

REPORT
of the
CHILD SUPPORT GUIDELINES TASK FORCE

OCTOBER 2008

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Given the inherent nature of the collaborative process and the breadth of issues the Task Force considered, no member of the Task Force necessarily endorses every one of its recommendations.

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I. Introduction

In October 2006, Chief Justice for Administration and Management Robert A. Mulligan, (CJAM) appointed the Child Support Guidelines Task Force to conduct a comprehensive review of the Massachusetts Child Support Guidelines. The Child Support Guidelines are used by the Justices of the Trial Court in setting temporary and final orders of child support, in deciding whether to approve agreements for child support, and in deciding whether to modify existing orders. Chief Justice Mulligan defined the Task Force objective as the open and transparent evaluation of all aspects of the current Guidelines, and the recommendation of changes to the existing Guidelines, where appropriate. The comprehensive review, which began in late 2006 and continued through September 2008, included an examination of the assumptions, principles, and methodology that formed the basis of the current Guidelines. This Report identifies all issues considered, describes the Task Force deliberations, and, ultimately, provides and explains the Child Support Guidelines Task Force recommendations.

The Task Force membership provided a wide range of expertise and experience. The groups represented include judges; family law practitioners; designees of the Massachusetts and Boston Bar Associations and the American Academy of Matrimonial Lawyers; the Department of Revenue; the Probate and Family Court Probation Department; Legal Services; and Fathers and Families, a Massachusetts' non-profit organization.

During 24 months of work, the Task Force considered federal and state statutory requirements; public comments and materials submitted at public forums throughout the Commonwealth both in 2005 and 2007, including written comments from the public; and ideas and opinions expressed both formally and informally by bar associations, judges, probation officers, legal services organizations and other individuals and groups interested in the substance and operation of the Guidelines. The Task Force review included analyses of: economic models and data; child support guidelines of other jurisdictions; detailed presentations concerning state and federal health insurance legislation; and the results of a review of a selection of case files and the frequency of judges' deviations from the Child Support Guidelines as reflected in the files. The Task Force also considered legal research on a number of issues related to child support, including termination of child support orders and federal and state statutory standards concerning limitations on access to the courts for modification based solely on a change in the Guidelines, as opposed to change in a party's economic, or other, circumstances. The Task Force also considered research on tax issues and reasons for deviation.

In August 2005, prior to convening the Task Force, the Trial Court issued a Request for Proposal (RFP) for an economic review of the existing Massachusetts Guidelines based on available economic data and models. As a result of that RFP, the Trial Court contracted with Policy Studies, Inc. (“PSI”). PSI economist Jane Venohr, Ph.D. issued a report in 2006 and made one presentation to the Task Force.

Trial Court personnel also organized all meetings and provided research, clerical, technical and administrative support.

II. Executive Summary

The Child Support Guidelines Task Force has recommended changes to the Child Support Guidelines with the intention of making the Guidelines text more simple, clear, and comprehensive. Changes were made to recognize the number of cases involving never-married parents, increased numbers of working primary caretakers, increased shared parenting arrangements, and increased parenting involvement by principal economic providers. Toward that end, it is important to read the changes as a whole, rather than in isolation. In making some clarification changes, the Child Support Guidelines Task Force was conscious that individuals may interpret even a slight wording change in the Child Support Guidelines as having greater weight than intended. Some changes were made only to clarify and simplify language used in the prior version of the Child Support Guidelines, while other more substantive changes were made to recognize current economic conditions and/or societal shifts and could be considered major shifts in policy. In summary fashion, the recommended changes are as follows:

Globally, the Child Support Guidelines Task Force changed some terminology used in prior versions of the Child Support Guidelines. The terms “custody” and “visitation” have been eliminated, as they no longer adequately reflect the roles of many parents in the lives of their children. The terms “obligor” and “obligee” have been replaced with “payor” and “recipient”, for ease of identification. For coordination with G. L. c. 119A, and other statutory provisions relating to child support, the term “payor” shall mean the same as the statutory term “obligor” and the term “recipient” shall mean the same as the statutory term “obligee”.

The section now titled “Preamble” has been simplified to focus only on the purposes of the Child Support Guidelines. Prior discussion of the grounds for modifying child support orders has been removed and placed in a new, separate, section titled “Modification”, discussed below. The language used to describe the presumptive effect of the Child Support Guidelines has been rewritten for clarity, but is not intended to be a substantive change.

The section now titled “Principles” has been amended to recognize the increased costs associated with health insurance and the requirement of mandatory health insurance in Massachusetts.

The section titled “Income Definition” is now more detailed. The definition of income has been revised to specifically include unreported and non-taxed income. The delineated sources of income now include military pay, allowances, and allotments, and specifically exclude children’s disability benefits and insurance reimbursements for property loss. The Child

Support Guidelines Task Force has added new paragraphs to this section to allow for a more uniform application of the Child Support Guidelines to cases involving overtime and secondary job income, self-employment and other income, unreported income, and non-parent guardian income.

The new paragraph titled “Overtime and Secondary Jobs” has been added to avoid the automatic inclusion or exclusion of overtime and secondary job income in setting child support orders. The Child Support Guidelines Task Force identified factors for the Court to consider when determining whether this income should be included in the calculation of child support. These factors include, but are not limited to: “history of the income, the expectation that the income will continue to be available, the economic needs of the parties and the children, the impact of the overtime on the parenting plan, and whether the extra work is a requirement of the job.” Income from secondary jobs and overtime income of either the payor or the recipient received after an order is entered is presumptively excluded in a future support order provided the secondary job or overtime income was not worked in the past.

The new paragraph titled “Self-Employment or Other Income” has been added to provide further guidance to courts when dealing with this type of income. The paragraph provides the following definition of gross income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely-held corporation: “gross receipts minus ordinary and necessary expenses required to produce income.” This definition is intended to clearly instruct that gross receipts are not the same as gross income and to distinguish taxable income from income used to calculate child support. In addition, the Court may consider “[e]xpense reimbursements, in-kind payments or benefits received by a parent, personal use of business property, payment of personal expenses by a business in the course of employment, self-employment, or operation of a business” as income, if such payments are significant and reduce personal living expenses.

The new section titled “Unreported Income” clarifies that the Court may impute unreported income to either parent who may be working “under the table.” The Court may also make an upward adjustment to unreported income to account for taxes not paid.

The new paragraph titled “Non-Parent Guardian” has been added to clarify that income earned from non-parent guardians is specifically excluded when determining a parent’s child support order.

The paragraph titled “Relationship to Alimony or Separate Maintenance Payments” has

been revised to eliminate ambiguity. The underlying purpose of this paragraph – to permit the characterization of some or all of child support as alimony – remains the same. The parties bear responsibility for providing the Court with tax calculations showing that the net after-tax amount paid to the recipient is the same as the amount of child support ordered.

The paragraph titled “Claims of Personal Exemptions for Child Dependents” remains the same. The Child Support Guidelines Task Force discussed whether to change the language in this paragraph, but ultimately decided that the language currently used is clear and to the point.

The paragraph titled “Minimum and Maximum Levels” has been revised to accommodate policy changes regarding maximum orders. The minimum order of \$80 per month remains the same. The Child Support Guidelines Task Force declined to recommend a reduction in the minimum order for incarcerated payors. However, this does not preclude a judge from deviating from the Child Support Guidelines in an appropriate case where a payor is incarcerated. The Child Support Guidelines Task Force has added incarceration of a payor to the list of circumstances that may justify deviating from the Child Support Guidelines, as discussed below.

The maximum annual gross income level to which the Child Support Guidelines presumptively apply has been raised from \$100,000 for an individual or \$135,000 combined, to \$250,000 for the parties’ combined income. The maximum was increased to provide equal treatment for children born of married and never-married parents, recognizing that alimony is not available to never-married parents. The new presumptive maximum is also consistent with other states with similar cost of living standards. The new presumptive maximum will now apply to more income in those cases where the combined joint income previously exceeded the scope of the formula.

The “up to \$20,000” custodial parent disregard has been eliminated. The new Guidelines eliminate the disregard of custodial parent income “up to a maximum of \$20,000” and the formula has been adjusted accordingly. Now, all the gross income of both the payor and the recipient is considered. In eliminating the disregard, the Child Support Guidelines Task Force made appropriate adjustments to protect household income in the most vulnerable low-income families.

The paragraph formerly titled “Custody and Visitation” is now titled “Parenting Time” and has been expanded. The phrase “traditional custody and visitation arrangements” has been eliminated. Application of the Child Support Guidelines presumes “child(ren) having a primary residence with one parent and spending approximately one-third of the time with the other

parent.” The Child Support Guidelines Task Force followed the concerns expressed by the bar, bench, and public warning against mathematically linking the number of days actually spent with the children with the amount of the child support order. The Child Support Guidelines Task Force removed the language that recommended the Court consider extraordinary travel expenses incurred by the non-custodial parent in setting the child support order. This language has been moved to the new section titled “Deviations”, discussed below. The Child Support Guidelines Task Force found that delineating some of the circumstances that warrant a deviation from the Child Support Guidelines creates a more user-friendly format.

The Child Support Guidelines Task Force has added two new paragraphs that explain how to calculate child support orders for families who share or split physical custody. In calculating child support in shared or split physical custody situations, the parties shall compute the Child Support Guidelines twice, once with one parent as the recipient and once with the other parent as the recipient. The difference between these two figures is the amount to be paid to the parent with the lower weekly support amount.

The paragraph formerly titled “Child Care Credit” has changed to incorporate new policy considerations and is now titled “Child Care Costs.” The Child Support Guidelines now permit both parents to deduct reasonable child care costs associated with employment, including those “due to training or education reasonably necessary to obtain gainful employment or enhance earning capacity.” The deduction is limited to the costs of the child care for only the children who are the subject of the order. Since the Child Support Guidelines are now broader than the Internal Revenue Code’s allowance of child care cost deductions, all references to the Internal Revenue Code have been eliminated.

The paragraph titled “Age of the Children” has been changed. The 10% increase at age 13 has been eliminated. The Child Support Guidelines now apply to children ages zero to 18, and include children who are age 18 and still attending high school. The Child Support Guidelines remain discretionary for children over 18 years of age and who are no longer attending high school, but the Child Support Guidelines Task Force specified factors to guide courts. These factors include: “the reason for the continued residence with and dependence on the Recipient, the child’s academic circumstances, living situation, the available resources of the parents, the costs of post-secondary education for the child and the allocation of those costs between the parents, and the availability of financial aid.”

The paragraph titled “Health Insurance, Uninsured, and Extraordinary Medical

Expenses” has been changed, recognizing the Massachusetts 2007 mandate for health insurance and the increased costs associated with medical insurance. The subparagraph titled “Health Insurance” now permits both parents to deduct from gross income the cost of individual or family health insurance coverage. The new provision treats the costs of health insurance as a deduction from gross income rather than a credit. However, the Court has discretion whether to allow the deduction in cases where the additional cost of coverage for a person or child not covered by the order unreasonably reduces the amount of child support. A footnote has been added to this subparagraph to highlight that the current law does not give the court authority to order the recipient to provide health insurance; only by agreement of the parties may the recipient provide health insurance. The Child Support Guidelines Task Force uses the footnote to explain that the Child Support Guidelines should be construed consistent with any changes made to the law regarding health insurance, if or when it is amended.

A new subparagraph has been added, titled “Dental/Vision Insurance”. The Child Support Guidelines Task Force added this subparagraph to permit either parent to deduct from a party’s gross income the costs of a dental/vision insurance policy covering the children. However, the Court has discretion whether to allow the deduction in cases where the additional cost of coverage for a person or child not covered by the order unreasonably reduces the amount of child support.

