

# Child Support Woes: Is it Time to Rethink New Jersey's Income Shares Model?

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This article attempts to provide an overview of how child support is typically calculated and what we can do to bring our approach to child support in line with the changing needs of New Jersey families.

Any practicing family law attorney has likely heard a client's dismay about child support. The parent who receives child support often feels like the obligation is too little, while the noncustodial parent feels they are paying too much. This dissatisfaction could cause further litigation relating to expenses for the child that may or may not be covered under the basic support obligation. The level of dissatisfaction that arises for clients leads to the question of whether New Jersey's current Income Shares Model is fair. This article examines the three main child support models used throughout the U.S. and analyzes which child support model is, on balance, the fairest.

## I. Various Models for Calculating Child Support

Currently throughout the United States, there are three models used to calculate child support. The most common is the Income Shares Model, used in 41 states including New Jersey.<sup>1</sup> The second most common is the Percentage of Income Model used in six states, and the third is the Melson Formula, used in three states.<sup>2</sup>

### a. Income Shares Model

The Income Shares Model is the most popular model for calculating child support and is used in a majority of states.<sup>3</sup> The basic principal driving the Income Shares Model is that child support should benefit the child as if the family remained intact, which means having the benefit of both parents' respective incomes.<sup>4</sup> The theory behind this model is that child support would be the same proportion of the parent's income the child would receive if the parents lived together in the same household.<sup>5</sup> The income shares model allows for flexibility in shared parenting arrangements.<sup>6</sup>

New Jersey's Appendix IX-A includes the following

expenses in the base child support obligation: housing, food, clothing, transportation, unreimbursed health care up to \$250 per child annually, entertainment, personal care products and services (hair, shaving, cosmetics), books/magazines, school supplies, cash contributions, personal insurance, and finance charges.<sup>7</sup> However, Appendix IX-A allows credits for recurring payments such as child care, health insurance, predictable recurring unreimbursed health care expenses in excess of \$250 per year, and other court approved expenses such as tuition, special needs of gifted or disabled children, and parenting time transportation expenses.<sup>8</sup>

The Income Shares Model fails to consider that each parent pays individual living expenses, instead of joint expenses, as if they continued residing together as an intact family. This flaw in the model is often criticized because custodial parents may need more child support due to the additional expenses they pay, including shelter expenses and other routine expenses to support their children. Likewise, the non-custodial parents view their payment as supplementing the other parent's total living expenses, while the non-custodial parent struggles to meet their own basic expenses.

While the Income Shares Model is not perfect, the consideration of both parents' respective incomes in fashioning support seems generally fair to all involved. The needs of the child supersede, to a limited extent, the needs of the parents, because under the Income Shares Model, child support is for the child, not the custodial parent.<sup>9</sup>

### b. Percentage of Income Model

The Percentage of Income Model is the second most used model in the United States and has historically been disfavored when compared to the Income Shares Model.<sup>10</sup> This model considers only the non-custodial parent's income when calculating child support.<sup>11</sup> One of the primary goals for states using the Percentage of Income Model is to create a unified child support calculation for non-custodial parents in similar financial circum-

stances.<sup>12</sup> The Percentage of Income Model is based on the premise that the proportion of income parents devote to their children in intact families is relatively consistent across income levels up to a certain upper income limit as determined by each state and that the custodial parent will contribute at minimum the same percentage of income to support the children.<sup>13</sup> For example, Wisconsin uses a flat rate Percentage of Income Model, and sets forth the percentages of gross income for the obligor as follows: 17% for one child, 25% for two, 29% for three, 31% for four and 34% for five or more children.<sup>14</sup> Similarly, Texas uses a varying Percentage of Income Model and sets forth the percentages as: 20% for one child, 25% for two children and 30% for three children.<sup>15</sup>

The main criticism of the Percentage of Income Model relates to the failure to consider the custodial parent's income. Without taking the custodial parent's income into consideration, there is a question of fairness to both the custodial parent and non-custodial parent. If one parent earns significantly less than the other parent, that lower-earning parent does not get the benefit of a proportional allocation of expenses as under the Income Shares Model.

