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Economic Windfalls and Child Support: How Should Gifts, Inheritances, and Prizes Be Treated?

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In the spring of 2013, the attention of many turned to one of the largest jackpots available in the history of the Powerball multistate lottery. Eventually, it was reported that Pedro Quezada of New Jersey was the sole winner of the prize. Quezada opted to take a $211 million lump-sum payment, rather than receiving the full amount of the $338 million prize in installments. However, New Jersey authorities made clear that the $29,000 Quezada owed in child support arrears would be deducted before any payments were made to him.[1]

Other than perhaps Quezada himself, few people would have any quibble with this relatively small deduction from his jackpot winnings. After all, the obligation to support one's children is firmly established in both law and morals. To the extent Quezada can use his newfound wealth to make up for any past failures to satisfy his child-support obligations, he should do so. Similarly, many would agree that Quezada's minor children should be able to share in his lottery winnings. However, reasonable people may disagree regarding whether this should be in the form of increased mandatory child support payments, or whether Quezada should be able to independently determine how to share (or not share) his newfound wealth with his children as part of his parental prerogative.

The issues arising from Quezada's situation become more challenging if we imagine his jackpot as being more modest, such as a $50,000 prize. These issues are exacerbated if we imagine Quezada was not behind in his child

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1. *See* Korva Coleman, *Powerball Winner Owes Thousands in Child Support Payments,* NPR, THE TWO-WAY: BREAKING NEWS FROM NPR (March 28, 2013, 9:42 AM), http://www.npr.org/blogs/thetwo-way/2013/03/28/175569263/pwerball-winner-owes-thousands-in-child support-payments.

support payments, but rather was current with this obligation. Further, consider a situation where Quezada was having difficulty making his mortgage payments and in danger home foreclosure. Finally, if the $50,000 prize was adequate to remove the risk of foreclosure, the question of what Quezada should do with his winnings is even more difficult. In these varied circumstances, should Quezada still be compelled to use at least some of the $50,000 winnings as increased child support payments?

The possible variations on this scenario are endless. Consider a situation where $50,000 was left to Quezada in his mother's will. Should the money be treated any differently for child support purposes? Would it impact the analysis if Quezada had faithfully taken care of his mother through her declining years, or if his mother had left him the money despite being estranged from her son entirely? Further, would it make any difference if rather than an inheritance, Quezada's mother, while living, provided her son with $2000 each month to pay his mortgage, after having learned of his financial distress?

Given the different answers these questions generate, it is not surprising that the law differs greatly from state to state, and even within states, regarding how the separate categories of gifts, inheritances, and prizes are treated for child support purposes. Taken as a whole, the law here is a mess. There are no consistent theoretical underpinnings for the manner in which these items are treated in existing child support law. Thus, the law in this area needs rationality and harmonization.

The purpose of this Article is to come up with an ideal manner in which gifts, inheritances, and prizes (referred to collectively from this point forward as GIPs), should be treated under child support law. This Article begins with an analysis of existing law regarding the treatment of these categories of resources for child support purposes.[2] After demonstrating the confused, conflicting, and contradictory state of the existing law in this area, it goes on to examine the goals and purposes of child support law.[3] It is only in relation to such goals and purposes that a recommendation can be made for the ideal treatment of GIPs. Thus, the third section examines GIPs in relation to the previously discussed goals and purposes of child support law.[4] Finally, this Article concludes with a recommendation to policymakers regarding the ideal treatment of GIPs in child support law.[5]

I. CURRENT TREATMENT OF GIPS UNDER STATE CHILD SUPPORT LAW

In 1988, Congress mandated that states adopt standardized mathematical guidelines for determining child support, making this a condition

2. *See infra* Part I.
3. *See infra* Part II.
4. *See infra* Part III.
5. *See infra* Part IV.

for receiving federal assistance for child support and enforcement programs.[6] As a result, all states have adopted such guidelines. However, the federal government did not impose any strictures as to the form such guidelines should take.[7] Therefore, there are significant differences in these guidelines from state to state. For example, even though the starting point for calculating guideline support in virtually every state is the incomes of the parents, states differ significantly in how they determine each parent's income.

Nowhere are these differences in income determinations greater than in the case of GIPs. For example, some state child support statutes expressly include gifts within their definition of countable income for child support purposes. One such state is Texas, which expressly includes gifts in its definition of "net resources," which are counted for purposes of calculating child support.[8] Not surprisingly, the Texas Court of Appeals held cash payments and other in-kind contributions made from a father to his adult son, who was a college student, were gifts that counted as the son's net resources in determining the child support payments he owed.[9] Similarly, Colorado expressly includes "monetary gifts" in its definition of income for child support purposes.[10] Thus, the Colorado Supreme Court held a party could conduct discovery to determine whether the opposing parent in a child support dispute

6. *See, e.g.,* Ira Mark Ellman & Tara O'Toole Ellman, *The Theory of Child Support*, 45 HARV. J. ON LEGIS. 107, 109, 112-13 (2008); Daniel L. Hatcher, *Collateral Children: Consequence and Illegality at the Intersection of Foster Care and Child Support,* 74 BROOK. L. REV. 1333, 1373 (2009); Laura W. Morgan, *Child Support Fifty Years Later,* 42 FAM. L.Q. 365, 368 (2008).

7. *See* Marsha Garrison, *Child Support and Children's Poverty*, 28 FAM. L.Q. 475, 503-04 (1994) (reviewing ANDREA H. BELLER & JOHN W. GRAHAM, SMALL CHANGE: THE ECONOMICS OF CHILD SUPPORT (1993)). The government commissioned studies regarding the costs of raising children that proved extremely influential in the development of state child support guidelines. *See id.* at 504. These studies led to the development of the "income shares" method of calculating child support, which has been adopted by the vast majority of states. *Id.*; *see also* Stacy Brustin, *Child Support: Shifting the Financial Burden in Low-Income Families,* 20 GEO. J. ON POVERTY L. & POL'Y 1, 6-7 (2012). The income-shares approach attempts to determine the marginal cost of adding children to a childless family, and then allocates that cost between the children's parents in proportion to the percentage of total family income earned by each parent. *See* Brustin, *supra*, at 6-7. The next most common method for calculating child support is the Percent of Obligor Income Model, which determines child support based upon a percentage of the noncustodial parent's income. *See id.* at 7. Neither method, however, specifies what resources should be included in income for purposes of calculating support, which is the issue that concerns us here.

8. *See* TEX. FAM. CODE ANN. § 154.062(b)(5) (West 2013).

9. *See In Re* L.R.P., 98 S.W.3d 312, 314-15 (Tex. Ct. App. 2003). In so holding, the court parted ways with two earlier decisions by the Texas Court of Appeals, which held that gifts should not be counted as net resources for purposes of calculating child support, because the donor could cease to provide the gifts at any point in time with no recourse for the recipient. *See* Tucker v. Tucker, 908 S.W.2d 530, 535 (Tex. Ct. App. 1995); Ikard v. Ikard, 819 S.W.2d 644, 649 (Tex. Ct. App. 1991). However, as the court in *L.R.P.* pointed out, the definition of resources contained in the Texas Family Code at the time these earlier cases were decided did not expressly include gifts. In Re *L.R.P.*, 98 S.W.3d at 314. *Compare* TEX. FAM. CODE ANN. § 154.052(b)(3) (1994), repealed by Acts 1995, 74th Leg., ch.20, § 2, effective April 20, 1995, *with* TEX. FAM. CODE ANN. § 154.062(b)(5) (West 2013).

