any Effect on Child Support?*

England and Australia agree with almost all U.S. jurisdictions that the income or needs of new partners should not affect the child support formula. In Australia, for example, the self-support reserve of the obligor increases only if the new partner and the obligor conceive or adopt a child.²²³ A recent Australian review committee noted that this policy does have the potential effect, due to varying income levels and responsibilities of new partners, of placing different children of the same parent at different standards of living. The review committee concluded, however, that the policy of ignoring stepparent income was

220. See CHILD SUPPORT SCHEME, *supra* note 10, at 404.

221. The government has recently rejected a proposal to adopt a policy like New Zealand's, which gives the absent parent credit for support provided stepchildren. See GOVERNMENT RESPONSE TO FIFTH REPORT, *supra* note 112, at 8.

222. See CHILD SUPPORT SCHEME, *supra* note 10, at 405. The committee also rejected a proposal to permit a reduction of child support liability if it could be shown that stepchildren were not receiving support from their absent parent. *Id.* at 407.

223. See *id.* at 410. An obligor may apply for a departure order due to a new spouse's special needs. CSAA, *supra* note 19, § 117(2).

consistent with general Australian family policy regarding a stepparent's duty of support. In addition, the committee noted that it would be very complicated to try to assure that the standards of living in each parent's household would be equal.²²⁴ The committee did not mention the potential negative effect a stepparent duty of support would have on remarriage prospects of noncustodial parents.

Most United States jurisdictions ignore the income of new partners when calculating the amount of support due under the guidelines. In some United States jurisdictions, if the obligor remarries a new partner with significant income, courts do not include that income in the child support computation formula, but might decide to deviate from the guidelines and increase the child support awarded in light of the new spouse's income.²²⁵ When California and Idaho courts began automatically to consider the income of new spouses of the noncustodial parent to compute the amount of child support due, legislation was passed, clarifying that the income of a new spouse should generally not be considered when calculating child support.²²⁶

In New Zealand, the absent parent's self-support reserve is increased with repartnering, regardless of whether the new partner is dependent upon the obligor.²²⁷

P. What Should Be Deducted from Gross Income When Calculating the Amount of Income That Should Be Used for the Child Support Calculation?

Wisconsin uses the obligor's gross income as the base amount of the child support component. Most jurisdictions allow some offsets, however, before the child support due is calculated. Australia uses the obligor's taxable income. England uses income offset by income taxes and 50% of pension contributions.

224. See CHILD SUPPORT SCHEME, *supra* note 10, at 410.

225. See, e.g., *Cummings v. Cummings*, 897 P.2d 685, 689 (Ariz. Ct. App. 1994); *In re Marriage of Riegel*, 611 N.E.2d 21, 23 (Ill. App. Ct. 1993); *In re Marriage of Staton*, 511 N.W.2d 418, 420-21 (Iowa Ct. App. 1993); *Ewing v. May*, 705 S.W.2d 910, 913 (Ky. 1986); *Rosenbloom v. Rosenbloom*, 654 So. 2d 877, 879-80 (La. Ct. App. 1995); *Bock v. Bock*, 506 N.W.2d 321, 324 (Minn. Ct. App. 1993); *Rogers v. Rogers*, 803 S.W.2d 92, 95 (Mo. Ct. App. 1990); *Rodgers v. Rodgers*, 887 P.2d 269, 272-73 (Nev. 1994); *Hutchinson v. Hutchinson*, 619 N.E.2d 466, 468-69 (Ohio Ct. App. 1993); *Abitz v. Abitz*, 455 N.W.2d 609, 614-15 (Wis. 1990).

226. See Bill Ainsworth, *Divorced Dads and New Wives Sway Legislators on Spousal Income Bill*, RECORDER (Sacramento), Apr. 14, 1993, at 6. This also happened in Idaho. See IDAHO CODE § 32-706(1)(b) (1996) (largely superseding *Yost v. Yost*, 735 P.2d 988 (Idaho 1987)).

227. See WORKING PARTY REPORT, *supra* note 138, at 20.

Pension contributions present an interesting issue in this area. On the one hand, the obligor does not have immediate possession of this money, so it seems fair to exclude it. Such a policy, particularly applied without limits to any amount contributed, would give the obligor an incentive to make very high contributions to pension plans and thereby reduce child support obligations. England resolves this issue by permitting a deduction for only 50% of the contribution. In Australia, most amounts contributed to pension plans are deductible from income; a recent committee report recommends that contributions in excess of 9% of the obligor's wages be considered excessive and not be deducted from income when calculating support.²²⁸ In America, a number of states deal with this problem by only permitting the deduction of *mandatory* pension contributions.