### c. Melson Formula

The Melson Formula is the most complicated and least popular child support model used in only three states: Delaware, Hawaii, and Montana.<sup>16</sup> This child support model incorporates the public policy consideration that each parent should be able to meet their individual needs as well as the child's.<sup>17</sup> Instead of first looking at the respective incomes of the custodial and non-custodial parent, the starting point for this calculation is inputting factors such as a parent's self-support reserve and the number of other dependent children who are not subject to the current child support matter.<sup>18</sup> After considering these factors, the guidelines establish the child's primary support allowance considering other monthly child care expenses, such as health insurance, to arrive at the amount which represents the total need and primary support obligation.<sup>19</sup>

This model also includes a standard of living adjustment, so that if parents improve their income, the child's standard of living will improve in proportion to their own standard of living.<sup>20</sup> This formula is similar to the Income Shares Model except for the added public policy consideration that each parent should be able to meet their own basic needs as well as the child's needs.

The Melson Formula originated in Delaware, and the case *Dalton v. Clanton* explains the formula in detail.<sup>21</sup> Step one is to determine available income of each parent. After determining net income for each parent, a self-support reserve is subtracted from each parent's income.<sup>22</sup> The self-support reserve represents the minimum support necessary for each parent to meet their needs. Step two is to determine the children's primary needs representing the minimum support amount required to maintain a child at subsistence level.<sup>23</sup> Additional expenses may be added to this amount, such as health care or childcare expenses. Third, the standard of living allowance must be determined, which is a percentage of remaining income allocated to support for the child. This standard of living allowance gives the child the benefit of a higher standard of living enjoyed by a parent.<sup>24</sup>

The Delaware Family Court Rules of Civil Procedure set forth additional factors that must be considered when calculating child support. Rule 52(c) provides the following:

1. Each support obligor's monthly net income
2. The absolute minimum amount of income each support obligor must retain to function at maximum productivity
3. The number of support obligor's dependents in an effort to apportion the amount available for support as equally as possible between or among said dependents according to their respective needs
4. The primary child support needs and the primary support obligation of each obligor
5. The available net income for a standard of living adjustment to be paid by each support obligor after meeting their own primary needs and those of dependents.
6. A consideration of the factors set forth in Del. C. Section 514.<sup>25</sup>

Adjustments can be made to the calculation for parents who equally share custody and expenses for the children.<sup>26</sup>

### d. Comparing the Models

There are some commonalities between the three models as well as many differences. Some of the most prevalent commonalities are they each incorporate varying degrees of a self-support reserve for the parents. All three models also allow for the imputation of income for the non-custodial parent if they attempt to avoid their child support obligation via underemployment or unem-

ployment. Each formula also takes into consideration extra expenses for the children, which can vary from state to state.

It is important to note that each state, regardless of the formula, determines whether to calculate child support using gross or net income. The difference between using gross and net incomes can be significant depending on the tax bracket of each parent. States also vary in whether and to what extent they consider the age of the child, childcare expenditures, parenting time costs, and extraordinary medical expenses. Moreover, when calculating what constitutes a shared parenting schedule and resulting adjustment to child support, the states vary widely, ranging from 20% of time with a noncustodial parent to 45% of time with a noncustodial parent.<sup>27</sup>

### ***Income Shares Model v. Percentage of Income Model***

The Percentage of Income Model does not easily allow for deviations in the guidelines where one or both parents have extremely high or low incomes. If a state switched from the Income Shares Model to the Percentage of Income Model, many noncustodial parents would see an increase in their child support obligations, particularly if they are high earners.<sup>28</sup>

The Percentage of Income Model is also not flexible in considering a variety of other circumstances, such as a family with higher medical expenses or extraordinary transportation costs.<sup>29</sup> The Income Shares Model, however, allows for these expenses to be considered as a credit to the parent paying the expense, resulting in an adjustment to the child support calculation.<sup>30</sup>

Under the Percentage of Income Model, if parents share equal custody of a child and have similar incomes, then neither parent pays or receives child support.<sup>31</sup> While under the Income Shares Model (and the Melson Formula), the number of overnights that are spent with the noncustodial parent are factored into their child support calculation on a proportional basis.<sup>32</sup> In New Jersey, under the Income Shares Model, an entirely different three-step calculation for true 50-50 shared parenting time is often used, referred to as the Wunsch-Deffler Analysis.<sup>33</sup>