10. COLO. REV. STAT. ANN. § 14-10-115(5)(U) (West 2014).

did in fact receive such gifts from their new spouse.[11] North Dakota also includes gifts in its calculation of income, provided the amount of such gifts exceeds $1,000 in a year.[12] Arizona and Maryland also expressly include gifts in income for child support purposes.[13]

In contrast, child support guidelines in other states expressly exclude gifts from consideration as income, at least for one time or nonrecurring gifts. For example, although the Alaska Rule of Civil Procedure 90.3 does not expressly address gifts, an official Comment to the Rule states that "the principal amount of one-time gifts . . . should not be considered as income."[14] Based on this language, the Alaska Supreme Court has concluded that even recurring gifts should not be counted as income for child support purposes under the Alaska guidelines.[15] Connecticut law expressly excludes gifts from spouses or domestic partners from income in calculating child support, but otherwise includes regularly recurring gifts in income.[16]

The most common situation in state child support calculation is where the guidelines neither expressly include nor expressly exclude gifts from income calculations.[17] Rather, the state guidelines are silent regarding the treatment of gifts. In such circumstances, states are split regarding whether to include or exclude the gifts from income.[18] One important factor in this analysis is the recurrence or non-recurrence of such gifts, with recurring gifts more likely to be included in income than nonrecurring gifts.[19] However, some states have concluded that even recurring gifts should not be treated as income for child support purposes, because the donor may cease to provide such gifts at any time.[20]

11. *See In Re* Marriage of Nimmo, 891 P.2d 1002, 1007 (Colo. 1995).

12. N.D. ADMIN. CODE 75.02-04.1-01(4)(b) (2014); *accord* Cook v. Eggers, 593 N.W.2d 781, 784 (N.D. 1999).

13. *See* Cummings v. Cummings, 897 P.2d 685, 686 (Ariz. Ct. App. 1994); Petrini v. Petrini, 648 A.2d 1016, 1022 (Md. 1994).

14. Nass v. Seaton, 904 P.2d 412, 415 (Alaska 1995) (quoting Comment III(A) to Alaska Rule of Civil Procedure 90.3).

15. *See id.* at 416.

16. *See* CONN. AGENCIES REGS. § 46b–215a–1(11)(B)(v) (2014); *see also* Lusa v. Grunberg, 923 A.2d 795, 805 (Conn. App. Ct. 2007).

17. *See* WIS. ADMIN. CODE DCF § 150.02(13)(a) (2013) (defining income to include salary, wages, etc., but does not include gifts, inheritances, or prizes).

18. For cases including gifts as income, *see generally Cummings*, 897 P.2d 685; *In re* Marriage of Alter, 89 Cal. Rptr. 3d 849 (Cal. Ct. App. 2009); Ordini v. Ordini, 701 So.2d 663 (Fla. Dist. Ct. App. 1997); *In re* Marriage of Rogers, 820 N.E.2d 386 (Ill. 2004); Barnier v. Wells, 476 N.W.2d 795 (Minn. Ct. App. 1991); *In re* Marriage of Petersen, 22 S.W.3d 760 (Mo. Ct. App. 2000). For cases finding gifts are not countable income, *see generally* True v. True, 615 A.2d 252 (Me. 1992); Styka v. Styka, 972 P.2d 16 (N.M. Ct. App. 1998); Huebscher v. Huebscher, 206 A.D.2d 295 (N.Y. App. Div. 1994); Triggs v. Triggs, 920 P.2d 653 (Wyo. 1996).

19. *See, e.g.*, *Alter*, 89 Cal. Rptr. 3d at 863-64; *Ordini*, 701 So.2d at 665-66; *Barnier*, 476 N.W.2d at 797; *Petersen*, 22 S.W.3d at 765; *see also* CONN. AGENCIES REGS. § 46b–215a–1(11)(B)(v) (2014).

20. *See, e.g.,* Nass v. Seaton, 904 P.2d 412, 416 (Alaska 1995); *True*, 615 A.2d at 253; *Huebscher*, 206 A.D.2d at 295; *Triggs*, 920 P.2d at 660-61.

While state child support guidelines provide judges with the presumptive amount of child support orders, courts can deviate from the guideline amount, provided they issue written findings of fact as to why such a deviation is in the child's best interests.[21] Thus, some states that do not include gifts in income for child support purposes have nonetheless concluded that gifts may be considered by the court in determining whether to deviate from the guideline amount.[22]

Turning to inheritances, it may appear that there should be no difference in the manner in which states treat inheritances from the manner in which they treat gifts in calculating child support. As a number of courts have pointed out, an inheritance is really nothing more than a testamentary gift.[23] Indeed, some states do treat gifts and inheritances together in their child support statutes.[24] On the other hand, some state child support statutes expressly deal with inheritances while remaining silent about gifts; the converse is true as well.[25] As suggested above, most state statutes are silent as to both categories, leaving the courts to determine how to treat gifts and inheritances in calculating child support.

As is the case with gifts, courts are divided regarding whether an inheritance should be counted as income for child support purposes when the relevant statutory definition of income fails to specifically mention inheritances. For example, in Indiana, an appellate court concluded an inheritance of $135,000, which was to be paid in two installments, counted as income for child support purposes.[26] There, the applicable child support statute expressly included gifts and prizes in its definition of income, but was silent as to inheritances.[27] The court found the inheritance to be a type of gift, and therefore, concluded that it fell within the express terms of the statute.[28] An appellate court in Virginia reached the same conclusion in similar

21. *See* Ira Mark Ellman, *A Case Study in Failed Law Reform: Arizona's Child Support Guidelines*, 54 ARIZ. L. REV. 137, 143 (2012).

22. *See Styka*, 972 P.2d at 21; *Triggs*, 920 P.2d at 660.

23. *See, e.g.*, *In re* A.M.D., 78 P.3d 741, 743 (Colo. 2003); *In re* Marriage of Leif, 266 P.3d 165, 168 (Or. Ct. App. 2011); Goldhamer v. Cohen, 525 S.E.2d 599, 603 (Va. Ct. App. 2000); Gainey v. Gainey, 948 P.2d 865, 869 (Wash. Ct. App. 1997).

24. *See* IND. CODE ANN. tit. 34, Guideline 3 (West 2013) ("Weekly Gross Income of each parent includes income from any source . . . and includes, but is not limited to . . . gifts, inheritance, [and] prizes . . . ."); OR. ADMIN. R. 137-050-0715(4)(e) (2014) ("Actual income includes but is not limited to: . . . [i]nheritances, gifts and prizes, including lottery winnings . . . .").

25. For statutes recognizing gifts and prizes, but not inheritances, for the purposes of calculating child support orders, *see* COLO. REV. STAT. ANN. § 14-10-115(5)(U)-(V) (West 2014); N.D. ADMIN. CODE 75-02-04.1-01(4)(b) (2014); TEX. FAM. CODE ANN. § 154.062(b)(5) (West 2013); VA. CODE ANN. § 20-108.2(C) (West 2014); WASH. REV. CODE ANN. 26.19.071(4)(c) (West 2014).

26. *See* Gardner v. Yrttima, 743 N.E.2d 353, 358-59 (Ind. Ct. App. 2001).

27. *See id*. at 357.

28. *See id*. at 358.

circumstances.[29] Using slightly different reasoning, a Texas appellate court also reached the same result.[30] The court reasoned the general words of inclusion for the Texas definition of income drew inheritances within the purview of the statute, even though inheritances were not expressly mentioned, as was the case with gifts and prizes.[31] In Tennessee, where the relevant regulatory language simply defined as countable "all income from any source . . . whether earned or unearned," the court concluded inheritances should be included in income for child support purposes, so long as they are reliable and regularly recurring.[32] An Arkansas court reached a similar result, even though the inheritance was nonrecurring.[33]

However, a number of courts have read statutory silence regarding inheritances to mean that such resources should not be counted under the applicable child support guidelines. Thus, the Supreme Court of South Dakota recently concluded a father's lump-sum inheritance of $260,000 should not be included in his monthly income for purposes of calculating his child support payment.[34] Similar results have been reached in California,[35] New Jersey,[36] New York,[37] Pennsylvania,[38] Washington,[39] and the District of Columbia.[40]

Even to the extent that certain jurisdictions have concluded inheritances should not be counted as income for purposes of calculating monthly child support payments under the applicable child support guidelines, some of these jurisdictions have nonetheless held that inheritances may be considered for other aspects of child support calculations. For example, to the extent that the inheritance leaves the child support obligor with an income-producing asset, the income earned on the asset may be included in the monthly child support calculation, even if the principal relating to the inheritance may not be.[41] This

29. *See* Goldhamer v. Cohen, 525 S.E.2d 599, 603 (Va. Ct. App. 2000).

