

THE ALI CHILD SUPPORT PRINCIPLES: INCREMENTAL CHANGES TO IMPROVE THE LOT OF CHILDREN AND RESIDENTIAL PARENTS

LESLIE JOAN HARRIS*

I. INTRODUCTION

For the last quarter-century child support has been one of the most high-profile issues in family law. Because of the high rate of divorce among families with children¹ and the high incidence of births to unmarried women,² the number of families in which support may be ordered is high. Moreover, the large number of divorces and out-of-marriage births is intrinsically related to one of today's pressing social problems, the high rate of poverty among children.³ Child support is widely regarded as one of the major solutions to this problem.

This view is based on two policy assumptions. The first is that providing for dependent children is principally a private obligation, rather than one shared by the society as a whole. While we recognize a general societal obligation to help poor children, welfare is only reluctantly provided as a backup when families do not support children adequately.⁴ The second is that biological (and adoptive) parents are obliged to support children, regardless of whether the

Copyright © 2001 by Leslie Joan Harris.

* Dorothy Kliks Fones Professor of Law, University of Oregon. Thanks very much to my colleagues who participated in the faculty's works in progress discussion of this paper.

1. ANDREW J. CHERLIN, MARRIAGE, DIVORCE, REMARRIAGE 26 (1992) (stating that during the late 1970s and 1980s, about two-fifths of all children will experience their parents' divorce by age 16); SARA McLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS 2 (1994) (stating that in 1984, 45 percent of children younger than 18 will experience their parents' divorce).

2. McLANAHAN & SANDEFUR, *supra* note 1, at 2.

3. In 1997, children under six living with a female single parent had a poverty rate of about 60 percent; in comparison, the poverty rate for married-couple families was about 11 percent. JOSEPH DALAKER & MARY NAIFEH, BUREAU OF CENSUS, US DEP'T OF COMMERCE, POVERTY IN THE UNITED STATES: 1997, vi (1997); *see also* Jay D. Teachman & Kathleen M. Paasch, *Financial Impact of Divorce on Children and Their Families*, 4 - 1 THE FUTURE OF CHILDREN—CHILDREN AND DIVORCE 63, 64 (Spring 1994) (1991 population survey data indicate that divorced women with children have a high likelihood of living in poverty; 39 percent of all divorced women with children and 55 percent of those with children under six were poor in 1991); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.03 cmt. g (Tentative Draft No. 3 Part II, 1998) [hereinafter ALI PRINCIPLES 1998] ("The risk of poverty is comparably high for children in one-parent households in all wealthy Western countries. When private resources alone are considered, cross national studies show notable similarity in the economic circumstances of one-parent families.").

4. The 1996 federal welfare statute eliminated welfare as an entitlement and imposes stringent work obligations on parents of even very young children. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1997) (codified at 42 U.S.C. §§ 602, 607-608 (1999)).

parents and children live together, and that other adults ordinarily have no obligation, regardless of whether they live or have lived with the children. While either or both of these assumptions can be and have been challenged, the child support provisions of the ALI *Principles of Family Dissolution* accept these assumptions and focus on defining how children can be adequately supported by their parents when the parents no longer live or have never lived in the same household as their children.⁵

The *Principles* are a substantial improvement over the child support guidelines in most states today because they offer a principled structure for deciding how much child support a non-residential parent should pay, as well as powerful arguments for increasing support levels. They acknowledge conflicts that arise between the interests of the child and the parents in the course of determining child support and seek justifiable balances among these interests.⁶ In practice, however, most of the tensions which the *Principles* identify are between the interests of the non-residential parent and the child or residential parent. The economic interests of the residential parent and the child rarely diverge, since they live in the same household.⁷

Both men and women are parents, and both can be residential and non-residential parents. However, most of the time children live with their mothers. Thus it makes sense to think about the *Principles* as if the residential parent is the mother and the non-residential parent is the father. While drafted in gender-neutral terms and with express concern for the interests of non-residential parents, the *Principles* express policies more favorable to residential parents than currently exist in many jurisdictions. However, in application, many of the advantages that the *Principles* would provide residential parents would accrue to middle and upper-class parents, without addressing the most pressing needs of poorer residential parents and their children.