### ***Percentage of Income Model v. Melson Formula***

The Melson Formula treats health insurance as a deduction from income and lists health insurance as a primary expense for the child.<sup>34</sup> While under the

Percentage of Income Model, parents must share the cost of health insurance equally or based on their respective incomes and this will occur by adjusting the child support obligation upward or downward.<sup>35</sup>

The Percentage of Income Model also does not have a universal or precise calculation for shared parenting time. Most states that use the Percentage of Income Model calculate shared parenting as 30% of the year, or 110 overnights per year.<sup>36</sup> The base child support calculation will then be multiplied by the percent of shared parenting time for both the parents.<sup>37</sup> The two numbers will be subtracted from one another and the parent who owes the difference pays child support.<sup>38</sup> While under the Melson Formula, an obligor receives a shared parenting time adjustment to their child support based on a percentage which corresponds to the designated ranges of the number of overnights with the child.<sup>39</sup>

### ***Income Shares Model v. Melson Formula***

A major difference with the Income Shares Model and the Melson Formula is that the child support obligation declines as a percentage of the nonresidential parent's income as the overall income increases.<sup>40</sup> The Income Shares Model also does not take into consideration the same public policy factors that the Melson Formula uses when calculating child support, such as the importance of the self-support reserve.<sup>41</sup>

Overall, the Income Shares Model and the Melson Formula are similar in that they are flexible when considering the number of expenses that can be factored in or credited to each parent. Both models also consider shared parenting arrangements. In general, under both models, the more parenting time the noncustodial parent has, the lower the child support obligation will be.

## **II. Is the Income Shares Model Fairest for Both Parents?**

While most states use the Income Shares Model for calculating child support, custodial parents have a host of complaints for their attorneys once child support is calculated. Much of the criticism stems from the custodial parent feeling as if they pay a much higher amount toward their child's everyday expenses than the noncustodial parent who is not incurring these daily expenses, but rather paying a weekly or monthly support obligation.

### **a. Custodial Parents can Seek Reimbursement for Recurring Expenses**

While under New Jersey's child support model many expenses are included in the base child support calculation, reoccurring expenses can be reimbursed to the custodial parent based on the noncustodial parent's percent of income share.<sup>42</sup> For example, for a custodial parent who earns \$50,000 and a noncustodial parent who earns \$75,000, the custodial parent would be responsible for 40% of the extracurricular expenses, rather than a 50% split which is sometimes used in Percentage of Income Model states.

The same approach is adopted by New Jersey for medical expenses in excess of \$250 paid by the custodial parent per child, per year. Appendix IX-A has a catch-all category as well to include any other court approved expenses, such as tuition, special needs of a gifted or disabled child, and parenting time expenses.<sup>43</sup>

#### **b. Consideration of Both Parents' Incomes Typically Benefits the Custodial Parent.**

The Income Shares Model and Melson Formula consider the parents' respective incomes when calculating child support. The goal of the Income Shares Model is to create a support obligation for the child as if the family remained intact.<sup>44</sup>

The custodial parent has the freedom to choose in what ways they wish to use the child support because the base obligation includes a wide range of appropriate uses.<sup>45</sup> Child support can go to food, clothing, housing expenses, and any transportation costs for the child, except for motor vehicle expenses related to a vehicle purchased for and operated primarily by the child, which is in addition to the guidelines-based child support.<sup>46</sup>

For custodial parents who have a lower income, the self-support reserve can be beneficial. The New Jersey guidelines focus on the self-support reserve for those parents who are at or near the poverty level, which is 105% of the U.S. poverty guideline for one person.<sup>47</sup> While this self-support reserve is beneficial for noncustodial parents, having the requirement for custodial parents is beneficial as well because it ensures custodial parents - after their share of child support is calculated - can meet their basic needs to then care for their children. The self-support reserve is calculated at \$258 per week.<sup>48</sup> Thus, both parents must have \$258 per week left after they have paid their share of child support.<sup>49</sup>

Similarly, the New Jersey child support guidelines have a significant deviation for high income parents. If the parents' combined net income is over \$187,200

annually, the guidelines cannot be used to calculate child support.<sup>50</sup> The court must then consider a list of 10 factors under N.J.S.A. 2A:34-23(a) in setting a child support amount. Based on these factors, the court can increase the noncustodial parent's child support obligation. When calculating child support for high income parents, the court will use the guidelines up to \$187,200 annually, and then weigh the following factors to consider adjustments:

