

In-Kind Child Support

by
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Abstract

Given that the importance of child support increases with the decline of the traditional family, it is essential to address the issues facing the child support system, such as high arrearages and loss of involvement by many noncustodial parents. This Article explores the merits of changing the current rules on child support, which do not recognize in-kind child support. Due to the administrative difficulty of in-kind child support and its potential hardship to custodial parents, this Article also proposes limits on such a system, including percentage caps on in-kind child support and judicial approval or parental agreement.

I. Introduction

Increasing numbers of children in the United States continue to be reliant on the child support system. While children of divorce generated significant reliance on child support in the United States in the twentieth century, today they are joined by many out-of-wedlock children whose parents never married. In 2014, more than 40% of births were to single women.¹ To the extent that divorce numbers are decreasing, it is because fewer people are marrying.

As a result of these demographic changes, more than 22 million children lived with only one parent—the custodial parent—in the spring of 2014, composing 26% of all children in the

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¹ *Unmarried Childbearing*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm> (last visited Jan. 11, 2017).

United States under 21.² It is thus important to have a legal framework for child support that addresses the needs of those children.

Yet, child support continues to be in crisis. Collection of child support often fails and arrearages are at high levels, leaving many children in poverty.³ Low income fathers face jail, preventing them from seeking employment to pay child support.⁴ Child support obligors often lose a stake in their children and start to disconnect.⁵ Commentators have thus issued calls for an update to the child support system,⁶ especially in light of family and family law changes.⁷

This Article proposes one such update: the recognition of in-kind child support. The current child support law generally does not allow in-kind child support, such as goods or services. Instead, it requires an amount of money. This Article considers whether in-kind child support is consistent with current family law and whether it may have benefits. Accordingly, Part II examines the state of current child support laws, while Part III examines their consistency with in-kind child support. Finally, Part IV addresses in-kind child support's benefits and limitations, offering methods of maximizing its advantages and minimizing its drawbacks.

² Timothy Grall, Current Population Reports, *Custodial Mothers and Fathers and Their Child Support: 2013*, U.S. CENSUS BUREAU (Jan. 2016). Most custodial parents are women. See, e.g., *Current Population Reports, Custodial Mothers and Fathers and Their Child Support: 2009 2*, U.S. CENSUS BUREAU (2011) (noting that over 80% of custodial parents are mothers, based on 2009 figures); Press Release, *More Young Adults Are Living in Their Parents' Home*, Census Bureau Reports, U.S. CENSUS BUREAU (Nov. 3, 2011), https://www.census.gov/newsroom/releases/archives/families_households/cb11-183.html ("Among the children who lived with one parent [in 2011], 87% lived with their mother.").

³ See *infra* Part II.

⁴ *Id.*

⁵ *Id.*

⁶ See, e.g., Sally F. Goldfarb, *Who Pays for the "Boomerang Generation"?: A Legal Perspective on Financial Support for Young Adults*, 37 HARV. J. L. & GENDER 45, 45 (2014) (arguing "that child support orders should be more broadly available for young adults who are past the age of majority but not yet financially independent" to take financial pressure off many single women currently supporting them due to demographic changes in the family).

⁷ See *infra* Part I.

II. Current Law on Child Support

While judges originally had significant discretion over the amount of child support awarded,⁸ the federal government prompted the use of child support guidelines in the states in the 1980's.⁹ The resulting state child support guidelines formulaically determine child support amounts, except at the high-income and low-income levels, where judges often continue to have discretion.¹⁰ At the high-income levels, parents may be ordered to pay an amount reflecting their increased resources, while at the low-income levels, parents may not have enough resources to pay

⁸ Ira Mark Ellman & Tara O'Toole Ellman, *The Theory of Child Support*, 45 HARV. J. ON LEGIS. 107, 110-12 (2008) ("At one time, child support orders were determined case by case. Trial judges exercised discretion under statutes that left them largely free to set awards at the dollar amounts they thought appropriate."); Daniel L. Hatcher, *Collateral Children: Consequence and Illegality at the Intersection of Foster Care and Child Support*, 74 BROOK. L. REV. 1333, 1373 (2009) ("Courts initially possessed wide discretion in setting child support amounts by simply considering children's needs and their parents' financial circumstances.").

⁹ See 42 U.S.C. § 667(a)-b (2006) ("Each State, as a condition for having its State plan approved under this part, must establish guidelines for child support award amounts within the State. The guidelines may be established by law or by judicial or administrative action, and shall be reviewed at least once every 4 years to ensure that their application results in the determination of appropriate child support award amounts."). For an excellent background on these guidelines, and Arizona's position, see Ira Mark Ellman, *A Case Study in Failed Law Reform: Arizona's Child Support Guidelines*, 54 ARIZ. L. REV. 137 (2012).

¹⁰ Family law typically remains in the domain of the states. See, e.g., *Moore v. Sims*, 442 U.S. 415, 435 (1979) ("Family relations are a traditional area of state concern."). See also Kristin A. Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 CARDOZO L. REV. 1761 (2005) (noting that family law is currently in the domain of the states, but that, historically, the federal government was not limited in this way). But see Libby S. Adler, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197 (1999) (arguing that there is no foundation for the view that family law belongs in the state domain). Justice Antonin Scalia expressed concern about the increasing federalization of family law: "I think it obvious . . . that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law. I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people." *Troxel v. Granville*, 530 U.S. 57, 93 (2000) (Scalia, J., dissenting).

support for their children.¹¹ For the average child support case, however, predictability and consistency within each state is ensured by the guidelines, which specify the dollar amount to be awarded in each case.¹²

Despite the move toward guidelines, there remain inconsistencies across states because each state uses a different model for its child support guidelines. Specifically, each state employs one of three different models to determine child support obligations: income shares, percentage of income, and the Melson formula. Most states utilize the income shares model, some states follow the percentage of income model, and the remaining few use the Melson formula.¹³

These models consider noncustodial parents' income.¹⁴ Other factors that influence the final child support award, such as whether there are subsequent children, depend on the state.¹⁵

Despite this legal framework, notable arrearages have accumulated across the child support system. For example, approximately 75% of custodial parents who were due child support in

¹¹ Margaret Ryznar, *The Obligations of High-Income Parents*, 43 *HOFSTRA L. REV.* 481 (2014). See also Laura Raatjes, Note, *High-Income Child Support Guidelines: Harmonizing the Need for Limits With the Best Interests of the Child*, 86 *CHI.-KENT L. REV.* 317 (2011) (proposing higher thresholds for determining who is a high-income parent and the creation of post-secondary educational trusts for the children of high-income parents).

¹² On the other hand, there are also disadvantages to the Guidelines, including less ability for judges to make case-by-case awards, the possibility for increased litigiousness, and potential issues with the substance of the Guidelines themselves. See, e.g., Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 *U. ILL. L. REV.* 319, 340-47; Ellman & Ellman, *supra* note 8, at 110-14; Arlene Browand Huber, *Children at Risk in the Politics of Child Custody Suits: Acknowledging Their Needs for Nurture*, 32 *U. LOUISVILLE J. FAM. L.* 33, 48 (1993).