After describing the criticism of existing child support guidelines, this commentary outlines and critiques the *Principles*' approach to child support, focusing on the basic support formula, provisions that affect parents' choices re-

5. The *Principles* apply to all child support cases, not just those following the divorce of a child's parents. ALI PRINCIPLES 1998, *supra* note 3, § 3.01. Federal law requires that state child support guidelines be of general applicability and apply to all cases. See Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (codified as amended in scattered sections of 42 U.S.C.). Under the *Principles*, an unmarried mother may seek child support from a father who has not been involved with the child with less fear that he will then be able to demand visitation, since Section 2.09 provides that such a father is not entitled to guaranteed contact with the child. ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.09 (Tentative Draft No. 4, 2000) [hereinafter ALI PRINCIPLES 2000].

6. ALI PRINCIPLES 1998, *supra* note 3, § 3.03.

7. Like the child support guidelines of many states, the ALI *Principles* treat as a "standard case" one in which the child lives with one parent at least 65 percent of the time. They make adaptations for "dual residence" cases. ALI PRINCIPLES 1998, *supra* note 3, § 3.14 cmt. b, reporter's note at 120. For dual residence cases, those in which time is divided between the parents more equally than 65 percent-35 percent, the *Principles* call for dividing the amount of support according to the amount of time the child spends with each parent. *Id.* § 3.14. The total amount due for support is increased, in recognition of the increased costs of dual residences, and the amount to be paid is calculated in a way that preserves the idea of supplementing the basic child support award to insure that the child's basic needs are met and that the child has an income not grossly disproportionate to that of either parent. *Id.*

garding work, school and childcare, and treatment of parents' previous and new families. The final section considers whether the advantages offered by the *Principles* are worth the political effort that would be required to get them adopted, and considers alternatives.

II. CRITICISM OF EXISTING CHILD SUPPORT GUIDELINES

Current child support guidelines in the United States are generally based on the principle that parents should pay as much of their income as they would spend if the child lived with both parents in the same household (the hypothetical intact household). This amount is determined by asking how much it would cost these parents to maintain their prior standard of living if they added a child to their household.⁸ Where the child does not live with both parents, each parent is expected to contribute to the total amount in proportion to his or her income. The non-residential parent's obligation is determined by multiplying the amount of the combined child support obligation of both parents by a fraction, the numerator of which is the non-residential parent's income and the denominator of which is the combined income of both parents.⁹

In application, child support guidelines in most states have not increased the size of child support awards as much as expected¹⁰ and so have not contributed as much as hoped to the reduction of poverty among children. But, as critics of existing guidelines have pointed out, there was no particular reason to expect that the guidelines would produce awards that satisfy the needs of the child(ren) because they do not take into account the actual economic conditions in the household in which the child(ren) actually live.¹¹ They are, instead, based on a hypothetical situation in which the income of both the child(ren)'s parents

8. See *id.* § 3.05 cmt. c. The reduction factor used in comment c assumes that the amount varies with the total income of the parents, based on economic studies of how much families at various economic levels spend on their children. See *id.*

9. In some states, the non-residential parent's child support duty is calculated as a fraction of his or her income without consideration of the residential parent's income. See Grace Ganz Blumberg, *Reporter's Memorandum to The Members of the Institute*, ALI PRINCIPLES 1998, *supra* note 3, at xxix n.5. Most states, however, use the Income Shares model, which provides that the non-residential parent's obligation is a function of the combined incomes of both parents. See *id.* As a practical matter, under a pure version of this approach, the amount of the residential parent's income does not significantly affect the amount of the non-residential parent's child support obligation. See *id.*; Leslie J. Harris, *The Proposed ALI Child Support Principles*, 35 WILLAMETTE L. REV. 717, 723 (1999) (giving an example and an explanation of why the non-residential parent's child support is based on the income of both parents).

10. See Jessica Pearson, Nancy Thoennes, & Patricia Tjaden, *Legislating Adequacy: The Impact of Child Support Guidelines*, 23 LAW & SOC'Y REV. 569, 585 (1989) (study of child support awards before and after guidelines in three states, found "a modest post-guidelines increase of 15 percent"); Nancy Thoennes, P. Tjaden, and J. Pearson, *The Impact of Child Support Guidelines on Award Adequacy, Award Variability and Case Processing Efficiency*, 25 FAM. L. Q. 325, 342-44 (1991) (stating that the average monthly award increased 5 percent in Colorado, 28 percent in Hawaii and 16 percent in Illinois). Data from all the states combined shows that low-income, single-child maternal custody families experienced a 19 percent increase in award levels following adoption of the guidelines, while middle- and upper-income families experienced a 7 percent and a 13 percent increase respectively. *Id.*

11. Blumberg, *supra* note 9, at xxix.

supports only the parents and the child(ren) in only one household. In fact, the income of the child(ren)'s residential parent may be significantly different from (and often is significantly lower than) that of the non-residential parent, and either or both households may have additional members. Thus, the standards of living in the two households may be very different from each other and from that of the hypothetical intact household.