Under the new “Routine Uninsured Medical and Dental Expenses” paragraph, the recipient is responsible for payment of the first \$250 each year for routine uninsured health and dental/vision expenses for *all* children covered by the order. Above \$250 annually, expenses are to be allocated by the Court between the parties. The annual amount that a recipient is responsible to pay has been changed from \$100 per child to \$250 combined for all children covered by the order, recognizing the increased uninsured medical costs and to minimize medical expense reimbursement disputes.

The subparagraph titled “Uninsured Extraordinary Medical and Dental Expenses” was edited to delete the provision permitting a temporary adjustment in support orders. Instead, the following language is included: “[w]here the Court makes a determination that such medical and dental services are necessary and are in the best interests of the child(ren), the Court shall allocate the expenses between the parties.” The temporary adjustment language was deleted because temporary adjustments foster increased disputes between parents and create collection difficulties.

The paragraph titled “Attribution of Income” has been edited to clarify that income attribution may apply to both parents. Before attributing income, the Court must first find that a party is capable of working and is unemployed or underemployed. The Child Support Guidelines direct that the Court shall consider a non-exclusive list of factors including “education, training, health and past employment history of the party, and the age, number, needs and care of the children” covered by the order. In consideration of these or other relevant factors, the Child Support Guidelines Task Force eliminated the provision precluding attribution of income for a custodial parent with children who are under the age of six. The overall changes to this subparagraph reflect the importance of uniformly applying attribution of income throughout the Commonwealth, based on public comments from both payors and recipients.

The paragraphs formerly titled “Prior Orders for Support” and “Expenses of Subsequent Families” have been merged under one heading, titled “Other Orders and Obligations”. The categories of deductible payments for other families were broadened. As in the past, prior orders for spousal and child support actually being paid are deductible from a party’s gross income. In addition, “[v]oluntary payments for other children a party has a legal obligation to support may be deducted in whole or in part to the extent the amounts are reasonable.” The party claiming the deduction must provide evidence of the prior order or voluntary payments.

The Child Support Guidelines Task Force also recognized that parties may have obligations for children residing with a party, but for whom no child support order exists. In establishing an order or defending a modification, a hypothetical child support amount shall be calculated according to the Child Support Guidelines using the gross income of both parents of the child. The hypothetical child support amount shall be deducted from the gross income. The party seeking the deduction must provide evidence to the Court. The expanded categories of deductible payments reflect increasing numbers of multiple families and a public policy encouraging support for all children. The provision concerning modification of prior orders as it relates to subsequent families has been moved to the new “Modification” section, discussed below. The concept of using expenses of a subsequent family as a shield, but not a sword, has been retained (i.e. expenses of a subsequent family may be used as a defense to a request to increase child support, but not as a reason to decrease an existing order.)

The Child Support Guidelines includes a new paragraph titled “Families with More than Five Children.” This paragraph notes that the Guidelines formula has been extended to cover up to five children, rather than three. With respect to orders that cover more than five children, the

Court has discretion to order additional support above the amount required for five children. This paragraph was added in response to numerous requests to provide guidance for larger families.

A new paragraph titled “Other Child-Related Expenses” has been added in response to numerous requests for allocation of expenses on which the existing Child Support Guidelines are silent. The Child Support Guidelines Task Force identified specific expenses that may be allocated by the Court on a case-by-case basis, if the expenses are in the best interests of the children and affordable. Examples of such expenses are “extra-curricular activities, private school, post-secondary education or summer camps”. The paragraph was added in recognition of the existence of such expenses in some cases, the significant cost of these expenses, and to clarify that the expenses are not automatically the responsibility of one or both parents.

The Child Support Guidelines Task Force added a new section to the Child Support Guidelines, titled “Modification”. Moving the topic of modification from the Preamble to its own section provides greater clarity. The Child Support Guidelines Task Force eliminated the 20% discrepancy requirement because it is inconsistent with state and federal statutes and regulations. New modification provisions, including an available three-year review without regard to material change of circumstance, follow state and federal law provisions. Specific grounds for modification now include: the fact that the existing order is at least three years old; health insurance previously available at reasonable cost is no longer available (or if available but not at reasonable cost); health insurance not previously available to a party at reasonable cost has become available; or a material change in circumstances has occurred. The Child Support Guidelines also provide direction to Courts where the prior order sought to be modified deviated from the Child Support Guidelines. In these circumstances, the Court shall apply the Child Support Guidelines unless the facts that gave rise to the prior deviation still exist, the deviation continues to be in the best interests of the child, and the Child Support Guidelines amount would be unjust or inappropriate under the circumstances.

A new section, titled “Deviations”, provides specific guidance as to when and how a Court may deviate from the Child Support Guidelines. Before the Court may deviate from the Child Support Guidelines, the Court must make four specific findings. These include: “[1] the amount of the order that would result from application of the guidelines; [2] that the guidelines amount would be unjust or inappropriate under the circumstances; [3] the specific facts of the case which justify departure from the guidelines; and [4] that departure is consistent with the best interests of the child.” After making these findings, the Court may deviate from the Child

Support Guidelines, if any of following circumstances exist:

- the parties agree and the Court approves their agreement;
- a child has special needs or aptitudes;
- a child has extraordinary medical or other expenses;
- application of the guidelines leaves a party without the ability to self-support;
- Payor is incarcerated, is likely to remain incarcerated for an additional three years and has insufficient financial resources to pay support;
- application of the guidelines would result in a gross disparity in the standard of living between the two households such that one household is left with an unreasonably low percentage of the combined available income;
- a parent has extraordinary medical expenses;
- a parent has extraordinary travel or other expenses related to parenting;
- application of the guidelines may adversely impact re-unification of a parent and child where the child has been temporarily removed from the household based upon allegations of neglect; or
- absent deviation, application of the guidelines would lead to an order that is unjust, inappropriate, or not in the best interests of the child, considering the Principles of these guidelines.

The list of circumstances is not exclusive.

Since application of the proposed formula may result in orders that are higher than intended in a discreet range of circumstances, particularly in cases in which payors have significantly lower incomes than recipients, two lines were added to the Worksheet as a safeguard to insure that the amount of support does not exceed a certain percentage of the payor's income.

The Child Support Guidelines Task Force has made changes to the "Child Support Guidelines Chart" and "Child Support Guidelines Worksheet" to incorporate the changes recommended above.

III. Federal Law / Regulations

42 U.S.C. § 667 (State Guidelines for Child Support Awards)

45 C.F.R. § 302.56 (Guidelines for setting child support awards)

IV. State Law

Child Support Guidelines (effective February 15, 2006)

G. L. c. 119, § 28 (Orders for payment of support; who may bring action; expiration of order or judgment)

G. L. c. 119A, § 1 (Child support enforcement program; public policy; remedies; commission established; department of revenue as IV-D agency)

G. L. c. 119A, § 3 (Actions to enforce subrogation rights; notice)

G. L. c. 119A, § 3B (Child support orders; receipt of IV-D agency services; modification of child support; notice; jurisdiction)

G. L. c. 119A, § 12 (Support orders; enforcement; arrearages; assignment of wages; notice and hearing; orders)

G. L. c. 119A, § 13 (Support payments or installments; judgment by operation of law; retroactive modification; application)

G. L. c. 208, § 28 (Children; care, custody and maintenance; provisions for education and health insurance; parents convicted of first degree murder)

G. L. c. 209, § 32 (Order prohibiting restraint of personal liberty of spouse; support, custody and maintenance orders; information provided to complainant; domestic violence record search; investigations; factors determining support amount)

G. L. c. 209, § 32F (Married persons living apart; actions for support)

G. L. c. 209, § 37 (Support orders for children of separated parents; modification; provisions for education and health insurance; parents convicted of first degree murder)

G. L. c. 209A, § 3 (Abuse Prevention, remedies; period of relief)

G. L. c. 209C, § 9 (Judgment or order for support; health insurance; financial statement; determination of amount; notice)

G. L. c. 209D, § 3-303 (Application of the Uniform Interstate Family Support Act to the Commonwealth)

V. Historical Overview

Guidelines development requires value judgments and balancing of competing interests to allocate limited economic resources between children, parents, other relatives, the state child support enforcement agency, courts, taxpayers, and society at large. Across the nation, child support guidelines were created to address three major problems in the issuance of child support orders. First, the guidelines were needed to bring uniformity and consistency to the issuance of child support orders, resulting in greater fairness to families and reduced forum shopping. Second, the predictability resulting from guidelines is intended to promote settlement and reduce conflicts, to the benefit of both the parties and the courts. Finally, research at the time showed that orders were too low to reflect the real needs of children. Guidelines ensured adequacy of orders, improving children's well-being.

Federal law provides specific requirements for the establishment of child support guidelines and subsequent periodic reviews to ensure that their application results in appropriate child support amounts. Each state was to establish child support guidelines by statute or by judicial or administrative action. The deadline for the guidelines to take effect was October 1, 1987. Specifically, 42 U.S.C. sec. 667 requires the following:

- 1) All jurisdictions must establish child support guidelines as part of the State Plan for establishing a comprehensive child support program;
- 2) States must conduct a review of the child support guidelines at least once every four years;
- 3) The guidelines shall be made available to all judges and other officials who have power to determine child support awards within the state;
- 4) There shall be a rebuttable presumption that the amount of the award which would result from the application of the guidelines is the correct amount of child support to be awarded in both the establishment and modification of orders; and,
- 5) A written finding must be made that the application of the guidelines would be unjust or inappropriate in a particular case under criteria established by the State and the facts shall be sufficient to rebut the presumption.

In addition to federal statutory law, 45 C.F.R. 302.56 provides the following additional requirements:

- 1) Child support guidelines must be based on specific descriptive and numeric criteria;
- 2) Child support guidelines must take into consideration all earnings and income of the non-

custodial parent;

- 3) Child support guidelines must provide for the child's health care needs through health insurance coverage or other means;
- 4) A four year review of guidelines, and their revision, if appropriate, to ensure that their application results in the determination of appropriate child support award amounts, and;
- 5) A State must consider economic data on the cost of raising children and analyze case data gathered through sampling or other methods, on the application of, and deviations from, the guidelines. The analysis of the data must be used in the State's review of the guidelines to ensure that deviations from the guidelines are limited.

In December 1984, Governor Michael Dukakis appointed the Governor's Commission on Child Support as required by the Child Support Enforcement Amendments of 1984 (Public Law 98-378). The commissioners were sworn in on January 29, 1985. 32 commissioners were appointed representing all aspects of the child support system. Over a period of eight months the commission examined the operation of child support collection and enforcement in Massachusetts and formulated recommendations based upon its investigation.

In October 1985, the Commission issued its report. The Commission recommended that the Commonwealth establish its guidelines via judicial action, ultimately by the Chief Justice for Administration and Management. It also recommended that the Chief Administrative Justice of the Trial Court appoint a committee to advise the Chief Justice in promulgating the Massachusetts Child Support Guidelines. Acting upon the Commission's recommendations, in July 1986 the legislature enacted "An Act Improving the Collection of Child Support in the Commonwealth," Statute 1986, Chapter 310, § 16A. The 1986 Act adopted the Commission recommendations. As the 1986 Act specified, Chief Administrative Justice Arthur M. Mason appointed a fifteen member Committee on Child Support Guidelines, comprised of seven members appointed by Chief Justice Mason, six members appointed by the Governor, and the Commissioner of Revenue. Chief Justice Mason chaired the committee (Mason Committee).