Q. *How Often Should Orders Be Automatically Reviewed?*

If orders are not reviewed periodically, the amount of the obligation increasingly bears no relationship to the obligor's ability to pay or the recipient's need.²²⁹ In formulating an update policy, it seems sensible to balance the value of the update with its cost. England initially tried to update orders annually, and found that the updates were administratively burdensome.²³⁰ The government has accepted a recommendation to update the order every two years.²³¹ Australia currently updates orders every year, but finds it quite burdensome; a study is now being undertaken to determine whether a system of updating every three years would be adequate.²³² In the United States, states are required to provide custodial parents with notice of a right to a review of child support every three years.²³³ In all jurisdictions, a child support obligation may be modified upon a showing of a substantial change of circumstances.

228. See CHILD SUPPORT SCHEME, *supra* note 10, at 452.

229. See J. Thomas Oldham, *Abating the Feminization of Poverty: Changing the Rules Governing Post-Decree Modification of Child Support Obligations*, 1994 B.Y.U. L. Rev. 841, 879-82 (discussing the merits of limited automatic periodic review).

230. See FIFTH REPORT, *supra* note 11, at xiv.

231. See GOVERNMENT RESPONSE TO FIFTH REPORT, *supra* note 112, at 3.

232. See Nov. Letter from Justice Kay, *supra* note 170.

233. See Oldham, *supra* note 229, at 879.

R. Unusual Custody Arrangements

England and Australia both provide a procedure for calculating child support when there is divided (split) custody or substantial access. The procedure for divided custody is the same in both countries.²³⁴ In this situation, two different child maintenance assessments are made for the two parents, based on the number of children in each household, the number of children being supported, and the taxable income of each parent.²³⁵ The lower amount is subtracted from the higher, and that net amount is due from one parent to the parent with the smaller maintenance assessment.²³⁶ Of the U. S. guidelines addressing this issue, almost all require an analogous calculation.²³⁷

Calculating child support when the absent parent has substantial access (sometimes called shared custody) is more complicated. In England, substantial access is defined as a minimum of 104 nights per year.²³⁸ If a parent has substantial access, this situation affects the absent parent's assessable income in a minor way by altering the manner in which the parent's self-support reserve is calculated.²³⁹ The major effect of substantial access, though, is that the maintenance assessment that would otherwise be due is reduced by the percentage of time the absent parent has responsibility for the children.²⁴⁰

The English response to substantial access does not attempt to add any additional child support due to the increased expenses that result from a substantial access custody arrangement. To the extent that one concludes that substantial access is more expensive, some means of addressing this greater expense would be desirable, if not too complicated. Australia attempts to accomplish this by using a different percentage chart for calculating child support when substantial access occurs.²⁴¹ This results in a higher child support award.

234. Indeed, it is the same in New Zealand as well. See WORKING PARTY REPORT, *supra* note 138, at 19.

235. *Id.*

236. See SUPPORT HANDBOOK, *supra* note 67, at 256.

237. See, e.g., ALA. R. JUD. ADMIN. 32(9) (Repl. 1996); OKLA. STAT. ANN., tit. 43, § 118(B)(17) (West Supp. 1996); UTAH CODE § 78-45-7.8 (Supp. 1996); VT. STAT. ANN., tit. 15, ch. 11, subch. 3A, § 657(e) (Supp. 1995). A few, like Idaho, would require a higher amount, due to perceived greater costs of this custody arrangement. See IDAHO R. CIV. P. 6(c)(6), § 10(f).

238. See SUPPORT HANDBOOK, *supra* note 67, at 278. The English use the term "shared care." *Id.*

239. See CHILD SUPPORT SCHEME, *supra* note 10, at 376-82.

240. *Id.*

241. Substantial access is defined as 30% of all nights. See CHILD SUPPORT SCHEME, *supra* note 10, at 380.

U.S. jurisdictions have not reached a consensus about how to deal with substantial access. Some states, in a manner similar to England, merely reduce the obligor's obligation based upon the percentage of time the obligor has the children;²⁴² other states increase the amount that otherwise would be due to reflect the higher costs of this arrangement.²⁴³ Most merely give the court discretion to deviate from the normal guideline amount.

