



Income Available for Child Support: Fact and Fiction in State Child Support Guidelines

On March 16, 2000 National Public Radio (NPR) interviewed Victoria Williams after she testified to Congress *against* proposed legislation that would have turned enforcement of child support orders over to the Internal Revenue Service (IRS).¹ Supporters of the bill believed that the IRS had the access to the resources and income data needed to collect child support.² Among other things, Ms. Williams, an attorney overseeing several local child support offices, argued that the IRS lacked the necessary experience to enforce child support orders owed by nonresidential parents who are paid in cash, are self-employed, or refuse to work. Or, as Ms. Williams essentially told NPR, the IRS would need to collect child support from chicken catchers, moss pickers, oyster shuckers, lawn mowers, and others who are often paid in cash.

Fast forward to 2015: child support agencies still face the challenges of establishing and enforcing orders for parents who are paid in cash, self-employed, or refuse to work, with the added challenge of addressing child support issues among a newly recognized category of nonresidential parents who are called “deadbroke,” “turnips,” or “low-income.” In a seminal article entitled “Deadbeats and Turnips in Child Support Reform,” Mincy and Sorensen (1998), define “turnips” as nonresidential parents who cannot afford to pay child support without impoverishing themselves or their new families.³ Using data from the 1990 Survey of Income and Program Participation (SIPP),⁴ Mincy and Sorensen found that 16 to 33 percent of young noncustodial fathers do not pay child support and are “turnips.” Other research often characterizes “turnips” or “deadbroke” fathers as having multiple employment barriers. For example, an analysis of the 1997 National Survey of America’s Families revealed that there were 2.6 million nonresident fathers with family incomes below the poverty line and that most of them faced multiple employment barriers (e.g., criminal records, lack of a high school education, relatively little recent work experience, and poor health).⁵ Although neither of the previously cited studies have been updated using current national data that includes all nonresidential parents, Sorensen shared some more recent statistics at the 2014

¹ Williams, Victoria. (March 16, 2000). *Statement of Victoria Williams*. Hearing H.R. 1488, the “Hyde-Woolsey” Child Support Bill, Testimony before the House Committee on Ways and Means, Subcommittee on Human Resources. Retrieved from: <http://waysandmeans.house.gov/legacy/humres/106cong/3-16-00/3-16will.htm>.

² For example, see Hyde, Henry. (March 16, 2000). *Statement of Hon. Henry J. Hyde, A Representative in Congress from the State of Illinois*. Hearing H.R. 1488, the “Hyde-Woolsey” Child Support Bill, Testimony before the House Committee on Ways and Means, Subcommittee on Human Resources. <http://www.gpo.gov/fdsys/pkg/CHRG-106hhrg71291/html/CHRG-106hhrg71291.htm>.

³ Mincy, Ronald B. and Sorensen, Elaine, J. (Winter, 1998). “Deadbeat and Turnips in Child Support Reform.” *Journal of Policy Analysis and Management*, Vol. 17. No. 1. Pp 44-51.

⁴ More information about the SIPP can be found at: <http://www.census.gov/programs-surveys/sipp/about.html>.

⁵ Sorensen, Elaine and Zibman, Chava. (Sept. 2000) A Look at Poor Dads Who Don't Pay Child Support, *Assessing the New Federalism*, Urban Institute, Washington, D.C. Retrieved from: <http://www.urban.org/Uploadedpdf/discussion00-07.pdf>.

NCSEA Policy Forum. Her analysis reveals that 24 percent of noncustodial parents did not work in 2009; 7 percent of noncustodial parents were incarcerated; the median income of noncustodial parents was \$21,000 per year; and 24 percent of noncustodial parents were poor.⁶

Federal Requirements of State Child Support Guidelines

Since 1987, federal regulation requires that each state establish one set of guidelines for setting and modifying child support awards.⁷ The application of the guidelines must be a rebuttable presumption in any judicial or administrative proceeding for the award of child support. In other words, a state's guidelines must be applied to all child support awards, not just those in the IV-D caseload. As of April, 2010 there were at least 13,672,494 custodial families in the United States and 62 percent of custodial families participated in the IV-D program.⁸

Based on data presented at the 2014 NCSEA Policy Forum, 24 percent of noncustodial parents were poor in 2009.

