Imputing Parental Income in Child Support Determinations: What Price For a Child's Best Interest?

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IMPUTING PARENTAL INCOME IN CHILD SUPPORT DETERMINATIONS: WHAT PRICE FOR A CHILD'S BEST INTEREST?

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When a marriage is intact, parents provide for their children, financially and emotionally, as they see fit. A parent's choice of employment, or a parent's decision not to work outside the home, is a uniquely private matter that is based, in part, upon the parents' assessment of their children's needs. Absent evidence of abuse or neglect, such parental determinations are beyond the reach of the court. Following dissolution of a marriage, however, the courts assume a duty to intervene on behalf of children, whose youth and dependence warrant special protection. This parens patriae interest is evident in the judiciary's responsibility for determining parental obligations for child support following divorce. The purpose of a court's child support order is to protect the welfare of the child until the child reaches the age of majority. Therefore, courts issue

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1. See Roe v. Doe, 272 N.E.2d 567, 570 (N.Y. 1971) (finding that "[i]t is the natural right, as well as the legal duty, of a parent to care for, control and protect his child from potential harm . . . and absent a clear showing of misfeasance, abuse or neglect, courts should not interfere with that delicate responsibility").

2. See Brody v. Brody, 432 S.E.2d 20, 22 (Va. Ct. App. 1993) (noting that in an intact family, the parents are free to make employment decisions, provided that the children's "basic needs" are met); see also Auman v. Auman, 464 S.E.2d 154, 156 (Va. Ct. App. 1995) (commenting that an intact family functions as a unit in which family decisions, including career choices, are made by consensus).


5. See 42 U.S.C. § 667(a) (1994) (establishing a requirement for state guidelines for child support awards); see also infra note 8 (listing examples of state child support statutes).

6. See, e.g., CAL. FAM. CODE § 4053(a) (West 1994) ("A parent's first and principal obligation is to support his or her minor children according to the parent's circumstances

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a child support decree upon dissolution of marriage that is subject to
modification by the court if warranted by the changed circumstances of
either parent.\footnote{7} In an effort to achieve uniformity and consistency in these child
support determinations, each state has established guidelines that prescribe
the method for calculating monetary child support obligations.\footnote{8} Child
support calculations require an evaluation of parental earning capacity,
to the extent consistent with children’s best interests.\footnote{9} In seeking this
balance, state courts agree generally with the opinion voiced by a Maryland appellate court, which found that “\text{the law and policy of this State is that the child’s best interest is paramount}.”\footnote{10} While the virtue of this
sentiment is unassailable, a precise definition of “best interest” is lacking.\footnote{11} It is useful to apply the guidance of Maryland’s Court of Special Appeals, which commented that “\text{the best interest of the child is . . . not considered as one of many factors, but as the objective to which virtually all other factors speak}.”\footnote{12}

A commonality in the states’ approaches to achieving this “best interests of the child” objective lies in the child support guidelines’ focus on

and station in life.”); Goldberger v. Goldberger, 624 A.2d 1328, 1333-34 (Md. Ct. Spec. App. 1993) (“\text{Parenthood is both a biological and a legal status. By nature and by law, it confers rights and imposes duties. One of the most basic of these is the obligation of the parent to support the child until the law determines that he is able to care for himself . . . .}” (quoting Carroll County v. Edelman, 577 A.2d 14, 23 (Md. 1990))); 24A AM. JUR. 2D Divorce and Separation § 1040 (1998) (setting forth the principle that the court should consider the standard of living that the child would have had if the family had remained intact).

7. \textit{See} HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 18.2, at 366 (2d ed. 1987) (emphasizing that modification proceedings require proof of a permanent, rather than temporary, change in circumstances that is relevant to a determination of the appropriate level of child support).

8. \textit{See}, e.g., \textit{CAL. FAM. CODE} § 4055 (West 1994); \textit{IND. CODE ANN.}, § 31-16-6-1 (Michie 1997); \textit{LA. REV. STAT. ANN.}, § 9:315 (West 1991); \textit{MD. CODE ANN., FAM. LAW} § 12-201 (1999); \textit{VA. CODE ANN.} § 20-108.2 (Michie Supp. 1998); \textit{see also infra} note 26 (discussing the goals of the child support guidelines).


11. \textit{See} Wagner v. Wagner, 674 A.2d 1, 19 (Md. Ct. Spec. App. 1996) (offering, in the context of a child custody case, a litany of terms that demonstrate the ultimate importance of children’s best interests). Citing several other court opinions, the \textit{Wagner} court described children’s best interests as being of “paramount concern,” “transcendent importance,” and as the “ultimate test” and “determining factor.” \textit{Id.} Whereas the frequent use of the term “best interests of the child” would indicate that it is a term of art, the sixth edition of \textit{Black’s Law Dictionary} contains no definition of, or reference to, the phrase. \textit{BLACK’S LAW DICTIONARY} 160-61, 812-14 (6th ed. 1990).

financial considerations.\textsuperscript{13} Giving concrete form to the elusive concept of “best interests,” child support calculations depend primarily upon the parents’ income.\textsuperscript{14} If the court determines that either parent’s actual income does not reflect his or her true earning capacity, however, the court may impute additional income to that parent.\textsuperscript{15} Typically, this imputation of income occurs when the court determines that a parent has voluntarily reduced his or her actual income.\textsuperscript{16}

Appellate courts afford a presumption of correctness to calculations that result from a court’s application of state child support guidelines.\textsuperscript{17} Thus, courts deviate from the resulting calculations only under special circumstances.\textsuperscript{18} With limited exceptions, courts have held that a parent’s decision to reduce or eliminate income in order to care for his or her

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\begin{enumerate}
  \item See supra note 8 (providing examples of child support guidelines); see also infra note 15 (providing examples of statutes that calculate child support based on actual and imputed parental income).
  \item See, e.g., LA. REV. STAT. ANN. § 315.2.D (West 1991) (requiring that the court determine the basic child support obligation “by using the combined adjusted gross income of the parties and the number of children involved in the proceeding”); MD. CODE ANN., FAM. LAW § 12-204(a)(1) (1999) (mandating that “[t]he basic child support obligation shall be divided between the parents in proportion to their adjusted actual incomes”); see also infra notes 45-46 and accompanying text (discussing the court’s general disregard for a distinction between the custodial and non-custodial parent when making child support determinations). But see infra note 35 (discussing the Percentage of Income model of child support, under which only the income of the non-custodial parent is considered). Note also that the Maryland statute, as interpreted by that state’s intermediate appellate court, “does not provide for imputation of a new spouse’s income to a parent upon remarriage.” See Moore v. Tseronis, 664 A.2d 427, 431 (Md. Ct. Spec. App. 1995).
  \item See, e.g., CAL. FAM. CODE § 4058(b) (West 1994) (“The court may, in its discretion, consider the earning capacity of a parent in lieu of the parent’s income, consistent with the best interests of the children.”); LA. REV. STAT. ANN. § 9:315(6)(a)-(b) (West 1991) (defining income as “[a]ctual gross income of a party, if the party is employed to full capacity; or . . . [p]otential income of a party, if the party is voluntarily unemployed or underemployed”); MD. CODE ANN., FAM. LAW § 12-201(b) (1999) (“‘Income’ means: the (1) actual income of a parent, if the parent is employed to full capacity; or (2) potential income of a parent, if the parent is voluntarily impoverished.”).
  \item See infra Part I.B.2 (discussing the affect of voluntary reductions in income on child support determinations).
  \item See 42 U.S.C. § 667(b)(2) (1994) (establishing a rebuttable presumption that the child support award that results from application of state guidelines is the correct amount of child support); see also infra note 29 and accompanying text (describing the Family Support Act of 1988, which establishes that the calculations resulting from application of child support guidelines are presumptively correct).
  \item See 42 U.S.C. § 667(b)(2) (permitting deviation when application of the guidelines would be “unjust or inappropriate”); CAL. FAM. CODE § 4053(k) (West 1994) (permitting deviation from the guidelines only under “special circumstances”); MD. CODE ANN., FAM. LAW § 12-202(a)(2)(iv)(2)(C) (1999) (permitting deviation from the guidelines upon a demonstration that doing so would “serve[] the best interests of the child”).
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children does not constitute a special circumstance. Instead, such a decision is simply considered a voluntary reduction in income. A parent who is found to have voluntarily reduced his or her income to provide care to his or her children is often labeled “voluntarily unemployed” or “voluntarily underemployed.” In such cases, the court may impute income to the parent in an amount consistent with the parent’s earning capacity, often without considering the relative merits of the parent’s economic and emotional contributions to the child’s welfare.

This Comment first examines relevant child support statutes and case law, focusing on the circumstances in which courts will impute income to a parent and the methods for calculating such income. This Comment then suggests that the courts are inconsistent in ascribing value to parental caregiving, resulting in the often inappropriate application of the labels “voluntary underemployment” or “voluntary unemployment.” This Comment also posits that, by focusing on parental earning capacity, courts often undervalue parents’ non-financial contributions to a child’s welfare. This Comment then asserts that imputation of income, as typically calculated by the courts, may fail in its purpose to protect children’s interests. Finally, this Comment offers recommendations for alternative approaches to the judicial management of parental wage-earning that may more fully serve the best interests of children.

I. BACKGROUND: PROTECTING CHILDREN FROM DIVORCE

A. Establishment of Child Support Guidelines

Child support determinations are within the exclusive province of state court authority. See infra Part I.D (discussing the nurturing parent doctrine exception).

But see Reuter v. Reuter, 649 A.2d 24, 33 (Md. Ct. Spec. App. 1994) (affirming the trial court’s conclusion that the custodial parent was not required to work full time in order to become self-supporting). The Reuter court stated, “we must remind ourselves of the reason why [the custodial parent] is unable to be self-supporting: her minor child - [the non-custodial parent’s] minor child - is in need of her care and attention, and she has agreed to shoulder that burden.” Id. at 34; see also infra Part I.C (discussing earning capacity).

20. See LaBass v. Munsee, 66 Cal. Rptr. 2d 393, 398-99 (Ct. App. 1997) (declining to carve out a caregiver exception to the general rule that both parents are equally responsible for the support of their children).

21. See infra Part I.B.2 (discussing the relevance of the voluntariness of a parent’s reduction in or elimination of income when determining whether to impute income to the parent).

22. See LaBass, 66 Cal. Rptr. 2d at 398 (imputing income to a mother who was unwilling to work full time). But see Reuter v. Reuter, 649 A.2d 24, 33 (Md. Ct. Spec. App. 1994) (affirming the trial court’s conclusion that the custodial parent was not required to work full time in order to become self-supporting). The Reuter court stated, “we must remind ourselves of the reason why [the custodial parent] is unable to be self-supporting: her minor child - [the non-custodial parent’s] minor child - is in need of her care and attention, and she has agreed to shoulder that burden.” Id. at 34; see also infra Part I.C (discussing earning capacity).

23. See 42 U.S.C. § 667(a) (1994) (requiring each state to establish child support
in such matters resulted, however, in significant variations in support orders for families in similar circumstances. In addition, it became apparent that children of divorced parents were not receiving adequate support. Therefore, in an effort to establish and enforce consistent child support obligations, Congress enacted the Child Support Enforcement Amendments of 1984. These Amendments require each state to establish mathematical guidelines for child support computations.