The Mason Committee met seven times between September and December 1986. The Mason Committee reviewed literature and commentary from committee members, the bar, and the general public. In January 1986, the Mason Committee circulated for comment its first child support guidelines draft. Based on comment on that draft, Chief Justice Mason amended the draft to provide increased flexibility and likelihood of greater financial gain for the Commonwealth's children.

On May 1, 1987, Chief Justice Mason promulgated Interim Child Support Guidelines, which remained in effect until December 31, 1987. Between May 1, 1987 and December 31, 1987, the justices of the Trial Court and family law practitioners evaluated the operation and substantive results of the Interim Guidelines. Meanwhile, the Trial Court solicited further public comments on the practical application of the Interim Guidelines. Data collected in selected Probate and Family Court divisions was analyzed, as were the results of a practitioners' survey. Based on the resulting data and comments, the Interim Guidelines were again revised. Chief Justice Mason issued the revised Child Support Guidelines, effective January 1, 1989.

According to federal regulations, the Commonwealth must review its child support guidelines at least every four years to ensure their application results in the determination of appropriate child support amounts. In the 18 years between the promulgation of the first Massachusetts Child Support Guidelines and Chief Justice Mulligan's appointment of the Task Force, the Trial Court reviewed or amended the Guidelines four times. Guidelines updates occurred in 1994, 1998, and 2002 and involved relatively minor adjustments to the original formula and scheme. The 2006 review led to the appointment of the Task Force.

VI. The 2006 Review

In preparation for the four-year guidelines review in 2006, the Trial Court conducted public hearings in 2005, held in Worcester, Springfield, Lawrence, Brockton and Boston. Then-Associate Justice Paula M. Carey and Associate Justice Peter C. DiGangi of the Probate and Family Court chaired the 2005 hearings. Written materials were collected from those hearings and hearing testimony was transcribed. In addition, in 2005, the Trial Court established e-mail and U.S. postal addresses to permit anyone unable or reluctant to speak publicly to provide comments. The Trial Court reviewed randomly selected divorce and paternity files in five divisions of the Probate and Family Court to determine deviation frequency and to determine whether there was adherence to written findings requirements. Representatives of the Trial Court Administrative Office met with interested groups, including the Massachusetts Bar Association, Boston Bar Association, Women's Bar Association, Fathers and Families, legal services attorneys as well as others to obtain comments. Probate and Family Court judges were also surveyed to assess current practice and identify areas of specific concern to the bench relating to the Child Support Guidelines.

In August 2005, the Trial Court issued a Request for Proposals (RFP) seeking an expert consultant knowledgeable in population and family economics, data analysis, and child support

policy formulation. The Trial Court engaged Policy Studies, Inc. (PSI) who reviewed the Massachusetts Child Support Guidelines and issued a report.

During the 2006 review, several interested groups, including the Massachusetts Bar Association, the Boston Bar Association, and the Academy of Matrimonial Lawyers, urged a thorough re-examination and academic study of the Guidelines and their effects upon families. By then, Massachusetts had 17 years of experience with the child support guidelines. Societal changes included an increase in two-parent participation in child-rearing, two parents working, and increasing numbers of children born to never-married parents. Bar associations and other interest groups urged that this confluence of factors warranted a wholesale review.

Chief Justice Mulligan determined to appoint the Task Force and to define its mission in the following statement:

The Child Support Guidelines are used by the justices of the Trial Court in setting temporary, permanent or final orders for current child support, in deciding whether to approve agreements for child support, and in deciding cases that are before the court to modify existing orders. According to federal regulations, the Commonwealth must review the Child Support Guidelines at least every four years to ensure their application results in the determination of appropriate child support amounts. Trial Court and public feedback suggests that, in general, the Massachusetts Child Support Guidelines are accepted, predictable, and easy to use. However, research findings may suggest some modifications to existing guideline variables. The Task Force's tasks will include, but not be limited to: meeting as needed; reviewing economic studies and data pertaining to the cost of living and raising children in Massachusetts; summarizing, analyzing and interpreting collected data and information; conducting public hearings; formulating recommendations; and submitting a final report following Trial Court review and comment.

In the meantime, Chief Justice Mulligan made only one adjustment to the Guidelines in 2006. The 2006 announcement clarified that the Court must make written findings for all orders that provide an amount different than the presumptive payment under the guidelines, even where the deviation from guidelines results from the parties' agreement. No other changes were made absent the complete study.

VII. Members of the Task Force

On February 15, 2006, Chief Justice Mulligan announced his intention to appoint a Child Support Guidelines Review Task Force. Efforts were made to ensure that the composition of the Task Force included all interested groups. Chief Justice Mulligan determined, following advice from a Child Support Guidelines Committee of the Massachusetts Bar Association, to include on

the Task Force members who would represent interests of children of diverse economic circumstances, interests of children of both divorced and never-married parents, and interests of both child support payors and recipients. The Child Support Enforcement Division of the Department of Revenue, which is the child support enforcement agency (IV-D Agency) for the Commonwealth pursuant to federal law, and the Probate and Family Court Probation Department, with its unique dispute intervention perspective and comprehensive knowledge of *pro se* dynamics, would also be represented. The Trial Court solicited nominations from the Massachusetts Bar Association, the Boston Bar Association, the American Academy of Matrimonial Lawyers, Massachusetts Law Reform Institute, and other interested parties. Two judges of the Probate and Family Court were appointed and the Chief Justice of the Probate and Family Court was to be the Chair. Chief Justice Mulligan appointed the following members of the Task Force:

- Hon. Sean M. Dunphy, Chief Justice of the Probate and Family Court¹ (Chair)
- Hon. Paula M. Carey² (Chair)
- Marilynne R. Ryan, Esq. (Vice Chair), Massachusetts Bar Association
- Hon. Anthony R. Nesi, Associate Justice, Bristol Division Probate and Family Court
- Marilyn Ray Smith, Esq., Deputy Commissioner, Child Support Enforcement Division, Department of Revenue
- Fern L. Frolin, Esq., American Academy of Matrimonial Lawyers
- Gayle Stone-Turesky, Esq., Boston Bar Association
- Richard Gedeon, Esq., Boston Bar Association
- Ned Holstein, M.D., Fathers and Families
- John Johnson, Chief Probation Officer, Hampden Division Probate and Family Court
- Christina Paradiso, Esq., Legal Assistance Corporation of Central Massachusetts
- Robert J. Rivers, Jr., Esq., Lee & Levine
- Mark Sarro, Ph.D., public policy economist

VIII. Task Force Work

Chief Justice Sean M. Dunphy of the Probate and Family Court presided over the first Task Force meeting on October 31, 2006. The first four meetings were several hours in duration.

¹ Chief Justice Dunphy retired in August 2007. He chaired the Task Force for ten months before his retirement.

² Chief Justice Carey was appointed as Chief Justice Dunphy's successor on October 1, 2007. She took over as Task Force Chair upon her appointment as Chief Justice.

In February 2007, the Task Force determined that full-day meetings would be necessary to complete the Task Force work within a reasonable period of time. The appointed members have each devoted more than 20 full working days to study, debate, and discussion at meetings, in addition to many hours of outside preparation.

Chief Justice Mulligan charged the Task Force with undertaking a critical examination of the Child Support Guidelines. He asked the Task Force to work diligently, to commit themselves to an open process, and to critically examine all aspects of the guidelines thoroughly, including possible alternatives to the current structure of the guidelines. The Task Force was asked to critically examine the assumptions, information and methodology for determining guidelines. The Chief Justice of Administration and Management otherwise defined no limits for the work of the Task Force.

At the first meeting, the Task Force discussed the need for confidentiality balanced against the benefits of transparency. At this point, the substantive work of the Task Force had not yet begun. To promote candid discussion, it was determined at that meeting that no remarks by any Task Force member would be openly attributed. Task Force members agreed that the substance of the comments made during the meetings might ultimately be made available to the public, but the identity of the individual who had made the comment would not be made public. As the meetings progressed, and the discussion turned from theories to quantitative proposals, the issue of confidentiality was again raised. After vigorous debate, the Task Force voted that the work of the Task Force would remain confidential in all respects until the work was finalized.

The second meeting of the Task Force was held on November 28, 2006. PSI economist Jane Venohr presented her report and her recommendations at this meeting. Dr. Venohr's recommendations involved modest revisions to the existing guidelines. Dr. Venohr explained the economic models on which child support guidelines are based, and her view that Massachusetts's current guidelines fell within those models. She also explained that child support guidelines nationwide follow one of two schemes. The majority of states use an "income shares" scheme, in which child-related expenditures are estimated as a proportion of both parties' combined incomes, and the payor pays as child support his or her percentage share of that amount.

A minority of states use a "percentage of payor income" scheme, in which child support orders are established as a percent of the payor's income, without regard to the recipient's income. Massachusetts and, until recently, the District of Columbia, used a hybrid of the "income shares" and "percentage of payor income" approaches, in which a portion of the

recipient's income is disregarded before calculation of the final amount of child support. In the hybrid approach, the preliminary child support amount is first calculated based only on the payor's income, then it is adjusted downward based on the recipient's percentage of the combined countable income. For purposes of the calculation, the recipient's income is gross income less the disregard and child care costs and the payor's income is gross income less prior orders for child support. Massachusetts is the only jurisdiction still using this hybrid child support scheme. Dr. Venohr explained that the number of states using the "income shares" scheme is growing, but many states still use payor's income only.

The Task Force discussed a minority concern that PSI's child support collection entity, which subcontracts collection services for some states, may conflict with PSI's objective consulting services. This concern was dismissed as not valid and not bearing on the information PSI provided to the Task Force.

Following Dr. Venohr's presentation, Task Force member Mark Sarro, public policy economist, presented an analysis of the economic models on which Dr. Venohr based her work. Dr. Sarro's presentation identified the strengths and weaknesses of the models.

A. Economic Models and Policy Considerations

In forming its recommendations on the structure of the guidelines formula and on the dollar amounts and income shares in the corresponding Chart, the Task Force considered economic research and empirical evidence on the magnitude of child costs and how those costs vary by household income and family size. The Task Force found the economic research useful but recognized that establishing child support guidelines ultimately requires policy decisions, not purely economic decisions.

The economic research presents a range of theoretical models, empirical approaches and results. All are designed to somehow estimate child costs, which are not directly observable. Many of the costs of raising children – such as housing and food – are "indirect costs" which are shared by adults and children in a household. Such costs cannot be directly attributed to a particular person in the household because specific data is not available on each person's separate utilization of the shared costs. Economists make certain assumptions to deal with this practical limitation. First, they use child *expenditures* to proxy for child *costs*,³ estimating the

³ How much households actually spend on children may, or may not, accurately reflect the relevant cost of children for policy purposes if there is too little income to cover all child costs, too much income to identify reasonable expenditure levels, or if the data on child costs are otherwise limited.

marginal cost of an additional child by comparing households with the same standard of living but different numbers of children. The idea is to compare spending patterns of equally well-off households with and without children in order to infer a measure of child costs based on observed spending differences. Of course, doing so requires a way to measure a household's standard of living. Most economists use one of two approaches: the Engel approach or the Rothbarth approach.⁴ The Task Force considered research based on both approaches.

The Engel approach, which is over 150 years old, defines a household's standard of living by the proportion of its expenditures on food.⁵ Since food is a necessity, this approach assumes that a household that spends proportionately less on food (because it is spending proportionately more money on other things) is better off than a household in which food is a larger component of total spending. The Engel approach assumes that households with the same proportional expenditure on food are equally well off, regardless of family size. Under this approach, child costs are imputed from the difference in total spending between households with the same food shares but different numbers of children.