30. *See In re* P.C.S., 320 S.W.3d 525, 537 (Tex. Ct. App. 2010).

31. *See id.* "[U]se of the terms ['includes' and 'including'] does not create a presumption that components not expressed are excluded." *Id*.

32. Ford v. Ford, No. 01A01-9611-CV-00536, 1998 WL 730201, at *4 (Tenn. Ct. App. Oct. 21, 1998) (citing TENN. COMP. R. & REGS. 1240-02-04-.03 (2014)). By contrast, the courts discussed previously in this paragraph reasoned it was immaterial whether the inheritances were recurring or nonrecurring. *See supra* notes 28-33 and accompanying text; *Gardner*, 743 N.E.2d at 355 (characterizing one-time inheritance paid in two separate installments as countable); *P.C.S.*, 320 S.W.3d at 526 ("[Texas's statute] indicates no intent to exclude from 'resources' income involving nonrecurring payments. . ."); *Goldhamer*, 525 S.E.2d at 603 ("The statute clearly includes irregular income in the gross income computation . . . .").

33. *See* Ford v. Ford, 65 S.W.3d 432, 439-40 (Ark. 2002) (including inheritance in income regardless of nonrecurring nature).

34. *See* Crawford v. Schulte, 829 N.W.2d 155, 160 (S.D. 2013).

35. *See* Kern v. Castle, 89 Cal. Rptr. 2d 874, 882 (Cal. Ct. App. 1999).

36. *See* Connell v. Connell, 712 A.2d 1266, 1269-70 (N.J. Super. Ct. App. Div. 1998).

37. *See* Cody v. Evans-Cody, 291 A.D.2d 27, 32-33 (N.Y. App. Div. 2001).

38. *See* Humphreys v. DeRoss, 790 A.2d 281, 286 (Pa. 2002).

39. *See* Gainey v. Gainey, 948 P.2d 865, 869 (Wash. Ct. App. 1997).

40. *See* Lasché v. Levin, 977 A.2d 361, 371-72 (D.C. 2009).

41. *See, e.g.*, *id.* at 371; Kern v. Castle, 89 Cal. Rptr. 2d 874, 882 (Cal. Ct. App. 1999); *Gainey*, 948 P.2d

may be true even if the inheritance is not actually in a form in which it produces income, as in the case of real property. In such instances, courts may impute an appropriate rate of return to the asset and include the income in the child support calculation.[42]

Moreover, some states that have determined inheritances should not be counted as income for purposes of calculating child support have nonetheless concluded an inheritance may provide a proper basis for a court to deviate from the presumptively correct guideline amount. In New York, the child support statute expressly provides for deviation based on gifts and inheritances, even though the statute does not expressly include or exclude these categories from its definition of income for purposes of its guideline calculation.[43] However, other courts have also held such a deviation from guidelines would be appropriate, even where there is no express language in the relevant child support statute addressing gifts or inheritances as grounds for deviation.[44]

An alternative approach is to include inheritances in current income for purposes of calculating child support, but only to the extent that principal from the inheritance is used to offset current living expenses. The Supreme Court of Colorado took this approach in In re *A.M.D.*[45] In this case, the issue was how to treat an inheritance paid to the father in four installments over a four-month period for calculating child support.[46] The court began its analysis by noting "monetary gifts" and "monetary prizes" are expressly included in the definition of income for child support contained in the applicable Colorado statute.[47] Because inheritances are testamentary gifts, the court had little difficulty concluding the cash inheritance in this case fell within the statutory definition of income.[48] The court went on, however, to conclude monetary inheritances should only be considered income for purposes of calculating monthly child support under the relevant guidelines to the extent the obligor expended such resources either to defray ordinary living expenses or to raise the recipient's standard of living.[49] Moreover, to the extent inherited resources were not expended for such purposes, any interest earned on the remaining balance should also be included in monthly income for purposes of calculating support.[50] Perhaps ironically, the California Court of Appeals in *County of*

at 869.

42. *See Castle*, 89 Cal. Rptr. 2d at 882.

43. *See* Cody v. Evans-Cody, 291 A.D.2d 27, 30 (N.Y. App. Div. 2001) (citing N.Y. FAM. CT. ACT § 413 (McKinney 2014) and N.Y. DOM. REL. LAW § 240 (McKinney 2014)).

44. *See Lasché*, 977 A.2d at 371; Connell v. Connell, 712 A.2d 1266, 1269-70 (N.J. Super. Ct. App. Div. 1998); Humphreys v. DeRoss, 790 A.2d 281, 288 (Pa. 2002).

45. 78 P.3d 741 (Colo. 2003).

46. *See id.* at 742.

47. *See id.* at 743 (citing COLO. REV. STAT. § 14-10-115 (2014)).

48. *See id.* at 743-44.

49. *See* In re *A.M.D.*, 78 P.3d at 746.

50. *See id.* The court noted interest is also expressly included in the definition of income for child

Kern v. Castle[51] reached the same result, despite concluding that gifts are *not* countable income for child support purposes in California.[52] The California court noted that to the extent the inheritance was used to meet ordinary living expenses, that amount could be considered income under the California child support statute.[53] Thus, similar facts could lead to the same result in both states, even though the inheritance would be considered income in Colorado, but not in California.

Of course, deciding whether to include an inheritance in income for purposes of calculating child support is just the first step of the process. Once that decision is made, the court must still decide how the inheritance will be counted. This task is perhaps most difficult when the inheritance is paid in a lump sum. For instance, if the entire inheritance is counted solely in the month in which it is received, the result may be a windfall to the child support recipient, and may also result in a child support amount the obligor cannot afford to pay in the future because he or she will not receive any inheritance in subsequent months. In some of the states that have decided to count an inheritance as income, the appellate courts have simply remanded the case to the trial courts to perform the difficult task of determining how to allocate the inheritance in calculating support.[54]

A few courts have tried to allocate a lump-sum inheritance for purposes of calculating monthly support. In the case In re *Marriage of Leif*,[55] the Oregon Appellate Court held the father's lump-sum inheritance of $75,000 was countable income for purposes of calculating child support, even though he had spent the money to retire pre-existing debt prior to the child support hearing.[56] The trial court judge apportioned the amount of the inheritance over the three years remaining until the fifteen-year-old child emancipated.[57] Neither party in that case challenged the manner in which the judge apportioned the inheritance for the purposes of calculating child support. Thus, once the appellate court

support purposes in the Colorado statute. *See id.*

51. 89 Cal. Rptr. 2d 874 (Cal. Ct. App. 1999).

52. *See id.* at 882.

53. *See id.* at 883.

54. *See, e.g.*, *In re* A.M.D., 78 P.3d 741, 747 (Colo. 2003); *In re* P.C.S., 320 S.W.3d 525, 543 (Tex. Ct. App. 2010); Goldhamer v. Cohen, 525 S.E.2d 599, 604 (Va. Ct. App. 2000). In *Gardner*, although the appellate court concluded inheritances should generally be included in income for child support purposes, the court did not remand the case back to the trial court because the trial court had properly exercised its discretion to deviate from the guidelines and not consider the inheritance. *See* Gardner v. Yrttima, 743 N.E.2d 353, 359 (Ind. Ct. App. 2001).

55. 266 P.3d 165 (Or. Ct. App. 2011).