The majority of states set their guidelines in statute, several states set them in court rule, and only a few states set them in administrative rule.⁹ Among other things, federal regulation also requires that each state's guidelines must, "take into consideration all earnings and income of the noncustodial parent."¹⁰ In November 2014, the Office of Child Support Enforcement (OCSE) proposed several changes to federal requirements regarding state guidelines for determining income used in the child support calculation.¹¹ Figure 1 highlights the proposed changes by showing the proposed deletions as strikeout text and the proposed additions as underlined, red text.

⁶ Sorensen, Elaine. (February 7, 2014). "Employment and Family Structure Changes: Implications for Child Support." Presentation to the NCSEA Policy Forum, slide 18.

⁷ 45 C.F.R. § 302.56. Retrieved from: <http://www.gpo.gov/fdsys/pkg/CFR-2010-title45-vol2/pdf/CFR-2010-title45-vol2-sec302-56.pdf>.

⁸ Lippold, Kye and Sorensen, Elaine (October 2013). *Characteristics of Families Served by The Child Support (IV-D) Program: 2010 Census Survey Results*. Urban Institute, Washington, D.C., page 3. Retrieved from: <http://www.urban.org/uploadedpdf/412926-characteristics-of-families-served-by-the-child-support-iv-d-program.pdf>

⁹ Venohr, Jane. (2013) "Child Support Guidelines and Guidelines Reviews: State Differences and Common Issues," *Family Law Quarterly*, vol. 43, no. 3 (Fall 2013).

¹⁰ This is the current wording of 45 C.F.R. § 302.56(c)(1). See Supra note 7. Proposed revisions to it are discussed later in this article.

¹¹ Department of Health and Human Services. (Nov. 17, 2014). "Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs." *Federal Register*, vol. 79, No. 221, p. 68580. Retrieved from: <http://www.acf.hhs.gov/programs/css/resource/nprm-flexibility-efficiency-and-modernization-in-child-support-enforcement-programs>.

Figure 1: Redline/Strikeout of Proposed Changes to Federal Requirements Regarding Income Provisions in State Guidelines for Setting Child Support Awards

45 C.F.R. § 302.56(c) The guidelines established under paragraph (a) of this section must at a minimum:

- (1) Take into consideration ~~all~~ the actual earnings and income of the noncustodial parent;
- (2) Be based on specific descriptive and numeric criteria and result in a computation of the support obligation;
- (3) Address how the parents will provide for the child(ren)'s health care needs through health insurance coverage and/or through cash medical support in accordance with § 303.31 of this chapter;
- (4) Take into consideration the noncustodial parent's subsistence needs and provide that any amount ordered for support be based upon available data related to the parent's actual earning, income, assets, or other evidence of ability to pay, such as testimony that income or assets are not consistent with a noncustodial parent's current standard of living; and
- (5) Provide that incarceration may not be treated as voluntary unemployment in establishing or modifying support orders.

Income Provisions in Existing State Guidelines

Most state guidelines provide comprehensive and detailed definitions of income (which is called "guidelines income" for the purposes of this article). Most state guidelines take into consideration *all* income, as required by existing federal regulation, by listing several possible sources (e.g., salaries, wages, commissions, tips, gratuities, bonuses, partnership distributions, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, gifts, inheritance, prizes, and lottery winnings). Several state guidelines specifically exclude Supplemental Security Income (SSI) and other means-tested income (e.g., cash TANF benefits). Provisions for evidence of income are generally similar across states, but their provisions for attributing, imputing, and presuming income have more variation.

What Is Evidence of Income?

Parents who are parties to a legal action setting a child support award are typically asked to complete a financial statement or financial affidavit, and to return the completed form to the court along with evidence of income. Some state guidelines provide for what is evidence of income, but several states rely on court rules of procedure, case-law, and precedent. Tax returns and paystubs are the most often cited sources of income evidence. For example, a state may ask for two years of tax returns or paystubs for the last year. Tax returns and paystubs best reflect actual income of parents who work for an employer, have stable employment, and no other source of income. They are inadequate for capturing cash income, in-kind income (e.g., company housing), fluctuating income, business income when there are significant expenses or retained earnings, potential income when a parent is voluntarily unemployed or

underemployed, income of a parent with recent or multiple job changes or losses, and other situations.