¹³ Charles J. Meyer, Justin W. Soulen & Ellen Goldberg Weiner, *Child Support Determinations in High Income Families - A Survey of the Fifty States*, 28 *J. AM. ACAD. MATRIM. LAW.* 483, 487 (2016) ("present[ing] a survey of the income determination approaches among the states and the District of Columbia, and then examin[ing] the differing methods for calculating child support in high-income cases.").

¹⁴ Pamela Foohey, *Child Support and (In)Ability to Pay: The Case for the Cost Shares Model*, 13 *U.C. DAVIS J. JUV. L. & POL'Y* 35 (2009).

¹⁵ See Indiana Child Support Obligation Worksheet, <https://www.in.gov/judiciary/files/csow.pdf> (last visited Jan. 11, 2017).

2013 received some child support, but less than half (45%) received full payments owed.¹⁶ A significant percentage of custodial parents live in poverty with their children.¹⁷

There are at least two reasons for these arrearages.¹⁸ First, many low-income child support obligors cannot afford to pay their child support orders.¹⁹ Second, many noncustodial parents disengage from their children after no longer being regularly involved, increasing their reluctance to pay child support.²⁰

¹⁶ See Grall, *supra* note 2, at 1.

¹⁷ The low rate of child support collections for poor children from their equally poor fathers has not changed significantly over time, nor has the child support enforcement program been successful in accomplishing its goal of reducing child poverty through enhanced collections from noncustodial parents. Indeed, there are more children living below the poverty line today than in 1975, the year in which Congress created the federal child support program. In 1975, seventeen percent of children in the United States lived below the poverty line. In 2010, twenty-two percent did. Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617, 648-49 (2012).

¹⁸ See, e.g., Foohey, *supra* note 14, at 39 (“Research shows that non-paying obligors, generally known as ‘deadbeat dads’ (fathers are the obligors in most cases), do not pay their child support obligations for a number of reasons falling into two broad categories: they do not have the financial resources to pay, or they do not want to and do not intend to pay despite having the financial capacity to do so.”).

¹⁹ See, e.g., Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U. CAL. DAVIS L. REV. 991, 1001-02 (2006) (“Although some fathers who do not pay child support can afford to pay the amount awarded, the majority of fathers who do not pay simply cannot afford to do so. In fact, over two and one half million nonresident fathers of poor children are poor themselves, earning less than \$6,000 a year.”).

²⁰ See, e.g., Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 947 (2005) (“Although counterintuitive, at least one study reveals that those fathers who were most involved in their children’s upbringing during the marriage are among those who are most likely to have little or no contact with their children after divorce. These formerly involved fathers apparently cope with the pain of not living with their children and not being able to parent them on a daily basis by withdrawing or focusing their energies elsewhere.”); Seth J. Schwartz & Gordon E. Finley, *Mothering, Fathering, and Divorce: The Influence of Divorce on Reports of and Desires for Maternal and Paternal Involvement*, 47 FAM. CT. REV. 506, 519 (2009) (“The present results indicate small differences by divorce in perceived maternal involvement, but comparatively larger differences in perceived paternal involvement.”). See also *infra* note 82 and accompanying text.

In light of these arrearages, states have become more creative and aggressive in their enforcement of child support orders.²¹ Enforcement techniques range from lighter penalties, such as the suspension of recreational licenses or the loss of a work permit, to severe sanctions, such as criminal prosecution and incarceration.²² Imprisonment continues to be the most serious penalty that states impose on parents who fail to pay child support.²³ If noncustodial parents are jailed for delinquent payments, however, then custodial parents are in a worse financial situation because it reduces the noncustodial parents' ability to pay.²⁴ If people are unable to work, they are unable to pay child support, resulting in further arrearages.²⁵

²¹ See, e.g., Margaret Campbell Haynes & Peter S. Feliceangeli, *Child Support in the Year 2000*, 3 DEL. L. REV. 5, 89 (2000) (explaining Delaware's ability to suspend recreation, driving, and professional licenses); Elizabeth Warren, *The Growing Threat to Middle Class Families*, 69 BROOK. L. REV. 401, 410 & n.27 (2004) (noting that parents behind on child support payments may lose their driver's licenses or work permits). For an in-depth treatment of license revocation for child support enforcement purposes, see generally Mark R. Fondacaro & Dennis P. Stolle, *Revoking Motor Vehicle and Professional Licenses for Purposes of Child Support Enforcement: Constitutional Challenges and Policy Implications*, 5 CORNELL J.L. & PUB. POL'Y 355 (1996); Mai M. Petersen, *Enforcing Child Support by Revoking Licenses: How Constitutional Is It?*, 11 J. CONTEMP. LEGAL ISSUES 441 (2000). See also Bobby L. Dexter, *Transfiguration of the Deadbeat Dad and the Greedy Octogenarian: An Intratextualist Critique of Tax Refund Seizures*, 54 KAN. L. REV. 643, 644 & n.9 (2006) (explaining how several states have worked with Congress and the U.S. Department of Treasury to collect owed child support).

²² See, e.g., *Turner v. Rogers*, 131 S. Ct. 2507, 2515-16, 2520 (2011).

²³ Critics have deplored the modern day debtors' prison created as a result. See, e.g., Richard E. James, Note, *Putting Fear Back Into the Law and Debtors Back Into Prison: Reforming the Debtors' Prison System*, 42 WASHBURN L.J. 143, 149 (2002) (describing a "de facto debtors' prison system" that has developed to address debt); Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J. L. & PUB. POL'Y 95, 117-18 (2008) (noting that the majority of parents with child support debts are indigent or otherwise unable to pay).

²⁴ See, e.g., Joel F. Handler, *Women, Families, Work, and Poverty: A Cloudy Future*, 6 UCLA WOMEN'S L.J. 375, 422-423 (1996); Leslie Joan Harris, *Questioning Child Support Enforcement Policy for Poor Families*, 45 FAM. L.Q. 157, 164-166 (2011); Laurie S. Kohn, *Money Can't Buy You Love—Valuing Contributions by Nonresidential Fathers*, 81 BROOK. L. REV. 53 (2015).

²⁵ Poor mothers are forced to name absent fathers, and then sue them—and sue them again and again. Because the fathers are often also poor, the vast

For example, a Massachusetts study found that parents who had been incarcerated for failing to meet their child support obligations owed an average of \$10,543 in support. Furthermore, because a parent's child support obligations do not change during imprisonment, the study predicted that parents incarcerated in Massachusetts would generate an additional \$20,461 in debt while serving their prison sentences, plus 12% interest and 6% penalties.²⁶ The U.S. Supreme Court has held that the Fourteenth Amendment's Due Process Clause does not require the state to provide counsel at a civil contempt hearing to an indigent person potentially faced with incarceration for failure to pay child support.²⁷

Often, noncustodial parents may be contributing toward their children in ways other than money. For example, 61.7% of custodial parents received some type of noncash support on behalf of their children from noncustodial parents.²⁸ Many parents who provided in-kind support to their children could not afford to do so after receiving a child support order.²⁹ In fact, some mothers receiving public assistance do not aid the government in establishing paternity for fear that a formal child support order will end the only support they are likely to receive, which is in the form of in-kind support.³⁰ There is also evidence that custo-

amount of assigned child support goes unpaid and insurmountable arrearages quickly result. The fathers who try almost always fail as the automated enforcement mechanisms throttle endlessly: a trucker's license is suspended, so he cannot work; a laborer's wages are garnished at sixty-five percent, so he cannot afford to pay his own rent; a father obtains a new job and then loses it after being incarcerated for contempt because of his child support arrearages. Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029, 1031 (2007). "[I]n some states, incarceration is not a sufficient basis for a downward modification [of child support]." Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 359 (2005).