25. See Diane Dodson & Robert M. Horowitz, Child Support Enforcement Amendments of 1984: New Tools For Enforcement, 10 Fam. L. Rep. (BNA) 3051 (Oct. 23, 1984), reprinted in CHILD SUPPORT PROJECT, A.B.A., 1 IMPROVING CHILD SUPPORT PRACTICE i-3 (Diane Dodson & Sherry Green de la Garza compilers, 1986) (describing Congress’ motive for entering the field of family law as a fiscal one, due to the significant cost to the federal government, under the Aid to Families with Dependent Children program, resulting from absent parents’ failures to support their children); see also CLARK, supra note 7, § 18.1, at 347 (noting the general inadequacy of child support awards).

26. See 98 Stat. 1305, 1321 (1984). At least one commentator defines the purpose of the law as follows: “By limiting the discretion of trial judges, the guidelines were intended to have the following effects: (1) to bridge the “adequacy gap” in child support awards; (2) to improve the consistency of awards ordered; and (3) to improve the efficiency of court award processes.” Karl A. W. DeMarce, Devaluing Caregiving in Child Support Calculations: Imputing Income to Custodial Parents Who Stay Home with Children, 61 MO. L. REV. 429, 433-34 n.39 (1996) (quoting Jennifer Clifton Ferguson, Missouri Child Support Guidelines, 57 MO. L. REV. 1301, 1302 (1992)); see also Lewis Becker, Spousal and Child Support and the “Voluntary Reduction of Income” Doctrine, 29 CONN. L. REV. 647, 650-51 (1997) (discussing inconsistency and unpredictability among the states as well as providing examples of inconsistent holdings within individual jurisdictions); Marsha Garrison, How do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making, 74 N.C. L. REV. 401, 404 (1996) (commenting that, due to federal government directives, judicial discretion in the area of child support has “been curtailed”).

Some commentators predicted that child support guidelines would result in more consistent awards. See Charles Brackney, Battling Inconsistency and Inadequacy: Child Support Guidelines in the States, 11 HARV. WOMEN’S L.J. 197, 206 (1988) (predicting that child support guidelines will result in more consistent awards). But see Melzer v. Witsberger, 480 A.2d 991, 999 (Pa. 1984) (Nix, C.J., dissenting) (arguing that by adopting guidelines, the court was trying to “transform the highly sensitive process of determining the equitable allocation of responsibility for child support into a rigid and sterile mathematical exercise”); Andrea Giampetro, Mathematical Approaches to Calculating Child Support Payments: Stated Objectives, Practical Results, and Hidden Policies, 20 FAM. L.Q. 373, 386-88 (1986) (criticizing the guidelines established by the 1984 Amendments by arguing that they are no better than judicial discretion, and that mathematical formulas serve only as a mechanism for judges to hide their policy preferences by using purportedly neutral formulas).

27. See 42 U.S.C. § 667(a) (requiring the establishment of child support guidelines as a condition to receiving federal aid for families with dependent children). For examples of state codes implementing the mandatory child support guidelines, see CAL. FAM. CODE § 4050 (West 1994); MD. CODE ANN., FAM. LAW § 12-201 (1999).
quently, the Family Support Act of 1988\textsuperscript{28} established that the numerical results yielded by the guidelines are presumptively correct.\textsuperscript{29} In response to these requirements, each state enacted legislation establishing both mathematical guidelines and a rebuttable presumption that the amount of child support derived from such guidelines is correct.\textsuperscript{30} Courts may deviate from this amount, however, if they determine that the result is not in the “best interests” of the children.\textsuperscript{31} The support calculations that result from application of the guidelines are based primarily on parental income.\textsuperscript{32}

There are three models under which child support is allocated between parents: the Income Shares model,\textsuperscript{33} the Melson Formula model,\textsuperscript{34} and the Percentage of Income model.\textsuperscript{35} The Income Shares model, which is used by a majority of states, calculates a child support obligation by combining the income of both parents and pro-rating the result in proportion to each parent’s income.\textsuperscript{36} Therefore, in the majority of states, the income of both parents is considered in calculating the appropriate amount of child support when applying state child support guidelines.\textsuperscript{37}


\textsuperscript{29} See 42 U.S.C. § 667(b)(2) (“There shall be a rebuttable presumption . . . that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded.”).

\textsuperscript{30} See, e.g., CAL. FAM. CODE § 4053(k) (West 1994); LA. REV. STAT. ANN. § 9:315.1 (West 1991 & Supp. 1999); see also LaBass v. Munsee, 66 Cal. Rptr. 2d 393, 396 (Ct. App. 1997) (holding that “guideline formula[s] [are] presumptively correct and may not be departed from without an express finding of special circumstances”).

\textsuperscript{31} See, e.g., CAL. FAM. CODE § 4053(e) (West 1994) (declaring that “[t]he guideline seeks to place the interests of children as the state’s top priority”); MD. CODE ANN., FAM. LAW § 12-202(a)(2)(iv)(2)(c) (1999) (allowing the court to depart from the guidelines by making a written finding stating “how the finding serves the best interests of the child”).

\textsuperscript{32} See supra notes 8, 15 (providing examples of state child support guidelines that rely on parental income).

\textsuperscript{33} See JUDITH AREEN, CASES AND MATERIALS ON FAMILY LAW 764 (3d ed. 1992); see also 2 MELLI & STANTON, supra note 24, § 13.03(2) (offering a detailed discussion of the Income Shares model).

\textsuperscript{34} See AREEN, supra note 33, at 764. Under the Melson Formula, a certain amount of self support is deducted from each parent’s income before calculating the parties’ child support obligations. See id. The Melson Formula is used in Delaware, Hawaii, West Virginia, and Montana. See id. at 157 (Supp. 1997).

\textsuperscript{35} See id. at 157 (Supp. 1997). A minority of states use the Percentage of Income model, which is based solely on the non-custodial parent’s income. See id.

\textsuperscript{36} See id. at 764. As of 1995, 34 states used the Income Shares model. See id. at 157 (Supp. 1997).

\textsuperscript{37} See id. at 767.
B. Computing Income Under the Guidelines

1. Gender-Neutral Application

Historically, most courts held that only fathers were legally obligated to support their children. Our society's current ideal of gender equality has called into question the constitutional validity of such views. Therefore, current child support guidelines do not distinguish between mother and father in establishing the formulas for calculating child support. An examination of the principles that underlie modern income assessments in the context of spousal support is helpful in understanding the principles of these gender-neutral rules. At least one commentator points out that in years past, the law tended to protect spouses who had become financially dependent as a result of their focus on family care rather than employment. At present, however, courts apply a "gender-neutral ideal of adult autonomy, which gives priority to financial self-reliance." This modern notion of encouraging the financial independence of both spouses is evident in the standards established for child support calculations. Under state guidelines, courts consider the income of both the mother and the father, usually without regard to which is the custodial

38. See Lodahl v. Papenberg, 277 S.W.2d 548, 550-51 (Mo. 1955) (finding that a "father has the primary common-law duty and obligation to support his minor children"). Courts traditionally held fathers primarily liable, and mothers secondarily liable. See, e.g., Haugen v. Swanson, 23 N.W.2d 535, 536 (Minn. 1946).
39. See U.S. CONST. amend. XIV, § 1 (providing that no state shall "deny to any person within its jurisdiction the equal protection of the laws"); see also Conway v. Dana, 318 A.2d 324, 326 (Pa. 1974) (holding that a presumption that fathers are primarily liable is incompatible with the notion of gender equality).
41. See Ann Laquer Estin, Maintenance, Alimony and the Rehabilitation of Family Care, 71 N.C. L. REV. 721, 722-23 (1993) (discussing the evolution of the law's current focus on financial independence). For the historical common law rule that fathers had the primary duty to care for their minor children, see Dunbar v. Dunbar, 190 U.S. 340, 351 (1903), in which the Court concluded that "[a]t common law, a father is bound to support his legitimate children, and the obligation continues during their minority." See also Luplau v. Luplau, 117 S.W.2d 366, 367 (Mo. Ct. App. 1938) (noting that the father has the primary responsibility to support the children of a marriage, regardless of whether the mother has means to do so).
42. See Estin, supra note 41, at 722-23.
43. Id.
44. See LaBass v. Munsee, 66 Cal. Rptr. 2d 393, 398 (Ct. App. 1997) (noting that the California Family Code states "unequivocably that both parents are equally responsible for the support of their children").
parent, when determining the amount of child support due.46

2. Examining Actual and Potential Earnings

Legislatures typically base child support guidelines on the actual income of the parents, but a court may impute additional income to a parent if the court determines that the parent is not fulfilling his or her earning capacity.47 The court’s oversight of the parents’ employment decisions is necessary to assure that both parents are fulfilling their parental responsibilities.48 Therefore, most state statutes give discretion to the trial court to substitute earning capacity for actual income where a parent is unemployed or underemployed and doing so is in the best interests of the children.49 Other states expressly direct the court to consider the potential income of an unemployed or underemployed parent.50 A court’s finding that a parent is unemployed or underemployed, however, will not, alone, result in imputation of income to that parent; the court must

45. See 2 MELLI & STANTON, supra note 24, § 13.03(2) (discussing the Income Shares model used in a majority of states, which looks to both the mother’s and father’s income). But see supra note 35 and accompanying text (observing that a minority of states use the Percentage of Income model, which distinguishes between custodial and non-custodial parents).

46. See Bennett v. Commonwealth, 472 S.E.2d 668, 672 (Va. Ct. App. 1996) (holding that “[a] custodial parent has no less responsibility to provide support to a minor child than does the noncustodial parent”); cf. Chinn v. Weaver, 600 N.E.2d 1134, 1136 (Ohio Ct. App. 1991) (suggesting that Ohio’s child support guideline statute was an “egregious” imbalance between custodial parent and non-custodial parent because it provided that the court could order only the obligor to seek employment). The Chinn court, however, held that the trial court “must apply the law as it is, wisely or unwisely, given” and had thus misapplied the Ohio statute by ordering the custodial parent to seek employment. See id. But see Luciani v. Montemurro-Luciani, 544 N.W.2d 561, 572 (Wis. 1996) (commenting that “the custodial parent’s income is generally not considered under Wisconsin law”); infra Part I.D (discussing the nurturing parent doctrine, under which the courts may distinguish between custodial and non-custodial parents).