56. *See id.* at 169. The relevant Oregon statute, and its predecessor, expressly included gifts in income, but did not specifically address inheritances. *See id.* at 167-68; *see also* OR. ADMIN. R. 137-050-0349(1) (2007), *repealed by* OR. ADMIN. R. 137-050-0715 (2014). Nonetheless, the statute included broad language of inclusion. *See Marriage of Leif*, 266 P.3d at 168; *see also* OR. ADMIN. R. 137-050-0349(1) (2007), *repealed by* OR. ADMIN. R. 137-050-0715(4)(e) (2014).

57. *See Marriage of Leif*, 266 P.3d at 166.

concluded the inheritance should be counted as income, the trial judge's order was affirmed.[58] In *Ford v. Ford*,[59] it appears the lump-sum inheritance was allocated over a year, as the child support calculation was made based upon an annual income figure.[60]

Of the three categories of economic windfall addressed in this Article, lottery winnings and other prizes are most likely to be expressly included in statutory definitions of income for child support purposes. However, the manner in which lottery winnings should be counted in determining child support still presents challenges for courts. In some instances, lottery winnings are paid out in installments over an extended period of time. In such instances, adding the installments into income for purposes child support guidelines is a relatively simple exercise. However, lump-sum winnings present the same calculation challenges as the lump-sum gifts and nonrecurring inheritances. For example, in In re *Marriage of Bohn*,[61] the father and child support obligor won $1.2 million in the Colorado State Lottery.[62] The relevant Colorado statute explicitly stated that lottery winnings should be considered income for child support purposes.[63] Moreover, the court rejected the father's argument that only the net amount of winnings should be counted as income because taxes were automatically withheld from the amount he received.[64] The court pointed out that the relevant child support statute expressly refers to "gross income," rather than "net income", for purposes of calculating support.[65] In terms of allocating the lump-sum award, the trial court apportioned the full amount over a year, resulting in a monthly gross income of more than $100,000 (including the father's other earnings).[66] The appellate court affirmed this aspect of the order despite the father's contention that he had invested a significant portion of the award rather than spending it.[67] The appellate court further rejected the father's contention that counting the full amount of principal of the award in the current year, as well as counting any income earned on the invested portion of the award in future years, amounted to double-counting.[68]

Even in jurisdictions where prizes or lottery winnings are not expressly

58. *See id.* at 170.

59. 65 S.W.3d 432 (Ark. 2002).

60. *See id.* at 439-40.

61. 8 P.3d 539 (Colo. Ct. App. 2000).

62. *See id.* at 540.

63. *See id.* at 541 (citing COLO. REV. STAT. § 14-10-115 (2014)). The statute excludes lottery winnings that do not need to be claimed at the lottery office—presumably smaller amounts of money—from income calculations. *See id.*

64. *See id*.

65. *See Marriage of Bohn*, 8 P.3d at 541.

66. *See id.* at 540.

67. *See In re* Marriage of Bohn, 8 P.3d 539, 541 (Colo. Ct. App. 2000).

68. *See id.* at 541.

included in the statutory definition of income for child support purposes, courts have reached the same result. For example, a Louisiana appellate court concluded lottery winnings were income for child support purposes, despite the fact that the relevant child support statute had previously been amended to remove language that expressly included gifts and prizes in the definition of income.[69] Because the father's jackpot of more than $1 million dollars was paid out in twenty annual installments of approximately $58,000, the court had little difficulty determining the manner in which to include the winnings for purposes of applying the child support guidelines.[70]

II. GOALS OF CHILD SUPPORT

Given the patchwork of treatment of GIPs for child support purposes under different states' laws, it is worth trying to determine the ideal treatment of these resources. Doing so requires us to consider the foundational principles and goals of our child support legal regime. The following is a non-exhaustive list of principles that might be considered in determining how economic windfalls should be handled in determining child support. Some of the following principles have been discussed previously in this Article, and all of these considerations have been raised in academic literature. However, as this discussion shows, not all of these principles hold up under close scrutiny. Moreover, the remaining principles conflict with one another and point in different directions. Thus, determining the ideal rule for handling economic windfalls in child support cases requires prioritization among competing values.

A. Principle 1: Assure the Well-Being of Children

Perhaps it should go without saying, but the primary and most frequently stated objective of child support law is to provide for the economic well-being of children.[71] Indeed, the move to determinate child support guidelines, which forms the backdrop of this Article, was an effort to end the previous regime that was almost wholly discretionary and allowed judges to issue child support orders that prevented the affected children from having an adequate standard of living.[72] While it is easy to agree that the goal of

69. *See* Green v. Scott, 687 So.2d 655, 658 (La. Ct. App. 1997). The court pointed out that the legislature chose not to add gifts and prizes to the list of items expressly *excluded* from income by the statute as well. *See id.*

70. *See id.* at 656. Further, because the father was married, his community property share of the winnings was only half of the actual income stream. *See id.*

71. *See In re* L.R.P., 98 S.W.3d 312, 313 (Tex. Ct. App. 2003); Ellman & Ellman, *supra* note 6, at 131 (describing this as "Child Well-Being Component" of child support).

72. *See* Ellman & Ellman, *supra* note 6, at 110-11; *see also* Morgan, *supra* note 6, at 367-68. *See generally* AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002) [hereinafter ALI PRINCIPLES].

providing children with adequate support is important, it is difficult to agree on the level of support that would satisfy this criterion, particularly given the existing disparities in families' available resources.

It is also impossible to separate the economic well-being of children from that of the adults who live with them. It is an unfortunate but necessary feature of the child support regime that the child support obligor must provide the child support payment to their former spouse or partner, from whom the obligor is typically estranged. This certainly contributes to the relatively poor levels of compliance with child support obligations documented in the United States.[73] Formally, child support is intended to benefit the child, while spousal support, such as alimony or maintenance, is intended to benefit the former spouse.[74] However, as long as children reside primarily with a custodial parent, resources that benefit one will necessarily benefit the other.[75]

This fact complicates child support law where either parent has a new partner or spouse. Because the new partner or spouse has no legal obligation to support the child from their partner's prior relationship, the new partner's income is not typically considered for child support purposes.[76] However, the new partner's resources certainly contribute to the economic well-being of the child support recipient, as well as any children that live with them. Thus, it should be a factor considered in calculating child support.[77]

B. Principle 2: Both Parents Have an Equal Obligation to Support Their Children

Child support law and policy clearly reflect the notion that both parents have an equal duty to support their children.[78] Certainly, as a theoretical matter, one might question why parents, as opposed to the state, ought to bear ultimate responsibility for the support of children, particularly in certain cases of "involuntary" parenthood.[79] As a practical matter, however, it is certain that child support law will continue to hold both parents responsible for the support

73. According to the U.S. Census Bureau's most recent statistics, only about 40% of custodial parents receive the full amount of child support due to them, and only about 60% of the total amount of child support due is paid. *See* TIMOTHY S. GRALL, U.S. DEP'T OF COMMERCE: U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2009, at 3 (Dec. 2011), *available at* http://www.census.gov/prod/2011pubs/p60-240.pdf.

74. *See* Steven K. Berenson, *Should Cohabitation Matter in Family Law?*, 13 J.L. & FAM. STUD. 289, 302 (2011).

75. *See* ALI PRINCIPLES, *supra* note 72, at § 3.05; Ellman, *supra* note 21, at 145.

76. *See* Ellman & Ellman, *supra* note 6, at 114.

77. For an analysis of how a new partner's income can be considered for purposes of deviating from the guideline amount, even where not considered directly for guideline support, *see supra* note 21.

78. *See* Petrini v. Petrini, 648 A.2d 1016, 1018-19 (Md. 1994); Connell v. Connell, 712 A.2d 1266, 1268 (N.J. Super. Ct. App. Div. 1998); ALI PRINCIPLES, *supra* note 72, § 3.04(1); Ellman & Ellman, *supra* note 6, at 137 (referring to this as the "Dual Obligation Component" of child support).