S. *Should the Custodial Parent Receive Any Compensation?*

One unique aspect of the English system is that, when calculating the basic child support obligation (the "maintenance requirement"), an amount is added to the basic obligation if there is a child younger than age 14.²⁴⁴ This additional component could be seen as either compensation for the child care services or compensation for career damage that results from child care responsibilities.²⁴⁵ The Australian system has no analogous additional component for the custodial parent; however, the drafters of the guidelines did consider the career damage to custodial parents, along with many other factors, when the guideline percentages were selected.²⁴⁶

T. *The Limits of Child Support*

Additional resources can be obtained for custodial households via well-functioning child-support systems. For example, a recent U.S. study concluded that, if all orders would be based on current guidelines and paid in full, the aggregate amount of child support received would more than triple.²⁴⁷ It must be remembered, however, that a significant number of noncustodial parents do not earn much money. For example, 23% of noncustodial parents assessed by the English Child Support Agency in 1993-94 were assessed 2.20 pounds weekly,

242. See, e.g., UTAH CODE ANN. § 78-45-7.9 (Supp. 1996); WYO. STAT. tit. 20, § 6-304(d) (Supp. 1996).

243. See, e.g., ALASKA R. CIV. P. 90.3(v)(B); D.C. CODE ANN. § 16-916.1(n) (Supp. 1996); IDAHO R. CIV. P. 6(c)(6), § 10(d); VT. STAT. ANN., tit. 15, § 657(a) (Supp. 1995).

244. See SUPPORT HANDBOOK, *supra* note 67, at 187.

245. For a discussion of such career damage, see J. Thomas Oldham, *Putting Asunder in the 1990s*, 80 CAL. L. REV. 1091 (1992) (reviewing *DIVORCE REFORM AT THE CROSSROADS* (Stephen D. Sugarman & Herma Hill Kay eds., 1990)).

246. See CHILD SUPPORT SCHEME, *supra* note 10, at 290.

247. See Irwin Garfinkel & Donald Oellerich, *Noncustodial Fathers' Ability to Pay Child Support*, in CHILD SUPPORT ASSURANCE 55, 73 (Irwin Garfinkel et al. eds., 1992).

the minimum assessment.²⁴⁸ For sixty-five percent of all absent parents, take-home pay is less than 150 pounds per week.²⁴⁹ In Australia in 1993, 31% of noncustodial parents earned less than \$10,000, 27% earned between \$10,000 and \$19,999, and 23% earned between \$20,000 and \$30,000.²⁵⁰ Thus, less than 20% of Australian noncustodial parents earned \$30,000, and less than one-half earned \$20,000, suggesting that many custodians will not receive significant child support.

A major source of public concern seems to be the amount of public benefits needed by poor single-parent families. The British and Australian systems can in large part be seen as an attempt to shift the burden of these expenditures from the public to the absent parent. The data in the previous paragraph, however, suggest that it is unlikely that the state will frequently be able to generate substantial child support on behalf of poor custodial parents. For example, a representative of the New Zealand scheme has estimated that, in all cases where the custodial parent is receiving state benefits, the absent parent pays the minimum amount under their formula in 60% of all cases.²⁵¹ In the United States, recent attempts to collect child support from absent parents whose children were receiving government benefits have cost more in administrative expenses than has been recovered.²⁵² Even after a decade of devoting substantial effort to obtaining child support from absent parents whose children were receiving Aid to Families with Dependent Children benefits, by 1986 only slightly more than one-half of all ever-married custodial parents and less than one-fifth of all never-married custodial parents in receipt of such benefits had a child support award.²⁵³ Of all never-married custodial parents who had obtained a child support award, in 1985 the mean annual amount of the award was \$964 per child, a significant decrease from 1978.²⁵⁴

This suggests that it is unrealistic to believe that private child support systems will significantly affect the standard of living of many poor custodial parents.²⁵⁵ Accordingly, as a practical

248. See *THE FIRST TWO YEARS*, *supra* note 95, at 11.

249. See Russell Cavanagh, *Child Support Agency to Raise Odds on Absentees*, *SCOTSMAN*, Jan. 22, 1996, at 16.

250. See *CHILD SUPPORT SCHEME*, *supra* note 10, at 43.

251. See Minutes of the Meeting of the Heads of Child Support Agencies, Hyatt Regency Crown Center, Kansas City, Mo. (Aug. 18-19, 1995), at 12.