The Rothbarth approach, which is over 60 years old, defines a household's standard of living by the dollar-value of expenditures on items used exclusively by adults (e.g., adult clothing).⁶ This approach assumes that a household that spends more on adult-only items is better off than a household that spends relatively less. The Rothbarth approach assumes that households with the same amount of spending on adult-only goods are equally well-off, regardless of family size. Under this approach, child costs are measured by the difference in total spending between households with the same adult-only expenditures but different numbers of children.

The Task Force started its review with the original research papers which first applied each of these two approaches in the context of child support guidelines.⁷ For example, the Task Force considered papers by Espenshade (1973, 1984) which applied the Engel approach to household data from the Consumer Expenditure Survey (CES) conducted by the Bureau of Labor

⁴ The approaches are known by the names of the economists who originally developed them.

⁵ Ernst Engel, *Die Productions und Consumptionsverhaeltnisse des Koenigreichs Sachsen, Zeitschrift des Statistischen Bureaus des Koniglich Sachsischen Ministeriums des Innern* (1857).

⁶ Erwin Rothbarth, "Notes on a method of determining equivalent income for families of different composition," in C. Madge (Ed.), *War-Time Pattern of Spending and Saving*, Cambridge University Press, Cambridge MA (1943).

⁷ Neither approach was originally developed for this purpose. The Engel approach was developed in the 19th century, and the Rothbarth approach was developed in the 1940s in response to the known limitations of the Engel approach. Neither approach was designed specifically to quantify child costs.

Statistics at the U.S. Department of Labor.⁸ The Task Force also considered a paper by Jacques van der Gaag (1982) that summarized the initial economic research using both approaches.⁹ Van der Gaag reported that the proportion of household income spent on children was in the range of 20 to 30 percent for the first child, with additional children costing proportionately less on the margin.

The Task Force also considered more current economic research. For example, David Betson (1990, 2000, 2006) applied both the Engel and Rothbarth approaches to CES data from 1980-87, 1996-99, and 1998-04, respectively.¹⁰ Betson reported his Rothbarth estimates were most reliable, consistently placing the marginal expenditure for the first child in a household at approximately 25 percent of total spending. Consistent with general economic theory, Betson also found expenditures on children account for a decreasing percentage of household spending as income increases. He found no significant differences in expenditures on children of different ages.

While the Task Force noted the results of this economic research, it also considered the practical limitations of relying on economic models in a policy context. Ira Mark Ellman (2004)¹¹ summarized several such limitations. For example, the economic research is based on *average* expenditures on children for a *given* level of household income. In reality, however, there is wide variation around the average both across and within income groups. Also, the economic models use data from intact households to inform policy decisions for households that are not intact. The models therefore implicitly assume that economic decisions are made the same way regardless of the distinction, when, in fact, the economic tradeoffs may be very different. One obvious difference is the additional overhead cost required by two separate households relative to the cost of a single household. By failing to account for this additional cost, economic models may overestimate the standard of living of a non-intact household at a given income level. Maintaining a standard of living estimate based on intact household data

⁸ Thomas J. Espenshade: (1) *The Cost of Children in Urban United States*, Population Monograph Series, No. 14, Institute of International Studies, University of California-Berkeley (1973); (2) *Investing in Children: New Estimates of Parental Expenditures*, The Urban Institute Press, Washington, D.C. (1984).

⁹ Jacques van der Gaag, "On measuring the cost of children," *Children and Youth Services Review*, Elsevier, vol. 4(1-2) (1982).

¹⁰ David M. Betson: (1) "Alternative Estimates of the Cost of Children from the 1980-86 Consumer Expenditure Survey," Institute for Research on Poverty, Special Report 51, University of Wisconsin-Madison (1990); (2) "Parental Expenditures on Children: A Preliminary Report," unpublished manuscript (2000); (3) "Parental Expenditures on Children: Rothbarth Estimates," prepared for Policy Studies, Inc., for the State of Oregon (2006).

¹¹ Ira Mark Ellman, "Fudging Failure: The Economic Analysis Used to Construct Child Support Guidelines," University of Chicago Legal Forum (2004).

likely requires more income than is actually available to a non-intact household.

The Task Force also recognized that the economic research provides only indirect estimates of child costs, not actual costs. To estimate child costs, economists rely on relatively narrow proxies for a household's standard of living: food cost shares under the Engel approach, and adult items (usually clothing) under the Rothbarth approach. The economic models based on either approach also require other implicit and explicit assumptions that are not always consistent with economic reality. The models also are based on data that are inherently incomplete or imprecise.

The Engel approach imputes a household's standard of living based on its proportional expenditure on food. However, it does not account for children being more "food intensive" than adults – i.e., food is a larger share of total expenditures on children than it is for adults. Instead, the Engel approach assumes that the proportion of household expenditures attributed to children is the same as the proportion attributed to the adults. By focusing on the expense item which children disproportionately consume, economists agree the Engel approach yields unreliable estimates of actual expenditures on children.

The Rothbarth approach imputes a household's standard of living based on the dollar-value of expenditures on adult items. However, it does not account for how the presence of children affects relative expenditures on adult-only items. It assumes preferences for adult-only items are similar for households with and without children at a given income level. However, if having children actually changes the composition of household spending on items shared with children, then the Rothbarth approach also yields unreliable estimates of actual expenditures on children.

Both approaches attempt to estimate *marginal* child costs – i.e., a child's incremental share of items consumed jointly by children and adults in a household. While this approach is appealing in theory, its results depend on the order in which each individual in a household is considered. Most shared costs are allocated to the first household members (typically the adults), while only additional costs are allocated to the remaining members. However, there are no inherent or objective economic principles to indicate the order in which to allocate costs or how much cost to allocate to each individual in a household.

Finally, the data on which the economic research relies have significant limitations.

The CES¹² data are most widely used, but the CES data are based on intact households

¹² CES stands for Consumer Expenditure Survey

and may include too few households to be reliable once the total number of respondents is divided into different income and family size categories. Also, the CES data show expenditures in excess of reported income for many income groups, indicating underreported income. The CES data also appear to underreport expenditures for some income groups.

The available economic research is based on data from all states, not just Massachusetts. The Task Force considered some cost and other data specific to Massachusetts as reported by the Department of Revenue, the 2006 Market Rate Survey, the Crittenton Women's Union, and other sources. The Task Force found this information helpful, but recognized that no estimates of expenditures on children specific to Massachusetts are available which are comparable to the national estimates in scope, sample, size, and methodology.

The Task Force found all of the economic data and research it considered to be informative at a general level, both for what the economic results showed and for what the economics alone cannot show. Ultimately, however, the Task Force decided not to rely directly on any one particular economic model or specific set of results. The Task Force determined there is no single economic study that, for the purposes of making guidelines recommendations, reliably isolates child costs or estimates the cost of raising a child in Massachusetts. The Task Force recognized that the available economic research is subject to credible criticism and empirical limitation, and there is no universally accepted standard among economists for precisely calculating child costs. Therefore, the recommendations of the Task Force on the guidelines formula and corresponding Chart reflect some broad principles and implications of the economic research but not any specific numeric result.

The broad principles considered include: (1) the importance of an economically sound household to a child; (2) the percentage of income devoted to children's needs levels off or declines at higher income amounts; and (3) assumptions that older children are more expensive as a percentage of household income than younger children have not been proven. General consensus on these statements informed many of the votes taken by the Task Force in the following months. The Task Force believes that a child's economic welfare is inextricably tied to the economic wellbeing of her or his caregivers. For those reasons, the Task Force determined that isolation of the specific household costs attributable to the child, who is the objective goal of the economic models, is neither necessary nor appropriate.

B. Materials Considered

After considering the economic research, the Task Force turned its attention to public hearings in order to learn first-hand from the parents and others most affected by the Child Support Guidelines. In February 2007, the Task Force held public hearings in Springfield, Boston and Worcester to supplement those hearings conducted in 2005. Each Task Force member attended at least one public hearing and all hearings were chaired by either the Task Force Chair or Vice Chair. The public hearings were well attended. The Task Force heard from mothers, fathers, grandparents and other caregivers, second spouses, adult children, and from attorneys. Representatives of a number of organizations, including Massachusetts Law Reform Institute, legal services organizations, Berkshire Fathers' Coalition, Jane Doe, Inc., and Crittenton Women's Union, addressed the Task Force.

Similar to the process used in 2005, public proceedings were recorded for review by those members not in attendance. The Trial Court also established e-mail and post office addresses to receive comments from individuals unable or unwilling to attend a public hearing, as in 2005.

To insure that all public comments, including those from the 2005 and the 2007 hearings, received thoughtful and thorough consideration, the Chair divided the Task Force into four reading groups. Voluminous written materials, including transcripts of the three 2007 hearings and the five 2005 hearings, all written testimony or other documents delivered at the hearings, and all comments submitted via e-mail, postal service, or other means, from 2005 through the 2007 comment period, were divided among the four groups and carefully read. The Chair asked each reading group to insure that every issue raised in the written materials and public commentary was included in the issues examined by the Task Force.

Over 1500 pages of materials were apportioned among the four reading groups. One or more Task Force members reviewed each and every comment. Reading group members then discussed within the groups every concern that any person had raised. Not surprisingly, when the reading groups compared their work product, they found that similar issues were raised with nearly equal frequency in each group's materials. The Trial Court compiled the work product of the four groups into a single compendium of issues for Task Force consideration.

The issues raised in the 2005 and 2007 comments included (in alphabetical order) the following:

Absentee parents – Comments were made concerning the amount of child support paid

by parents who exercise parenting time compared to the amount paid by those who do not exercise parenting time. The comments favored reducing the amount of child support for those parents who spend time with their children, since the overall weekly expenses incurred by the child are absorbed by both parents. In addition, a reduction in the child support order for parents who exercise parenting time would act as an incentive. An absentee parent, on the other hand, should pay more child support because he or she does not contribute toward the child's expenses during his or her parenting time.

Accountability for use of child support – Comments were made regarding a possible accountability requirement for the usage of child support payments. While the obligation to pay child support is well defined, the custodial parent's obligation to spend on behalf of the children is not. Some comments favored periodic accounting of child support money, documenting that the custodial parent was spending money on behalf of the child; other comments opposed this proposed requirement.

Alimony in relation to child support – Comments were made that the Child Support Guidelines should take into account the different tax treatment of alimony and child support.

Allocation of health insurance costs – Comments were made that the Child Support Guidelines should consider the costs of health insurance, especially since health insurance is mandatory and often expensive. There were requests for a definition of health care costs and methods for allocating the costs between parents. There was also concern that the 50 percent child support credit sometimes decreases child support payments to very low levels.

Attribution of income – Comments were made that the Child Support Guidelines should clarify whether the Court can attribute income to both parents. Comments pointed out that Courts vary in their practice when attributing income. Some comments suggested that attribution income orders may be too difficult, or too easy, to obtain.

Custodial parent disregard – Comments were made concerning a variety of aspects of the custodial parent disregard. Some comments found the amount arbitrary while others favored increasing or decreasing the amount. Other comments favored applying the disregard to both parents while others asked that the disregard be eliminated completely. Still other comments voiced concern that the disregard created a perception that custodial parents received advantageous treatment under the Child Support Guidelines and needs of non-custodial parents were devalued. Many comments expressed the view that the disregard discourages custodial parents from earning more than the disregard amount, rather than encouraging custodial parents

to work.