²⁶ Nancy W. Thoennes, *Child Support Profile: Massachusetts Incarcerated and Paroled Parents* 27 CTR. POL'Y RES. (2002), <http://cntrpolres.qwestoffice.net/reports/profile%20of%20CS%20among%20incarcerated%20&%20paroled%20parents.pdf>.

²⁷ Turner v. Rogers, 131 S. Ct. 2507, 2515-16, 2520 (2011).

²⁸ See Grall, *supra* note 2, at 2.

²⁹ See *id.*

³⁰ Harris, *supra* note 24, at 165.

dial parents accept, appreciate, or even prefer in-kind child support.³¹ Studies show that parents with little to no income also prefer to give their children tangible items rather than cash to the custodial parent.³²

Some authors have advocated that in-kind child support be recognized and that these contributions be credited against support obligations.³³ They point to evidence that when a low-income noncustodial parent makes in-kind contributions to a child, it typically increases the child's amount of visitation time with that parent as well.³⁴ Recognition of in-kind payments can thus avoid driving away low-income noncustodial parents.

Yet, in-kind child support is not recognized by the courts as a fulfillment of child support obligations. Courts do not allow evidence of past in-kind items or the promise of future in-kind payments to count against support obligations.³⁵ In other words, as a general rule, there is no in-kind child support allowed in the current child support system.³⁶

A different set of guidelines apply to tribes and tribal organizations.³⁷ Under these guidelines, in-kind contributions may be recognized. This allowance is made in recognition of the sub-

³¹ Handler, *supra* note 24, at 422-23 (1996) (discussing findings from a study explaining why some women prefer in-kind support); Harris, *supra* note 24, at 164-66 (summarizing the findings from the *Fragile Families* report regarding informal and in-kind support received by custodial parents).

³² Maldonado, *supra* note 19, at 1006-07.

³³ See, e.g., Kohn, *supra* note 24 (advocating for allowing noncustodial parents to make in-kind payments of support in lieu of financial payments); Maldonado, *supra* note 19 (arguing for the recognition of in-kind child support).

³⁴ Kohn, *supra* note 24; Maldonado, *supra* note 19.

³⁵ *Perry v. Whitehead*, 10 A.3d 673 (Me. 2010); *Stewart v. Rogers*, 321 Mont. 387 (Mont. 2004); *Matter of Adoption of K.L.J.K.*, 730 P.2d 1135 (Mont. 1986); *In re Adoption of D.R.*, 328 P.3d 691 (Okla. Civ. App. 2014).

³⁶ See, e.g., *Perry*, 10 A.3d 673 (ruling that support payments must be made in cash, and credit was not granted for in-kind support); *Stewart*, 321 Mont. 387 (finding that father was not entitled to credit against child support arrearage for in-kind contributions made for daughter's welfare); *Adoption of K.L.J.K.*, 730 P.2d 1135 (holding that providing articles of clothing or other in-kind payments does not satisfy parent's obligation to contribute to financial support of his or her child); *Adoption of D.R.*, 328 P.3d 691 (denying admission of evidence of defendant's in-kind support).

³⁷ Tribal Child Support Enforcement Programs, 69 Fed. Reg. 16638, 16658-16661 (Mar. 30, 2004). Final rule and comments regarding allowing for

sistence lifestyle maintained by some tribe members.³⁸ Under these guidelines, the court must list items and services that will count as in-kind support and the court must figure out the cash value of such services and items.³⁹ This might provide a model for states interested in recognizing in-kind child support.

III. In-Kind Child Support's Consistency With Family Law

The issues plaguing the child support system in the United States—many of them revolving around the noncustodial parent's inability to pay or disengagement—confirm that the child support system could be improved. Thus, this Part explores whether allowing in-kind child support would enhance the child support system, examining its feasibility in light of current family law and concluding that family law already has features similar to in-kind child support. In fact, in-kind child support is consistent not only with the current family law framework, but also with the trends in family law.

Family law is slow to change, and child support has been no exception. However, both have shown evolution in recent decades, with a decline in gender roles. For example, society views fathers decreasingly as only a source of financial support for the family⁴⁰ and increasingly as important to children's best interests.⁴¹ Meanwhile, the high divorce rate and the high out-of-wedlock birth rate mean that women must become more financially sufficient.⁴²

With the decrease of sharply divided gender roles, and as fathers more often receive generous parenting time as well as joint custody, financial adjustments are made to noncustodial

in-kind and non-cash support to satisfy child support obligations for members of Indian Tribes and Tribal organizations.

³⁸ *Id.*

³⁹ *See id.*

⁴⁰ *See supra* Part II.

⁴¹ "What is 'responsible fatherhood?' The [2012 White House's report Promoting Responsible Fatherhood] explains in a way that captures economic, emotional, and social aspects, resisting reducing fathers to paychecks." Linda C. McClain, *Federal Family Policy and Family Values from Clinton to Obama, 1992-2012 and Beyond*, 2013 MICH. ST. L. REV. 1621, 1687.

⁴² *See supra* Part I.

parents' child support obligation to reflect the financial spending they do directly on their children. This is similar to in-kind child support. Thus, while in-kind child support is not currently part of the general family law, it is consistent with the general family law.

A. *Parenting Time Credit*

Most states treat child support independently of a parent's right to visitation,⁴³ called "parenting time" in some states.⁴⁴ In other words, visitation is granted even if a parent has child support arrearages. However, there are certain links between child support and visitation outside of the formal court process. Specifically, visitation may increase compliance with a child support order,⁴⁵ likely because the noncustodial parent regains a stake in the children through visitation.

A more formal link between visitation and child support, resembling in-kind child support, is that some states allow a parenting credit toward child support to account for the fact that noncustodial parents incur costs associated with caring for the child during visitation.⁴⁶ This child support reduction can also be

⁴³ *Legal Rights of Children*, 1 LEG. RTS. CHILD. REV. 2D § 4:10 (2015 3d ed.).

⁴⁴ For example, the Indiana Parenting Guidelines use the words "parenting time" instead of the word "visitation" "so as to emphasize the importance of the time a parent spends with a child." Commentary, Indiana Parenting Time Guidelines, <http://www.in.gov/judiciary/rules/parenting/> (last visited Jan. 11, 2017). The Indiana approach to visitation in the form of Parenting Guidelines is "applicable to all child custody situations, including paternity cases and cases involving joint legal custody where one person has primary physical custody." *Id.*

⁴⁵ See U.S. Dept. Health & Hum. Serv., *Child Access and Visitation Programs: Participant Outcomes* 9 (Jan. 2006), http://www.acf.hhs.gov/sites/default/files/ocse/dcl_07_15a.pdf (referring to U.S. Census Bureau statistics showing 77.1% of those with joint custody or visitation rights paid at least some child support, compared with 55.8% of their counterparts without visitation rights or joint custody).