Another problem is that many parents do not provide completed financial statements, financial affidavits, or evidence of income to the court. This is less an issue in cases involving divorcing or separating parents than never-married parents because divorcing couples typically have access to information about each other's income through filing joint tax returns and other shared financial obligations and assets. In some jurisdictions, parents in non-IV-D cases often stipulate an agreement without providing the court with detailed financial information. If a parent does not provide income information or if income is disputed, the divorce may be delayed, a court hearing will be held, and it can even result in an assessment of a financial penalty to the non-cooperating parent in some states.¹²

In contrast, a never-married parent is less likely to have access to the other parent's tax returns or evidence of income than a divorcing parent. This is a problem common to IV-D order establishments. In 2010, 40 percent¹³ of IV-D custodial parents were never-married while only 27 percent of non-IV-D custodial parents were never-married.¹⁴ Although most courts will consider evidence of income from other sources besides tax returns and paystubs, alternative sources are rarely identified in state guidelines, and are inconsistently used among jurisdictions. Examples of other income sources specifically mentioned in state guidelines are: oral testimony provided under oath (District of Columbia),¹⁵ an employer statement (Indiana),¹⁶ and W-2 and IRS 1099 statements (New Jersey).¹⁷ The author knows of no state guidelines that specifically mentions income data from automated sources available to IV-D agencies (e.g., quarterly wage data and the National Directory of New Hires) that can be used to as evidence of income.

Guidelines Provisions for Income Attribution, Imputation or Presumption

No matter what a state calls it or how a state defines it, most state guidelines have provisions for attributing, imputing, or presuming income when a parent is voluntarily unemployed or underemployed, or income information is not provided or unknown. Although the slang term for this is

The author knows of no state guidelines that specifically mention income data from automated sources that are available to the IV-D agency (e.g., quarterly wage data) can be used as evidence of income.

¹² For example, see Vermont statute at 15 V.S.A. § 662 (a). Retrieved from: <http://legislature.vermont.gov/statutes/section/15/011/00662>.

¹³ Many believe that 40 percent understates the actual percentage of IV-D orders involving parents who were never married to each other and that the percentage is actually increasing.

¹⁴ Supra, note 8, Lippold and Sorensen, page 8.

¹⁵ 2012 District of Columbia Code Section 16-916.01. Retrieved from; <http://law.justia.com/codes/district-of-columbia/2012/division-ii/title-16/chapter-9/section-16-916-01.html>.

¹⁶ *Indiana Rules of Court Child Support Rules and Guidelines*. Retrieved from: http://www.in.gov/judiciary/rules/child_support/#g3.

¹⁷ *New Jersey Rule 5:6A. Child Support Guidelines. Appendix IX-B*. Retrieved from: <http://www.judiciary.state.nj.us/csguide/app9b.pdf>.

“fictional income,” there is an inarguable need for these provisions to deal with parents who purposely reduce or hide income to affect the amount of their individual child support orders. Just as the IRS deals with tax evaders, child support guidelines and policies must deal with parents who intentionally lower income or purposefully withhold income information to affect the child support award amount.

For the purposes of this article, the author uses the term “imputed income” to also cover attributed income, presumed income, and potential income even though many states do not use the term, “imputed income” this way. Based on the author’s analysis of all state guidelines in 2010, most state guidelines list several considerations to imputing income.¹⁸ The parent’s employment history, education attainment, and employment qualifications are the most common. As of 2010, 34 state guidelines considered whether unemployment or underemployment is voluntary, about half of state guidelines considered local employment opportunities and prevailing wage rates, and 24 state guidelines specifically mentioned that income shall not be imputed if the parent is mentally or physically incapacitated. Other circumstances in which state guidelines provide that income shall not be imputed are when the parent is a caretaker to young children (23 state guidelines), and the parent is a student trying to increase his or her earnings potential (9 states). As of 2010, five state guidelines provided that income shall not be imputed to an incarcerated parent, but based on the author’s updated count in 2013, 19 state guidelines specifically mention incarceration. This reflects that many states have recently added a provision about incarcerated parents into their guidelines. The author only recalls two state guidelines in which incarceration cannot be considered involuntary unemployment, but a couple of state guidelines require income imputation at minimum wage to an incarcerated parent. A caveat to these counts is that more states may be actually considering these factors due to non-guidelines statutes, case-law, and precedent.