In response to these criticisms, the ALI child support provisions, while still based on the Income Shares model, evaluate the need for and adequacy of child support awards by comparing the economic standards of living in the households of the parents. Where the household of the residential parent has a significantly lower standard of living, the *Principles* call for increased child support to narrow the gap; where the residential parent's household has a significantly higher standard of living, child support is lower.

The *Principles* accept as a starting place the proposition that underlies most existing child support formulas—that the non-residential parent has a superior claim to his earnings and an interest in limiting his contribution to the support of the children to what he would spend if he were living with the children in a two-parent household.¹² The difficulty with this proposition is that it holds the non-residential parent harmless against the costs of multiple households and imposes all the costs on the residential parent and child. For this reason, the guidelines proposed by the *Principles* do not fully protect this interest of the non-residential parent.

The main interest of the residential parent recognized by the *Principles* is the avoidance of a disproportionate share of the direct and indirect costs of child rearing.¹³ These costs include not only money spent on providing for the child, but also loss of market earnings because of childcare obligations.¹⁴ In considering the child's interests, the *Principles* do not recognize two common aspirations about protecting children—that a child should not suffer economically because the parents are not living together, and that a child should not suffer disproportionately as compared to other family members. The *Principles* argue that attempting to achieve either goal would infringe upon the rights of the non-residential parent too much.¹⁵ Instead, the *Principles* suggest that the goals of the child support formula should be to: 1) allow the child to “enjoy a minimum decent standard of living when the resources of both parents together are sufficient to achieve such result without impoverishing either parent;”¹⁶ 2) allow the child to “enjoy a standard of living not grossly inferior to that of the child's higher income parent;”¹⁷ and 3) prevent the child from suffering “loss of important life

12. ALI *Principles* 1998, *supra* note 3, § 3.03 cmt. e.

13. *Id.* § 3.03 cmt d.

14. *Id.* Section 5.06 of the *Principles* provides that compensation in the form of spousal support may be justified for a former spouse who has lost earning capacity because of “his or her disproportionate share during marriage of the care of the marital children, or of the children of either spouse.” *Id.* § 5.06.

15. *Id.* § 3.03 cmt. c.

16. *Id.* § 3.03(1)(b). The *Principles* use the concept of “minimum decent standard of living” for various purposes and define it as 150 percent of the federal poverty threshold. ALI *Principles* 1998, *supra* note 3, glossary at 165.

17. *Id.* § 3.03(1)(b).

opportunities that the parents are able to provide without undue hardship to themselves or their other dependents.”¹⁸

The tension among these interests runs throughout the child support provisions of the *Principles*. The next two portions of this paper consider the most important ALI sections, which develop the essential parts of the child support formula.

III. CALCULATION OF THE BASIC CHILD SUPPORT OBLIGATION UNDER THE ALI PRINCIPLES

The balance among the interests of the child and parents is expressed most fundamentally in the basic child support formula. The *Principles* advocate for a formula that will increase the amount of child support owed in most cases. However, because of the *Principles*' treatment of childcare expenses, in application the *Principles* will sometimes fail to achieve this goal.

The first step in applying the ALI guidelines is to establish a “base amount” of child support owed, the amount that would be required under a well-constructed income shares formula. However, the *Principles* argue that the interests of the parents and child are in balance only when the parents have the same incomes. When the residential parent's income is lower than the non-residential parent's (as is often true) the typical formula does not produce an award large enough to allow the child to “enjoy a standard of living not grossly inferior to that of the child's higher income parent;”¹⁹ and to prevent the child from suffering “loss of important life opportunities that the parents are economically able to provide without undue hardship to themselves or their other dependents.”²⁰ Sometimes the basic award does not even provide the child with a “minimum decent standard of living,” even though the non-residential parent's income may be sufficient enough to meet this goal.²¹

Therefore, the *Principles* provide that an additional sum, the “supplement” should be added to the base amount to produce an award that partially compensates for the disparity in standards of living of the two households. The sum of the base and the supplement is the “preliminary assessment,” which never exceeds half the support obligor's net income.²² The preliminary assessment is the highest amount that a non-residential parent would ordinarily be expected to pay.

The *Principles* argue that if the parents have equal incomes, the base amount appropriately balances the interests of the child and the parents because it equalizes the standard of living in the two households. Therefore, the preliminary assessment must be reduced to eliminate the supplement when the parents' incomes are equal, and the supplement must be gradually reduced as the residential parent's income rises. The “reduction mechanism” accomplishes

18. *Id.* § 3.03(2).