Deduction of prior support orders – Comments were made regarding whether the Child Support Guidelines should consider voluntary payments of child support made by payors and the impact of voluntary payments on the payor’s income for purposes of calculating child support.

Deduction of support obligations for prior or subsequent children – Comments were made concerning the weight or preference given to prior or subsequent children in calculating child support.

Deviations from guidelines – Comments were made that the Child Support Guidelines should provide guidance to courts on when it is appropriate to deviate from the Child Support Guidelines. Comments pointed out that courts vary in practice on when to deviate from the Child Support Guidelines. By providing guidance, the Child Support Guidelines could make court practices more uniform.

Directly-paid child expenses – Some comments favored giving the court authority to order the payor to pay child support directly to providers of goods or services, rather than the other parent. Comments suggested that third party direct-pay orders could serve as an alternative to periodic accounting for the usage of child support money.

Domestic violence – Comments were made concerning the correlation between restricted parenting time by an abusive payor and his or her child support obligation. Similar to the comments made about absentee parents, comments favored a higher support order for an abusive parent, since child costs would not be absorbed during the payor’s parenting time.

Fact-specific cases – Comments were made about particular fact situations. Examples of such fact-specific situations included remarried or cohabitating child support recipients whose total household income greatly exceeded the payor’s household income, and requests for compensation for child care expenses resulting from missed parenting time.

Impact of support orders on subsequent families – Comments were made that child support orders prevent payors from having, or adequately supporting, subsequent families. Some comments urged that prior orders be reduced upon birth of subsequent children. Other comments said that subsequent children should not be used as a defense to requests for upward modification.

Impact of high income custodial parent on the support order – Comments were made that the Child Support Guidelines should provide guidance to courts that encounter the situation where the recipient is earning more than the payor. Some comments suggested that the

Guidelines should set a maximum percentage reduction for recipient's income.

Minimum support levels – Comments were made concerning whether to raise the minimum support level since the amount is not sufficient to cover a child's basic needs. Other comments concerned whether to lower the minimum amount for incarcerated payors.

Maximum income levels – Comments were made that the maximum amount should be increased to make the Child Support Guidelines applicable to a greater range of income in more cases and to reduce the amount of judicial discretion. Other comments favored a maximum income cap used in other states. Other comments favored increasing the maximum income level to reduce the inequity between married and never-married parents.

Modifications – Comments were made that the current grounds for modification, the 20% discrepancy, is not in compliance with state and federal law. Other comments favored clarifying the grounds for modification of child support within the Child Support Guidelines.

More than three children – Comments were made that the Child Support Guidelines formula should be broadened to include larger families. Comments indicated that the fourth and fifth child were often ignored by the courts applying the formula based on three children. Comments were also made concerning the method of calculating support for each additional child.

Multiple family orders – Comments were made concerning the effect of multiple families on child support obligations and whether the original order should change when one or both parents start a new family. There were requests for clarification of the order of payment obligations in arrears cases.

Over age 18 support orders – Comments were made that the Child Support Guidelines should provide greater guidance to courts on how to calculate support orders for children who are 18 years old and still attending high school. Other comments requested that the Child Support Guidelines include guidance for courts when ordering child support for children over the age of 18, making these orders more uniform across the Commonwealth.

Over- utilization of judicial discretion – Comments were made concerning the amount of discretion given to judges. Comments favored greater guidance in the Child Support Guidelines to reduce the amount of judicial discretion.

Pro se litigants – Comments were made that the Child Support Guidelines formula and narrative should be easy to understand and use, given the large number of *pro se* litigants in the Probate and Family Court.

Re-married custodial parents – Comments were made concerning the effect of second spouse income and how it may change the child support calculation or obligation.

Self-support reserve – Comments were made that the Child Support Guidelines should permit both parents to retain a minimum amount of income as a self-support reserve. Rather than using all income in the calculation of child support, some comments urged that a portion of income should be set aside to protect parents in the event of financial disaster or arrears.

Shared physical custody – Comments were made that the Child Support Guidelines are not applicable to shared physical custody cases. Further comments were made that the Child Support Guidelines should provide a method for calculating child support orders in cases where the parents share physical custody of the child.

Simplicity of calculation – Comments were made that the Child Support Guidelines should be easy to use and understand. Comments favored a simple formula in order to make the Child Support Guidelines user-friendly, especially since a large number of the litigants before the court are *pro se*.

Split physical custody – Comments were made that the Child Support Guidelines are not applicable to split physical custody cases. To broaden the application of the Child Support Guidelines, comments favored including a formula for child support in split physical custody cases.

Tax effects of orders based on gross income – Comments were made that orders should be based on after-tax, or “net”, available income. Other comments favored retention of the gross income approach, because taxes may be complicated, fluctuating, or subject to manipulation.

Utilization of judicial discretion – Comments were made that Child Support Guidelines should allow for more judicial discretion. Other comments said that there should be more uniformity, therefore less discretion.

During the course of its deliberations, Task Force members and the Administrative Office of the Probate and Family Court (“AOPFC”) provided substantial resources and materials for review. All members of the Task Force had opportunity to present data and information to the group. Data was presented concerning demographics of families receiving support, including data showing household income and numbers of children in families and data on transitional assistance benefits and household income. Child support guidelines and the approaches used in other jurisdictions were presented on a variety of issues.

The list of all items distributed at meetings appears in Appendix #2.

Legal research was done on a wide variety of issues, including the following: Internal Revenue Code provisions; child support enforcement and technical assistance which might be provided under the federal mandate for review; federal and Massachusetts child support statutory and regulatory mandates; the similarities and differences between the American Law Institute (ALI) child support formula and the Massachusetts child support formula; the Massachusetts child support principles required under federal law; requirements under federal law for a minimum order of child support; required definitions of income for child support awards under federal and state law; federal or state law authority for excluding overtime income in calculating child support obligations; availability of the dependant tax credit to non-custodial parents; federal and state law authority to adjust a child support order up or down two percent; availability of the federal child care credit to non-custodial parents; Massachusetts' statutory language on post-minority support; federal and state law authority for the health care deduction; uninsured extraordinary medical and dental expenses; attribution of income; subsequent families; the treatment of shared parenting time when calculating child support awards; the treatment of a custodial parent's income in calculating a child support obligation in several jurisdictions; the treatment of unreported income; the statutory meaning of the terms "shall," "should," and "may"; the federal history of quantitative standards and the implications of a quantitative standard for adjustment in Massachusetts; quantitative standards for adjustment in non-IV-D cases; types of military pay; and alimony payments as income under the guidelines.

In the months following the public hearings, the Task Force invited two guest speakers to educate the members on the intersection between child support and recent state and federal health insurance developments and mandates. In May 2007, the Task Force heard from Yvette Riddick of the U.S. Department of Health and Human Services, Administration for Children and Families and Eric Dahlberg of the Commonwealth Health Insurance Connector Advisory Board.

Yvette Riddick, of the Office of Child Support Enforcement, Administration for Children and Families, U.S. Department of Health and Human Services, made a presentation to the Task Force about current and expected future federal requirements concerning health insurance. She provided the Task Force with information concerning current federal regulations which require, in part, that all support orders in the IV-D program address medical support. She also provided information about proposed regulations that would require states to consider the health insurance of both parents and would redefine "reasonable cost" as it relates to health insurance. The Child Support Guidelines Task Force considered the proposed changes in federal regulations when

drafting the Child Support Guidelines.

Eric Dahlberg, from the Commonwealth Health Insurance Connector Advisory Board, made a presentation to the Task Force concerning state mandates regarding health insurance, including the new mandatory health insurance law. He explained how the law works, how it is enforced, and the options available for waiver. The Child Support Guidelines Task Force considered the Massachusetts health insurance law when drafting the Child Support Guidelines.

C. Deliberations Procedures

After the presentations about health insurance, the Task Force began its substantive considerations. The Task Force utilized both formal and informal mechanisms and procedures. Trial Court personnel took detailed minutes of each meeting. Minutes were always provided to members who had opportunity to review and suggest revisions prior to approval and adoption. Formal votes were taken on all proposals made by members, including whether to adopt or amend current guidelines text. Informal “sense of the Task Force” votes were often taken in order to determine in which direction the Task Force should proceed. On several occasions, formal votes were reconsidered at the request of one or more Task Force members.

To organize its process, the Task Force considered each issue in the order in which the issue appears in the text of the current Child Support Guidelines. The Task Force painstakingly discussed the guidelines text, line-by-line and paragraph-by-paragraph. A formal vote was taken on each provision, to determine whether the majority thought the provision should be retained or revised. All members had opportunity to offer motions for consideration, and the Task Force determined to follow *Robert’s Rules of Order* requiring that, before each vote there be a motion and second, followed by opportunity for discussion.

After analyzing the text, the Task Force moved to the difficult work of devising a formula and the associated support percentage tables. The Task Force collectively considered calculations based on evolving formulas and percentage tables in “real time”. Many formulas and percentage tables were applied to literally hundreds of hypothetical fact patterns. The Task Force rejected several formulae and percentage variations after the results proved unfair or unworkable, even though the ideas behind those formulas or percentages had been intuitively appealing to the members. Moreover, some principles that the Task Force had adopted by earlier votes resulted in unbalanced hypothetical orders; these unworkable principles were also revised on subsequent reconsideration votes.

The Task Force worked for approximately 15 months to devise a formula that accomplished results acceptable to all members. A sampling of results were considered with estimated tax consequences to estimate the net income available for spending in hypothetical households,¹³ although the child support guidelines remain as a calculation based on gross income. New proposed results were also compared with current guidelines outcomes.

IX. Issues and Recommendations

Significant changes to the Child Support Guidelines have been recommended, but the recommendations must be read as a whole. Some of the changes have been made simply to clarify; others reflect a change in policy or recognition of current economic conditions or societal changes. In carrying out its charge, the Child Support Guidelines Task Force was motivated by, and responded to, requests for simplification, clarification, and specificity in areas not previously addressed. Since the basic format of the text of the Child Support Guidelines remains the same, caution is urged in viewing the changes selectively, without consideration of the changes as a whole. It would be misleading to isolate sections of the Child Support Guidelines without recognition of the interrelated effects of the various provisions of the Child Support Guidelines. Some word changes intend substantive changes; some changes were merely stylistic.

The recommendations are set out in detail below. Rationale and Task Force commentary are also provided so that the reasoning of the Child Support Guidelines Task Force will be understood. The Task Force recommendations and the sections of the current Child Support Guidelines that have been changed are as follows:

1. Preamble

The modification provision has been moved from the introductory section to its own new separate sections (section III).¹⁴ The deviation criteria also have been moved to a separate section (section IV). A sentence has been added to clarify that orders less than three years old may require a showing of a change in income or other circumstances warranting a modification, but that orders at least three years old shall be modified based on the guidelines without the need to show a change in circumstances.

¹³ There was little support on the Task Force for basing orders on net income, although this was suggested and discussed. All formulas the Task Force considered were based on gross income.

¹⁴ New modification provisions and the rationale for those provisions appear at page 45 of this report.

2. Principles

The principles were refined and clarified. The reasons for making these changes were to update the principles and eliminate ambiguity. The Child Support Guidelines Task Force eliminated the terms “custody” and “visitation” throughout the Child Support Guidelines. Importance, availability, and cost of health insurance coverage for the child were added to the Child Support Guidelines principles.