79. *See generally* Ellman & Ellman, *supra* note 6.

of their children.[80] This means noncustodial parents may be held responsible to pay child support even in situations where the custodial parent's resources alone are sufficient to provide for the child, such that the child support payment may result in a "windfall" to the child and custodial parent. In many such cases, this "excess" support will only provide additional support for the child at a level well below what one might consider a life of luxury. Further, even in cases where child support would result in a luxurious lifestyle for the child, support may be warranted based on the fairness aspect of the equal-support-obligation principle, and also to provide the noncustodial parent with a tangible connection to the child in the form of the support payment.[81]

C. Principle 3: Maintain the Child's Pre-Divorce Standard of Living

A frequently stated goal of child support orders is to maintain the pre-divorce standard of living the child enjoyed.[82] In fact, many state child support guidelines are based on an estimate of the amount of household income that would have been devoted to the child had the family remained intact.[83] This goal is impractical because the same amount of income that provided for the child before the divorce must now support two separate households, rather than one.[84] A more realistic goal is to seek as little diminution in the child's standard of living as is possible, in light of this necessary increase in expenditures. Another possibility is to share, either equally or in a predetermined proportion, the loss in standard of living brought about by the family dissolution.[85] Note, however, that in an increasingly large number of instances, the parents never shared a household, thus rendering this measure irrelevant in many cases.[86]

D. Principle 4: Avoid Impoverishment of Child Support Obligors

For some low-income earners, a child support order that is sufficient to provide the child with an adequate standard of living may leave the obligor without enough resources for an adequate standard of living.[87] In some

80. *See* Leslie Joan Harris, *The ALI Child Support Principles: Incremental Changes to Improve the Lot of Children and Residential Parents,* 8 DUKE J. GENDER L. & POL'Y 245, 245-46 (2001).

81. *See* Ellman & Ellman, *supra* note 6, at 137.

82. *See* Gardner v. Yrttima, 743 N.E.2d 353, 357 (Ind. Ct. App. 2001); *Petrini*, 648 A.2d at 1019; *Connell*, 712 A.2d at 1268; Ellman & Ellman, *supra* note 6, at 116; Marsha Garrison, *Child Support Policy: Guidelines and Goals,* 33 FAM. L.Q. 157, 172 (1999).

83. *See* Cummings v. Cummings, 897 P.2d 685, 687 (Ariz. Ct. App. 1994); Ellman & Ellman, *supra* note 6, at 115.

84. *See* ALI PRINCIPLES, *supra* note 72, at § 3.04(c); Ellman & Ellman, *supra* note 6, at 116.

85. *See* Garrison, *supra* note 82, at 174.

86. *See id.* at 168.

87. *See* Brustin, *supra* note 7, at 1; Ellman & Ellman, *supra* note 6, at 120, tbl.1, 145; Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers,* 39 U.C. DAVIS L. REV. 991, 1002-03 (2006).

troubling cases, the obligor's child enjoys an adequate standard of living with the custodial parent, but the noncustodial parent must nonetheless pay child support to a degree that leaves the obligor destitute. It seems a relatively uncontroversial principle that a person should not be obligated to provide for the needs of others until one is able to provide for themselves, even if the other person happens to be one's child. I will refer to this as the "airplane principle," based on the familiar instruction on an airplane that if there is a loss of cabin pressure, an adult should secure their own oxygen mask before placing one upon their children.[88]

The plight of low-income child support obligors received heightened attention in 2011 when the Supreme Court granted certiorari in *Turner v. Rogers*.[89] *Turner* involved the incarceration if a child support obligor for failure to comply with a South Carolina trial court's child support order.[90] The Supreme Court's decision was highly anticipated by proponents of a constitutional right to counsel in certain civil cases. This argument built on the Court's ruling in *Gideon v. Wainwright,*[91] where the Court held that a right to counsel existed in certain criminal cases.[92] In *Turner*, the Court did not hold Turner had a right to counsel in his civil contempt trial even though the possibility of incarceration existed.[93] However, the Court found Turner had a right to a reliable determination of his ability to pay the child support order, which was a necessary precursor to convicting him of civil contempt.[94] The case was remanded based upon the Supreme Court's conclusion that the South Carolina courts had not made an adequate effort to make a reliable determination of Turner's ability to pay.[95] *Turner* highlights the plight of thousands of low-income child support obligors, who have no realistic possibility of satisfying their child support obligations, and who are nonetheless subject to a variety of coercive sanctions, up to and including incarceration, that further impede their ability to provide economically for their children.[96]

Most state child support guidelines do provide for a self-support reserve, a low-income adjustment, or some other mechanism to help ensure that

88. *See* Ellman & Ellman, *supra* note 6, at 145 (referring to this as "Earner's Priority Principle").

89. 131 S. Ct. 2507 (2011).

90. *Id.* at 2513.

91. 372 U.S. 335 (1963).

92. *See id.* at 342-43; Tom Pryor, Note, Turner v. Rogers*, The Right To Counsel, and the Deficiencies of* Matthews v. Eldridg, 97 MINN. L. REV. 1854, 1855 (2013).

93. See Pryor*, supra* note 92, at 1855-56; *see also* Russell Engler, Turner v. Rogers *and the Essential Role of the Courts in Delivering Access to Justice*, 7 HARV. L. & POL'Y REV. 31, 33-34 (2013).

94. *See Turner*, 131 S. Ct. at 2520; Engler, *supra* note 93, at 33-34.

95. *See* Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011).

96. *See generally* Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families,* 15 J. GENDER RACE & JUST. 617 (2012); Maldonado, *supra* note 87.

poor child support obligors are not impoverished.[97] However, these provisions only partially achieve that goal.[98]

E. Principle 5: Minimize the Standard-of-Living Gap Between the Child and the Noncustodial Parent

Another frequently stated goal of child support law is to minimize gross disparities in living standards between the child and the noncustodial parent.[99] This principle also justifies an order of support in situations where the child's standard of living with the custodial parent would otherwise be adequate to provide for the child's basic needs.

The gendered nature of child support determinations adds another complication. Most, though certainly not all, custodial parents are women.[100] Yet in the aggregate, women earn less than men.[101] The greatest factor in determining a child's economic well-being post separation is the income level of the custodial parent.[102] Yet given that the custodial parent is likely to be the lower-earning mother, in many cases, only extremely high child support payments can assure the child enjoys a similar standard of living to the noncustodial parent.[103] However, extremely high child support orders invite efforts of noncompliance by the obligor, reduce the obligor's incentive to work and earn additional income, and reduce the custodial parent's incentive to work and earn income.[104] At least some scholars have advocated that a goal of child support policy should be to equalize the standard of living of all family members.[105] However, such a policy runs into the challenges mentioned above.

F. Principle 6: Beyond Providing for the Necessities for the Child's Well-Being, Parents, Rather than the State, Should Determine How Their Resources

97. *See* Garrison, *supra* note 82, at 162.

98. For example, in California, a low-income adjustment is presumptively available to parties earning less than $1000 per month. However, a person working a minimum wage job for thirty hours per week would be slightly above that threshold (8 x 30 x 4.3 = 1032). Assume for purposes of simplicity that the custodial parent has the same income, and the noncustodial parent has a 20% time share with the child. The monthly child support payment for one child would be $146, leaving the noncustodial parent with a gross income of $886, which is below the monthly prorated federal poverty level of $975.50 for a single person. Note that even applying California's low-income adjustment to both parents, the child support payment would be $89 per month, still leaving the noncustodial parent in poverty. *See generally Calculate Child Support*, CAL. DEP'T CHILD SUPPORT SERVICES, https://www.cse.ca.gov/ChildSupport/cse/guidelineCalculator (last visited Aug. 25, 2014).