47. See infra Part I.C (discussing examples of the tests used to determine a parent’s earning capacity).

48. See Paulin v. Paulin, 54 Cal. Rptr. 2d 314, 318 n.5 (Ct. App. 1996) (contending that the court requires the ability to consider earning capacity in order to ensure that a parent cannot unilaterally eliminate his or her responsibility for the support of a child, thereby placing the entire burden on the employed parent).


find first that such unemployment or underemployment was voluntary.\footnote{51. See Niemie\textit{c} v. Commonwealth \textit{ex rel.} Niemie\textit{c}, 499 S.E.2d 576, 579 (Va. Ct. App. 1998) (holding that "[f]ollowing a divorce, a parent may not voluntarily pursue low paying employment 'to the detriment of support obligations to the children'"{(Brody v. Brody, 432 S.E.2d 20, 22 (Va. Ct. App. 1993))}. The burden of proving whether or not unemployment or underemployment is "voluntary" is on the party to whom income will be imputed. \textit{See Brody}, 432 S.E.2d at 22.}{52. \textit{See infra} note 83 (describing situations in which a parent’s motive may be relevant to his or her reduced income).}

An element of voluntariness is the parent’s motive or intent in reducing or eliminating income, a subject that may arise in several situations.\footnote{53. \textit{See infra} note 84 (discussing cases in which the courts have evaluated a parent’s motive in reducing income to pursue education or due to incarceration).} For example, a parent may choose to pursue educational advancement or change careers; a parent may become incarcerated; or, most relevant to the present discussion, the parent may choose to reduce paid work in order to provide care to his or her children.\footnote{54. \textit{See Padilla} v. Padilla, 45 Cal. Rptr. 2d 555, 558 (Ct. App. 1995). \textit{But see Becker, supra} note 26, at 723 (arguing that resolving child support cases by determining whether the parent’s reduced income was the result of “voluntary” conduct is a question that is “essentially useless and irrelevant in dealing with the difficult issues presented”).} The significance of voluntariness to a parent’s unemployment or underemployment lies in the well-settled notion that a parent may not divest himself or herself of earning ability at the children’s expense.\footnote{55. \textit{See supra} note 51; \textit{see also} DeMarce, \textit{supra} note 26, at 438 (commenting that “[w]hile the cases typically do not speak in terms of the custodial/noncustodial parent distinction, it is apparent . . . that the common law rule developed in an effort to enforce the obligations of the noncustodial parents.”).}{56. \textit{See MD. CODE ANN., FAM. LAW} § 12-204(b) (Supp. 1999).}{57. 601 A.2d 149 (Md. Ct. Spec. App. 1992).}{58. \textit{See id.} at 156.}{59. \textit{Id.} The court also identified factors to be considered in determining whether a party is voluntarily impoverished, including:

   (1) his or her current physical condition; (2) his or her respective level of education; (3) the timing of any change in employment or other financial circumstances}
however, the Maryland Court of Appeals clarified that the term "voluntarily impoverished" is not limited to situations where a parent seeks to avoid a support obligation, holding that the relevant question is simply whether a parent's impoverishment is voluntary. The court held expressly that a parent's intent regarding his or her child support responsibilities is not relevant to a finding of voluntary impoverishment.

Other courts refuse to consider motive before imputing income to an underemployed parent. In these jurisdictions, motive, whether in good or bad faith, is irrelevant. The California Court of Appeals, in Padilla v. Padilla, addressed this point clearly, stating that "[s]tatutory commands and the inherent responsibility parents owe their children lead us to conclude the bad faith rule, as applied to child support, if not ill conceived in the first instance, can no longer be supported." In fact, the California Court of Appeals expressly rejected the notion that courts should give special consideration to voluntary reductions in income made by a parent relative to the divorce proceedings; (4) the relationship between the parties prior to the initiation of divorce proceedings; (5) his or her efforts to find and retain employment; (6) his or her efforts to secure retraining if that is needed; (7) whether he or she has ever withheld support; (8) his or her past work history; (9) the area in which the parties live and the status of the job market there; and (10) any other considerations presented by either party.

Id. at 156-57.

61. See id.; see also Goldberger v. Goldberger, 624 A.2d 1328, 1333, 1335 (Md. Ct. Spec. App. 1993) (imputing income to a non-custodial father who had never sought employment and intended to spend his life as a permanent Torah/Talmudic student). The Goldberger court held that "[w]hether the voluntary impoverishment is for the purpose of avoiding child support or because the parent simply has chosen a frugal lifestyle for another reason, doesn't affect that parent's obligation to the child." Id. at 1335.
62. See generally Becker, supra note 26, at 657-75 (offering a detailed discussion of various courts' tests regarding the relevance of motive in application of voluntary unemployment and underemployment theories).
63. See Padilla v. Padilla, 45 Cal. Rptr. 2d 555, 558 (Ct. App. 1995) (holding that "[a] parent's motivation for reducing available income is irrelevant when the ability and opportunity to adequately and reasonably provide for the child are present"); see also Othman v. Hinman, 64 Cal. Rptr. 2d 383, 387 (Ct. App. 1997) (quoting In re Marriage of Iblis, 16 Cal. Rptr. 2d 345 (Ct. App. 1993) for the proposition that "[w]hile deliberate avoidance of family responsibilities is a significant factor in the decision to consider earning capacity, the statute explicitly authorizes consideration of earning capacity in all cases."). Accordingly, the court in Othman affirmed that the trial court was not limited to considering earning capacity only when a deliberate attempt to avoid support responsibilities had been found. See id. But see Gould v. Gould, 687 So. 2d 685, 693 (La. Ct. App. 1997) (holding that "voluntary underemployment is a question of good faith of the obligor spouse").
64. 45 Cal. Rptr. 2d 555 (Ct. App. 1995).
65. Id. at 560. For examples of earlier California cases that imputed income only upon finding that the parent was deliberately avoiding his or her support obligations, see Philbin v. Philbin, 96 Cal. Rptr. 408, 411-12 (Ct. App. 1971) and Catalano v. Catalano, 251 Cal. Rptr. 370, 379 (Ct. App. 1988).
in order that he or she might spend more time with his or her children.\footnote{66} The California court described an "emerging consensus" that the only circumstances in which courts would not impute income were if the parent had no capacity to earn or if relying on earning capacity would not be in the children's best interest.\footnote{67}

Whether a court evaluates a parent's motive in reducing or eliminating his or her income depends upon the underlying statute and judicial discretion in each case.\footnote{68} All courts, however, have either the discretion or the duty to ascertain a parent's earning capacity and calculate the requisite child support payment accordingly.\footnote{69}

C. Measuring Earning Capacity

If the court determines that a parent is voluntarily unemployed or underemployed, the court may impute income based on a determination of that parent's earning capacity.\footnote{70} To determine a parent's earning capacity, the courts may analyze a number of factors, as in the three-part test established in \textit{Regnery v. Regnery}.\footnote{71} The court in \textit{Regnery} held that earning capacity consists of

(1) the ability to work including factors such as age, occupation, skills, education, health, background, work experience and qualifications; (2) the willingness to work exemplified through

\footnotesize{66. See LaBass v. Munsee, 66 Cal. Rptr. 2d 393, 398-99 (Ct. App. 1997) ("Section 4058 [of the California Code] is unmistakably clear that the only qualification to the discretionary imputation of income is that it be consistent with the children's best interest. We decline to carve out an exception . . . for caregiver parents that would be inharmonious with the language and policy goals articulated by the Legislature."); see also Othman, 64 Cal. Rptr. 2d at 390 (declining to "adopt a per se rule prohibiting the imputation of income to parents who refrain from employment in order to care for preschool-age children").

67. See Othman, 64 Cal. Rptr. 2d at 389. Emphasizing this point, the court stated that ""'[b]ad faith' (deliberate avoidance of family financial responsibilities) is not a condition precedent to imputation of income."' Id. (quoting 1 HOGOBOOM & KING, CAL. PRACTICE GUIDE: FAMILY LAW ¶ 6:441, at 6-125 to 6-126 (The Rutter Group 1996)). The court in \textit{Othman}, however, provided no guidance as to how the court should determine whether relying on earning capacity was in the children's best interest. See id.

68. See supra Part I.B.2 (discussing differing views on the relevance of motive or intent on the part of a parent who is voluntarily unemployed or underemployed).

69. See CAL. FAM. CODE § 4058(b) (West 1994) (granting the court discretion to consider a parent's earning capacity rather than the parent's income); cf. LA. REV. STAT. ANN. § 315.2(B) (West 1991) (requiring that "[i]f a party is voluntarily unemployed or underemployed, his or her gross income shall be determined as set forth in R.S. 9:315.9").

70. See infra notes 71-83 and accompanying text (discussing various tests for determining earning capacity).

71. 263 Cal. Rptr. 243 (Ct. App. 1989). For other cases applying the three-part \textit{Regnery} test, see LaBass v. Munsee, 66 Cal. Rptr. 2d 393, 397 (Ct. App. 1997) and \textit{Everett v. Everett}, 269 Cal. Rptr. 917, 925 (Ct. App. 1990).}
good faith efforts, due diligence and meaningful attempts to secure employment; and (3) an opportunity to work which means an employer who is willing to hire.\textsuperscript{72}

Further, the court clarified this test, stating that earning capacity is absent when the parent lacks the ability or opportunity to work.\textsuperscript{73}

The recent decision in \textit{Cohn v. Cohn}\textsuperscript{74} modifies the third element of the \textit{Regnery} test by establishing a new standard for determining whether a non-custodial parent has the opportunity to work.\textsuperscript{75} In \textit{Cohn}, the court determined that the “employer willing to hire” definition of opportunity to work established by \textit{Regnery} was too narrow in the case of professionals or tradespeople who are self-employable.\textsuperscript{76} The court held that a better definition of “opportunity to work” is the substantial likelihood that a party could, with reasonable effort, apply his or her education, skills and training to produce income.”\textsuperscript{77} The \textit{Regnery} test, as modified by \textit{Cohn}, illustrates one state court’s approach to determining earning capacity.\textsuperscript{78}

Other jurisdictions apply alternative tests. For example, Maryland’s test for determining earning capacity is comprised of the following factors:

1. age 2. mental and physical condition 3. assets 4. educational background, special training or skills 5. prior earnings 6. efforts to find and retain employment 7. the status of the job market in the area where the parent lives 8. actual income from any source 9. any other factors bearing on the parent’s ability to obtain funds for child support.\textsuperscript{79}

Similarly, in Virginia, when considering imputation of income, the

\textsuperscript{72} \textit{Regnery}, 263 Cal. Rptr. at 245.

\textsuperscript{73} See \textit{id.} The court in \textit{Regnery} further stated that “[w]hen the payor is unwilling to pay and the other two factors are present, the court may apply the earnings capacity standard to deter the shirking of one’s family obligations.” \textit{Id.; see also} Othman v. Hinman, 64 Cal. Rptr. 2d 383, 389 (Ct. App. 1997) (stating that “[a]s long as ability and opportunity to earn exists, . . . the court has the discretion to consider earning capacity when consistent with the child or children’s best interests”) (citations omitted).

\textsuperscript{74} 76 Cal. Rptr. 2d 866 (Ct. App. 1998).

\textsuperscript{75} See \textit{id.} at 871. The court in \textit{Cohn} denied an unemployed, non-custodial father’s claim that he was not subject to imputation of income because he had looked exhaustively for work as an attorney and was unable to find an employer willing to hire him. See \textit{id.} at 870.

\textsuperscript{76} See \textit{id.} at 871.

\textsuperscript{77} \textit{Id.} It is curious that the court created this new standard under the facts of this case, as Mr. Cohn had attempted a solo practice for a year with little success. See \textit{id.} at 870.