⁴⁶ William V. Fabricius & Sanford L. Braver, *Non-Child Support Expenditures on Children by Nonresidential Divorced Fathers—Results of a Study*, 41 FAM. CT. REV. 321 (2003).

used as an incentive for noncustodial parents to spend more time with their children.⁴⁷

There is debate regarding whether an adjustment should be available at all. Indeed, some authors have suggested arguments against the allowance of any child support adjustments based on visitation.⁴⁸ Others argue in favor of a parenting time credit.⁴⁹

There are currently three methods employed for determining whether an adjustment will be made to the child support amount based upon visitation time. The majority of the states adjusting for visitation employ the cliff method, typically setting the threshold for adjustment at around 30% to 35% or more of the child's time being spent with the noncustodial parent. Many states do not make any adjustment, except for certain deviations such as extreme travel distance between households.⁵⁰ A few states utilize either a very low threshold or allow for incremental adjustments as the amount of visitation increases.⁵¹

Discussion has focused on these different methods.⁵² Specifically, arguments have been made on both sides regarding the cliff method of calculation, in which the noncustodial parent does not receive any credit against child support owed until the visitation amount reaches a certain threshold. One study found that expenses for the noncustodial parent are more linear rather than "cliff like," thus leading to an argument against the cliff

⁴⁷ See, e.g., Brian Jay Nicholls, *Reduction in Child Support for Extended Visitation in Utah: Extra-Credit or Financial Time-Out?*, 11 J.L. & FAM. STUD. 193, 193-94 (2008).

⁴⁸ See, e.g., Karen Syma Czapanskiy, *The Shared Custody Child Support Adjustment: Not Worth the Candle*, 49 FAM. L.Q. 409 (2015) (arguing against a mandatory child support adjustment for shared parenting time).

⁴⁹ See, e.g., J. David Sanders, *Shared Responsibility: Time for Illinois to Adopt the Income Shares Model of Child Support*, 38 S. ILL. U.L.J. 281 (2014) (discussing Illinois' application of the income shares model and highlighting the lack of parenting time credit afforded to noncustodial parent).

⁵⁰ Sanford L. Braver et. al., *Public Sentiments About the Parenting Time Adjustment in Child Support Awards*, 49 FAM. L.Q. 433, 434 (2015).

⁵¹ *Id.* at 433 (2015) (providing an overview of the treatment of parenting time adjustments in the fifty states, and discussing the results of a survey evaluating public opinion of the various calculation methods).

⁵² See, e.g., Nicholls, *supra* note 47 (discussing the child support reduction in Utah).

method.⁵³ However, another study found that the noncustodial parent does not bear the same expenses as the custodial parent and that the cliff method is an important safeguard to ensure against a large disparity in the standard of living between the custodial and noncustodial homes.⁵⁴

Utah, for example, has a threshold in place, reasoning that the threshold helps to balance the competing interests of incentive versus expenditures.⁵⁵ The state wants to encourage noncustodial parents to spend time with their children, while helping to ensure that the visitation is not cost prohibitive to either parent.

A number of considerations come into effect when determining whether an adjustment will be made. First, the credit may not be automatic. Depending upon the state, a minimum monthly income for the custodial parent must be met before the visitation credit can be applied. This is to ensure that the custodial parent can financially accommodate the reduction in support.⁵⁶ Next, the visits with the noncustodial parent may need to include an overnight in order to be counted for the purposes of support calculation.⁵⁷

There may be additional limits. Depending upon the jurisdiction, child support credit will not be given if visitation has not

⁵³ Fabricius & Braver, *supra* note 46. See also Sanford L. Braver et. al., *Public Intuitions About Fair Child Support Allocations: Converging Evidence for a "Fair Shares" Rule*, 20 PSYCHOL. PUB. POL'Y & L. 146 (2014) (presenting a study analyzing laypersons' views on child support calculation methods).

⁵⁴ Irwin Garfinkel et al., *Visitation and Child Support Guidelines—A Comment on Fabricius and Braver*, 42 FAM. CT. REV. 342 (2004).

⁵⁵ Nicholls, *supra* note 47. See also Laura W. Morgan, *Shared Custody, Split Custody, and Extraordinary Visitation*, Child Support Guidelines Interpretation & Application § 7.03 n.98 (2017).

⁵⁶ *Bogner v. Bogner*, 29 N.E.3d 733 (Ind. 2015); *Vandenburgh v. Vandenburgh*, 916 N.E.2d 723 (Ind. Ct. App. 2009) (holding that the trial court's refusal to grant noncustodial parent a parenting time credit for his child support obligation was not an abuse of discretion); *Jeffus v. Jeffus*, 375 S.W.3d 862 (Mo. Ct. App. 2012) (holding that the minimum monthly income required for custodial parent, under state guidelines, must have been met before a visitation credit can be applied in calculating the child support obligation).

⁵⁷ *Young v. Young*, 891 N.E.2d 1045 (Ind. 2008) (determining that the noncustodial parent was not entitled to parenting time credit for evening visits during which the children did not stay overnight).

actually been exercised.⁵⁸ Also, at least one state has determined that visitation is only to be applied to the noncustodial parent's support calculations; thus the custodial parent is not directly credited for his or her share of the visits.⁵⁹ Conversely, some state statutes imply that an abatement is available to the custodial parent, usually after a prescribed number of days have been met within a specified time frame.⁶⁰ Finally, since the payment adjustment is made during the calculation process, some states do not allow for an additional abatement of payments during extended parenting time such as summer vacation.⁶¹

In Indiana, for example, the parenting time credit will be given for visits which include an overnight stay,⁶² with no additional abatement provided for extended parenting time visits, such as during summer break.⁶³ Whether to include an adjustment is in the court's discretion⁶⁴ and consideration will be given to whether the adjustment will create a hardship for the custodial parent.⁶⁵ A visitation adjustment to child support will not be

⁵⁸ *Nevins v. Green*, 317 S.W.3d 691 (Mo. Ct. App. 2010) (determining that child support credit will not be given if visitation has not been exercised, and holding that the noncustodial parent who did not exercise visitation with the child was not entitled to 29% overnight visitation credit).

⁵⁹ *Fuchs v. Martin*, 836 N.E.2d 1049 (Ind. Ct. App. 2005), *aff'd*, 845 N.E.2d 1038 (Ind. 2006).

⁶⁰ *Gaia Bernstein & Zvi Triger, Over-Parenting*, 44 U. CAL. DAVIS L. REV. 1221, 1279 n. 113 (2011) (summarizing state statutes regarding the application of visitation credit in child support calculations).

⁶¹ *Flanagan v. Flanagan*, 656 So. 2d 1228 (Ala. Civ. App. 1995); *In re Paternity of S.G.H.*, 913 N.E.2d 1265 (Ind. Ct. App. 2009); *Abbott v. Abbott*, 25 P.3d 291 (Okla. 2001); *Jensen v. Milatzo-Jensen*, 340 P.3d 276 (Wyo. 2014) (holding that the noncustodial parent was not entitled to a 50% child support abatement during periods in which the mother paid for day-care expenses while the father had extended summer visitation with child).