19. *Id.* §3.03(1)(b).

20. *Id.* § 3.03(2).

21. *Id.* § 3.03(1)(a).

22. ALI *Principles* 1998, *supra* note 3, § 3.05 cmt. g.

these purposes,²³ though it does not operate until the residential parent's income is more than enough to insure the parent a "minimally decent standard of living."²⁴

To understand fully how the ALI formula works, its treatment of childcare costs must also be considered, since the non-residential parent's share of those costs is folded into the supplement. Child support guidelines today usually provide that the parents should contribute to actual costs of childcare in proportion to their incomes.²⁵ In contrast, under the *Principles*, the non-residential parent's share is included in the child support he pays, and the residential parent pays for actual childcare costs from her income and the child support. Thus, the amount the non-residential parent pays in child support is the same, regardless of the actual childcare costs.²⁶

Because of this treatment of childcare costs, in practice the ALI child support guidelines may not greatly increase the amount of child support that some residential parents receive, in comparison to how much they receive under current guidelines. For example, consider a family in which the mother has custody of the only child and a net income of \$1,000, while the father has a net income of \$2,000. The ALI *Principles* provide that the father owes child support of \$680, and the mother pays all costs of childcare. If the cost were \$200 per month, the mother's household would have a net monthly income of $\$1,000 + \$680 - \$200 = \$1,480$. Under a typical Income Shares model, in which childcare costs are allocated separately, the mother's monthly net income would be \$1,366. If childcare costs \$300 per month, the mother would net \$1,405 under the ALI formula. Under the Income Shares model, she would have \$1,433 net income.²⁷

Which of the formulas produces greater total awards depends on the parents' incomes and the actual cost of childcare. The ALI formula is less likely to provide greater total awards for families with lower income levels and higher childcare costs than the Income Shares model. It would be possible to increase the supplement to increase the non-residential parent's contribution to childcare. However, this solution is inconsistent with the theoretical approach that under-

23. *Id.* § 3.05(4). The reduction mechanism actually goes further; for cases in which the residential parent's income is greater than the non-residential parent's, the reduction mechanism continues to operate, reducing the child support award below what a typical formula would produce. *Id.* § 3.05(5).

24. *Id.* § 3.05(4).

25. This is how the *Principles* recommend treating medical costs, since they are so variable. *Id.* § 3.05(7). The *Principles* also give the fact finder discretion to apportion extraordinary costs such as long-distance travel to exercise visitation rights and children's expenses such as special tutoring for a learning disability or private music lessons. *Id.* § 3.05.

26. A support obligor paying the full preliminary assessment does not pay more for childcare, and the residential parent pays the full cost. ALI PRINCIPLES 1998, *supra* note 3, § 3.05. If the residential parent's income is high enough that the reduction mechanism is operating, the non-residential parent's share of childcare costs is offset against the reduction of the preliminary assessment. *See id.* § 3.05 cmt. j. The *Principles* cap the non-residential parent's contribution to childcare costs at the maximum amount of the reduction figure. *Id.* § 3.05(6). "This cap is likely to operate only when the income of the residential parent is relatively low and childcare expenditure is relatively great, circumstances usually involving a very young child." *Id.* § 3.05 cmt. j.

27. *See Harris, supra* note 9, at 741 (providing the example of a lower-income family where the mother's income is half that of the father's).

lies the *Principles*, and it would produce the undesirable result that a residential parent who used little or no childcare would receive a windfall.

In actual practice the ALI *Principles* might not increase child support as much as was hoped. This is especially true for families at lower income levels, because of how childcare costs are treated and because non-residential parents with low incomes will not be ordered to pay so much that they themselves are impoverished.²⁸

IV. PROMOTING PARENTAL AUTONOMY—DECISIONS ABOUT WORK, EDUCATION AND CHILDCARE

The ALI *Principles* support the autonomy of residential parents by allowing them to decide whether to work, go to school or provide childcare personally, so long as their choices are reasonable. However, economic necessity requires many residential parents to work, so that the choice offered by the *Principles* is, for them, only theoretical.