99. *See* ALI PRINCIPLES, *supra* note 72, § 3.04(1)(b); Ellman & Ellman, *supra* note 6, at 140 (referring to this as "The Gross-Disparity Component").

100. *See* Garrison, *supra* note 82, at 172.

101. *See id.*

102. *See* Ellman & Ellman, *supra* note 6, at 127.

103. *See* Garrison, *supra* note 82, at 173.

104. *See id.*

105. *See id.* at 174; Adrienne Jennings Lockie, *Multiple Families, Multiple Goals, Multiple Failures: The Need for "Limited Equalization" as a Theory of Child Support*, 32 HARV. J.L. & GENDER 109, 153-54 (2009).

Are Used for Child Rearing

Many states' child support guidelines "top off" at a certain level of income.[106] Above that amount, courts have discretion to order additional child support. In general, in an intact family, the state would not intervene to compel a parent to support a child in a particular manner, unless the child's level of well-being fell to the point where the state could legitimately claim the child had been abused, abandoned, or neglected.[107] This is an offshoot of the recognized constitutional right of parents to raise their children the manner they deem appropriate.[108] Mandated child support payments are a recognized exception to this constitutional principle. However, beyond a certain point, the marginal benefit to the child of additional child support payments is reduced to the point where additional payments can no longer be justified as an appropriate intrusion on this constitutional right. Beyond this point, additional child support payments can only be justified on grounds of minimizing the standard-of-living gap between the noncustodial parent and the child.

G. Principle 7: Consistency with Other Areas of Law

A number of states have borrowed their statutory definition of income for child support purposes from the federal Internal Revenue Code.[109] Gifts and inheritances are not included in the definition of income for federal income tax purposes.[110] Some courts have suggested the determination of income for child support purposes should be consistent with the determination of income for tax purposes.[111] This would result in the exclusion of gifts and inheritances from income in calculating child support. On the other hand, a number of courts have concluded the purposes of child support are different from those of income taxation, and therefore, it is appropriate to have different definitions of income.[112]

While one purpose of income taxation is to raise revenue for the government, principles of fairness and other values often lead to a narrower definition of income in calculating tax obligations than in determining child-support obligations. Moreover, even if gifts and inheritances are not subject to

106. *See* Downing v. Downing, 45 S.W.3d 449, 454 (Ky. Ct. App. 2001); Connell v. Connell, 712 A.2d 1266, 1268 (N.J. Super. Ct. App. Div. 1998).

107. *See* Ellman & Ellman, *supra* note 6, at 142.

108. *See* Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923).

109. *See* I.R.C. § 102(a) (2014); *In re* Marriage of Alter, 89 Cal. Rptr. 3d 849, 861 (Cal. Ct. App. 2009).

110. *See* I.R.C. § 102(a) (2014); *In re* Marriage of Schulze, 70 Cal. Rptr. 2d 488, 495 (Cal. Ct. App. 1997).

111. *See In re* Marriage of Loh, 112 Cal. Rptr. 2d 893, 897 (Cal. Ct. App. 2001); *Marriage of Schulze*, 70 Cal. Rptr. 2d at 495.

112. *See, e.g.*, Cummings v. Cummings, 897 P.2d 685, 687 (Ariz. Ct. App. 1994); *Marriage of Alter*, 89 Cal. Rptr. 3d at 862; *In re* Marriage of Rogers, 820 N.E.2d 386, 390 (Ill. 2004).

federal income tax, they do not escape federal tax treatment altogether. There is a separate estate and gift tax under federal law, which is very high—40% for 2013—and is paid by the donor of the gift or inheritance, rather than the recipient.[113] However, most gifts and inheritances are exempt from such taxation. For example, gifts and bequests to a spouse are not taxable, and gifts of up to $14,000 per year can be given to any other person without subjecting the donor to the gift tax.[114] Overall, lifetime or testamentary gifts totaling less than $5.25 million are not subject to taxation.[115]

If gifts and inheritances are not considered income for child support purposes, they will not figure into the determination of child support in any way unless a court decides to deviate from the applicable child support guidelines. This may provide a reason to include such payments in income for child support purposes, even if they are not included for income tax purposes.

By contrast, prizes and lottery and gambling winnings are included in income for federal income tax purposes.[116] Thus, the fact that such winnings are generally included in income for child support purposes indicates consistency between income tax and child support law as this type of economic windfall is concerned.

H. Principle 8: Child Support Calculations are Based Upon Income Rather than Assets

Child support guidelines, to a certain extent, rest upon a distinction between income and assets. Because support generally must be paid on a monthly basis, recurring resources are typically counted as income, whereas one-time or nonrecurring sources are not. If a child support order is based upon income that is not likely to recur, the obligor may be left with an order they may not be able to comply with in the future.[117] However, case law shows this principle is not uniformly applied, as child support orders sometimes include nonrecurring GIPs.

Cases in which the court must determine whether to count GIPs for child support purposes, particularly where state law does not expressly address the question, often start by considering general or legal dictionary definitions of "income."[118] The online edition of Webster's dictionary defines income as "a

113. *See* Mary Randolph, *The Federal Gift Tax*, NOLO, http://www.nolo.com/legal-encyclopedia/the-federal-gift-tax.html, (last visited Aug. 25, 2014). *See generally* I.R.S., *Publication 950: Introduction to Estate and Gift Taxes* (2011), *available at http://www.irs.gov/pub/irs-prior/p950--2011.pdf.*

114. *See* Randolph, *supra* note 113.

115. *See id.*

116. *See* Robert W. Wood, *All Prizes Trigger Taxes (And You Can't Pay IRS in Doughnuts)*, FORBES (Dec. 11, 2012, 10:47 PM), http://www.forbes.com/sites/robertwood/2012/12/11/all-prizes-trigger-taxes-and-you-cant-pay-irs-in-doughnuts/.

117. *See* Ford v. Ford, No. 01A01-9611-CV-00536, 1998 WL 730201, at *4 (Tenn. Ct. App. Oct. 21, 1998).

118. *See In re* Marriage of Alter, 89 Cal. Rptr. 3d 849, 861 (Cal. Ct. App. 2009).

gain or recurrent benefit usually measured in money that derives from capital or labor."[119] Black's Law Dictionary, in turn, defines income as "[t]he money or other form of payment that one receives, [usually] periodically, from employment, business, investments, royalties, gifts, and the like."[120] The recurring nature of the payment seems to be an important element in both of these definitions. For this reason, as stated previously, the recurring or nonrecurring nature of payments also seems to be important to courts in determining whether or not GIPs should be treated as income for child support purposes.[121]

I. Principle 9: Maintain the Predictability and Determinacy of Child Support Orders

As stated earlier, one of the goals of determinate child support guidelines was to raise the overall level of child support awards so as better to serve the well-being of children. However, determinate child support guidelines offer other benefits as well. They lower the cost of litigation by making extensive arguments over the level of child support largely irrelevant, and encourage parties to settle their disputes because the outcome of litigation is relatively easy to predict. Of course, frequent deviations from child support guidelines potentially undermine these benefits. A number of authorities suggest the proper time to consider GIPs is while determining whether to deviate from the child support guidelines, rather than addressing the issue in the guidelines themselves. To the extent that these policies put increased pressure on courts to deviate from guidelines, there is a greater risk that the benefits of determinate guidelines will be undermined.

J. Principle 10: Parents Should Not be Allowed to Manipulate Their Income to Avoid Paying Child Support

To the extent a child support obligor receives a lump-sum GIP, the obligor retains some ability to manipulate the funds to avoid garnishment for child support purposes. For example, if the obligor allows the funds to sit in a bank or other investment account, the funds are subject to levy for purposes of satisfying child support obligations. On the other hand, if the obligor invests the funds in real property or uses the money to pay existing debts, the funds will no longer be available to satisfy a child support obligation, even though the obligor has obtained similar economic benefit in both instances. Because obligors usually have control over such funds, child support law should take into account this ability of obligors to limit the availability of GIPs to fund for

119. *Income*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/income (last visited Aug. 25, 2014).