⁶² *Young*, 891 N.E.2d 1045.

⁶³ *Paternity of S.G.H.*, 913 N.E.2d 1265 (holding that the noncustodial parent is not entitled to an abatement of child support during extended parenting time on top of parenting time credit; the parenting time credit already accounts for the extended parenting time).

⁶⁴ *Bogner*, 29 N.E.3d 733 (holding that the trial court permissibly declined to award to the noncustodial parent the full parenting time credit under the child support guidelines for the child's overnight visits, where the court found that applying full credit would create a hardship on the custodial parent's ability to provide care for child); *Vandenburgh*, 916 N.E.2d 723.

⁶⁵ *Bogner*, 29 N.E.3d 733.

granted if it would create a hardship.⁶⁶ Additionally, because of the way child support calculations are calculated, the adjustment is only applied to the noncustodial parent.⁶⁷

In sum, parenting time credit is a type of in-kind child support because parents spend on goods and services for their children during their time together, instead of paying money for child support. Some states have accepted this type of arrangement, which is similar in many ways to an in-kind child support system.

B. *Trend Toward Joint Custody*

The trend toward joint custody is a magnified version of generous visitation time. Its impact on the child support obligation also resembles in-kind child support.

Modern determinations of child custody are made using the best interest of the child standard.⁶⁸ This standard allows for judicial discretion and individualized determinations as to which parent would best serve the child's needs.⁶⁹ The standard is flexi-

⁶⁶ *Id.*

⁶⁷ *Fuchs*, 836 N.E.2d 1049.

⁶⁸ *See e.g.*, *Albright v. Albright*, 437 So.2d 1003, 1005 (Miss. 1983). There are several factors a court may use when determining the best interest of the child; such factors include: 1) age, health, and sex of the child; 2) determination of the parent that had the continuity of care prior to the separation; 3) which parent has the best parenting skills and which has the willingness and capacity to provide primary child care; 4) the employment of the parent and responsibilities of that employment; 5) physical and mental health and age of the parents; 6) emotional ties of the parent and child; 7) moral fitness of the parents; 8) the home, school, and community record of the child; 9) the preference of the child if the child is at an age sufficient to express a preference by law; 10) stability of the home environment and the employment of each parent; and 11) other factors relevant to the parent-child relationship. Furthermore, marital fault should not be used as a sanction in custody awards. *See also Reno v. Flores*, 507 U.S. 292, 303-04 (1993) ("The best interests of the child,' a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody."). For a useful background on the American best interests standard, see John C. Lore III, *Protecting Abused, Neglected, and Abandoned Children: A Proposal for Provisional Out-of-State Kinship Placements Pursuant to the Interstate Compact on the Placement of Children*, 40 U. MICH. J.L. REFORM 57, 64 n.23 (2006).

⁶⁹ Compare the child's best interests standard to historical gender-driven custody presumptions. *See, e.g., Ex parte Devine*, 398 So. 2d 686, 688-691 (Ala. 1981) (reviewing the history of gender-preference child-custody standards).

ble and all disputes are determined on a case-by-case basis, balancing the child's needs against each parent's ability to provide for the child.⁷⁰ There are two types of child custody—legal custody provides a parent the power to make major decisions for the child, while physical custody determines with which parent the child resides.⁷¹

Joint custody allows the custody of children to be shared between divorcing parents,⁷² although joint custody does not neces-

But see Susan Beth Jacobs, Note, *The Hidden Gender Bias Behind "The Best Interests of the Child" Standard in Custody Decisions*, 13 GA. ST. U. L. REV. 845 (1997) (discussing "how inherent judicial subjectivity in the best interest of the child standard may result in gender bias impacting custody determinations").

⁷⁰ Jo-Ellen Paradise, Note, *The Disparity Between Men and Women in Custody Disputes: Is Joint Custody the Answer to Everyone's Problems?*, 72 ST. JOHN'S L. REV. 517, 532 (1998). *See also* Michael J. Waxman, *Children's Voices and Fathers' Hearts: Challenges Faced in Implementing the "Best Interests" Standard*, 26 ME. B.J. 71 (Spring 2011) (noting the difficulties in applying the standard).

⁷¹ "Legal custody includes the 'right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare.'" *McCarty v. McCarty*, 807 A.2d 1211, 1213 (Md. Ct. Spec. App. 2002). Physical custody includes the "right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent having such custody." *Id.* These two types of custody may be awarded in differing combinations. *See, e.g.,* *LaChapelle v. Mitten*, 607 N.W.2d 151, 168 (Minn. Ct. App. 2000) (affirming one parent's sole physical custody and shared legal custody with another parent and granting a third party a particular right).

"Joint legal custody means that both parents have an equal voice in making those decisions, and neither parent's rights are superior to the other[']s." By contrast, sole legal custody means that only one parent has the right to make the significant long-term decisions. "Joint physical custody" refers to the child's being in the physical care of both parents; however, the term can be defined precisely because there is no fixed formula or number of days as to when "joint physical custody" begins.

Dorothy R. Fait, Vincent M. Wills, & Sylvia F. Borenstein, *The Merits of and Problems with Presumptions for Joint Custody*, 45 MD. B.J. 12, 14 (Feb. 2012) (citing *Taylor v. Taylor*, 311 508 A.2d 962, 974 (Md. 1986)).

⁷² The notion that parents could share custody had great appeal to a variety of parties. Judges could avoid the difficult task of choosing between two fit parents, family law could reduce or eliminate the acrimony inspired by the traditional winner/loser custody model, both parents would be respected and encouraged to spend significant time

sarily mean equal custody.⁷³ Nonetheless, both parents can maintain significant contact with their children through joint physical custody and some control over financial decisions through joint legal custody. The joint custody paradigm may also further the child's best interests, assuming that such interests require significant contact with each parent.⁷⁴

Family law has been moving toward the involvement of both parents through joint custody. Almost every state in the United States has a joint custody option or even a presumption of joint custody⁷⁵ compared to 1975, when only one state permitted joint custody.⁷⁶ Now, joint custody is common and even the default in many cases.⁷⁷

with their children, and children would benefit from the continuing involvement of both parents.

Cynthia Lee Starnes, *Lovers, Parents, and Partners: Disentangling Spousal and Co-Parenting Commitments*, 54 ARIZ. L. REV. 197, 222 (2012).

⁷³ See IND. CODE § 31-17-2-14 ("An award of joint legal custody under section 13 of this chapter does not require an equal division of physical custody of the child.").

⁷⁴ "Joint custody became the new standard of what was considered 'in the best interests' of the child." Mary Ann Mason, *The Roller Coaster of Child Custody Law Over the Last Half Century*, 24 J. AM. ACAD. MATRIM. LAW. 451, 453 (2012).