Like existing rules in many states, the *Principles* provide that when a parent is voluntarily under- or unemployed and could reasonably be expected to earn more, a fact finder should treat that parent as having the income he or she could earn, based on his or her demonstrated earning capacity.²⁹ However, the *Principles* state that earnings should not be imputed to a parent who pursues “education, training, or retraining in order to improve employment skills so long as the pursuit is not unreasonable in light of the circumstances and the parent’s responsibility for dependents,” or who changes jobs “so long as the child support award based upon the parent’s employment in the new occupation does not unreasonably reduce the child’s standard of living taking into account the child’s total economic circumstances.”³⁰ These standards, while applicable to both parents, could be particularly helpful to residential parents who need to upgrade

28. The *Principles* protect obligors with incomes below 150 percent of the federal poverty level through use of a self-support reserve. ALI PRINCIPLES 1998, *supra* note 3, § 3.05. Other child support formulas also use self-support reserves. *Id.* § 3.09.

29. *Id.* § 3.12(5). The *Principles* provide that if income is imputed to a residential parent, the maximum amount that should be imputed is “an amount that, in combination with the residential parent’s actual income, does not exceed the income of the non-residential parent.” *Id.* § 3.06(4). Thus, the maximum effect of imputing income to the residential parent is to treat her as having income equal to that of the non-residential parent, which eliminates the supplement but does not cut into the base amount of child support. The rationale for the limitation, apparently, is that imputing income to the residential parent is will insure that the supplement is not claimed when the assumptions upon which it is based are absent. *See id.* § 3.06(4) cmt. d. However, even this cap can be waived when the fact finder thinks it is equitable. *See generally* LESLIE J. HARRIS & LEE TEITELBAUM, FAMILY LAW 582-83, 619-25 (2d ed. 2000) (discussing the treatment of unemployed and underemployed parents). The *Principles* acknowledge that imputing income to the residential parent does not promote the interests of the child. The income-imputing rules are justified as protecting the interests of the non-residential parent. ALI PRINCIPLES 1998, *supra* note 3, § 3.12 cmt. e.

30. *Id.* § 3.12(a), (b). Current state law varies in its treatment of this issue. In a few states, no voluntary reduction in income is regarded as legitimate; in some the reduction is legitimate if in good faith, and in others the court balances the advantage to the obligor against the adverse impact on the persons owed support. *See generally* HARRIS & TEITELBAUM, *supra* note 29, at 619-25.

their skills. On the other hand, these provisions may also be invoked by non-residential parents, thereby lowering the amount of child support they owe.

Unlike the rules in many states, the *Principles* provide that income should not be imputed to a residential parent who is under-or unemployed because of childcare responsibilities.³¹ For a child younger than six years old, the *Principles* say that a residential parent should be able to remain out of the work force without having income imputed.

The ALI guideline does not second guess the hard choices facing parents with residential responsibility for preschool children. This abstention acknowledges the difficulties of securing adequate day care and meeting employer expectations while serving as the residential parent of a young child. Although these difficulties do not entirely disappear when a child enters school, they lessen substantially at that point.³²

For older children, the ALI *Principles* generally presume that it is appropriate for the residential parent to work,³³ though the trier of fact has discretion to find that such parents should not be expected to work full time or even to work at all.³⁴ Moreover, the *Principles* should preclude imputing income to a parent who takes a lower paying job because it offers a schedule more conducive to the parent's childcare responsibilities.³⁵

The ALI *Principles'* treatment of childcare expense payments also promotes the autonomy of the residential parent. The residential parent is free to decide whether and how much to use childcare, without having to account to the non-residential parent. On the other hand, in a recent article, the principal Reporter of the ALI child support section explained the childcare provision in terms more favorable to the non-residential parent. She wrote, "[The *Principles* acknowledge] that the cost of childcare is a form of child expenditure that should be taken into account by the child support rules, but [they do] so in a manner that requires the residential parent to internalize the entire cost of childcare and thus

31. ALI PRINCIPLES 1998, *supra* note 3, § 3.12 (5)(c). Support payments to allow a parent to remain at home might also be characterized as spousal, rather than child support. However, it is uncommon for state law to authorize spousal support for this purpose. See Ann Laquer Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721, 728-38 (1993).

32. ALI PRINCIPLES 1998, *supra* note 3, § 3.06 cmt. b.

33. *Id.* § 3.06(1) cmt. b.

34. *Id.* § 3.12(5).