More than half of the state guidelines provide a floor for income imputation (e.g., minimum wage earnings).

Income Floors when Imputing Income

In 2010, 26 state guidelines specified a floor for income imputation or an amount to be used when income is unknown. The count is actually higher when non-guidelines statutes, case-law, and precedent are considered. For example, although Arizona child support guidelines are set in court rule, Arizona statute requires that the court presume, in the absence of contrary testimony, that a parent is capable of full-time employment earning at least minimum wage.¹⁹ Most states set these floors at state or federal minimum wage levels, but a few states set higher minimum amounts. For example, the Tennessee guidelines use state median wage.

¹⁸ The findings from the California analysis are published in: Judicial Council of California, (2010). *Review of Statewide Uniform Child Support Guideline*. San Francisco, California. Retrieved from: <http://www.courts.ca.gov/documents/review-sucsg-0611.pdf>

¹⁹ Arizona Revised Statute §25-320(N).

Only 19 state guidelines specify the number of hours worked to be considered when imputing income. Most of these states specify full-time or 40 hours per week. A few states specify 25 to 35 hours per week. Recently, several states have considered using fewer than 40 hours per week due to employment trends in the service sector and the Affordable Care Act mandate that requires large employers to offer health insurance for workers employed more than 29 hours per week, which some believe further limits the number of hours a service sector employee will work in an average week.

With the notable exception of California,²⁰ states do not normally track the number and percentage of order establishments in which income is imputed at or presumed to be minimum wage. However, there are some available statistics on the frequency that a guidelines calculation is made based on the parent's income being equivalent to full-time minimum wage earnings. An analysis of recently established and modified child support orders (that included both IV-D and non-IV-D orders) in Arizona found that 13 percent of the nonresidential parents had incomes equivalent to full-time, minimum wage earnings.²¹ The author's analysis of the IV-D caseload of another state without a minimum-wage income floor specified in its guidelines found that nine percent of nonresidential parents in newly established and modified IV-D orders had income equivalent to full-time, minimum wage earnings. In contrast, 20 percent of the California orders analyzed in the widely cited Orange County study included nonresidential parents with minimum-wage income. The Orange County study is often cited because it found that child support compliance and payment consistency decrease over time when the order is set above 19 percent of the nonresidential parent's wage.²² Arizona found that 76 percent of its orders were for less than 20 percent of the obligated parent's gross income and those for 20 percent or more tended to be for larger families.²³ (The author would like to clarify that the Orange County researcher found a higher percentage threshold for larger families, but that higher threshold is rarely mentioned when citing the Orange County finding.)

The Wisdom to Know when to Impute or Not Impute

Arguably, one of the major challenges in crafting income provisions is providing guidance on when to impute income and when not to impute income. Interpretation, case-law, and precedent exacerbate the issue. Figure 3 shows examples of income imputation provisions from Maryland and Wisconsin. Some interpret the Maryland provision to mean that income cannot be imputed if a parent is impoverished by no fault

²⁰ California Health and Human Service Agency tracks the number and percentage of establishments in which income is presumed and other federal and state-specific performance measures. They are available from: <http://www.childsup.ca.gov/reports.aspx>.

²¹ Venohr, Jane and Slattery-Quintanilla, Claire. (2014). *Arizona Child Support Guidelines Review: Findings from Case File Data*. Report to the Arizona Supreme Court. Retrieved from: <http://www.azcourts.gov/Portals/31/GuidelinesReview/AZChildSupportGuidelinesReviewFindingsfromCaseFileData082014RED.pdf>.

²² Takayesu, Mark. (August 21, 2014). *Establishing Realistic Child Support Orders. Three Child Support Strategies to Increase Family Self-Sufficiency Webinar* hosted by the Self-Sufficiency Research Clearinghouse and Federal Office of Child Support Enforcement. Retrieved from: https://www.opressrc.org/sites/default/files/Webinar%2Bslides_SSRC_child%2Bsupport_final-md_79_jw.pdf.