1. Needs of the child;
2. Standard of living and economic circumstances of each parent;
3. All sources of income and assets of each parent;
4. Earning ability of each parent, including educational background, training, employment skills, work experience, custodial responsibility for children including the cost of providing child care and the length of time and cost of each parent to obtain training or experience for appropriate employment;
5. Need and capacity of the child for education, including higher education;
6. Age and health of the child and each parent;
7. Income, assets and earning ability of the child;
8. Responsibility of the parents for the court-ordered support of others;
9. Reasonable debts and liabilities of each child and parent; and
10. Any other factors the court may deem relevant.<sup>51</sup>

The courts have rejected a formulaic approach of simply adding onto the guidelines support by the percentage of income over the maximum, in favor of requiring a full statutory analysis.<sup>52</sup>

### **III. Is there a Fairer Model?**

Of the models currently in use, the Income Shares Model provides, on balance, the fairest approach, with some reasonable adjustments to keep pace with the times. When analyzing fairness, the main factors to consider should be: (1) that the child's needs are met; (2) the calculations are reasonably consistent and predictable for a majority of cases; and (3) that both parents are able to meet their respective individual needs considering the support obligation.

The Melson Formula is complex because of the subjective factors the court must consider in each case. While there are many advantages to the Melson Formula, and after a review Delaware has found in most cases, the formula produced fair and consistent results,<sup>53</sup> the

calculation based on those subjective factors can result in unfair outcomes despite the built-in Standard of Living Adjustment. In practice, if a number of factors weigh in favor of the noncustodial parent, the child support obligation may end up being adjusted and become disproportionately lower than the base formula, potentially producing an unfair outcome for custodial parents.

Conversely, the Percentage of Income Model can be too objective and inflexible. The custodial parent's income does not play any role, and often extra reoccurring expenses for the child are ordered to be split 50-50 despite each parent's respective income.<sup>54</sup> This can result in unfair outcomes, especially if a custodial parent's income is very different from the noncustodial parent's income. Similarly, there are almost no consistent factors to consider with respect to any adjustments in the interest of fairness to either parent and the lifestyle of either parent is not a consideration.<sup>55</sup> While this allows for a very consistent child support obligation across many cases, it does not allow for the flexibility that either parent may require in a calculation.<sup>56</sup>

The Income Shares Model, used in New Jersey, is the middle ground among the three models and combines the best attributes of both approaches. While the Income Shares Model is not perfect, it allows for some flexibility in calculating child support while also remaining relatively consistent across many cases. However, the argument that the Income Shares Model in New Jersey includes too many discretionary expenses with basic child support is valid, and could potentially be addressed through a more frequent review of Appendix IX-A instructions.

One area that is ripe for review about whether it should be included in New Jersey's base child support calculation is the category of "entertainment." According to Appendix IX-A, Section 8, many extracurricular activities fall under Section 8, entertainment expenses:

Entertainment: Fees, memberships and admissions to sports, recreational or social events, lessons or instructions, movie rentals,

televisions, mobile devices, sound equipment, pets, hobbies, toys, playground equipment, photographic equipment, film processing, video games, and recreational, exercise or sports equipment.<sup>57</sup>

The language of Appendix IX-A, Section 8 is in need of updating. The cost of smart phones, iPads, laptops, webcams, unlimited data plans, travel or competitive league sports, educational or sports camps unrelated to childcare and intensive tutoring appear not to have been contemplated separately under New Jersey's child support structure. We are all familiar with arguments that such expenses are included with basic child support under Appendix IX-A, thus there is no additional reimbursement due from the noncustodial parent. While Appendix IX-A, Section 9, may permit a custodial parent to be reimbursed for some of these "large or variable expenditures," there is a lack of clarity in the Appendix.<sup>58</sup>