120. BLACK'S LAW DICTIONARY 831 (9th ed. 2009).

121. *See Marriage of Alter*, 89 Cal. Rptr. 3d at 862-63; *see also supra* note 19 and accompanying text.

the payment of support.

K. Principle 11: Treat Like Cases Alike

It is a fundamental legal principle that similar cases should be treated alike. The different treatment of GIPs, both within and across different jurisdictions, strains the applicability of this fundamental principle. But even within a single jurisdiction, is there good reason to treats GIPs differently from one another for child support purposes? If not, existing disparities in treatment should be eliminated.

As previously discussed, of the three types of windfalls considered in this Article prizes are the most often expressly included in definitions of child support. Is this because we perhaps see jackpot winnings or prizes the most fortuitous of the economic windfalls addressed in this article?

III. APPLYING THE GOALS OF CHILD SUPPORT TO THE TREATMENT OF GIFTS, INHERITANCES, AND PRIZES

A. Assure the Well-Being of Children

The goal of assuring the well-being of children compels, regardless of other consideration, that the principal amount of GIPs be included as income required to raise the child's standard of living above the poverty level. Because poverty levels are determined based on the number of persons residing in the child's household, this would require some variance from traditional child support principles, as the custodial parent's new spouse or partner's income would have to be considered in determining whether the child's income is above the poverty threshold. However, that income would not be added into the child support calculation, but rather, would be used to make a threshold determination on whether the GIP should be included in the child support obligor's income.[122]

122. Much of what follows in terms of analysis and recommendations focuses on well-being as measured by household income in relation to federal poverty levels. Most discussions relating to the adequacy of child support have not taken this approach. *See* Ellman & Ellman, *supra* note 6, at 113-14 (noting impact of third parties generally not considered when determining child support). However, only such an approach takes into account the aforementioned fact that when children reside with adults and other members in a household, it is inescapable that their economic fortunes are intertwined. *See id.* at 114. Only aggregate measures of household well-being adequately take this fact into account. *See id.* Of course, much criticism has been levied at the current method used for calculating the federal poverty level, with many contending the current levels are too low to maintain an adequate standard of living. *See* Juliet M. Brodie, *Post-Welfare Lawyering: Clinical Legal Education and a New Poverty Law Agenda,* 20 WASH. U. J.L. & POL'Y 201, 209 (2006). However, debate over the adequacy of the current federal poverty level is beyond the scope of this Article, and the balance of the Article will assume that income above the federal poverty threshold is adequate to meet minimal standards of child and other household member well-being. In fact, just as many government programs set their eligibility levels at a certain multiplier of the federal poverty level, (e.g., 150% or 200% of the poverty level) in reality it is almost certain that some multiplier of the federal poverty level would be needed actually to

B. Both Parents Have an Equal Obligation to Support Their Children

Parents' equal obligations to support their children imply the GIP principal should be included in income for child support purposes if the noncustodial parent would otherwise not pay child support. However, the equal obligation principle is satisfied if the noncustodial parent is already paying child support on earned income. Similarly, to the extent income earned on the GIP is counted for purposes of calculating monthly support, then the noncustodial parent's child support payment will increase as a result of the GIP, even if not by as much as if the principal amount were counted as income. Thus, it may be possible to satisfy the equal-obligation objective, while also staying true to some of the other goals that seem to militate against including the GIP principal in income in all cases.

C. Maintain the Child's Pre-Divorce Standard of Living

For reasons mentioned in the previous section, the goal to maintain the child's pre-divorce standard of living is really a chimera that should not play much of a role in determining how GIPs are treated in calculating child support. To the extent GIPs raise child support payments at all, they will contribute to the child's standard of living, even if the payment is insufficient to accomplish the goal of maintaining the child's pre-divorce standard of living.

D. Avoid Impoverishment of Child Support Obligors

A large GIP may be adequate to raise both a poor child support obligor out of poverty, with money left over to accomplish the goals of child support law. However, a more modest GIP, like the $50,000 lottery winnings mentioned in the introduction, may not be sufficient to raise an obligor out of poverty and accomplish child support goals. Consistent with the airplane principle mentioned above, the child support obligor should be able to devote the GIP to his own needs to the extent it raises him out of poverty. [123] This requires using the GIP to pay ordinary living expenses, including food, shelter, and transportation.

Because poverty rates are calculated on a household basis, allowing the child support obligor to use the GIP to raise himself out of poverty may have the incidental effect of benefiting other members of the obligor's household, including a new partner or children from a new relationship. This is controversial, as it seems to place the economic needs of the obligor's "new" family ahead of the obligor's "old" family. Indeed, a long-standing controversy in child support law is whether child support guidelines should

raise children and their families' living standards to adequacy.

123. *See supra* note 88 and accompanying text.

adopt a "new family first" or "old family first" approach.[124] A third approach is equalization, where a parent's support obligations are equally divided between all of their children.[125] However, equalization would not apply to non-biological children who reside in the child support obligor's home.

In any event, it is not necessary for present purposes to resolve these long-standing controversies. Recognition of the airplane principle would allow child support obligors to exempt the GIP principal from income for child support purposes up to the point at which the obligor's household is raised above the poverty threshold. Beyond that, the GIP principal should be included in income at least to the degree necessary to raise any supported children out of poverty.

E. Minimize the Standard-of-Living Gap Between the Child and the Noncustodial Parent

Significant differences in living standards between the child and the noncustodial parent are problematic. Of course, nothing prevents the noncustodial parent from sharing the benefits of the GIP with the child outside of the context of court ordered child support payments. Moreover, to the extent the child spends time with the noncustodial parent, the child may, and likely will, benefit from the higher standard of living the noncustodial parent enjoys as a result of the GIP. In any event, transfers of income from the noncustodial parent to the child where the child's standard of living with the custodial parent is above the poverty threshold, violate the parental prerogative principle discussed in the next subsection. Thus, it may not be justifiable, particularly where other factors seem to militate strongly against including the principal amount of GIPs in income for child support purposes where the child's standard of living is otherwise above the poverty threshold.

F. Beyond Providing for the Necessities of the Child's Well-Being, Parents, Rather than the State, Should Determine How Their Resources Should Be Used for Child Rearing

Though this principle has extremely firm constitutional footing, it has never been held to prohibit the order of child support payments, even to children whose standard of living is well above the poverty threshold. Nonetheless, to the extent that multiple other factors seem to point in the direction of exempting GIPs from inclusion in income where the child's standard of living exceeds the poverty threshold, this principle provides further support for that conclusion.

124. *See* Lockie, *supra* note 105, at 110-11; *see also* Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2466-68 (1995).

125. *See* Lockie, *supra* note 105, at 141.

G. Consistency with Other Areas of Law

Consistency with other areas of the law seems to be a particularly weak goal of child support law, and courts and commentators frequently disregard it. Moreover, given that gifts and inheritances are treated differently than prizes in tax law, it would be impossible to maintain external consistency with these areas of law while also maintaining internal consistency in child support law, as is discussed in a previous section.[126] Because consistency between the three different types of windfalls is more important than consistency across the different areas of law, this objective will be one that receives little weight in concluding how GIPs should be accounted for in child support.

H. Child Support Calculations are Based Upon Income Rather than Assets

The distinction between income and assets seems to be an important one for purposes of determining how to account for GIPs in child support law. Again, a person's belief on this issue may depend upon the amount of the GIP received. Recipients of a large GIP will likely be able to pay increased child support on an ongoing basis, even if the GIP is nonrecurring. On the other hand, recipients of a modest GIP are unlikely to be able to pay increased amounts of child support on an ongoing basis once they exhaust the GIP principal. In such circumstances, the child support obligor would be entitled to a modification of the support amount once the GIP principal is exhausted. Still, requiring frequent litigation to modify child support payments in the case of relatively modest GIPs does not seem to be in the best interests of either the litigants or overburdened courts.