35. Further, the *Principles* caution that in deciding whether to impute income to the residential parent, the fact finder "should take into account the relative economic situations of the parties. In exercising its discretion to impute . . . income [to the residential parent], the trier of fact should additionally consider the benefit, if any, accruing to the children of the parties from the residential parent's underemployment." *Id.* § 3.06(5). The commentary adds, "The support obligor's 'shirking' may reflect an intent to avoid parental obligations; the residential parent's 'shirking' may be motivated instead by desire to provide the parties' children with personal care. Imputation of earnings to the support obligor serves to increase child support available in the residential household, while imputation of earnings to the residential parent may merely decrease that support. While both forms of imputation should be approached with caution, imputation of earnings to the residential parent should be approached with even more circumspection." *Id.* § 3.06 cmt. b; see also *id.* § 3.12 cmt. e.

to make efficient choices between gainful employment and the personal provision of childcare.”³⁶

In theory, the provisions which allow residential parents to make choices regarding childcare, training and work options eliminate some recurring causes for parental disputes over control and enhance the autonomy of residential parents. In reality, most mothers—whether married or single—work. Less than half of all mothers of children younger than six stay at home with them full-time, and less than a third of single mothers do so.³⁷ While some of these women choose to work when they could afford to stay at home, most do not. For a single mother to remain at home full-time with children or even to go to school, she must either have enough wealth to provide for herself, access to educational loans, substantial spousal support, or very generous child support payments. Spousal support is potentially available only to a mother who was married to the child’s father. In rare cases, a mother may be entitled to support payments as an ex-cohabitant, but even then the father must have a substantial income before much support is ordered. Substantial child support payments also depend on the non-residential parent having a substantial income. While the ALI base plus supplement is intended to provide some money for the residential parent to remain at home with young children, many non-residential parents’ incomes are so low that they would not be ordered to pay enough to make this feasible.

Further, the *Principles*’ decision to fold a standardized amount for childcare into the basic award (leaving it to the residential parent to decide whether and how much childcare to purchase), could encourage residential parents to make decisions that are not consistent with the best interests of the children or that are not economically sound in the long-run. The *Principles* might encourage some working residential parents to use cheap or no childcare, when they might use care if the costs were clearly shared with the non-residential parent. The *Principles* also encourage mothers with limited work skills to care for children rather than working because they cannot earn enough to pay for childcare and still come out ahead economically. A parent in this position probably needs to improve her earning capacity by taking a job that offers on-the-job training or by going to school. While the latter choice might be viable if she can obtain loans and low-cost childcare, many parents do not have these opportunities.

V. PARENTS’ PREVIOUS AND NEW FAMILIES

For the most part, the ALI *Principles* take a conventional position on how obligations to serial families are treated, except for its treatment of the income of residential parents’ new partners. In general, the *Principles* provide that finan-

36. Grace Ganz Blumberg, *Balancing the Interests: The American Law Institute’s Treatment of Child Support*, 33 FAM. L.Q. 39, 86 (1999).

37. HANDBOOK OF U.S. LABOR STATISTICS, EMPLOYMENT, EARNINGS, PRICES, PRODUCTIVITY AND OTHER LABOR DATA 104 (2d ed. 1998).

cial responsibility to a parent's first family comes first.³⁸ Thus, a parent who owes child support to other children under a prior order is allowed to deduct the amount actually paid, which is the usual approach to pre-existing child support duties.³⁹ In addition, the *Principles* provide that a parent may take a deduction for a child from an earlier relationship who lives with him or her,⁴⁰ which most current guidelines do not allow.⁴¹ Since most children live with their mothers when the family is not intact, the former, traditional provision tends to favor fathers, and the addition of the latter provision brings mothers into parity with fathers on this issue.

The *Principles* are less generous to parents who have additional children with new partners. They only allow the factfinder to grant such a parent a credit against expenses incurred in providing for the "basic consumption needs" of the parent's new children who live with him or her if necessary to avoid hardship.⁴² In determining whether to exercise this discretion, the fact finder is to "compare the standards of living of the non-residential and residential households, and should not grant a hardship deduction if the standard of living in the other parent's household is, or would be by the granting of the deduction, lower than the standard of living in the household of the parent requesting the reduction."⁴³

The *Principles* generally provide that stepparents do not have support duties, which is consistent with the law in most American jurisdictions today.⁴⁴ However, the treatment of the income of a residential parent's new spouse or cohabitant deviates from this approach. As discussed above, most imputed income rules apply to both parents. But Section 3.06 provides that up to half the income of the residential parent's spouse or stable cohabiting partner may be imputed to the residential parent, which would have the effect of lowering the non-residential parent's support obligation. The *Principles* do not, however, al-

38. ALI PRINCIPLES 1998, *supra* note 3, § 3.12 cmt. i; see also *id.* § 3.03 cmt. f (explaining that the *Principles* do not take into account the interests of either parent in remarrying).

39. *Id.* § 3.12(3).

40. *Id.*

41. Current rules may allow the fact finder to deviate from the presumptive amount of child support calculated under the jurisdiction's formula for this reason. See HARRIS & TEITELBAUM, *supra* note 29, at 638-51.