252. See Garrison, *supra* note 125, at 481 n.29.

253. See ANDREA H. BELLER & JOHN W. GRAHAM, *SMALL CHANGE: THE ECONOMICS OF CHILD SUPPORT* 27 (1993).

254. *Id.* at 29.

255. One American study did estimate that if all absent parents of children receiving AFDC benefits paid 18% of their income in child support, this would significantly affect the standard of living of many AFDC recipients. See BELLER &

matter, the government's options are either to support these households or take steps to make them self-sufficient. Viewed in this light, a more viable policy option may be for governments to consider policies encouraging custodial parents to enter the work force, such as child care, flexible work schedules, and paid parental leave.²⁵⁶ Such policy options, however, have not been a panacea in the countries where they are in effect. For example, in Sweden, the income of single-parent families is below the poverty line in more than 50% of all cases before any government transfers are considered; the figures in Denmark are not much better.²⁵⁷ These societies have had to make substantial public commitments to such families to reduce the poverty rate of these families to below 10%.²⁵⁸ For example, one study calculated that Sweden has spent approximately 13% of its GDP on social protection programs for the nonaged, compared to approximately 8% in the U.K. and 4% for the United States and Australia.²⁵⁹ Viewed in this light, it may be easier to understand why the poverty rate for single-parent families in the United States and Australia is more than ten times higher than that of Sweden.²⁶⁰

IV. CONCLUSION

The child support experiments begun by England and Australia have provided useful information for other jurisdictions contemplating administrative systems. The English experience strongly suggests that some amount of discretion must be retained; an automatic formula with no flexibility is perceived as unfair. Also, a system with no discretion will inevitably be either excessively arbitrary or too complex if it tries to incorporate in a

GRAHAM, *supra* note 253, at 246 (The authors do not say whether the effect would be the same if the absent parent would only be required to pay 18% of his income after deducting a reasonable self-support reserve.).

A 1989 study of AFDC recipients found that 19% of the absent parents had an income over \$10,000. See Joseph L. Penkrot, *Can AFDC Parents Pay Child Support?*, 8 J. POL'Y ANALYSIS & MGMT 104, 106 (1989). Another study, apparently consistent with Penkrot's findings, concluded that if all AFDC recipients received child support from the absent parent in an amount consistent with the Wisconsin percentage of income guidelines, the AFDC caseload would be reduced by 19%. See DANIEL MEYER ET AL., *THE COSTS AND EFFECTS OF A NATIONAL CHILD SUPPORT ASSURANCE SYSTEM* (Institute for Research on Poverty, University of Wisconsin-Madison discussion paper 940-91, 1991).

256. See Siv Gustafsson & Roger Jacobson, *Trends in Female Labor Force Participation in Sweden*, 3 J. LAB. ECON., S256 (1985).

257. See LUXEMBOURG INCOME STUDY, *supra* note 7, at Figure 6.

258. *Id.*

259. *Id.* at Figure 8.

260. *Id.* at Table 3.

formula some concern for an individual's circumstances. In addition, the English experience teaches that it is important to have a simple formula to calculate the presumptive child support amount. The difficulties encountered in England by attempting to assume jurisdiction over all child support matters in a short period suggest that the Australian approach of gradually assuming jurisdiction over an increasing number of cases eases administrative burdens. Also, if a new system is imposed on parents who divorced before the adoption of the new system, additional problems arise because the parents may have made some provision for child support in a property settlement.

From Australia's experience, it seems sensible to conclude that there are significant advantages in placing the child support office within the tax office. Australia's system also teaches that a simple way to determine the approximate income of parents is to rely on information in tax returns. Finally, Australia's policy of passing through a substantial amount of child support paid in respect of parents receiving government benefits has encouraged custodial parents to cooperate with the agency.

In sum, both England and Australia agree that the optimal child support system is an administrative one. The basic child support amount should be determined by a formula, but some discretion should be retained, so that, in approximately 10% of all cases, a deviation from the formula would be possible. Both systems specify a maximum amount of child support due, thereby limiting the child support due from obligors with very high incomes. Both specify exempt income self-support reserves for obligors to minimize the likelihood that poor obligors will have to pay child support. Both reduce the child support due if the obligor has substantial access. New partners of either parent do not affect the amount of child support due. Orders are periodically updated under both systems. Other jurisdictions that decide to adopt an administrative child support scheme may wish to consider these common features now accepted by both England and Australia.