RATIONALE: The words “custody” and “visitation” were changed because these words do not adequately recognize the roles of parents in the lives of their children. The terms “obligor” and “obligee” have been replaced with “payor” and “recipient”. For coordination with G. L. c. 119A, and other statutory provisions relating to child support, the term “payor” shall mean the same as the statutory term “obligor” and the term “recipient” shall mean the same as the statutory term “obligee”. A change was made to recognize the increased cost of health insurance as a percentage of family income and new state and federal mandates for medical insurance coverage.

3. Income definition

All changes to the income definition section (section I of the Guidelines) were for the purpose of clarification. In particular, the new Child Support Guidelines clarify existing law that, on the one hand, excludes a child’s disability benefit from a party’s income, while, on the other hand, includes dependency benefits derived from the parent’s disability or social security benefits.¹⁵ Income of a non-parent guardian is expressly *per se* excluded.

The Child Support Guidelines Task Force provided a list of factors to assist the Court and parties in determining whether to include overtime and secondary job income. Income from secondary jobs and overtime income of either the payor or the recipient received after an order is entered is presumptively excluded in a future support order provided the secondary job or overtime income was not worked in the past.

For clarification, the new Child Support Guidelines explain that gross income from self-employment and similar business endeavors is defined as “gross receipts minus ordinary and necessary expenses required to produce income.”

The new Child Support Guidelines provide some guidance regarding the adjustment of unreported income to account for taxes not paid.

¹⁵ A footnote in the Child Support Guidelines explains that dependency allotments are included in income for purposes of the child support calculation, in accordance with Rosenberg v. Merida, 428 Mass. 182 (1998).

The addition of a category for “any other income or compensation” clarifies that the income definition list is not intended to be exhaustive.

RATIONALE: Comments were made concerning the lack of consistency in treatment of different forms of income and indicated some confusion concerning the method for calculating self-employment income. The Child Support Guidelines Task Force expects the definition of gross self-employment income to help resolve these problems.

In direct response to public comment, the Child Support Guidelines Task Force includes the list of factors to be considered in determining what circumstances warrant an inclusion of overtime and secondary job income and to what extent secondary job income and overtime income should be considered. The list of factors regarding overtime and secondary job income is intended to clarify that inclusion or exclusion of overtime and secondary job is not automatic. Careful case-by-case analysis should precede inclusion or exclusion of this income.

The presumptive exclusion of certain secondary job and overtime income was added to allow both parents, after an order is entered, to supplement their income by way of a secondary job or overtime. Such additional effort should inure to that parent’s benefit, and to the benefit of the child(ren), when they are with that parent.

4. Relationship to alimony

As provided under the current Child Support Guidelines, the new text provides that a portion or all of a child support award may be paid as alimony. The parties must submit the necessary calculations for consideration by the Court. Prior language providing that the standard of living of the child may not be diminished by the characterization of support as alimony was edited for clarification. The new language expressly states that the net after-tax amount of child support characterized as alimony must be no less than the amount of child support that the Court would have ordered.

RATIONALE: These Child Support Guidelines have been developed with the understanding that child support is non-deductible by the payor and non-taxable to the recipient pursuant to I.R.C. § 262. As continues to be the case, however, Section II(A) of the proposed Child Support Guidelines permits the Court to decide that any order be denominated, in whole or in part, as tax-deductible alimony without it being deemed a deviation, provided the tax consequences are considered in determining the order and the after-tax support received by the recipient is not diminished.

The Child Support Guidelines Task Force suggests that the Court give due consideration

to allocating some, or perhaps all, of the support order as deductible alimony and/or unallocated alimony and child support, especially in cases involving parties with high levels of income. By designating some, or all, of an obligor spouse's support obligation as tax-deductible to the payor and a taxable payment to the recipient, a greater portion of the family's collective income may be shifted into a lower income tax bracket. Consequently, tax-deductible support payments may permit a significant tax benefit at a time when the family is, in all likelihood, facing increased expenses as each parent establishes an independent household and the parties necessarily incur duplicative living expenses. Failing to allocate support obligations as tax-deductible payments may result in a loss of these potential tax savings.

Whenever considering an allocation of support payments as being tax-deductible, the parties should be mindful that the Court is not obligated to consider the tax consequences of its support orders unless such consequences have been brought to the Court's attention via reasonably instructive evidence bearing on the tax issues present in the particular case. Fechtor v. Fechter, 26 Mass. App. Ct. 859 (1989). Therefore, the parties are instructed to familiarize themselves with the applicable provisions of I.R.C. § 71, which provides specific rules that must be followed in order to fashion support orders that will be deemed tax-deductible under the Internal Revenue Code.

The language permitting child support to be allocated as alimony is especially important because the Child Support Guidelines Task Force recommends raising the presumptive minimum amount of gross income to which the Child Support Guidelines apply from \$100,000 for individuals and \$135,000 combined income to \$250,000 combined gross income. (See section 6 of this report, below). The Task Force recognizes that the expanded scope of combined family income covered by the new guidelines may result in fewer alimony awards. However, alimony should be considered in many cases to maximize spendable after-tax income.

5. Claims of Personal Exemptions for Child Dependents

The Child Support Guidelines Task Force recommends that this paragraph remain the same. See section II B of the proposed Guidelines.

RATIONALE: After extensive debate, the Child Support Guidelines Task Force found that the language employed in the prior version of the Child Support Guidelines is clear, comprehensive, and to the point. There were no reasons presented that justified changing the language as it exists. This was not a topic addressed in public comments.

6. Minimum and Maximum Levels

After extensive discussion, the Child Support Guidelines Task Force determined that the minimum \$80 a month order should not be changed. See section II C of the proposed Guidelines.

The Child Support Guidelines Task Force recommended, after very lengthy debate, to increase the presumptive maximum income to which the child support guidelines should apply from \$100,000 per year for the payor's income or \$135,000 per year for the parties' combined income to \$250,000 per year in combined income.

The Child Support Guidelines Task Force recommends eliminating the \$20,000 custodial parent disregard. Due to the elimination of the disregard, the Child Support Guidelines Task Force adjusted upward the percentage tables at the lower income ranges.

RATIONALE: Although no change is made to the minimum order, the Child Support Guidelines Task Force recognized that the amount of the minimum order without other income is insufficient to meet the support needs of the child. The Child Support Guidelines Task Force also recognizes that there is value in requiring every parent to financially support his or her children, even if only with a minimum amount.

The Child Support Guidelines Task Force discussed at length whether a lower order should apply to incarcerated payors. The Child Support Guidelines Task Force rejected that proposal as unfair to working payors. The Child Support Guidelines Task Force determined that it was inappropriate public policy to treat incarcerated individuals more favorably than other low income payors. However, incarceration may be a deviation factor under some circumstances.

The Child Support Guidelines Task Force decided to abolish the two-tiered presumptive maximum income approach, whereby there was one presumptive maximum income amount for payor's income (\$100,000) and a different presumptive maximum amount for combined income (\$135,000). Since the two-income level approach was promulgated in the 2002 revisions, there appears to have been no consensus about how the presumptive maximum should operate. Comments were made concerning the confusion generated by this two-tier arrangement.

Over the course of two meetings, the Child Support Guidelines Task Force engaged in lengthy debate before voting to increase to \$250,000 the combined maximum income on which child support guidelines should apply. The reasons for extending the scope of income included in the formula were to provide predictability in higher income cases, to address the potential support disparity between children of never-married parents and divorcing parents, to apply to a

larger proportion of cases, and to better reflect current ranges of income. The Task Force also considered that guidelines in a number of other states are applicable to income at the higher level. The Child Support Guidelines Task Force recognized that for families with income above the presumptive maximum, an award of alimony is available as additional support for the children of divorced or divorcing parents. However, this same allocation is not available to children of never-married parents. There appeared to be county-to-county disparity in actual awards of child support for children of higher income never-married parents.

The Child Support Guidelines Task Force selected \$250,000 as the presumptive income on which child support should be awarded because that amount is consistent with presumptive applicable combined income amounts in other states which have cost of living data similar to Massachusetts. The Child Support Guidelines Task Force received many comments urging that the existing \$100,000 - \$135,000 presumptive limits did not provide sufficient child support when compared to available income in high income cases.

The Child Support Guidelines Task Force cautions that basic order amounts based on the new tables presume that the award will be allocated as all child support, which is contrary to present practice in some divorce cases. It remains the responsibility of the parties to present tax evidence and analysis to determine whether it is in the best interests of the child to provide more available after-tax income to the family by allocating some or all of a child support award as alimony.

As originally promulgated in 1989, the Child Support Guidelines provided that a portion of the custodial parent's income "up to a maximum of \$15,000 (increased to \$20,000 in 2002)" should be disregarded in cases where the custodial parent "chooses to work" in order "to maintain a domicile and reasonable standard of living for the minor children." In practice, however, the disregard was applied to all cases, and always at the maximum level.

Extensive commentary from the public and the bar during the hearings and throughout the review process concerned the perception that custodial parents received advantageous treatment under the Child Support Guidelines and that the non-custodial parents' needs to provide a household for their children were undervalued. Comments indicated the existence of a perception that the disregard discourages custodial parents from earning more than the disregard amount, rather than encouraging custodial parents to re-enter the workforce, as it was designed to do. No objective data confirms the accuracy of this belief. However, the Child Support Guidelines Task Force noted that this perception often causes animosity between parents and

diminishes respect for the Child Support Guidelines and the courts. For these reasons, there was strong consensus to eliminate the disregard, provided that the economic circumstances of children were not adversely affected.

The Child Support Guidelines Task Force observed that the disregard provision had little effect on actual child support calculations where the recipient parent earned substantially more than \$20,000. However, where the recipient parent earns less than \$20,000, or little more than that amount, elimination of the disregard would drastically reduce child support unless the Child Support Guidelines Task Force made other adjustments to the percentage table. The Child Support Guidelines Task Force, therefore, determined to recognize all income in the first instance, and to adjust upward the basic order amounts at low income levels to insure that eliminating the disregard would not harm the Commonwealth's neediest children. The Child Support Guidelines Task Force intends that children in families at the lowest income levels will receive at least as much child support under the new formula as they would have under the existing Child Support Guidelines.

7. Custody and Visitation

The heading for this paragraph has been renamed "Parenting Time" (see section II D of the proposed Guidelines), and a number of other changes have been recommended. The Child Support Guidelines Task Force recommends eliminating the reference to "Traditional Custody and Visitation Arrangements." The basic Child Support Guidelines formula is based upon the child(ren) having a primary residence with one parent, and spending approximately one-third of the time with the other parent. The proposed Child Support Guidelines retain the existing provision that shared and split physical custody require a different approach, but provide guidance in how to determine the child support award in those cases. The language that recommends that courts consider extraordinary travel expenses incurred by the non-custodial parent when exercising visitation has been moved to a new section entitled "Deviations". (See section 15 of this report, below).

RATIONALE: The phrase "traditional custody and visitation arrangements" fails to adequately recognize the active participation of two parents in many families. Moreover, in practice, visitation and custody labels may be polarizing and may discourage active involvement by both parents, which is generally in the children's best interest.

The basic proposed Child Support Guidelines formula applies to children having a primary residence with one parent, and spending approximately one-third of the time with the

other parent. In recommending the approximate one-third/two-thirds division of time for the basic formula, the Child Support Guidelines Task Force intended to capture the majority of cases, as required by federal law.