²³ Supra, note 21, page 19.

of his or her own, but not all Maryland courts interpret it that way. The Wisconsin provision is interesting because of who carries the burden of proof. In most states where there is a presumption that a parent is capable of earning at least a minimum wage income, the burden of providing evidence that a parent cannot earn minimum wage falls onto that parent. In contrast, the Wisconsin provision appears to place the burden on the IV-D agency if it is a party to the case; that is, the IV-D agency would have to provide evidence that it attempted to ascertain income and it was unavailable.

Figure 2: Examples of Income Provisions in State Guidelines That Appear to Limit Income Imputation

MD ²⁴	<p>12–204. (b) (1) Except as provided in paragraph (2) of this subsection, if a parent is voluntarily impoverished, child support may be calculated based on a determination of potential income.</p> <p>(2) A determination of potential income may not be made for a parent who:</p> <ul style="list-style-type: none"> (i) is unable to work because of a physical or mental disability; or (ii) is caring for a child under the age of 2 years for whom the parents are jointly and severally responsible.
WI ²⁵	<p>If evidence is presented that due diligence has been exercised to ascertain information on the parent’s actual income or ability to earn and that information is unavailable, the court may impute to the parent the income that a person would earn by working 35 hours per week for the higher of the federal minimum hourly wage under 29 USC 206 (a) (1) or the state minimum wage</p>

Besides guidelines provisions, there other ways states have or can reduce the incidence of income imputation. California has made remarkable reductions through a multi-faceted approach. In 2005, 45 percent of California orders were established by default,²⁶ which very often meant they were based on imputed or presumed income. In fiscal year 2013, less than seven percent of newly established California IV-D orders involved nonresidential parents with presumed income.²⁷ California was able to reduce default orders and the incidence of presumed/imputed income through advances in technology used to access income from automated sources, information sharing between the IV-D agency and courts, changes in policy and procedure procedures, and training commissioners, and placing family facilitators in the courts to help parents navigate the court system.²⁸

²⁴ Maryland Code, Family Law, Sections 12-204.

²⁵ Wisconsin Legislative Reference Bureaus. 35.93, *Wis. Stats*, Department of Children and Families Chapter 105.2 Retrieved from: http://docs.legis.wisconsin.gov/code/admin_code/dcf/101_153/150.pdf.

²⁶ U.S. Department of Health and Human Services, OCSE. (2007). *The Story Behind the Numbers: Effects of Child Support Order Amounts on Payments by Low-Income Parents*. Retrieved from; http://www.acf.hhs.gov/sites/default/files/ocse/im_07_04c.pdf.

²⁷ California Health and Human Service Agency. (March 2014). *Comparative Data for Managing Program Performance, FFY 2013*. Data Performance Analysis Branch, Sacramento, CA, Table 3.7. Retrieved from: <http://www.childsup.ca.gov/portals/0/resources/docs/reports/2013/ffy2013comparativedatareport.pdf>.

²⁸ Judicial Council of California (2006). *Review of the Statewide Uniform Child Support Guidelines: 2005*, Administrative Office of the Courts, San Francisco, California. Retrieved from: <http://www.courts.ca.gov/documents/csguideline2005.pdf>.

When a parent fails to appear, another option is to base the support award on reliable evidence of the parent's ability to pay and order the nonresidential parent to use government-sponsored employment services and provide actual income or ability-to-pay information to the courts; then, set the order up for automatic review one year after the default judgment is entered. This was the recommendation of the 2010 Michigan Supreme Court Taskforce that was formed out of concern that off-the-books income (income from the underground economy) was being overlooked in child support cases and adversely affecting state income tax revenues.²⁹

Still another option is to refer nonresidential parents to resources that can help them overcome barriers affecting child support outcomes. An example of this is the Orange County Department of Child Support Service (CSS) Community Resource Center, where CSS staff can provide assistance to customers, such as helping them complete child support forms.³⁰