⁷⁵ Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Working Toward More Uniformity in Laws Relating to Families*, 44 FAM. L.Q. 469, 511 (2011). See, e.g., IDAHO CODE ANN. § 32-717B(4) (2006) ("[A]bsent a preponderance of the evidence to the contrary, there shall be a presumption that joint custody is in the best interests of a minor child or children."); OR. REV. STAT. § 107.169(3) (2011) (presuming joint custody is preferable when "both parents agree to the terms and conditions of the order"). Critics have pointed out that this is undesirable in cases of domestic abuse. Janet R. Johnston & Nancy Ver Steegh, *Historical Trends in Family Court Response to Intimate Partner Violence: Perspectives of Critics and Proponents of Current Practices*, 51 FAM. CT. REV. 63, 68 (2013).

⁷⁶ Milton C. Regan, Jr., *Divorce Reform and the Legacy of Gender the Illusion of Equality: The Rhetoric and Realty of Divorce Reform*. By Martha Albertson Fineman, 90 MICH. L. REV. 1453, 1472 (1992).

⁷⁷ *But see* Douglas W. Allen & Margaret Brinig, *Do Joint Parenting Laws Make Any Difference?*, 8 J. EMP. L. STUDS. 304, 313 tbl.1 (2011) (finding that after Oregon's enactment of a presumption of joint custody, mothers were awarded sole custody 59% of the time, fathers were awarded sole custody 10% of the time, and the remainder were joint custody awards); Janet R. Jeske, *Issues in Joint Custody & Shared Parenting*, 68 BENCH & B. MINN. 20 (Dec. 2011) (reviewing the results of an Australian study finding that even in a country

When the child's best interest is not served by joint custody, then sole custody is the result. There are several reasons joint physical or joint legal custody might not be appropriate, such as high-conflict or abusive parents.⁷⁸ In such cases, the noncus-

whose laws presume equal or near-equal shared care, most parents revert to a pattern of single parent primary care); Suzanne Reynolds et al., *Back to the Future: An Empirical Study of Child Custody Outcomes*, 85 N.C. L. REV. 1629, 1669 (2007) (finding that in a survey of North Carolina divorces, mothers received primary custody in 72%, of cases, fathers were awarded primary custody in 13% of cases, with the remainder being joint custody).

⁷⁸ See, e.g., IND. CODE § 31-17-2-15:

In determining whether an award of joint legal custody under section 13 of this chapter would be in the best interest of the child, the court shall consider it a matter of primary, but not determinative, importance that the persons awarded joint custody have agreed to an award of joint legal custody. The court shall also consider:

- (1) the fitness and suitability of each of the persons awarded joint custody;
- (2) whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing the child's welfare;
- (3) the wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age;
- (4) whether the child has established a close and beneficial relationship with both of the persons awarded joint custody;
- (5) whether the persons awarded joint custody:
 - (A) live in close proximity to each other; and
 - (B) plan to continue to do so; and
- (6) the nature of the physical and emotional environment in the home of each of the persons awarded joint custody.

Many custody decisions in Indiana, as across the United States, thus have turned on whether the parents are able and willing to communicate. As one Indiana court stated, "The issue in determining whether joint legal custody is appropriate is not the parties' respective parenting skills, but their ability to work together for the best interests of their children." *Carmichael v. Siegel*, 754 N.E.2d 619, 636 (Ind. Ct. App. 2001).

Even two parents who are exceptional on an individual basis when it comes to raising their children should not be granted, or allowed to maintain, joint legal custody over the children if it has been demonstrated, as here, that those parents cannot work and communicate together to raise the children . . . The trial court here was placed in a position of choosing one parent over the other regarding legal custody, because of their inability to communicate and work together.

Id.

custodial parent may not be able to retain some control.⁷⁹ There is not much middle ground for these situations.

Joint custody allows both parents, to some extent, to direct financial contributions for the support of the child, but does not necessarily negate the child support obligation.⁸⁰ Courts have determined that the custodial parent can be ordered to pay child support to the noncustodial parent in situations where a large income disparity exists.⁸¹ In fact, some commentators have argued that joint custody encourages child support payment.⁸²

⁷⁹ This is despite the parental right to autonomy. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 63 (2000) (“The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”). *See also Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (noting that the freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment); *Pierce v. Soc’y of the Sisters*, 268 U.S. 510 (1925) (noting that the parents’ right to choose private education over public education is a fundamental liberty interest protected by the Fourteenth Amendment); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (noting that the parents’ right to hire a teacher to teach their child a foreign language is a fundamental liberty interest protected by the Fourteenth Amendment).

⁸⁰ Typically, the guidelines contemplate that although joint custody may be awarded, one parent will be named the custodial parent with day-to-day responsibilities of the child. Thus, the guidelines require the noncustodial parent to make the child-support payment to the custodial parent. Guidelines from several states have specific provisions and worksheets for the calculation of child support where custody is equally shared. Other states with no specific provisions for joint custody allow the courts to deviate from the guidelines in that situation and use their discretion in determining a correct amount.

Stephanie Giggetts, *Application of Child-Support Guidelines to Cases of Joint-, Split-, or Similar Shared-Custody Arrangements*, 57 A.L.R. 5TH 389, 389 (2016).

⁸¹ *In re Marriage of Turk*, 12 N.E.3d 40 (Ill. 2014) (holding that the custodial parent may be ordered to pay child support to the noncustodial parent where circumstances and the best interest of the child warrant it); *McClure v. Haisha*, 51 N.E.3d 831 (Ill. App. Ct. 2016) (ordering the father to pay child support to the mother, despite his status as the custodial parent, because of a vast income disparity); *R.B. v. K.S.*, 25 N.E.3d 232 (Ind. Ct. App. 2015) (ordering child support to be paid to the noncustodial parent in light of the custodial parent’s high income).

⁸² “In addition, fathers’ rights activists and politicians alike argued that joint custody would function as an incentive for men to fulfill child support obligations.” Deborah Dinner, *The Divorce Bargain: The Fathers’ Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 128 (2016). *See also*

Nonetheless, joint custody often facilitates the noncustodial parent's ability to direct some spending on the child—which is the goal and effect of in-kind child support.

The current family law system thus recognizes the benefits of an in-kind child support allotment through features like the parenting time credit and joint custody, which recognize that parents make some financial contributions directly to their children in terms of goods and services.⁸³ While a formal recognition of in-kind child support goes one step further, it is not a dramatic shift from current family law principles and practices.

IV. A Targeted Proposal on In-Kind Child Support

Given the benefits of in-kind child support, this Part proposes a rule that would recognize in-kind child support, in terms of services or goods. Ideally, any proposed rule would increase a noncustodial parent's stake in the children and address inability to pay. In-kind child support targets these two points.

Yet, a rule permitting in-kind child support will not work in an unlimited fashion. There are some concrete reasons to limit in-kind child support that must be addressed. This Part looks at how to recognize in-kind child support in a way that maximizes its benefits and minimizes its drawbacks.

A. Benefits of In-Kind Child Support

Scholars have already articulated several benefits for moving toward an in-kind child support system.⁸⁴ This Article focuses on

Cynthia R. Mabry, *Indissoluble Nonresidential Parenthood: Making It More Than Semantics When Parents Share Parenting Responsibilities*, 26 *BYU J. PUB. L.* 229, 236 (2012) (“Parents who have access are more likely to continue engagement and to pay child support.”); Michael A. Saini, *A. M. Hetherington and H. Kelly, For Better or For Worse: Divorce Reconsidered*. New York: W. W. Norton, 2002, 307 pp, 41 *FAM. CT. REV.* 416, 418 (2003) (“Specifically, the authors found that joint custody and mediation were more likely to make a man feel satisfied with the settlement and more likely to remain an engaged parent and to pay child support.”).