Many comments the Child Support Guidelines Task Force received from the bar, the bench and the public warned against mathematically linking the guidelines calculation to the specific number of days or nights that a child spends with each parent. The Task Force agreed with comments indicating that parents should be discouraged from litigating for additional parenting time, if contrary to the children's best interests, to achieve a greater economic benefit. There was great concern that a series of time-based formula adjustments would foster economically-driven custody litigation. The Child Support Guidelines Task Force, therefore, adopted a single adjustment for shared or split physical custody, leaving it to the parties or the Court to determine at what point in the shared time spectrum to adjust the basic formula for time sharing. The single adjustment is calculated by applying the Child Support Guidelines twice, first with one parent as the recipient using the number of children in his or her care, and second with the other parent as the recipient using the number of children in his or her care. The difference in the calculations is paid to the parent with the lower weekly support obligation.

8. Child Care Costs

The paragraph formerly entitled "Child Care Credit" has been renamed "Child Care Costs." (section II E of the proposed Guidelines) The reference to U.S.C. Section 21, I.R.C. Section 21 has been eliminated. In lieu of the Internal Revenue Code definition, the Child Support Guidelines Task Force identified specific criteria to determine whether a parent is entitled to deduct child care expenses. Child care expenses must be both "reasonable" and "necessary" for either work or work-related training. The Child Support Guidelines Task Force recommends that child care should be treated as a deduction from gross income before calculation of the child support order. Each party may deduct child care expenses, which he or she actually pays, for a child covered by the order.

RATIONALE: The paragraph title was edited in order to more accurately describe the treatment of child care expenses. In lieu of the Internal Revenue Code definition, the Child Support Guidelines now contain a broader definition of child care and permit both parents to deduct reasonably necessary child care expenses as an early step in the child support calculation.

The Child Support Guidelines Task Force observed that, in many families, both parents may incur necessary child care expenses in order to work or participate in training for work.

Work-related training child care was included in the child care definition in order to encourage parents to obtain training or education reasonably necessary to acquire gainful employment or to enhance earning capacity. The revised Child Support Guidelines recognize that such work, training or education often generates child care costs.

The tax code definition for child care was deemed too restrictive because it applies only to children under the age of 13, limits the dollar amount, and covers only licensed providers with a tax identification number. In reality, many families depend on paid neighborhood providers or babysitters to provide child care and some child care, for example, transportation services, may be necessary for children 13 or older. The Task Force intends this section to cover such expenditures if they are both “reasonable” and “necessary” under the totality of the circumstances.

9. Age of the Children

The 10% support increase at age 13 was eliminated. The Child Support Guidelines Task Force recommends that children over age 18 who are still attending high school should be presumptively entitled to a continuation of the child support as if the child was under the age of 18 (See section II F of the proposed Guidelines).

Application of the Child Support Guidelines for support of children over age 18 and no longer attending high school remains discretionary; however, the Child Support Guidelines Task Force recommends specific factors to be considered in the exercise of the Court’s discretion. These factors include: the reason for the continued residence with and dependence on the recipient, the child’s academic circumstances; the child’s living situation; the parents’ available resources; costs of post secondary education for the child and the allocation of those costs between the parents; and the availability of financial aid.

RATIONALE: The Child Support Guidelines Task Force eliminated the age 13 “add-on” because the Child Support Guidelines Task Force was unable to discern any clear economic relationship between children’s ages and the expenditures for their benefit as a percentage of income.

Significant public commentary requested guidance for children over age 18. The existing Child Support Guidelines provide that child support for children over 18 is discretionary in all cases. However, comments indicated there is inconsistency in the application of the Child Support Guidelines for children over age 18 throughout the Commonwealth. Some courts extend full child support to unemancipated children. Other courts award little or no child support in

most cases for children over age 18. The new language is intended to provide uniformity for children who are still attending high school. For post-high school children, the Child Support Guidelines Task Force stresses the need for case-by-case consideration of child support, with particular attention to the relationship between child support and post-high school education expenses, or the reason for the continued residence with and dependence on the recipient.

10. Health Insurance, Uninsured and Extraordinary Medical Expenses

The Child Support Guidelines Task Force recommends that reasonable health insurance costs be fully deducted from gross income. This provision (section II G (1) in the proposed Guidelines) replaces the existing 50% credit against a party's support obligation. Health insurance costs are specifically defined as either party's reasonable cost of individual or family insurance. However, if the Court determines that the additional cost of coverage for a person not covered by the order would unreasonably reduce the amount of child support, then some or all of such additional cost shall not be deducted. The Child Support Guidelines Task Force also added a footnote to this provision highlighting the current law regarding health insurance. The purpose of the footnote is to convey that at such time as the legislature amends the law, the Child Support Guidelines should be construed, to the extent possible, consistent with any amendments to Massachusetts law and federal regulations.

The reasonable cost of dental/vision insurance actually paid by a party for a policy covering the child(ren) may also be deducted. However, if the Court determines that the additional cost of coverage for a person not covered by the order would unreasonably reduce the amount of child support, then some or all of such additional cost shall not be deducted.

In place of the current provision that the custodial parent pay the first \$100 of routine uninsured medical and dental expenses per child per year, the Child Support Guidelines Task Force recommends that the recipient shall be responsible for payment of the first \$250 each year in routine uninsured medical, dental, and vision expenses, total, for all children covered by the order. Amounts above \$250 per year shall be allocated between the parties at the time of the order. Extraordinary uninsured medical, dental and vision expenses should also be allocated between the parties if the Court finds the services necessary and in the child's best interest.

RATIONALE: Following the presentations of experts who spoke to the Child Support Guidelines Task Force, it was determined that treatment of health insurance as a deduction rather than a credit was necessary in view of the dramatic rise in health insurance premiums and the mandatory nature of health insurance in Massachusetts. The provision crediting 50% of

insurance costs sometimes resulted in unreasonable adjustments. The majority of other states treat health insurance premiums as a deduction from income. Inclusion of the reasonable cost of individual coverage as a deduction from gross income was deemed fair by the Child Support Guidelines Task Force because health insurance is a mandatory and major expense.

The Child Support Guidelines Task Force determined to adjust the amount of the recipient's obligation from \$100 per child to \$250 for all children for out-of-pocket unreimbursed expenses because of the rising costs of "co-pays" and to reduce necessary bookkeeping and reimbursement transactions between the parties.

11. Attribution of Income

In order for the Court to attribute income to a party pursuant to the Child Support Guidelines (see section II H of the proposed Guidelines), the Court must first make a finding that the party is capable of working and is either unemployed or underemployed. In making this finding, the Court shall consider a non-exclusive list of factors. These factors include the education, training, health and past employment history of the party, and the age, number, needs and care of the children covered by the order. If the Court makes a determination that either party is earning less than he or she could through reasonable effort, the Court should consider potential earning capacity rather than actual earnings in making its order. The Child Support Guidelines Task Force's use of the words "shall" and "should" is deliberate. The use of the word "may" in the existing Child Support Guidelines was considered, debated, and intentionally eliminated. Attribution of income is intended to apply to either or both parties after careful consideration of factors specifically enumerated in the proposed Child Support Guidelines.

The provision automatically precluding attribution of income for custodial parents with children under the age of six was eliminated. In the past, the *per se* exclusion of income based on one isolated factor—i.e. the age of the child—diminished the importance of the other factors and sometimes led to unfair results. The Child Support Guidelines Task Force determined that the bright line exclusion of attribution income for children under age six was no longer valid. Children often enter school before the age of six, and depending on the circumstances, children over the age of six may require a parent to remain at home full-time.

The Child Support Guidelines Task Force inserted "care of the children" as a mandatory factor for the Court's consideration in attributing income in order to assure that deletion of the age six provision would not result in inappropriate attribution of income to full-time parents who cannot or should not be required to increase income. The Child Support Guidelines Task Force

cautions that consideration of all the attribution factors on a case-by-case basis cannot be overemphasized.

12. Other Orders and Obligations

The “Prior Orders of Support” paragraph was merged with “Expenses of Subsequent Families” in a new section entitled “Other Orders and Obligations” (see section II I of the proposed Guidelines).

The Child Support Guidelines Task Force expanded the definition of prior orders of support to include reasonable voluntary payments. “Voluntary payments of child support” is further defined to include payments made to support children who reside with a party and payments made to support children who do not reside with a party. As in the past, prior orders for spousal and child support are deductible from a party’s gross income. It is the party’s obligation to provide evidence of actual payments, whether voluntary or pursuant to court order.

Where the payments are voluntary and made to support children who do not reside with a party, the Child Support Guidelines Task Force recommends that the Court consider the reasonableness of the payments before calculating the new order. Where the payments are voluntary and made to support children who reside with the payor, the Child Support Guidelines Task Force recommends that the Court calculate a putative order for the voluntary payments and deduct the amount of the putative order from the payor’s gross income before calculating the new order.

The Task Force retained the concept that expenses of a subsequent family may be used as a defense to a requested increase in child support, but not as a reason to request a decrease in an existing order.

RATIONALE: The Child Support Guidelines Task Force recognizes that parties may have obligations to children for whom an order has not yet been set, including older or younger half-siblings. Public policy should encourage voluntary support of children for whom a party has an obligation to support. In order to recognize voluntary payments and obligations to intact families, the Child Support Guidelines Task Force devised a specific procedure consistent with Dept. of Revenue v. Mason M., 439 Mass. 665 (2003). This procedure is already used in many courts in the Commonwealth. Codification in the revised Child Support Guidelines will provide uniformity.

13. Provisions for more than three children

In response to comments that provisions be made for more than three children, the Child

Support Guidelines now provide for five children (see section II J of the proposed Guidelines). Support orders for more than five children remain discretionary, although a higher order than that which is provided for five children could be expected.

RATIONALE: Many comments requested guidance for larger families, and anecdotal evidence and data on the size of orders indicate that courts seldom order an increase in child support for a fourth or fifth child. In order to provide guidance and improve the adequacy of child support for larger families, the Child Support Guidelines Task Force recommends small, incremental adjustments for the fourth and fifth children.

“Per child” adjustments for families larger than five children received many hours of debate. Ultimately, the Child Support Guidelines Task Force determined that statistics provided by the Department of Revenue, and reports from the bar and members of the Child Support Guidelines Task Force, suggest that there are very few child support orders in the Commonwealth covering more than five children. The uniqueness of those situations requires a case-by-case analysis.

14. Other Child Related Expenses

The existing Child Support Guidelines are silent concerning the allocation of responsibility for extra-curricular or similar expenses. In response to many public requests that responsibility be defined, a new section entitled “Other Child-Related Expenses” has been added. The Child Support Guidelines Task Force identified specific expenses that may be allocated on a case-by-case basis, if the Court finds them to be in the best interests of the child and affordable by the parties. These expenses include without limitation extra-curricular activities, private school, post secondary education or summer camps. The new paragraph was added to clarify that such expenses are not automatically the responsibility of one or both parents.

The Child Support Guidelines Task Force discussed adding language to this paragraph to remind everyone that the purpose of child support is to provide for the day-to-day needs of children, such as food, clothing, housing, and transportation. Task Force members considered whether the recipient should have to render a periodic accounting of child support to the payor but declined to add such language. The Child Support Guidelines Task Force determined that requiring an accounting of child support would probably increase animosity between parents, which would not be in the child’s interest.

15. Deviations

A new paragraph was added to provide consistency in determining whether deviations are

warranted. As in the past, the Court must enter four specific written findings before deviating from the Child Support Guidelines. These findings are: 1) the amount of the order that would result from application of the Child Support Guidelines; 2) a finding that the Child Support Guidelines amount would be unjust or inappropriate under the circumstances; 3) the specific facts of the case which justify departure from the guidelines; and 4) that such departure is consistent with the best interests of the child.