Conclusions: Looking to the Future

The proposed OCSE rule change that requires the use of "actual income" has the potential to increase the use of income information from automated sources when determining support awards. This should reduce the incidence of income imputation, as well as increase the percentage of child support actually paid.³¹ The impact of the proposed change, however, may be limited by the percentage of nonresidential parents who actually have income information from automated sources. For example, a data match between the Maryland IV-D caseload and Maryland Automated Benefits System (MABS), which includes employment and earnings data from Maryland jobs covered by unemployment insurance, found that only 42.9 percent of nonresidential parents had MABS-recorded employment in the previous year, and only 34 percent of nonresidential parents had MABS-recorded employment in the study month, July 2011.³² Another limitation is if that the evidence of income indicates no income or income significantly less than full-time, minimum wage earnings, the order amount may be set at \$0 or a state-specific minimum order amount such as \$50 per month, which is the mode among state guidelines. As noted by some researchers, lowering the support award, in general, does not actually increase the amount received by families.³³

States should give careful consideration to any revisions to their income imputation provisions such that they address the issues of "turnips", "deadbroke" dads, and low-

²⁹ Michigan Supreme Court (June 2012). *Underground Economy*, Lansing, MI. p. 18. Retrieved from: <http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Reports/UETF-2010.pdf>.

³⁰ Guillen, Jesse. (January 2013). "Orange County Center Exemplifies Our Sincere Commitment to Families." *Child Support Report*, Federal Office of Child Support [online]. Retrieved from: <http://www.acf.hhs.gov/sites/default/files/programs/css/csr1301.pdf>.

³¹ Based on evidence that income imputation and payment are negatively correlated. See supra note 2.

³² Gleason, Elizabeth, Passarella Letitia, and Born, Catherine. (November 2013). *People & Payments: A Profile of Maryland's Child Support Caseload in July 2011*. University of Maryland Family Welfare Research & Training Group, Baltimore Maryland. Retrieved from: <http://www.familywelfare.umaryland.edu/reports1/ca2011.pdf>.

³³ For example, see Huang, Chien-Chung, Mincy, Ronald, and Garfinkel, Irwin, (December 2005). "Child Support Obligations and Low-Income Fathers." *Journal of Marriage and Family* 67, pp. 1213-1225.

income parents, as well as nonresidential parents who are paid in cash, are self-employed, or refuse to work. Time and time again, child support agencies have learned that some, but not all, parents appearing to have no income actually have income or the means to pay child support. For example, an evaluation of the Parents' Fair Share (PFS) demonstration project, which among other things mandated participation in employment programs, found that one-third of the tracked PFS participants appearing for hearing reported previously unknown employment to the child support agency. In effect, these participants could not participate in PFS employment programs because they already had jobs that the mandate forced them to reveal— i.e., “smoked out”— their employment. Even Mincy and Sorensen’s seminal article found that 34 to 41 percent of young noncustodial fathers did not pay child support and were actually able to pay.³⁴

Although some chicken catcher jobs have been replaced by technology and others have been unionized so that they are no longer paid in cash, the underground economy is vibrant, growing, and an important source of income to parents. One economist estimates that underground activity totaled as much as \$2 trillion in 2012, which is double the amount estimated in 2009.³⁵ The problem of cash income is not just an issue among nonresidential parents. Kathryn Edin, one of the nation's preeminent poverty researchers, finds that many mothers also work under the table or in the underground economy for the simple reason that there is an economic incentive to do so.³⁶ Certainly, the policy objectives are not to push both custodial and nonresidential parents into the underground economy or increase the number of support awards set at \$0 or minimum guidelines amounts. More research and policy development are needed to prevent these possible outcomes and to develop child support policies that will best serve children.

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³⁴ Supra, note 3, page 47.

³⁵ Surowiecki, James. (April 23, 2013). “The Underground Recovery.” *The New Yorker* [online]. Retrieved from: <http://www.newyorker.com/magazine/2013/04/29/the-underground-recovery>.

³⁶ Mencimer, Stepanie. (March/April 2014). “What If Everything You Knew About Poverty Was Wrong?” *Mother Jones*. [online]. Retrieved from: <http://www.motherjones.com/politics/2014/03/kathryn-edin-poverty-research-fatherhood>.