⁸³ See *supra* Part III.

⁸⁴ See *supra* Part I. See also Laurie S. Kohn, *Engaging Men as Fathers: The Courts, the Law, and Father-Absence in Low-Income Families*, 35 *CARDZO L. REV.* 511 (2013).

two particular benefits of in-kind child support that address current problems with child support—noncustodial parents’ disengagement with their children and noncustodial parents’ inability to pay.

Regarding disengagement of noncustodial parents, allowing noncustodial parents to direct their child support to certain expenses retains their stake in their children. While married people may opt to do as they please in an intact marriage,⁸⁵ they obviously lose bargaining power at divorce. To lose that power is jarring and causes detachment. However, in-kind child support would regain some involvement by the noncustodial parent.

The charitable contribution deduction in tax law has been successful for similar reasons. It incentivizes giving and individual control.⁸⁶ People often prefer to control where their money goes, which is seen as preferable to taxing and redistributing—it creates taxpayer buy-in.

While joint custody has a similar effect of giving the noncustodial parent some control, not everyone can move toward joint custody, such as when it is not in the child’s best interests.⁸⁷ In-

⁸⁵ The doctrine of necessities is the main limit on financial discretion in marriage. Under the doctrine of necessities, the courts intervene to ensure that the earning spouse is responsible for the payment of expenses incurred by the nonearning spouse for those things that are necessary for the family. *See, e.g.,* Susan Kalinka, *Taxation of Community Income: It Is Time for Congress to Override Poe v. Seaborn*, 58 LA. L. REV. 73, 94 (1997).

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.

Catherine Moseley Clark, Comment, *Imputing Parental Income in Child Support Determinations: What Price for a Child’s Best Interest?*, 49 CATH. U. L. REV. 167, 167 (1999).

⁸⁶ “These metrics generally suggest that the charitable deduction does in fact incentivize charitable giving and quantitatively increase taxpayer giving behavior among those who qualify for the deduction.” Alyssa A. DiRusso, *Charity at Work: Proposing a Charitable Flexible Spending Account*, 2014 UTAH L. REV. 281, 298 (2014).

⁸⁷ “[L]egislators tend to favor presumptions toward joint custody (not necessarily equal custody) in custody determinations absent evidence that joint custody would be detrimental to the child.” Elizabeth A. Pfenson, Note, *Too Many Cooks in the Kitchen?: The Potential Concerns of Finding More Parents*

kind child support stakes out a kind of middle ground between strict sole custody and strict joint custody, allowing noncustodial parents some role in their child's life and facilitating buy-in by the noncustodial parent. In-kind child support can be seen as a third form of custody/parenting time by creating a different level of parental input, a third category beyond the physical/legal and joint/sole paradigms when those do not work in particular cases.⁸⁸

Meanwhile, for noncustodial parents with the inability to pay child support, in-kind child support could be used as a tool to help them meet their child support obligation by giving them an alternative method of doing so in order to avoid the strictest consequences of failure to pay. For low-income noncustodial parents, recognition of an in-kind child support contribution could give credit to those who are doing the best they can with limited resources. The effect may be to keep them out of prison and instead working to financially contribute to their children.⁸⁹

B. *Limitations on In-Kind Child Support*

Despite the benefits, there are several issues created by in-kind child support that justify limiting it. First among them is the administrative burden of in-kind child support, including valuing and tracking it. Second is any negative impact or inconvenience caused to custodial parents.

1. *Administrative Burdens*

The administrative burdens inherent to an in-kind child support allotment—such as how to value certain goods and services, as well as how to track noncash payments in the system—pose an obstacle. However, similar problems have arisen in other contexts and the law offers various solutions.

The tax law provides many examples of valuing goods and services. For instance, tax rules would include the fair market value of bartered goods received in a taxpayer's gross income.⁹⁰

and Fewer Legal Strangers in California's Recently-Proposed Multiple-Parents Bill, 88 NOTRE DAME L. REV. 2023, 2040 (2013).

⁸⁸ See *supra* Part II.

⁸⁹ See *supra* Part II.

⁹⁰ Sergio Pareja, *It Taxes a Village: The Problem With Routinely Taxing Barter Transactions*, 59 CATH. U. L. REV. 785 (2010).

Barter rules assign a value to in-kind contributions, providing a model for in-kind child support in family law.

In family law, another example of difficult valuation is in calculating alimony or child support. If the court believes a person's market salary exceeds actual income, the court imputes income to that person by assigning an income to that person that is higher than he or she is earning.⁹¹

Alternatively, the formulaic nature of the Child Support Guidelines can provide estimates for various goods. There can be added a list of acceptable goods, which could have values attached to them. Or, there can be offered a table of the values of accepted in-kind contributions. Indeed, there has been a trend in family law toward formulae to increase predictability and consistency.⁹²

There also can be limits placed on items bought by noncustodial parents or services provided—such as a bar on more than three packages of diapers per month or on age-inappropriate goods. Another concrete limitation may be using a wish list created by the custodial parent, such as that available on electronic marketplaces like Amazon.

Although these limitations require law- and policy-makers' time and resources, they could be adjusted to inflation to be

⁹¹ See, e.g., *Hayden v. Hayden*, 662 So. 2d 713 (Fla. Dist. Ct. App. 1995), as clarified (Nov. 15, 1995); *In re Marriage of Elies*, 618 N.E.2d 934 (Ill. App. Ct. 1993).

⁹² There are already timetables for visitation in some states. For example, the Indiana Supreme Court adopted the "Parenting Time Guidelines" in 2001. The Guidelines represent the minimum recommended time a parent should have in order to maintain frequent, meaningful, and continuing contact with a child. Indiana Parenting Guidelines, <http://www.in.gov/judiciary/rules/parenting/>. See also Michigan Parenting Time Guideline, http://courts.michigan.gov/scao/services/focb/parentingtime/FOC_Forms/pt_guidelines.pdf (last visited Jan. 13, 2017); South Dakota Parenting Time Guidelines, <http://www.sdjudicial.com/courtinfo/parenttimeguide.aspx> (select "Parenting Time Guidelines" link) (last visited Jan. 13, 2017). "Although a few states have adopted visitation or parenting time guidelines that offer presumptive or minimum amounts of visitation to a noncustodial parent when parents cannot agree on a caretaking arrangement, the majority of states require courts to engage in individual fact-finding and adjudication to resolve contested custody and visitation cases." Stacy Brustin & Lisa Vollendorf Martin, *Paved With Good Intentions: Unintended Consequences of Federal Proposals to Integrate Child Support and Parenting Time*, 48 IND. L. REV. 803, 832 (2015).

more automatic. Furthermore, family law cases are already highly individualized to ensure children's best interests, and it is a feature of family law, for better or worse.