\textsuperscript{78} See \textit{supra} notes 71-77 and accompanying text (describing the State of California’s test for determining earning capacity).

courts have evaluated factors such as the parent’s “financial resources, education and training.” 80 Whatever test is applied, the factors are financial in nature. 81 Whether the court will impute the resultant earning capacity to a parent who reduces his or her income to care for his or her children will turn, in part, upon whether the particular state gives weight to the parent’s motive. 82 The most common approach is to simply reserve for the trial court the discretion to impute income to underemployed or unemployed parents in appropriate circumstances. 83

D. The Nurturing Parent Doctrine Exception

A limited number of jurisdictions have carved a narrow exception to the courts’ general disregard for a parent’s motive or purpose in failing to maximize his or her earning capacity. 84 Under this exception, termed the

81. See supra notes 71-80 and accompanying text (describing alternative tests for measuring earning capacity); see also AREEN, supra note 33, at 758 (proposing an alternative formula for calculating earning capacity). Professor Areen suggests that the calculation be based on a computation of “the amount of time actually devoted to parenting by the custodial parent (taking into account the age and needs of the child(ren)) and then deduct[ing] that amount from the hours available for outside work in computing the earning ‘capacity’ of the custodial parent.” Id.
82. See supra Part I.B.2 (discussing circumstances in which states consider a parent’s motive in voluntarily reducing income when deciding whether to impute income).
83. See Stanton v. Abbey, 874 S.W.2d 493, 499 (Mo. Ct. App. 1994). The Stanton court provided the following list of factors to assist in the determination of whether income should be imputed:
   (1) the age, maturity, health, and number of children in the home; (2) the custodial parent’s employment history, including recency of employment and earnings, as well as the availability of suitable employment; (3) the age and health of the custodial parent; (4) the availability of appropriate child-care givers; (5) the relationship between the expense of child-care givers and the net income the custodial parent would receive; (6) the cost, if any, for transportation, suitable clothing, and other items required for the custodial parent to have the imputed employment; (7) the custodial parent’s motivation or reasons for being at home; and (8) the adequacy of available resources if the custodial parent remains at home. Id. The Pennsylvania courts consider the following factors: “the age and maturity of the child, the availability of others who might assist the child, the availability of others who might assist the parent, the adequacy of financial resources at home, and finally, the parent’s desire to stay home and nurture the child.” Kelly v. Kelly, 633 A.2d 218, 219 (Pa. Super. Ct. 1993) (quoting Hesidenz v. Carbin, 512 A.2d 707, 710 (Pa. Super. Ct. 1986)).
84. See infra notes 85-98 and accompanying text (discussing the nurturing parent doctrine). Note that there are other exceptions to the courts’ general disregard for a parent’s motive in limiting his or her earning capacity, such as a court’s decision not to impute income to a parent who has reduced his/her income in order to pursue education. See McHale v. McHale, 612 So. 2d 969, 973 (La. Ct. App. 1993) (noting that “where obligors have temporarily terminated their employment to obtain additional education which will
"nurturing parent doctrine," income may not be imputed to a custodial parent who remains at home, or works less than full time, in order to provide a nurturing environment for young children.\textsuperscript{85} Courts may also refuse to impute income to a custodial parent who is caring for a child with particular health or other special needs.\textsuperscript{86} The Superior Court of Pennsylvania, in \textit{Commonwealth ex rel. Wasiolek v. Wasiolek},\textsuperscript{87} aptly espoused the rationale for this exception:

It would surely be ironic if by its support order a court were to dictate that a parent desert a home where very young children were present when the very purpose of the order is to guarantee the welfare of those same children. Such an order would ignore the importance of the nurture and attention of the parent in whose custody the children have been entrusted and would elevate financial well-being over emotional well-being.\textsuperscript{88}

\textsuperscript{85} Ultimately result in higher income, the courts have found the obligors reasonable and justified in their voluntary change of circumstances\textsuperscript{)}. \textit{But see} LaBass v. Munsee, 66 Cal. Rptr. 2d 393 (Ct. App. 1997) (recognizing that a mother may choose to pursue her education, but disallowing her from using that choice to avoid the obligation to financially contribute to the support of her children). Certain courts have also made exceptions when parental income is reduced due to incarceration. \textit{See} Wills v. Jones, 667 A.2d 331, 339 (Md. 1995) (holding that a prisoner is not voluntarily impoverished unless he or she committed a crime with intent of going to prison or otherwise becoming impoverished). \textit{But see} Layman v. Layman, 488 S.E.2d 658, 659 (Va. Ct. App. 1997) (holding that a parent's incarceration may constitute voluntary unemployment, precluding a reduction of a support obligation based on loss of income resulting from that incarceration).

\textsuperscript{86} \textit{See} Stredny v. Gray, 510 A.2d 359, 363 (Pa. Super. Ct. 1986) (refusing to impute income to a mother whose child was emotionally disturbed and holding that "an unemployed, nurturing parent should not be expected to find employment to advance a child's economic welfare at the expense of the child's emotional welfare"); \textit{see also} AMERICAN LAW INST., 2 PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.06, at 67 & cmt. b (Tentative Draft No. 3, 1998) (proposing revised guidelines that do not impute earnings to the custodial parent of children who are not of school age).

\textsuperscript{87} \textit{See} Bennett v. Commonwealth ex rel. Bennett, 472 S.E.2d 668, 672 (Va. Ct. App. 1996) (refusing to impute income to a custodial mother who stayed home to care for a child with Down's Syndrome, as well as to home school her two other children). In a concurring opinion, however, Judge Benton takes exception to the court's position based on his finding that the mother's unavailability for employment was due to her decision to home school two of her children, and that she voluntarily chose "the convenience or personal preference . . . to remain unproductive . . . so as to avoid support obligations." \textit{Id.} at 674-75 (Benton, J., concurring) (quoting Hur v. Virginia Dep't of Social Servs., 409 S.E.2d 454, 458 (Va. Ct. App. 1991)).

\textsuperscript{88} \textit{Id.} at 403 (citation omitted). Note that the Pennsylvania Superior Court has also applied the nurturing parent doctrine when the custodial parent sought to stay home in order to care for the child of a subsequent marriage. \textit{See} Hesidenz v. Carbin, 512 A.2d 707, 709-10 & n.4 (Pa. Super. Ct. 1986) (reciting an earlier holding that "the fact that the child to be nurtured is not the subject of the support order does not necessarily remove the case from the application of the 'nurturing parent' doctrine"); \textit{see also} Thomas v. Thomas,
The court in Wasiolek also gave significant weight to the parent's opinion as to whether the children are better served by the custodial parent remaining at home. 89 Although the nurturing parent doctrine is usually applied in the context of custodial parents, on occasion the courts have held that a non-custodial parent's decision to reduce his or her employment may not be "voluntary underemployment" warranting imputation of income. 90 This result may occur when the non-custodial parent's reduction in employment is motivated by the goal of maximizing visitation. 91

Whereas the nurturing parent doctrine is not always identified as

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589 A.2d 1372, 1372-73 (N.J. Super. Ct. Ch. Div. 1991) (refusing to impute income to a mother who was the full-time custodian of children from a second marriage). The court in Thomas concluded that "[t]o rule otherwise would, in effect, determine that monetary contributions to children living with another is more important than providing care to children in the obligor's custody." Id. But see Othman v. Hinman, 64 Cal. Rptr. 2d 383, 391 (Ct. App. 1997) (holding that the California Family Code "does not require awards based on earning capacity to be consistent with the best interests of any child other than the child or children who are the subject of the child support award"); Moore v. Tsernois, 664 A.2d 427, 432 (Md. Ct. Spec. App. 1995) (commenting on a mother's decision to remain home with children from a second marriage by stating that "[i]t is unreasonable to expect the children of the Defendant's first marriage to pay for this choice"); Canning v. Juskalian, 597 N.E.2d 1074, 1078 (Mass. App. Ct. 1992) (holding that "the words 'custodial parent with children' do not encompass the children of a subsequent marriage").

89. See Wasiolek, 380 A.2d at 403 (holding that while a parent's opinion is not dispositive, it should be given significant weight). The Wasiolek court also defined the factors that should be balanced before the nurturing parent should be required to seek employment, including "age and maturity of the child; the availability and adequacy of others who might assist the custodian-parent; [and] the adequacy of available financial resources if the custodian-parent does remain in the home." Id.

90. See infra note 91 (providing examples of decisions not to impute income to non-custodial parents who had voluntarily reduced their income).

91. See Gould v. Gould, 687 So. 2d 685, 693 (La. Ct. App. 1997) (holding that a non-custodial father was not voluntarily underemployed for purposes of determining his child support obligation when he reduced his work hours by taking off every other Friday in order to make a bi-weekly ten hour drive to visit his children); see also Mullin v. Mullin, 634 N.E.2d 1340, 1342 (Ind. Ct. App. 1994) (finding that a father who reduced his overtime work in order to increase visitation with his children was not voluntarily underemployed). In Mullin, the court noted that "[a] high value should be placed on visitation between the children and the noncustodial parent. In the vast majority of cases, maintaining a close relationship and frequent contact between the children and both parents is recognized as being in the best interest of the children." Id. at 1342 (citations omitted); see also Canning, 597 N.E.2d at 1075-76 (imputing income to custodial mother who was earning much less than she could, thereby adjusting non-custodial father's support responsibilities in recognition of the fact that he would incur significant expenses in exercising his visitation rights after his ex-wife and their son moved to California). The Canning court relied upon express provisions of the state child support guidelines that note that the non-custodial parent may incur significant travel-related expenses when exercising visitation rights. See id. at 1076. The Canning court recommended considering such travel expenses when calculating the support decree in order to foster parental involvement with the children. See id.
such, the underlying principle, which recognizes the necessity and value of parental care-giving to young children, is evident in state statutes that prohibit the imputation of income to the at-home custodial parent of young children. Such statutes often establish an absolute exception to the imputation of income when a parent is caring for children under a prescribed age. Except as established by statute, however, the nurturing parent doctrine is not absolute. Instead, the doctrine simply encourages the court to consider a parent’s desire to nurture his or her children. Although the courts have been sensitive to the fact that an assessment of earning capacity requires an intrusion into previously private employment decisions, divorced parents relinquish the autonomy of decisionmaking that exists in an intact marriage in favor of the over-arching goal of serving children’s best interests.

92. See Hesidenz, 512 A.2d at 711 (denying appellant’s argument that the trial court’s failure to use the phrase “nurturing parent doctrine” disallowed application of the doctrine, noting that “[i]f we impose such a requirement would evaluate form over substance”).

93. See VA. CODE ANN. § 20-108.1(B)(3) (Michie Supp. 1999) (stating that “[i]ncome may not be imputed to the custodial parent when a child is not in school, child care services are not available and the cost of such child care services are not included in the computation”); see also infra note 94 (providing additional examples of state statutes adopting implicitly the nurturing parent doctrine).

94. See, e.g., LA. REV. STAT. ANN. § 9:315.9 (West 1991) (“If a party is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of his or her income earning potential, unless the party . . . is caring for a child of the parties under the age of five years.”); MD. CODE ANN., FAM. LAW § 12-204(b)(2) (Supp. 1999) (“A determination of potential income may not be made for a parent who: . . . (ii) is caring for a child under the age of 2 years for whom the parents are jointly and severally responsible.”). The Louisiana statute has been strictly applied. See Greene v. Greene, 634 So. 2d 1286, 1289 (La. Ct. App. 1994) (finding that a mother who voluntarily quit her job in order to be home with her children who were over age five was voluntarily unemployed, requiring consideration of her earning potential).

95. See infra note 96 (discussing the absence of a definitive rule with respect to the nurturing parent doctrine).

96. See Bender v. Bender, 444 A.2d 124, 126 (Pa. Super. Ct. 1982) (stating that there is no “absolute rule” that income is not imputed to a parent at home caring for young children). The court in Bender required only that a parent’s desire to stay home with minor children be considered, holding that the parent may be excused from contributing support payments in “appropriate cases.” See id.

97. See Rohloff v. Rohloff, 411 N.W.2d 484, 488 (Mich. Ct. App. 1987) (describing the difficult balancing of interests involved when a noncustodial parent reduces his or her income). In Rohloff, the court noted that whereas courts must not interfere unnecessarily with individuals’ personal choices merely because they are divorced, the divorce process thrusts courts into their personal lives in order to protect their children. See id.