42. ALI PRINCIPLES 1998, *supra* note 3, § 3.13(1)(c).

43. *Id.* § 3.13(2).

44. Section 3.02A provides that in "exceptional cases" an adult who is not a child's legal parent may be stopped to deny a child support duty. ALI PRINCIPLES 2000, *supra* note 5, § 3.02A. This duty may be warranted if "(a) there was an explicit or implicit agreement or undertaking by the person to assume a parental-support obligation to the child; (b) the child was born during the marriage or cohabitation of the person and the child's parent; or (c) the child was conceived pursuant to an agreement between the person and the child's parent that they would share responsibility for raising the child and each would be a parent to the child." *Id.* § 3.02A(a). Paragraph (b) is not as broad as it might first appear; subsection 3 of this part provides that "No continuing obligation to support a child arises merely from a person's former cohabitation with or marriage to the child's parent." *Id.* § 3.02A(b). The rest of the section and its commentary make clear that the support duty should be imposed only when the would-be obligor's actions have eliminated or greatly reduced the chance that support can be obtained from the child's absent parent. *Id.* § 3.02A. See generally HARRIS & TEITELBAUM, *supra* note 29, at 647-48, 1068-81 (reviewing current general principles regarding stepparents).

low for the income of the non-residential parent's partner to be imputed to him, which would increase the amount of child support owed.

The commentary to Section 3.06 explains this disparate treatment. Recall that the basic child support formula increases the amount of support by means of the supplement when the residential parent's household's standard of living will otherwise be substantially lower than that of the non-residential parent's household.⁴⁵ However, since the *Principles* accept that the non-residential parent has a superior right to his income and a valid interest in paying no more child support than he would in the intact household, they argue that it is justifiable to reduce his child support payments to that level if the standard of living of the child and residential parent rises for any reason.⁴⁶ Even though a new spouse or partner of the residential parent has no legal child support duty, the household's standard of living may rise because of the new spouse or partner's income,⁴⁷ and therefore the non-residential parent's support duty may be lowered.⁴⁸ Income of the non-residential parent's new partner is not imputed because the partner has no legal child support duty.

VI. ALTERNATIVES—CHILD SUPPORT ASSURANCE AND EQUAL LIVING STANDARDS

The *Principles* make very important and valuable contributions to our continuing discussion about child support policy. If implemented, they would increase child support levels for many families, reduce the opportunities for disputes between parents, and enhance the autonomy of parents, especially residential parents. However, the *Principles* provide little help to children with poor non-residential parents, and residential parents who need to work to maintain a modest standard of living would not be able to take advantage of the choices the *Principles* offer.

These shortcomings are not surprising, for they flow from designing child support rules within the boundaries of existing child support law. Both problems are closely related to the assumptions that support is a private obligation and that only legal parents have the duty to support children. The ALI's acceptance of these assumptions should enhance the political acceptability of the *Principles*. However, I fear that convincing lawmakers to adopt some aspects of the *Principles* would actually be fairly difficult, particularly those provisions identified in this commentary as beneficial to residential parents.

Resistance could be expected to the provisions of the *Principles* that allow parents to make decisions about childcare, work, and school when the effect of the decision is to increase the other parent's obligation. As we have seen, most—though not all—of these provisions protect the choices of residential parents. This fact increases the likelihood of political resistance because non-

45. See *supra* notes 22-24 and accompanying text.

46. ALI *Principles* 1998, *supra* note 3, § 3.06 cmt. d.

47. MCLANAHAN & SANDEFUR, *supra* note 1, at 79-94; David L. Chambers, *Stepparents, Biologic Parents, and the Law's Perceptions of "Family" after Divorce*, in *DIVORCE REFORM AT THE CROSSROADS* 102, 105 (Stephen D. Sugarman & Herma H. Kay eds., 1990).

48. ALI *Principles* 1998, *supra* note 3, § 3.06 cmt. c.

residential parents who actually pay money to the other parent would see the provisions as adversely affecting their interests.