To minimize administrative burdens, there could also be a private market solution, and that is for vendors to accept services from noncustodial parents and grant equivalent services to the custodial parent. The market value of in-kind child support is then set by the third party middleman. Federal tax credits might encourage private organizations to participate in creating a market for in-kind child support. Such tax incentives might end up being revenue neutral if taxpayers do not have to substitute for noncustodial parents in paying child support.⁹³

Childcare co-ops can be a good example of this, where the noncustodial parent may donate time to the organization that would be credited to the custodial parent. Another example is if the custodial parent gets credited at a food bank because the noncustodial parent contributes working time or food, allowing the custodial parent to use the food bank based on such credit. This way, the custodial parent is not limited to the type of goods or services provided by the noncustodial parent. Or, the employer of the noncustodial parent may grant its services to the custodial parent in exchange for extra services by the noncustodial parent. For example, if the employer is an auto mechanic, there could be benefits granted to the custodial parent if the noncustodial parent contributes an excess of services to the employer.

In sum, the administrative burdens of an in-kind child support system can be eased by moving toward a formulaic approach. Additional limits and rules may be set to ease administrative concerns.

2. *Hardship to Custodial Parents*

A second significant issue with in-kind child support is that custodial parents should not be further inconvenienced or pushed toward poverty because they are receiving non-custodial in-kind child support instead of the money needed to run the household. Indeed, the child's best interests for meaningful fi-

⁹³ See Margaret Ryznar & Karen E. Woody, *A Framework on Mandating Versus Incentivizing Corporate Social Responsibility*, 98 MARQ. L. REV. 1667 (2015) (examining the incentivizing of corporations through tax policy).

nancial support from both parents should continue to take priority under any changes to the current child support system.⁹⁴

For this reason, and because the purchase of a noncustodial parent's choice of goods may be frivolous or duplicative, in-kind child support may be limited to a percentage of the total child support award. Alternatively, there could be an actual dollar amount limit, or a percentage limit that would more easily apply across a multitude of cases. Thus, some of the benefits of in-kind child support would be garnered,⁹⁵ while still ensuring that the minimum financial support is provided to the child. Child support modification standards could also include language that enables a change from in-kind child support if it is not sufficiently supporting the child financially.

Given parents' differing abilities to pay child support, there could be a sliding scale of the in-kind child support amount allowable in reverse based on income. There could also be a phase-out income contribution, as there often is in the tax law.⁹⁶ This is because low-income parents need more accommodations due to an inability to pay. Another solution might be for higher income noncustodial parents to buy an additional percentage of

⁹⁴ "The child support program is guided by the best interests of the child standard." Hatcher, *supra* note 8, at 1335. See also Lori W. Nelson, *High-Income Child Support*, 45 FAM. L.Q. 191, 191 (2011) (noting how child support cases were driven by the "best interest of the child" standard); see also *supra* Part II.

⁹⁵ See *supra* Part IV.

⁹⁶ "Benefits subject to phaseout include personal exemptions, 80% of itemized deductions, the exclusion of Social Security benefits, the child credit, and Hope scholarships." Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1, 8 (2000). However, income phaseouts trigger the cliff effect.

The Internal Revenue Code contains many credits, deductions, exclusions, and other benefits that apply when a taxpayer satisfies a certain numerical criterion, but that immediately vanish once this triggering criterion is no longer met. As a result, two taxpayers in nearly identical economic situations can face considerably different federal tax liabilities depending on which side of the triggering criterion they happen to fall. The "cliff effects" attached to these tax provisions can drastically affect taxpayer behavior and undermine what these provisions are intended to accomplish.

Manoj Viswanathan, *The Hidden Costs of Cliff Effects in the Internal Revenue Code*, 164 U. PA. L. REV. 931, 931 (2016).

in-kind child support. In other words, they would choose between paying a cash figure or paying a slightly higher amount of in-kind child support. This extra amount of money paid would address any duplication of goods and services provided by the custodial parent.

If the parents are extreme in not getting along, or there is abuse, then parents must be separated as completely as possible, and only a cash child support payment will work. To the extent that in-kind child support requires parents to work together and coordinate, or creates a middle ground between sole and joint custody—it should be avoided in these contexts.

Thus, as a final limitation, to avoid significant inconveniences to the custodial parent, parents may need to opt-in, or receive judicial-approval, for an in-kind child support award.⁹⁷ This is in the spirit of increased allowance in family law for parents to agree on child-related matters.⁹⁸ Additionally, it gives courts another tool to utilize to increase child support payments.

⁹⁷ Parental agreement is often encouraged at divorce. *See, e.g., Paternity of K.R.H.*, 784 N.E.2d at 991 (noting that although the Indiana Parenting Guidelines provide courts with specific parenting time for children of a given age, they do not foreclose parents from agreeing, and being granted, additional or reduced parenting time as deemed reasonable). *See also* the trend toward mediation and collaborative divorce. *See, e.g., IND. CODE* § 31-15-9.4-1:

Whenever the court issues an order under this article, other than an ex parte order, the court shall determine whether the proceeding should be referred to mediation. In making this determination, the court shall consider: (1) the ability of the parties to pay for the mediation services; and (2) whether mediation is appropriate in helping the parties resolve their disputes.

But see Luke Salava, *Collaborative Divorce: The Unexpectedly Underwhelming Advance of a Promising Solution in Marriage Dissolution*, 48 *FAM. L.Q.* 179 (2014).

⁹⁸ “The [Uniform Premarital and Marital Agreements] Act implies that there can be guidance within prenups and midnups on future child support for existing and future children.” Jeffrey A. Parness, *Parentage Prenups and Midnups*, 31 *GA. ST. U. L. REV.* 343, 346 (2015). Traditionally, people could not contract on significant decisions regarding their children in prenups. *See, e.g.,* Margaret Ryznar & Anna Stepień-Sporek, *To Have and to Hold, For Richer or Richer: Premarital Agreements in the Comparative Context*, 13 *CHAP. L. REV.* 27 (2009). *See also* *IND. CODE* § 31-11-3-5 (“A premarital agreement may not adversely affect the right of a child to support.”).

V. Conclusion

As the importance of the child support system increases due to the decrease in intact families, it becomes important to ensure that the system works and that it evolves along with the family as well as family law trends. It is thus helpful to consider new ideas to make child support more effective.

One such proposal is the recognition of in-kind child support, which is child support in the form of goods and services instead of money. Although in-kind child support is being paid informally already, it is not recognized by family law. However, there are several advantages to recognizing it. These include giving noncustodial parents a larger stake in their children and acknowledging the support of indigent noncustodial parents.

In-kind child support has not yet been allowed a role in the child support system because of important reasons, such as its administrability and potential hardships to custodial parents. Thus, there must be limits placed on in-kind child support to offset these concerns that have prevented it from becoming a rule. Such limits include capping in-kind child support to a percentage of the child support award and providing schedules for the value of everyday items frequently used as in-kind child support, as well as requiring judicial approval or parental agreement. In proposing any model for in-kind child support, it is important to recognize these limits and offer workable solutions.

Nonetheless, in-kind child support offers an additional option to increase the success of child support collection. Allowing even a small role for in-kind child support in the current child support framework may yield benefits at a time when the efficient working of a child support system is essential to a successful family law system.