98. See supra note 4 and accompanying text (discussing the courts’ role in protecting children upon the divorce of their parents).
II. ASSESSING CHILDREN'S INTERESTS WHEN IMPUTING INCOME: INCONSISTENCY ABOUNDS

A. Valuing Caregiving: Inconsistency Among the Courts

Courts of all jurisdictions share a consistency of purpose—to serve children's best interests.99 Most states also share a similar methodology for calculating child support, applying the Income Shares model, which considers the incomes of both parents in calculating the parents' child support responsibilities.100 The states diverge, however, in determining the circumstances in which imputation of income is warranted.101 Specifically, state courts vary in the weight given to a parent's motive in limiting his or her income, including choices made to maximize the parent's ability to spend time with his or her children.102 By failing consistently to consider parental motive when a reduction in income results from a parent's desire to have increased involvement with his or her child, the courts are necessarily inconsistent in ascribing value to parental caregiving.103

I. A Strict Construction Approach: Disregarding Parental Motive

Certain states, like California, give no weight to a parent's motive in limiting his or her employment, including parental decisions to limit employment in order to provide care to a child.104 California's statutory command is simply to "consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children."105 The statute does not define "best interest," nor does it express any requirement to consider the reason for a parent's choice to limit em-

99. See supra notes 10-12 and accompanying text (discussing the overriding objective of serving children's best interests).

100. See supra note 33 and accompanying text (describing the Income Shares model). But see supra notes 34-35 (discussing alternative child support models known as the Melson Formula and the Percentage of Income model).

101. See infra Part II.A.1 (providing examples of states that disregard parental motive when imputing income to underemployed or unemployed parents); see also infra Part II.A.3 (setting forth examples of states that consider parental motive when imputing income to underemployed or unemployed parents).

102. See infra Parts II.A.1-3 (describing varying judicial approaches to considering parental motive for reductions in income).

103. See infra Parts II.A.1-3 (offering a discussion of various states' approaches to considering parental motive in reducing income to care for children and the effects of such approaches on the value ascribed by courts to caregiving).

104. See supra notes 64-66 (discussing the irrelevance of parental motive in California law, and the state's refusal to carve out an exception for caregivers).

105. CAL. FAM. CODE § 4058(b) (West 1994).
ployment, such as a desire to provide for the child emotionally. California courts have clearly interpreted this silence as legislative intent to disregard parental motive in limiting employment when deciding whether to impute income. This understanding is evident in the current application of California's three-part test to determine the earning capacity of a parent who is underemployed or unemployed. When this test was first established in Regnery v. Regnery, the court found that a noncustodial father's deliberate refusal to make modest child support payments, coupled with his failure to make reasonable efforts to find employment, reflected a desire to avoid his familial obligations. This commentary indicates the Regnery court's evaluation of the father's motive in terminating his employment.

The California courts still apply a variation of the Regnery test. The

106. See id. § 4053 (listing the principles to be followed by the courts in implementing uniform guidelines). Other than the sweeping guidance of § 4053(e) (stating that "[t]he guideline seeks to place the interests of children as the state's top priority"), the statute offers no guidance on how the courts should evaluate considerations associated with meeting children's emotional needs. See id.

107. See supra notes 65-67 (discussing the fact that motive is irrelevant in California); see also LaBass v. Munsee, 66 Cal. Rptr. 2d 393, 397 (Ct. App. 1997) (holding that "[i]f a parent is unwilling to work despite the ability and the opportunity, earning capacity may be imputed. A parent's motivation for not pursuing income opportunities is irrelevant when applying the Regnery test.") (citations omitted).

108. See supra notes 71-77 and accompanying text (discussing California's three-part test for measuring earning capacity).

109. 263 Cal. Rptr. 243 (Ct. App. 1989). The test to determine the earning capacity of a parent consists of an analysis of: "(1) the ability to work including such factors as age, occupation, skills, education, health, background, work experience and qualifications; (2) the willingness to work exemplified through good faith efforts, due diligence and meaningful attempts to secure employment; and (3) the opportunity to work which means an employer who is willing to hire." Id. at 245.

110. See id. at 246.

111. See id. at 245-47 (reviewing the father's historical conduct in great detail, finding that he had deliberately refused to pay child and spousal support and that he voluntarily left employment merely because it was arduous). The court in Regnery concluded that "the evidence fully supports the [trial] court's implied finding [that] his avoidance of family financial responsibilities was deliberate." Id. at 248.

112. See Cohn v. Cohn, 76 Cal. Rptr. 2d 866, 871 (Ct. App. 1998) (finding that the "employer willing to hire" definition established in Regnery was too narrow to address professionals or tradespeople who are self-employable). The court in Cohn redefined the "opportunity to work" element to mean "the substantial likelihood that a party could, with reasonable effort, apply his or her education, skills and training to produce income." Id. In Cohn, the court applied its new standard for earning capacity to a non-custodial father who had been unsuccessful, after considerable effort, in obtaining work as a lawyer. See id. at 870. Pursuant to the new definition, the court remanded the case for a trial court determination as to the amount of income that should be imputed to Mr. Cohn based on what he could reasonably expect to earn as a sole practitioner. See id. at 871-72. The court also suggested that the trial court focus on whether Mr. Cohn exercised "reasonable
issue of parental motive which gave rise to the creation of the three-part test, is, however, no longer relevant.\textsuperscript{113} Instead, when a parent is capable of providing for his or her child, the parent's motive for reducing his or her income is irrelevant.\textsuperscript{114} The California courts' disregard for parental motive extends to a parent's desire to nurture his or her children.\textsuperscript{115} Rather than making children a state priority,\textsuperscript{116} California has chosen to ignore a parent's motive in reducing income even when the choice is in favor of caregiving.\textsuperscript{117}

2. \textit{A Moderate Approach: Acknowledging Parental Caregiving Choices}

The statutory and decisional law in Maryland represents a juxtaposition of theories regarding the value of caregiving.\textsuperscript{118} On one hand, Maryland courts demonstrate a strong presumption against parental decisions to decrease or eliminate employment.\textsuperscript{119} The state's use of the dramatic phrase "voluntary impoverishment" in lieu of the more neutral terms "voluntary unemployment" or "voluntary underemployment" used by most states exemplifies this presumption.\textsuperscript{120} On the other hand, Maryland's statute provides a limited exception to the imputation of diligence in developing his law practice." \textit{Id.} at 872. Although California holds both the custodial and non-custodial parents to the same standard for measuring earning capacity, see \textsc{Cal. Fam. Code} \textsection 4053(b) (West 1994), the court was silent on the possible impact of its holding on custodial parents who possess professional skills. \textit{See Cohn, 76 Cal. Rptr. 2d at 870-72.}

\begin{itemize}
\item \textsc{See supra notes 64-66} (discussing cases in which the California courts have established that parental motive in reducing income is irrelevant).
\item \textsc{See Padilla v. Padilla, 45 Cal. Rptr. 2d 555, 558 (Ct. App. 1995).}
\item \textsc{See LaBass v. Munsee, 66 Cal. Rptr. 2d 393, 398-99 (Ct. App. 1997) (stating that "[w]e decline to carve out an exception . . . for caregiver parents").}
\item \textsc{See \textsc{Cal. Fam. Code} \textsection 4053(e) (West 1994) (establishing the goal of placing "the interests of children" as California's "top priority").}
\item \textsc{See supra notes 64-66 and accompanying text (discussing the California courts' position that motive is irrelevant when determining whether a parent is voluntarily unemployed or underemployed, and specifically declining to make an exception for caregiver parents). \textit{But see Meegan v. Meegan, 13 Cal. Rptr. 2d 799, 801 (Ct. App. 1992) (reducing a child support order when the obligor, a business executive, quit his job to enter a monastery).}
\item \textsc{See infra notes 119-36 and accompanying text (discussing Maryland case law that addresses the value of caregiving).}
\item \textsc{See infra note 120 and accompanying text (discussing Maryland's child support statute).}
\item \textsc{See Md. Code Ann., Fam. Law \textsection 12-204(b) (1999); see also John O. v. Jane O., 601 A.2d 149, 156 n.5 (Md. Ct. Spec. App. 1992) (noting that before the legislature passed the final version of the child support guidelines, it substituted the term "voluntarily impoverished" for the phrase "unemployed or underemployed"). The court in \textit{John O.} stated that by substituting the term "voluntarily impoverished," the Legislature "evinced its intention that the courts be able to consider whether a person had purposely taken a reduction in salary to avoid his or her support obligations." \textit{Id.}}
\end{itemize}
come for custodial parents of children under the age of two. Addition-
ally, the harshness of the phrase "voluntary impoverishment" is amelio-
RATED by the Maryland courts' willingness to consider, to a limited extent, a parent's motive in reducing his or her income.

Whereas the Maryland courts articulate forcefully an emphasis on the voluntariness of a parent's unemployment or underemployment, the case law demonstrates that Maryland courts will typically impute income only to a parent who is underemployed or unemployed for reasons the court finds meritless. For example, in Wagner v. Wagner, where the court concluded that a custodial mother had voluntarily impoverished herself, the court discussed extensively the meaning of voluntary impoverishment. Focusing on the voluntary aspects of the employment decision, the court held that a parent's intention regarding support payments is irrelevant. Nonetheless, the court emphasized factors relevant to motive. For example, the court found that the mother had deliberately transferred her only asset to her parents in exchange for minimal consideration, that she had freely contracted to work at one-third of her previous salary, and that she had a history of attempting to avoid court or-

122. See Wills v. Jones, 667 A.2d 331, 335 (Md. Ct. App. 1995) (holding that "a court must inquire as to the parent's motivations and intentions" in order to decide if a parent is voluntarily impoverished); see also infra notes 125-34 and accompanying text (discussing cases in which the Maryland court has considered a parent's motive in reducing his or her income).
123. See Wagner v. Wagner, 674 A.2d 1, 22 (Md. Ct. Spec. App. 1996) (summarizing the Maryland courts' position on the ultimate significance of voluntariness over motive or intention in determining whether a parent is voluntarily impoverished). The court in Wagner reiterated the reasoning articulated in Wills:
In determining whether a parent is voluntarily impoverished, the question is whether a parent's impoverishment is voluntary, not whether the parent has voluntarily avoided paying child support. The parent's intention regarding support payments, therefore is irrelevant. It is true that parents who impoverish themselves "with the intention of avoiding child support... obligations" are voluntarily impoverished. But... a parent who has become impoverished by choice is "voluntarily impoverished" regardless of the parent's intent regarding his or her child support obligations.
Id. (quoting Wills, 667 A.2d at 338) (internal citations omitted).
124. See infra notes 125-34 and accompanying text (analyzing Maryland court decisions that rely purportedly upon voluntariness of a parent's reduced earning capacity in determining whether income should be imputed, but that actually give weight to the motive behind a parent's voluntary acts).
126. See id. at 22-23.
127. See id. at 22.
128. See infra note 129 and accompanying text (describing the factors considered by the Wagner court).
Applying a similar approach, the court in Moore v. Tseronis, although still articulating the importance of voluntariness over motive for a finding of "voluntary impoverishment," found that a father had not voluntarily impoverished himself even though he had voluntarily relocated to a geographic area with a weaker economy, thereby diminishing his earnings. The court in Moore stated that a parent's child support obligations should not immobilize a parent from making reasonable job and location decisions. The court also noted that it did not appear that the father was attempting to "shirk his child support obligations." In sum, although Maryland law provides expressly for consideration of caregiving issues only in the case of custodial parents of children under two, the Maryland courts generally give a broader consideration to parental motive in reducing income.