Resistance to provisions intended to increase child support would also be predictable. Under existing guidelines, payors often complain about child support being too high.⁴⁹ This resistance comes not just from the fathers' political action committees but also from the administrators and lawyers who run the system.⁵⁰ Academics have also joined in the attack. For example, two recently published articles challenge the claim that, in many families, non-residential parents' standards of living are significantly higher than those of residential parents and children.⁵¹

The ALI *Principles* rejected an approach to child support which would equalize standards of living between households, even though this approach would better serve children's interests. The commentary to Section 3.03 explains, "By requiring that the standard of living of the residential parent's household be no lower than that of the non-residential parent's, an equal living standards measure would effectuate the child's interest not to bear disproportionately the adverse economic effects of family dissolution. However, it not only would require that the non-residential parent share income with the child, but would also often require that the non-residential parent equally share income with the residential parent."⁵²

On the other hand, any child support order involves income sharing between the parents because the residential parent and child live together. The *Principles* go further than most existing guidelines by providing for support to reduce the disparity between the two households' standards of living. The question is not whether to make orders on this basis, but to what extent. Moreover, other provisions of the *Principles* carry comparison between the two households' standards of living further. For example, the provision concerning

49. See, e.g., Robert G. Williams, *An Overview of Child Support Guidelines in the United States*, in CHILD SUPPORT GUIDELINES: THE NEXT GENERATION 1, 8-9 (Margaret C. Haynes et al. eds., 1994) (explaining that generally the concept of guidelines is accepted, but that it is common for non-custodial parents to object that the award levels under existing guidelines are too high).

50. For example, after it received recommendations from a national consultant to update the state's guidelines, the Oregon drafting committee systematically reduced the amount of child support owed, particularly for lower-income families. See Harris, *supra* note 9, at 751-52. Oregon family law lawyers reported that they could never convince clients to accept higher amounts because clients who received child support rarely complained about awards being too low while non-residential parents regularly complained about awards being too high. *Id.* at 756-57.

51. See Sanford L. Braver, *The Gender Gap in Standard of Living After Divorce: Vanishingly Small?*, 33 FAM. L.Q. 111 (1999); R. Mark Rogers, *Wisconsin-Style and Income Shares Child Support Guidelines: Excessive Burdens and Flawed Economic Foundation*, 33 FAM. L.Q. 135 (1999).

52. ALI PRINCIPLES 1998, *supra* note 3, § 3.03 cmt. e. The commentary also argues that an effort to equalize household incomes would give the residential parent an incentive not to work outside the home. *Id.* Another theme that runs through the *Principles* is that they should not "discourage the labor force participation or vocational training of either parent." *Id.* § 3.03(5). This is identified as one of the fundamental principles shaping the guidelines. *Id.* The commentary also argues against an equal standards of living approach by saying that it would allow the residential parent to diminish her work effort and receive an augmented child support transfer. Conversely, she can increase her work effort and receive a diminished child support transfer. *Id.* § 3.03 cmt. k(ii). However, an equal living standards model can be adapted to address this problem. Marsha Garrison, *Child Support Policy: Guidelines and Goals*, 33 FAM. L.Q. 157, 180-81 (1999).

cases of split-residence states that the child support award should be designed to reduce significant disparity between the standards of living of the parties' children in their different residences.⁵³

However, the equal living standards approach can be criticized for other reasons. Because it would link the economic fortunes of the households closely, the occasions for disagreements among the parties could increase. In addition, if the approach were fully implemented, it would require recalculation of support duties in both households whenever either household added or lost a member. Carried to its logical extreme, this approach would result in a myriad of transfers among households with children—with the idea that adults support only their mates and their legal children lost in the maze.

In a sense, though, this system already exists. Many households pay child support to one or more other families while receiving support from still others. The members of each household share the standard of living provided by the income remaining after these transfers.⁵⁴ The system is very complicated, creating transaction costs and opportunities for continued conflict without solving the problem of childhood poverty. As I and others have argued elsewhere, a publicly-funded child support assurance program, along European lines, is the only universal solution to childhood poverty.⁵⁵ This program, which could be supplemented with less onerous child support duties based on legal parenthood, would be less expensive and would create fewer opportunities for dissension among the parties. The problem is political—convincing the public to accept greater collective responsibility to provide for children and their caretakers. While it may seem unlikely that such a view will be widely accepted soon, it may be worth the political effort to try.⁵⁶

53. ALI PRINCIPLES 2000, *supra* note 5, § 3.15(1)(b).

54. Most single parents go on to form new families and take on new dependents. HARRIS & TEITELBAUM, *supra* note 29, at 638-39 (citing studies that found most divorced adults, including those with custody, often remarry).

55. Harris, *supra* note 9; see also Leslie J. Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461.

56. Several serious proposals to introduce a national child support assurance program were made during the 1990s. See, e.g., NAT'L COMM'N ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 93-94 (1991); IRWIN GARFINKEL, ASSURING CHILD SUPPORT: AN EXTENSION OF SOCIAL SECURITY 45-48 (1992); Stephen D. Sugarman, *Reforming Welfare Through Social Security*, 26 U. MICH. J.L. REFORM 817 (1993).