Because most GIPs are likely to be modest in amount, the foregoing discussion suggests that the principal amount of such GIPs should not be included in income for purposes of calculating monthly child support. Courts retain their ability to do justice in the case of larger GIPs through their ability to deviate from guideline awards, although such deviations should be reserved for compelling cases.

I. Maintain the Predictability and Determinacy of Child support Orders

It seems that a determinate rule regarding the treatment of GIPs, whether or not GIPs are included as income, would serve this objective. By contrast, an open-ended policy allowing judges discretion regarding GIPs undermines this goal.

126. *See supra* Part II.K.

J. A Parent Should Not Be Allowed to Manipulate Their Income to Avoid Paying Child Support

This concern can be addressed by imputing income to the obligor where there is persuasive evidence that the obligor has manipulated the GIP in an effort to shield it from consideration for child support purposes.

K. Treat Like Cases Alike

It may initially seem like the differences between gifts, inheritances, and prizes warrant different treatment for purposes of child support law. After all, prizes, above the others, seem like a complete windfall to the recipient. Most lotteries and other contests are games of chance, with the winners unable to claim any sort of "desert" for their winnings. Gambling winnings may be an exception, as gambling success may involve a certain measure of skill.

By contrast, gifts and inheritances involve at least some sense that the recipient has done something to warrant the donor's largesse, and therefore, may be more deserving of keeping a larger portion of what they have received than prize winners. However, it is not often the case that the recipient has done anything in particular to merit the gift or inheritance. In fact, intestacy laws provide for inheritance based upon familial relationships regardless of any inquiry into the relationship between the testator and the recipient, or any sense of whether the recipient has "earned" the bequest.

In fact, our laws regarding inheritance, at least, seem driven more by efforts to stimulate certain behaviors on the part of donors, rather than on the part of recipients. We allow donors to pass their wealth along to the objects of their affection rather than having the money escheat to the state or pass to relations according to the laws of intestacy (assuming the donor has a will) because we think this regime will provide incentives to hard work and save money.

In any event, all of these events look the same from the perspective of the recipient—an economic windfall. As a result, they do not warrant different treatment in terms of how they should be accounted for in calculating child support.

IV. CONCLUSION

Application of the primary goals of child support law to the situation presented by GIPs yields the following conclusions as to how they should be treated.

A. The Principal Amount of GIPs Should Be Available to Satisfy Any Child Support Arrears

The full amount of any GIP should be available to retire any child

support arrears. By definition, arrears represent child support that is due and owed, and the child has been deprived of necessary support which they are legally owed. Thus, when arrears are owed, any resources available to the obligor should be fair game in order to address the arrearage.[127]

B. Child Support Should Not Be Ordered Unless Doing So Will Leave the Obligor Out of Poverty Even Where There is a GIP

Even to the extent that a child support obligor is the recipient of a GIP, the GIP should not be considered for child support purposes unless it is sufficient to raise the obligor out of poverty. The principle that everyone has the first claim to their own income, as well as a human dignity claim to a standard of living above the poverty level, requires that GIPs not be considered for child support purposes until that basic threshold is achieved. This may leave the supported child in poverty, but where the combined resources of both parents are inadequate to raise the child out of poverty, the state should provide additional support to the extent necessary to raise the child out of poverty. In order to accomplish this goal, any GIP principal should be apportioned on a monthly basis in order to raise the obligor out of poverty, potentially through the age of emancipation of the minor. For example if the child is 10 years old, and the obligor's income is $1000 per month lower than the poverty level, up to $96,000[128] of the principal amount of any GIP should be shielded from inclusion in income for child support purposes, because that is the amount necessary to raise the obligor out of poverty for the balance of this child's minority.[129] If the obligor's income changes, these figures are subject to modification accordingly.

C. The Principal Amount of GIPs May Be Considered To Help Raise Children Out of Poverty

Of all of the remaining purposes of child support, addressing the well-being of children is the most compelling. To the extent a child is not able to

127. This is not to deny that in many instances, payment of the full amount of the arrears may result in some injustice to the obligor. After all, in no jurisdiction are child support orders self-regulating. Thus, a party must move the court or appropriate administrator to modify a child support order that is no longer appropriate in light of changed circumstances. But precisely when such a review is most needed, for example upon the loss of a job, incarceration, homelessness, or addiction, the obligor is poorly positioned to seek such a modification. Moreover, because by federal law past due child support obligations are treated as court judgments as soon as they are incurred, often obligors incur large arrearages that are non-modifiable for periods in which the obligor genuinely lacked the resources to pay the current support obligation. Requiring payment in full of such arrearages, which often include amounts of interest that border on the usurious, is certainly problematic in some cases. *See generally* Steven Berenson, *Homeless Veterans and Child Support,* 45 FAM. L.Q. 173 (2011).

128. This number is reached using the following calculation: 8 years x 12 months x $1000.

129. A more sophisticated calculation would attribute a rate of return to the portion of the GIP set aside to raise the obligor out of poverty, and reduce the principal amount that would need to be set aside to achieve the result accordingly.

live above the poverty level based upon the custodial parent's resources and the noncustodial parent's pre-GIP child support payment, then a court should be able to consider the principal amount of the GIP so as to order support to be paid to the extent necessary to raise the child out of poverty.

D. Once the Child is Above the Poverty Level, the Principal Amount of GIPs Should Not Be Counted Unless Used to Reduce Ordinary Living Expenses

Once a child's economic circumstances have been raised above the poverty line, the justification for court-ordered child support payments decreases significantly. Of course, there is room for improvement in the child's well-being by adding additional resources to the child's household when the child is living at or near the poverty level.[130] However, the justifications for additional support here do not outweigh the factors that militate against inclusion of the principal amount of GIPs in income for child support purposes. As mentioned previously, the entire child support payment system is based upon a distinction between income and assets, and unless the GIP is received regularly and in a recurring fashion, it simply contradicts the premises of the system too directly to include it in income. However, as some courts have already found,[131] to the extent that the GIP is used to pay for ordinary living expenses, such as food, shelter, and clothing, on a recurrent and ongoing basis, it is proper to count the amount spent as income, just as regular and recurring in-kind provision of food, shelter, and clothing has been counted as income.

E. Income and Earnings on GIPs Should be Counted as Income for Child Support Purposes

It seems uncontroversial based upon the foregoing principles that to the extent a GIP is treated as an asset and not included in income for child support purposes, any income earned on the GIP should be included in child support income determinations. Moreover, to the extent the GIP is deliberately invested in a non-income producing asset, the court may attribute an appropriate rate of return to the asset to prevent the noncustodial parent from manipulating the system to deprive the child of support. However, double counting should be avoided. If the investment of the GIP in a non-income producing asset, such as a home, has resulted in the attribution of the amount of saved housing costs in income for purposes of running the guidelines, it would be inappropriate also to attribute investment income from those funds in current income for purposes of calculating guideline support.

F. Lump Sum or Limited Recurring GIPs Should Be Averaged Over a Longer

130. *See* Ellman & Ellman, *supra* note 6, at 132-33.
131. *See In re* A.M.D., 78 P.3d 741, 746 (Colo. 2003).

Period Depending on the Size of the GIP and Its Impact On the Child Support Award

To the extent large GIPs are included in income under the principles previously discussed, a manner for including them in child support guidelines must be developed. Averaging the GIP over a certain timeframe should be considered in order to bring the child support payment to a level sufficient to raise the supported children out of poverty.

G. Deviations from Guidelines Based on GIPs Should Be Limited

Of course, to the extent the above principles fail to achieve justice in any given circumstances, the possibility of a deviation from the guidelines always remains. However, such deviations should be minimized in order to maintain the benefits attained from determinate child support guidelines in the first instance.