3. A Deferential Approach: Respecting Parental Caregiving Decisions

Other states, such as Louisiana, consistently consider motive, giving significant weight to parental caregiving choices that may result in a reduction in income. Pursuant to statute, the Louisiana courts will not

129. See Wagner, 674 A.2d at 23. Notwithstanding the court's analysis of the mother's apparently deliberate attempts to reduce her earning capacity, the court went out of its way to state that the fact that the trial court had concluded that the mother impoverished herself with the intention of avoiding her child support obligations was "of no consequence." Id. The court in Wagner also stated that parents who act in order to avoid their child support obligations deliberately are simply a subset of the class of parents who voluntarily impoverish themselves by deliberately reducing their income for any reason. See id.


131. Id. at 430 (affirming that "for the purposes of the child support guidelines, a parent shall be considered "voluntarily impoverished" whenever the parent has made the free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate resource." (quoting Goldberger v. Goldberger, 624 A.2d 1328 (Md. Ct. Spec. App. 1993)).

132. See id. at 431.

133. See id.

134. Id. (noting further that the father did not intend to live a "lifestyle of ease or indolence").


136. See supra notes 125-34 and accompanying text (providing examples of cases in which the Maryland courts gave weight to parental motive underlying a voluntary decision to reduce income).

137. See infra notes 138-52 and accompanying text (discussing Louisiana's approach to weighing caregiving when deciding whether to impute income to a parent in a child support determination). Pennsylvania courts exhibit a similar willingness to evaluate parental motive in voluntarily reducing income, going so far as to refuse to impute income to a
impute income to a parent who is voluntarily unemployed or underemployed if that parent is caring for a child of the parties under the age of five.\textsuperscript{138} Furthermore, the Louisiana courts have refused to impute income to parents who have reduced income specifically to spend time with a child.\textsuperscript{139} In \textit{Saussy v. Saussy},\textsuperscript{140} the Louisiana Court of Appeals affirmed the trial court's decision not to impute income to a non-custodial father who took a lower paying job so that he could spend more time with his children.\textsuperscript{141} Unlike his previous job, the father's new employment gave him the opportunity to visit his children on the weekends.\textsuperscript{142} Accordingly, the court affirmed the trial court's finding that he acted in good faith when he accepted the new job.\textsuperscript{143}

Similarly, the court in \textit{Gould v. Gould}\textsuperscript{144} found that a non-custodial father who had reduced his income voluntarily by taking every other Friday off in order to make a ten hour drive to visit his children was not voluntarily underemployed.\textsuperscript{145} The court recognized that voluntary underemployment is a question of good faith.\textsuperscript{146} The court affirmed the trial court's holding that it would be “inequitable” to punish the father for time missed at work in order to exercise visitation rights because the father had been regular and diligent in exercising these rights.\textsuperscript{147} Further-

\textsuperscript{138} See \textit{LA. REV. STAT. ANN. § 9:315.9} (West 1991).

\textsuperscript{139} See infra notes 140-51 and accompanying text (discussing cases in which the Louisiana courts have declined to impute income to parents who voluntarily reduced their income in order to spend time with their children).

\textsuperscript{140} 638 So. 2d 711 (La. Ct. App. 1994).

\textsuperscript{141} See \textit{id.} at 714.

\textsuperscript{142} See \textit{id.}

\textsuperscript{143} See \textit{id.} The court in \textit{Saussy} stated that “[a] father’s children benefit not only by the money he is able to earn, but by the presence of his company, and nowhere does the law require that a parent work 60-70 hours to the detriment of his children’s right to the parent’s company.” \textit{Id.} In the dissenting opinion, however, Judge Knoll found that “under our jurisprudence, a parent . . . claiming to work for less money so the parent can spend more time with the children, is voluntarily underemployed, albeit, a worthy desire.” \textit{Id.} at 715 (Knoll, J., dissenting).

\textsuperscript{144} 687 So. 2d 685 (La. Ct. App. 1997).

\textsuperscript{145} See \textit{id.} at 693.

\textsuperscript{146} See \textit{id.}

\textsuperscript{147} See \textit{id.}
more, the court in *McHale v. McHale*\(^{148}\) demonstrated the importance of good faith when evaluating parental motive in decreasing income.\(^{149}\) In that case, the court imputed income to a non-custodial father who had relocated and was unable to obtain a job at a salary level similar to that earned previously, even though the purported reason for the move was to be near his children.\(^{150}\) In making its decision, the court observed that the father had not exercised fully his visitation rights in the past and had been frequently in arrears with child support payments.\(^{151}\) These cases demonstrate that the State of Louisiana values parental caregiving, and gives credence to good faith parental motive when determining whether to impute income to an underemployed or unemployed parent.\(^{152}\)

**B. Valuing Caregiving: Inconsistency in Related Areas of Law**

It is primarily in the area of child support that the law fails to recognize sufficiently, or consistently, the value of non-monetary contributions to the family such as caregiving.\(^{153}\) In matters of spousal support or property distribution, for example, the courts acknowledge consistently a spouse’s non-monetary contribution to the family’s general welfare.\(^{154}\)


\(^{149}\) See infra notes 150-52 and accompanying text (addressing implicitly the importance of good faith).

\(^{150}\) See McHale, 612 So. 2d at 971, 974.

\(^{151}\) See id. at 972.

\(^{152}\) See supra Part II.A.3 (discussing cases which demonstrate the value that Louisiana affords parental caregiving choices). For an example of another court’s express consideration of parental motive, see *Stanton v. Abbey*, 874 S.W.2d 493, 499 (Mo. Ct. App. 1994), which included “the custodial parent’s motivation or reasons for being at home” in a list of factors to be considered when deciding whether to impute income. See also *Kelly v. Kelly*, 633 A.2d 218, 219 (Pa. Super. Ct. 1993) (identifying “the parent’s desire to stay home and nurture the child” as a factor to be considered when imputing income (quoting *Hesidenz v. Carbin*, 512 A.2d 707, 710 (Pa. Super. Ct. 1986))).

\(^{153}\) See infra notes 154-76 and accompanying text (discussing contrasting approaches to valuing caregiving in the context of child support, maintenance support, and property distribution). See generally Estin, supra note 41 (analyzing the principles underlying modern divorce law with respect to the valuation of caregiving).

\(^{154}\) See Reuter v. Reuter, 649 A.2d 24, 33 (Md. Ct. Spec. App. 1994) (declining to impute income to a custodial mother who worked only part-time when calculating appropriate alimony payment). In *Reuter*, the mother had custody of the couple’s two children, ages four and seven. See id. at 26-27. The mother testified that the younger boy was having trouble adjusting to his parent’s separation, and a clinical psychologist concluded that spending a full day in day care would not be in the child’s best interests. See id. at 27. The court accepted this testimony and did not require the mother to act contrary to the best interests of her child in order to be self-supporting. See id. at 33. The court reached this conclusion, however, in the alimony portion of its decision, not in the analysis relating to child support. See id. at 31-33. See also DeMarce, supra note 26, at 448-52 (discussing the “partnership” concept of marriage as an influence on the increasing recognition of the
The Uniform Marriage and Divorce Act (UMDA) takes the position that a spouse may legitimately obtain maintenance support if he or she is the custodian of a child "whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home."\textsuperscript{155} Similarly, the UMDA position on property distribution upon divorce directs the courts to consider the "contribution of a spouse as homemaker."\textsuperscript{156} For instance, the Connecticut Appellate Court, in \textit{O'Neill v. O'Neill},\textsuperscript{157} held that "[t]he investment of human capital in homemaking has worth and should be evaluated in a property division incident to a dissolution of marriage."\textsuperscript{158} The \textit{O'Neill} court expressly required consideration of caretaking responsibilities in making the property distribution.\textsuperscript{159}

In contrast, many states do not express consideration for the non-financial contributions of a parent when dealing with child support.\textsuperscript{160} Instead, parents who are unemployed or underemployed in order to care for their children are "voluntarily underemployed" or "voluntarily unemployed" and, therefore, may be subject to imputation of income.\textsuperscript{161} Even where courts give effect to the nurturing parent doctrine,\textsuperscript{162} it is applied as an exception, rather than granting the presumptive value to non-financial familial contributions that is evident in most property distribution cases within community property jurisdictions. See AREEN, supra note 33, at 716. In Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington, the eight community property states, all marital property is subject to division upon divorce. See id.\textsuperscript{156}

\textsuperscript{155} \textbf{UNIF. MARRIAGE AND DIVORCE ACT} § 308(a)(2), 9A U.L.A. 347, 348 (1998). Eight states have substantially adopted the UMDA. See AREEN, supra note 33, at 348; see also Estin, supra note 41, at 727 n.16, 728 n.18 (providing examples of state statutes that reflect variations of the UMDA position).


\textsuperscript{157} 536 A.2d 978 (Conn. App. Ct. 1988).

\textsuperscript{158} Id. at 984.

\textsuperscript{159} See id. The Michigan Appellate Court found that a law degree was a marital asset subject to property division because the degree was the product of a "concerted family effort." Postema v. Postema, 471 N.W.2d 912, 918 (Mich. Ct. App. 1991). The \textit{Postema} court recognized the value of "intangible, nonpecuniary" efforts, such as child rearing. \textit{Id.} at 920.

\textsuperscript{160} See supra Part I.C (discussing the courts' processes for determining earning capacity).

\textsuperscript{161} See supra notes 52-62 and accompanying text (discussing voluntary underemployment and voluntary unemployment and the resultant imputation of income).

\textsuperscript{162} See supra Part I.D (discussing the nurturing parent doctrine exception).
tion cases. By definition, the labels of "voluntary unemployment" and "voluntary underemployment" rest on the foundational assumption that child care is not work—a position with which few parents would agree. In fact, few people would argue that a parent at home with children and managing household duties is unoccupied. Yet, somehow, these efforts are not considered "work" in the eyes of the law. One commentator accurately summarized this conundrum by stating that

Despite its economic, social, and familial importance, the work of caregiving remains invisible to lawyers and judges because the law construes family care as a matter of love and obligation, not a matter of personal choice or arm's-length bargaining. . . . By its very nature, nurturance is supposed to be silent, hidden, selfless, and self-effacing—"something different" from work.

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163. See supra notes 154-59 and accompanying text (discussing the value ascribed to caregiving in property distribution cases).

164. See Estin, supra note 41, at 782. Professor Estin describes a series of . . . custody opinions issued by the West Virginia Supreme Court of Appeals [in which] the court suggested [that] the "caring and nurturing duties of a parent" [are]: (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e., transporting to friends' houses or, for example, to girl or boy scout meetings; (6) arranging alternative care, i.e., babysitting, day care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking the child in the morning; (8) disciplining, i.e., teaching general manners and toilet training; (9) educating, i.e., religious, cultural, social, etc.; and (10) teaching elementary skills, i.e., reading, writing and arithmetic.

Id.

165. See supra note 164 (providing one court's summation of the duties of a custodial parent).

166. See Estin, supra note 41, at 767 (commenting that "[l]awyers encounter difficulty in conceptualizing marriage as a financial relationship, and the difficulty is the greatest in those areas of family life defined by tangles of love and obligation"). Professor Estin reasons, "[t]hese contributions transcend everyday economic life . . . [b]ut to set them aside as beyond the grasp of concepts like 'justice' is to abandon the family law policy of valuing all of the contributions a husband and wife make." Id.