Items previously thought of as "entertainment," including cell phones, laptops, webcams and fast Wi-Fi/internet are now largely necessities, particularly for older children. Many of these expenditures are necessary for children to attend virtual school, complete schoolwork, maintain social contact with friends and remain in contact with parents. New Jersey's child support guidelines already permit courts to consider payment from obligors for predictable and recurring expenses. Now may be the time to address cell phone and internet expenses, especially to the extent that such access is required to complete schoolwork. Likewise, the cost to the noncustodial parent who provides similar items for the children must be considered as well. Specifically, adding these types of expenses to the category of predictable reoccurring expenses may help to render the Income Shares Model fairer to both parents in light of our quickly-evolving world. ■

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## Endnotes

1. New Jersey Court Rules, 2021 Ed., Appendix IX-A.
2. Child Support Guideline Models, National Legislative Conference, [ncsl.org/research/human-services/guideline-models-by-state.aspx](https://ncsl.org/research/human-services/guideline-models-by-state.aspx) (last visited March 5, 2021).

3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. Appendix IX-A, Line 8.
8. *Id.* at Line 9.
9. Appendix IX-A, Line 1.
10. Linda Henry Elrod, The Federalization of Child Support Guidelines, Vol. 6 *Journal of the American Academy of Matrimonial Lawyers* 103 (1990).
11. Child Support Guideline Models, *supra*.
12. *Id.* at 121.
13. *Id.*
14. Wis. Admin. Code [DCF] § 150.03 (1)(a-e).
15. Tex. Family Code § 154.001.
16. Child Support Guideline Models, *supra*.
17. *Id.*
18. *Id.*
19. *Id.*
20. The Honorable Michael K. Newell, Chief Judge, Report of the Family Court Judiciary, The Family Court of the State of Delaware, Delaware Child Support Formula Evaluation and Update, courts.delaware.gov/forms/download.aspx?id=39228 (November 8, 2018), (last visited March 5, 2021).
21. *Dalton v. Clanton*, 559 A.2d 1197 (Del. 1989).
22. The Honorable Michael K. Newell, Chief Judge, *supra* 4.
23. *Clanton*, 559 A.2d at 1203-04.
24. *Id.*
25. Del. Family Court Civil Rule 52(c).
26. See *Smith v. Francisco* 737 A.2d 1000 (1999).
27. Patricia R. Brown and Tonya Brito, Characteristics of Shared-Placement Child Support Formulas Used in the Fifty States, Institute for research on Poverty University of Wisconsin—Madison, irp.wisc.edu/wp/wp-content/uploads/2018/06/Brown\_Brito\_Task11.pdf (March 2007) (last visited March 5, 2021).
28. Jennifer Straka, New Income Shares Model for Determining Child Support to be More Equitable. 23 *Pun. Int. L. Rep* 20 (2017).
29. *Id.*
30. See Appendix IX-A, Line 9.
31. See Wis. Admin. Code [DCF] § 150.04(2) determining child support for shared-placements.
32. Appendix IX-A, Lines 13 and 14.
33. See *Wunsch-Deffler v. Deffler* 406 N.J. Super. 505 (2009).
34. The Honorable Michael K. Newell, Chief Judge, *supra* at 5.
35. See Wis. Admin. Code [DCF] § 150.05.
36. Brown and Brito, *supra* 4.
37. *Id.*
38. *Id.*
39. See The Honorable Michael K. Newell, Chief Justice, *supra* 44.
40. See Appendix IX-A, Section 6(h).
41. *Clanton*, 559 A.2d at 1203.
42. Appendix IX-A, Section 9.
43. Line 9(d).
44. Appendix IX-A, Section 1.
45. *Id.* at Line 8.
46. *Id.*
47. Appendix IX-A, Section 20(a).
48. *Id.*
49. *Id.*
50. Appendix IX-A, Section 20(b).
51. N.J.S.A. 2A:34-23(a).
52. *McGinley v. McGinley*, 2011 WL 5266117 (App.Div. 2011).
53. *Clanton* 559 A.2d at 1206.
54. See also Wis. Admin. Code [DCF] § 150.05 providing that each parent's ability to pay should be considered when mandating the payment of health insurance benefits for the child.
55. See Wis. Admin. Code [DCF] § 150.03(11), explaining the court may deviate from the percentage standard upon request by a party, where the standard would be unfair to the child or to any of the parties.
56. *Elrod*, *supra* at 121.
57. Appendix IX-A, Section 8.
58. Appendix IX-A, Section 9.