The Child Support Guidelines Task Force identified specific factors that may support a judicial finding for deviation. The list was developed throughout the entire review process. In each instance where specific concerns were raised about the fairness of applicability of general rules to specific outlier cases, a notation was made to consider a deviation factor for that particular rule. Our list could not be exhaustive and parties are encouraged to present their case for deviation where appropriate.

RATIONALE: The Child Support Guidelines are intended to apply without deviation to most families and the vast majority of cases based on the most common facts. The Child Support Guidelines Task Force recognizes the need, however, to balance ease of administration with fairness. In some cases, the specific circumstances will inevitably require deviation and where appropriate, deviation, should be encouraged.

16. Modifications

The Child Support Guidelines Task Force added a separate new section III addressing modifications. The Child Support Guidelines Task Force recommends that a child support order may be modified if any of the following circumstances exists: the existing order is at least three years old; or health insurance previously available at reasonable cost is no longer available (or if available but not at reasonable cost); or health insurance not previously available to a party at reasonable cost has become available; or any other material change in circumstances has occurred. The new Child Support Guidelines eliminate the threshold of a 20% discrepancy between the old order and the new order.

The Child Support Guidelines Task Force has added language to guide courts when faced with circumstances in which a party seeks to modify a support order that was not based on the Child Support Guidelines when originally ordered. In these circumstances, the Court is to apply the Child Support Guidelines to calculate the modified support order, unless the facts that gave rise to the prior deviation still exist, deviation continues to be in the child's best interest, and the Child Support Guidelines amount would be unjust or inappropriate under the circumstances.

RATIONALE: The former requirement of a 20% discrepancy is inconsistent with federal requirements and state law permitting modification. Federal law requires review in IV-D cases every three years. In order to treat IV-D and other cases uniformly, the Child Support Guidelines Task Force adopted a provision permitting modification of any order that is at least three years old.

The Child Support Guidelines Task Force carefully balanced the competing considerations set forth below in determining to limit modifications upon promulgation of the new Child Support Guidelines. The decision to limit modifications upon immediate promulgation of the Child Support Guidelines was based upon: presumptive nature of Child Support Guidelines; anticipated initial burden on the Courts when new Child Support Guidelines are promulgated; predictability for families with economic commitments based on existing orders; due process; and fairness to litigants. The Child Support Guidelines Task Force determined that following federal statutory requirements allowing modification of any order three years old or older was fair to the litigants and would provide reasonable management of the court docket.

17. Child Support Obligation Schedule

The Task Force recommends a complete revision of the Child Support Obligation Schedule. The new percentage Table A is based on the combined incomes of both parents. Nine income range categories are recommended, where the existing guidelines table contained only four income ranges. In summary, the minimum order for one child remains at \$80 per month. Beginning with combined income levels of \$5,252 per year and up to a presumptive maximum of \$250,000 combined annual income, recommended child support percentages range in an arc from 21 percent of the combined income at the lowest income levels, to 26 percent of incremental income, gradually declining to a recommended 15 percent at the highest income levels (see Table A.)

The specific recommended income range categories, along with the corresponding weekly child support amounts (for orders covering one child) are as follows:

- \$100 a week (less than \$5,200 in combined gross annual income): a discretionary order, no less than \$80 per month
- \$101 to \$200 a week (\$5,252 to \$10,400 combined gross annual income): 21 percent of combined gross income

- \$201 to \$320 a week (\$10,452 to \$16,640 combined gross annual income): 24 percent of combined gross income
- \$321 to \$500 a week (\$16,692 to 26,000 combined gross annual income): \$77 plus 26 percent of income above \$320 per week
- \$501 to \$1,000 a week (\$26,052 to \$52,000 combined gross annual income): \$124.00 plus 25 percent of income above \$500 per week
- \$1,001 to \$1,500 a week (\$52,052 to \$78,000 combined gross annual income): \$249.00 plus 22 percent of income above \$1000 per week
- \$1,501 to \$2,500 a week (\$78,052 to \$130,000 combined gross annual income): \$359.00 plus 19 percent of income above \$1500 per week
- \$2,501 to \$3,500 a week (\$130,052 to \$182,000 combined gross annual income): \$549.00 plus 17 percent of income above \$2500 per week
- \$3,501 to \$4,808 a week (\$182,052 to \$250,000 combined gross annual income): \$719.00 plus 15 percent of income above \$3500 per week

The Task Force recommends eliminating the existing provision permitting the Court to increase or decrease the support amount by two percent without deviating from the guidelines.

The recommended new Child Support Guidelines calculation contains no “age add-on”. A new Table B, entitled “Adjustment for Number of Children” expresses the adjustment for orders covering multiple children as a multiple of the recommended first child order. For a second child, the adjustment is 1.20, or 20 percent higher than the single child order would be. Third, fourth and fifth child order adjustments are 1.27, 1.32, and 1.35 factors, respectively. Thus, an order covering five children should be 35 percent higher than an order covering one child under the same facts and circumstances.

In accordance with the Trial Court’s past convenient practice of publishing a Child Support Chart that calculates the dollar orders at incremental income amounts, the new Guidelines include a similarly-constructed Child Support Guidelines Chart. Litigants, lawyers, judges and probation officers can use this tool to determine the weekly child support amount based on combined weekly gross income, after deduction of allowable medical and dental/vision insurance, and before adjustment for multiple children. Both income amounts and resulting support amounts have been rounded to the nearest dollar. The effect of rounding support amounts creates small gaps (usually about \$4 per week) between income levels listed on the

Child Support Guidelines Chart. In creating the Child Support Guidelines Chart, all income and support amounts were rounded such that a user who seeks the support amount for an income amount falling between the two listed income numbers should always utilize the highest income number that falls below actual combined gross income.

RATIONALE: The Task Force’s recommendation moves Massachusetts from its position as one of the minority of states that does not base its child support formula on all income of both parents. As a new “income shares” state, Massachusetts will join the majority of U.S. jurisdictions.

The growing national trend to income shares is based on a general recognition that children’s expenses are based on family lifestyle. In nearly all families, lifestyle depends on all available income. Two working parents are common today in single household families. They are even more common in two household families. Income of two adult workers is often necessary to maintain the family lifestyle. The income shares model recognizes that necessity.

The Task Force experimented with fewer income percentage categories, in which the income ranges for each category were broader than the recommendations set forth in Table A. Results were unsatisfactory, partly because the Task Force determined to cover income up to \$250,000. The Task Force determined that the number of categories could be easily expanded without complicating the calculation process.

Early in the process of Task Force meetings, the Task Force reached its decision to increase to \$250,000 the income covered by the guidelines. At the same time that the Task Force determined to raise the presumptive maximum income, the group recognized that economic data suggests that higher income families may spend a lower percentage of available income on children. The decision to arc the percentage table, and to peak the percentages at \$26,000 combined annual income, reflects, first, the fact that low income families with children generally must spend a high percentage of income to meet children’s needs; second, the relatively low peak percentage income amount lessens the impact of elimination of the disregard at low income levels. Lower support percentages at the highest included income levels reflect the fact that there is more discretionary income available for parity of the second household and for adult needs. The availability of additional support at higher income levels in the form of alimony for former spouses is another rationale for lower child support percentages for high income families.

The 2% discretionary increase or decrease was eliminated because comments and Task Force members’ experiences suggested that this provision was seldom used. Where it was

applied, the Task Force felt that deviation would be more appropriate in view of the new Deviation section and the necessity of findings before deviation.

Age add-ons were eliminated because of the lack of economic data to support them. Adjustments for additional children were raised for the second child to recognize that a second child usually costs incrementally more than the existing incremental adjustment. Third, fourth and fifth children are incrementally, relatively, less expensive because of economies of scale.

The Task Force notes that the economic studies on which many states base their child support guidelines were not dispositive. However, the studies were informative, and the Task Force compared preliminary calculations with the studies, with the existing guidelines, and with our collective experience. Ultimately, the results recommended in the new schedule are consistent with the ranges recommended by the economic models.

18. Child Support Guidelines Worksheet

The Task Force recommends a complete revision of the Child Support Guidelines Worksheet. Consistent with the premise that both parents contribute to support of the children as they have available income, both parents' income information appears in parallel columns at the top of the page. The Worksheet shows each parent's deductible expenses for child care costs paid or children covered by the order, health insurance costs paid, dental/vision insurance cost paid and other support obligations paid. Resulting calculations in each parent's column is the "Available Income". Recipient's available income plus payor's available income equals "Combined Available Income".

Using Combined Available Income, one can calculate the child support order for one child using the information listed on Table A at the left bottom corner of the Worksheet. For convenience, the results of that calculation, rounded to the nearest whole dollar of weekly child support, are set forth on the Child Support Guidelines Chart, published as part of the new Guidelines. The Child Support Guidelines Chart is a tool that will assist the Court, litigants, lawyers, and probation department personnel by eliminating manual calculation of the one-child order. While not necessary to calculate support, use of the Child Support Guidelines Chart tool will speed calculation and minimize arithmetical error.

The lower right corner of the Worksheet contains Table B: "Adjustment for Number of Children" for use in calculating orders that cover two to five children. Multiplying the one-child order by the appropriate factor for the number of children covered by the order yields the

“Combined Support Amount.”

To determine the recipient’s share of the “Combined Support Amount”, one divides the recipient’s available income by the “Combined Available Income”, resulting in the recipient’s percent of “Combined Available Income”. Recipient’s percentage share is converted to a dollar amount by multiplying recipient’s percentage by the “Combined Support Amount”. The Child Support Guidelines amount, “Payor’s Weekly Support Amount” is the Combined Support Amount minus the recipient’s share, expressed in dollars.

Lines 2(g) and 2(h) were added to the worksheet to avoid orders that are higher than intended in a discreet range of circumstances, particularly in cases in which payors have significantly lower incomes than recipients. This acts as a safeguard to insure that the amount of support does not exceed a certain percentage of the payor’s income.

RATIONALE: In developing the new Child Support Guidelines Worksheet, the Task Force was guided by these principles: ease of calculation, brevity, and a user-friendly format that minimizes the likelihood of either confusion or arithmetical error. The Task Force’s intent is that the Worksheet recognizes each parent’s obligation and ability to support the child(ren) covered by the order and walks the user through the necessary calculations in a simple one-page, one-sided format.

The Child Support Guidelines Task Force has suggested a delay in the effective date of these revisions, to allow sufficient time for educational programs. The Child Support Guidelines Task Force also supports an interim period of implementation in order to work out any unforeseen ramifications or consequences.

X. Conclusion

These are broad based recommendations, and we are mindful of their consequences. We have met the federal requirements, and have responded to public commentary, cognizant of the need to update Child Support Guidelines for reasons of economic and societal changes of the last two decades. Our recommendations value the involvement and importance of both parents. We have taken into consideration the increase in health insurance costs, the new mandate in the Commonwealth for individual coverage, and tax considerations. Our recommendations will provide greater guidance for the circumstances of many more families in the Commonwealth.

For those cases where the circumstances rebut the presumption that the amount calculated under the Child Support Guidelines should apply, we have set forth considerations and standards for deviation. Provisions have been made for previously-unaddressed concerns including families with more than three children, college expenses and children over the age of 18. We have attempted to maintain the simplicity of the existing scheme, and provided explanation, rationale and purpose to assist attorneys and litigants in understanding and using the guidelines. We intend these guidelines to preserve judicial discretion, but to provide additional guidance to our Courts in how to utilize that discretion.

XI. APPENDICES

Appendix #1 Child Support Guidelines

Appendix #2 List of items distributed at Task Force meetings

Minority Report