167. Id. at 776 (citations ommitted). Professor Estin also points out that "[c]aregiving work, when well done, is substantially invisible, seen not as work but as love, instinct, or the natural order of things." Id. at 776 n.205. For a rare case finding that child care is work, see Thomas v. Thomas, 589 A.2d 1372, 1373 (N.J. Super. Ct. Ch. Div. 1991) ("It is important to note that [the mother] is not unemployed. She is employed on a full-time basis as a caregiver to her young children. This employment is, however, not compensated monetarily."). See also Stredny v. Gray, 510 A.2d 359, 364 (Pa. Super. Ct. 1986) (refusing to impute income to a mother who was the full-time custodian of her child from a second marriage, observing that "[a] parent of minor children who works in the home caring for children should be viewed as employed although he or she usually receives no paycheck at the end of the week") (quoting Butler v. Butler, 488 A.2d 1141, 1142 (Pa. Super. Ct. 1985)).
This commentator also suggests that the courts are resistant to ascribing financial value to caregiving for fear of "commercializing" marriage. 168 Whether it is due to these proposed theories, or simply because there is no ready "market" for family caregiving, 169 the fact remains that courts generally ascribe no monetary value to caregiving when making child support determinations. 170

Certainly, intangibles such as love, care, and nurture do not readily lend themselves to monetary quantification. 171 Caregiving does have a financial component, however, given the costs of child care, transportation, clothing, and other expenses associated with working outside the home. 172 Nonetheless, non-monetary contributions to a family, if addressed in the child support guidelines at all, are typically relegated to catch-all phrases such as "any other consideration," 173 or "special circumstances." 174 This approach contrasts dramatically with the value courts

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168. See Estin, supra note 41, at 775. Professor Estin calls this concern "paradoxical," pointing out that marriage is, by its nature, partly an economic venture, which becomes particularly apparent upon death or divorce. See id. at 775-76. Professor Estin suggests that the true concern of judges may be "the risk that if the law inquires into caregiving it will be forced to expose the traditionally private aspects of family life." Id. at 776. Certain courts have also expressed a concern about commercializing marriage. See Hoak v. Hoak, 370 S.E.2d 473, 478 (W. Va. 1988) (holding that "[m]arriage is not a business arrangement, and this Court would be loathe to promote any more tallying of respective debits and credits than already occurs in the average household"); see also Pyatte v. Pyatte, 661 P.2d 196, 207 (Ariz. Ct. App. 1982) ("[T]he courts cannot and will not strike a balance regarding the contributions of each to the marriage and then translate that into a monetary award. To do so would . . . reduce the institution of marriage to that of a closely held corporation.").

169. See DeMarce, supra note 26, at 446 n.109 (commenting on the relationship of non-economic familial contributions to the traditional employment marketplace).

170. See supra notes 160-63 (discussing the fact that the law does not often address, in a monetary context, caregiving and similar intangible family matters).

171. See supra note 166 (discussing the difficulty of assessing the non-economic values of family life in the economic context of divorce).

172. See DeMarce, supra note 26, at 451 n.122 (citing one commentator's view that it is "inconsistent to reimburse a custodial parent in whole or in part for the expense of paid child care while denying her any financial recognition for the value of the care she herself provides") (quoting Sally S. Goldfarb, Child Support Guidelines: A Model for Fair Allocation of Child Care, Medical, and Educational Expenses, 21 Fam. L.Q. 325, 349 (1987)). DeMarce also identifies a fundamental flaw in legal decisions that ascribe no monetary value to caregiving, pointing out that costs for child care outside the home, incurred so that a parent can work, are costs that are considered in making child support determinations. See DeMarce, supra note 26, at 450 n.199. See also Estin, supra note 41, at 798 (commenting on the view that economic value should be attributed to services provided within a family).


ascribe to caregiving in many property distribution cases. Thus, general judicial reliance upon a theory that child care is not work, including the characteristic labels of "voluntary underemployment" and "voluntary unemployment," seems oddly limited to the context of child support determinations.

III. SERVING THE BEST INTERESTS OF CHILDREN WHEN IMPUTING PARENTAL INCOME: WEAKNESSES IN CURRENT APPROACHES AND RECOMMENDATIONS FOR IMPROVEMENT

A. Can a Child's Best Interests be Bought?

Children have certain needs that require money, such as food, shelter and clothing. The best interests of a child, however, cannot be bought. Embedding a child's intangible need for love and nurture in oblique phrases such as "special circumstances" trivializes the value of caregiving, and demeans parents who would forego some material wealth in favor of their children's emotional well-being.

Developmental psychologists have written extensively on the importance of a child forming close emotional bonds with a consistent care-

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175. See supra notes 157-59 and accompanying text (discussing property distribution cases in which value was ascribed to caregiving).

176. See supra Part II.B (discussing differing approaches to valuing caregiving in property distribution and spousal maintenance cases in comparison with child support cases).

177. See supra note 8 (providing examples of financially oriented child support guidelines, illustrating congressional consensus on children's fundamental need for economic support).

178. See Estin, supra note 41, at 785 (summarizing "fundamental parental responsibilities" to demonstrate the irrelevance of money to certain basic needs of children). Professor Estin defines parental responsibilities as "preserving the child's life and health; fostering the child's physical, emotional, and intellectual growth; and shaping the child's behavior to produce an acceptable adult member of the social group." Id.

179. CAL. FAM. CODE § 4053(k) (West 1994).

180. See DeMarce, supra note 26, at 468 (offering a public policy argument against the law's failure to consider the value of caregiving). DeMarce noted that "[a] judicial determination that a parent staying at home with minor children is 'voluntarily unemployed or underemployed' carries with it a powerful value judgment about the relative worth of different roles in our society." Id. For an egregious example of judicial diminution of the value of caregiving, see the trial court holding which led to Hartung v. Hartung, 306 N.W.2d 16, 21 (Wis. 1981), in which the Supreme Court of Wisconsin soundly overturned a trial court decision to award only short-term maintenance to a custodial spouse. The trial court judge stated, "I don't think she would want to sit around the rest of her life. My God, she will turn into a vegetable if she did that anyhow." Id. at 19. In overturning the trial court, the Wisconsin Supreme Court held that "if the circumstances dictate to a woman that the appropriate choice for her is to remain at home to care for small children, that choice, like a career choice, will be respected by this court." Id. at 21.
giver, typically a custodial parent. It is also well recognized that maintaining an emotional relationship with both the custodial and non-custodial parent is generally best for a child. The courts, however, are inconsistent in their recognition of such sociological findings, and similarly inconsistent in their recognition of good faith employment decisions made by parents to benefit their children. Unquestionably, it is difficult to quantify the value of caregiving, or to determine whether a particular child would benefit more from increased parental presence or increased financial support. Declaring parents "voluntarily unemployed," however, because they have chosen to forego certain material wealth in order to provide care and guidance to their children, is a harsh judicial assessment of a difficult parental decision, and one which presumes that a child's economic interests will always outweigh the child's emotional needs.

In those jurisdictions that do not recognize

181. See Estin, supra note 41, at 792 (noting that "[t]he standard references in developmental psychology explore extensively the importance for infants and young children of a sensitive, responsive caregiver with whom the child can develop a secure attachment, and the risk of serious developmental consequences where those early bonds are not achieved and protected"). Professor Estin cites a number of resources and detailed studies on the impact of emotional bonding on healthy child development. See id. at nn.274-78, 794 nn.286 & 291-92. One early childhood educator's research and experience have led her to conclude that meaningful, consistent relationships with adults, typically parents, are a necessary prerequisite to a child's ability to develop appropriate social skills. Interview with Jacky Howell, Early Childhood Educator and Consultant, Montgomery Child Care Association, in Silver Spring, Md. (Oct. 29, 1998). Howell also observed that the security, safety, and trust that result from a consistent parent/child bond are critical factors in establishing school readiness, commenting that "[i]n order to be a learner, you must be a risk taker; in order to be a risk taker, you must feel safe." Id. Therefore, this educator asserts, when one parent leaves the family home, it becomes critical to maintain consistency in the child's relationship and routine with the custodial parent. See id. According to Howell, "[i]f we want children to be healthy, competent adults, we must tend to their needs now." Id. But see Sharon Begley, The Parent Trap, NEWSWEEK, Sept. 7, 1998, at 52 (reviewing JUDITH RICH HARRIS, THE NURTURE ASSUMPTION: WHY CHILDREN TURN OUT THE WAY THEY DO; PARENTS MATTER LESS THAN YOU THINK AND PEERS MATTER MORE (1998), which cites new studies purportedly demonstrating that peers are more influential upon children than their parents).

182. See Canning v. Juskalian, 597 N.E.2d 1074, 1076-77 (Mass. App. Ct. 1992) (decreasing a support order issued to a non-custodial father in order to recognize the costs associated with coast-to-coast travel necessary for the father to exercise his visitation rights). The court in Canning noted "the importance which attaches to both parents hav[ing] frequent and continuing association with their child, and the broad recognition of the 'interests of the non-custodial parent and the child in visiting with each [other]." Id. (citations omitted).

183. See supra Parts II.A.1-3 (discussing differing approaches to considering parental decisions to limit their earning capacity in order to spend time with their children).

184. See infra note 203 (discussing the necessity of recognizing the value of caregiving in judicial decisionmaking).

185. See AMERICAN LAW INST., supra note 85, commentary to § 3.06 at 70 (com-
the nurturing parent doctrine, the courts' ready reliance on tangible financial matters when deciding whether to impute income seems to be an abdication of responsibility, a refusal to make the more difficult judgments regarding intangible elements that affect a child's well-being. Thus, in their search for consistency in child support orders, such courts may have lost sight of the value of caregiving.

B. Imputation of Income: A Self-Defeating Purpose?

Courts ascribe imputed income to voluntarily unemployed or underemployed parents ostensibly to serve the children's best interests. By imputing income to parents who have, in good faith, reduced or eliminated their income in order to be more available to their children, however, the courts may harm the very children whose interests they seek to protect. In treating caregiving as voluntary unemployment or underemployment, and therefore imputing income to a parent, the courts may impose an economic cost upon the child.

Imputing income to a parent increases that parent's financial obligation, but does not necessarily increase the actual financial resources available to support the child because the parent may not realize the im-
Furthermore, this focus on financial considerations fails to give sufficient or consistent weight to non-economic factors that may be relevant in meeting the breadth of a child's needs.192 The American Law Institute summarizes this point by noting that "to the extent that income is merely imputed, but not realized, the effect is to penalize the child economically for the parent's decision to give the child more rather than less direct parental care."193

C. Recommendations: Serving Children's Best Interests

In determining child support, any judicial analysis of a child's best interests is incomplete absent an evaluation of the relative merits of a parent's financial and emotional contributions to the child's welfare.194 The following recommendations provide a framework in which the courts may consistently give consideration to parents' non-financial contributions to a child's welfare, without surrendering their ultimate duty and authority to determine what is in the child's best interests.195

Each state should establish an exception to the labels of "voluntary unemployment" and "voluntary underemployment," applicable to both custodial and non-custodial parents of minor children.196 The application of such an exception would be based on the court's evaluation of whether the parent's actions in reducing or eliminating income were reasonable, justified, and in good faith, without the intent to avoid child support obli-

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191. See Canning v. Juskalian, 597 N.E.2d 1074, 1077-78 n.9 (Mass. App. Ct. 1992) (recognizing that "income generated by attribution is often fictional and, therefore, of no benefit to the child entitled to support").
192. See supra note 181 (discussing the importance of consistent parent-child relationships to healthy child development).
193. AMERICAN LAW INST., supra note 85, commentary to § 3.06 at 70.
194. See Estin, supra note 41, at 722 (arguing for the "rehabilitation" of family care as "an important value worthy of greater recognition in the economic management of divorce"). In modern divorce law, according to Professor Estin, there is a "remarkable disregard for caregiving—the norms of nurturance, altruism, and mutual responsibility that are usually thought to characterize family life." Id. at 721; see also Karen Czapanskiy, Giving Credit Where Credit is Due, in CRITICAL ISSUES, CRITICAL CHOICES: SPECIAL TOPICS IN CHILD SUPPORT GUIDELINES DEVELOPMENT 141, 148-51 (Women's Legal Defense Fund 1986) (arguing for child support guidelines that expressly take non-economic contributions of the custodial parent into account).
195. See supra note 4 (discussing the court's duty to protect children of divorced parents).
196. This recommendation would extend the nurturing parent doctrine to all states. See supra Part I.D (discussing the nurturing parent doctrine in its present form). This recommendation would also give recognition to the value of continuing contact with the non-custodial parent that certain courts have recognized. See supra note 91 (discussing cases that demonstrate the value of a child's continuing involvement with the non-custodial parent).
The nurturing parent doctrine, in its current form, accomplishes this objective to a limited extent, extending deference to nurturing decisions made by the custodial parent of young children. The law, however, holds both parents financially responsible for their children. Therefore, both parents should bear accountability for their children's emotional welfare and be entitled to receive the benefits of their children's companionship.

Because the proposed exception is not absolute, the courts should apply a balancing test as a prerequisite to the imputation of income to either a custodial or non-custodial parent. This analysis would weigh the

197. See Saussy v. Saussy, 638 So. 2d 711, 713 (La. Ct. App. 1994) (applying the factors that this Comment recommends for application in all courts). In the case of a custodial parent, the exception would apply to parental decisions to reduce or eliminate employment in order to be available to his or her children. See supra note 84 and accompanying text (providing examples of cases in which the courts declined to impute income to custodial parent who had voluntarily reduced income in order to provide personal care for his or her children). In the case of a non-custodial parent, the exception would apply to parental decisions to reduce employment in order to maximize visitation. See supra note 91 and accompanying text (providing examples of cases in which the courts have declined to impute income to non-custodial parents who voluntarily reduced income in order to maximize visitation). For a discussion of other considerations favoring non-attribution of income, see Canning v. Juskalian, 597 N.E.2d 1074, 1078 n.9 (Mass. App. Ct. 1992). The Canning court suggests that factors favoring non-attribution of income include:

1. avoiding the creation of economic disincentives to remarriage and the rearing of children;
2. not punishing innocent children for their parent's actions;
3. giving priority to the "nurturing parent" doctrine; and
4. recognizing that the income generated by attribution is often fictional and, therefore, of no benefit to the child entitled to support.

Id. (citations omitted). According to Canning, factors favoring attribution of income include:

1. . . . minimizing the economic impact of family breakup on children by discouraging parental unemployment and underemployment;
2. recognizing that staying at home to care for subsequent children frequently constitutes volitional unemployment; and
3. placing the burden of any hardship to children of a second marriage upon those who voluntarily formed the second family.

Id. (citations omitted).

198. See supra Part I.D (discussing the nurturing parent doctrine).
199. See Canning, 597 N.E.2d at 1077 (reiterating that "[t]he concept of joint parental responsibility for child support is well established" and that "[t]here is no question that [the child support statute] . . . imposes a duty of child support on the wife as well as on the husband" (quoting Silvia v. Silvia, 400 N.E.2d. 1330 (Mass. App. Ct. 1980))); see also supra Part I.B.1 (discussing gender-neutrality of the child support guidelines).
200. See Commonwealth ex rel. Wasiolk v. Wasiolek, 380 A.2d 400, 403 (noting that "[i]t is no longer the law that a mother is presumed more fit to care for a child than a father"); see also Saussy, 638 So. 2d at 714 (opining that "[a] father's children benefit not only by the money he is able to earn, but by the presence of his company").
201. See AMERICAN LAW INST., supra note 85, commentary to § 3.06 at 70 (recommending that imputation of income to both custodial and non-custodial parents should be approached cautiously, but that imputation of income to a custodial parent should be "ap-
relative benefits to a child of his parents working full time, working reduced hours, or staying home. Under this proposal, the courts would retain the discretion to impute income; the recommended analysis would simply ensure that the courts do not rush to judgment on the parent's earning capacity without considering first the children's non-economic needs.

In order for the judiciary to give value to caregiving while remaining vigilant against parents who attempt to shirk their responsibilities to their children, the courts should apply the balancing test by giving reasonable deference to good faith parental decisions regarding their children's best interests. Reasonable people may debate the relative merits of staying home, working part-time, or working full time. Ultimately, however, the decision is a personal one—a matter of choice—made by the person who presumably knows the child best. Given the fundamental right of

202. See IND. CODE ANN. 2 Court Rules, Support Guideline 3, commentary 2(c)(1) (Michie 1999) ("The need for a custodial parent to contribute to the financial support of a child must be carefully balanced against the need for the parent's full time presence in the home."); see also Saussy v. Saussy, 638 So. 2d 711, 714 (La. Ct. App. 1994) (holding that a parent who quit his job in order to have more visitation time with his children was not voluntarily unemployed). The Saussy court stated "nowhere does the law require that a parent work 60-70 hours to the detriment of the children's right to the parent's company." Id.; see also Estin, supra note 41 at 794 n.286 (commenting on the negative effect on children of parental focus on material well-being).

203. See Estin, supra note 41, at 803 ("Caregiving, particularly in its modern expressions, is not easily addressed within our legal traditions. Our most difficult task may also be the simplest: to affirm that family life is still a matter of deep personal importance and valid legal concern.").

204. See DeMarce, supra note 26, at 429-30 (arguing that "[a]s a matter of public policy, the law should remain neutral, [and] respect the private choices made by parents concerning their allocation of labor between the household and the marketplace"); see also Becker, supra note 26, at 705-06 (arguing that a caregiving parent's decision to defer employment in order to care for a young child should be given substantial weight).

205. See Thomas v. Thomas, 589 A.2d 1372, 1373 (N.J. Super. Ct. Ch. Div. 1991) (deferring to a mother's decision to remain home with her young children from a subsequent marriage). The court in Thomas recognized that one can argue the costs and benefits of staying home rather than working. See id. Accordingly, the court decided it should not overrule a parent's decision or punish the decision by imposing a "monetary award" because such parental decisions go "to the very heart of the manner in which children are raised." Id. Therefore, interference with such parental decisions constitutes an "impermissible intrusion into an area typically considered beyond the State's reach." Id.; see also supra note 89 and accompanying text (discussing the decision of the court in Commonwealth ex rel. Wasiolek v. Wasiolek, 380 A.2d 400 (Pa. Super. Ct. 1977), which gave significant weight to the custodial parent's opinion regarding how to best serve the child's needs).

206. See AMERICAN LAW INST. supra note 85, commentary to § 3.06 at 69 (noting that "[t]he ALI guideline does not second guess the hard choices facing parents with residential responsibility for preschool children"). The Guideline should also be applied "with


a parent to raise his or her children, and absent a finding of bad faith, it is unduly intrusive for the court to substitute its judgment for a parent's in deciding whether money or parental presence will best serve a child.\(^{208}\) Instead, comporting with the basic principle of non-interference with family relations, it is appropriate that the courts give parents' decisions in these matters reasonable, although not absolute, deference.\(^{210}\)

The court has continuing jurisdiction over child support decisions, and can assess the credibility of parental claims as to motive for reducing or eliminating wage-earning potential.\(^{212}\) Therefore, the court may adjust a child support obligation if a parent fails to demonstrate that his or her motives in reducing or eliminating income were sincere.\(^{213}\) The recommended balancing test would undoubtedly place an additional burden due respect for the residential parent's reasonable parenting choices." \(id.\) at 70.

\(^{207}\) See Thomas, 589 A.2d at 1373 (characterizing the right to conceive and raise children as "essential" and a "basic civil [right] of man").

\(^{208}\) See Wasiolek, 380 A.2d at 403 (holding that "[o]nce custody of a very young child is awarded, the custodial parent, father or mother, must decide whether the child's welfare is better served by the parent's presence in the home or by the parent's full-time employment").

\(^{209}\) See supra note 1 (discussing the natural right of a parent to care for his or her children).

\(^{210}\) See Becker, supra note 26, at 701-08 (posing four approaches to deference toward parental employment reduction decisions made in order to care for children). Professor Becker suggests that the four possible approaches are absolute deference, modified absolute deference, child care as a substantial but not determining factor, and no deference to parental preference. See id. Professor Becker also recommends that courts give deference to parental decisions, while considering the following factors: the child's age (giving substantial weight to a caregiving parent's decision to defer employment in order to care for a very young child); hardship the non-custodial parent may encounter; any adverse effects upon the child if the non-custodial parent cannot provide sufficient support and the employment waived by the custodial parent would result in the inadequate level of support; and whether the non-custodial parent has previously agreed with the custodial parent's decision to forego employment in order to care for their children. See id. at 706-07.

\(^{211}\) See supra notes 5-7 (discussing the courts' right and duty to protect the child until the age of majority).

\(^{212}\) The courts have often analyzed a parent's historical behavior to determine whether his or her actions were in good faith, examining facts such as the frequency and nature of the parent's contact with the children, the level of involvement previously demonstrated by the parent and, in the case of a non-custodial parent, the extent and consistency of prior visitation and the regularity of child support payments. See Gould v. Gould, 687 So. 2d 685, 693 (La. Ct. App. 1997) (refusing to impute income to a father who had been diligent and regular in his visits).

\(^{213}\) See John O. v. Jane O., 601 A.2d 149, 156-57 (Md. Ct. Spec. App. 1992) (providing a list of factors a court should consider when imputing income, including consideration for whether or not the parent has ever withheld support); see also McHale v. McHale, 612 So. 2d 969, 972 (La. Ct. App. 1993) (imputing income to a father who had been inconsistent in exercising his visitation rights and was in arrears in his child support payments).
upon the courts; however, the courts’ mandate to protect children of divorced parents demands no less.\textsuperscript{214}

IV. CONCLUSION

The child support guidelines presently in place in all fifty states share a common and admirable goal—to protect the best interests of children of divorced parents. Unfortunately, state courts have been unsuccessful in articulating or applying a consistent approach to achieving this “best interests of the child” objective. Instead, many state courts have utilized a limited approach that focuses on the economic aspects of children’s welfare, with insufficient attention to caregiving as a necessary component of children’s well-being. Therefore, we must seek judicial recognition of a simple and compelling truth—that parental duty extends beyond the pocketbook. Only through consistent consideration of children’s emotional, as well as financial, requirements can the breadth of children’s needs be addressed and the term “best interests of the child” have meaning.

\textsuperscript{214} See supra note 203 (noting both the difficulty and necessity of recognizing the value of caregiving in legal proceedings); see also Becker, supra note 26, at 700 (arguing that the right to forgo employment is not simply based on a “freedom of choice rationale,” but is required for fulfillment of a “social mandate” to provide care for children).